

BUILDING OUR RESPONSE ON COVID-19 AND DETENTION

OMCT Guidance brief to the
SOS-Torture Network and
partner organizations



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I. PURPOSE OF THIS BRIEF

This brief intends to provide evidence-based support and good practices for the protection of one of the most vulnerable groups of individuals affected by the COVID-19 outbreak: those deprived of liberty. It is addressed to members of the global SOS -Torture Network but may be used by any organization acting on people in custody.

It aims to inform advocacy, legal actions, other forms of support or dialogue with authorities, detention or penitentiary services, the media or the public on the protection of detainees in the present crisis. It focuses on the situation of those behind bars, detained and deprived of liberty. It also addresses the emerging issue of ill-treatment and criminalization of those breaking confinement rules.

The document is built on experiences of SOS-Torture Network members and core partner organizations of the OMCT, who act to protect detainees, seek their release, provide physical and mental protection, legal support or mitigate the impact on the confinement, and who monitor human rights violations in the context of the COVID-19 pandemic. We hope that this information can help and encourage others who are facing similar challenges, as both the virus and confinement response are spreading further from country to country and from region to region.

The brief is not a collection of legal human rights standards, though it is informed by law. It is focused on those formally deprived of liberty while recognizing that there may be other situations requiring similar actions, such as those in migration camps. It is in no way an exhaustive list of all relevant detention issues and does not cover all detention realities, which often differ even within the same country. Instead, the note touches on key items that have been at the forefront of SOS-Torture Network advocacy. More detailed policy papers and recommendations by international partners are annexed.

Some lessons learnt by SOS-Torture Network members and international partners:

- 1. The context of detention is very different from country to country and whatever strategy proposed to address COVID-19 and the rights of those deprived of liberty has to be adjusted to the reality of your country;**
- 2. Authorities are looking for guidance and examples from other countries. Providing such experiences has proven particularly impactful in human rights advocacy with prison and/or other authorities;**
- 3. There is urgency to act as the virus causing COVID-19 can have a truly devastating and uncontrollable effect on prisoners, prison staff and the public health system as such;**
- 4. Importantly, there are also real opportunities to focus now on prisons and COVID-19 for broader policy reform, and to seek a new level of engagement with prison services or other detention authorities;**
- 5. There is a need to recognize the challenges for prison and detention authorities. Beyond the general emergency in our societies, there is a very specific emergency in detention.**

Authorities have to re-organize life in a very sensitive environment. Places of detention are sometimes repressive, but they are also always fragile environments. Any change, even a minor one, is immediately noticed. Confinement measures in detention, far more than those outside of prisons, have an amplifying effect on detainees' lives and on their physical and psychological well-being. This is part of the potentially explosive security environment in confining the already confined. Transparent and responsible communication towards those affected and their families is thus a core and an overriding principle to prevent adverse reactions and potential prison riots and other forms of violence.

Facing the pandemic is uncharted territory. Our learning on the issue evolves and so do successful advocacy and engagement practices. An example are the alarming new reports about the criminalization of populations for non-compliance with curfew rules that impact the level of incarceration and are accompanied by serious allegations of ill-treatment in a vacuum of controls and effective monitoring (see strategy VI).

In this document, we use the terms jail, prison and detention or correctional facility interchangeably for places where individuals are held. We recognize that differences exist between these facilities regarding populations, their exposure to different legal mechanisms and to different sections of the local justice system.

We intend to update this briefing on a regular basis. We encourage you to join this effort by contacting us to share challenges, concerns and experiences, and to engage us on joint action required to protect those detained.

For further questions, queries or possible advocacy action, please contact the OMCT Network Coordinator, Stella Anastasia (sa@omct.org) or our offices (omct@omct.org).

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- ◇ **Association for the Prevention of Torture (APT), Switzerland**
- ◇ **Associazione Antigone, Italy**
- ◇ **Justice Project Pakistan (JPP), Pakistan**
- ◇ **Physicians for Human Rights (PHR), USA**
- ◇ **Prison Insider, France**
- ◇ **Public Committee Against Torture in Israel (PCATI), Israel**
- ◇ **Public Verdict Foundation, Russian Federation**

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II. FIVE REASONS WHY AND HOW TO ENGAGE

URGENCY

The most immediate need – typically in the first phase of the COVID-19 outbreak - is a significant reduction of those deprived of their liberty. To most of us this is evident. Given the often dramatic overcrowding in prisons, there is simply no way that globally recommended public health policies (especially maintaining physical distancing) will work without a significant reduction in numbers.

Reducing detention is thus a non-negotiable risk reduction strategy. There are other measures needed to provide safety for detainees and staff, to mitigate the effects of confinement, and to prevent a dangerous accountability vacuum.

Moreover, new issues arise with the repression and criminalization of those breaking confinement rules.

MOMENTUM

Authorities, especially prison services, are themselves frightened over the potential health crisis emanating from and within detention. There is thus unique momentum to call for the release of inmates, be it for a general reduction of prisoner populations or for specific groups of inmates, and to act on other human rights issues in prisons.

Prison authorities may in many instances be unusually open to support, dialogue and practical ameliorations of prison life – not the least to reduce security incidents. In this context, we may find unusual allies in the system itself, as prison staff, their unions and their families will be sharing the same concerns over their own safety.

OPPORTUNITY

Our advocacy has an immediate goal of saving lives. But there are longer term gains we can pursue in engaging on prisons and detention issues now. Acting on the reduction of prison populations or other reforms during this crisis can be a catalyst for change with long term effects. Some of the measures needed to address the crisis now, for example access to video-conferencing, calls etc., may be sustained for future use.

It is thus strategic to engage now. Prison authorities are in dire need of support in their efforts to prevent the inevitable outbreaks. This may be the moment to change the dynamics of the relationship, hopefully opening doors for the future. Even in ‘repressive systems’ there may be opportunities, such as for the release of journalists, human rights defenders or others on whose behalf many of us have advocated already for years.

FRAMING THE ARGUMENT

The driver of the debate is the containment of a major health crisis in and outside prisons, and it is essential that the human rights arguments we use build on the prevention, mitigation or containment of a health crisis and the right to health, rather than being standalone human rights or anti-torture arguments.

There may be more understanding of the situation of those deprived of liberty among the public and policymakers, as everybody else faces confinement in their homes. This may help overcome the indifference to prisoners’ needs. However, we need to be conscious that to some our action for detainees will reinforce their perception that human rights organizations only care about marginal groups, such as prisoners, at a time when we ‘all

suffer'. Integrating a strong public health/ right to health argument is crucial if we do not want to 'sound pale or predictable'.

Similarly, prison staff are under heightened risk of infection, and under tremendous pressure. It is highly recommended that we also show care for them as well as for the detained. Security considerations for everyone should play a role in our argument, be it for release or other measures. The health crisis heightens the risk for internal tensions, security incidents, mutinies and violence in places of detention. By linking human rights concerns to these risks, we gain credibility and may be better heard by prison authorities.

DO NO HARM

It is equally important to integrate a perspective of the risks that particular groups of offenders may pose to the public – for example those convicted of sexual or domestic violence – to ensure that the policies we recommend are neither naïve nor risking further harm. The early release of violent or dangerous offenders should be prevented, and we should avoid advocating for the potential release of war criminals, those convicted of crimes against humanity, genocide or the crime of torture, whose prosecutions many of us have supported. A second do no harm concern is to ensure measures are taken to ensure that, when individuals are released into the community, it is done with adequate planning that offers a safe place to go and grants access to community-based resources (such as employment, housing and healthcare).

III. CORE PROTECTION STRATEGIES ON COVID-19 AND DETENTION

STRATEGY I: ADVOCATING FOR THE REDUCTION OF DETENTION AND PRISON POPULATION

1.1. WHY DOES THE REDUCTION OF DETENTION POPULATION NEED TO BECOME A PRIORITY HEALTH RESPONSE?

- ◇ Other measures to reduce health risks in prisons, including through the very concept of 'physical' distancing alone, will simply not be suitable to prevent a major spread of the disease.
- ◇ Reducing the prison population is thus essential to prevent the worsening of the health crisis inside and outside prisons. The consequences of not doing so will be dire, risking the lives of prisoners, of the staff, of those who keep societies safe, and detention facilities will become a hotspot for COVID-19, spreading back into local communities.
- ◇ Prison populations are among those most vulnerable given the conditions of detention, typically poor hygiene, dramatic overcrowding and poor healthcare infrastructure within these facilities. Incarcerated individuals also have higher rates of pre-existing conditions that put them at higher risk for more severe forms of the disease and higher death rates.
- ◇ Prisoners have no or limited means to protect themselves, they are fully dependent on State action to mitigate the risk. The State has the responsibility to protect, and when protection in detention is impossible, there is a need and a legal obligation to consider

emergency relief including temporary release, suspension of sentences or amnesties.

- ◇ If no action is taken, there is a risk of death or serious health consequences, violating the right to life, health, security and the right not to be tortured or treated in another cruel, inhuman or degrading way.
- ◇ There is an equal need and obligation to use due diligence to protect those working in custody, notably penitentiary staff but also social workers and health workers, whose safety is equally concerning.
- ◇ It is essential to act swiftly now before the novel coronavirus spreads out of control. Countries around the world have already engaged in reducing the numbers of detainees in order to prevent a 'ticking time bomb' of infections with dire implications for the health system.
- ◇ Those who have not acted early have been forced to do so later, in a far more difficult environment where such measures carry more risks (such as in Iran) or lead to security incidents and increased levels of violence.
- ◇ There are examples of prison mutinies, violence and security incidents from around the world, or massive lowering of the morale of serving officers, as well as a significant increase in violence and disciplinary problems in prisons.
- ◇ The urgency is illustrated by looking at the occupancy rates, percentages of overcrowding in the prison system or in any particular facility (see statistics or any form of authoritative finding on the overpopulation and health hazards in prisons – prison oversight bodies, UN CAT, SPT, CPT, SR on Torture, NPMs or key NGO reports – as such numbers are particularly useful for public, media or policy advocacy).
- ◇ While calling for the reduction in the number of prisoners, we need to be conscious of the principle of do no harm and prevent the release of those who pose a particular risk to society, especially in times of confinement (such as perpetrators of hate-based crimes, sex offenders or other violent offenders).
- ◇ Release strategies need to be complemented by measures to provide safe places to go to and to avoid release into unstable situations (for example, housing, food, healthcare). Release planning must include work on placement options outside of detention, such as for migrants and other categories, and seek engagement from relevant State and non-state actors in support.

1.2. WHO ARE WE CALLING FOR TO BE RELEASED AND WHO SHOULD BE ELIGIBLE?

Approach: Members of the SOS-Torture Network have called both for an overall reduction in prison population as well as for the release of particular categories of detainees or individual prisoners. In principle, we advise for a comprehensive approach to the reduction of prisoners which does not single out particular prisoners or detainees, to avoid discriminating or being seen as serving our own interests.

The call for release may take account of the principle of do no harm, time already served, the vulnerability of certain groups of prisoners, and should not be discriminatory. It should typically benefit both convicted prisoners and those awaiting trial or under investigation.

A general call for release may, however, include categories of prisoners depending on the country context, the needs and the work of the organisation, including those convicted of non-violent acts. This covers, but is not limited to, human rights defenders, journalists, political prisoners, and dissenting voices. In a similar way, it may cover those criminalized for their religious beliefs or for their sexual orientation.

(Sentenced) prisoners:

- ◇ Prisoners who have already served a good part of their term (authorities may not require a law but could use suspension of sentences, temporary release or executive decisions or amnesties);
- ◇ Vulnerable categories of prisoners (age and health factors that make prisoners vulnerable such as HIV, TB and other diseases or conditions) should be in principle privileged for release. Some organizations have called for the full release of this category of prisoners, others in more qualified ways so as not to include offenders that may pose risks to society;
- ◇ Some countries established list of crimes eligible for release, which can be reasonable in the local context. It can, however, be problematic if national security, public order or anti-terrorism laws have been used to criminalize political dissent or opposition, or human rights work and journalism. Thus, a good criterion would be to include any prisoner who has not committed direct acts of violence.

Pre-trial detainees:

- ◇ Most detention places, especially in developing countries, host a large number or even a majority of prisoners awaiting trial. Even though international law foresees that pre-trial detention is the exception not the rule, in many cases detainees have already spent years in custody. It is essential to prioritize their release, except for certain limited categories of detainees.
- ◇ Pre-trial prisoners are often neglected as they may not be covered by amnesties, suspension of sentences or parole rules that apply only to those sentenced. Strategies have thus to target other authorities, including prosecuting and judicial authorities, who can issue guidance or order releases.
- ◇ In some countries, investigative actions are effectively halted, and courts reduce their operations, with the inherent risk of delaying trials, hearings or habeas corpus proceedings. In others, we see States easing procedures for prolonging police custody or pre-trial detention, thus contributing to the proliferation of pre-trial detainees, contrary to the aim to reduce the number of inmates.
- ◇ Prosecutorial guidance should also be issued to end pre-trial detention where not essential, and consider alternatives such as house arrest or home confinement.

- ◇ For detention authorities, new incoming detainees are a risk group that can bring the coronavirus into detention, apart from increased overcrowding. Delays in the execution of sentences or their transformation in non-custodial sentences are options here.
- ◇ In some countries, relevant authorities have suspended the use of certain types of detention (ex. use of administrative detention of migrants pending deportation in parts of Switzerland).

The case of child detention and women prisoners:

- ◇ For organizations working on the COVID-19 crisis, it is important to integrate a gender and child rights perspective in calls for release and other protective measures.
- ◇ Release should extend to women prisoners, especially those with children, pregnant women or those in a vulnerable situation. The detention of women is particularly problematic in many countries due to overcrowded conditions and neglect. Women detainees (often convicted for less violent crimes) can frequently be seen also as a lesser security threat, making release possible.
- ◇ While children or minors may be less at risk of catching COVID-19, they are vulnerable in other ways. In many parts of the world, their detention conditions are characterized by serious overcrowding, neglect, and they tend to suffer stronger psychological impacts from measures of isolation and the cutting of contacts with family and the outside world. Their detention must be a clear exception to the rule, yet children or minors are often detained pending trial. Their release should contribute to the overall reduction of prison population.
- ◇ During efforts to release children from detention, State authorities should coordinate with child protection actors and provide community support to ensure adequate care and safety for children released from detention. Where release is not possible, it is important to mitigate the severe mental health effects on children. It is crucial that children maintain contact with their families, including remotely by putting in place or strengthening already available technological tools.
- ◇ It is equally important to ensure that monitoring mechanisms integrate a child rights dimension into their crisis response, and that the risk of criminalization of children for curfew or lockdown violations, including street children or children from poorer communities, is carefully monitored.

Human rights defenders, journalists and dissenting voices

- ◇ The present environment provides an opportunity to call for the release of human rights defenders, journalists or other dissenters unduly criminalized.
- ◇ There is legitimate interest in their release, because they are detained arbitrarily in violation of international standards in the first place. It will be wise to target their release now as countries may find it easier to release them as part of a package – thus saving face and improving their international standing and reputation.
- ◇ On the other hand, the risk is to be seen as favoring one category of prisoners in need over another and being self-serving or serving the interest of a few.

- ◇ Refining the argument may be a suitable strategy. An approach taken in some places, such as Turkey, was to argue, on the basis of the non-discrimination principle, that certain categories of prisoners or detainees should not be discriminated against and thus be included in release or amnesty packages.
- ◇ In such situations, one may either call for the release of human rights defenders specifically, or ensure that elements of non-violence, speech offenses or the like that characterize their alleged offenses are among the criteria for release. This is important because the crimes for which they were convicted may include offenses under national security laws that States tend to exclude in release packages.
- ◇ There are other categories who should be covered by release plans, such as those detained for their religious beliefs or, in a number of countries, on the basis of their sexual orientation. Advocacy organisations may define the best strategy for their release based on the country context.

1.3. WHAT FORM SHOULD OR COULD RELEASES TAKE?

The reduction of incarceration can be achieved in multiple ways and needs to be defined in the most practical and strategic way in each country or setting. The preferred option is to secure a permanent release, as it reduces the psychological impact of changing the environment from prison to life outside prison and return to prison afterwards. States may prefer to use options that do not require legislative action, such as the application of existing tools for suspended sentences, parole, or, in some countries, amnesties, while others will need to seek a special law.

It is important not to forget pre-trial detainees for whose release judicial authorities (prosecutors and judges) have the keys in their hands. Advocacy, dialogue and legal action such as habeas corpus remedies and public interest litigation have been used successfully in some countries in support of release.

1.4. WHAT HAS TO COME WITH RELEASE (DO NO HARM AND COMPLEMENTARY ACTIONS)?

We need to be conscious in our calls of concerns over what happens after release.

In the first place, the risk that certain prisoners may pose to society should argue against their inclusion in prisoner reduction schemes in the COVID-19 context (such as high-risk offenders, particular violent offenders, in certain countries those responsible for genocide, war crimes and crimes against humanity, or torture or cases of sexual and domestic violence with the risk posed by release into confinement).

There are additional needs coming with release strategies. Release into confinement with families can also create difficulties and tensions with little time to prepare for release and appropriate post release monitoring or support. There may also be detainees without clear places to go to, including foreigners, migrants, children or women defenders whose family ties are broken, or street children. Organisations wishing to engage on the release of detainees may want also to look into measures needed to accompany liberation into other settings of confinement, ranging from appropriate shelter and housing to access to services and psychological support. and engage with State or non-state actors as needed.

Similarly, when release is attempted from carceral settings where cases of the novel coronavirus have been reported, release into the community must be carefully planned and coordinated with local health officials.



STRATEGY II: MONITORING THE REASONABLE ACCOMMODATION OF THE RIGHTS OF THOSE DEPRIVED OF LIBERTY

2.1. HOW TO MITIGATE CONFINEMENT NEEDS WITH THE ENJOYMENT OF RIGHTS?

There is an inherent internal conflict between the health response with its logic of quarantine and isolation which may entail the sealing off of places that are seen as posing a risk to public health, as well as seriously limiting the flow of people (visitors, families, legal workers) in and out, and the idea laid out by anti-torture laws to ensure access and transparency as a safeguard against abuse and access to an open, accessible justice system.

The limitation of access to detention is a legitimate and logical protective measure – also taken for hospitals or elderly peoples’ homes – to prevent the coronavirus from entering these facilities and contributing to a local outbreak.

The question is the scope of such measures and how their effects can be mitigated to comply with legal standards: to retain the core of the right, and to be necessary, time-limited, proportionate, non-discriminatory and subject to review.

In a practical sense, we suggest an analogy to the concept of reasonable accommodation, defined by the Convention on the Rights of Persons with Disabilities, according to which States have to secure an equivalent access to the right through adjustments made in its practical operation and access.

How best to accommodate may depend on local realities, access to resources, technical equipment and the ability to generate outside support. Its rationale is to respect safety and health concerns while finding at times new and innovative ways to ensure that the essence of the right is secured and remains operational, and simultaneously contributes to the reduction of tension, violence as well as to better security in custody settings.

2.2. WHAT ABOUT REASONABLE ACCOMMODATION OF ACCESS TO FAMILY AND OUTSIDE CONTACTS?

Reducing access to detention facilities is a suitable measure to prevent the novel coronavirus from being brought into the prison and can thus be an acceptable derogation from ordinary rules.

There should be measures to mitigate and compensate for the effect of reduced or blocked access, as experience shows that any measure to isolate understandably enhances the fears and anxieties of prisoners and negatively affects their well-being. In many countries, sealing off prisons and suspending visits not only affects the detainees' psychological well-being, but also their access to food, medicine or essential services.

If not handled well, security incidents, hunger strikes and even mutinies might develop (examples in Italy and other places illustrate such risks).

Key elements to mitigate in this regard are:

- ◇ **Transparency and communication** – restrictions or new protocols should be well communicated and explained to detainees and families to ensure these are understood as a protective measure. Examples in some countries have shown that a lack of communication has induced unnecessary travels, frustrations, anger and additional anxiety including to the point of security incidents.
- ◇ **Use precautions during visits** – some countries have not fully suspended visits but reduced them to the most essential ones and introduced precautions such as windows for protection, physical distance in meetings, entry and exit procedures, including verbal screening and temperature checks, and hygienic measures. However, such measures may not always be sufficient, suitable, or may be difficult to implement in detention facilities.
- ◇ **Accommodating measures** – one of the most important and beneficial approaches is to ease the rules on outside communications and allow significant access to communication via phone, videoconferencing, email or other digital tools. Such possibilities are highly recommended given the volatile situation of prisons and prisoners during crises. Communication with the outside world should be free and frequent.
- ◇ **Access to food** – visits can be as much about food and survival as they are about social support. The obligation of the State is clear in terms of the necessity to provide sufficient food and supplies for those in custody. However, in reality, the level of access to food is in many contexts very limited and, without outside support, there are high risks to detainees. It is thus essential that there are ways for relatives to deliver food and other supplies to prisoners, in line with local customs.
- ◇ **Anti-corruption** – places of detention are amongst the most corrupt places in many parts of the world. In reality, access to food, incoming parcels, supplies, visits and any other privilege are easily conditioned on corruption. In this environment, unrealistically strict rules will facilitate more corruption, sidelining and frustrating the impact of safety measures. While the issue is complex, there is an argument for clear rules, transparency in their communication, and for such rules to be sufficiently permissive to avoid a sharp rise in corruption.
- ◇ **Psycho-social support** – a real challenge is that social and other programming during the crisis period may be at minimal levels, thus reinforcing anxieties, tensions and potential violence. This global crisis and its impact on populations behind bars may also retraumatize individuals with a history of trauma and have a direct effect on the exacerbation of mental health conditions, which are found in higher rates in the prison population. A very positive example has been the ability of organisations with experience in psycho-social support or rehabilitation to offer such help to prison staff in

Tunisia and to work with the authorities on the proper communication and information on health issues and their impact on prison rules.

- ◇ **Resource mobilization** – in developing countries, basic internet access, equipment and computers, or even the most basic infrastructure may be lacking in many prisons, which are often located in remote areas. In many such situations, detention authorities will suffer from political neglect and bureaucracy, rendering any set up of technological measures and reasonable accommodation unrealistic. This underscores the need to allow some limited physical access, but it calls also for the mobilization of resources.

Non-state actors, including NGOs, may be able to provide support. In certain countries, they already provide the lion's share of social rehabilitation, educational and psychological support. We have also seen that in some countries it was possible to engage embassies or development agencies present locally to provide support to allow access to basic infrastructures and computers.



STRATEGY III: SECURING LEGAL PROTECTION, EFFECTIVE ACCESS TO LAWYERS AND JUDICIAL REMEDIES

3.1. HOW TO PREVENT A LEGAL ACCOUNTABILITY AND PROTECTION VACUUM?

- ◇ **Problem:** The logic of confinement and closures does have a critical impact on the principle of open justice, access to lawyers, courts and effective remedies. It also affects key legal safeguards developed to counter the already heightened risk of violence, abuse, and torture in detention. Human rights law and anti-torture laws center on the concepts of transparency, access to lawyers, medical examination by an independent doctor, as well as courts and preventive safeguards. On the other hand, confinement by definition limits access and contact, thus creating a difficult juncture of competing needs.
- ◇ **Combined effect:** All new limitations and protocols must be necessary, time-bound and proportionate. However, the most critical is the combined effect of a series of limitations which together create a dangerous vacuum, disproportionately impacting the legal protection of detainees at a time of heightened anxiety and tension. The following chapter thus looks into some of the experiences and offers suggestions to prevent a substantial 'accountability vacuum' in custody as a collateral damage to the COVID-19 response.
- ◇ **Use of remedies:** Anti-torture organisations should continue using the legal system to protect clients and victims of torture and prevent other human rights violations. Members of the SOS-Torture Network are also using litigation as an effective strategy to protect detainees in the COVID-19 context, such as through habeas corpus proceedings in Argentina and the United States or through public interest litigation in Pakistan. As with any litigation in emergency type situations, they do constitute one of the most powerful tools at our disposal, but they also risk setting dangerous precedents into law. Measuring these potentials and risks will need to be a decision taken at the local level. Relevant international NGOs, including the OMCT, may be approached for support, including through advocacy actions and amicus curiae briefs.

3.2. WHAT ABOUT THE RIGHT TO ACCESS LAWYERS?

- ◇ **Access to justice:** a first benchmark is that States cannot extinguish the right to remedy, habeas corpus and the principle of access to justice, even in a state of emergency. The principle of open justice has to be operational in the present health crisis. Judicial services are to be treated as part of the essential services and functions that are absolutely necessary, even during a pandemic. There can be, however, limited, time-bound and proportionate modifications in the operation of courts, the scheduling of hearings, and also adjustments affecting detention.
- ◇ **Visits and contacts:** As a rule, access to justice and lawyers needs to be guaranteed. This implies that at least important visits should be enabled, ideally while alternatives are encouraged (notably video conferencing and safe electronic communication). This would limit in-person meetings while allowing clients to make informed decisions regarding their representation and to effectively participate in it. This would also uphold the principle of do no harm.
- ◇ **Priority contacts:** Access is particularly important in the context of investigation and for pre-trial prisoners, as well as where there are real risks of torture and abuse. For physical visits, the authorities need to take all typical precautions - enough space to ensure physical distancing, and, where possible, separation through a glass or plastic window and; the provision of hygienic protective measures, products and safeguards.

Example: In Italy, one of the most affected countries with a rigid lockdown, legal access is still permitted, while in other countries there have been further exclusion of physical or other access to prisoners that has affected the ability of human rights organisations or lawyers to learn of and act on allegations of abuse.

Video conferencing: Prison authorities should permit secure video conferencing and other tools to enable lawyers to communicate with their clients as a key alternative to in-person visits. If such tools are available, there should be no further restriction such as a limitation to certain types of legal issues or remedies, and the normal rules on access to lawyers should apply. The communication should be free and frequent.

In practice, this is not without challenges, as prisons may not be equipped with broadband internet and computers. While calling on the authorities to set up the necessary systems, we may also reach out and encourage aid providers, but also bar associations and national human rights institutions that can help to set up basic tools and infrastructure.

- ◇ **Lawyer-client privilege:** Alternative settings must guarantee the lawyer-client privilege and confidential communication and safeguards against reprisals and intimidation. To this end, it may be advisable for bar associations, national human rights institutions (NHRI) or national preventive mechanisms (NPM) were to set up or monitor systems and protocols. Communication should provide for the possibility of encryption to reduce the risk of surveillance and reprisals.
- ◇ **Local permanence:** Access may be difficult given movement restrictions, as prisons tend to be located away from populated areas. In particular, security detention is often secluded, and at a considerable distance from families and lawyers. Bar associations, legal aid systems, human rights organisations may consider whether to put in place a form of 'permanence' that is locally present and able to more easily access prisons

or detention facilities. Such a system would need to be run and overseen by bar associations or independent human rights organizations.

3.3. HOW ARE COURTS OPERATIONS AND ACCESS AFFECTED?

- ◇ **Principle of open justice:** In any state of emergency, maintaining access to an independent civilian judiciary is of fundamental importance, as we know from experience. This should in no way be different when the primary source of the emergency is not political, but health related.

Thus, the principle of open justice must be secured, and courts must continue operating. This applies in particular to the protection of non-derogable rights, such as the absolute prohibition of torture. It equally applies under human rights law to key safeguards, such as the right to remedy and habeas corpus rights.

- ◇ **Practical limitations:** There are of course practical and reasonable limitations on the operation of the judiciary, including through elements of electronic communication, partial telecommuting of staff, and the delays of some proceedings considered less essential. Courts operate on a different schedule, prioritizing certain types of proceedings and cases, and they have introduced changes to their physical presence and access.

In some cases, States have changed the rules on pre-trial detention, limiting judicial involvement, and reports indicate that one important safeguard in habeas corpus proceedings, namely physical presence, is not always secured. In the worst case, we have learnt that hearings on release and arrest are simply not taking place, creating a serious gap of protection and lengthy pre-trial detention. Investigations are also largely suspended, resulting in the same effect.

- ◇ Efforts to use video conferencing and electronic communications in the justice system may help to retain its core operation, except for criminal trials and proceedings where on-site physical presence is essential. However, in many places, court systems are not technologically equipped so aid providers and others are encouraged to support emergency measures to remedy such difficulties.



STRATEGY IV: ENSURING EFFECTIVE MONITORING OF DETENTION AS KEY SAFEGUARDS AGAINST TORTURE

4.1. HOW TO BALANCE THE IMPACT ON OUR ABILITY TO PROTECT?

Impact on our protective reach: Quarantine and public health-related closure policies impose an important limitation on our ability, as anti-torture organisations, to prevent, document and protect. These public health measures formally restrict or imply (self-imposed) limitations on accessing detention facilities to the extent possible in a given country. While there is a clear public interest that human rights organisations continue to monitor, document and verify information, organisations will rarely be exempted from movement restrictions, quarantine and isolation rules.

As a result, our organisations have to develop other tools for monitoring violations, receiving and sharing information, and verifying allegations of human rights abuses, including through online and electronic means or through a network of contacts in particular neighborhoods

and regions of the country. Useful references may also be found in the OMCT *Handbook on documenting torture remotely in closed environments*.

4.2. HOW TO ENGAGE NHRIS AND NPMS ON THEIR PROTECTIVE MANDATE?

- ◇ **National Human Rights Institutions (NHRIs)/Ombudsperson/National Preventive Mechanisms (NPM)s:** one avenue is to advocate for a stronger role of State human rights institutions, such as that of ombudsperson or NPMs to prevent an accountability vacuum. While the track record of such institutions may differ from country to country and civil society may be reluctant to engage with some of these institutions, they do retain a formal mandate to monitor, access and advise and/or remedy human rights concerns, including or in particular in detention.

As anti-torture and human rights organisations, it is thus vital that we engage them in a critical dialogue on their role as protective institutions. In some countries, civil society is part of or associated with NPMs, which can provide a particularly important opening and a degree of access to information, as well as the ability to help constructing protective policies that ensure prisoners' right to health and protection against abuse.

- ◇ **Impact on the protective mandate:** During a public health crisis, NPMs and other mechanisms, too, are caught between a rock and a hard place, as their visits are more extensive than for example the visit of a lawyer visiting a single client, for instance. They thus carry a higher risk of inadvertently bringing the novel coronavirus into prisons. In application of the 'do no harm' principle, some mechanisms have had to suspend their visiting program. This is problematic, as this has to be seen not only from the 'do no harm' principle (the risk of bringing in the virus), but also the potential harm that the lack of visits and transparency carries.
- ◇ While NPMs may be forced to limit certain visits, they retain the mandate to prevent torture and to protect those at risk. In an environment of heightened tensions and strong risk of violence and torture, they cannot stop exercising their mandate but may adjust their operation and methodologies.

In other words, they too need to look for reasonable accommodations of their visiting mandate and focus their work on other areas of their protective function. They may consider:

- Smaller sized visits (or a sort of permanence/regular presence) including through people entrusted locally in the proximity of detention places who may be screened or tested prior to visits; the provision of personal protective equipment for those carrying out visits.
- Setting up confidential complaint mechanisms, including through electronic means, with NPMs seeking corrective action where needed, including the transfer to prosecuting authorities;
- Use of 'confidential' videoconferencing with concerned detainees organized through a focal point or 'permanence' in detention. NPMs should also facilitate setting up similar systems to access lawyers or other protective agencies, including human rights NGOs;

- Regular dialogue with prison and custody authorities on the crisis management, put in place to assume the NPMs advisory function on the policy level and its implementation;
- Advocacy on legal and policy measures of the State to protect prisoners, including for the reduction of prison population and the provision of an adequate preventive health response, as well as a medical response when cases are identified;
- Facilitating contact groups: an important role that independent human rights institutions or national preventive mechanisms should play is to facilitate the dialogue between key interested parties to deal with the prison and health crisis. This could take shape through contact groups, regular calls or other means. It could include prison authorities and their ministries, human rights organisations, local public health organisations and health departments, social workers, organisations providing psychosocial support and include or facilitate input from prisoners' rights associations or families of prisoners, prison staff unions or others. Such mechanisms can support protective policies, can mobilize additional support and build confidence, thus contributing to an important de-escalation of the situation.

For those wishing to engage NPMs and similar mandates on their crisis response, we recommend the guidance provided by the UN Subcommittee on the Prevention of Torture. We also recommend seeking the expertise of the Association for the Prevention of Torture, who convened regional consultations with NPMs (see Annex).



STRATEGY V: ADVOCATING FOR AN EFFECTIVE AND EQUIVALENT RIGHT TO HEALTH IN PRISONS

5.1. WHAT SHOULD I KNOW ABOUT AN APPROPRIATE HEALTH RESPONSE TO THE CRISIS IN LINE WITH HUMAN RIGHTS LAW?

- ◇ States are responsible to ensure quality health care for any prisoner or detained individual, and to take the necessary preventive measures to counter health hazards or a pandemic in prison settings. The United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”) state that prisoners shall enjoy the same standard of health care available to their community and should have access to necessary health care services without discrimination and free of charge.
- ◇ The overriding principle is that of the ‘equivalence of care’. Similar standards have been recommended by the WHO and OHCHR. Enforcing and realizing those standards in prisons is a major challenge in normal times, let alone during a global pandemic that is stretching countries’ health systems capacities to the maximum. It is even more challenging now for under-resourced prison systems around the world, thus requiring our urgent attention.

- ◇ As anti-torture organisations, our support can take many shapes, including legal and case advocacy for the provision of the protection of the right to health in prisons, the monitoring of emergency measures taken, calls to allocate more resources, supplies and health measures, but also a direct engagement helping prison authorities to provide and sustain the systems and care required to prevent or tackle a potential outbreak within their walls.

5.2. WHICH ELEMENTS ARE KEY REQUIREMENTS FOR AN ADEQUATE RESPONSE?

Responding to the COVID-19 crisis is an enormous challenge for prison authorities and their staff. It is a challenge in terms of resources, of logistics and of organisation.

The responsibility to design a protective health strategy requires a significant change in prison life, including systems of distancing, isolation and quarantine, the provision of hygiene products, as well as the development of occupational and social support structures. All this usually takes place in an environment notoriously under-resourced, especially vis-à-vis access to health professionals, equipment and medication, and it takes place in an environment of stress and anxiety for prison staff and prisoners alike. The responsibility is considerable, and we should support those efforts in a situation of crisis.

The access to basic health protection and hygiene has become a fundamental issue of concern within the prison reality, and even small changes in prison life can have security implications. Examples in countries that have experienced COVID-19 outbreaks show that such issues can be a source of substantial inter-prisoner violence, corruption, and can also lead to hunger strikes or the eruption of violence against the authorities. Even the communication on the news such as amnesties can cause violence (as occurred in Togo) when the criteria are not clearly communicated. A potential concern to be monitored within the prison setting is the use of disproportionate disciplinary action for violating internal rules set up to prevent coronavirus outbreaks in prisons, which need to be carefully measured and applied to be proportionate.

- ◇ **Communication and transparency:** It is thus vital to ensure clear communication policies in prisons that provide the necessary information in a calm, professional and clear way to all actors involved. Such communication should be provided with the linguistic and health literacy levels of the detainees in mind, including in languages other than the official language of the State. The lack of transparency and access to information has been one of the most fundamental concerns.
- ◇ **Basic hygiene, cleaning, masks, medication, testing:** As in the surrounding communities, there is need for basic hygiene products, such as soap, disinfectant, water, as well as for practices such as the frequent disinfection of shared facilities, sanitary equipment, and frequently touched surfaces. In many prisons around the world, even the most basic facilities and hygiene products and practices are missing or lax. Given the universal focus on the importance of hygiene practices as the only effective means of preventing the spread of the coronavirus, this point is both a fundamental priority and an enormous challenge.

To the extent possible, prison authorities have to make such services and products available, and advocacy by civil society can push for this to happen or may support prison administrations calls for more support with relevant political actors. In some instances, human rights organisations may also consider personal access to development

agencies, embassies or aid providers that could provide help and support.

Some prisons have started to produce key protective products (such as soap or masks) for their own use within prisons. In prisons, like anywhere else, there is a need to ensure that such tools benefit those most in need (vulnerable prisoners, those showing symptoms, those with known exposures, and those in contact with changing sets of people).

While 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.

As physical distancing is generally impossible to exercise within detention facilities, it is even more important to ensure a system that monitors and responds quickly and effectively to the presentation of first symptoms. Systematic screening and testing of prison populations, those working with them, and those accessing or leaving prisons will be key. In practice, however, testing seems to be rarely available, and screening is often unreliable, creating additional risks of an uncontrollable spread of the virus.

- ◇ **Isolation and quarantine:** As in the outside world, there needs to be a re-organization of detention facilities that allows for the isolation of detainees who exhibit symptoms (even mild ones). As the viral spread in prisons may be fast, this may pose an enormous challenge, and will require sufficient regular testing protocols and equipment, and the set-up of separate facilities within the structure (such as negative pressure rooms), akin to the solutions that have been found and recommended for prisons dealing with other infections such as TB. A particular concern in this regard is to ensure that solitary confinement is not used for the purpose of medical isolation. Access to ongoing medical care, fresh air, communication in and outside prison walls will be essential, and those cannot be accessed by those in disciplinary solitary confinement. It is important to note that prolonged solitary confinement is considered as a form of torture and is prohibited under any circumstances.

There will be cases in which detainees have to be quarantined. While physically separated, they should remain able to have access to food and medical services, as well as to communicate with the outside world. One major concern is poor access to health services in prisons. In most prisons, health services and access to medication are very limited, and once people fall ill, there is limited ability to be transferred to a hospital. In some countries, access to hospital services is only provided if the detainee or the family can pay for such treatment. Many cannot afford it.

As articulated in the Mandela Rules, equitable and non-discriminatory access to health care and life saving measures is critical within detention, as well as when it comes to transfers to community-based hospitals and facilities. To the extent possible, we may also call on development and aid organizations, or specialized NGOs to provide vital health care support.

- ◇ **Vulnerable prisoners:** In general, prison populations have higher rates of HIV and other medical and psychiatric conditions, which may increase the risks for suffering worse outcomes from COVID-19. Enhanced planning and precautions must be taken to ensure these groups benefit from special protections and appropriate considerations for

release, transfer and quarantine.

- ◇ **Social programming and psychosocial assistance:** It is important to maintain activities and social support structures within the prison as much as possible, even as public health measures call for their cancellation. This will require creativity, adjustments and innovation in the social service sector. NGOs working on prison issues can be called on to contribute to make psychosocial support available. Psychosocial support should be provided to both prisoners and prison staff through various means. Anti-torture organisations may have relevant expertise as well.



STRATEGY VI: MONITORING THE REPRESSION AND CRIMINALIZATION OF CURFEW VIOLATIONS

Emerging challenges: The OMCT has received through its global SOS-Torture Network increasing reports of abuse and cruel, inhuman or degrading treatment or punishment towards those violating quarantine and lockdown directives.

- ◇ In many settings, these violations reflect the overall lack of awareness of human rights, ineffective control and oversight over law enforcement officials and military authorities.
- ◇ They also illustrate the inherent risks when regular control and oversight mechanisms are non-operational or operating themselves with serious limitations regarding free movement and required to be themselves quarantined.
- ◇ In many instances, these violations indicate a deliberate policy of instilling fear and intimidation to prevent people from leaving their homes, sometimes targeting specific areas, popular neighborhoods and communities.
- ◇ In many settings, breaking quarantine or lockdown orders carry risks of being stopped by the police, incurring fines, citations, and jail, which may discriminate and overburden certain marginalized populations (including the poor, low-wage workers, immigrants, minority communities or communities of color).
- ◇ These policies may result in a new wave of criminalization, and in individuals being unduly taken to detention and prisons, thus further limiting their ability to carry out preventive measures such as self-quarantine, physical distancing and hygiene practices, and increasing their risk for contracting the virus in these densely populated carceral settings.

6.1. HOW TO ADDRESS ABUSIVE LAW ENFORCEMENT PRACTICES?

- ◇ Emerging challenges: The OMCT has received through its global SOS-Torture Network increasing reports of abuse and cruel, inhuman or degrading treatment or punishment towards those violating quarantine and lockdown directives.
 - Physical abuse, including beatings with sticks, cruel, inhuman or degrading treatment such as spraying with disinfectant and irritants and acts of torture;

- Deprivation of liberty outside any legal process in non-official detention facilities like schools and in violation of orders to avoid congregation;
 - Degrading punishment and public humiliation such as sitting in the hot sun, exposure to the public as curfew breaker, or in some countries the shaving, beating, humiliating or even locking into cages of minors;
 - Further, such law enforcement actions often create situations in which officials/officers come in very close physical proximity with alleged offenders, often without protective barriers, thus enhancing the risk of viral transmission.
- ◇ It is vital to monitor those abuses and emerging practices and to advocate for a response to curfew violations that is lawful, necessary, proportionate and that adheres to public health preventive measures.

It is also crucial to ensure that law enforcement officials, the military or other State agencies comply with basic human rights standards. At present, we observe that violence and intimidation are not just some level of aberration or related to abuse of power and corruption, but appear in some places to be part of a deliberate strategy to enforce such rules through intimidation and instillation of fear.

The development of an advocacy strategy on the issue has to include a reflection on the root causes of violations of curfew and lockdown orders, where they are unrealistic or lack practical and effective support from certain communities.

- ◇ As our ability to collect evidence may be more limited due to our own social isolation, we encourage members of the SOS-Torture Network to develop online and electronic tools to receive and verify information to support victims of such violations and seek remedies and reparation, conduct online interviews and use systems of focal points within different regions and/or hotspots within the country (see also *OMCT Handbook on monitoring torture in closed environments* – provided in the annex).

6.2. HOW TO PREVENT THE RE-FILLING OF DETENTION FOR BREACHES OF QUARANTINE OR LOCKDOWN MEASURES?

- ◇ Breaking the curfew should be seen as an administrative and not as a criminal offense, punishable by fines or alternative sentences such as community service. As a rule, it does not justify pre-trial detention. It is particularly disproportionate when it targets the poor and those who simply cannot afford to stay in their own homes due to work requirements, housing problems and other risks to their safety. Such measures are likely to reinforce marginalization and entrench discrimination in justice systems.
- ◇ It also runs counter the notion of reducing the prison and detention population by adding detainees. In many countries, prison authorities have identified the intake of new prisoners as a safety and security concern, as this requires additional resources and screening protocols. Intake of new detainees should be limited only to absolutely necessary cases and offences.

Annex: Reference and resources

1. The United Nations [Standard Minimum Rules for the Treatment of Prisoners](#) (known as the “Nelson Mandela Rules”);
2. Office of the High Commissioner for Human Rights (OHCHR):
 - o UN High Commissioner for Human Rights Ms. Michelle Bachelet’s [statement](#) “Urgent action needed to prevent COVID-19 rampaging through places of detention”
 - o Inter-Agency Standing Committee (IASC) [Interim Guidance on COVID-19](#): Focus on Persons Deprived of Their Liberty (developed by OHCHR and WHO)
 - o [OHCHR’s COVID-19 Guidance webpage](#)
3. United Nations Subcommittee on Prevention of Torture (SPT), [Advice](#) of the SPT to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic;
4. Council of Europe’s Committee for the Prevention of Torture (CPT), [Statement of Principles](#) relating to the treatment of persons deprived of liberty;
5. World Health Organization (WHO), [Interim Guidance](#): Preparedness, prevention and control of COVID-19 in prisons and other places of detention;
6. Penal Reform International, [Briefing note](#): Coronavirus: health and human rights of people in prison
7. For country-specific information on prisons and COVID-19 see [Prison Insider](#), a French-based member of the SOS-Torture Network;
8. A database on COVID-19 and Persons Deprived of Liberty developed by the Association for the Prevention of Torture (APT) is available here.

Further information can be found on our website www.omct.org or twitter [@omctorg](https://twitter.com/omctorg).