AMICUS CURIAE

HONORABLE MRS. MARILIA DE CASTRO NEVES VIEIRA, JUSTICE OF THE COURT OF JUSTICE OF THE RIO DE JANEIRO STATE

RAPPORTEUR OF THE INTERLOCUTORY APPEAL

Nº 0032145-12.2020.8.19.0000

PUBLIC INTEREST CIVIL ACTION Nº 0087229-92.2020.8.19.0001

CONECTAS DIREITOS HUMANOS - ASSOCIAÇÃO DIREITOS HUMANOS EM REDE, non-profit association, qualifying as a Public Interest Organization for Civil Society, registered at CNPJ/MF nº. 04.706.954/0001-75, headquartered at Paulista Ave., 575, 19th floor, São Paulo – SP (Docs. 1, 2 e 3); **ASSOCIAÇÃO ELAS EXISTEM - MULHERES ENCARCERADAS,** non-profit association, registered at CNPJ nº 32.598.607/0001-01, headquartered in Rio de Janeiro, at Venezuela Ave.**;** in collaboration with **OPEN SOCIETY JUSTICE INITIATIVE,** respectfully require to present to Your Honor, through counsel who signed below, according to art. 138 of the new Code of Civil Procedure, the **AMICI CURIAE** brief to be included in the records of the aforementioned Public Interest Civil Action, filed by the Public Prosecution and the Public Defender's Office of the State of Rio de Janeiro, presenting to this honorable Justice the international obligations of the Brazilian State and the best practices and standards to fight COVID-19 in prisons.

I. INTEREST OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Social Relevance of the case

1. This Public Interest Civil Action further consolidates the joint action of the Public Prosecution and the Public Defender's Office of the Rio de Janeiro state, demonstrating consensus on the need for a strong and coordinated response from the public bodies questioned herein.

2. The defendants are not preparing and organizing themselves enough for the control of the pandemic within the prisons, and the recommendations presented in this case arise from the absolute consensus among national and international experts. The insufficient control of the disease in the prison system is doomed to limit efforts employed in the fight against the virus by the society as whole.

3. Governments across the globe are facing an unprecedented public health emergency caused by COVID-19, and the need to address the spread in detention has taken on worldwide urgency.[1] As recognized by numerous human rights bodies, prisoners are particularly vulnerable and at higher risk of contracting the virus,[2] which can spread rapidly in prisons due to the high concentration of persons detained in confined spaces.[3]

4. As noted by the United Nations ("UN"), "COVID-19 is already sweeping through detention facilities, where distancing measures are almost impossible, and detainees are more vulnerable to the disease."[4]

5. One of the most common recommendations by the UN,[5] regional human rights systems, numerous State governments, and the scientific and medical community alike, is to ensure

[1] For example, Iran, with around 240,000 persons in overcrowded prisons, announced the temporarily release of nearly 100,000 prisoners, Francis Pakes, *Coronavirus: why swathes of prisoners are being released in the world's most punitive states*, The Conversation, April 20, 2020, https://theconversation.com/coronavirus-why-swathes-of-prisoners-are-being-released-in-the-worlds-most-punitive-states-136563. Likewise, in the US, California released 3,500 prisoners early because of coronavirus, and reduced the population in its jails, but even so "some 3,200 persons contracted Corona virus and 16 died in a public health catastrophe that advocates say was both predictable and preventable." Sam Levin, *People are sick all around me': inside the coronavirus catastrophe in California prisons*, The Guardian, May 20, 2020, https://www.theguardian.com/us-news/2020/may/20/california-prisons-covid-19-outbreak-deaths.

[2] United Nations ("UN"), *COVID-19 and Human Rights. We are all in this together*, April 2020, at 12; Inter-Agency Standing Committee ("IASC") of the World Health Organization ("WHO") and Office of the High Commissioner for Human Rights ("OHCHR"), *Interim Guidance. COVID-19: Focus on Persons Deprived of Their Liberty*, March 27, 2020 at 2 [hereinafter, IASC, *Interim Guidance*].

[3] *Ibid.* at 2.

[4] UN, *COVID-19 and Human Rights. We are all in this together*, April 2020, at 8.

[5] *Ibid.* at 12; UNODC, WHO, UNAIDS, and OHCHR, *Joint Statement on COVID-19 in Prisons and Other Closed Settings*, May 13, 2020, https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings.

physical ("social") distancing by reducing the numbers of people detained through, for instance releasing prisoners, delaying the commencement of a sentence, or resorting to alternatives to detention. While these efforts are crucial, they are not sufficient *per se*.

6. Systemic problems endemic to the common penitentiary system across multiple jurisdiction—such as overcrowding, poor living and sanitary conditions, including poor ventilation of cells, and unsatisfactory level of health services—are being exacerbated by the novel coronavirus pandemic, endangering the lives of prisoners, prison staff and the community alike.

7. Yet, under international and regional law, States are under a duty to provide an adequate level of health care to those remaining in detention. Brazil, and by extension the State of Rio de Janeiro, is also duty bound by this obligation.

8. Over 7 million people were diagnosed globally with the novel coronavirus, and nearly half a million have died as a result. Infection is spreading across Brazil at an increasing rate, and prisons are a tinderbox for transmission, placing prisoners, corrections officers and the community at a uniquely perilous threat. According to recent data, authorities have already confirmed that coronavirus entered prison system in the state of Rio de Janeiro.[6] As of June 7, 2020, 24 prisoners tested positive for COVID-19.[7] Medical evidence and examples from other State jurisdictions clearly demonstrate that "… once COVID-19 begins spreading within a prison, it is only a matter of time until the outbreak spreads rapidly with many of those inside eventually infected and with the disease soon spreading to the community."

9. This unfortunate reality will remain the case until a vaccine is developed that can prevent transmission of the virus. This solution is months to years away. Therefore, prison authorities in the state of Rio de Janeiro and across Brazil must/should take the immediate steps necessary to provide for urgent risk mitigation, which at the forefront must center on the reduction of the prison population.

10. As would always be required, the State of Rio de Janeiro must ensure safe and sanitary conditions within the prison system, especially in the mist of this current public health emergency. This includes providing adequate treatment and preventive medicine to incarcerated persons, which should include comprehensive diagnostic testing of prisoners and staff in order to trace cases and secure early detection of COVID-19 cases. In line with its obligations and in line with public health guidelines, the state must also provide the needed supplies in prisons to help mitigate coronavirus transmission, including the distribution of sanitizers, disinfectants, personal protective equipment (e.g., facemasks) to all prisoners.[8] State authorities need also ensure that those who do contract the virus are treated properly and in line with international, regional and federal law.

11. Therefore, it is clear the undeniable relevance and social repercussion of the subject, to the point that the oversight of the scenario demonstrated by experts can generate an unprecedented amount of deaths in the prison system. The failure to mitigate the dissemination of the virus jeopardizes the safety of the inmates and prison officials who are vulnerable and members of the risk groups, due to their own health conditions and the conditions of imprisonment. Moreover, it goes without saying that the failure to control the dissemination of the virus in the prison system may compromise the fight against the contagion of the whole society. Therefore, it is necessary to adopt the precautionary measures required in the exact terms proposed on the complaint.

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[6] Governo do Estado do Rio do Janeiro, Seap Bulletin, June 7, 2020, http://www.rj.gov.br/secretaria/NoticiaDetalhe.aspx?id_noticia=6493&pl=boletim-seap---7-de-junho-de-2020

[7] *Ibid*,

[8] WHO, *Overview of public health and social measures in the context of COVID-19: Interim Guidance*, May 18, 2020; WHO, *Laboratory testing for coronavirus disease (COVID-19) in suspected human cases: Interim Guidance*, March 19, 2020; WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, March 15, 2020.

Legitimacy of Amici

12. *Amici* are national and international civil society organizations that have witnessed the disastrous effects of the COVID-19 pandemic on persons detained in prisons.

13. Due to conditions of detention, individuals imprisoned face elevated infection risks and risks of serious illness and death, while those in the general public are better protected by stay-at-home and other emergency orders. The staff and medical personnel that work at these prisons cannot escape infection risks when they leave prison facilities and bring COVID-19 back into their homes and the community.

14. *Amici* have a longstanding interest in upholding and protecting human rights and the rule of law. Accordingly, *Amici* urges this Court to grant a preliminary injunction to protect the federal and international rights to be free from the preventable spread of disease. *Amici* also have a vital interest in protecting those in prison, including prisoners and staff, as well as their families and the wider communities, including domestically and internationally.

15. Everyone's health depends in part on the effective management of COVID-19 in all states, including Brazil, which is currently recording the second highest number of COVID-19 cases worldwide.

16. *Amici* rely on our knowledge and experience in the matters of international and regional human rights law and jurisprudence and legal standards and situation with respect of rights of those deprived of liberty in Brazil. In addition, we cite statements provided to us by preeminent medical and scientific experts and researchers based on their professional knowledge and experience.

17. Annexed is a medical expert opinion submitted by Dr. Ranit Mishori, M.D., M.H.S., F.A.A.F.P. and Dr. Michele Heisler, M.D., M.P.A., two U.S.-based medical doctors associated with the international organization Physicians for Human Rights ("PHR"). The opinion details current data and knowledge regarding COVID-19 in prisons.[9]

18. Reference is also made to the opinion of a panel of international medical experts ("Panel of International Medical Experts;" "Panel of Experts"), including Gregg Gonsalves, Ph.D. (Yale), Jason Andrews, M.D. (Stanford), Ted Cohen, M.D., M.P.H., D.P.H. (Yale), Julio Croda, M.D. (Fundação Oswaldo Cruz), Albert Ko, M.D. (Yale), José Roberto Lapa E Silva, M.D., Ph.D. (Universidade Federal do Rio de Janeiro), Mary Petrone (Yale), and Katharine Walter, Ph.D., MSc. (Stanford), which was previously submitted by Plaintiffs in the present case[10].

19. Annexed are two additional statements describing promising practices in Irish and Italian prisons, submitted on behalf of penitentiary experts, Fiona Ni Chinneide, Executive Director of the Irish Penal Reform Trust in Ireland, and Patrizio Ginella, of Antigone, a civil society organization based in Italy.

20. As set forth below, *amici* is of the opinion that under Brazilian, regional and international law obligations, and in light of the medical science informing proper public health measures with regards to COVID-19, it is urgent that the state of Rio de Janeiro, as well as Brazil generally, implement immediate measures to mitigate the risk posed by COVID-19 in prisons, and as such, the community writ large.

21. *Amici* also emphasizes the critical role of the judiciary to protect those under its jurisdiction from the imminent and irreparable harm of this infectious disease and possible death. *Amici* respectfully request this court to grant the urgently needed measures sought by Plaintiffs. In doing so, the court will prevent immeasurable damage, while saving countless lives.

Conectas Direitos Humanos - Network of Human Rights Association

22. Conectas' mission is to implement human rights and fight against inequality, aiming at building a just, free and democratic society. Working on its institutional purposes, the entity develops

[9] Statement of Michele Heisler and Ranit Mishori, Annex 1.

[10] Medical Authorities' Opinion, Annex to the Defender's Internal Appeal, June 18, 2020.

several actions connected to the protection of human rights in Brazil and in the world, including the defense of environmental rights and development, the strengthening of the democratic space and the fight against institutional violence. As a result, since 2006 the petitioner has a consulting status in the United Nations Human Rights Council and, since 2009, Conectas has been maintaining an observer status in the African Commission on Human and Peoples' Rights.

23. In the fight against institutional violence, Conectas monitors and files complaints against violations committed by the State, especially concerning people deprived of their freedom, police violence, the impact of the "war on drugs" and the right to demonstrate. In the advocacy for the rights of people deprived of their freedom, it works to ensure that all of them, adolescents or adults, have the right to serve their time in a decent way, as required by law.

24. In addition, Conectas acknowledges the violations of the system as resulting of racism, which is structurally ingrained in our society, and works to reverse the current scenario of mass incarceration, fighting for the deprivation of freedom to be ordered only in exceptional cases, therefore reducing the number of prisoners and inmates.

25. Among its actions, the petitioner participates in international fora and demands answers from the State about proven cases of torture, mistreatment, poor hygiene and health conditions, and overcrowding in the adult prison system and in the educational correctional system units aimed at adolescents.

26. By the use of national and international strategic litigation, regular inspections in prisons and legislative and legal work, the organization tries to implement the observation of fundamental rights, to stop registered violations, to improve the control and transparency mechanisms of prison units and to hold accountable public agent perpetrators.

27. This diversified action has given legitimacy (or interest in the case) to the petitioner in several cases with similar purposes to this one. It's important to highlight that the organization was qualified as *amicus curiae* in the ADPF (action against the violation of a constitutional fundamental right) nº 347, when the Supreme Court, as a precautionary measure, acknowledged the unconstitutional status of the Brazilian prison system, and in other cases with direct impact on the system: the Extraordinary Appeal n.º 635.659, the Binding Precedent Proposition nº 57, the Direct Action for the Declaration of Unconstitutionality nº 4162 and the writ of Habeas Corpus nº 118.533. On an international level, the plaintiff also acts as petitioner in the Inter-American Court of Human Rights, in the case concerning the situation of *Complexo Penitenciário de Pedrinhas* (Penitentiary Complex of Pedrinhas).

28. Concerning the fight against the violations in the aforementioned Penitentiary Complex, Conectas has produced a report entitled "Ongoing Violations, two years of the Pedrinhas crisis", alongside Global Justice, OAB-MA (Brazilian Bar Association - Maranhão state section) and SMDH (Human Rights Society of Maranhão), after the issuance of a provisional measure against the Brazilian State by the IACHR (Inter-American Commission on Human Rights) of the OAS (Organization of American States), on December 16, 2013.

29. Conectas also has a representative in the National Committee for the Prevention and Fight Against Torture, a body created by Law nº 12847, from 2013, as part of the National System for the Prevention and Fight Against Torture.

30. Lastly, it is also important to highlight that, besides the aforementioned elements, Conectas also develops periodic research studies related to the criminal justice and the prison system, for instance, "Shielded Torture reports: How the institutions of the Justice system perpetuate the violence in the custody hearings" and "Judging Torture: Jurisprudence Analyses of the Courts of Law in Brazil (2005-2010)" and the comparative study "Effective Criminal Defense in Latin America".

31. Therefore, considering that the entity develops practices connected to the protection of human rights, especially in the field of criminal justice and prison system, and considering the repercussion of the subject matter of this action, we can duly demonstrate the fulfillment of the

requirements for the petitioner's admission in the capacity of *amicus curiae*.

Elas Existem - Incarcerated Women Association

32. Elas Existem - Incarcerated Women Association is a non-profit organization that aims at championing women in the prison system and adolescents in the educational correctional system in the Rio de Janeiro state. According to art. 4 of its bylaws, the main focal points of the organization are: pregnant women and mothers who are breastfeeding or have recently given birth and are deprived of freedom; interim prisoners; arrested transsexual women; women entering and leaving the prison system; women deprived of freedom assisted by legal-sanatorium units; adolescents deprived of freedom; foreign women deprived of freedom and black women associated to prisons.

33. Elas Existem has been working since 2016 in several work fronts, aiming at fostering the discussion with civil society concerning female incarcerations, structural and institutional racism in the criminal justice system and the genocide of the black population, guided by the epistemology and practice centered on intersectional feminism and on the anti-punitive and penal abolitionist conception.

34. Currently, the Association is part of seven different areas of policy advocacy in the fight for the population deprived of freedom, five of them in the Rio de Janeiro state and other two in national networks: 1) State Committee for the Prevention and Fight Against Torture, 2) State Work Front for the Disincarceration in Rio de Janeiro, 3) Permanent Forum of Health in the Prison System of Rio de Janeiro, 4) Work Group of Women and Girls Deprived of Freedom – ALERJ (House of Representatives of Rio de Janeiro), 5) Community Council RJ, 6) Brazilian Platform of Drug Policies and 7) National Agenda for Disincarceration, aiming at participating in the advocacy for the shaping and revision of public policies on the prison system, and championing disincarceration, access to fundamental rights and the fight against human rights violations perpetrated against women and adolescents deprived of liberty, according to art. 5 of its bylaws, *in verbis*:

> Art. 5: The ELAS EXISTEM - INCARCERATED WOMEN ASSOCIATION will champion the: I – Disincarceration; II - Access to rights and justice; III - Antipunitivism; IV - Formulation and revision of the prison system's public policies of the Rio de Janeiro state; V – Participation in political workspaces for the prison system of the Rio de Janeiro state; VI - Data collection, production and analysis on female incarceration; VII – Fostering of the discussion and debate with civil society on female incarceration; VIII – Fight against structural and institutional racism in the penal system and against the genocide of the black population; IX- Fight against the violation of rights of women and adolescents deprived of freedom.

35. The work focus of the Association is the prison and the educational and correctional systems of the Rio de Janeiro state, close to women and adolescents deprived of liberty, in order to, in addition to several activities, observe the practice of systematic violation of human rights within these settings, above all.

36. Moreover, the Plaintiff has been following up the COVID-19 pandemic situation in the state prison system and is able to provide the Court with relevant information and practices concerning the pandemic scenario within the prison system, as we will see further on, in details.

Open Society Justice Initiative

37. The Open Society Justice Initiative uses the law to promote and defend justice and human rights. Through litigation, advocacy, investigation and technical assistance, the Justice Initiative works to set precedents that strengthen the law's protections and ensure access to justice can be available to everyone. Our staff is based in Abuja, Brussels, Berlin, The Hague, London, Mexico City, New York, Paris and Washington, D.C.

38. The Justice Initiative promotes responsibility for international crimes, combat racial discrimination and statelessness, supports criminal justice reform, combats abuses on issues

related to national security and counter-terrorism measures, promotes freedom of information and expression, combats corruption related to the exploitation of natural resources, among other things.

39. In the field of detention and public health, the Justice Initiative has filed lawsuits, provided free legal aid or submitted amicus curiae briefs in various domestic court systems, the three regional human rights systems and in the United Nations Treaty Body Committees, including the UN Human Rights Committee and UN Committee Against Torture. For the past 15 years, the Justice Initiative has been involved in litigation of cases seeking accountability for torture and death in custody in Central Asia and Latin America.

Terminology used concerning incarcerated people's gender

40. Before we approach the subject matter of this case, it is important to provide a brief explanation about the terminology used in this brief, concerning women.

41. Politically speaking, it is important to understand gender identity in order to fight structural and discursive transphobia. In this sense, both cisgenerity and transgenderity are possibilities for the social subjects to exist.

42. According to the scholar Jaqueline Gomes de Jesus, cisgender people are those who identify with the gender identity predetermined in the moment of their birth, while transgender people do not identify, in different degrees, with behaviors and/or roles expected from the genders that were attributed to them when they were born.

43. In this way, transsexual women are those who claim the social and legal recognition as women, although they are not respected due to structural transphobia.

44. Besides understanding the different possibilities of existing, it is key, when we speak about an identity, that it is considered as part of cisgenerity and transgenderity. For that, the terms "cis" and "trans", respectively, when applied to the speech, help to acknowledge the presented identities and, consequently, to include transgender people who, many times, have their identities disrespected based on a biologizing view concerning the concept of "gender".

II. THE UNCONSTITUTIONAL STATUS OF THE BRAZILIAN PRISON SYSTEM AND ITS IMPACTS ON THE FIGHT AGAINST COVID-19 IN RIO DE JANEIRO

Overview

45. There are numerous violations of imprisoned people's fundamental rights: they are subjected to prison overcrowding conditions; they sleep in unhealthy accommodations; they do not have access to basic rights, such as health, education, healthy diet and work; many times, they only count on poor hydraulic, sanitary and electrical structures; cells with poor or no lighting and ventilation, representing an ongoing health risk, since they are exposed to agents that may cause several infections; bathing areas that share their room with open sewage and poor or no access to water, for hygiene and hydration.

46. One should not forget that we face in this country an "unconstitutional status", in which the powers are not willing to take joint actions to improve the calamitous situation of the Brazilian prison system. Justice MARCO AURÉLIO, rapporteur of the ADPF (action against the violation of a constitutional fundamental right) nº 347, summarized the vigorous role, often against the mainstream, of the judiciary power on the fight against this situation:

> "I understand that the assessment of this request for provisional measure is of utmost importance. It is not an 'audience leader' topic, to please the public opinion. On the contrary, it is an unpopular topic, concerning the rights of a group of people that are not only stigmatized, but are also deemed lost in their dignity, since they committed crimes. Notwithstanding the attention provided by this Court in favor of majority's social claims, **one cannot forget the mission to defend minorities, the counter majority role in acknowledging the rights of those repudiated by society and forgotten or repeatedly ignored by the political powers.**" (ADPF 347 MC, Rapporteur: Justice MARCO

AURÉLIO, En Banc Court, tried on 09/09/2015, ELETRONIC PROCESS DJe-031 DIVULG 18-02-2016 PUBLIC 19-02-2016). (Emphasis added)

47. The structural unconstitutionality of the Brazilian prison system, acknowledged by the Supreme Court, is noticeable starting with the lack of precise information that could guide the public policy in this area – the first step for any public policy.

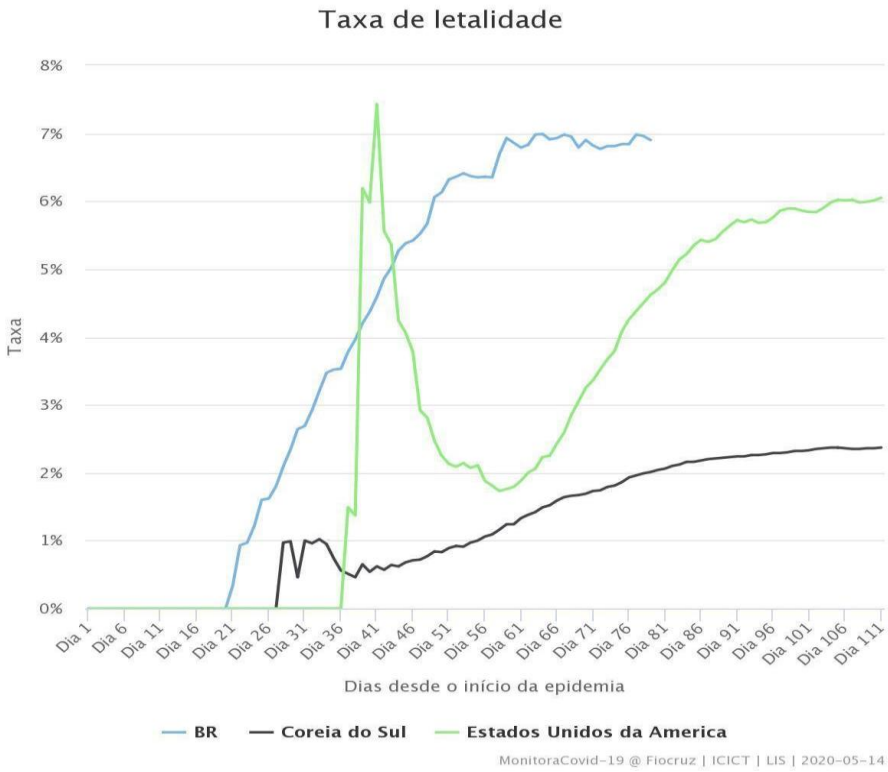
48. According to the Nacional Council of Justice, the country has already registered 861,753 incarcerated people[11], and a vacancy deficit of over 428 thousand[12] resulting in an occupancy rate of 201.34%; in turn, according to data published by the National Prison Department, there are more than 755 thousand incarcerated people in Brazil, [13] and the vacancy deficit in the country is approximately 313 thousand, resulting in a 171.62% occupancy rate. Despite the discrepancies, both surveys point to the same conclusion: the failure of the prison system.

49. This very high overcrowding rate is a barrier to the implementation of minimum health conditions for the people deprived of freedom, once there is not enough basic hygiene items to distribute, medical assistance, provision of water for personal and environmental cleaning, access to medicine and proper nutritional diet.

50. Due to the aforementioned characteristics, potentially lethal diseases, such as tuberculosis and HIV-AIDS reach epidemic levels in prison settings. For example, an incarcerated person is 35 times more likely to contract tuberculosis[14] than the non-incarcerated population, showing that the prison is a place where infectious diseases proliferate easily.

51. Regretfully, humanity is experiencing an exceptional pandemic state, according to the official statement of the World Health Association, from March 11th. Along the same lines, the Federal Executive Power declared state of emergency on March 14th.

[11] National Council of Justice – CNJ. National Database for Prison Monitoring. Available at: https://portalbnmp.cnj.jus.br/#/estatisticas, last accessed on 14/05/2020.
[12] National Council of Justice – CNJ. Monthly Report of the National Register of Inspections in Penal Facilities (CNIEP). Available at : https://www.cnj.jus.br/inspecao_penal/mapa.php, last accessed on 14/05/2020.
[13] National Prison Department – DEPEN. *National Survey on Penitentiary Information*, June 2019. Available at: http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-analiticos/br/relatorioconsolidadonacional.xls, last accessed on 14/05/2020. [14] "In Alert due to coronavirus, prisons already face tuberculosis epidemic". Public Agency. Available at: https://apublica.org/2020/03/em-alerta-por-coronavirus-prisoes-ja-enfrentam-epidemia-de-tuberculose/, Last accessed on 14/05/2020.



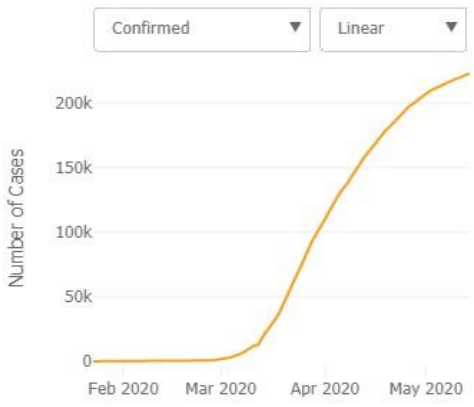
Lethality Rate

Brazil: Blue **South Korea**: Black **United States**: Green

52. In face of this reality and the rapid dissemination of coronavirus, urgent measures should be taken. For example, the lethality rate in Brazil is already higher than the rate in the United States[14].

53. As we may observe in the chart below, Brazil presents rates higher than Italy, the country that suffered the most serious consequences of the pandemic: [15]

Italy



Brazil

[14] FIOCRUZ. Available at: < https://bigdata-covid19.icict.fiocruz.br/ >, last accessed on 14/05/2020.
[15] John Hopkins University. Available at: <https://coronavirus.jhu.edu/data/cumulative-cases>. Last accessed on 15/05/2020.

54. According to the panel on the pandemic, administered by the National Prison Department, 38 deaths, 1,227 positive cases and 910 suspected cases were registered in the Brazilian prison system, and only 4804 tests were performed.[16]

55. Indeed, the COVID-19 mortality mong inmates has reached five times the rate for the general population, 23 days after the first death due to the disease:

> The first case of coronavirus in a prison was confirmed on April 8th. During these 23 days, 239 infected inmates and 13 deaths were accounted: a lethality rate of 5.5%. In the general population, the first case was confirmed on February 26th and, on the 23rd day, there were 621 infected people and 6 deaths: a rate of 0.96%.
>
> The first death due to the disease happened faster in the prison system: nine days after the first confirmed case. Less than half the time observed for the first death in the general population — 20 days.
>
> The numbers may be even more alarming. This happens because the DEPEN system updates cases with a delay, providing an overview that is distant from reality. [17]

56. On May 5th, Brazil officially registered 16 deaths of inmates infected with COVID-19 and was the 4th on the list of mortality due to the pandemic in the prisons of the world, only behind the United States, Bolivia and Iran[18].

57. Twenty five days later, the DEPEN[19] data show the scale up in the contamination among inmates in the country: according to information updated on May 30th, the number more than doubled, reaching 44 deaths officially stated, placing Brazil at the 2nd place of the ranking of prison deaths due to COVID-19.

58. Concerning the inmates who tested positive, one can notice an exponential growth of approximately 450%, surging from 200 positive cases to 1,362 detected cases.

59. In the Rio de Janeiro state, there are 11 official deaths due to COVID-19, or 25% of the entire country. In other words, one fourth of the prison deaths are concentrated in cells in the Rio de Janeiro state. In the regional context, this number corresponds to 40.7% of the deaths that happened in the Southeast region.

60. Considering that on May 30th, according to the information provided by DEPEN, the total number of cases in Rio de Janeiro was 20, we come to the alarming COVID-19 lethality rate in state prisons of 55%, whereas the Brazilian lethality rate of the non-incarcerated population is 5.8%.

61. However, most certainly the real scenario is even worse, since according to the ENSP/Fiocruz (National School of Public Health - Fiocruz) researcher and coordinator of the research group on Health in Prisons, Alexandra Sanchéz, the underreporting of the system is very high[2021]. In a recent virtual discussion, the researcher regretted the lack of data transparency in Rio de Janeiro and stated that the official information does not represent the reality of the prison units.

62. To prove her point, she mentioned the revision of deaths counts in Rio de Janeiro from March on, claiming that the increase of deaths due to serious pneumonia and acute respiratory syndrome in

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[16] NationalPrisonDepartment, https://app.powerbi.com/view?r=eyJrIjoiYThhMjk5YjgtZWQwYS00ODlkLTg4NDgtZTFhMTgzYmQ2MGVlIiwidCI6ImV iMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9/ last accessed on May, 22, 2020.

[17] Available at: https://www1.folha.uol.com.br/cotidiano/2020/05/letalidade-do-coronavirus-entre-presos-brasileiros-e-oquintuplo-da-registrada-na-populacao-geral.shtml. Last accessed on: May 30. 2020.

[18] Available at: https://ponte.org/em-lista-de-47.-paises-brasil-e-4o-com-mais-mortes-de-presos-pela-covid-19/. Last accessed on: May 30. 2020.

[19] Available at: https://app.powerbi.com/view?r=eyJrIjoiYThhMjk5YjgtZWQwYS00ODlkLTg4NDgtZTFhMTgzYmQ2MGVlIiwidCI6ImV iMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Last accessed on: May 31. 2020.

[20] Available at: https://portal.fiocruz.br/noticia/covid-19.-nas-prisoes-foi-tema-do-centro-de-estudos-da-ensp. Last accessed on May 21, 2020

the state prison system warned the researchers:

> "We revised the death counts from March on, when the pandemic started. Only by reclassifying deaths that have no confirmation through diagnostic tests, but were due to serious pneumonia or severe acute respiratory syndrome, we reached a rate of 49 in one thousand people, that is, five times higher than the official rate, only by reclassifying the deaths in this report revision. This is of utmost importance. (...) The mortality rate in April was 48/100 thousand people, whereas in February it was 19/100 thousand people. In March, COVID-19 contributed to 35% of the death rates in prisons, whereas in April, it contributed to 54%. This shows an important trend of growth, since the mortality rate, excluding COVID-19, is around 20 to 25% per 100 thousand people."

63. The failure of the prison health system has been shown repeatedly by several different institutes and institutions that work inside the prison units, entailing the creation, by the Federal Government, represented by the Ministry of Health, in 2014, of the National Policy of Comprehensive Health Care for Persons Deprived of Freedom in the Prison System (PNAISP). However, this measure was not capable to develop satisfactory solutions to overcome the existing problems[22].

64. In Rio de Janeiro, the access to health for people deprived of liberty is historically poor, and there are no means to ensure even basic healthcare.

65. Data from the State Mechanism for the Prevention and Fight Against Torture[23] show that "the current conditions of the prison system in the Rio de Janeiro state enhances the vulnerabilities of people deprived of liberty and place them at real risk of death in a coronavirus pandemic".

66. The resolutions SES/SEAP nº 736 and SEAP nº 804, issued in the Rio de Janeiro state by the administrative authority of the State Department of Health and Prison Administration, with recommendations to be adopted for the prevention and control of COVID-19 infections in prison units, are completely dissociated from the reality of the prison system.

67. The resolutions suggest a range of actions of personal hygiene, breathing etiquette, ventilation of the environment, the use of personal protection equipment by prison officers, among other measures, and also propose a healthcare process flow for suspected cases of incarcerated people and prison system workers.

68. In response, the State Mechanism for the Prevention and Fight Against Torture in Rio de Janeiro[24], completely aware of the reality in the prison system of Rio de Janeiro and its flaws, pointed out that the resolutions needed express measures to guarantee its execution, listing reasons why they are impossible to be put into practice. It was said:

> "1. Hand sanitation: the lack of water in the entire prison system in Rio de Janeiro is notorious. Water is supplied to inmates in an extremely rationed way, usually only twice a day. There is no foreseen increase in the water supply for inmates so that they can take care of their personal hygiene or the cleaning of collective spaces. Equally, a great part of the

[22] Overlooking the prison population is contradictory, since it is a group that is totally kept in the state custody, differently from the non-incarcerated population. In reality, the neglect confirms that there is no intention, of any of the authorities, of resocializing the convicted person.

[23] Partial Report of the COVID-19 impacts on the Prison System of Rio de Janeiro, developed by the State Mechanism for the Prevention and Combat of Torture - RJ.

[24] The State Mechanism for the Prevention and Combat of Torture in Rio de Janeiro (MEPCT/RJ) is a body created by the State Law No 5.778 from June, 30, 2010, under the Legislative power of the Rio de Janeiro state, with the objective or planning, developing and performing periodic and regular visits to spaces of liberty deprivation, whatever the form or foundation of detention, imprisonment, contention or placement in public or private facility of control, vigilance, interment, shelter or treatment, to verify the conditions to which people deprived of liberty are submitted, aiming at preventing torture and other ill treatments or cruel, inhuman or degrading penalties. Available at: https://elasexistem.files.wordpress.com/2020/05/6-relatc3b3rio-parcial-do-mepctrj-sobre-o-covid19-nohttps://elasexistem.files.wordpress.com/2020/05/6-relatc3b3rio-parcial-do-mepctrj-sobre-o-covid19-no-sistemaprisional-atualizado-17.05.pdfsistemaprisional-atualizado-17.05.pdf

hygiene material, if not all of it, is supplied by family members, which had been reduced in the last two years due to the SEAP resolution on this subject. Up until this moment, there is no news indicating an emergency public bidding of SEAP for the purchase of any of these items.

Breathing etiquette and absence of contact: since 2011, the MEPCT/RJ has been complaining about the extreme overcrowded situation in the units, where inmates do not even have enough room to sleep, sometimes sharing beds and with permanent proximity with one another. It is completely unfeasible, in this scenario, to implement the measure concerning inmates, since they do not even have enough room to properly stay in the cells. Contact is unavoidable, which may be corroborated by the frequent skin disease outbreaks, the rapid dissemination of meningitis, the tuberculosis epidemic, and the recent emergence of measles cases, noticeably in the Ary Franco Penitentiary.

Keeping the spaces ventilated: it is equally notorious that several spaces and cells in the prison units lack enough ventilation even to mitigate the heat, let alone to prevent the dissemination of an epidemic that is easily transmitted. We may mention as examples the Talavera Bruce Penitentiary, the Saint Expedite Penal Institute and the Ary Franco Penitentiary as facilities that will clearly be unable to ensure the effective application of this preventive requirement.

Care of symptomatic cases: it is notorious the complete absence of medical teams in state prison units. Most of them count on nursing technicians at most. Also, according to SEAP there will be a reduction in the contingent of agents that, in practice, are the agents who perform the screening for healthcare. Therefore, there is no established measure for active search and detection of symptoms, so that at least a minimum damage reduction can be secured. We highlight that a great deal of what is recommended at the SES and SEAP Resolutions is impossible to be put into practice, taking into account the total absence of physicians and health professionals in the prison units, what can be aggravated by the foreseen removal of assigned professionals.

Isolation in the Hamilton Agostinho Emergency Hospital: we also point out, in case of an epidemic within the system, the complete incapacity of this hospital for dealing with crises of this magnitude, not only because the hospital does not have proper beds to treat the most serious cases, but also due to the low number of available beds, many of them already occupied by patients who contracted other diseases. We should also highlight that there are inmates inside this very place that belong to risk groups. There is no infrastructure to guarantee the effective isolation or proper care of serious cases within the system. In the case of risk groups, the resolution only establishes that they should be inserted in the SisReg, since it is not possible to be treated at Hamilton Agostinho Emergency Hospital. However, we highlight that there is no reference about the place where they will wait for transfer or vacancy, which once more shows the clear practical inefficiency of the flow, and the high risk of keeping the risk group in freedom deprivation."

Epidemiological projection of COVID-19 infection spread

69. Based on the opinion of numerous international medical experts, the only scientifically sound way to prevent an outbreak of COVID-19 in Rio de Janeiro, as well as Brazil's, prison system is by reducing its population size and ensuring adequate physical distancing, along with employing proven practices that mitigate the risk of the coronavirus spread.

70. As described by Dr. Mishori and Dr Heisler[25]:

> [t]he novel coronavirus, officially known as SARS-CoV-2 (Coronavirus), causes a disease known as COVID-19 … [which] is thought to pass from person to person primarily through respiratory droplets (by coughing or sneezing) but it also survives on surfaces for up to a few days… Studies have shown that the average infected person passed the virus on to 2-3 other people; transmission occurred at a distance of 3-6 feet. The "contagiousness" of this novel

[25] Statement of Michele Heisler and Ranit Mishori, Annex 1.

> coronavirus—its R0, or replication number (the number of people who can get infected from a single infected person)—is twice that of the flu. It is estimated that in congregate environments such as prisons and other places of detention, the 'replication number' can be much higher, with some models showing and R0 between 5-10. Not only is the virus very efficient at being transmitted through droplets, everyone is at risk of infection because our immune systems have never been exposed to or developed protective responses against this virus. There is no vaccine to prevent novel coronavirus infection.

71. Mishori and Heisler emphasize that "individuals placed in prisons are at a significantly higher risk of infection with coronavirus as compared to the population in the community, and that they are at a significantly higher risk of complications and poor outcomes if they do become infected" resulting in severe illness and even death.[26]

72. In the particular context of prisons in the state of Rio de Janeiro, the experts specify that

> …overcrowding, poor hygiene measures, medical negligence, and poor access to resources and medical care have led to outbreaks of infectious diseases in jails and prisons globally.
>
> Conditions of over-crowding… make social distancing impossible and create conditions ideal for the rapid spread of SARS-CoV-2 infection. Under these conditions, it is imperative to have adequate screening, testing, identification and appropriate medical management of individuals with COVID-19, presence of well-trained health care teams to provide medical care and adequate hospital beds and transfer processes as necessary to public hospitals and medical centers. [27]

73. Further, Mishori and Heisler recommend that given that:

> the only viable public health strategy available in Brazil currently is risk mitigation, reducing the size of the population in detention centers, jails and prisons is crucially important to reducing the level of risk both for those within those facilities and for the community at large. *Not doing so is not only inadvisable but also reckless given the public health realities facing Brazil at the moment* (emphasis added).[28]

74. As detailed in the Opinion of the Panel of International Medical Experts submitted by Plaintiffs: [29]

> As of June 7, Brazil has had over 614,000 confirmed [COVID-19] cases, and over 34,000 have died. This staggering death toll is approximately 325 percent what it was a month ago. On May 25, Brazil's daily death toll surpassed the United States, reporting the most daily coronavirus fatalities in the world over a 24-hour period. Experts predict that this rapid growth will continue in Brazil, with a recent study predicting Brazil death toll could climb five-fold to 125,000 by early August. As of June 7, Brazil has more new confirmed COVID-19 cases per day per million people in the world.
>
> Because the illness can remain asymptomatic for many people and because Brazil does not have regular, reliable, comprehensive testing, the number of people infected with SARS-CoV-2 is likely to be far larger than the number of documented diagnosed cases.
>
> For all people…the case fatality rate of COVID-19 is about ten-fold higher than that observed from a severe seasonal influenza…In the highest risk populations, the case fatality rate is about 15 percent. For high risk patients who do not die from COVID-19, a prolonged recovery is expected to be required, including the need for extensive rehabilitation for profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity that can be expected from such a severe illness.[30]

75. The Panel stresses that prisons serve as an accelerant to the spread of SARS-CoV-2 and people

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[26] Statement of Michele Heisler and Ranit Mishori, Annex 1.

[27] Statement of Michele Heisler and Ranit Mishori, Annex 1.

[28] Statement of Michele Heisler and Ranit Mishori, Annex 1.

[29] Medical Experts Opinion. Annex to the Internal Appeal filed by the Plaintiffs.

[30] Medical Experts Opinion. Annex to the Internal Appeal filed by the Plaintiffs.

in these facilities will be significantly more at risk from COVID-19. They note that prisons are tinderboxes for infectious disease—once SARS-CoV-2 is in a facility, it will spread rapidly, requiring significant resources from nearby hospitals. To demonstrate, the Panel describes what has happened in prisons across the world:

> …at the early stages of the pandemic, prisons in China reported more than 500 cases of COVID-19 spread across four facilities, affecting both correctional officers and incarcerated people. Likewise, in the United States, the coronavirus has spread rapidly in various prison environments. For instance, the jail on Rikers Island in New York City went from a single confirmed case to 287 cases in just over two weeks. At one point, an outbreak at Marion Correctional Institution (CI) in Ohio was the largest-known source of coronavirus infections in the United States. Over 80% of the individuals incarcerated at Marion CI tested positive—in other words, over 2,000 of the 2,500 inmates That county is now experiencing above average rates of community spread outside the prison. This experience demonstrates that once COVID-19 begins spreading within a prison, it is only a matter of time until the outbreak spreads rapidly with many of those inside eventually infected and with *the disease soon spreading to the community* (emphasis added).[31]

76. Medical experts agree: for a number of reasons the risk of coronavirus is greater among prisoners than in the general public, and once COVID-19 is confirmed inside prisons, it is a matter of time until the outbreak spreads rapidly. Poor prison conditions, including insufficient healthcare services and overcrowding, in the state of Rio de Janeiro, and Brazil generally, exacerbates the transmission of COVID-19. Altogether, this undermines state and nationwide efforts to control the disease.

III. THE STATE'S OBLIGATIONS TO GUARANTEE THE RIGHT TO HEALTH

Overview

77. Governments across the globe are facing an unprecedented public health emergency caused by COVID-19, and the need to address the spread in detention has taken on worldwide urgency.[32] As recognized by numerous human rights bodies, prisoners are particularly vulnerable and at higher risk of contracting the virus,[33] which can spread rapidly in prisons due to the high concentration of persons detained in confined spaces.[34]

78. As noted by the United Nations ("UN"), "COVID-19 is already sweeping through detention facilities, where distancing measures are almost impossible, and detainees are more vulnerable to the disease."[35] One of the most common recommendations by the UN,[36] regional human rights

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[31] Medical Experts Opinion. Annex to the Internal Appeal filed by the Plaintiffs.

[32] For example, Iran, with around 240,000 persons in overcrowded prisons, announced the temporarily release of nearly 100,000 prisoners, Francis Pakes, *Coronavirus: why swathes of prisoners are being released in the world's most punitive states*, The Conversation, April 20, 2020, https://theconversation.com/coronavirus-why-swathes-of-prisoners-are-being-released-in-the-worlds-most-punitive-states-136563. Likewise, in the US, California released 3,500 prisoners early because of coronavirus, and reduced the population in its jails, but even so "some 3,200 persons contracted Corona virus and 16 died in a public health catastrophe that advocates say was both predictable and preventable." Sam Levin, *People are sick all around me': inside the coronavirus catastrophe in California prisons*, The Guardian, May 20, 2020, https://www.theguardian.com/us-news/2020/may/20/california-prisons-covid-19-outbreak-deaths.

[33] United Nations ("UN"), *COVID-19 and Human Rights. We are all in this together*, April 2020, at 12; Inter-Agency Standing Committee ("IASC") of the World Health Organization ("WHO") and Office of the High Commissioner for Human Rights ("OHCHR"), *Interim Guidance. COVID-19: Focus on Persons Deprived of Their Liberty*, March 27, 2020 at 2 [hereinafter, IASC, *Interim Guidance*].

[34] *Ibid.* at 2.

[35] UN, *COVID-19 and Human Rights. We are all in this together*, April 2020, at 8.

[36] *Ibid.* at 12; UNODC, WHO, UNAIDS, and OHCHR, *Joint Statement on COVID-19 in Prisons and Other Closed Settings*, May 13, 2020, https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings.

systems, numerous State governments, and the scientific and medical community alike, is to ensure physical ("social") distancing by reducing the numbers of people detained through, for instance releasing prisoners, delaying the commencement of a sentence, or resorting to alternatives to detention. While these efforts are crucial, they are not sufficient *per se*.

79. Systemic problems endemic to the common penitentiary system across multiple jurisdiction—such as overcrowding, poor living and sanitary conditions, including poor ventilation of cells, and unsatisfactory level of health services—are being exacerbated by the novel coronavirus pandemic, endangering the lives of prisoners, prison staff and the community alike

80. Under international human rights obligations, States have a heightened duty to protect the well-being of incarcerated persons by, among other measures, providing them with requisite healthcare.[37] This includes adequate treatment in prison, transferring incarcerated persons to outside medical facilities when needed, as well as providing preventive medicine and adequate sanitary conditions.

81. International and regional human rights laws, standards and guidelines offer specific instructions for legal systems and prison administrations during this time of COVID-19. Brazil signed several international obligations in this regard after democratization, the country stands out as a signatory to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment[38], the American Convention on Human Rights[39], the International Covenant on Economic, Social and Cultural Rights[40].

82.

83. The immediate implementation of measures to mitigate the risk of coronavirus, in line with the human rights legislation and the recommendations of the World Health Organization (WHO) has proven successful in many foreign contexts. The examples of Ireland and Italy, that will be described in detail further ahead, were particularly successful, since they were able to contain the virus dissemination and minimize positive cases within the prisons.

84. At the national level, besides the Recommendation n. 62 of the National Council of Justice, there are many public demonstrations in favor of the urgent measures, as in the case of the National Collegiate of General Public Defenders - CONDEGE, that published a note in favor of the issuance of a special general pardon to face the seriousness and urgency of this matter,[40] and the Criminal Justice Network[41], that published on March 17, 2020, a public note demanding urgent actions:

> "The situation must be faced within this "Unconstitutional Status" – a prison system structurally collapsed and reproducing cruel practices – aiming at the reduction of the prison population and attentive to the educational correctional system, releasing immediately, among others, people with pre-existing diseases, who are over 60 years old, mothers who are guardians of children of up to 12 years old, pregnant women, breastfeeding mothers - (as established in the Legal Framework of the Early Childhood), people charged with nonviolent

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[37] UN Human Rights Committee ("UNHRC"), *General Comment No. 36: Article 6 (on the right to life)*, October 30, 2018, CCPR/C/GC/36, para. 25 (stating that there is "a heightened duty of care" on governments "to take any necessary measures to protect the lives of individuals deprived of their liberty by the State," including providing "necessary medical care," "since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their life...and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.") [hereinafter, UNHRC, *General Comment No. 36*].

[38] Decree nº 40, February 15, 1991.

[39] Decree nº 678, November 6, 1992.

Decree 591, July 6, 1992.

[40] National Collegiate of General Public Defenders Available at: http://www.condege.org.br/publicacoes/noticias/condege-quer-indulto-especial-para-conter-coronavirus-nos-presidios. Last accessed on 15/05/2020.

[41] Available at: https://redejusticacriminal.org/wp-content/uploads/2020/03/2020_03_17-Nota-sobreCoronavi%CC%81rus-RJC_versa%CC%83o-final-1.pdf

crimes, including drug trafficking; establishing the replacement of custodial sentences with restrictive rights sentences for people sentenced to up to 4 years; replacing semi-open and open regimes with house arrest, suspending the enforceability of arrest warrants to start sentence execution of unappealable judgment of conviction and preventive detention and replacing them with other provisional measures, aiming at containing the dissemination of the virus."

85. Agreeing with the aforementioned statements, the National Mechanism for the Prevention and Fight Against Torture published a technical note[42] about the situation and dedicated a chapter of recommendations of disincarceration and deinstitutionalization, that should be highlighted:

> 3.1. Disincarceration and Deinstitutionalization
>
> President of the Republic
>
> To immediately publish, in the format required by the noble National Collegiate of General Public Defenders (CONDEGE), a Special Decree of Presidential Pardon, as established in art. 84, XII of the Federal Constitution of 1988, with the humanitarian end of minimizing the negative impacts of the serious pandemic of COVID 19 that will reach the degrading and inhumane Brazilian Prison System, bringing about a potential number of deaths;
>
> Federal Government
>
> To secure immediate financial injection for enhancing and supporting the expenses of services of the Psychosocial Care Network in states and municipalities, in order to assure the due shelter and care of people with mental disorders and/or sufferings in the territories, an issue that may be intensified with the social isolation measures and the processes of deinstitutionalization;
>
> To secure full and effective redress to family members of people deprived of liberty who died in the institutions as consequence of overcrowding, and consequent lack of proper conditions of healthcare.
>
> Courts of Law
>
> To adopt the Recommendation nº 62/202010, of the National Council of Justice – CNJ, that points out effective ways for disincarceration, a key measure for facing COVID19 and the risk of massive deaths that this pandemic may cause within prisons and other institutions of freedom deprivation in Brazil;

86. Likewise, the Penal Reform International published a document with practices enforced all over the world so that the prison system does not have a negative impact on the coronavirus[43] proliferation, in compliance with the rights of incarcerated people, the prison staff and visitors of the prison system.

Healthcare is a fundamental right in prison

87. 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."[44] The Universal Declaration of Human Rights (1948)—the foundational document of international human rights law—affirms that

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[42] https://mnpctbrasil.files.wordpress.com/2020/03/nota-5_ppl_corana-virus_mnpct.pdf. Statement of Michele Heisler and Ranit Mishori, Annex 1.

[43] Penal Reform International. *Global Prison Trends 2020*. Disponível em: < https://cdn.penalreform.org/wpcontent/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf >. Last accessed on May 13th, 2020.

[44] United Nations Committee on Economic, Social and Cultural Rights ("CESCR"), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, August 11, 2000 U.N. Doc. E/C.12/2000/4, para. 1; *see also* UN General Assembly ("UNGA"), Resolution 45/111 adopted on December 14, 1990, *Basic principles for the Treatment of Prisoners*, para. 9; OHCHR & WHO, *The Right to health, Fact Sheet No. 31*, June 2008 at 1.

everyone has the right to health, including adequate standard of living and medical care.[45] The International Covenant on Economic, Social and Cultural Rights (1966) ("CESCR") a multilateral treaty to which Brazil is a State party, requires States to recognize the right of everyone to the enjoyment of the highest attainable standards of physical and mental health.[46] This is also recognized in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.[47]

88. Specifically, under international human rights law, it "is axiomatic that the State is responsible for the healthcare of those whom it holds in custody."[48] Access to healthcare is internationally considered a fundamental right for prisoners.[49]

89. The UN Human Rights Committee ("HRC"), the body that oversees the International Covenant on Civil and Political Rights (1966) ("ICCPR") to which Brazil is a State party, holds that States have

> [a] heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives and bodily integrity…The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health.[50]

90. Likewise, the Inter-American Commission on Human Rights ("IACommHR") recognizes that prisoners must have access to the "enjoyment of the highest possible level of physical, mental, and social well-being,"[51] as such, States must provide them with:

> amongst other aspects, adequate medical, psychiatric … care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or

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[45] UNGA, *Universal Declaration of Human Rights*, December 10, 1948, G.A. Res. 217A (III), A/810, art. 25(1).
[46] CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 34.
[47] Organization of American States ("OAS"), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador,"* November 17, 1988, art. 10.
[48] UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT"), *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic*, April 7, 2020, CAT/OP/10, section II.8. *See* Organization of American States, *American Declaration of the Rights and Duties of Man*, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, 2 May 1948, at Art. XI. Inter-American Commision of Human Rights ("IACommHR"), *Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, at 525. *Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, Inter-American Court of Human Rights ("IACHR"), *Annual Report 1998*, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 135. *Neira-Alegría et al. v. Peru*, IACHR, Judgment of January 19, 1995, Series C No. 20 (1995), para. 60. *Lantsova v. Russian Federation*, March 26, 2002, UN Doc CCPR/C/74/763/1997 para 9.2.
[49] UNGA, *Resolution 70/175, The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules*), adopted on December 17, 2015, Rule 24.1; Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (European Prison Rules)*, January 11, 2006, Rule 39; IACommHR, *Resolution 1/08, Principles and best practices on the protection of persons deprived of liberty in the Americas*, March 13, 2008, Principle X.
[50] UNHRC, *General Comment No. 36*, para. 25.
[51] IACommHR, *Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, at 5.

high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices.[52]

91. In this regard, a State cannot neglect its duty to provide adequate healthcare to all, not even when facing a difficult financial situation.[53] 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.[54]

Failure to provide healthcare violates the right to health, life, and the prohibition of torture

92. Failure to guarantee adequate detention conditions, including proper medical care, can lead to the violations of several fundamental rights, including, but not limited to, the right to health, protection from torture and ill-treatment and right to life.[55] Article 10 of the ICCPR States that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[56] The right to life under the ICCPR (*Art. 6*) requires States to take appropriate measures to address the pervasiveness of life-threatening diseases, including contagious diseases.[57]

93. The HRC notes that "[d]eprivation of life involves...otherwise foreseeable and preventable life-terminating harm or injury, cause by an act or omission," and States may violate this right, even if the person does not ultimately lose their life.[58] For instance, the HRC held that States are under an "obligation to ensure the health and life of all persons deprived of their liberty" and that the "[d]anger to the health and lives of detainees as a result of the spread of contagious diseases…amounts to a violation of article 10 [*dignity for those deprived of liberty*] of the Covenant and may also include a violation of articles 9 [*right to liberty and security*] and 6 [*right to life*]."[59]

94. The absolute 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.[60] For instance, according to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), to which Brazil is party, the failure to

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[52] *Ibid*.
[53] OHCHR, *The Right to Health. Fact Sheet no. 31*, June 2008, at 5, https://www.ohchr.org/Documents/Publications/Factsheet31.pdf.
[54] *See e.g*., *Vélez Loor v. Panama*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 23, 2010. Series C No. 218, para. 198; UNHRC, *General Comment No. 36*, para. 25 ("States parties assume the responsibility to care for their life...and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.").
[55] OAS, American Convention on Human Rights *"Pact of San Jose"*, Costa Rica, November 22, 1969, art. 5; IACommHR, *Resolution 1/08, Principles and best practices on the protection of persons deprived of liberty in the Americas*, Principle X; World Organisation Against Torture ("OMCT"), *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System: a Handbook for Victims and their Advocates*, 2014, OMCT Handbook Volume Series No. 2, at 103-111, https://www.omct.org/files/2014/11/22956/v2_web_guide_interamricain_en_omc14.pdf, pp.103-111 (covering the Scope of the Right to Personal Integrity and elaborating on Article 5 of the American Convention); IACHR, *Lori Berenson-Mejía v. Peru*, Judgment of November 25, 2004, Series C No. 119, para. 101.
[56] UNGA, *International Covenant on Civil and Political Rights (ICCPR)* adopted on December 16, 1966, A/6316 (1966), art. 10; *see also*, UN, Basic principles for the Treatment of Prisoners, Principle 1.
[57] UNHRC, *General Comment No. 36*, para. 26.
[58] *Ibid*., para. 6-7.
[59] UNHRC, *Concluding observations of the Human Rights Committee*, Republic of Moldova, CCPR/CO/75/MDA, para. 9.
[60] IACHR, *Vélez Loor v. Panama*, para. 198; IACommHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, para. 519.

provide adequate medical care to prison population can amount to a violation of this fundamental right.[61]

95. Thus, the right to health in prison lies at the nexus of a State taking the step of depriving a prisoner of their liberty and thereby their responsibility to provide for their healthcare. As such, the only way for a State to comply with its duty, if a prisoner cannot be released, not to subject prisoners to ill-treatment is for it to provide adequate healthcare.[62]

Equivalence of care

96. The "UN Standard Minimum Rules for the Treatment of Prisoners" first adopted by the UN General Assembly in 1957 and revised in 2015 as the "Nelson Mandela Rules" ("Mandela Rules") are regarded by States as the primary source of standards relating to treatment in detention.[63]

97. According to the Mandela Rules, incarcerated persons must have access to the same standard of healthcare as available to the public.[64] Moreover, medical services must be delivered without discrimination, including on such grounds as race, gender, language, religion, political or other opinion, national or social origin, property, birth or legal status,[65] and access should be free of charge, fair, and transparent and should effectively meet the medical needs of prisoners.[66]

98. Additionally, the United Nations in its Manual on Human Rights Training for Prison Officials indicates that

> [i]t is not appropriate to argue that, because a person is in prison, he or she is entitled to a lower standard of health care than that provided in the community. On the contrary, in depriving a person of his or her liberty, the State takes on a special responsibility to provide adequate healthcare.[67]

99. States must also take into consideration specific conditions of detention and needs of prison population and include various factors such as overpopulation. This should include, for instance, the overall health condition of incarcerated persons, unhealthy conditions of detention, or overcrowding.[68] Treatment and protection from COVID-19 within prison system should include

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[61] UN Committee Against Torture ("CAT"), *Concluding Observations: New Zealand*, September 16, 1998, Supplement No. 44, A/53/44, para. 167-178; CAT, *Concluding Observations: Cuba*, May 23, 2012, CAT/C/CUB/CO/2, para. 10; UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)*, December 10, 1984, G.A. Res. 39/46, annex, 39, at 197; CAT, *Observations of the Committee on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, December 16, 2013, CAT/C/51/4, para. 16, 24, 32-34; CAT, *Concluding Observations of the Committee Against Torture: Ethiopia*, January 20, 2011, CAT/C/ETH/CO, para 26.

[62] Joanne Mariner & Rebecca Schleifer, *The right to health in prison,* in Advancing the Human Right to Health (eds. José M. Zuniga, Stephen P. Marks & Lawrence O. Gostin), Oxford University Press (2013).

[63] *Nelson Mandela Rules*.

[64] *Nelson Mandela Rules*, Rule 24(1); UN, *Basic principles for the Treatment of Prisoners*, Principle 9; IACommHR, *Principles and best practices on the protection of persons deprived of liberty in the Americas,* Principle X. IASC, *Interim Guidance,* at 2; IACHR, *Neira-Alegría et al. v. Peru*, Judgment of January 19, 1995, Series C Nº 20 (1995), para. 86. IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, preamble, April 10, 2020, http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf; IACommHR, *Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, para. 529.

[65] UN, *Basic principles for the Treatment of Prisoners*, Principle 2, 9.

[66] *Nelson Mandela Rules*, para. 575.8.

[67] OHCHR, *Human Rights and Prisons. Manual on Human Rights Training for Prison Officials*, 2005, https://www.ohchr.org/Documents/Publications/training11en.pdf.

[68] Penal Reform International, *Health in prisons: realizing the right to health*, Penal Reform Briefing no. 2, 2007, at 2, https://cdn.penalreform.org/wp-content/uploads/2013/06/brf-02-2007-health-in-prisons-en_01.pdf.

those and other pathologies and be adapted accordingly.[69]

Access to preventive medicine of infectious disease

100. The CESCR requires States to take effective steps to prevent, treat and control epidemics and diseases,[70] and to ensure that preventive measures are a part of healthcare services, including to people in custody.[71] Rule 24 of the Mandela Rules holds that the "provision of healthcare for prisoners is a State responsibility," and care "should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for…infectious diseases." As specified in Rule 25(1) of the Mandela Rules, access to healthcare in prisons means not only access to treatment, but also preventive medicine.

101. As regards prevention from infectious diseases, the European Court of Human Rights ("ECtHR") has indicated that the lack of implementation of adequate or timely medical care and the failure to prevent a prisoner from contracting tuberculosis amounts to a violation of his fundamental rights, including the prohibition on degrading treatment.[72]

102. Within the realm of COVID-19, specific, enhanced preventive measures are necessary, and in light of the rule of equivalency of care, States must ensure that these measures are effectively implemented within a prison environment.

Healthcare in prison during the COVID-19 pandemic

103. The spread of communicable diseases, like COVID-19, constitutes a serious public health[73] concern in the prison environment, which often serves as an incubator of highly contagious diseases due to the nature of detention conditions. As noted by the IACommHR, the,

> COVID-19 pandemic may seriously affect the full exercise of people's human rights because of the severe risks to life, health and personal safety that it poses," specifically calling on state to "address overcrowding in prisons" and "[a]dapt the conditions of detention…particularly []health, sanitation and quarantine measures to prevent COVID-19 contagion…[and ensure] that all prison units have medical care available.[74]

104. During a pandemic, the IACommHR has stressed that an essential component of medical care in prisons is the States' duty to ensure that all prisons have medical units, and the guarantee of timely and appropriate prevention measures, diagnosis, and treatment to all prisoners, with particular attention paid to those considered at-risk.[75]

105. Similarly, the UN Subcommittee on the Prevention of Torture ("SPT") – the body established pursuant to the UN Optional Protocol to the Convention against Torture ("OPCAT") to which Brazil is a party – issued advice on how States should respond to the COVID-19 pandemic with respect to those in detention, recommending that States:

> [r]educe prison populations...by implementing schemes of early, provisional or temporary"

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[69] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), *Third General Report on the CPT's activities covering the period 1 January to 31 December 1992*, June 4, 1993, CPT/Inf (93) 12, para. 75.

[70] UNGA, *International Covenant on Economic, Social and Cultural Rights* ("ICESCR") adopted on December 16, 1966, at 49, A/6316 (1966).

[71] CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, August 11, 2000, E/C.12/2000/4, para. 34.

[72] *See* European Court of Human Rights ("ECtHR"), *Melnik v. Ukraine*, Application no. 72286/01, March 28, 2006, paras. 104-106, 110-112.

[73] *See* IACommHR, *Principles and best practices on the protection of persons deprived of liberty in the Americas*, Principle X. IASC, *Interim Guidance*, at 2.

[74] IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, para. 47.

[75] IACommHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, para. 575(1); IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, Preamble.

> release "[p]lace particular emphasis on places of detention where occupancy exceeds the official capacity, and…which does not permit social distancing;" "[e]nsure that sufficient facilities and supplies are provided (free of charge) to all who remain in detention in order to allow detainees the same level of personal hygiene;" and "[p]revent the use of medical isolation taking the form of disciplinary solitary confinement," among others.[76]

106. Likewise, the UN Inter-Agency Standing Committee ("IASC") issued recommendations to States regarding COVID-19 in places of detention, placing significant importance on the need to ensure adequate healthcare to those detainees who are not released.[77]

107. Timely and effective prevention and management measures are key to containing the spread of the coronavirus within the prison system. This is a principal component of the right to health, and as such, States are under an obligation to implement these measures

108. According to Dr. Mishori and Dr. Heisler, this is essential, as

> "[o]nce somebody becomes sick with COVID-19, the harm can be long lasting. The disease is known to affect multiple body system including the lungs, heart, kidneys and blood vessels, requiring rehabilitation." [78] Additionally, "[w]hile individuals of any age any be infected with the novel coronavirus, recent data suggest that those with chronic medical conditions, such as diabetes, heart or lung disease, or other chronic conditions, are at a higher risk of developing severe cases, facing complications and dying from COVID-19." [79] Those "who do not die from serious cases of COVID-19 may also face prolonged recovery periods, including extensive rehabilitation from cardiac damage and loss of respiratory capacity." [80]

109. These experts also stress that "[b]ecause the lack of treatment or an effective vaccine, prevention strategies are crucial. Prevention strategies require population-based and public health interventions focusing on containment and mitigation. Containment requires testing, tracing and isolating people who are ill or who have had contact with people who are ill. This strategy, however, requires mass testing, which has not been widely available due to delayed action." [81]

110. The International Panel of Medical Experts explain that conditions of detention in Brazil enhances the likelihood of transmission, as was demonstrated in the case of tuberculosis ("TB"), another highly contagious disease: "…overcrowding sits at the crux of the issue, contributing to high rates of TB within prisons, and inadequate screening and diagnostic tools prevent prisoners with TB from being identified until late stages of the disease. As such, prisons in Brazil act both as reservoirs and amplifiers for TB, facilitating its spread to surrounding communities."

111. Therefore, preventive medicine is essential to protect prisoners during this pandemic, especially since, as Mishori and Heisler indicate,

> a coronavirus brought into prison can quickly spread among the dense detainee cohort. Many may become sick—including high-risk groups such as those with chronic conditions—quickly overwhelming the already strained health infrastructure within the facility. This can also lead to a strain on the surrounding hospitals to which these individuals may have to be transferred.

112. As such, additional measures need to be urgently implemented. Therefore, in line with recommendations from the WHO, it is vital that States prioritize the following in places of detention: comprehensive diagnostic testing; physical distancing, including non-punitive medical

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[76] UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT"), *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. CAT/OP/10 (2020), March 25, 2020, para. 9.
[77] IASC, *Interim Guidance,* at 4.
[78] Statement of Michele Heisler and Ranit Mishori, Annex 1
[79] Statement of Michele Heisler and Ranit Mishori, Annex 1
[80] Statement of Michele Heisler and Ranit Mishori, Annex 1
[81] Statement of Michele Heisler and Ranit Mishori, Annex 1

isolation when necessary; improved hygiene (personal and environmental), and personal protective measures ("PPE").[82]

Testing

113. According to the WHO, COVID-19 testing in prisons is an integral part of States' response to COVID-19 generally,[83] noting that "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."[84]

114. According to Dr. Heisler and Dr. Mishori, "[e]veryone is at risk of infection because our immune systems have never been exposed to or developed protective responses against this virus and there is no vaccine to prevent novel coronavirus infection."[85] As emphasized by the Office of the High Commissioner for Human Rights ("OHCHR"), in order to prevent the further spread of COVID-19, States must ensure "widespread access to testing…for detainees…[and] prison personnel."[86] States should perceive both prisoners and staff as priority categories for testing.

115. International human rights law stresses the importance that detainees undergo a medical examination at the time of admission,[87] as well as any other time at a later stage when it would be medically prudent to do so.[88] This is especially important in the context of infectious diseases. As the experience with tuberculosis ("TB") demonstrates, active case detection requires screening prisoners at different points of their incarceration. If this done "properly, systematically and effectively and followed by an adequate treatment regimen," the WHO concludes that this can "lead to a reversal of the growing incidence of TB and to a reduction in TB mortality."[89]

116. Likewise, laboratory testing for COVID-19 should cover all prisoners: for those newly admitted to prison, as well as for those already detained, with special emphasis on vulnerable persons, regardless of if no symptoms are present, e.g., fever or cough, as often those infected are asymptomatic, yet can still transmit the disease.[90]

117. Prisoners should be examined by qualified healthcare professionals "in the interests of preventing the spread of transmissible diseases", and prisoners suspected of infection should be isolated for

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[82] WHO, *Overview of public health and social measures in the context of COVID-19: Interim Guidance*, May 18, 2020; WHO, *Laboratory testing for coronavirus disease (COVID-19) in suspected human cases: Interim Guidance*, March 19, 2020; WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, March 15, 2020.
[83] WHO, *Laboratory testing for coronavirus disease (COVID-19) in suspected human cases: Interim Guidance*, at 1; WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, para 6.4.
[84] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, para 1.
[85] Statement of Michele Heisler and Ranit Mishori, Annex 1
[86] Spokesperson for the UN High Commissioner for Human Rights, *Press briefing note on Americas / Prison conditions*, May 5, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25864&LangID=E.
[87] UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173, December 9, 1988, Principle 24; IACommHR, *Principles and best practices on the protection of persons deprived of liberty in the Americas*, Principle IX.3. IASC, *Interim Guidance*, at 4.
[88] IACHR, *Provisional measures for María Lourdes Afiuni, Venezuela. Order of the President of the Inter-American Court of Human Rights of December 10, 2010*, recital 11; *Nelson Mandela Rules*, Rule 24. OHCHR, *Human Rights and Prisons. Manual on Human Rights Training for Prison Officials*, 2005, at 63
[89] WHO, Regional Office for Europe, *Prisons and Health*, 2014, at 58.
[90] Statement of Michele Heisler and Ranit Mishori, Annex 1 ("While individuals of any age any be infected with the novel coronavirus, recent data suggest that those with chronic medical conditions, such as diabetes, heart or lung disease, or other chronic conditions, are at a higher risk of developing severe cases, facing complications and dying from COVID-19.")

the period of infection.[91] If a prisoner or a staff member tests positive, prisoners and staff members who were in contact with them in the two previous weeks should also be tested.[92]

118. Proactive testing of all prisoners to detect outbreaks early and at minimum a systematic testing of symptomatic prisoners is an effective way of protecting prisoners, prison staff, and the community.[93] Mishori and Heisler recommend that Brazil and other states should implement "a robust mass testing program that includes regular and frequent testing of symptomatic and asymptomatic inmates and staff, followed by contact tracing and appropriate medical management of those who test positive (that does not include solitary confinement), especially those in the high risk groups."[94]

119. Ireland provides a noteworthy example of how prompt implementation of international and regional human rights standards can effectively combat the spread of COVID-19 in prisons. In Ireland, for instance, the Department of Health designated prisoners and prison staff as priority categories for testing. As of May 26, Ireland had 24,735 confirmed COVID-19 cases, yet not one confirmed case amongst its prisoners.[95]

120. Ireland also currently quarantines all newly admitted prisoners for 14 days. The Irish Prison Service is working with the Health Service Executive ("HSE") to implement a process that will facilitate the testing of all newly admitted prisoners at an early stage, and thus will allow the prisoner to exit quarantine sooner provided their COVID-19 test results are negative.[96]

121. 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 transfers to other prison facilities.[97] As such, infected prison staff may bring coronavirus into the prison thereby perpetuating the spread. In addition to testing, as in Ireland, staff should be subjected to daily basic health checks, including screening questions and taking of temperatures every time they enter prisons.[98]

Physical distance and medical isolation

122. Securing physical distancing is essential to prevent the spread of COVID-19.[99] The WHO has advised to maintain at least a 1 meter distance between people and to avoid crowded places.[100] As detailed by medical experts

> …jailed or imprisoned, people have much less of an opportunity to protect themselves by social distancing than they would in the community. Congregate settings such as jails and prisons allow for rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets through coughing and sneezing. When people live in close, crowded quarters and must share dining halls, bathrooms, showers, and other common areas, the opportunities for transmission are greater. Toilets, sinks, and showers are shared, without disinfection between use…Spaces within jails and prisons are often also poorly

[91] *Nelson Mandela Rules*, Rule 30; Council of Europe ("CoE"), *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules* ("European Prison Rules"), Rules 42.1 and 42.3; IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, Principle IX.
[92] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, at 14.
[93] IASC, *Interim Guidance,* at 4.
[94] Statement of Michele Heisler and Ranit Mishori, Annex 1
[95] Statement of Fiona Ni Chinneide, Annex 2.
[96] *Ibid*.
[97] Statement of Michele Heisler and Ranit Mishori, Annex 1.
[98] *Ibid.*
[99] WHO, *Coronavirus disease (COVID-19) advice for the public*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public (last updated April 29, 2020); Centers for Disease Control and Prevention, *Coronavirus Disease 2019, Social Distancing*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated May 6, 2020).
[100] Statement of Michele Heisler and Ranit Mishori, Annex 1.

ventilated, which promotes highly efficient spread of diseases through droplets.[101]

> [p]rison facilities should implement social distancing strategies to increase the physical space between incarcerated/detained persons…regardless of the presence of symptoms. Prescribed measures for implementation of social distancing include enforcing increased spacing between individuals in holding cells and other common spaces, such as dining halls, recreational areas, intake and waiting areas, and medical examination rooms.[102] In housing units, prison administrators should reassign units to provide more space between individuals.

123. Specific measures to enable distancing are also necessary in prisons, but they should not undermine the fundamental rights of detained people.[103] For instance, between end of February and mid-May, Italy significantly decreased its prison population, which was at 120 percent (120%) capacity, by an overall reduction rate of 13.9 percent (13.9%), enabling better distancing.[104] Ireland introduced, among other measures, physical distancing within prisons by the inclusion of signage and markings on the floors, staggered mealtimes and requiring prison staff to remain in the areas that they are specifically assigned for duty.[105]

124. According to the Mandela Rules, in "cases where prisoners are suspected of having contagious diseases," prison services should "provid[e] for the clinical isolation and adequate treatment of those prisoners during the infectious period."[106] As held by the UN Human Rights Committee, "a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under articles 6, paragraph 1 [right to life]."[107]

125. Such medical isolation must meet certain conditions and in all cases, prisons must make every effort to ensure prisoners' rights.[108] If utilized, isolation must be ordered on the basis of independent medical evaluation, be proportionate, limited in time and subject to procedural safeguards—never should it resemble disciplinary solitary confinement.[109] Quarantine facilities should be of sufficient size ensuring prisoners can practice strict physical distancing effectively, while still being provided as many of the privileges of general population as possible

126. Medical isolation must continue to respect the human rights of the individual, including the minimum requirements of outdoor exercise, while taking account of the measures necessary to address the COVID-19 pandemic,[110] and should ensure detainees have the opportunity to engage in meaningful human contact every day, which may require active engagement with medical prison staff to avoid complete isolation, and additionally access

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[101] Statement of Michele Heisler and Ranit Mishori, Annex 1.

[102] *Id*. Not sure if this is PHR or Gregg or both?

[103] OHCHR, *Urgent action needed to prevent COVID-19 - rampaging through places of detention*, March 25, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E.

[104] *Ibid*.

[105] Affidavit of Fiona Ni Chinneide, Annex 2.

[106] *Nelson Mandela Rules*, Rule 30(d).

[107] UNHRC, *Cabal and Pasini Bertran v. Australia*, Communication No. 1020/2001, CCPR/C/78/D/1020/2001, September 19, 2003.

[108] SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,* section II.9(m).

[109] UNHRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* adopted at the Forty-fourth Session of the Human Rights Committee, on March 10,1992, para. 6 ("The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7."); *see also* SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,* section II.9(n).

[110] *Ibid*.; CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, March 20, 2020.

to alternative means of communication if in-person contact places individuals at risk of contracting COVID-19.[111]

127. As noted by Mishori and Heisler, in order to prevent the transmission of the coronavirus, "people who are infected and symptomatic need to be isolated in specialized negative pressure rooms. Most places of detention have few negative pressure rooms if any, and these may be already in use by people with other conditions (including tuberculosis or influenza)."[112]

128. As described above, in Ireland, all newly admitted prisoners go through obligatory quarantine for up to 14 days upon arrival. The Irish Prison System has also opened a specific unit "to allow for the isolation of any confirmed case…[and] accommodate symptomatic prisoners who are suspected of having COVID-19,"[113] where isolation continues "until cleared from isolation through the COVID-19 testing process."[114] Any prisoner who advises staff that are experiencing symptoms of COVID-19 is assessed by prison healthcare staff who arrange for the prisoner to be isolated and tested, if they meet specific criteria. Some prisoners who do not meet the threshold for COVID-19 testing but are experiencing some symptoms continue to be isolated in line with HSE advice. Prisoners who are isolated for precautionary reasons due to COVID-19 may leave their cells to access services such as psychological services, or to use the prisoner phone system once escorted by staff wearing appropriate PPE.[115]

129. Additionally, the Panel of Experts highlights the importance of introducing "[a] reliable means by which incarcerated people report symptoms of coronavirus and be seen the same day by medical staff, even if no guards or few guards are on duty in their housing units."

130. The Irish Prison System also introduced a "cocooning" mechanism for vulnerable prisoners in order to minimize all interactions with other prisoners or staff to ensure their health and safety. The cocooning covers prisoners: (1)70 years of age or more; or (2) with medical conditions who the healthcare team identify as vulnerable due to underlying conditions or risk factors (e.g., cancer, severe respiratory disease, pregnant women with cardiovascular disease).[116]

Personal Hygiene

131. Rule 16 and 18 of the Mandela Rules provides that prisoners shall be "provided with water and with such toilet articles as are necessary for health and cleanliness," and guarantees "[a]dequate bathing and shower installations…as frequently as necessary for general hygiene."[117] The IACommHR adds that

> [p]ersons deprived of liberty shall have access to clean and sufficient sanitary installations that ensure their privacy and dignity. They shall also have access to basic personal hygiene products and water for bathing or shower, according to the climatic conditions.[118]

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[111] CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, March 20, 2020.
[112] PHR
[113] Ireland Department of Justice and Equality, *Information regarding the Justice Sector COVID-19 plans*, http://www.justice.ie/en/JELR/Pages/Information (last updated June 2, 2020).
[114] *Ibid.*
[115] Statement of Fiona Ni Chinneide, Annex 2.
[116] Ireland Department of Justice and Equality, Information regarding the Justice Sector COVID-19 plans.
[117] *Nelson Mandela Rules*, Rules 16, 18.
[118] IACommHR, *Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, at 6.

132. Dr. Mishori and Dr. Heisler hold that

> During an infectious disease outbreak, people can protect themselves by washing hands. Many detention facilities do not provide adequate opportunities to exercise necessary hygiene measures, such as frequent handwashing or use of alcohol-based sanitizers when handwashing is unavailable. Jails and prisons are often under-resourced and ill-equipped with sufficient hand soap and alcohol-based sanitizers for people detained in these settings.

133. Additionally, the Panel of Experts recommends "[p]rovision of a no-cost supply of soap and other hand washing materials to incarcerated persons, sufficient to allow frequent hand washing." As they explain,

> [l]iquid soap should be provided where possible, and if bar soap must be used, prison authorities should "ensure that it does not irritate the skin and thereby discourage frequent hand washing." Facilities should also provide inmates with running water and hand drying machines or disposable paper towels for hand washing; tissues and no-touch trash receptacles for disposal; and alcohol-based sanitizer with "at least 60% alcohol where permissible based on security restrictions." Prisons should implement a facility-wide protocol, and effectively train residents and staff to use it, whereby a resident who runs out of soap can obtain more promptly.

134. The WHO issued detailed recommendations on the improved hygiene needed in places of detention in order to prevent and protect against the spread of the coronavirus, which include provisions for hand hygiene products and environmental sanitation and disinfectant.119

135. As such, prisoners must be provided with sufficient conditions to practice the necessary hygiene to comply with these rules, such as the ability to wash hands frequently. In this regard soap, water, and personal towels must be constantly and consistently available.120 As the SPT highlighted, in line with the principle of equivalency and as part of preventive medicine, sanitation supplies must be provided free of charge to all prisoners to guarantee the same level of personal hygiene as is to be followed in the community.[121]

136. Additionally, the WHO recommends the use of sanitizers when handwashing is not available.[122] In lieu of alcohol-based sanitizers, which may be considered contraband due to the alcohol content, the WHO recommends that sanitizers containing chlorine may be used by prisoners and guards when soap and water are not available.[123] In Ireland, for instance, alcohol-free sanitizers are made available in prisons.[124]

137. The WHO also recommends the use of "wall-mounted liquid soap dispensers, paper towels and foot-operated pedal bins…in key areas such as toilets, showers, gyms, canteens and other high-traffic communal areas to facilitate regular hand hygiene."[125]

Environmental Hygiene

138. Per Rule 17 of the Mandela Rules, States are obliged to ensure that "[a]ll parts of a prison

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[119] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, at 13.
[120] *Ibid.*
[121] SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,* section II.9(j).
[122] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, at 13. *Nelson Mandela Rules,* Rule18; IACommHR, *Principles and best practices on the protection of persons deprived of liberty in the Americas,* Principle XII. IASC, *Interim Guidance,* at 4.
[123] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance*, at 13.
[124] Statement of Fiona Ni Chinneide, Annex 2.
[125] WHO, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, at 19.

regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times."[126]

139. Environmental disinfecting is crucial in attempts to contain the spread of the virus, as the coronavirus survives on surfaces for up to a few days and "people may become infected by touching contaminated surfaces or objects and then touching their eyes, nose or mouth."[127]

140. The Panel of Medical experts indicate that, for instance, "[d]etainees often have a small number of telephones that they share…,"[128] therefore, phones, showers, sinks, toilets or other high-touch surfaces such as doorknobs, light switches should be disinfected between uses and all prisoners should have access themselves to cleaning products to clean their prison cells and other surfaces.[129]

141. The Panel of Experts recommends that the state of Rio de Janeiro, and Brazil more broadly, implement "[i]ntensified cleaning and disinfecting procedures, even in those facilities where COVID-19 cases have not yet been identified." They explain that

> Frequently touched surfaces and objects should be cleaned and disinfected several times per day, especially in common areas. Such "surfaces may include objects/surfaces not ordinarily cleaned daily (e.g., doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones)."[130] In addition to regular cleaning routines, prison staff should also "thoroughly clean and disinfect all areas where [a] confirmed or suspected COVID-19 case spent time."[131] Prison authorities should ensure that places and objects, like yard equipment, furniture, holding tanks, and transport vans, are cleaned and disinfected several times per day with disinfectants effective against the coronavirus.

142. The WHO recommends implementing specific measures ensuring that environmental cleaning and disinfecting of prisons cells and other spaces are followed regularly[132] by trained personnel, as cleaning procedures are essential to prevent virus spread.[133] 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."[134] Since the coronavirus can survive for several days, surfaces that may be contaminated should be cleaned regularly and thoroughly before they are reused.[135] This becomes especially important for areas used for food preparation or in areas in which foodservice is communal.

143. Rule 21 of the Mandela Rules provides that 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.[136] The WHO further specifies that "clothes, bedclothes, bath and hand towels, etc. can be cleaned using regular laundry soap and water or machine-washed at 60–90 °C with common laundry detergent. Waste should be treated

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[126] *Nelson Mandela Rules*, Rule 17.
[127] Statement of Michele Heisler and Ranit Mishori, Annex 1
[128] Statement of Michele Heisler and Ranit Mishori, Annex 1
[129] CoE, *European Prison Rules*, Rule 19.5., 19.6.
[130] CDC, *Guidance for Correctional & Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (accessed May 28, 2020).
[131] *Ibid.*
[132] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance*, at 20.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*
[136] *Nelson Mandela Rules*, Rule 21.

as infectious clinical waste and handled according to local regulation." [137]

144. Additionally, Rule 35 of the Mandela Rules adds that a physician or competent public health body, has the duty to supervise the conditions of hygiene and cleanliness in prison, its sanitation, temperature, and ventilation, as well as suitability and cleanliness of prisoner's clothing and bedding.[138]

Personal Protective Equipment (PPE)

145. 144. The knowledge of the COVID-19 is constantly evolving as scientists learn more about the specific features of this disease. Consequently, public health recommendations, which are science-based, are also changing. This was highlighted with the example of States' differing approaches towards wearing masks in public.

146. However, it is now well established that masks help stem the spread of the virus,[139] as it passes from person-to-person primarily through respiratory droplets.[140] Since people can transmit the virus before they begin to exhibit symptoms (or even when they are asymptomatic),[141] masks are an essential item of protection for everyone. In many places worldwide, this is already compulsory (per guidance of the WHO).[142] In the opinion of the Panel of Experts, while cloth masks are necessary within prisons, medical masks, which guarantee a higher level of protection, should be strongly considered.[143]

147. As correctly indicated by the World Organization Against Torture (OMCT),

> "[w]hile prison staff, social and other workers may require personal protective equipment, access to masks should not be exclusive to staff at the expense of prisoners. Access to masks, hygiene products and medication can become easily a cause for major corruption, increased violence within a prison setting, and a source of tension with the prison authorities."[144]

148. Prisons are often under-resourced, but this does not absolve the state from its obligation to protect those it incarcerates. Therefore, as a matter of principle, where physical distancing is not possible, which is the case in densely populated prison cells, masks should be distributed to each incarcerated person and staff member free of charge; taking into consideration that access to healthcare includes preventive medicine, and is based on the principle of equivalence of care.

149. Additionally, the WHO also explains that "[s]tudies of influenza, influenza-like illness, and human coronaviruses provide evidence that the use of a medical mask can prevent the spread of infectious droplets from an infected person to someone else and potential contamination of the environment by these droplets"[145] WHO notes however that while use of a medical mask is a necessary part of PPE, it should be always combined with other measures, including enhanced

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[137] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, at 21.
[138] *Nelson Mandela Rules*, Rule 35; *see also* CoE, *Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016*, January 19, 2017.
[139] *See* WHO, *Advice on the use of masks in the context of COVID-19: interim guidance*, April 6, 2020, at 2. https://apps.who.int/iris/handle/10665/331693.
[140] Statement of Michele Heisler and Ranit Mishori, Annex 1.
[141] Statement of Michele Heisler and Ranit Mishori, Annex 1

[142] WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, Press release, 5 June 2020.
[143] Expert Opinion of Professor Gregg Gonsalves, Jason Andrews, Ted Cohen, Julia Croda, Albert Ko, [CASE FILE REF NO]
[144] OMCT, *Building our Response on COVID-19 and Detention: OMCT Guidance brief to the SOS-Torture Network and partner organizations*, April 15, 2020, https://www.omct.org/files/2020/04/25784/omct_covid19_prisonsresponse_en.pdf.
[145] WHO, *Advice on the use of masks in the context of COVID-19: interim guidance*, at 1.

hygiene, physical distancing, and medical isolation.[146]

150. Given that Rio's prisons are poorly ventilated and densely populated[147], thus conducive to spread of the COVID-19 through droplets[148], and protective masks are currently compulsory in public spaces due to the advice of national authorities, wearing masks in prison should be compulsory and seen as crucial. At a minimum, prisoners should be obliged to wear masks when in contact with prisoners from other cells or with prison staff.

Timely treatment within prison system hospitals and public hospitals in the community

151. Under international and regional human rights law, all prisoners shall have prompt access to medical care,[149] and should be transferred to specialized institutions or civil hospitals if specialized treatment or surgery is required.[150] Nevertheless, hospital facilities within prison system should be adequately staffed and equipped to provide requisite level of care.[151]

152. However, as Dr. Mishori and Dr. Heisler explain, prison "medical facilities are almost never sufficiently equipped to handle large outbreaks of infectious diseases…In the course of an infectious disease outbreak, resources will become exhausted rapidly and any beds available will soon be at capacity. [152]

153. Additionally, as the Panel of Experts emphasize "[p]risons often need to rely on outside facilities (hospitals, emergency departments) to provide intensive medical care given that the level of care they can provide in the facility itself is typically relatively limited." Importantly, they also stress that

> "people with chronic underlying physical and mental health conditions may not be able to receive the care they need. Failure to provide individuals adequate medical care for their underlying chronic health conditions results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality if they do become infected. Moreover, mental health conditions may be exacerbated by the stress of incarceration during the COVID-19 pandemic, including isolation and lack of visitation.

154. Therefore, as the UN stresses, it is essential that in the context of the current pandemic all prisoners suspected or confirmed to have COVID-19 have access to health services, including urgent, specialized health units outside the prison system, without undue delay.[153] Mishori and Heisler estimate that of those infected, 80 percent will have mild/moderate disease, 15 percent will have severe disease requiring hospitalization, and approximately 5 percent will need to be treated in the intensive care unit.[154] The care of those with severe COVID-19 requires an entire team of clinicians, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians.[155]

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[146] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance*, at 19.
[147] Yale Global Health Justice Partnership, *Reservoirs of Injustice: How incarceration for drug-related offenses fuels the spread of tuberculosis in Brazil* 3 (March 2019), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/reservoirs_of_injustice-_how_incarceration_for_drug-related_offenses_fuels_the_spread_of_tb_in_brazil_ghjp_report_2019.pdf.
[148] Statement of Michele Heisler and Ranit Mishori, Annex 1 ("Spaces within jails and prisons are often also poorly ventilated, which promotes highly efficient spread of diseases through droplets.").
[149] *Nelson Mandela Rules*, Rule 27(1); ECtHR, *Ivko v. Russia*, Judgment of 15 December 2015, para. 94; IACHR, *De la Cruz-Flores v. Peru*, Judgment of November 18, 2004, (Series C) No. 115, para. 132.
[150] *Nelson Mandela Rules*, Rule 27; SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic*, section 9(o).
[151] *Nelson Mandela Rules*, Rule 27.
[152] Statement of Michele Heisler and Ranit Mishori, Annex 1
[153] IASC, *Interim Guidance*, at 4.
[154] Statement of Michele Heisler and Ranit Mishori, Annex 1
[155] Statement of Michele Heisler and Ranit Mishori, Annex 1

155. Referral to a community hospital or other unit must be based solely on a clinical status, not on any other selection criteria, such as discrimination based on age, gender, social or ethnic affiliation, or disability[156] and should be ordered exclusively by qualified medical staff.[157] Transferring one out of prison when necessary is crucial as prison systems in different jurisdictions often rely on outside hospitals and emergency units to provide intensive medical care, as the healthcare service in detention are usually limited.

156. In the context of COVID-19, the UN highlights that all prisoners with suspected or confirmed cases of infection by COVID-19 must have access to healthcare services, including specialized urgent healthcare units, outside the prison system, without undue delay.[158] The referral to a community hospital or another unit must be based exclusively on the clinical status of the inmate, and not on any other selection criteria, such as: ageism, gender, social or ethnic discrimination, or ableism[159][160], and it must be requested exclusively by a qualified medical team.[161] It is vital to transfer a person outside the prison when necessary, since prison systems in different jurisdictions usually depend on external hospitals and emergency units to provide intensive medical attention, and the healthcare service inside prisons is usually limited.

157. Importantly, prison service should develop close links with community healthcare and other healthcare providers and be aware which hospitals have capacity to provide specialized service (such as respiratory support, intensive care units). The WHO clarified that appropriate action in confirmed COVID-19 case requires transfer to specialist facilities for respiratory isolation and treatment. 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."

158. In this regard, it is essential to develop, as a matter of management of the current public health emergency, clear policies between relevant administrations or agencies assisting prison health services: and providing them with guidance on when to transfer prisoners to the hospital and what should be a safety protocol implemented in such instances.

159. In Italy, for instance, the Ministry of Health issued detailed recommendations for prison services on how to handle suspected or confirmed COVID-19 cases. Patients with suspected infection are visited by the prison doctor, the case is reported to an emergency number and the Department for Infectious Diseases, and the patient is placed either in medical isolation or transferred to the hospital. Transfers are carried out in line with a detailed safety protocol. A prisoner who is experiencing mild symptoms or has been in contact with a confirmed case (but tested negatively herself), is examined by medical personnel and the health authorities. Positive asymptomatic prisoners are placed in quarantine and observed by prisoner's doctor.[162]

160. The obligation to ensure timely treatment is crucial as any failure or delay in this regard might lead to tragic consequences and result in irreversible harm or death,[163] and consequently violate the law.

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[156] IASC, *Interim Guidance,* at 4; *see also Wenner v. Germany*, ECtHR, Judgment of September 1, 2016, para. 57; ECtHR, *Nogin v. Russia*, Judgment of January 15, 2015, para. 84.

[157] *See* CoE, *Report to the Serbian Government on the visit to Serbia carried out by the CPT from 26 May to 5 June 2015*, para. 80.

[158] IASC, *Interim Guidance,* p. 4.

[159] IASC, *Interim Guidance,* p. 4; see also *Wenner v. Germany*, ECtHR, Judgement of September 1st, 2016, para.

[160] ; ECtHR, *Nogin v. Russia*, Jugdment of January 15, 2015, para. 84.

[161] *Ver* CoE, *Report to the Serbian Government on the visit to Serbia carried out by the CPT from 26 May to 5 June 2015*, para. 80.

[162] Affidavit of Antigone, Annex 3.

[163] IACommHR, *Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, para 552.

Transparency of COVID-19 measures

161. Active transparency about COVID-19 in prison, and the preventive measures taken in response, is crucial to guarantee the well-being of people deprived of liberty.

162. Prison healthcare services should communicate to prisoners all the restrictive measures to be imposed[164] and 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 (e.g., physical distance, use of PPE, hand hygiene practice, cleaning and disinfection), the possible symptoms and the treatment that will be available.[165] Staff should receive specific training on COVID-19 infection, transmission and prevention.[166] For prisoners and visitors, as underlined by WHO, there may be a need to develop translation or visual material to address language barriers, such as short information sheets, flyers, posters, internal videos to be placed in prison common areas and in areas designated for visits.[167]

163. As the Panel of Experts indicate:

> Prison authorities should "communicate clearly and frequently with incarcerated/detained persons about changes to their daily schedule and how they can contribute to [COVID-19] risk reduction." They should "[p]rovide up-to-date information about COVID-19 to incarcerated/detained persons on a regular basis" from reputable scientific sources (e.g. in Brazil, FIOCRUZ) and in simple language so that even those with less educational opportunities can understand the risks of COVID-19. Authorities should post signage throughout the prison facility that (1) identifies the symptoms of COVID-19, (2) provides hand hygiene instructions, and (3) instructs incarcerated people to report symptoms to staff; they should also ensure that "signage is understandable for…those with low literacy[.]" Finally, authorities should "communicate [COVID-19] information verbally on a regular basis[,]" and "consider having healthcare staff perform rounds on a regular basis to answer questions about COVID-19."[168]

164. As noted by the WHO, "[t]he psychological and behavioural reactions of prisoners…are likely to differ from those of people who observe physical distancing in the community; consideration should therefore be given to the increased need for…transparent awareness-raising and information-sharing on the disease, and for assurances that continued contact with family and relatives will be upheld."[169]

165. In Ireland, for instance, communication with staff and prisoners include two prison newsletters published weekly (one for prisoners held in isolation, one for the general population) and regular COVID-19 information leaflets for prisoners and newsletters for staff regarding actions taken. Moreover, the Irish Red Cross prisoner volunteer program, which is peer-led, has played a critical role in the communication of health information across the prisoner population. In addition, a dedicated phone service was introduced for prisoners to access chaplains, prison psychologists and addiction counsellors. The Psychology Service is also providing audio resources on physical

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[164] SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,* II(9)(q).
[165] CPT, *Third General Report on the CPT's activities covering the period 1 January to 31 December 1992*, June 4, 1993, para. 54; WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*, at 14.
[166] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance,* at 14; 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. 3; CPT, *Report on the visit to "the former Yugoslav Republic of Macedonia" carried out by the CPT from 21 September to 1 October 2010*, CPT/Inf (2012) 4, para. 71.
[167] WHO, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention. Interim guidance*, at 15.
[168] Gregg Affv cite (citations omitted).
[169] *Ibid.*, at 5.

and mental health for the in-cell Channel on the TV system in some prisons.[170]

166. Likewise, the importance of transparency was also crucial for Italy's success. After a Ministerial Decree was issued that suspended family visits throughout the country, prisoners in some facilities were informed of what was done to protect them form COVID-19, and in turn they would have increased access to telephone calls, and also allowed video calls with their families. In the prisons that did not promptly adapt and explain these changes, many experienced rioting and upheaval.[171]

167. Additionally, inspection and monitoring visits play a key role in the prevention of torture and ill-treatment in places of deprivation of liberty. The numerous challenges posed by the pandemic require close monitoring of the situation in prison in order to assess how life, health and well-being of prisoners are protected. The UN SPT encouraged National Preventive Mechanisms to continue to carry out their inspection missions.[172] However, the confinement rules prevent many monitoring bodies to carry out their duties. 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.

168. Applied to the provision of healthcare, this extended duty of transparency should lead States to provide detailed information on the measures taken regarding preventive medicine and healthcare in prisons.

169. States should also communicate and publicize updated data, such as the number of COVID-19 cases detected, the number of deaths as a result (along with the number of deaths due to non-COVID-19 reasons), including among staff members, and the number of cases referred to the authorities in charge of investigations. As regards to any deaths in custody, States must conduct an independent, impartial, timely, and effective investigation into the circumstances and causes of death.[173] Even during the global pandemic, States remain under this duty, as failure to provide a plausible explanation for a detainees' death gives rise to a presumption of unlawful death.[174]

Effective interagency management of COVID-19 in prisons

170. 169. Health is a public good that States must protect and it is a public health concern to contain the spread of transmissible diseases, such as COVID-19 in prisons.[175] According to IACommHR, States must guarantee adequate interagency cooperation, in particular effective coordination with the public health system to guarantee that public policies and practices are applied to places of detention.[176] These should be taken immediately, with due diligence, and in all cases be in line with human rights standards. [177]

171. The UN recommends that the prison system should be an integral part of national health and emergency planning during the COVID-19 pandemic.[178] As a long-term goal, COVID-19 responses should become part of the prison health strategies to improve the overall access to

[170] Statement of Fiona Ni Chinneide, Annex 2.
[171] *Ibid.*
[172] SPT, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic,* section I, para. 7.
[173] *Nelson Mandela Rules*, Rule 71. UN, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death 2016: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN, New York, 2018, chapter 4.
[174] UNHRC, *Eshonov v. Uzbekistan*, Views of 22 July 2010, CCPR/C/9/D/1225/2003, para. 9.2.
[175] IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, Preamble.
[176] IACommHR, *Principles and best practices on the protection of persons deprived of liberty in the Americas*, Principle X.
[177] IACommHR, *Resolution 1/20, Pandemic and Human Rights in the Americas*, at 7.
[178] UNODC, *Position Paper, COVID-19 Preparedness and Responses in Prisons,* March 31, 2020, at 3.

medical services to incarcerated people.[179]

172. For instance, much of the success in keeping COVID-19 out of Irish prisons is part of Ireland's multi-agency, public health-led approach. In close working relationship with multiple health agencies, including the HSE and the National Public Health Emergency Team, the Irish Prison Service, following closely the guidance from the WHO and the Council of Europe, was able to execute quick preventive planning and action.[180]

173. Similarly, since February 2020, Italy's Penitentiary Administration Department ("DAP") has issued several guidelines to combat the virus in prisons, beginning with recommendations on the coordination of penitentiary institutions and local health authorities. The Minister of Justice established a task force whose members are the Heads of all the Justice Departments, which includes Heads of the DAP, and the Department of Juvenile Justice and Community Measures.[181]

IV. THE ROLE OF THE JUDICIARY IN GUARANTEEING RIGHTS DURING THE PANDEMIC

174. Given the global emergency and the need to undertake immediate actions by state authorities, there is a special role of judiciary across the globe in guaranteeing its timely implementation. Therefore, the Court should seek enforcement of the right to health amidst the pandemic, by *inter alia*, by recognizing urgency and necessity of precautionary measures. Both Brazilian case law, as well as foreign case law is instructive in this context, demonstrating that the judiciary's role is to protect the people—specifically based on its responsibility of enforcing safeguards thereby protecting human rights, including the right to health and life.

175. Brazil has a rich jurisprudential history on the guarantee of the Right to Health. The Federal Supreme Court sanctioned the solidary accountability of all Brazilian State entities regarding the compliance with Art. 196 of the Federal Constitution, on the Extraordinary Appeal nº 855.178, with the following Thesis[182]:

> "The entities of the federation, as a result of their common competence, are solidarily accountable for the healthcare provision demands and, according to the constitutional criteria of decentralization and hierarchization, the judicial authority is in charge of guiding this compliance according to the rules of competence sharing, and determining the reimbursement of those held accountable for the financial burden"

176. Particularly, in the pandemic scenario, amidst so many threats to rights and complex responses, once again the judiciary is summoned to guarantee that the minimum measures of health prevention in the prison system are respected.

177. The distinguished Superior Court of Justice, on the HC documents no. 565.799 – RJ, through the Honorable Justice Rapporteur ROGÉRIO SCHIETTI CRUZ determined the granting of an injunction to replace the preventive arrest of a patient with other cautionary measures, according to the following reasons:

> "due to the global coronavirus crisis and, especially, the imminent severity of the national scenario, more daring intervention and attitudes are demanded from the authorities, including the Judiciary Power. Thus, I consider that, in the current situation, (...), the hurdle found on Summary no. 691 of STF must be relaxed at a higher degree, since the granting of the order would be probable in the merit".

Comparative Foreign Jurisprudence

178. In foreign jurisdictions, such as Mexico, Argentina and the United States, the judiciary is playing an important and guiding role in protecting the right to health in prisons, thereby protecting not

[179] *Ibid.*
[180] Statement of Fiona Ni Chinneie, Annex 2.
[181] Statement of Antigone, Annex 3.
[182] See also: RE 271.286 AgR, rel. min. Celso de Mello, j. 9-12-2000, 2ª T, DJ from 11-24-2000;

only the lives of prisoners, but also their families and the community writ large. This court has a crucial role to play in the overall efforts to protect life and health, which can be achieved by issuing the injunctive measures Plaintiffs seek, and urging state authorities to implement immediate steps to mitigate the risk of COVID-19 inside prisons.

Mexico

179. Following a *recurso de amparo* requesting that the government of Mexico city to issue protocols and guidance regarding prevention and treatment of COVID-19 within Mexico City's prisons, the federal judge granted precautionary measures. Acknowledging health as a public good, the judge determined that the state had a duty to: guarantee primary healthcare to all individuals under the jurisdiction of the state; provide immunizations, prevention and treatment for endemic diseases; educate the population on prevention and treatment; and provide for the needs of at-risk groups and those most vulnerable due to poverty issues. [183]

180. 179. To implement these duties, the judge ordered authorities to undertake the following measures: 1) implement prevention protocols according to the guidance of the Secretary of Health in penitentiary facilities of Mexico City; 2) take proportional health measures to prevent the spread of the virus in penitentiary facilities; 3) take necessary actions to detect cases in penitentiary facilities; 4) guarantee that persons deprived of liberty can remain in contact with relatives outside; and 5) guarantee access to information for persons deprived of liberty, and their relatives, so they are aware of the measures taken to protect their health.

181. In another case, based on a collective *amparo* lawsuit before the federal court in the state of Cohualia, the judge granted the requested precautionary measures requiring the Governor and penitentiary authorities to release certain groups of vulnerable prisoners, and to issue immediate sanitary, hygiene and prevention measures to protect detainees according to expert medical guidelines recommending, among others, early detection of cases and prioritizing high risk cases among prisoners, as well as protecting prison staff. [184] It also recognized the need to provide urgent medical care in cases of infected prisoners.

182. Acknowledging the right to health under the Mexican Constitution, the judge held that this right translates into the obligation of the State to establish the necessary mechanisms so that every individual has access to healthcare, which includes information, prevention, treatment, disease control, and medicines and any other supplies to guarantee diagnosis and treatment.

Argentina

183. In Argentina, the state court in Mendoza[185] ruled in favor of a collective *habeas corpus* petition requesting the release of at-risk incarcerated individuals and protective measures in prisons. In turn, the court ordered home arrest for incarcerated persons considered at-risk and ordered the: restriction of non-essential activities and movements within prisons, introduction of measures to isolate elderly or ill individuals, guarantee hygiene products to prisoners and regular disinfecting of the prison facilities. It also allowed temporary use of cellphones for as long as family visits are suspended.

United States

184. At the time of submission, the United States was the epicenter of the coronavirus, and custodian of one-fifth (20%) of the world's prison population. [186] As such, the methods by which the United States handles COVID-19 within its penitentiary system is particularly instructive to the situation of Brazil, which currently has the second-highest number of positive COVID-19 cases, and is the

[183] Juicio de Amparo Indirecto 381/2020, Juzgado Primero de Distrito en Materia Administrativa en la Ciudad de México (Federal Judicial Power), February 25, 2020.
[184] Amparo 254/2020, Juzgado Tercero de Distrito en el Estado de Coahuila de Zaragoza (Federal Judicial Power), April 30, 2020.
[185] Primer Juzgado Colegiado Primera Circus, decision of March 30, 2020, 47215/V.
[186] Peter Wagner & Wanda Bertram, *What percent of the U.S. is incarcerated?* Prison Policy Initiative, January 16, 2020, https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/.

world's third largest prison population.[187]

185. The U.S. Supreme Court, the country's highest federal court, has long recognized the state's duty to provide medical care to those it imprisons, finding that a failure to do so violates the constitutional ban on "cruel and unusual punishment" and may "produce physical 'torture or a lingering death,' …[or] may result in pain and suffering which no one suggests would serve any penological purpose."[188] The Court opined that depriving "adequate medical care, is incompatible with the concept of human dignity and has no place in a civilized society." Moreover, the Court holds that medical care deemed "adequate" is unattainable in circumstances of overcrowding in prisons and thereby unconstitutional.[189]

186. When assessing rights violations in prison settings, U.S. federal jurisprudence does not "require prisoners to suffer []injury before obtaining court ordered correction of objectively inhumane prison conditions" and "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief."[190] This reasoning was extended to the framework of infectious disease, thereby not requiring complainants to in fact become infected, only requiring that they be held in conditions where infection is possible if exposed.[191]

187. U.S. court are now applying this in the context of COVID-19—which is ravaging the U.S. penitentiary system, infecting and killing prisoners and staff.[192]

188. As of May 27, approximately 35,000 prisoners detained in the U.S. tested positive for the disease, though this number is an underrepresentation given the lack of comprehensive testing.[193] U.S. courts are rapidly issuing preliminary injunctions and other decisions aimed at ameliorating the spread of coronavirus through orders of release and the improvement of conditions that are at present conducive to the spread of the coronavirus infection.[194]

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[187] World Prison Brief, *Prison Population Total*, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last accessed May 30, 2020).

[188] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), https://tile.loc.gov/storage-services/service/ll/usrep/usrep429/usrep429097/usrep429097.pdf.

[189] *See Plata v. Brown*, 563 U.S. 493 (2011), https://www.supremecourt.gov/opinions/10pdf/09-1233.pdf (ordering a state to reduce its prison population, which was at nearly double capacity, in order to remedy its constitutional violation).

[190] *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (reaffirmed *Farmer v. Brennan*, 511 U.S., 825, 845 (1994)).

[191] *Helling v. McKinney*, 509 U.S. 25, 33 (1993), https://tile.loc.gov/storage-services/service/ll/usrep/usrep509/usrep509025/usrep509025.pdf (rejecting the proposition that prison officials "may ignore a condition of confinement that is sure or very likely to cause serious illness" in the future). Lower courts have applied this standard to an array of communicable diseases easily transmittable in prison settings, *see e.g., Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (recognizing that "tuberculosis presents a substantial risk of serious harm…[and] is particularly dangerous in a prison environment, where overcrowding and poor ventilation can hasten the spread of this airborne disease"); *Kimble v.Tennis*, No. CIV. 4:CV-05-1871, 2006 WL 1548950, at *4 (M.D. Pa. 2006) (finding that "an inmate infected with MRSA and with open sores could constitute a serious health risk[.]"); *Hemphill v. Rogers*, No. CIV.A.07-2162JAG, 2008 WL 2668952, at *11 (D.N.J. 2008).

[192] The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last accessed May 29, 2020).

[193] *Ibid.*

[194] For example, in the United States, several state courts have found that social distancing is the only appropriate measure for preventing the spread of the virus and protecting prisoner health. *See e.g., Zaya v. Adducci*, No. 20 Civ. 10921, 2020 WL 1903172, at *4 (E.D. Mich.), April 18, 2020 ("The evidence strongly suggests that release is the only justifiable option consistent with public health principles."); *Vazquez Barrera v. Wolf*, No. 4:20 Civ. 1241, 2020 WL 1904497, at *4 (S.D. Tex.), April. 17, 2020 ("[I]n most cases, unconstitutional conditions of confinement can be remedied through injunctions that require abusive practices be changed. However, the current case is not one where such injunctive relief is available…Courts around the country have recognized similar assertions and ordered immediate release of particularly vulnerable detainees…"); *Thakker v. Doll*, 20-cv-480, 2020 WL 1671563, at *9 (M.D. Penn.),

189. For instance, in a class action lawsuit brought on behalf of individuals detained in the state of Michigan, a federal court granted a preliminary injunction ordering that medically vulnerable people were to be released to serve their sentences at home noting that given the pandemic, and in the interest of justice, they cannot safely protect them from the grave risk of serious harm posed by COVID-19.[195]

190. In the state of Ohio, a federal class action habeas petition was brought against the U.S. Bureau of Prisons ("BOP"), the executive agency that manages all federal prisons. The judge ordered BOP to identify and expeditiously release over 800 incarcerated people most vulnerable to the coronavirus. This was to be done by converting the sentence to home confinement, approving release, granting furloughs, or transferring the person to a safer facility able to implement adequate testing and physical distancing measures. Moreover, the judge ordered that released individuals could not return to the facility in question until measures were safe enough or there was a vaccine available. The ruling was upheld by an appellate court, and the U.S. Supreme Court denied a request from the BOP to block the judge's order.[196]

191. In the state of Illinois at the Cook County jail—the single, largest coronavirus hotspot in the United States—a federal judge ordered that those incarcerated can no longer be housed in a cell together and that most dormitory housing must be stopped. The order also required adequate sanitation, testing, and physical distancing at intake and the distribution of PPE.[197]

192. Following a lawsuit filed by the Office of the Public Defender, the state of Hawaii's Supreme Court ordered that all jails and prisons within the state must reduce the detainee population to the facilities' design capacity in order to promote physical distancing. As of May 7, over 800 individuals were released.[198]

V. ON THE RACIAL INEQUALITY OF FEMALE INCARCERATION

193. Unfortunately, in Brazil, the scars of slavery are still present in our social relationships, that continue to be based on hierarchy and racial oppression. Such feature of the country's formation produced what we currently call structural racism, a phenomenon that, as acknowledged by the UN, deeply penetrates our culture, economy and society, in order to legitimize and naturalize institutional practices that harm certain social groups due to the skin color of its members.

194. Drenched in racial prejudice, some may unfairly consider black people as more dangerous and more likely to commit crimes. In this scenario, they are the greatest victims of the violence practiced in Brazil

195. In the words of Silvio Almeida "[the] racism [...] allows the conformation of souls, even the noblest ones in society, subjected to the extreme violence practiced against entire populations, naturalizing the death of children by 'stray bullets', [...] the extermination of thousands of black young men every year, which, for years, has been qualified as genocide by the black movement".

196. Therefore, the researcher concluded that it is "impossible to deny the racial bias of violence in Brazil, the most evident face of racism in our country".

March 31, 2020, at *8 ("Social distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19.").

[195] *See Cameron v. Bouchard,* Opinion, CV-20-10949 (E.D. Mich.), May 21, 2020, https://advancementproject.org/wp-content/uploads/2020/05/Parker-Order-granting-PI.pdf.

[196] *See Williams, Warden, et al. v. Wilson, Craig, et al.*, 590 U.S. ___, May 26, 2020, https://www.supremecourt.gov/orders/courtorders/052620zr_e2p3.pdf (denying the government's application for stay).

[197] *See Mays v. Dart*, 20-cv-2134 (N.D. Ill.), April 27, 2020, https://chicagobond.org/wp-content/uploads/2020/04/mem-order-re-pi.pdf.

[198] John Burnett, *Jail population plummets: HTH sought list of inmates released to due pandemic — but there isn't one, officials say*, Hawaii Tribune-Herald, May 10, 2020, https://www.hawaiitribune-herald.com/2020/05/10/hawaii-news/jail-population-plummets-hth-sought-list-of-inmates-released-to-due-pandemic-but-there-isnt-one-officials-say/.

> "Even though we have identified a generalized pattern of vulnerability among the black population: in health, education, the labor market, the access to cultural assets, as victims of human trafficking, maternal death and other types of diseases, no other area may be more representative of the racial injustices in Brazil than the prison system."[199]

197. Dina Alves,[200] in her texts, always reflects upon what she calls the *senzalas* (slave quarters)-favelas-prisons, when we analyze not only the number of incarcerated black people, but also the number of black people who are victims of police execution by the State, daily.

198. According to data from IBGE[201] (Brazilian Institute of Geography and Statistics) disclosed on November 2017, the black population in Brazil is equivalent to 54.9% of the total population, that is, more than half of the population of the country is black.

199. In 2018, the Inter-American Commission of Human Rights (IACHR) paid an *in loco* visit to Brazil, identifying the ongoing extremely unequal context[202], where racism and structural criminalization of the black population persist expressively.

200. The public security policy, producing unproportioned impacts on the fundamental rights of the black population, especially the ones who are incarcerated, makes it clear that the State has the duty of working for the reduction of illegitimate distinctions when it comes to the enjoyment and exercise of the rights of these citizens.

201. It is imperative to highlight that structural and institutional racism have already been acknowledged by this Supreme Court on the trial of the Direct Action for the Declaration of Constitutionality (ADC) no. 41.

202. The concept of structural racism permeated the decision, and it was explicitly mentioned, for instance, by Justices Edson Fachin and Dias Toffoli.

203. It must be highlighted, on the same ADC, the words of Justice Roberto Barroso:

> In second place, certainly because of these circumstances that I just narrated, structural racism exists in the Brazilian society. Here, differently than what happened in the United States, discriminatory laws, such as the "Jim Crow" laws, were not necessary, like: wagons for black people and wagons for white people on trains; beaches for black people and beaches for white people, public restrooms for black people and public restrooms for white people. We do not need this, because here **racism was so deeply structured that it has happened naturally, regardless of the law, because of the marginalization and the feeling of inferiority that it has created. We grew accustomed to a society in which black people were treated in a stratified manner, hierarchically inferior in the activities they performed. Thus, we have gotten used to seeing black people working as doormen, janitors, bricklayers, blue-collar workers; black women were maids.** (...)
>
> Besides, skin color influences the lives of African descents in all aspects: their housing and health conditions, their relations with the Police and the State, their education and, also, with special relevance, the labor market. In favelas, 66% of the households are owned by black people. In the prison system, 61% of the inmates are black; and 76.9% of the youth who are victims of homicides are black. And the statistics continue with illiteracy rates: black people receive, in average, 55% of white people's income, in general. Therefore, the figures

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[199] Dina Alves is an effective member of Adelinas – Autonomous Collective of Black Women. Doctor in Social Sciences from PUC/SP. Master's in Social Sciences from Pontifícia Católica de São Paulo.

[200] Dina Alves is an effective member of Adelinas – Autonomous Collective of Black Women. Doctor in Social Sciences from PUC/SP. Master's in social sciences from Pontifícia Católica de São Paulo.

[201] Available at: https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/18282-pnad-cmoradores.html. Accessed on: Jul. 11 2018.

[202] On this topic, Nicky Fabiancic, resident-coordinator of the United Nations System in Brazil, indicates that data show the "harsh reality" faced by the Brazilian black youth, "who suffers the impact of the structural racism that we need to fight". See: *ONU Brasil. O racismo mata e não podemos ser indiferentes*. Available at: https://nacoesunidas.org/oracismo-mata-e-nao-podemos-ser-indiferentes-diz-onu-brasil-em-lancamento-da-campanha-vidasnegras/. Accessed on: May 30 2020.

demonstrate the persistence of structural racism... (emphasis added)

VI. ON THE DISPROPORTIONATE IMPACT OF PRISON DUE TO GENDER ISSUES

Cis Women

204. The female prison population has been skyrocketing in the last few years, from 5,600 in 2000 to 37,200 cis women incarcerated in 2019, according to the National Survey of Penitentiary Information, published on December 2019 by the Nacional Penitentiary Department. Still, cis women represent only about 5% of the incarcerated population in the country, and have their specificities ignored by the current prison administration.

205. On the last report, the deficit of vacancies in the prison system, for example, did not showcase information on the vacancies separated by gender. That is, it is not possible to know the level of overincarceration in female prisons, because of the expressive increase of female inmates.

206. The last specific report about incarcerated cis women in Brazil is the Infopen Mulheres 2018, published with data collected in 2016. At that moment, it already indicated that the occupancy rate of female prisons was 156.7%, that is, four years ago the situation of superincarceration was already explicit. This situation prevents the adoption of necessary measures to avoid contamination by COVID-19, especially social distancing.

207. It is worth highlighting that most of the incarcerated cis women in Brazil today were arrested for nonviolent crimes. Most of them were arrested because of drug trafficking, which, according to Infopen Mulher 2018. corresponded to 62% of the occurrences that resulted in the arrest of cis women.

208. The structure of the illegal drugs market reproduces a very similar pattern to the world of legal work, in which women fill the most subordinate positions, and also the most vulnerable ones, since they perform activities that demand direct contact with drugs, and in general, have less margin for negotiation with security agents. Thus, the gender identity and representations assign specific roles for women and they have a strategic and functional role in the trafficking dynamics, in which they exercise functions that are dischargeable, especially with storage and transportation of illegal substances, and they are more likely to be arrested[203].

209. The researchers Bárbara Musumeci Soares and Iara Ilgenfritz corroborate this statement, since they performed a survey in the prison system of the Rio de Janeiro state, between 1999 and 2000, and demonstrated the position of women in the drug trafficking chain[204]. Based on inmate declaration and statements, they concluded that: (a) 27.3% swallowed drugs for transport; (b) 14% were users; (c) 13% were mules/transporters; (d) 12.7% were sellers; (e) 11.7 % were resellers; (f) 10.7% were accomplices; (g) 1.7% occupied, respectively, positions of assistant/fireworks operators, stocker/distributor, drug dealer, manager, owner of a crack house; (h) and lastly, 0.7% were cashiers/accountants[205].

210. The data narrated above are corroborated by other surveys. In this sense, we quote Paulo Roberto da Silva Bastos, who analyzed the profile of the female incarcerated population at the Penitentiary Professor Ariosvaldo de Campos Pires, in the city of Juiz de Fora, in Minas Gerais[206]. Bastos pointed out that women work in supporting roles, most of the times, as resellers, mules and scouts.

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[203] Chernicharo, Luciana Peluzio. *Sobre mulheres e prisões: seletividade de gênero e crime de tráfico de drogas no Brasil*. Master's Thesis presented during the Graduation Course in Law of the Federal University of Rio de Janeiro, as a partial requirement to obtain the title of Master in Law. Guidance Counselor: Prof. Dra. Luciana Boiteux de Figueiredo Rodrigues. Rio de Janeiro, 2014, p. 137.

[204] Soarez, Bárbara Musumeci. Ilgenfritz, Iara. *Prisioneiras - Vida e Violência atrás das Grades. Rio de Janeiro.* Garamond Publishing House, 2002.

[205] *Ibid.,* p. 87.

[206] Bastos, Paulo Roberto da Silva. *Criminalidade feminina: Estudo do perfil da população carcerária feminina na Penitenciária Professor Ariosvaldo de Campos Pires - Juiz de Fora (MG)/2009*. In: Âmbito Jurídico, Rio Grande, 81, 01/10/2010. Available at : <https://ambitojuridico.com.br/cadernos/direito-penal/criminalidade-feminina-estudo-do-perfil-da-populacao-carcerariafeminina-da-penitenciaria-professor-ariosvaldo-de-campos-pires-juiz-de-fora-mg-2009/>, accessed on: May 27 2020.

Likewise, a research developed by Moura, at the Female Penal Institute Desembargadora Auri Moura Costa, in the city of Fortaleza, in Ceará, shows that 81.4% of the inmates mentioned that they worked in subordinate positions, such as mules, resellers and sellers[207].

211. According to a report published by DEPEN over the last year, about 30% of the incarcerated population is made up of interim prisoners. Once again, there is no data organized by gender that allows us to learn the specific situation of incarcerated women.

212. Infopen Mulheres 2018 shows that 45% of the incarcerated cis women were still awaiting trial – soon, they could be granted provisional release or alternative cautionary measures, if the principle of presumption of innocence was not constantly relativized inside Brazilian courts.

213. A survey carried out by the Brazilian Institute of Applied Economic Research (IPEA) shows that 37% of the defendants that served their time in jail were not even awarded with liberty deprivation sentences, which reveals the systematic, abusive and disproportional use of pre-trial custody by the Brazilian justice system[208].

214. According to the Technical Note no. 18/2020 by the National Penitentiary Department DEPEN, among the female interim prisoners in Brazil, currently 77 (seventy-seven) are pregnant; 20 (twenty) are puerperal; and 3,136 (three thousand one hundred and thirty-six) are mothers of children of up to 12 years old. The permanence of these women behind bars clearly violates items IV and V of art. 318 of the Penal Process Code, that predicts house arrest in these cases, according to the wording of the Early Childhood Legal Framework (Law no. 13.257, from 2016).

215. It also violates the international commitments undertaken by Brazil on the Bangkok Rules, which are the Rules of the United Nations for the treatment of incarcerated women and alternative measures to freedom deprivation for female offenders.

216. Notwithstanding, the reluctance of the Judiciary in granting house arrest in such cases is notorious, which actually led to the proposition of the Collective Habeas Corpus 143.641[209][210] in order to determine the replacement of pre-trial custody with house arrest for incarcerated women, all over the national territory, who are pregnant or mothers of children of up to 12 years old or people with disabilities, granted by this Federal Supreme Court in February 2018.

217. Pregnant women display more likelihood of hypoxemia due to anatomical and physiological alterations associated to pregnancy on their cardio-respiratory system, causing high demands of oxygen, hypercoagulable states, increasing the risk of pulmonary microvascular thrombosis and altered immunological function, causing unfavorable inflammatory responses, which may play an important role in physiopathology and an impact in the course of COVID-19 in pregnant women[211].

218. Such physiological changes remain during their puerperal stage (women who have had their children up to 45 days before), since they are not immediately resolved after labor.

219. Such conditions, when added to the number of deaths of pregnant/puerperal women due to COVID-19 verified in the country, led the Ministry of Health to review their previous position and consider, in April 2020, women on the pregnant/puerperal cycle part of the risk group for the disease[212].

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[207] Imoura, Maria Juruena, *Mulher, tráfico de drogas e prisão.* Fortaleza: Eduece, 2012.

[208] Institute of Applied Economic Research (IPEA). *A Aplicação de Penas e Medidas Alternativas*, p. 38. Rio de Janeiro, 2015. Available at: http://repositorio.ipea.gov.br/bitstream/11058/7517/1/RP_Aplicação_2015.pdf. Accessed on: May 29 2020.

[209] Habeas Corpus no. 143641, Rapporteur Min. Ricardo Lewandowski. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5183497>, acessado em 29 de maio de 2020.

[210] Technical Note No. 12/2020-COSMU/CGCIVI/DAPES/SAPS/MS.

[211] Westgren, Pettersson, Hagberg, Acharya, *Severe maternal morbidity and mortality associated with COVID-19: The risk should not be down-played.* 2020. Available at: https://doi.org/10.1111/aogs.13900

[212] Technical Note No. 12/2020-COSMU/CGCIVI/DAPES/SAPS/MS. *Protocolo de Manejo Clínico da COVID-19 na Atenção Especializada*, Ministry of Health, 2020.

220. The review of some recent studies show that pregnant and puerperal women have an increased risk of developing more severe cases when infected by COVID-19 and have more chances of needing the support of mechanical ventilation and intensive care[213] .

221. Besides these data, some studies already associated the scarcity of resources and social vulnerability as factors in the increased risk of disease worsening for pregnant women infected with COVID-19, which include populations that come from the slums and those in situation of freedom deprivation[214].

222. Another important finding shows that there was a higher frequency of cases among black women and women from other ethnic minorities[215] .

223. Black women, besides being the majority among the incarcerated population, also have their ethnicity as a risk factor for the development of arterial hypertension during pregnancy, which, by itself, already represents a high-risk pregnancy. It is the highest cause of maternal death in Brazil[216], as well as gestational diabetes - a frequent complication of pregnancy – with an incidence of 18% in the country[217], factors that increase the risk for COVID-19 worsening.

224. These peculiarities are aggravated by the terrible prison conditions in the country, which are mostly badly ventilated, badly sanitized and overcrowded.

225. Besides pregnant and puerperal women, the prison conditions also worsen the situation of prisoners and inmates with comorbidities which, single-handedly, represent risk factors for a bad evolution of the disease, increasing their possibility of dying in case they are contaminated with COVID-19.

226. Again accordingly to the Technical Note no. 18/2020 of the National Penitentiary Department, there are currently 4,052 (four thousand and fifty-two) women with chronic diseases or respiratory diseases inside the prison system, 2,452 (two thousand four hundred and fifty-two) of them are hypertensive, 434 (four hundred and thirty-four) are HIV-positive, 411 (four hundred and eleven) have diabetes, 231 (two hundred and thirty-one) have asthma, 226 (two hundred and twenty-six) have bronchitis, 108 (one hundred and eight) have pulmonary disease, 51 (fifty-one) have hepatitis, 43 (forty-three) have neurological diseases, 19 (nineteen) have tuberculosis, 16 (sixteen) have cancer, and 179 (one hundred and seventy-nine) have other diseases, including psoriasis, dyslipidemia, tuberculosis, thrombosis, STIs, immunosuppression or hypothyroidism.

227. Also, there are 434 (four hundred and thirty-four) women incarcerated who are 60 years old or older, which also constitutes a risk factor, according to the extremely high rates of mortality verified in this age group, all over the world, as a consequence of the new coronavirus infection.

228. Since they have a naturally weaker immune system, less antibodies in the organism, and weaker lungs and mucosae, among other features, the elders constitute a more vulnerable group for infectious diseases – and COVID-19 is one of them.

229. The situation becomes more concerning because of the absence of regular provision of hygiene and sanitation materials, as well as drinkable water inside the Brazilian prisons, since the disinfection of hands and surfaces is paramount to avoid contagion with the new virus.

230. It happens that, with the claim of curbing the dissemination of the new coronavirus, visits were

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[213] Westgren, et al, 2020.

[214] Amorim, MMR, Takemoto, MLS, Fonseca, EB. *Maternal Deaths with Covid19: a different outcome from mid to low resource countries?* Am J Obstet Gynecol.2020 Apr 26. DOI: https://doi.org/10.1016/j.ajog.2020.04.023. Knight, Bunch,
Vousden, et al. Characteristics and outcomes of pregnant women hospitalized with confirmed SARS-CoV-2 infection in the UK: a national cohort study using the UK Obstetric Surveillance System (UKOSS) [published online 2020 May 12]. medRxiv. doi:10.1101/2020.05.08.200 99268.

[215] Available at: https://www.rcog.org.uk/globalassets/documents/guidelines/2020-05-13-coronavirus-covid-19-infectionin-pregnancy.pdf.

[216] Available at: https://bvsms.saude.gov.br/bvs/artigos/hipertensao_arterial_gestacao.pdf.

[217] Available at: https://www.diabetes.org.br/profissionais/images/pdf/diabetes-gestacional-relatorio.pdf.

suspended in prison units, significantly increasing the lack of access to basic items which, in the specific case of incarcerated women, is already reduced, requiring, thus, a special attention of this Court to the women incarcerated in the prison system.

231. Therefore, what we see in the current prison system context, especially when it comes to detained cis women, is the overlapping of public calamity scenarios, which are accentuated with the current pandemic caused by the new coronavirus (SARS-CoV-2), whose transmissibility rate, according to the Brazilian Association of Infectiology is 2.74 – that is, one sick person with COVID-19 transmits the virus, in average, to other 2.74 people[218] .

232. The collapse of the prison healthcare system has been pointed out for several years by many institutes and institutions that work inside the units, leading the Federal Government, represented by the Ministry of Health, to launch, in 2014, the National Policy of Comprehensive Attention to the Health of People Deprived of Freedom in the Prison System (PNAISP). However, such measure was not capable of bringing satisfactory solutions to overcome the existing problems[219].

233. In Rio de Janeiro, the access to health for people deprived of freedom has been historically weak, since there are no appropriate means to even guarantee basic healthcare. Data from the State Mechanism of Prevention and Struggle Against Torture[220] point out that "the current condition of the prison system in the state of Rio de Janeiro potentializes the vulnerabilities of people deprived of freedom and puts them at a real death risk while facing this coronavirus epidemic".

234. All these data clearly demonstrate the unviability of elaborating a contingency plan to face COVID-19 in prisons which could be capable of safeguarding the right to life, health and physical integrity of people in custody, based solely on isolation and hygiene measures.

235. On the contrary, executive and judicial authorities will be signing the exacerbation of the application of degrading and cruel sentences, besides the imposition of a death sentence to those who are under state custody – which is forbidden by the current Federal Constitution.

Trans Women

236. It is important to highlight that there is no way to outline the incarcerated lives of the LGBTQ+ population, without writing a primary draft on the social experiences of transvestite and transsexual women in this scenario, in ruins, that represents the Brazilian prison system and, in this specific case, the state of Rio de Janeiro.

237. In contrast with the hermeneutical scenario, this non-fiction goes through the legal script and flies towards the disadvantage of the rights and lives of the female inmates.

238. There is a growing punitive culture, but, on the other hand, there is also a gradual social perception of State abuse and silence. However, human rights violations that affect people because of their sexual orientation or gender identity, real or perceived, constitute a global, consolidated pattern, leading to several cautions and visible concerns.

239. The range of such violations includes extrajudicial executions, torture and mistreatment, sexual assaults and rape, invasion of privacy, arbitrary detention, denial of employment and education opportunities, and serious discriminations regarding the enjoyment and fruition of other human rights.

240. These behaviors are reiterated by other forms of violence, hate, discrimination, and exclusion, as the ones based on race, age, religion, disabilities or status, either economic, social or of another kind.

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[218] Available at: https://www.abo.org.br/noticia/informe-da-sociedade-brasileira-de-infectologia-sbi-sobre-o-novocoronavirus-atualizado-em-12-03-2020.

[219] The omission of the incarcerated population is a contradiction, since it consists of a group that is totally under state custody, differently than the external population. Actually, the neglect confirms that there is no intention, from any of the authorities to ressocialize the sentenced person.

[220] Partial Report on the impacts of COVID-19 on the Prison System of Rio de Janeiro, elaborated by the State Mechanism of Prevention and Fight Against Torture- RJ.

241. We are aware of the cultural aspects of prison, that impose gender and sexual orientation standards to people through tradition, legislation, and violence, in order to control how they live their personal relationships and how they identify themselves.

242. Despite all the efforts to change the behavior inside prison, especially with prison agents, the policing of sexuality continues to be a powerful force underlying the persistent gender violence, as well as gender inequality.

243. We live in a paradigmatic moment regarding LGBTQ+ human rights. While the State and the public policies advance in the recognition of their rights, there is an increase in news and complaints about discriminatory violence suffered by this population. However, inside the prison, this experience is old and continuous.

244. Juan Mendez, UN rapporteur, performed a survey in 2015 and corroborated this data informing that he is clearly concerned about this population, while recognizing that lesbians, gays, bisexuals, transvestites, and transsexuals are vulnerable to the effects of the precariousness of the Brazilian prison system.[221]

245. The country has the third largest incarcerated population in the world, with 726 thousand people, according to the National Survey of Penitentiary Information from December 2017, disclosed by the National Penitentiary Department (DEPEN), of the Extraordinary Ministry of Public Security.

246. According to the report, 89% of the prison population are in overcrowded units. According to information collected by DEPEN, there are supposed to be 101 prison units dedicated to the LGBTQ+ population in Brazil, subdivided into "Wards/Galleries" and "Cells".

247. In the reality of the state of Rio de Janeiro, the situation is even worse, considering that no jail that answered the Questionnaire forwarded by the Ministry of Women, Family and Human Rights informed that there is a specific cell for the LGBTQ+ population.

248. The lack of official data about the incarcerated LGBTQ+ population, and the lack of information on how the prison units are implementing standards end up motivating the observation by the Civil Society and their representatives.

249. Coherently with the current demand, the civil society representatives who were part of the National Council for the Fight Against Discrimination (CNCD/LGBT) and the Coordination for the Promotion of the LGBTQ+ Rights have discussed with the National Council of Criminal and Penitentiary Policy (CNPCP) and produced the Joint Resolution No. 1/2014, with the purpose of establishing parameters of penal treatment for the LGBTQ+ population.

250. This Resolution is one of the drivers for the publication of SEAP/RJ Resolution no. 558, on May 29th, 2015, establishing a set of conduct and norms which, if followed, would end the need of going to the judiciary to claim for fundamental rights.

251. However, the reality is that all these norms do not reach prisons and are not practiced by prison agents.

252. Data by Infopen published in 2018 show that, in 2016, the quantity of people in female units reached 42,355, whereas in the male units the number reached the mark of 665,482. Even though, in this overview of the incarcerated population, the quantity in male units surpasses the number of people in female units approximately 15-fold, the self-declared LGBTQ+ population in female prisons, in absolute numbers, surpasses the LGBTQ+ population in male units. This relationship does not mean that there are necessarily more cis, lesbian, bisexual women and trans men in deprivation of freedom than gay, bisexual, transvestites and transsexual women.

253. This large relative difference between the proportion of self-declarations in female and male units

[221] General Assembly of the United Nations, Report n the Visit to Brazil by the Special Rapporteur for torture, mistreatment and cruel, inhuman or degrading treatments, January 29, 2016. Available at: https://carceropolis.org.br/publicacoes/relat%C3%B3rio-do-relator-especial-para-a-tortura-maus-tratos-etratamentos-cru%C3%A9is-desumanos-e-degradantes-da-onu-miss%C3%A3o-brasil-2015.

is another indication that being acknowledged as LGBTQ+ inside a female prison, mostly does not imply a risk to life, in opposition to what happens with the LGBTQ+ population in male units.

254. And this relationship of risk to integrity and life is directly related to the transvestites and trans women who remain, in their majority, inside male prison units, in jails divided by gangs, with rules of conduct and behavior, regarding how to relate to and approach a transsexual woman and a transvestite.

255. It is known that the rules of physical, moral, sexual violence and, especially, the lives of these bodies are to permanently play the role of victims of these tortures, these crimes. The violence culture passes from generation to generation inside prisons.

256. We are in 2020, and the struggles of the LGBTQ+ population continue to progressively increase. However, prisons dictate their rules and, by them, trans women and transvestites, who are mostly black, are humiliated, physically and psychologically mistreated, are object of lewdness, often without consent, and continue suffering barbaric acts.

257. We can move forward to the current Technical Note no. 7 by DEPEN and we will see that the principles of Yogyakarta, presented in Geneva at the UN Convention, in 2006, are present and all enforced norms and resolutions add up to this content.

258. It is important to highlight that the set of legal norms must be fulfilled with maximum urgency, especially because of the current pandemic scenario, where, as aforementioned, these women are mostly inside male prison units.

259. We know that transsexual women are the inmates with less resources, more health needs, less acceptance from their families, and when they enter the prison system, they are the ones who are even more forgotten and suffer the most with family abandonment.

260. In times of COVID-19, when isolation is mandatory, when the whole incarcerated mass experiences extreme solitude, it is possible to believe that the violence curve has been accentuated. And in a Penitentiary Administration System that does not respect at least separate cells for LGBTQ+ population, this type of situation is expected.

261. Violence occurs and will never be notified, the bodies are crossed by violence, from all sides, and the state omission continues with unjustified indifference.

262. Thus, it is the role of the civil society, as *amicus curiae*, to highlight fundamental rights and highlight, in the complaint, that the request made through Resolution SEAP/RJ no. 558/2015 should be fulfilled, as should all the rights related to the Principle of Yogyakarta, UN - 2006, and especially the most recent Technical Note by DEPEN no. 7/2020, as well as the surveillance on the healthcare issues for the LGBTQ+ population.

263. Lastly, we would like the basic rights to integrity, life, health, personal safety, non-discrimination, and equality to be considered a constitutional basis to be fulfilled by the prison staff, agents and administrators.

VII. CONCLUSIONS AND REQUESTS

264. Due to the severity of the aforementioned scenario and, consequently, the measures that aim at interrupting perpetrated violations, the signatory entities declare their position, without harming any posterior manifestations, in favor of all injunction requests formulated in the beginning.

265. Therefore, we have fulfilled the legal requirements for entity admission as *amicus curiae*, an important instrument of democratization and pluralization of the jurisdictional debate. Due to the relevance of the matter, the social repercussion of the controversy, the appropriate representativity, proved by the historical work of the other bodies, these entities come before Your Honor to require:

- That we are admitted in the quality of *amicus curiae*, according to the terms of article 138 of the Code of Civil Procedure, so, thereby, we are able to exercise all faculties inherent to this role, such as the presentation of memorials and the possibility of oral defense of our

arguments in a Plenary Session, when the merit of this matter is appreciated;

- That we are subpoenaed, through our lawyers, at all the acts in the process;
- Alternatively, in case it is the preference of Your Honor, you may receive the matter in the form of memorials, in favor of the provision of Internal Appeals, so that, lastly, the requests of the Public Defender's Office and the Public Prosecutor's Office of the State of Rio de Janeiro may be answered.

266. From São Paulo, New York, Berlin and Rio de Janeiro, June 19th, 2020.

Henrique Apolinario de Souza
Gabriel de Carvalho Sampaio
Conectas Direitos Humanos

Agnes Regina Felippe
Caroline Mendes Bispo
Associação Elas Existem

Irmina Pacho
Natasha Arnpriester
Masha Lisitsyna
James A. Goldston
Open Society Justice Initiative

LIST OF ANNEXES

Annex 1: Declaration of Dr. Ranit Mishori (MD, MHS, FAAFP) and Dr. Michele Heisler (MD, MPA)

Annex 2: Declaration of Fiona Ni Chinneide, Executive Director of the Irish Penal Reform Trust.

Annex 3: Declaration of Patrizio Ginella, from Antigone, civil society organization established in Italy.