

Lawyers' Rights Watch Canada

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Prisoners' Right to Medical Treatment International Law Provisions

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Prisoners have a right to receive medical treatment. By arresting and detaining a person, a State takes full responsibility at international law for providing health care to ensure their lives and wellbeing.¹ While prisoners generally do not have a right to choose a specific medical treatment,² international human rights law requires State authorities to provide the most appropriate treatment in accordance with professional medical standards.

I. The United Nations Human Rights System: *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) does not expressly provide for a right to health care. However, the United Nations (UN) Human Rights Committee's (HR Committee) position³ is that adequate or appropriate and timely medical care must be provided to all detainees as part of state duties to ensure the enjoyment by all persons of the following rights:

- Article 6 on the right to life:

1 Lines, Rick, "The right to health of prisoners in international human rights law," *International Journal of Prisoner Health*, March 2008; 4(1): 3_53, available at http://www.ahrn.net/library_upload/uploadfile/file3102.pdf, citing *Lantsova v. Russian Federation* (26 March 2002) UN Doc CCPR/C/74/763/1997 para 9.2.

2 Van Kempen, Piet Hein, Positive Obligations to Ensure the Human Rights of Prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR and the AfChHPR (2008), at http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/Stavern/05_Stavern_Contribution%20Van%20Kempen.pdf.

3 See the following cases: Human Rights Committee 'Concluding Observations: Georgia' (2002) UN Doc A/57/40 vol I 53 para 78(7); *Pinto v. Trinidad and Tobago* (Communication No. 232/1987) Report of the Human Rights Committee vol 2 UN Doc A/45/40 p. 69 para 12.7; *Kelly v. Jamaica* (2 April 1991) UN Doc CCPR/C/41/D/253/1987 para 5.7; Human Rights Committee 'Concluding Observations: Portugal' (2003) UN Doc A/58/40 vol I 56 para 83(11); Human Rights Committee 'Concluding Observations: Cambodia' (1999) UN Doc A/54/40 vol I 57 para 306; Human Rights Committee 'Concluding Observations: Congo' (2000) UN Doc A/55/40 vol I 43 para 282; Human Rights Committee 'Concluding Observations: Mongolia' (2000) UN Doc A/55/40 vol I 49 para 332; Human Rights Committee 'Concluding Observations: Syrian Arab Republic' (2001) UN Doc A/56/40 vol I 70 para 81(13).

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. [Art. 6(1)]

- Article 7 on the prohibition on torture or cruel, inhuman or degrading treatment and punishment:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. [Art. 7(1)]

- Article 10 on the right to human treatment of prisoners:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [Art. 10(1)]

In its jurisprudence, the United Nations Human Rights Committee (HR Committee) often also points to the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which were adopted unanimously by the UN General Assembly in 2015,⁴ to reinforce the obligation of States to provide medical care and treatment for sick prisoners.⁵ The following Rules draw attention to the duty to provide prisoners with medical assessment, care and treatment:

- Rule 24:

- 1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.*
- 2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.*

- Rule 25:

- 1. Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with*

⁴ General Assembly Resolution 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175 (17 December 2015).

⁵ See, for example, Human Rights Committee, Communication No. 2146/2012: Human Rights Committee: Views Adopted by the Committee under article 5(4) of the Optional Protocol, 12 May 2017, CCPR/C/119/D/2146/2012, para 8.7, available at <http://juris.ohchr.org/Search/Details261>

health issues that hamper their rehabilitation.

2. *The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry. The services of a qualified dentist shall be available to every prisoner.*

- Rule 26:

1. *The health-care service shall prepare and maintain accurate, up-to-date and confidential individual medical files on all prisoners, and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file.*

2. *Medical files shall be transferred to the health-care service of the receiving institution upon transfer of a prisoner and shall be subject to medical confidentiality.*

- Rule 27:

1. *All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.*

2. *Clinical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff.*

...

- Rule 30:

A physician or other qualified health-care professionals, whether or not they are required to report to the physician, shall see, talk with and examine every prisoner as soon as possible following his or her admission and thereafter as necessary. Particular attention shall be paid to:

- a) Identifying health-care needs and taking all necessary measures for treatment;*
- b) Identifying any ill-treatment that arriving prisoners may have been subjected to prior to admission;*
- c) Identifying any signs of psychological or other stress brought on by the fact of imprisonment, including, but not limited to, the risk of suicide or self-harm and withdrawal symptoms resulting from the use of drugs, medication or alcohol; and undertaking all appropriate individualized measures or treatment;*
- d) In cases where prisoners are suspected of having contagious diseases, providing*

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- for the clinical isolation and adequate treatment of those prisoners during the infectious period;*
- e) *Determining the fitness of prisoners to work, to exercise and to participate in other activities, as appropriate.*

- Rule 31:

The physician or, where applicable, other qualified health-care professionals shall have daily access to all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed. All medical examinations shall be undertaken in full confidentiality.

The HR Committee has stated that “the State party by arresting and detaining individuals takes the responsibility to care for their life.”⁶ Further, the State has a duty to be proactive in providing adequate medical care. The HR Committee has stated that it is “incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection.”⁷

This does not necessarily mean that prisoners are free to choose a particular treatment. Authorities are only compelled to provide for the most appropriate treatment in accordance with professional medical standards. In *Fabrikant v. Canada*,⁸ a prisoner wanted to be transferred from Quebec to British Columbia for an angiography. The prisoner said he had a doctor in British Columbia who was willing to perform the surgery. The State argued that the prisoner had been evaluated by twelve Canadian heart specialists who concluded that angioplasty was not appropriate in his case and that he should be treated with a bypass or with medication. The State argued that the ICCPR should not be interpreted as guaranteeing the prisoner the medical treatment of his choice. The prisoner was ultimately transferred to British Columbia and received an angioplasty with the doctor of his choice. The HR Committee affirmed that the State “remains responsible for the life and well-being of its detainees,”⁹ but did not decide the issue; the prisoner’s communication was ruled inadmissible because he did not provide information as to how authorities failed to determine the most appropriate treatment in accordance with professional medical standards.

II. The Inter-American Human Rights System: American Convention on Human Rights

The American Convention on Human Rights (ACHR) provides the broadest right to healthcare for prisoners. Article 4 provides the right to life:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. [Art. 4(1)]

6 Lantsova v. Russian Federation (26 March 2002) UN Doc CCPR/C/74/763/1997 para 9.2.

7 Lantsova v. Russian Federation (note 129) para 9.2.

8 *Fabrikant v. Canada*, Communication No. 970/2001, U.N. Doc. CCPR/C/79/D/790/2001 (2003), at <http://www1.umn.edu/humanrts/undocs/970-2001.html>

9 *Fabrikant v. Canada* (6 November 2003) UN Doc CCPR/C/79/D/970/2001) para 9.3.

Article 5 provides the right to humane treatment for prisoners:

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. [Art. 5(2)]

Article 5 has been interpreted to include an implied duty on States to provide detainees with regular medical care and adequate treatment. Professor Van Kempen wrote that authorities must facilitate and allow medical assistance to detainees by a physician of their choice but that this does not mean that all of the detainee's wishes have to be satisfied.¹⁰

In *Vera Vera v. Ecuador*¹¹, the accused had sustained a gunshot to his chest during his arrest. He was not taken immediately to hospital after his arrest and later died of his injuries. The Inter-American Court of Human Rights (IACtHR) reiterated that the State has a negative obligation to respect Article 4 of the ACHR (right to life) and a positive obligation to take the appropriate measures to ensure them in fulfilling its general obligation established in Article 1(1). Since the State is the institution responsible for detention establishments, it is the guarantor of the rights of those under its custody. This implies the State's duty to guarantee the health and welfare of inmates by providing them, among other things, with required medical care, and it must also ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention. The States cannot invoke economic hardships to justify imprisonment conditions that do not comply with minimum international standards and respect the inherent dignity of the human being. The IACtHR held that the State had violated the prisoner's right to life under Article 4 and right to humane treatment under Article 5.

In its submission to the Open-Ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, the Inter-American Commission on Human Rights reaffirmed the obligation of States to provide adequate medical care for persons deprived of their liberty as follows:

As has been already established, persons deprived of their liberty are in a position of subordination vis-à-vis the State, meaning they are dependent in law and in fact for all of their needs. By depriving a person of liberty, the State acquires a special level of responsibility and becomes the guarantor of the person's fundamental rights, including his or her rights to life and humane treatment. Thus, it owes a duty to protect the health of prisoners by providing them, among other things, the required medical care.

Adequate medical care is a minimum and indispensable material requirement for the State to be able to ensure the humane treatment of prisoners in its custody. Loss of liberty should never mean loss of the right to health. Incarceration may not be allowed to compound the deprivation of liberty with illness and physical and mental distress.

10 Van Kempen, supra note 1.

11 *Vera v. Ecuador*, [2011] IACtHR at http://www.corteidh.or.cr/docs/casos/articulos/seriec_226_ing.pdf

As the Inter-American Court has indicated, this duty of the State “does not imply the existence of a duty to satisfy all wishes and preferences of a person deprived of liberty regarding medical assistance, but only those real needs consistent with the actual circumstances and condition of the detainee.” Therefore, “lack of adequate medical assistance could be considered per se a violation of Articles 5(1) and 5(2) of the Convention, depending on the specific circumstances of the person, the type of disease or ailment, and the time spent without medical attention and its cumulative effects.”¹²

III. The European Human Rights System: *European Convention on Human Rights*

The European Convention on Human Rights (ECHR) does not expressly provide a right to healthcare. Article 2 on the right to life and Article 3 on the prohibition of inhuman treatment provide a duty on the State to provide adequate medical assistance. There is no general obligation for authorities to release a detainee on health grounds or place him in a civil hospital to obtain a specific treatment. Prisoners do not have a right to choose a particular medical treatment under the ECHR. States are allowed to transfer a prisoner to another facility in order to provide the necessary treatment.

In *Salakhov and Islyamova v. Ukraine*¹³, the European Court of Human Rights (ECtHR) held there was a violation to the right to life in a case where a prisoner was refused medical treatment which led to his death. Mr. Salakhov was HIV positive. His health in prison began to deteriorate. He suffered from a constant fever, weight loss and other symptoms. The authorities downplayed his complaints. He was handcuffed to his hospital bed throughout his hospitalization. He was released from prison and died two weeks later. The ECtHR held that the prohibition on torture and cruel, inhuman and degrading treatment imposes an obligation on the State to ensure that the health of a prisoner is adequately secured. The ECtHR found that the failure by the detention centre and hospital to provide Mr. Salakhov with adequate medical care violated his rights. The ECtHR also found that handcuffing Mr. Salakhov during his hospitalization, despite his critical state of health and the fact that he had never behaved violently, also constituted a violation of the ECHR prohibition on cruel, inhuman and degrading treatment. The ECtHR restated its right-to-life case law that a positive obligation of the State arises when it has been established that “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court found there was a violation to the right to life in this case.

In *Gulay Cetin v. Turkey*¹⁴, the applicant was a prisoner who was diagnosed after imprisonment

12 Inter-American Commission on Human Rights, Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (2013), page 12 at https://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/IEGM_Vienna_25-28-March-2014/IACHR-E-VMTG.pdf.

13 *Salakhov and Islyamova v. Ukraine*, [2013] ECHR, Application No. 28005/08, at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117134#{"itemid":\["001-117134"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117134#{)

14 *Gulay Cetin v. Turkey*, [2013] ECHR, Application No. 44084/10 at <http://sim.law.uu.nl/SIM/CaseLaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/164d4d9faea32579c1257b21002e>

with metastatic gastric cancer. An oncologist's assessment found her condition was life-threatening and recommended transferring her to a more suitable facility. The authorities refused to move her. The prisoner was unable to carry out everyday activities without assistance. The prisoner's sister was allowed to stay with her in the prison ward to provide her with constant care. The prisoner deteriorated and died when she was transferred to an intensive care unit. The applicant relied on Article 2 (right to life) and alleged that the prison doctor has been responsible for the fatal progression of her cancer. Unfortunately, the ECtHR dismissed this complaint for failure to exhaust domestic remedies as the applicant had not applied to the Turkish administrative courts for a ruling on whether her condition might have been caused by medical negligence. The ECtHR did conclude that her detention amounted to inhuman and degrading treatment in breach of Article 3. Authorities decided to keep her in detention despite the fact that her health had been continually deteriorating. The authorities' actions prevented the application from dying in dignity with her family.

In its growing jurisprudence in this area, the ECtHR has further held that the following State actions violate Article 3:

- failure to transfer prisoners to a civilian hospital for treatment when prison equipment and specialists are lacking¹⁵;
- failure to provide meals compatible with the prescribed diet for a patient with type 2 diabetes and coronary artery disease¹⁶;
- failure to provide adequate psychiatric treatment to prisoners with mental illnesses¹⁷;
- failure to convert a prisoner's sentence to house arrest where his advanced age and state of health are incompatible with the prison regime¹⁸;
- failure to provide physical rehabilitation treatment or to adapt the prison premises to accommodate a prisoner's severe disability¹⁹; and,
- failure to protect a prisoner with chronic pulmonary disease from the harmful effects of passive smoking (e.g. detention in a cell with smokers)²⁰.

IV. The African Human Rights System: *African Charter on Human and Peoples' Rights*

Article 16 of the African Charter on Human and Peoples' Rights (ACHPR) enshrines the right to enjoy the best attainable state of physical and mental health. It also recognizes the obligation of States to protect the health of their people and to ensure that they receive medical attention when they are sick. The African Commission on Human and Peoples' Rights (the "Commission") has noted that this obligation is "heightened" in cases where an individual is in State custody, as the

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15 *Mozer v. the Republic of Moldova and Russia*, [2016] ECHR, Application No. 11138/10 at

<http://hudoc.echr.coe.int/eng?i=001-161055>

16 *Ebedin Abi v. Turkey*, [2018] ECHR, Application No. 10839/09 at <http://hudoc.echr.coe.int/eng?i=001-181721>

17 *Raffray Taddei v. France*, [2010] ECHR, Application No. 36435/07 at <http://hudoc.echr.coe.int/eng?i=001-102439>

18 *Contrada (no. 2) v. Italy*, [2014] ECHR, Application No. 7509/08 at <http://hudoc.echr.coe.int/eng?i=001-140772>

19 *Helhal v. France*, [2015] ECHR, Application No. 10401/12 at <http://hudoc.echr.coe.int/fre?i=001-152257>

20 *Elefteriadis v. Romania*, [2011] ECHR, Application No. 38427/05 at <http://hudoc.echr.coe.int/eng?i=001-103007>

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person's integrity and well-being is completely dependent upon the actions of the authorities.²¹

In *Malawi African Association and Others v. Mauritania*²², the government of Mauritania was accused of committing numerous human rights violations against its citizens between 1986 and 1992. These allegations included claims about the conditions of detention of political and other prisoners. Several prisoners had died due to deprivation of food and medical attention. The Commission reaffirmed that the State was directly responsible for the health and welfare of detainees and found that the Mauritanian government had violated Article 16 of the ACHPR.

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21 *International Pen and Others. on Behalf of Saro Wiwa v. Nigeria*, AHRLR 212 (ACHPR 1998); Communications 137/94, 139/94, 154/96 and 161/97

22 *Malawi African Association and Others v. Mauritania*, (2000) AHRLR 149 (ACHPR 2000); Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98