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Ministry of Interior

INDEPENDENT COMMISSION FOR HUMAN RIGHTS
ICHR

DEPRIVATION OF LIBERTY AMID THE OUTBREAK OF COVID-19

JOINT NOTE BY OHCHR oPt , ICHR AND THE PALESTINIAN MINISTRY OF INTERIOR

Amid the outbreak of coronavirus COVID-19 in the State of Palestine, on 5 March 2020 Palestinian President Mahmoud Abbas declared a state of emergency for 30 days, which entailed several preventive and precautionary measures. The state of emergency is regulated by the Palestinian Basic Law, and International Human Rights Treaties the State of Palestine has acceded to and is obliged by. In addition to the general obligations, specific focus should be drawn concerning detention and the treatment of detainees to ensure their enjoyment of basic human rights, and specific preventive and responsive measures related to the outbreak of COVID-19.

Hence, the following note briefly outlines specific obligations and recommendations on detention and the treatment of detainees amid the state of emergency following the outbreak of COVID-19 in the State of Palestine.

STATE OF EMERGENCY UNDER IHRL AND PALESTINIAN BASIC LAW:

The State of Emergency is regulated under articles 110-114 of the Palestinian Basic Law. Article 111 prohibits restrictions on fundamental rights and freedoms during a state of emergency, except to the extent necessary to fulfill the purpose stated in the decree declaring the state of emergency. Article 112 provides specific guarantees on arrests resulting from the state of emergency. In addition to the Palestinian Basic Law, International Human Rights Treaties, particularly article 4 of the International Covenant on Civil and Political Rights, which Palestine has acceded to and is bound by since 2014 also regulate the state of emergency and its impact on rights and freedoms. The State of Emergency is regulated under article 4 of the International Covenant on Civil and Political Rights, which Palestine has acceded to and is bound by since 2014. Article 4 articulates that although some derogations may be possible during a state of emergency, any derogation must be of an exceptional and temporary nature, and limited to the extent strictly required by the exigencies of the situation. The State must act within its constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers under international obligations. Moreover, the restriction must be non-discriminatory, and with specific attention to vulnerable and marginalized groups, taking into account the disproportionate impact it may have on vulnerable groups, including women and children in particular.

In accordance with article 4 of ICCPR, non-derogable rights include:

- The right to life (Article 6 of the Covenant);
- The obligation not to subject individuals to torture or cruel or degrading treatment (Articles 6, 7);
- Prohibiting all forms of slavery and servitude (Article 8, Paragraphs 1 and 2);
- The prohibition against imprisoning anyone merely for failing to fulfill a contractual obligation (Article 11);
- The principle of non-retroactivity of laws (Article 15);
- Recognition of every individual as a person before the law (Article 16); and
- Freedom of thought, conscience, and belief (Article 18).

Furthermore, the Human Rights Committee expanded the interpretation of non-derogable rights during states of emergencies in General Comment no. 29 to include, inter alia, article 10 on the human treatment of persons deprived of liberty.

PROHIBITION OF TORTURE AND ILL-TREATMENT

The prohibition of torture and ill-treatment can in no circumstance be derogated during a state of emergency. The treatment of all persons deprived of their liberty, including those quarantined, must be humane and respectful of their dignity, a fundamental and universally applicable basis in all circumstances. The right to file complaints of ill-treatment must be recognized in domestic law and the competent authorities must urgently and impartially investigate complaints and hold perpetrators accountable.

FAIR TRIAL GUARANTEES

Fair trial guarantees including inter alia, the right to be brought before a judge; and the right of anyone deprived of liberty to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful, must be effectively enforced at all times. Such guarantees also include that detainees should be presented without delay to the competent judicial authority regarding the lawfulness and extension of their detention, where means such as technology could be used to ensure no delays. Such guarantee is further stipulated under the Palestinian Criminal Procedure Code (2001) particularly articles 119-120 which specify the duration under which individuals should be presented before the public prosecution (within 24 hours) and competent court (within 48 hours). The current state of emergency and irregularities of courts' functioning have been tailored to ensure proper judicial review on detention and release orders even during such irregularities. According to Decision no. (194/2020) issued by Interim Chief of Justice Issa Abu Sharar, during the period between 11 March – 26 March 2020 courts will only consider, inter alia, postponing cases, urgent requests that cannot be postponed, and detention and release requests. Other guarantees such as being informed of the reasons for arrest and the charges; habeas corpus; and the right not to be tried in absentia also apply during this state.

Special health considerations should be taken into account while ensuring fair trial guarantees to ensure the protection of detainees from COVID-19. This includes protecting detainees during the transfer to and from courts, and during their presence in court, e.g. ensuring that means of transportation is clean and disinfected; that detainees, officers, and judges abide by hygiene standards and regularly wash their hands; and that detainees are not placed in overcrowded courtrooms which might increase their exposure to the virus. Alternatives such as the use of technology such as video hearings could be applied when warranted.

THE RIGHT TO UNIVERSAL HEALTH CARE

The right to the highest attainable standard of physical and mental health, and the right not to be subjected to medical or scientific experimentation without one's free consent, apply similarly to persons deprived of liberty. In light of the outbreak of COVID-19, authorities should conduct extensive regular medical examinations whether through prison doctors or a doctor of one's own choice; ensure that detention facilities are clean, disinfected and well ventilated; provide personal preventive items (masks, gloves, personal hygiene items, and medical kits) to detainees; ensure the availability of adequate medicine and medical supplements; ensure the availability of adequate healthy food; review constantly health conditions; provide detainees with health education and knowledge about the virus, symptoms, transmission methods and risks, and health prevention measures; follow mandatory procedures such as quarantine of suspected or infected person, while emphasizing the prohibition of quarantining detainees or transferring them as a form of punishment, or justified by punishment; ensure the availability of well-equipped health facilities including quarantine spaces which should include assigned health personnel. Detainees should be protected against any form of discrimination or stigmatization deriving from their infection or presumed infection.

RIGHT TO LEGAL COUNSEL

Detainees have the right to obtain independent legal assistance from lawyers and to communicate with them since the beginning of their detention. If the lawyer cannot reach the detainee, alternatives must be made available such as affordable or free, as well as available, means of communication so that detainees can communicate with a lawyer and obtain legal advice. The right to legal counsel should be applied also during the state of emergency. To ensure the protection of detainees while maintaining their right to legal counsel, counsels could be screened for symptoms before meeting detainees, and alternatives could be applied in cases of strict necessity to facilitate virtual communication or longer phone calls between attorneys and detainees.

ALTERNATIVES TO DETENTION

The pretrial detention should not be the general rule, and alternatives must be sought and applied wherever possible. In any case, detention and its continuation must be justified, and its extension must be done through the legally authorized authority. The search for alternatives is necessary, particularly during the current health emergency, to also avoid overcrowding thus avoiding exposing detainees to diseases. Alternatives should be sought before detention, and the release of certain detainees should be considered particularly in cases of minor fiscal crimes and any case of failure to fulfill a contractual obligation including failure to pay civil debt; for persons with underlying health conditions, for persons above 60, minors; pregnant women; in addition to any other cases where alternatives could be provided. In cases where detention is necessary, health examinations including specific prior testing of the virus should be conducted, and those who might be infected should be quarantined accordingly to ensure isolation from other detainees until recovery or clearance. Additionally, those who are to be released should also be tested before their release.

CONDITIONS IN DETENTION FACILITIES

The conditions in detention facilities must be fair and fully prepared in all aspects to ensure that they do not result in exposing detainees to COVID-19, and more generally to avoid any form of ill-treatment. Facilities should have sufficient space, and each detainee should have his/her bed and supplies, the detention facilities should be well ventilated, and detainees should also be allowed time outdoors.

Additionally, sanitation should be prioritized during this period, where facilities should be clean and disinfected. Sanitary and hygiene products including hand sanitizers should be provided; common areas, lavatories, and sinks should be cleaned and disinfected regularly; and more time should be allowed for showers. Moreover, it is advised that guards and officers wear masks and gloves when near detainees, and should regularly wash hands.

The separation between convicts and non-convicts should be maintained, as well as adults separated from juveniles, moreover it is necessary to isolate those who might be infected from the rest of the detainees in isolation rooms that are well equipped and health services should be provided and maintained accordingly.

ACCESS TO INFORMATION

Detainees, similar to the general public, should have access to accurate and comprehensive information on the prevention, early diagnosis, and treatment of COVID-19, as well as the status of efforts to contain it. Detainees should also be informed on procedures applied inside detention facilities to prevent and contain COVID-19. In this regard, establishing a prevention plan through information sharing between relevant institutions and organizations, in addition to regular evaluation and follow-up on the medical conditions of the public and individuals, is essential. It is further important to communicate the prevention plan and efforts inside detention facilities with the detainees, who should also be able to participate in planning and efforts taken to prevent and contain the virus. While access to information is key, the right to privacy for detainees should be respected at all times. Hence, detainees' private information and data including their medical files shall not be shared with any party without their prior consent.

COMMUNICATING WITH THE OUTSIDE WORLD

Detainees should be allowed to communicate with the outside world, including lawyers, relatives, and persons of their choice. This communication is essential and necessary in light of the current health situation in Palestine given that detainees could be more concerned about the health conditions of their relatives. However, given the health safety considerations associated with visits, visitors should be subjected to prior screening and should wash their hands prior and following each visit. Masks should be provided accordingly if requested. Limited exposure to visits could be imposed if strictly necessary, however, alternatives should be applied in such instances such as longer free phone calls and virtual communication with relatives and family members.

DETENTION VISITS BY INTERNAL OVERSIGHT BODIES, HUMAN RIGHTS ORGANIZATIONS AND INTERNATIONAL PARTNERS

Human rights organizations and international partners should be allowed visits at all times including during the state of emergency. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defense, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevents the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit. Visiting organizations must be mindful of the 'do no harm' principle when exercising their mandate. This may require adaptations to normal working practices, in the interests of those in detention, those undertaking the visit, and the general interest in halting the spread of the virus. Additionally, oversight visits by the public prosecution and judges as stipulated by law should be intensified to ensure the proper response to COVID-19 and the health conditions of detainees inside detention facilities.

SPECIAL RULES: TREATMENT OF JUVENILES AND WOMEN

Juveniles: Juveniles should only be deprived of their liberty in accordance with international human rights law including the principles set forth in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). According to article 37 of the Convention on the Rights of the Child, deprivation of the liberty of a juvenile should be a measure of last resort and for the shortest appropriate period of time and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

Persons with disabilities: Specific considerations should be given to persons with disabilities, including ensuring their access to proper health care and ensuring that they are placed in facilities appropriate for their conditions each as their case requires; any measure taken should be consistent with the obligations stipulated under the Convention on the Rights of Persons with Disabilities.

Women: Ensure that women deprived of liberty are treated in a manner that ensures that they are considered one of the vulnerable groups with special needs and requirements. In addition to the general rules, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) must be taken into account.

QUARANTINES

Quarantines may be imposed due to necessity, though such measures should be proportionate to the risk, time-bound, safe and legitimate under international human rights law and the Palestinian domestic law including the Public Health Law no. 20 (2004). The rights of those under quarantine must be protected, including rights to food and clean water, the right to be treated humanely, access to health care including a doctor to conduct check-ups and medical examinations, the right to be informed, right to freedom of expression, and the right to privacy including preserving personal belongings. Although quarantine is imposed for the public benefit, it remains a place of deprivation of liberty, and accordingly, it should not result in mistreatment of detainees and should take into consideration the cultural, religious and social values and beliefs of those quarantined. Additionally, quarantines should be suitable for persons with disabilities including those with hearing disabilities who would use sign language. It is also required to uphold all basic guarantees, including the right to receive information about their health status, and the notification of a third party, in addition to the right to obtain independent legal advice and referral to a doctor of his / her choice. Furthermore, adequate and appropriate measures must be established to prevent abuses related to ill-treatment, including discriminatory practices that may lead to stigmatization or marginalization of certain groups of people who have been subjected to compulsory quarantine, and which may include individuals and groups that are considered to be at risk or potential virus carriers. Quarantined persons have the right to file a complaint against any of the persons responsible, which requires follow up by the competent authority. In all cases, the Ministry of Health or any competent authority may not detain, investigate or exercise powers other than those granted to them by law, or exceed the objectives for which the quarantine was established.