
Detention and Pandemic Exceptionality

Carla Ferstman, Senior Lecturer, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_023]

Abstract

This essay considers the circumstances of persons deprived of their liberty in the context of Covid-19. Detention is always intended to be exceptional and the essay explores the extent to which the pandemic impacts upon this exceptional character. First, by increasing the unacceptability of detention, have the rules regarding what may constitute “arbitrary detention” changed? Secondly, for persons serving out prison sentences, to what extent should Covid-19 serve as a justification for early release or commutation of punishment? In this respect, should the goals of retribution and specific and general deterrence be weighed against the rights to health and safety of prisoners and prison staff, and if so, how? Do detaining authorities have absolute discretion to determine which detainees to release or must they ensure that policies of release also, are not arbitrary? To what extent does the arbitrary resort to detention as well as the arbitrary decision to maintain someone in detention during the pandemic, which may heighten certain individuals’ exposure to the disease and thereby produce extreme anxiety, give rise to cruel, inhuman or degrading treatment or punishment, if not torture?

The paper considers how governments, specialist agencies and courts are beginning to grapple with these legal, ethical and public health issues. On the one hand, recognition of the heightened health risks for detainees associated with the pandemic is proving to be an important opportunity to reduce reliance on detention – and thereby to make good on the intention for detention to be recognised as an exceptional measure. Yet on the other hand, as will be shown, the selectivity of approaches and lack of transparency and oversight of decision-making has put some detainees at even greater risk of harm.

I. Introduction: A Brief Roadmap

This essay starts by considering the various contexts of detention. It then reviews the concept of “arbitrariness” as applied to detention. It continues by considering the different ways in which the understanding of “arbitrariness” are impacted by Covid-19. It does so by considering a range of pandemic-related circumstances that can heighten the arbitrariness of detention. It also considers how Covid-19-inspired releases from detention, whether they are temporary releases or permanent commutations of sentences, may also contribute to arbitrariness.

ion. Indeed, the use of quarantines and protective detention have featured regularly in Covid-19 responses. Also, persons who ignore emergency regulations may be prosecuted, and in that context may be detained. The potential over-reach of emergency provisions, discriminatory impacts and/or the ways in which the restrictions put in place have been balanced with other rights, particularly for the most vulnerable in our societies, are all topics worthy of detailed consideration.¹ Notwithstanding their importance, these aspects are not the focus of this essay. The essay focuses on how responses to Covid-19 are impacting

¹ UN Working Group on Arbitrary Detention (WGAD), ‘Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies’, 8 May 2020.

persons who are already detained or at risk of detention for reasons unconnected to the pandemic.

II. Places of Confinement: Positive Obligations in a State of Hyper-Engagement

Places of confinement are particularly dangerous for the spread of infectious diseases. This is regardless of whether they are prisons, police stations, hospitals, drug rehabilitation centres, ships, residential care homes, transit zones, refugee and migrant detention or removal centres or closed refugee or displaced persons camps. It is also irrespective of whether the goals of the places of confinement are to care for or protect the inhabitants, to respond to emergencies or to serve as some form of rehabilitation or punishment. The dangers associated with places of confinement stem from the large number of persons forced to live in close proximity to one another and the inability to practice effective social distancing measures and hygiene best practise. Also, the heightened risks stem from the vulnerability of many individuals within some detainee populations on account of their underlying health statuses and/or their experience of different forms of marginalisation, taken together with often poor ventilation, challenging sanitation conditions, limited space and insufficient access to doctors and medical supplies. Consequently, detainees as well as those working in detention settings face a disproportionately high risk of infection as well as a higher mortality rate.

Given the lack of autonomy within detention settings, detainees are reliant on those responsible for their detention to address both proactively and reactively, their health, safety and related needs. This reliance exists at all times but is accentuated in the time of a pandemic given the special health risks. The reliance heightens detainees' vulnerability, which in turn means that any acts or omissions of the authorities are likely to have a greater impact on detainees' psychological well-being on account of the feelings of powerlessness they engender. Arguably, it also means that detaining authorities have a heightened or special duty of care to those they detain,² which because of the greater risks of infection and higher mortality rates associated with the pandemic in detention, goes beyond the general duty of care recognised in the *Mandela Rules* to provide to detainees (irrespective of citizenship, nationality or migration status) the same level of care inside detention as is available outside in the community.³ The special duty of care will be breached if detention conditions and the policies relating to detention do not take adequate account of the specific contexts of detention and the special risks posed by Covid-19, and tailor services and measures to adequately protect against the disease.

This heightened duty of care, or in human rights terms states' obligation to exercise due diligence, is one of means rather than result, however it is context-specific; it is focused on the reasonable steps detaining authorities must take in light of the specific and heightened risks posed by the pandemic in places of confinement, in terms of protective gear for staff; testing for detainees at the time of admission; ventilation and general air quality; hand sanitisers; and measures to improve physical distancing. Because of the nature and

² UN Human Rights Committee, General comment No. 36, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 6, 25. See also, *Rowson v Department of Justice and Community Safety* [2020] VSC 236, 1 May 2020, discussed in Human Rights Law Centre, 'Supreme Court rules Victorian Government prima facie breached duty of care to person in prison in their response to COVID-19 pandemic' 2 May 2020 (at <https://www.hrlc.org.au/>).

³ UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), GA Res'n 70/175, Principle 24(1).

seriousness of the risks and the vulnerability of detainees, states' positive obligations to protect detainees and staff operating in places of confinement extends beyond the right to liberty and security of the person, to the rights to life, freedom from torture and other cruel, inhuman and degrading treatment or punishment, health, to be treated with humanity and with respect for the inherent dignity of the human person, and an array of other rights. These rights are not simply engaged – the pandemic puts them in a state of “hyper-engagement” given the significant, special risks posed.

III. The Exceptional Nature of Detention

The right to liberty and security of the person is a fundamental principle of human rights law recognised by numerous international and regional treaties, case law and national constitutions.⁴ While there will be circumstances when detention is appropriate, it is always supposed to be exceptional; it cannot be “arbitrary”.

No detention that is arbitrary can ever be regarded as lawful;⁵ though the parameters of what might constitute “arbitrary” detention are not always clear. Detention tends to be arbitrary if it is ordered outside of any law, or if it involves an unfair or improper procedure,⁶ a degree of inappropriateness, injustice or unpredictability.⁷ Examples of arbitrary detention include: indefinite or unduly prolonged administrative detention; automatic pretrial or administrative detention without review; if there is no possibility to review the legality of the detention within a reasonable time from the detention and at regular periodic intervals thereafter; if it results from discrimination against a protected group or from an individual or group seeking to exercise freedom of expression or association.⁸

In order for a detention to be lawful, the detention must be on grounds and in accordance with a procedure prescribed by law.⁹ Potential examples, which would depend on the facts in any given case, include: if a person has been found guilty of a crime and sentenced to a term of imprisonment; to prevent the commission of a crime; when someone presents a risk of absconding from future legal proceedings or administrative processes or presents a danger to their own or public security. Other reasons may relate to the mental health of the person which may make it necessary to detain them for their own protection or protection of others.¹⁰

Beyond this, any decision to detain must be made on the basis of and in accordance with such procedures as are established by law, and the law itself must be appropriate, accessible, sufficiently precise, consistently applied and predictable.¹¹ Equally, the detention must be for a legitimate purpose and must be necessary and proportionate - there must be no lesser means available to achieve the objective justifying

⁴ Art 9 UDHR; Art 9 ICCPR; Art 5 ECHR; Art 6 Banjul Charter; Art 7 ACHR.

⁵ *Winterwerp v. The Netherlands* Appl No. 6301/73, 24 October 1979, para. 39.

⁶ *Ibid*, para. 45. See also, *Kemmache v. France* (No. 3), Appl No. 17621/91, 24 November 1994, para. 37.

⁷ *Mukong v. Cameroon*, Case No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, 21 July 1994, para. 9.8.

See also, *Gangaram Panday v. Suriname* (Merits, reparations, and costs), Series C No. 16, 21 January 1994, para. 47.

⁸ WGAD, ‘Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law’, UN Doc. A/HRC/22/44, 24 December 2012.

⁹ Art 9(1) ICCPR.

¹⁰ Art 5(1) ECHR.

¹¹ *Mukong v. Cameroon* (n. 7), para. 9.8; *Khlaifia and Others v. Italy* (Grand Chamber), Appl. No. 16483/12, 15 December 2016, para. 92. See also, WGAD, Deliberation No. 11 (n. 1), para. 10.

detention.¹² Furthermore, detention must be of a limited duration and must be applied in a non-discriminatory manner.

Inadequate conditions of detention may make detention arbitrary. This is because the conditions can impede detainees from exercising crucial rights. The UN Working Group on Arbitrary Detention (WGAD) has explained that pre-trial detainees who endure detention conditions that affect health, safety or well-being, or who have none or insufficient access to counsel or others, will participate in criminal proceedings in less favourable conditions than the prosecution, impairing the prospect for a fair trial. Sometimes, conditions will be so poor so as 'to create an incentive for self-incrimination, or - even worse - to make pre-trial detention a form of advance punishment in violation of the presumption of innocence.'¹³

IV. Does Covid-19 Impact on Exceptionality in Detention?

a) Covid-19 and conditions of detention

It has been recognised that detainees must be held in conditions that are compatible with respect for their human dignity, that they are not subjected to distress or hardship that goes beyond the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.¹⁴ At times, conditions of detention will be so deficient that they will cause severe pain or suffering that may rise to the level of cruel, inhuman or degrading treatment or punishment, if not torture. Severe overcrowding can amount to prohibited ill-treatment¹⁵ on account of the distress or hardship it engenders, for example by being 'obliged to live, sleep and use the toilet in the same cell with so little personal space'.¹⁶ It is not difficult to extend this logic to detainees who fear the spread of Covid-19 because of inadequate sanitation, poor ventilation, lack of protective gear for staff entering and exiting facilities and inadequate testing and medical care.

Detention authorities have taken measures to reduce the risk of Covid-19 spreading. Some measures have to do with releases, discussed in the next section (b). Other measures have to do with improving sanitation, increasing social distancing within detention facilities (through solitary cell confinement; reducing exercise and other mingling between detainees) and prohibiting or severely restricting access to outside visits. There is a question whether these measures are sufficient or appropriate in the circumstances in light of authorities' heightened due diligence obligations. There is also a question whether the measures taken may increase the risk of arbitrariness. This is because of the arbitrary way in which decisions tend to be taken. For example, the lack of transparency with respect to who may be temporarily released as a social distancing measure and who may be subjected to new/additional restrictions on movement within places of confinement; as well as the failure for detaining authorities to consider adequately the impact on particularly vulnerable detainees of the removal of privileges (which tend to increase isolation within detention settings as well as vulnerability).

¹² *Saadi v. the United Kingdom* (Grand Chamber), Appl. No. 13229/03, 29 January 2008, paras. 68-74.

¹³ WGAD, 'Report of the Working Group on Arbitrary Detention', UN Doc. E/CN.4/2005/6 1 December 2004, paras. 69, 70.

¹⁴ *Ramirez Sanchez v. France* (Grand Chamber), Appl. No. 59450/00, 4 July 2006, para. 119.

¹⁵ *Kalashnikov v. Russia*, Appl. No. 47095/99, 15 July 2002, paras. 96-97.

¹⁶ *Khudoyorov v. Russia*, Appl. No. 6847/02, 8 November 2005, para 107.

Detainees must receive appropriate medical treatment, and where needed, psychological counselling. Detaining authorities have a positive obligation to prevent the spread of contagious disease, and must introduce appropriate measures, such as screening detainees upon admission and prompt and effective treatment programmes.¹⁷ The European Court of Human Rights has recognised that the failure to diagnose and provide adequate medical care to detainees can amount to ill-treatment;¹⁸ lack of treatment resulting in death also violates the right to life.¹⁹ In *Gladkiy v. Russia*, it determined that, 'for lack of adequate medical treatment, the applicant was exposed to prolonged mental and physical suffering diminishing his human dignity.'²⁰

In an effort to increase social distancing, many institutions have severely restricted or even eliminated outside visits, including from families and lawyers. Similarly, independent detention monitoring and oversight bodies which are crucial to help stop abuse and inadequate prison conditions, have been placed on hold, increasing detainee vulnerability, isolation, fears and anxieties. Reportedly, one woman at HMP Downview prison in Surrey, United Kingdom, has alerted the United Nations to a breach of her human rights, because she has been locked in her cell for 23 hours a day - measure taken by the facility to reduce the likelihood of spread of the disease.²¹ It is important as some policy bodies have recognised, that any limitations '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.'²² The WGAD has recognised that the 'introduction of blanket measures restricting access to courts and legal counsel cannot be justified and could render the deprivation of liberty arbitrary.'²³ It determined that '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.'²⁴

b) Covid-19 and Justifications for Early Release

The rules to determine whether a particular detention is arbitrary have not changed because of the pandemic. It is still necessary to consider whether the detention was subject to law, whether the law itself was just and appropriate, and whether the detention was necessary and proportionate to fulfil a legitimate purpose. However, the factors to take into account when determining whether detention was necessary and proportionate have certainly changed and the pandemic may change the outcome of such considerations.

¹⁷ *Poghosyan v. Georgia*, Appl. No. 9870/07, 24 February 2009, para. 69, 70.

¹⁸ *Khudobin v. Russia*, Applic. No. 59696/00, 26 October 2006, paras 94 – 96. See also, *Asyukov v. Russia*, Applic. No. 2974/05, 5 April 2011, para. 76.

¹⁹ *Salakhov and Islyamova v. Ukraine*, Applic. No. 28005/08, 14 March 2013.

²⁰ *Gladkiy v. Russia*, Applic. No. 3242/03, 21 December 2010, para. 96.

²¹ See, Lara Keay, 'Coronavirus: Woman in Surrey Jail Petitions UN over "Horror" Lockdown Treatment', *Sky News*, 11 June 2020.

²² OMCT, 'Building Our Response on COVID-19 and Detention: OMCT Guidance brief to the SOS-Torture Network and partner organizations', April 2020.

²³ WGAD, Deliberation No. 11 (n. 1), para. 21.

²⁴ *Ibid.* See also, Inter-Agency Standing Committee (IASC) of OHCHR and WHO, 'Interim Guidance COVID-19: Focus on Persons Deprived of Their Liberty', March 2020; Fair Trials, 'The Public Health Need to Keep People out of Detention Practical Guidance', March 2020.

Certain detentions which would otherwise satisfy necessity and proportionality requirements may no longer do so, given the disproportionately high risk of infection in detention and higher mortality rate. Consequently, it is necessary to assess whether, in light of the change in circumstances occasioned by the pandemic, continued detention is still justified in each detained case or class of cases.²⁵ The failure to do so increases the arbitrariness of detention by failing to allow individuals' changed circumstances to be considered as part of a review of the legality of their detention.

Proportionality and necessity requirements may have changed as a result of Covid-19. First, proportionality requires some comparison between the detention and the purpose it is intended to achieve. Purposes will differ depending on the type of detention. The purpose of pre-trial detention is to ensure defendants appear at trial and the safety of accused and/or the public whereas the purpose of sentencing is to ensure the various crime control punishment rationales (e.g., specific and general deterrence; retribution; rehabilitation). In other settings, purposes include to ensure physical or psychological care and protection in hospital and care settings; to ensure attendance at future legal proceedings or administrative processes for migrant and refugee processing or removal centres. These various purposes may change over time,²⁶ and sometimes, Covid-19 may render the purposes no longer justifiable. For instance, it may not be justifiable to detain a failed asylum seeker to await deportation, when deportation to the country of origin is not an option because that country is not expecting to accept entrants within a reasonable time, because of Covid-19.²⁷ But also, the costs associated with detention are augmented by Covid-19, arguably shifting the balance. As an example, pre-trial detention may be harder to justify if trials in a particular country have been put on hold because of the pandemic. As explained by the Howard League for Penal Reform, in the UK, 'remand and sentenced prisoners alike are being held in conditions amounting to solitary confinement, for extended periods as they await trials that have invariably been delayed. Nothing has been done to address this, for adults or children in the system.'²⁸

Secondly, necessity is focussed on whether there are realistic alternatives to detention. Here, the negatives associated with detention during Covid-19 are augmented, but the alternatives to detention will also have been affected; due to lockdowns, there may be fewer available half-way houses or less temporary accommodation; community programmes to help integrate released detainees may not be operational and parole systems may be dysfunctional.²⁹ As OMCT highlights, '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.'³⁰

Releases, whether permanent or temporary, help underscore that detention should be exceptional, and particularly so in the context of a pandemic. Releases encourage detaining authorities and policymakers to consider alternatives to detention. These could

²⁵ 'Challenging immigration detention in the COVID-19 pandemic', Landmark Chambers, 15 April 2020.

²⁶ *Murray v. the Netherlands* (Grand Chamber), Appl. No. 10511/10, 26 April 2016, para. 100.

²⁷ *Ibid.* See also, *R v Governor of Durham Prison ex parte Hardial Singh*[1984] 1 WLR 704.

²⁸ Howard League for Penal Reform, 'Justice and fairness under Covid-19 restrictions', May 2020.

²⁹ *Ibid.*

³⁰ OMCT (n. 22).

be applied to short-term pandemic needs, but might in the longer term be incorporated as standard alternatives to detention.

Nevertheless, release is another area where an absence of clear rules transparently implemented may result in arbitrariness, particularly if there is no clear procedure for detainees to petition to have their cases considered. The jurisprudence on the reducibility of life sentences is relevant, where the European Court of Human Rights has found a violation of Article 3 when legislation on clemency did not require the President ‘to assess whether continued imprisonment is justified on legitimate penological grounds.’ Nor did it ‘set a time-frame in which the President must decide on the clemency application or to oblige him or the Minister of Justice ... to give reasons for the decision....’³¹ Covid-19 releases which are undertaken without transparency or without a clear framework can also result in those who remain in detention feeling as if they are being doubly punished.

Many oversight bodies have recommended who should be prioritised for release.³² The recommendations tend to focus on factors connected, first, to the rationale for the detention (e.g., persons unlawfully or arbitrarily detained should be released, as should the bulk of pre-trial detainees; persons held for non-penal reasons such as immigration detainees).³³ Regarding migrants, the WGAD noted that ‘detention is only permissible as an exceptional measure of last resort, which is a particularly high threshold to be satisfied in the context of a pandemic or other public health emergency.’³⁴ However, some of the major refugee receiving countries have been slow to implement releases, with dangerous consequences. Arguably migrants are the equivalent in terms of the derision they receive to the human rights defenders and protest movements operating in the most repressive regimes. At the time of writing, the USA’s ICE programme had refused to proceed with releases of vulnerable migrants detained in its wide network of immigration detention centres.³⁵

Other factors taken into account include whether persons pose a danger to society (prisoners serving short prison sentences for non-violent crimes; prisoners who are almost at the end of their prison term).³⁶ States have begun to take on board some of these recommendations, leading to an important number of temporary and permanent releases in many countries. However, there are some important gaps. Many countries that routinely resort to arbitrary detention, particularly against protest movements, opposition groups, human rights defenders and journalists, have failed to proceed with their releases. At times, this is because the individuals concerned have been charged and at times convicted of security-related offences, which have been classified as some of the most serious offences not subject to full or conditional release.³⁷ At other times, it is because the state has introduced arbitrariness into the release process, picking and choosing who should benefit from this solution. For instance, it has been reported that in the context of the pandemic, Turkey introduced legislation to secure the release of up to 100,000 prisoners,

³¹ *T.P. and A.T. v. Hungary*, Apps. 37871/14, 73986/14, 4 October 2016, para. 49. See also, *Matiošaitis and others v. Lithuania*, Apps. No. 22662/13, 51059/13, 58823/13, 23 May 2017, 157-181.

³² UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, ‘COVID-19 and Protection of right to life in places of detention’, COVID-19 Human Rights Dispatch No. 2, 5 May 2020.

³³ IASC (n. 24); see also, WGAD, Deliberation No. 11 (n. 1).

³⁴ WGAD, Deliberation No. 11 (n. 1), para. 23.

³⁵ Sam Levin, ‘He lived in the US for 40 years. Then he became the first to die from Covid-19 in immigration jail’, *The Guardian*, 12 May 2020.

³⁶ See, e.g., the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its COVID-19 Statement of Principles; IASC (n. 24).

³⁷ OMCT (n. 22).

but detained journalists and human rights activists are not included.³⁸ Similarly, Israel has announced the release of thousands of Israeli prisoners, including serious offenders. However, reportedly, it has failed to release Palestinian prisoners, even the minors, women, the elderly and infirm.³⁹ In Egypt, thousands of prisoners have been pardoned but reportedly, none of those pardoned are “political” prisoners.⁴⁰ For those forced to remain in detention it is a double punishment; arbitrarily detained and now condemned to anxiously await infection.

Also, there is an emphasis on different forms of vulnerability, which focuses on categories such as persons over a certain age, pregnant women and women who are breastfeeding, persons with underlying health conditions, and persons with disabilities, as well as children and women with children.⁴¹ Who is considered vulnerable, and relative levels of vulnerability, particularly if connected to disease susceptibility, is highly contested as the disease is not yet fully understood. Also, assessments of vulnerability can ignore or undervalue complex, intersecting vulnerabilities. Invariably, considerations of who should be released on account of their vulnerability will involve both ethics and science, and also some consideration of human rights. It is important that decisions to release are taken on clear and transparent grounds that are non-discriminatory.

In respect of persons serving out sentences of imprisonment for crimes committed, to what extent should Covid-19 serve as a justification for early release or commutation of sentence? In this respect, should the goals of retribution and specific and general deterrence be weighed against the right to health and safety of prisoners and prison staff, and, if so, how? A number of elderly and potentially frail convicted war criminals have been temporarily released from detention, on vulnerability considerations. Penological considerations such as retribution or rehabilitation have not been major considerations for the release, particularly as they are intended to be temporary releases. These include Hissène Habré, who was sentenced to life imprisonment by the Extraordinary African Chambers seated in Senegal, for the torture and crimes against humanity he directly perpetrated and oversaw in Chad, has been given a two month leave from prison (to house arrest) as a consequence of the Covid-19 risks.⁴² Victims of Habré’s crimes have expressed deep concern, given the failure to progress their reparations awards; all the concern over Habré’s health leaves them cold.⁴³ Many convicted war criminals have been seeking release around the world.⁴⁴ The human rights community has struggled with its

³⁸ Emma Sinclair-Webb, ‘Turkey Should Protect All Prisoners from Pandemic’, HRW, 23 March 2020. Beyond Turkey, Human Rights Watch has reported that key human rights defenders remain in detention despite national release programmes making progress with other detainee groups in Bahrain, Egypt, Iran, Kyrgyzstan, Myanmar, Cambodia, Cameroon, Libya, South Sudan, Syria, Yemen and China. See, HRW, ‘COVID-19: A Human Rights Checklist’, 23 April 2020.

³⁹ Raji Sourani, ‘COVID-19 and Human Rights – 2013 Laureate Raji Sourani: “Governments must put human rights and dignity at the centre”’, The Right Livelihood Foundation, 8 May 2020.

⁴⁰ ‘No political prisoners freed as Egypt pardons thousands on Eid: President el-Sisi grants clemency to 3,157 people, including ex-policeman jailed for murder of singer Suzanne Tamim’, *Al Jazeera*, 24 May 2020.

⁴¹ E.g., WGAD, Deliberation No. 11 (n. 1), para. 15, 16; See also IASC (n. 24).

⁴² ‘Chad: Ex-president temporarily released from jail due to COVID-19’, *Aljazeera*, 7 April 2020.

⁴³ Ephrem Rugiririza, ‘COVID-19: Should we Release Vulnerable Convicts?’, *Justiceinfo.Net*, 16 April 2020.

⁴⁴ See, e.g., Jo-Marie Burt, ‘In Guatemala, COVID-19 Puts Justice on Hold, Emboldening Convicted War Criminals to Seek Their Freedom’, *International Justice Monitor*, 17 April 2020. See also, ‘ADC-ICT Urges President of the UN International Residual Mechanism for Criminal Tribunals to Urgently Grant Early or Provisional Release to Detainees in Light of the COVID-19 Pandemic’, 27 March 2020.

response to such releases. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has issued guidance on this issue, noting that ‘the legitimate and necessary measures to protect against Covid-19 and overcrowding should not lead, *de jure or de facto*, to impunity for persons convicted in various parts of the world for serious violations of human rights, crimes against humanity, genocide, or war crimes.’ He has underscored that temporary house arrest should only be afforded if it is impossible to relocate such prisoner to a prison facility with safe and healthy conditions.⁴⁵ OMCT has taken a more direct line, recommending to the organizations in its network that ‘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.’⁴⁶ But this presents an arbitrary exception to the application of vulnerability criteria, which cannot be right.

IV. Conclusions: An Increase or Reduction in Arbitrariness?

We know that there is a prohibition of arbitrary detention. However, as has been described, Covid-19 can accentuate the arbitrariness of detention in several important ways. First, detention may no longer satisfy the tests of proportionality and necessity. Second, inadequate prison conditions, including poor health and sanitation as well as distancing measures which isolate detainees for their own health and safety, but fail to provide reasonable accommodation, can also make the detention arbitrary given the impact such conditions have on the ability of detainees to exercise their rights. Detention in the context of Covid-19 can also heighten the arbitrariness associated with a number of other human rights violations.⁴⁷

Also, arbitrariness can enter into decisions to release detainees as part of distancing measures. Lack of clarity, fairness and transparency in decisions to release contributes to arbitrariness and increases the stress and anxiety of detainees and their families, which constitutes a double punishment which they do not deserve, this time cruel, inhuman or degrading treatment.

⁴⁵ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings (n. 32).

⁴⁶ OMCT (n. 22), p. 5.

⁴⁷ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings (n. 32).