

Working Group on Arbitrary Detention

Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies

I. Introduction

1. The events of recent weeks have brought about a profound change in the lives of everybody globally as the spread of the new coronavirus (COVID-19) has led to the adoption of stringent measures by States in an attempt to combat it. The Working Group on Arbitrary Detention acknowledges the unprecedented nature of the circumstances and the need for a wide range of public health emergency measures introduced to combat the pandemic in a manner respectful of international law.

2. The Working Group is nonetheless mindful of the fact that not all measures taken by States pay due respect to the international human rights obligations undertaken by them, and therefore calls for their urgent review.

3. Furthermore, the Working Group recalls that, in instances where a public health emergency has required States to resort to the introduction of an emergency regime, all States should act in accordance with their obligations under international law and with their constitutional and other provisions of law governing the proclamation of a state of emergency and the exercise of emergency powers.¹ All such measures must be publicly declared, be strictly proportionate to the threat to the public caused by the emergency, be the least intrusive means to protect public health and be imposed only for the time required to combat the emergency.

4. The Working Group is aware of the valuable statements and advice that have already been issued by numerous international and regional organizations,² which it encourages all

¹ See Human Rights Committee, general comment No. 29 (1999) on states of emergency, para. 2.

² See Office of the United Nations High Commissioner for Human Rights (OHCHR), COVID-19 Guidance (www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx), OHCHR and the World Health Organization (WHO), COVID-19: Focus on Persons Deprived of Their Liberty: Interim Guidance, March 2020 (<https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf>); OHCHR, Guidance on the Human Rights Dimensions of COVID-19: Migrants (available from <https://interagencystandingcommittee.org/other/iasc-interim-guidance-covid-19-focus-persons-deprived-their-liberty-developed-ohchr-and-who>); advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus pandemic (adopted on 25 March 2020); WHO Regional Office for Europe, "Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance", 15 March 2020; Advice of the Subcommittee on Prevention of Torture to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland regarding compulsory quarantine for Coronavirus, adopted at its fortieth session (10 to 14 February 2020); Organization of American States (OAS), *Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas* (see www.oas.org/en/media_center/press_release.asp?sCodigo=E-032/20), 7 April 2020; Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic

States to consider. The aim of the present deliberation is to set out a guidance to avoid cases of arbitrary deprivation of liberty in the implementation of public health emergency measures aimed at combating the COVID-19 pandemic and, *mutatis mutandis*, in the event of other public health emergencies.

II. Absolute prohibition of arbitrary deprivation of liberty

5. The Working Group is mindful of the fact that a person's right to liberty is only one of the rights particularly affected by the wide variety of measures that have been recently taken by many States. While the right to liberty is not an absolute right, and derogations from it are permitted under international law,³ the Working Group wishes to emphasize that the prohibition of arbitrary deprivation of liberty is absolute and universal.⁴ Arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health. The prohibition applies in any territory under a State's jurisdiction or wherever the State exercises effective control, or otherwise as the result of its actions or omissions of its agents or servants.⁵ Consequently, the Working Group calls upon all States to respect the absolute prohibition of arbitrary deprivation of liberty as public health emergency measures are introduced to combat the pandemic.

6. Furthermore, any derogation from a person's right to liberty must strictly comply with the limits imposed upon a State party's power to derogate from that right by international law. In particular, States must adhere rigorously to the requirements of strict necessity and proportionality; such derogations are only permissible for the time period justified by the exigencies of the prevailing circumstances of the public health emergency.

III. Regimes of deprivation of liberty

7. The Working Group recalls that the prohibition of arbitrary deprivation of liberty extends to all types of detention regimes, including detention within the framework of criminal justice, administrative detention, detention in the context of migration and detention in the health-care settings.⁶

8. Moreover, the deprivation of liberty is not only a question of legal definition but also a question of fact; therefore if the person concerned is not at liberty to leave a premise, that person is to be regarded as deprived of his or her liberty.⁷ To this end, it is of critical importance that, irrespective of what such places are called, the circumstances in which an individual is detained are examined to determine whether the person has been deprived of liberty.⁸ The Working Group wishes to clarify that mandatory quarantine in a given premise, including in a person's own residence that the quarantined person may not leave for any reason, is a measure of de facto deprivation of liberty.⁹ When placing individuals under quarantine measures, States must ensure that such measures are not arbitrary. The time limit

issues by the European Committee for the Prevention of Torture, 20 March 2020 CPT/Inf (2020)13 (19 March 2020); African Commission on Human and Peoples' Rights, press statement of 28 February 2020 on the coronavirus (COVID-19) crisis, (available from www.achpr.org/pressrelease/detail?id=480) and press Statement of 24 March 2020 on human rights-based effective response to the novel COVID-19 virus in Africa (available from www.achpr.org/pressrelease/detail?id=483). See also OHCHR, "COVID-19 and its human rights dimensions", at www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx.

³ International Covenant on Civil and Political Rights, art. 4.

⁴ See A/HRC/22/44, paras. 42-43; see also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 66.

⁵ A/HRC/30/37, para. 25; opinions Nos. 70/2019, 52/2014 and 50/2014.

⁶ A/HRC/36/37, para. 50.

⁷ A/HRC/36/37, para. 56. See also deliberation 1 on house arrest (E/CN.4/1993/24).

⁸ A/HRC/36/37, para. 52.

⁹ See advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus pandemic, para. 10 (5); and advice of the Subcommittee on Prevention of Torture to the national preventive mechanism of the United Kingdom of Great Britain and Northern Ireland regarding compulsory quarantine for coronavirus, para. 2.

for placement in mandatory quarantine must be clearly specified in law and strictly adhered to in practice.

9. The Working Group also wishes to emphasize that secret and/or incommunicado detention constitutes the most serious violation of the norm protecting a person's right to liberty. Arbitrariness is inherent in such forms of deprivation of liberty, as the individual is left without any legal protection.¹⁰ Such secret and/or incommunicado detention cannot be part of the public health emergency measures introduced to combat a health-related crisis.

IV. Necessity and proportionality of the deprivation of liberty

10. Any deprivation of liberty that has no legal basis or is not carried out in accordance with the procedure established by law is arbitrary.¹¹ Any law authorizing the deprivation of liberty must therefore be scrutinized. Any deprivation of liberty, even if it is authorized by law, may still be considered arbitrary if it is premised upon arbitrary legislation or is inherently unjust, relying for instance on discriminatory grounds, or if there is an overly broad statute authorizing automatic and indefinite deprivation of liberty without any standards or review, or the law does not specify clearly the nature of the conduct that is unlawful.¹²

11. Moreover, even the lawful deprivation of liberty may still be arbitrary if such detention is not strictly necessary or a proportionate measure in pursuance of a legitimate aim.¹³ In particular, States must be mindful that detention that initially satisfied the requirements of necessity and proportionality may no longer be justified insofar as the circumstances may have changed significantly.

12. The Working Group therefore calls upon all States to pay particular attention to the requirements of necessity and proportionality of deprivation of liberty in the context of public health emergencies, such as the newly emerging emergency related to the COVID-19 pandemic.

13. In particular, States should urgently review existing cases of deprivation of liberty in all detention settings to determine whether the detention is still justified as necessary and proportionate in the prevailing context of the COVID-19 pandemic. In doing so, States should consider all alternative measures to custody.

14. Pretrial detention should only be used in exceptional cases.¹⁴ The current public health emergency puts an additional onus of consideration upon the authorities, as they must explain the necessity and proportionality of the measure in the circumstances of the pandemic. The Working Group recalls in particular that automatic pretrial detention of persons is incompatible with international law.¹⁵ The circumstances of each instance of pretrial detention should be assessed; at all stages of proceedings, non-custodial measures should be taken whenever possible, and particularly during public health emergencies.

15. The Working Group is aware that COVID-19 mostly affects persons older than 60 years of age, pregnant women and women who are breastfeeding, persons with underlying health conditions,¹⁶ and persons with disabilities. It therefore recommends that States treat all such individuals as vulnerable. States should also refrain from holding such individuals in places of deprivation of liberty where the risk to their physical and mental integrity and life is heightened.

¹⁰ A/HRC/22/44, para. 60.

¹¹ International Covenant on Civil and Political Rights, art. 9. See also opinions Nos. 1/2017, 30/2017, 35/2018, 70/2018 and 49/2019; and Human Rights Committee, general comment No. 35, para. 11.

¹² A/HRC/22/44, para. 63. See also opinions Nos. 41/2017, 52/2018 and 62/2018, paras. 57-59; Human Rights Committee, general comment No. 35, para. 22.

¹³ A/HRC/22/44, para. 61. See Human Rights Committee, general comment No. 35, paras. 11–12.

¹⁴ A/HRC/19/57, paras. 48–58.

¹⁵ See for example opinions Nos. 1/2018, 53/2018, 75/2018, 14/2019, 64/2019. See also Human Rights Committee, general comment No. 35, para. 38.

¹⁶ See www.who.int/news-room/q-a-detail/q-a-coronaviruses.

16. Lastly, noting that overcrowding and poor hygiene pose a particular risk of spreading COVID-19,¹⁷ States should seek to reduce prison populations and other detention populations wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures as provided for in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)¹⁸ and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). Noting the obligation arising from the Convention on the Rights of the Child of not detaining children, particular consideration should be given to releasing children and women with children, and also those serving sentences for non-violent crimes.

17. All States must comply with their obligations under international human rights law, including customary international law, the Universal Declaration of Human Rights and relevant international instruments to which they are party, which are interpreted and applied in opinions adopted by the Working Group. When detention has been determined by the Working Group to be arbitrary, the detainee should be released immediately in every case, and as a matter of urgency during public health emergencies.

V. Right to challenge the lawfulness of the deprivation of liberty

18. The right to challenge the lawfulness of detention before a court is a self-standing human right, a peremptory norm of international law that cannot be derogated from¹⁹ that applies to all forms of deprivation of liberty and to all situations of deprivation of liberty.²⁰ The right applies irrespective of the place of detention or the legal terminology used in relevant legislation; consequently, any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.²¹

19. The Working Group wishes to emphasize that the right to challenge the legality of deprivation of liberty applies also to those in mandatory quarantine or otherwise detained in the context of public health emergency measures that are introduced to combat a pandemic. Such individuals must also be ensured that they are able to exercise this right effectively by, *inter alia*, having access to legal assistance.

VI. Right to a fair trial

20. The Working Group is mindful of the fact that the public health emergency measures introduced to combat the pandemic may limit access to detention facilities, which in turn may effectively prevent persons held in places of deprivation of liberty from attending their court and other judicial hearings, meetings with parole boards or other entities empowered to consider their continued deprivation of liberty, or from holding meetings with their legal counsel and family.²² This may have an adverse effect particularly on those in pretrial detention, and on detainees seeking a review of a decision to detain them, as well as those seeking to appeal against a conviction or sentence.

21. If the exigencies of the prevailing public health emergency require restrictions on physical contact, States must ensure the availability of other ways for legal counsel to communicate with their clients, including secured online communication or communication over the telephone, free of charge and in circumstances in which privileged and confidential discussions can take place.²³ Similar measures can be taken for judicial hearings. The

¹⁷ WHO Regional Office for Europe, “Preparedness, prevention and control of COVID-19 in prisons and other places of detention”.

¹⁸ See advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus pandemic, para. 9 (2).

¹⁹ A/HRC/22/44, para. 49.

²⁰ A/HRC/30/37, paras. 11 and 47 (a)-(b).

²¹ *Ibid.*, para. 47 (b).

²² *Ibid.*, principle 10.

²³ *Ibid.*, paras. 15 and 69.

introduction of blanket measures restricting access to courts and legal counsel cannot be justified and could render the deprivation of liberty arbitrary.

VII. Use of emergency powers to target certain groups

22. Emergency powers must not be used to deprive particular groups or individuals of liberty. For example, the power to detain persons during public health emergencies must not be used to silence the work of human rights defenders, journalists, members of the political opposition, religious leaders, health-care professionals or any person expressing dissent or criticism of emergency powers or disseminating information that contradicts official measures taken to address the health emergency.

VIII. Detention in the context of migration

23. Detention in the context of migration is only permissible as an exceptional measure of last resort,²⁴ which is a particularly high threshold to be satisfied in the context of a pandemic or other public health emergency.

24. The Working Group reminds all States that migrant children and children with their families should not be detained in the context of migration policies, and should therefore be immediately released.²⁵

25. Asylum seekers should not be held in places of deprivation of liberty during the course of the procedure for the determination of their status, and refugees should be protected by authorities of the recipient State and not detained.

IX. Equality and non-discrimination

26. Emergency measures or powers enacted to address public health emergencies must also be exercised with respect to the principle of equality and non-discrimination based on the grounds of birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status.²⁶

27. Such measures and powers must take into account the disparate impact upon vulnerable groups who already experience disadvantage, including persons with disabilities, older persons, minority communities, indigenous peoples, people of African descent, internally displaced persons, persons affected by extreme poverty, homeless persons, migrants and refugees, persons who use drugs, sex workers and LGBTI and gender-diverse persons,²⁷ who may not have the same capacity to comply with health directives (such as isolation at home, self-funded quarantine in hotels, requirements not to attend work or to pay fines or bail), and may be deprived of their liberty as a result.

X. Independent oversight and cooperation with human rights mechanisms

28. The Working Group emphasizes the importance of independent oversight by national and international human rights mechanisms over all places of deprivation of liberty to minimize the occurrence of instances of arbitrary deprivation of liberty.²⁸ Such mechanisms include prosecutorial and judicial authorities, government human rights departments, national human rights institutions, national preventive mechanisms and civil society at the national level, as well as the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and other relevant non-governmental organizations at the international level.

²⁴ See revised deliberation No. 5 on deprivation of liberty of migrants (A/HRC/39/45), para. 12.

²⁵ A/HRC/36/37/Add.2, para. 21.

²⁶ A/HRC/36/37, paras. 46-49; A/HRC/36/38, para. 8(e).

²⁷ A/HRC/36/37, para. 46.

²⁸ A/HRC/39/45/Add.1, para. 17; A/HRC/39/45/Add.2, paras. 16-17.

29. The Working Group acknowledges the particular challenges that the prevailing public health emergency poses to such independent oversight as those involved in human rights monitoring seek to uphold the principle of “do no harm”. However, the prevailing public health emergency cannot be used as a blanket justification to prevent all such independent oversight. The Working Group calls upon all States to allow visits of independent oversight mechanisms to all places of deprivation of liberty during the COVID-19 pandemic and other public health emergencies.²⁹ Due consideration should be given to such practical measures as staggering the visits of oversight bodies, allowing for extra telephone and internet contact and establishing hotlines and the use of personal protection equipment.

30. The Working Group encourages States to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and States that are a party thereto to adhere to the advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus pandemic.

31. All States should maintain their efforts to engage effectively with the special procedures of the Human Rights Council and the Working Group and its procedures during public health emergencies.

[Adopted on 1 May 2020]

²⁹ See advice of the Subcommittee on Prevention of Torture to States parties and national preventive mechanisms relating to the coronavirus pandemic, para. 13.