Access to healthcare and social distance during COVID pandemic cannot stop at the prison gate

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By Maïté De Rue

Because they are often very populated places with poor living conditions, prisons present a high risk of contamination in a period of pandemic such as COVID-19. A number of countries have taken measures to decrease pressure on penitentiary institutions by releasing prisoners or decreasing the number of new arrivals. This approach is with no doubt an essential one, especially in light of overcrowding that characterizes many prisons around the world. However, this is not the only measure that States must take to respond to the health crisis, as many people will stay in prison. They have also the duty to organize the protection of health and life of prisoners.

What does such obligation concretely entail when facing a pandemic? The norms and standards developed by the Council of Europe, and in particular by the Court and the European Committee for the prevention of torture (CPT), and by the United Nations can help to answer this question and to define the main duties that define State obligations with regards to protecting prisoners against COVID-19.

General principles

The ECtHR has repeatedly said that persons in custody are in a particularly vulnerable position and that, according to article 2 of the Convention, the authorities are under an obligation to account for their treatment (Kats and others v. Ukraine). States must take appropriate steps to safeguard the lives of those within its jurisdiction (Slimani v. France).

Article 3 of the Convention imposes on States the duty to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical care (Kudla v. Poland). Care must be provided to detainees in conditions comparable to those enjoyed by patients in the outside community, while also taking into account the special needs of the prison population (principle of equivalence of care, also endorsed by the United Nations, in rule 24.1 of the Mandela rules). Finally, the Court considered that the spread of transmissible diseases is a public health concern in the prison environment (Cătălin Eugen Micu v. Romania).

Preventive medicine

Preventive actions must be taken in prison. It is indeed of paramount importance to understand that health care in prison is not limited to treating detainees with illnesses. Healthcare teams have a preventive and proactive role to play by "evaluating, promoting, protecting and improving the physical and mental health of prisoners" (Rule 25 Mandela Rules). In addition, medical staff have a duty to supervise the conditions of hygiene in prison (including, for example, cleanliness of clothing and bedding; access to hygiene products and running water; and sanitary installations).

In order to address the risks posed by COVID-19, States must take all measures that can contribute to limiting contamination, in addition to detecting ill prisoners and staff members and providing medical treatment to those infected.

In addition, prison health care services have the duty to circulate educational information about transmissible diseases to prisoners and staff, covering topics including protective measures, symptoms, and treatment. Staff should receive specific training in the preventive measures to be taken. While mainly

developed in the light of tuberculosis, hepatitis and HIV, these rules must apply also to the context of COVID-19.
All around the world, people are instructed to wash their hands with soap or hand sanitizer on a regular basis to prevent the spread of the virus. Spreading happens when mucus or droplets containing the virus get into the body through eyes, nose or throat, and often, this happens through hands. Prisoners should also be able to wash their hands regularly, and States have precisely the responsibility to provide all detainees with adequate quantities of hygiene products such as soap and regular access to running water in order to keep their persons clean (rule 18.1 of Mandela Rules). This is by consequence one of the measures that should be taken immediately by authorities, as regular access to soap and water for all detainees is critical to avoid the widespread of COVID-19 in prison.

Keeping cells clean is also an important preventive measure in order to avoid contamination by COVID-19, as the virus can survive for a number of hours on different types of surfaces. Prisoners must be able to keep their accommodation in an adequate state of cleanliness, and States have therefore the duty to provide prisoners with sufficient cleaning materials. In addition, blankets and bed linen should be washed at regular intervals.

Of course, preventive medicine has a particular resonance when it comes to communicable diseases such as COVID-19. In addition to hygiene measures, a specific medical approach must be proactively developed in prison. There is today a common understanding that testing is an important tool in the fight against coronavirus in order to correctly detect and treat ill people and to avoid further contamination, especially as one third of infected persons show no symptoms. According to WHO, "efforts to control COVID-19 in the community are likely to fail if strong infection prevention and control measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well". The CPT has repeatedly emphasized the importance of medical screening of newly arrived prisoners, "in particular in the interests of preventing the spread of transmissible diseases". Such screening could include testing of these diseases. The question whether testing could be mandatory is worth examining. Although consent of prisoner prior any kind of treatment is the rule, both the CPT and the WHO have encouraged systematic testing of newly arrived prisoners for tuberculosis. This disease is indeed considered as a problem of public health. The same rule must apply to COVID-19, given its volatile nature and possible absence of symptoms. Regarding the bulk of prison population, drawing again a parallel with tuberculosis, prisoners should have access to regular testing, and if a prisoner or a staff member is positively tested, further testing should be offered to prisoners and staff members with whom the ill prisoners had contact in the previous two weeks.

The wearing of masks in public spaces, and especially where social distance cannot be respected, is today a measure commonly adopted in order to limit the risks of widespread of COVID-19. Inmates and staff members should have access to and wear masks when they are in contact with other people. This is a concrete application of the principle of equivalence of care, and also takes into account the proximity of contacts that characterizes life in prison.

Access to treatment

Access to medication and to treatment is essential, and prisoners must have access to similar treatments as in the outside community. Prison authorities must also ensure that treatment is properly administered and monitored by qualified staff (Bamouhammad v. Belgium). If the health of a prisoner requires their transfer to the hospital, they must be transported with the promptness and in the manner required by their state of health (Raffray Taddei c. France).

Medicine should be provided free of charge to those prisoners who do not have the necessary financial means to pay for it. This rule should also apply to the provision of masks, as they are part of preventive health care.

Social distance

A very delicate question is the organization of "social distance" in prison. Three questions must be addressed: living space for prisoners, interaction with staff and the application of quarantine and solitary confinement measures.

Giving prisoners enough vital space is a structural problem in the vast majority of prisons around the world, as overcrowding characterizes many of them. The CPT has developed minimum standards in that regard which demonstrate their importance in the context of the current crisis: cells of two or more prisoners should give 4m² of living space per prisoner – the place taken by sanitary facilities being excluded from the calculation. The CPT has even started promoting "desirable" higher standards for multi-occupancy cells (10m² for two inmates, 14m² for three inmates and 18m² for four inmates), considering that 4m² can still lead to cramped conditions.

However, it remains unclear whether these standards actually adhere to the required social distance in the context of COVID-19. In addition, the CPT has repeatedly criticized the use of large-capacity dormitories as they inevitably imply a lack of privacy and increases the risks of intimidation and violence, but they can also become COVID-19 infection clusters within the prison. As applied in the case of tuberculosis, measures to reduce overcrowding and to improve living conditions for all prisoners should be implemented to reduce the transmission of COVID-19.

When facilities allow, some countries have applied de facto solitary confinement as a form of social distance, with inmates locked up in their cells or quarantined almost 24/7. The damaging effect of solitary confinement on mental, somatic and social health has been extensively described, both by the CPT and by UN bodies. It may of course be necessary to isolate or quarantine a prisoner who is infected or if there is suspicion they may be infected. But such isolation should not last for a period longer than medically required and the prisoner should be provided with meaningful human contact every day. Any other form of de facto isolation should be banned considering the risks created for the well-being of prisoners. This is to say that even if non-essential activities must be suspended during the pandemic, inmates should get daily access to outdoor exercise for at least one hour, should have human contacts every day, and suspended visits of families should be duly compensated for by increased access to alternative means of communication.

Finally, a difficult question relates to the interaction between inmates and staff members. Positive relations between prison staff and prisoners are important in the daily life, and they contribute to improve control and security within the prison. In the context of pandemic, physical distance should be maintained between staff and inmates as much as possible. This is particularly true when it comes to strip searches, which implies close interaction between prisoner and staff. It's fundamental that strip searches be carried out only if absolutely necessary and after an individual risk assessment, considering their invasive and potentially degrading nature. Risks of infection posed by COVID-19 should lead authorities to implement these long-standing standards. When a strip-search needs to be carried out, it goes without saying that all preventive measures should be applied: hands should be washed beforehand and everyone should wear a mask.

Need for new forms of transparency

The confinement rules imposed by authorities in many countries as well as the closure of borders have prevented many monitoring bodies, including National Preventive Mechanisms (NPMs), the Committee for the Prevention of Torture (CPT), and the Subcommittee On Prevention Of Torture (SPT), to carry out their duties. Inspection and monitoring visits play a key role in the prevention of torture and ill-treatment in places of deprivation of liberty. According to the CPT, despite the pandemic, "States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine". The SPT also encouraged NPM's to continue to carry out their inspection missions. Both the CPT and the CPT however invited the monitoring bodies to take every precaution to observe the 'do no harm' principle.

Given the practical difficulties faced by monitoring bodies in carrying out visits, 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. Defining the scope of this extended duty of transparency would go beyond this contribution. However, when applied to the duty to protect life and health of prisoners against the risks of contamination, it would have as a consequence that States should for example communicate on a regular basis different figures such as the number of cases detected and number of deaths, including among staff members. They should also provide detailed information on the measures taken regarding preventive medicine, health care and regime of prisoners. Everyone would benefit from such transparency, starting from authorities themselves that will demonstrate they care about vulnerable people within the society.

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Justice cannot stop at the prison gate, the Court said (Campbell and Fell v. United Kingdom). COVID-19 does not stop at the prison gate. Prisoners have no other option than to rely on measures taken by the authorities to have their health protected. States have no alternative: articles 2 and 3 of the Convention impose clear obligations on them towards the prison population. They cannot fail to take the appropriate actions. With no delay.

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