

Observations to the Inter-American Court of Human Rights on the request for an advisory opinion submitted by the IACHR

Differentiated Approaches to Persons Deprived of Liberty



association pour la prévention de la torture
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I. Introduction

1. In accordance with Article 73.3 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), the signatory institutions present for the consideration of the Court the following joint observations in relation to the request for an advisory opinion submitted by the Inter-American Commission on Human Rights (IACHR) to the Court on "Differentiated Approaches to Persons Deprived of Liberty".

2. We consider that the IACHR request represents a very important opportunity for the Inter-American Court to establish criteria that will allow progress in the effective protection of the human rights of persons in situations of special vulnerability in the context of deprivation of liberty, both in the Americas and in other regions of the world.

3. Our observations aim to make a contribution from the analysis of law and practice on the protection of the rights of LGBTI persons¹ deprived of their liberty. This document is focused on the specific situation of this group, based on the work carried out by the signatory institutions in this area.

4. The APT has been working for several years on issues related to LGBTI persons in detention, making visible the specific situation and risks faced by these persons when deprived of their liberty, advocating for greater protection of LGBTI persons and carrying out capacity building activities. The National and Local Preventive Mechanisms (NPMs and LPMs) established under the Optional Protocol to the UN Convention against Torture (OPCAT) play a key role in contributing to ensure the protection of LGBTI persons in detention.

5. In the area of deprivation of liberty, specific regional and international instruments such as the *IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* and the revised *UN Standard Minimum Rules for the Treatment of Prisoners* (known as the "*Nelson Mandela Rules*"), emphasize the principle of non-discrimination of persons deprived of liberty on different grounds, including sex, gender, ethnic origin, age and sexual orientation. In addition, there are well established obligations under international human rights law to protect LGBTI people². However,

¹ Throughout the document, the acronym LGBTI is used when referring to lesbian, gay, bisexual, trans and intersex persons. In some sections, the acronym LGBT or LGBTQ is used depending on the sources of information cited. In addition, the categories of gender identity, gender expression, sexual orientation, and the reference to intersex persons in some sections, are used in order to consider people who do not relate to the above acronyms.

² IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OAS/Ser/L/V/II.131, Document approved by the Commission at its 131st regular session held from 3 to 14 March 2008, Principle II "Equality and non-discrimination"; UN *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, E/CN.15/2015/L.6/Rev.1, 21 May 2015, Rule 2.

we identify that there are no specific international or regional standards on detention that address in particular the needs of LGBTI people deprived of their liberty (as is the case for other groups in situations of vulnerability in detention, such as women or children³). We therefore consider that an advisory opinion from the Inter-American Court that includes considerations related to sexual orientation and gender identity in the context of deprivation of liberty would represent a significant advance in the development of specific standards on the protection of LGBTI persons deprived of liberty both in the Americas and globally.

6. This document consists of four main sections. The first section includes some preliminary considerations related to the human rights of LGBTI persons, which are closely linked to the protection of this group in the context of deprivation of liberty, with the aim of providing the Court with additional elements of analysis when presenting its advisory opinion. In the second and third sections, we address the questions raised in the request for an advisory opinion on LGBTI persons as well as some additional issues that we deem relevant, analysing risk factors, standards and practice, and making recommendations on the matter. The last section includes some specific considerations regarding the prevention of torture and other ill-treatment against LGBTI persons in detention.

II. Preliminary considerations

7. LGBTI persons have historically been subject to discrimination and abuse as well as institutional violence. Discriminatory patterns based on sexual orientation, gender identity or diverse sexual characteristics are deeply entrenched in society and are exacerbated in contexts of deprivation of liberty⁴.

8. While this document refers to detention in the prison context, according to the scope of the request made by the IACHR, it should be noted that LGBTI persons are subject to discrimination, abuse, violence and even torture throughout the different stages of detention, including from the moment of arrest. In Peru, for example, the National Preventive Mechanism has reported the ill-treatment suffered by LGBTI persons during the COVID-19 pandemic. Cases were reported of trans women who had problems with

³ See in particular the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* ("Bangkok Rules"), the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules"), or the *UN Rules for the Protection of Juveniles Deprived of their Liberty* ("Havana Rules").

⁴ See *The Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2006, Introduction; IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, 12 November 2015, para. 148.

their identity documents and were forced by law enforcement to perform physical exercises with denigrating harangues⁵.

9. Moreover, LGBTI persons are also discriminated against and abused in other contexts of deprivation of liberty, including in migrant detention centres or psychiatric hospitals.

10. The prison context is characterised by a strict division between the sexes, in a binary and heteronormative logic that exposes LGBTI persons to a greater risk of discrimination and violence. In addition, LGBTI persons are particularly affected by the structural problems that characterise many penitentiary systems in the Americas, such as overcrowding, corruption and prison self-governance, which increase the vulnerability to abuse of already over-exposed groups.

11. This situation has been highlighted, for example, both by **Paraguay's** National Preventive Mechanism following its visits to Tacumbú prison in 2013⁶ and 2015-2016⁷ and by the IACHR's Rapporteurship on the Rights of Persons Deprived of Liberty following its visit to Paraguay in 2014⁸. With the highest levels of overcrowding and overpopulation in the country, Tacumbú prison presents greater risks for LGBTI detainees⁹. Both the NPM and the IACHR have pointed out the very poor material conditions in which trans persons are detained in Tacumbú, in addition to the violence and discrimination to which they are exposed.

12. The State Mechanism to Prevent and Combat Torture in Rio de Janeiro, **Brazil**, in its visits to prisons has found that, in general, trans persons occupy the most precarious spaces in the centre, where the absence of lighting and ventilation, and the presence of humidity and mould are more intense.

⁵ Peruvian National Mechanism for the Prevention of Torture, *Informe especial N°4: Condiciones de las personas privadas de libertad en el contexto de emergencia sanitaria por Covid-19* [Special Report No. 4: Conditions of Persons Deprived of their Liberty in the Context of a Health Emergency by Covid-19], page 43.

⁶ National Preventive Mechanism of Paraguay, *Informe especial, Tacumbú: El estado de los derechos humanos de las personas privadas de libertad en la Penitenciaría* [The state of human rights of persons deprived of liberty in the prison], September 2013, pages 32-33.

⁷ National Preventive Mechanism of Paraguay, *Informe de seguimiento Penitenciaría Nacional de Tacumbú* [Follow-up report Tacumbú National Penitentiary, February 2016, pages 35-36.

⁸ See IACHR press release, *Rapporteurship on the Rights of Persons Deprived of Liberty Wraps Up Visit to Paraguay*, 15 September 2014: https://www.oas.org/en/iachr/media_center/PReleases/2014/097.asp

⁹ Throughout the document, the terms "detained person" and "person deprived of liberty" will be used interchangeably to refer to persons in the prison system - covering both sentenced and accused persons.

A. LGBTI persons: a heterogeneous group

13. The acronym "LGBTI" is commonly used to refer to "Lesbian, Gay, Bisexual, Trans and Intersex" people. However, persons with non-normative sexual orientations and gender identities, or LGBTI persons, are not a homogenous group¹⁰.

14. The acronym "LGBTI" has evolved over time. In recent years, new concepts have been introduced, such as the "Q" (*queer*) and the "+" symbol, to include all groups that are not represented in the previous acronym. Some LGBTI persons do not identify with these acronyms, rejecting their labels and associated narratives. For example, some men who have sex with men or women who have sex with women do not identify as "gay" or "lesbian". What matters, in the end, is how the person identifies him or herself. Additionally, certain people who do not identify themselves as LGBTI, but who might be perceived as such, are exposed to the same risks of discrimination and abuse¹¹.

15. Despite the differences and specificities of LGBTI persons, many face common patterns of discrimination and abuse when deprived of their liberty on the grounds of sexual orientation, gender identity and expression and sexual characteristics and are *"disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations"*¹².

16. In addition, in many cases LGBTI persons are deprived of liberty as a result of their precarious economic and social condition, family rejection, social stigma, discrimination that they suffer and which can lead them to commit crimes in order to survive and to rely on non-traditional means of income as their only option. At the same time, many of these factors also have detrimental consequences to the ability of LGBTI persons to access means of probation, bail, legal representation and ultimately to benefit from alternatives to detention. In addition, it should be mentioned that the discrimination that LGBTI persons face is exacerbated in detention contexts.

17. In some countries, arbitrary arrests are used as an excuse to extort money or sexual favours from sex workers, particularly trans people, in exchange for their freedom.

18. It is also worth highlighting how the vulnerable situation of LGBTI persons in the context of deprivation of liberty is exacerbated by other factors that overlap with sexual

¹⁰ See *Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (YP + 10)*, 10 November 2017, Preamble.

¹¹ See APT, *Towards Effective Protection of LGBTI People Deprived of their Liberty: A Monitoring Guide*, 2019, pages 23-24: https://www.apr.ch/sites/default/files/publications/apr_20181204_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf

¹² *Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly*, A/56/156, 3 July 2001, para. 19.

orientation, gender identity or expression and sexual characteristics, such as age, sex, ethnicity, religion or the presence of disability.

19. In recent years, there has been some progress in recognising the vulnerable situation of LGBTI persons as an element to be taken into account when deciding on the type of criminal sanctions. This was the case of **Argentina** and **Chile**, where the courts have granted alternative measures to the deprivation of liberty to trans women, considering their vulnerable situation as well as the lack of a gender and sexual diversity perspective in the justice system¹³.

B. Invisibility of LGBTI persons in detention

20. In many countries in the region, there is a lack of data and information on the LGBTI prison population. Often, the available data is seen to underestimate the true figure, as there is concern on the part of LGBTI persons that information collected on the basis of sexual orientation, gender identity or expression and sexual characteristics could be used for discriminatory purposes. Lack of information about LGBTI persons in prison leads to the invisibility of LGBTI people and their needs, exacerbating the risks to which they are exposed.

21. If, on the one hand, trans persons are more visible in detention, the difficulties faced by other groups, such as lesbian women, bisexual and intersex persons, for example, remain largely unknown, with a few exceptions.

22. In recent years, significant efforts have been made in Latin America to make these groups visible in prison settings. In **Brazil**, for example, in early 2020 the government published a national mapping on LGBTI persons in prisons¹⁴. In addition, in January 2020, the National Penitentiary Department (DEPEN)¹⁵ asked Brazilian states for quantitative information on the LGBTI population in prisons in order to support the development of public policies for these groups. In March 2020, after a public

¹³ Almas Cautivas, Casa de las Muñecas Tiresias, Casa Hogar Paola Buenrostro, the International Drug Policy Consortium (IDPC), Dejusticia, Equis: Justicia para las Mujeres, Procuración Penitenciaria de la Nación in Argentina, Red Corpora en Libertad y WOLA, *Trans Women Deprived of Liberty: Invisible Stories Behind Bars*, April 2020, p. 18 (<https://www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars-Final-3.pdf>)

¹⁴ See Ministry of Women, Family and Human Rights, National Secretariat for Global Protection, Department for the Promotion of LGBT Rights, *LGBT nas prisões do Brasil: diagnóstico dos procedimentos institucionais e experiências de encarceramento* [LGBT in Brazilian prisons: mapping of institutional procedures and experiences of incarceration], 2020: <https://www.gov.br/mdh/pt-br/assuntos/noticias/todas-as-noticias/2020-2/fevereiro/TratamentopenaldepeessoasLGBT.pdf>

¹⁵ See <http://antigo.depen.gov.br/DEPEN/mais-de-10-mil-presas-se-autodeclaram-lgbti-no-brasil>; Ministry of Justice and Public Security, National Penitentiary Department, Technical Note n.º 10/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, 3 April 2020 (https://www.gov.br/depen/pt-br/depen-publica-nota-tecnica-com-orientacoes-para-populacao-lgbti-encarcerada/SEI_MJ11311909NotaTcnica.pdf).

consultation, the DEPEN published a Technical Note¹⁶ on procedures related to the detention of LGBTI persons in the **Brazilian** prison system.

23. Several NPMs and LPMs have monitored the situation of LGBTI persons and recommended to the relevant authorities to collect, systematise and publish information on LGBTI people in detention. For example, the **Rio de Janeiro** LPM (Mecanismo Estadual de Prevenção e Combate à Tortura do Rio de Janeiro - MEPCT/RJ) recently published two thematic reports, on women and girls in detention and on health in the prison system, which include specific information on LGBT persons¹⁷. In its visits to prisons to monitor women's conditions, **Peru**¹⁸'s National Preventive Mechanism conducted a survey in which many women identified themselves as belonging to the LGBTI community. However, the NPM noted the lack of official registration in this regard and recommended that the authorities register the LGBTI population in the prison registration system in order to protect them from possible aggression, mistreatment, abuse and harassment, ensure their integrity, sexual freedom and protect them from discrimination in all services provided in the centres.

24. The visibility of LGBTI persons deprived of their liberty is important in order to be able to design public policies and guidelines that respond to their specific needs. However, it is worth mentioning that the way in which data is collected and used can generate various problems and even be grounds for discrimination and abuse.

25. In this regard, it is recommended that States collect information on LGBTI persons in detention in a manner that is consistent with human rights and responds to the principles of participation, self-identification, privacy, informed consent, transparency and accountability¹⁹.

26. The expression of sexual orientation, gender identity or expression should be done on a voluntary basis, in conditions of privacy, security and preservation of integrity.

¹⁶ Ministry of Justice and Public Security, National Penitentiary Department, Technical Note No. 7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJepen, 13 March 2020

file:///C:/Users/VFILIP~1/AppData/Local/Temp/copy2_of_sei_mj11156365notatcnica.pdf

¹⁷ See Rio de Janeiro State Mechanism to Prevent and Combat Torture, *Mulheres, Meninas e Privação de Liberdade* [Women, Girls and Deprivation of Liberty], 2016 (<https://drive.google.com/file/d/1OqxEZJLRSS-8ywDm9desCRIXw2UC1OT/view>); *Sistema em colapso: atenção a saúde e política prisional no estado do Rio de Janeiro* [Collapsing system: health care and prison policy in the state of Rio de Janeiro], 2018 (<https://drive.google.com/file/d/1N28jgO9itWLWt10rxi3dlgEdNUFIRxCw/view>).

¹⁸ Ombudsman's Office of Peru, National Mechanism for the Prevention of Torture, Special Report No 02-2019-dp-mnpt: *Condiciones de las mujeres en establecimientos penitenciarios de cuatro departamentos del Perú* [Conditions of women in prisons in four departments of Peru], 2019, p.205.

¹⁹ APT, "Towards the Effective Protection of Persons ..." *op. cit.*

27. In addition, officials in charge of collecting such information should have received specific training on human rights, gender and sexuality.

28. Disaggregated data is important to ensure that the needs and situations of each group included in the LGBTI acronym are clearly distinguished and understood.

C. Criminalisation and its impact on LGBTI persons in detention

29. The *Yogyakarta + 10 Principles* clearly establish the right to be free from criminalisation and sanction, stating that *"everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics"*²⁰.

30. However, globally, 68 States still criminalize adult same-sex acts²¹, including 9 in the Caribbean. Penalties include several years' imprisonment, life imprisonment, forced labour, whipping and even the death penalty²².

31. In many countries, including in Latin America and the Caribbean, there are also laws or regulations that restrict the right to freedom of expression in relation to sexual orientation, gender identity²³ and sexual characteristics. These include, for example, rules on morality and public decency and laws that prohibit expressions of privacy between people of the same sex or the publication of information related to sexual orientation or gender identity.

32. In addition, other legislation may affect LGBTI persons, even though it does not explicitly refer to them. This is the case, for example, with laws prohibiting or restricting sex work, which can be used disproportionately against LGBTI persons. In some countries in the Americas, for example, the existence of rules prohibiting sex work or the absence of explicit regulation often serves as a pretext for arbitrarily detaining trans women sex workers²⁴.

²⁰ *Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sexual Characteristics to Complement the Yogyakarta Principles (YP + 10)*, 2017, Principle 33.

²¹ ILGA World: Lucas Ramon Mendos, *State Homophobia 2019: Global Legislation Overview Update*, December 2019, p. 51

²² Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, St. Vincent and the Grenadines, St. Kitts and Nevis, St. Lucia Source: ILGA World: Lucas Ramon Mendos, *State Homophobia 2019: Global Legislation Overview Update*, December 2019, p. 54.

²³ *Ibid*, p. 59.

²⁴ See REDLACTRANS and International HIV/AIDS Alliance, *The night is another country: impunity and violence against transgender women human rights defenders in Latin America*, 2012, p. 16

33. Standards that criminalise or discriminate against people on the basis of their sexual orientation, gender identity or expression and sexual characteristics have a direct impact not only on the rate of imprisonment of LGBTI persons but also on their treatment and conditions of detention.

34. In contexts that criminalise LGBTI persons, there is a direct relationship between these norms and a prison environment where acts of discrimination and violence on the grounds of sexual orientation, gender identity or expression and sexual characteristics are tolerated or condoned, both by staff and other persons deprived of their liberty. In addition, these standards may have a direct impact on the lives of persons deprived of liberty, for example, in relation to their right to freedom of expression or the right to receive intimate visits. As the IACHR has pointed out, *"these laws provide a social sanction for abuse, breed intolerance, and have been used to justify arbitrary detention, police abuse, and extortion and torture. As a result, LGBT persons are drawn into the criminal justice system. Once such persons are incarcerated or otherwise implicated in the justice system, this situation can in turn give rise to further incidents of discrimination and violence"*²⁵.

35. Both the bodies of the Inter-American system and those of the United Nations system have considered these legal provisions to be contrary to international human rights law, as they violate the principle of equality and discrimination, and have urged States to repeal these laws²⁶.

36. In particular, the IACHR has urged *"States of the region that still have laws criminalizing consensual sex and sexual intimacy between adults of the same sex, serious and gross indecency laws –in as much as they criminalize same-sex intimacy-, and legislation criminalizing cross-dressing, to repeal those laws, and, in the interim, to impose an explicit and formal moratorium on the enforcement of those laws. This would send a clear message to society in general, and law enforcement agents in particular, that such laws cannot be used to threaten, extort or commit acts of violence against LGBT persons or those perceived as such"*²⁷.

²⁵ IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, 12 November 2015, para. 4.

²⁶ See IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, 2015, para. 4-5; Inter-American Court of Human Rights, *Advisory Opinion oc-24/17 of 24 November 2017. Gender identity, and equality and non-discrimination with regard to same-sex couples*, para. 39; *Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council*, A/HRC/31/57, 24 February 2016, para. 69, p. 19; *Protection from violence based on sexual orientation and gender identity*, Report of the Independent Expert on protection from violence and discrimination based on sexual orientation and gender identity, A/72/172, 19 July 2017, Chapter V, p. 11; A/HRC/38/43, para. 90, p. 19.

²⁷ IACHR, *"Violence against Lesbian, Gay..."*, *op. cit.*, para. 5.

37. Furthermore, the UN Subcommittee on Prevention of Torture (SPT) has clearly stated that *"the repeal of laws criminalizing same-sex sexual relations between consenting adults and other laws used to penalize individuals on the grounds of sexual orientation or gender identity is a mandatory requirement for the prevention of torture against lesbian, gay, bisexual, transgender and intersex persons"*²⁸.

38. Finally, it should be noted that the repeal of these legal provisions is a necessary but not sufficient pre-condition to ensure the protection of the rights of LGBTI persons, as LGBTI persons deprived of their liberty face discrimination and violence also in contexts where same sex sexual relations and non-normative gender identities or expressions are not criminalised.

D. Recognition of self-perceived gender identity and expression and its relationship to deprivation of liberty

39. The following section is intended to demonstrate that progressive developments in the recognition of gender identities and non-normative gender expressions should also permeate the prison system. The reason is that, historically, the protection framework directed towards persons deprived of their liberty, including that relating to protection from torture and ill-treatment, has largely evolved around responses and situations that disproportionately affect men²⁹, in accordance with the gender/sex binary system.

- **Right to recognition of self-perceived gender identity in the prison system**

40. Gender identity is understood by international human rights law as the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth³⁰.

41. The IACHR states that gender identity is a constitutive element of a person's identity, and therefore its recognition by the State is of vital importance to guarantee the full enjoyment of human rights by people, particularly trans persons, for whom it also constitutes a **basic premise for access to other rights, such as protection against violence, torture, ill-treatment**, the right to health, among others³¹.

42. In order to guarantee the recognition of this right, States in the region have approved gender identity regulations such as: the enactment of comprehensive laws

²⁸ UN, *Eighth annual report of the SubCommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/54/2, 26 March 2015, para.70.

²⁹ UN, *Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council*, A/HRC/31/57, 24 February 2016, para. 5.

³⁰ *Ibid.*, *Advisory Opinion OC-24/17*, para. 32 (f).

³¹ *Ibid.*, para. 98.

for the trans population (**Uruguay**); specific laws on gender identity (**Argentina, Chile, Bolivia**), reforms of civil registry laws and regulations (**Costa Rica, Ecuador, Mexico, Panama**), and reforms to civil or family codes (**Mexico**)³².

43. Although the right to gender identity is recognised through the normative channels mentioned above, this right and those interrelated (health, dignified treatment, among others) in the prison environment are often subordinated to conditions of possibility, which are the very conditions that the prison authorities determine³³.

44. In the prison system, the authorities exercise full control over those in their custody³⁴. This situation results in the person being completely dependent on the decisions taken by those authorities³⁵.

45. This subordination of the person deprived of liberty to the State impacts the recognition of self-perceived gender identity due to the total control that the authorities exercise over persons with non-normative gender identities. In practice, this situation occurs when the authorities do not recognise people's³⁶ self-perceived gender identity.

46. This type of decision contravenes, in particular, Article 11 of the American Convention on Human Rights, which provides that "*no one may be the object of arbitrary or abusive interference with his private life*" and that "*everyone has the right to the protection of the law against such interference or attacks*". In this regard, the Court points out that the private life of individuals is characterized by being an area of freedom that is exempt and immune from abusive or arbitrary interference by third parties or public authorities³⁷.

47. This freedom implies that people can identify themselves and behave in accordance with their self-perceived gender identity, a recognition which is rarely given in the prison system, as these are spaces which are only perceived by two rigid categories:

³² OAS, *Overview of Legal Recognition of Gender Identity in the Americas*, May 2020, page 33.

³³ Sánchez, Laura Judith, *Derechos puestos en agenda judicial: la identidad de género en contextos de encierro*, Revista de la Facultad de Derecho y Ciencias Sociales de la UNC, Vol. V N° 1 New Series II, (2014) p. 128.

³⁴ I/A Court H.R., *Matter of María Lourdes Afiuni regarding Venezuela*, Resolution of the President of the Inter-American Court of Human Rights of 10 December 2010, Recital 11; I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 126.

³⁵ UN, Working Group on Arbitrary Detention, Report to the Human Rights Council, A/HRC/10/21, adopted on 16 February 2009, Chapter III: Thematic considerations, para. 46.

³⁶ IACHR, "*Violence against Lesbian, Gay, (...) op. cit.*", para. 155.

³⁷ I/A Court H.R., *Case I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs, para. 149; *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 194, and *Case of the Peasant Community of Santa Barbara v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 1 September 2015. Series C No. 299, para. 200.

male/man and female/woman³⁸, and against which the entire prison system is constructed.

48. In addition, the State has a special relationship of subjection by virtue of which, when a person is deprived of liberty, it is the guarantor of all those rights that are not restricted by the deprivation of liberty³⁹, including the right to recognition of self-perceived and freely manifested gender identity.

49. In this regard, in **Colombia**, the Constitutional Court establishes that the fundamental rights of persons in detention are not restricted as a whole, but are progressively limited, linked to the very nature of the deprivation of liberty. It also recognizes that there is a group of fundamental rights of persons in prison that cannot be limited in any way by the prison authorities⁴⁰.

50. Among these rights are human dignity, equality and the **free development of personality** - a right from which⁴¹ self-perceived gender identity is derived.

51. The Colombian Constitutional Court also holds that the State has the obligation to guarantee minorities their sexual identity or choice, so that they can exercise the aforementioned fundamental rights, in terms of the manifestations of their sexual identity, and so that they are not subject to sanctions or humiliation because of this⁴².

52. In the same vein, the Inter-American Court and the IACHR agree that the lack of recognition of gender identity could result in indirect censorship of gender expressions that deviate from cisnormative or heteronormative standards. This would send a widespread message that those who deviate from such "traditional" standards will not have legal protection and recognition of their rights on an equal footing⁴³ with others.

53. A message that, in the prison environment, permeates not only the authorities, but also reaches the rest of the population deprived of liberty, reinforcing the discrimination that affects people with non-normative gender identities and perpetuating their exclusion. This situation results in authorities considering that they are less reliable or do not have full rights to an equal level of protection even against violence perpetrated by non-state actors.

³⁸ IACHR, Basic Concepts, Multimedia Site of the Report on Violence against LGBTI Persons.

³⁹ IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, 2011, para. 49.

⁴⁰ Constitutional Court of Colombia, Sentence T-062-11, Treatment of prisoners belonging to sexual identity minorities.

⁴¹ Inter-American Court of Human Rights, "*Advisory Opinion -24/17 ...*", *Op. cit.*, para. 95.

⁴² *Ibid.*

⁴³ IACHR, Observations submitted by the Commission on 14 February 2017, para. 49. See also United Nations, Committee on the Rights of the Child, General Comment No. 20 (2016) on the realization of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34, and Office of the United Nations High Commissioner, *Living Free & Equals. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, pp. 86-87.

54. With regard to the legal recognition of self-perceived gender identity in the prison system, we note that persons with non-normative gender identities, when entering prisons, may find themselves in situations where their gender identity does not match the legal identification data, for example, with the identity documents presented during the criminal process. In these cases, as noted by the Inter-American Court, if there is no such match, there should be the possibility of modifying it⁴⁴.

55. We also mention that there are other circumstances in which persons with non-normative gender identities deprived of their liberty may decide to refrain from seeking legal and formal recognition of their gender for fear of being transferred to other sections of the prison or to other facilities. This is particularly the case for trans men, who may fear automatic transfer to male prisons⁴⁵. These decisions must also be respected.

- **Right to recognition of self-perceived gender expression in the prison system**

56. Gender expression is understood as the external manifestation of a person's gender, through his or her physical appearance, which may include the way he or she dresses, the hairstyle, the use of cosmetic items, or through mannerisms, the way of speaking, among others. A person's gender expression may or may not correspond to his or her self-perceived gender identity⁴⁶.

57. On gender expression, the Inter-American Court considers that **the prohibition of discrimination based on gender identity** is understood not only with respect to real or self-perceived identity, but **must** also be **understood in relation to externally perceived identity**, regardless of whether that perception corresponds to reality or not. Thus, gender expression is also a protected category against discrimination⁴⁷.

58. However, on many occasions - such as in the case of transvestites - persons deprived of their liberty may face situations of violence, or the denial of rights or the provision of a service because of the way they express their gender. For instance, because of their clothing, the way they walk or speak, among other aspects, even though they do not assume a gender identity different from that assigned to them according to their sex at birth. In other words, they face violence because they do not fit stereotypical models of what is masculine or feminine⁴⁸.

⁴⁴ Inter-American Court of Human Rights, *Advisory Opinion OC-24-17*, *Op. cit.* para. 105.

⁴⁵ APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019, p. 77.

⁴⁶ Inter-American Court, *Advisory Opinion OC-24-17*, *Op. cit.* para. 32 (g).

⁴⁷ Inter-American Court, *Advisory Opinion OC-24-17*, *Op. cit.* para. 79.

⁴⁸ According to the International Commission of Jurists, quoted by the IACHR: *"La noción de aquello que constituyen las normas masculinas o femeninas correctas ha sido fuente de abusos contra los derechos humanos de las personas que no encajan o no se ajustan a estos modelos estereotípicos de lo masculino o lo*

59. For example, the MEPCT/RJ has recorded that trans and transvestite persons detained in **Rio de Janeiro** (including 79 transvestites at the time of the visit) were subjected to mockery, insults and harassment by prison staff, and were forced to wear men's uniforms, among other abuses. The MEPCT/RJ also identified that most trans and transvestite women preferred to remain in male prisons rather than be transferred to female facilities⁴⁹.

60. The *Yogyakarta Principles* recognise that violence, discrimination and other prejudices can be related to issues such as objects to express gender and therefore States should create policies to address these situations (Principle 9)⁵⁰.

61. This has been noted, for example, by the Constitutional Court of **Colombia** in the case of a person who identified himself as a "transsexual gay". He was threatened by prison authorities with a haircut and his make-up and accessory products were removed. In this case, the Constitutional Court protected the person's right to appear according to his gender expression and determined that:

- Human dignity implies the ability of a person to choose a sexual identity and to exercise behaviours and attitudes derived from it.
- The need for prison authorities to implement a campaign to raise awareness and train prison staff and inmates on the rights of people with diverse sexual identities or choices.
- Disciplinary measures may not be used to prohibit the entry into prison of items of personal use necessary for the exercise of a person's identity⁵¹.

62. The Constitutional Chamber of **Costa Rica**, in the case of a man dressed as a woman in a penitentiary centre who was not allowed by the authorities to continue dressing like that, alleging security reasons, determined that this limitation on the form of dress constituted sexual discrimination because it was not a general rule applicable to all persons deprived of liberty. In this case, the prison authority could not establish that there had been any disturbance of order or security, and the limitation was motivated only by the form of dress⁵².

63. In this regard, the Ministry of Justice and Peace of **Costa Rica**, in the guidelines for the care of people with diverse sexual orientation, expression or gender identity, provides that:

femenino. Las posturas, la forma de vestir, los gestos, las pautas de lenguaje, el comportamiento y las interacciones sociales [...], son todos rasgos que pueden alterar las expectativas de género"; Supreme Court of Justice of Mexico, *Protocolo de actuación para quienes imparten justicia en casos que involucren la orientación sexual o la identidad de género.*

⁴⁹ State Mechanism for Preventing and Combating Torture in Rio de Janeiro, *Mulheres, Meninas e Privação de Liberdade, Op. cit.*

⁵⁰ Yogyakarta Principles, *Op. cit.*, Principle 9.

⁵¹ Constitutional Court of Colombia, Sentence T-062/11.

⁵² Constitutional Chamber Costa Rica, Resolution No. 04524-2012, decided on 30 March 2012.

- The imposition of compulsory clothing or haircuts is prohibited.
- In the case of trans or transsexual persons, the entry and use of clothing or articles in accordance with assumed gender identity or expression is permitted, as authorised by the Directorate of Social Adaptation.
- And it states that the use of such articles cannot be used as a basis for imposing sanctions on LGBTI people.

64. In view of the fact that gender identity and expression are categories protected against discrimination by the American Convention, it is recommended that prison system regulations expressly prohibit of discrimination on the grounds of gender identity and expression.

65. It is recommended to train or sensitize prison staff and persons deprived of their liberty on the recognition of the rights of persons with non-normative gender identities and expressions.

66. Prison regulations should be reviewed and modified to allow the entry of elements of personal use into prison systems so that persons deprived of liberty with non-normative gender identities and expressions can exercise the right to identity, and therefore to the free development of personality.

67. It is recommended that simple guidelines or procedures be developed for recognising people's self-perceived and freely manifested gender identity, establishing self-identification as a guiding principle.

III. Considerations on the questions raised in the request for an advisory opinion

A. Right to equality and non-discrimination

68. In this section, some considerations are presented regarding the following questions asked by the IACHR:

a. ¿Is it possible to justify, based on Articles 24 and 1(1) of the Convention, the need to adopt differentiated approaches or measures to guarantee that their specific circumstances do not affect the equality of their conditions with the other persons deprived of liberty, as regards both their detention conditions, and the remedies filed to protect their rights in the context of the deprivation of liberty?

b. ¿What are the specific implications of the content of the rights established in these articles on the scope of the correlative obligations of the States in this matter?

69. The Inter-American Court has determined that the prohibited grounds of discrimination, according to Article 1.1. of the *American Convention on Human Rights*, do not constitute an exhaustive list. Therefore, this article allows for the incorporation of other categories based on the term "other status", by virtue of which sexual orientation and gender identity are included⁵³.

70. The *Inter-American Convention against All Forms of Discrimination and Intolerance* expressly recognizes that discrimination may be based on grounds of sexual orientation, gender identity and expression, among others⁵⁴.

71. Specifically, in the general or *soft-law* standards relating to the area of deprivation of liberty, the principles of equality and non-discrimination are developed in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. They establish that persons in such situation shall be entitled to equal protection of the law and the courts of justice (formal equality).

72. They also develop an anti-discrimination clause by providing that under no circumstances shall persons deprived of liberty be discriminated against on various grounds, including explicit recognition of sex, gender, sexual orientation, or any other social condition - among other categories⁵⁵.

73. In this regard, the *Nelson Mandela Rules* address the applicability of the principle of non-discrimination in the prison system, by providing that prison administrations shall take into account the individual needs of prisoners, in particular the most vulnerable categories in the prison context (Rule 2.2)⁵⁶. For example, on the issue of women in detention, the Committee on the Elimination of Discrimination against Women (CEDAW) has established that when detention centres do not include a perspective that takes into account the specific needs of women prisoners, this constitutes discrimination⁵⁷.

74. The *Nelson Mandela Rules* also provide that any **measures taken to protect and promote the rights of** prisoners with **special needs shall not be considered discriminatory**.

75. Thus, differentiated measures and approaches for LGBTI persons deprived of their liberty in relation to the rest of the population should not be considered discriminatory, given that the Inter-American Human Rights System has moved towards the concept

⁵³ Inter-American Court of Human Rights, *Advisory Opinion OC-24-17*, *Op. cit.* para. 67.

⁵⁴ OAS, *Inter-American Convention against All Forms of Discrimination and Intolerance*.

⁵⁵ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by IACHR Resolution 1/08 at its 131st regular session, held March 3-14, 2008, (Principle II) <http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>

⁵⁶ General Assembly, Resolution 70/175, annex adopted on 17 December 2015, United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 2.2.

⁵⁷ *Inga Abramova v Belarus*, Communication No. 23/2009, UN Doc. CEDAW/C/49/D/20/2008 (2011).

of material or structural equality based on the recognition that certain sectors of the population require the adoption of special equality measures. This implies the need for differential treatment when, due to the circumstances affecting a disadvantaged group, equal treatment means restricting or worsening access to a service or the exercise of a right⁵⁸.

76. In the case of deprivation of liberty, this equality of treatment means that all persons should be subject to the same rules, services and regimes, without considering that deprivation of liberty (including pre-trial detention) affects in a differentiated and disproportionate manner persons at particular risk, such as the LGBTI population.

77. Furthermore, the IACHR has pointed out that differences in treatment in otherwise similar circumstances are not necessarily discriminatory. The IACHR has even established that a distinction based on "reasonable and objective criteria" could serve a legitimate interest of the State in accordance with the provision of Article 24 of the *American Convention on Human Rights* (concerning equality before the law). Such distinction may be necessary to bring justice or protect persons who require the application of special measures⁵⁹.

78. On this point, the Inter-American Court has established that **certain de facto inequalities can be an instrument for the protection** of those who should be protected, considering the situation of greater or lesser weakness or helplessness in which they find themselves⁶⁰.

79. This is based on the fact that **certain groups have specific protection needs** due to their particular circumstances of special vulnerability or because they have historically been victims of structural discrimination⁶¹, stigma, various forms of violence and violations of their fundamental rights. This is the case for LGBTI persons for whom discrimination and related acts are compounded by deprivation of liberty, as shown below.

*Discriminatory profiling and violence during arrest or detention*⁶²

⁵⁸ IACHR, *Missing and Murdered Indigenous Women in British Columbia, Canada*. OAS/Ser.L/V/II. Doc. 30/14. 21 December 2014, para. 137; IACHR, *Report on Poverty and Human Rights in the Americas*. OAS/Ser.L/V/II.164 Doc. 147. 7 September 2017, para. 160; and IACHR, *Access to maternal health services from a human rights perspective*, OAS/Ser.L/V/II. Doc. 69. 7 June 2010, para. 70.

⁵⁹ IACHR, Report No. 04/01. Case 11.625. Background. María Morales de Sierra. Guatemala. 19 January 2001

⁶⁰ Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of 28 August 2020, para. 55.

⁶¹ The IACHR defines structural or systemic discrimination as the set of norms, rules, routines, patterns, attitudes and behavioural patterns, both de jure and de facto, that give rise to a situation of inferiority and exclusion against a group of people in a generalised way, which are perpetuated over time and even over generations, that is, they are not isolated, sporadic or episodic cases, but rather discrimination that arises as a consequence of a historical, socioeconomic and cultural context. IACHR, *Report on Poverty and Human Rights in the Americas*, OAS/Ser.L/V/II.164 Doc. 147, 7 September 2017, para. 393.

⁶² APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019.

80. The *Yogyakarta Principles* are categorical in stating that arrest or detention on the basis of sexual orientation or gender identity, whether in compliance with a court order or for any other reason, is arbitrary⁶³. However, LGBTI persons often experience serious discrimination even before arrest as they can be arbitrarily detained as a result of homophobic or transphobic prejudice⁶⁴.

81. This social context produces a scenario where LGBTI people are at greater risk of being arbitrarily arrested, harassed, extorted and subjected to excessive use of force by the police compared to the rest of the population. These risks increase where same-sex relationships and/or non-normative gender identities are criminalised.

Deprivation of liberty of LGBTI persons

82. In the prison system, people with non-normative sexual orientations and gender identities (or who are perceived as such) can be subject to multiple or aggravated discrimination⁶⁵ for being deprived of their liberty and being part of the LGBTI population⁶⁶. They are therefore victims of higher rates of sexual, physical and psychological violence than the general prison population on the grounds of their sexual orientation or gender identity⁶⁷.

83. The Special Rapporteur on Torture has pointed out that LGBTI persons are particularly at risk of torture and ill-treatment in situations of deprivation of liberty because of the strict hierarchy that is often established in the centres, and those at the bottom of the hierarchy, such as LGBTI people, tend to suffer double or triple discrimination⁶⁸.

84. In addition, the SPT identifies that abuse includes acts of discrimination based on preconceived ideas or prejudice, for example, when men suspected of homosexual behaviour are subjected to non-consensual testing in order to "*prove*" or "*disprove*" their homosexuality⁶⁹.

⁶³ Yogyakarta Principles, Principle 7, The Right to Freedom from Arbitrary Deprivation of Liberty.

⁶⁴ See Working Group on Arbitrary Detention, Opinion No. 22/2006

⁶⁵ In accordance with the Inter-American Convention against All Forms of Discrimination and Intolerance, multiple or aggravated discrimination is understood to be any preference, distinction, exclusion, or restriction based concomitantly on two or more grounds mentioned in Article 1.1. or others recognized in international instruments, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of one or more human rights and fundamental freedoms set forth in the international instruments applicable to the States Parties.

⁶⁶ Alfonsín, J. et. al. *Trans Women Deprived of Liberty: Invisible Stories Behind Bars*, <https://www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars-Final-3.pdf>

⁶⁷ CAT/C/CRI/CO/2; UN, A/56/156, Interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, 3 July 2001, paragraph 19.

⁶⁸ UN, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 61.

⁶⁹ Ibid.

85. In the circumstances described above, the principle of non-discrimination⁷⁰ should not prevent special measures from being taken to reduce the situations of inequality or discrimination described. In this regard, the Special Rapporteur on Torture also states that **measures need to be taken to protect and promote the rights and address the specific needs of LGBT persons, which will not be considered discriminatory**⁷¹.

B. Admission, registration and placement

86. This section presents some considerations regarding the following question asked by the IACHR:

How should States take into account the gender identity with which a person identifies himself or herself when determining the unit where they should be placed?

- **Prior considerations on admission, registration and placement in the prison system**

87. Article 5.4. of the *American Convention on Human Rights* - similar to Article 10.2 (a) of the *International Covenant on Civil and Political Rights* - provides that **persons deprived of liberty must be separated** on the basis of their status between those who are prosecuted and those who are convicted. On this point, the Inter-American Court has considered that the lack of separation of persons deprived of liberty in this sense is a violation of this article⁷².

88. In this regard, the Court has also been emphatic in pointing out that prisoners belonging to various categories should be placed in different sections within the establishment according to the reasons for their detention and the treatment to which they are entitled⁷³.

89. In the same vein, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* establish the separation of categories according to sex, age, reason for deprivation of liberty, the need to protect the life and integrity of persons deprived of liberty, special needs of care, or other circumstances related to internal security issues. Additionally, the *Principles* state that such separation shall not

⁷⁰ IACHR. The child's right to family: alternative care. Ending Institutionalization in the Americas. OAS/Ser.L/V/II. Doc. 54/13. 17 October 2013, para. 160.

⁷¹ UN, Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council, A/HRC/31/57, para. 14.

⁷² Inter-American Court of Human Rights, Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No 114.

⁷³ Inter-American Court of Human Rights, Matter of the Urso Branco Prison regarding Brazil. Provisional Measures. Resolution of the Inter-American Court of Human Rights of 29 August 2002.

be used to justify discrimination, torture or more severe or less appropriate conditions of deprivation of liberty on a particular group of persons (Principle XIX)⁷⁴.

90. The principle of separation in prison is based on the protection and guarantee of the right of all persons deprived of their liberty to be treated with dignity. In operational terms, it helps to maintain security and order, prevent prison violence⁷⁵, provide protection and seeks to contribute to the achievement of the objectives of sentencing - i.e. social reintegration⁷⁶. It is also a measure that seeks to preserve the principle of the presumption of innocence of persons in pre-trial detention.

91. In this regard, it is worth clarifying that the separation of persons deprived of liberty by categories is different from their classification in the prison population. In other words, persons who have been prosecuted and sentenced must be classified within a few days of their admission to prison. This procedure mainly aims to ensure that the conditions of detention correspond to their needs, especially from the perspective of individualised execution of sentence and social reintegration. The classification also aims to prevent escapes and to minimise the risks of violence and conflict⁷⁷.

92. Therefore, classification should be done on a case-by-case basis, through the most comprehensive assessment possible of each new arrival to determine age, profile, type of crime or misdemeanour committed, special needs, etc. Although classification is different from categorization, it can lead to a measure of separation in the short or long term⁷⁸. In light of the above, below are some details on the admission, registration and placement of LGBTI people.

- **Admission**

93. For the IACHR, the maintenance of appropriate admission protocols is an effective means of protecting the rights of persons in detention⁷⁹, which in the case of LGBTI persons requires the establishment of particular criteria because the information collected at this early stage will have a direct impact, in particular, on their placement in the facilities.

⁷⁴ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XIX "Separation by Categories".

⁷⁵ IACHR, Report on the Situation of Persons Deprived of Liberty in the Americas, 2015, paragraph 283.

⁷⁶ Social reintegration has been defined in Mexico's National Law on Penal Enforcement as the restitution of the full exercise of freedoms after the completion of a penalty executed with respect for human rights, Article 4. Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LNEP_090518.pdf. On the purpose of punishment, Rule 4 of the Nelson Mandela Rules indicates that the objectives of penalties and measures of deprivation of liberty are to protect society against crime and to reduce the incidence of crime. These objectives can be achieved by using the time of imprisonment to achieve the reintegration of prisoners into society.

⁷⁷ APT, *Separation of Detainees*, Detention Focus Database, available at: <https://www.apr.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/separation-detainees>

⁷⁸ *Ibid.*

⁷⁹ IACHR, *Report on the Situation of Persons Deprived of Liberty*, *Op. cit.* para. 146.

94. In addition, when considering the specific needs of LGBTI persons from their admission, it is ensured that the individual treatment or social reintegration plan is based on information regarding their particular needs, abilities, and inclinations as set out in the *Nelson Mandela Rules* (Rule 94).

95. In practice, initial assessments are often conducted in such a way that they amount to discriminatory "*admission examinations*" based on appearances or stereotypes, making assessments that can be humiliating. Therefore, people in detention may prefer not to reveal their sexual orientation or gender identity, while prison staff may point out in the admission procedure that the person did not identify himself or herself as LGBTI⁸⁰.

96. Based on the above, a guiding principle in determining the placement of LGBTI persons, in particular trans persons, should be self-identification. In this regard, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has urged States to ensure that "*judicial and prison authorities, when deciding allocation of trans-gender person to either a male or female prison, do so in consultation with the prisoner concerned and on a case-by-case basis*". The Special Rapporteur has also indicated that "*safety considerations and the wishes of the individual must be paramount*"⁸¹.

97. An example of the above was identified by the National Preventive Mechanism of **Costa Rica**, which has identified that the *Procedure for the Care and Monitoring of the Trans Population in the National Prison System* (hereinafter the Care Procedure) from the admission phase stipulates that:

- The trans person should be interviewed by staff trained and sensitized to the issue of sexual diversity.
- At all times the person must be called by the name of his or her choice or by the surname. It also provides that the name of the official identity document will continue to be used for other purposes and the name known as will be also included, if available.
- Trans persons may be placed in separate spaces, if they request or require it in any penitentiary centre.

98. From the perspective of comparative experience, in the **United States of America**, various departments of corrections include during the initial classification criteria relating to the self-identification of individuals. If they choose to do so, inmates may complete a gender preference form through which they request the most appropriate location for them, express their safety concerns, preferred name and pronoun, shower preferences and registration.

⁸⁰ APT, *Towards the effective protection of LGBTI persons deprived of liberty*, Op. cit. p. 73.

⁸¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, A/HRC/35/23, June 2017, para. 110 (e).

99. In some U.S. states, it is recognized within the youth system that trans youth can be identified based on: their statements that they are trans; by expressly requesting to be called by a name not traditionally associated with their birth sex; or by any statement in the arrest report that the young person is trans or that the police were unsure of the sex of the minor⁸².

100. In the **United Kingdom**, the 2019 Policy on the Care and Management of Individuals who are Transgender of the Prison Service provides that during this initial contact with trans persons, they should be asked for their views on which part of the state prison best reflects the gender with which they identify. If the place where the trans detainees wish to be housed is in a part of the prison that is not in accordance with their legal sex, the decision should be made through a local "Transgender Case Board" and on a case-by-case basis⁸³.

101. In **Costa Rica**, the Ministry of Justice and Peace recognizes that "*the determination of sexual orientation, gender identity and gender expression does not require proof or intervention by third parties, but rather the self-definition and self-determination of the persons deprived of liberty will be sufficient. A person should not be forced to express his or her sexual orientation or gender identity. Refusal to answer questions in this regard shall not be a ground for sanction*"⁸⁴.

- **Registration**

102. Records are essential to carry out the process of classification of persons deprived of liberty, to comply with the individualised treatment of the sentence, and to have precise information on the location of each person in prison according to the section, ward and cell in which they are held. The *Nelson Mandela Rules* specify that, in the management of records at the time of admission to prison, there should be "*precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender*" (Rule 7.a).

103. However, in practice, the information on gender identity that is recorded is related to the legal status of the gender, rather than to the gender with which the person deprived of liberty identifies. This exposes trans people in particular, who have not

⁸² Santa Clara County Probation Department JH Transgender Procedure Guidelines, page 2 Available at: <https://juvjustice.org/sites/default/files/ckfinder/files/SCCPD%20Transgender%20Procedures%20JH.pdf>

⁸³ UK Ministry of Justice and Her Majesty's Prison and Probation Service, *The care and management of individuals who are transgender*, 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863610/transgender-pf.pdf

⁸⁴ Ministry of Justice and Peace of Costa Rica, *Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system*, 2018, Article 20.

obtained legal recognition of their identity, to a range of violations and security risks that make it clear that they need to be treated on the basis of self-identification even if they have not (yet) obtained legal recognition⁸⁵. For example, not having accurate information about a person's gender identity can limit access to medical care related to hormone therapies.

104. In this regard, it is worth mentioning **Argentina's** Law 26,743 on Gender Identity which aims to ensure that no person is treated differently from the internal and individual experience of gender as each one feels it. In its application in the prison environment, it has been stipulated that it would be contrary to logic and reason to deny a person such treatment in a prison facility, simply because the procedure for changing their gender identity has not yet been completed on their identity card (...) and therefore deny the requested transfer (...) which would imply not fully recognising the right to gender identity that every person has, including, without doubt, persons deprived of their liberty⁸⁶.

105. In **Colombia**, the *General Regulations of National Prison Facilities* establish that an identity name is understood to be the name by which trans persons are identified, according to their gender identification, regardless of whether or not this has been modified in the identification document⁸⁷.

- **Placement**

106. Decisions on the placement of persons are derived from the initial classification of persons deprived of liberty and from information obtained during admission. In this regard, the *Yogyakarta Principles* establish the right to be treated with dignity. States shall adopt and implement policies on the placement and treatment of persons deprived of liberty that reflect the needs and rights of all sexual orientations, gender identities, gender expressions and sexual characteristics, and shall **ensure that persons participate in decisions regarding the facilities in which they are placed** (Principle 9).

107. In practice, the placement of LGBTI persons is carried out in a diverse manner generally based on the genitality of people deprived of their liberty, without taking into consideration human diversity in terms of gender and sexual orientation. These practices can be summarised as follows:

⁸⁵ UN, *Living free and equal: what states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, 2016.

⁸⁶ Sánchez, Laura Judith, *Derechos puestos en agenda judicial: la identidad de género en contextos de encierro* *Op. cit.* p. 129.

⁸⁷ INPEC, *Reglamento General de los Establecimientos de Reclusión del Orden Nacional* [General Regulations of National Prison Facilities], available at:

http://seup.co/wp-content/uploads/2016/08/R004130_23082016.pdf

- *Placing LGBTI persons deprived of their liberty in wards for vulnerable or at risk people (including people who have committed sexual offences).*

108. In **Argentina**, the Provincial Commission for Memory (*Comisión Provincial por la Memoria* - CPM) has found that in the Buenos Aires Penitentiary System the trans population, including trans women and transvestites, is held in "gender" or "diversity" facilities in men's prisons. In these facilities, trans women and transvestites are placed in the same spaces as people who have been prosecuted and convicted of crimes against sexual integrity, derived from a prejudice that assimilates trans people with crimes against sexual integrity by assigning them the category of "*sexual deviants*". Even the name of the facility can be pejorative in itself, as it has been recorded by the CPM in the Province of Buenos Aires, where in 2016 the facility was called "*of passive homosexuals and crimes against sexual integrity*"⁸⁸.

109. In **Honduras**, the National Committee for the Prevention of Torture (MNP-CONAPREV) has identified that LGBTI persons are placed by the prison authority in modules where persons with mental health problems are deprived of their liberty.

- *Creation of special wards for LGBTI persons in detention*

110. In other countries such as **Panama** and **Chile**, it has been identified that in the prisons visited there are wards separated from the rest of the population where people with diverse sexual orientations are held. For example, the SPT in its visit to **Panama** identified that in one prison facility gay men were held in a separate ward with the door kept closed to ensure their safety and prevent the possibility of disease transmission⁸⁹. In **Chile**, the National Human Rights Institute (INDH) identified that, of the 83 prisons in the country, 12 considered - in 2018 - a special ward for persons of sexual diversity⁹⁰.

111. On the other hand, in **Colombia**, the General Regulations of National Prison Facilities explicitly indicate that no establishment will segregate groups of people belonging to the LGBTI sectors under consideration of their rights⁹¹.

112. Given that the most common response by prison systems to the protection of LGBTI people in detention is separation from the rest of the prison population, it is necessary to stress that such measures can sometimes put at risk the integrity of persons with non-normative sexual orientations and gender identities.

113. In this regard, the SPT, during its visit to **Chile** in 2016, found that gay and trans people were assigned a specific ward and that, unlike other wards visited in the same

⁸⁸ Information sent by the CPM of Buenos Aires, Argentina

⁸⁹ UN, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Panama from 20 to 26 August 2017: observations and recommendations to the State party. Report of the Subcommittee*, CAT/OP/PAN/1, 31 July 2018, para. 128.

⁹⁰ INDH, *Estudio de las Condiciones Carcelarias en Chile*, p. 70.

⁹¹ INPEC, *Reglamento General de los Establecimientos de Reclusión del Orden Nacional*, Op. cit.

prisons, LGBTI persons didn't have access to recreation, workshops, employment and education. It also found that these restrictions affected good behaviour benefits and probation⁹².

114. Likewise, the Inter-American Court in 2017 found through an *on-site* visit that, in the Curado Prison Complex in **Brazil**, the LGBT cell was a fairly small space, with two "floors" where six trans persons and their partners live. In that space, they reported that they are threatened by other inmates with being burned inside their cells⁹³.

115. This type of segregation could even be contrary to the main objective of imprisonment - social reintegration - because it limits access to the means by which such reintegration is sought, such as education, vocational training and work⁹⁴. Above all, it limits relations with other people and with the outside world, links which are indispensable to the life project of persons deprived of their liberty.

116. Although the use of segregation can sometimes be a matter of life and death, it is not a long-term solution to the problem of prison violence arising from homophobia and transphobia⁹⁵. However, it is important not to assume that LGBTI people in detention will always prefer to be separated from other inmates. Therefore, decisions about placement should not be irrevocable and LGBTI people in detention should be given the opportunity to appeal. In addition, should the decision be made to allocate specific areas for LGBTI persons deprived of their liberty, access to recreation, activities, family and intimate visits, among other services available in the prison, must be guaranteed.

- *Placement of trans people in detention in male or female facilities*

117. Additionally, trans persons are held in facilities for men or women based on their assigned sex at birth, where they are extremely vulnerable to abuse. For example, trans women may in some cases be coerced into performing sexual favours in exchange for protection by prison staff⁹⁶.

118. In the opinion of the European Committee for the Prevention of Torture (CPT), "*transgender persons should either be accommodated in the prison section corresponding to their gender identity or, if exceptionally necessary for security or other reasons, in a separate section which will best ensure their safety. If accommodated in a separate*

⁹² SPT, *Report on the visit to Chile, recommendations and observations addressed to the State*, paras. 124, 126.

⁹³ Inter-American Court of Human Rights, *Matter of the Curado Penitentiary Complex regarding Brazil*, Resolution of the Inter-American Court of Human Rights of 23 November 2016.

⁹⁴ Mexico, Article 4 of the National Law on Penal Enforcement. Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LNEP_090518.pdf

⁹⁵ APT, "*Towards the Effective Protection of Persons ...*" *op. cit.*

⁹⁶ APT, "*Towards the Effective Protection of LGBTI Persons...*", *Op. cit.* p. 76.

*section, they should be offered activities and association time with the other prisoners of the gender with which they self-identify*⁹⁷.

- **LGBTI persons placed in solitary confinement for protection**

119. The practice of isolation or segregation of persons deprived of their liberty is often used to protect LGBTI people from attacks by other inmates or from possible reprisals by prison officers themselves. On this issue, the **Brazilian** National Mechanism to Prevent and Combat Torture (MNPCT) has observed that LGBTI persons are generally placed in isolation spaces (or also called "safe" cells), being specific cells for the LGBTI population.

120. According to the *Istanbul Statement on the Use and Effects of Solitary Confinement*, solitary confinement is understood as the physical isolation of a person in his/her cell from 22 to 24 hours a day. It is characterised by: minimising contact with other persons; reducing stimuli; occasional contacts are seldom freely chosen, and are often monotonous. In this regard, the *Nelson Mandela Rules* define this practice as "*the confinement of prisoners for 22 hours or more a day without meaningful human contact*" (Rule 44).

121. When solitary confinement for protection is prolonged (for a period longer than 15 consecutive days) it can be considered as constituting at least one form of cruel, inhuman and degrading treatment, because the psychological consequences after this period become irreversible.

122. It has even been considered as torture in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, which establish that "*its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment*" (Principle XXII (3)).

123. The Inter-American Court has determined that keeping a person in prolonged isolation or incommunicado detention constitutes, in itself, a form of cruel and inhuman treatment, harmful to his/her mental and moral integrity, as well as incompatible with the right of detained persons to have their inherent dignity respected⁹⁸.

124. In the particular case of LGBTI persons, the Special Rapporteur on Torture has stated that States must ensure that "*protective measures do not involve the imposition of more restrictive conditions on lesbian, gay, bisexual, transgender and intersex persons than on other detainees*",⁹⁹ such as isolation. In light of the above, the European Court

⁹⁷CPT, CPT visit to Spain, CPT/Inf , 2017, para. 95.

⁹⁸Inter-American Court, Case of Cantoral Benavides v. Peru. Background. Judgment of August 18, 2000. Series C No. 69, para. 83.

⁹⁹Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/ HRC/31/57, 24 February 2016, para. 70 (t).

of Human Rights has established that the **use of solitary confinement on the grounds of sexual orientation is discriminatory**, even though it is intended to be a protective measure¹⁰⁰.

125. In this regard, the SPT has recommended that solitary confinement, incommunicado detention and administrative segregation are not appropriate methods of ensuring the security of persons and can only be justified if used as a last resort, in exceptional circumstances, for the shortest possible period of time and with adequate procedural guarantees¹⁰¹.

- **Repeal of placement**

126. The IACHR establishes that the State must create other mechanisms, in addition to the judicial ones, so that persons deprived of liberty can submit to the prison administration their petitions, claims, and complaints regarding aspects of the conditions of detention and life, which by their nature would not be appropriate to be presented through judicial channels¹⁰².

127. As a result, in prison **decisions about placement must be revocable**. Therefore, LGBTI people deprived of their liberty must be given the possibility to appeal. In such cases, the Special Rapporteur on Torture has recommended not only to *"take individuals' gender identity and choice into account prior to placement"* but also to *provide opportunities to appeal placement decisions*¹⁰³.

128. In this regard, the NPM of **Costa Rica** identified that, in the Procedure for the Care and Monitoring of the Trans Population in the National Prison System, it is possible that trans persons present disagreement over placement, through an appeal for revocation of the agreement on placement by the Interdisciplinary Technical Council, as well as an appeal to the National Institute of Criminology.

129. In view of the above, it is recommended that the self-identification of each person be a guiding principle in the admission, registration and placement processes.

130. If the person does not wish to self-identify, he or she should not be subject to disciplinary action or punishment for such a reason.

131. Decisions regarding the placement of LGBTI people must be considered on a case-by-case basis, not just on the basis of anatomy or gender assigned at birth,

¹⁰⁰ Grijalba Cabrero, Estela, *La orientación sexual ante el Tribunal Europeo de Derechos Humanos*, 2014. p. 332.

¹⁰¹ SPT, Report on the Visit to Chile, *Op. cit.*

¹⁰² IACHR, *Report on the Situation of Persons Deprived of Liberty in the Americas*, *op. cit.*

¹⁰³ Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council, A/HRC/31/57, 24 February 2016, para. 70 (s).

and the person must be consulted about his or her wishes regarding where to be placed¹⁰⁴.

132. It is recommended that the initial assessment of LGBTI persons deprived of their liberty be carried out by multidisciplinary teams, based on objective and professional criteria, with a view to avoiding discrimination and stigmatisation.

133. Decisions on the placement of LGBTI people must be frequently reviewed against human rights criteria.

134. It is recommended that objective restrictions be placed on the use of protective isolation, including the creation of alternatives before deciding on the involuntary placement of LGBTI persons¹⁰⁵.

C. Prevention of violence against LGBTI persons in detention

135. The following are some considerations regarding the questions:

a. What specific obligations do States have to prevent any act of violence against LGBT persons deprived of liberty that do not involve segregation from the rest of the prison population?

b. What particular obligations have States with regard to recording different types of violence against LGBT persons deprived of liberty?

- **Prison violence towards LGBTI people**

136. In addressing the issue of violence, it should be recalled that the method of deprivation of liberty should not exceed the level of suffering inherent in imprisonment¹⁰⁶. In other words, the person deprived of liberty must be treated humanely, with all the dignity of his or her person, while the system must seek his or her social reintegration¹⁰⁷.

137. Prison violence is one of the most serious problems facing prison systems in the region, to a greater or lesser extent depending on the national context. For the IACHR, prison violence as such, as a violation of the rights to life and personal integrity, is a reality that includes both aggression committed by State agents and acts of violence between persons deprived of liberty or committed by them against State agents or any other person¹⁰⁸.

¹⁰⁴ See National Council of Justice (CNJ) of Brazil, Resolution No. 348, 13 October 2020, Art. 7.

¹⁰⁵ National Center for Transgender Equality, LGBT people and the prison rape elimination act, 2012.

¹⁰⁶ Inter-American Court of Human Rights, *Case of Velez Loo v. Panama*. Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C. No. 218, para. 198.

¹⁰⁷ IACHR, *Annual Report 2002*, Chapter IV, Cuba, OEA/Ser.L/V/II.117, Doc. 1 Rev. 1, adopted 7 March 2003, para. 73; IACHR, *Annual Report 2001*, Chapter IV(c), Cuba, OEA/Ser.L/V/II.114, Doc. 5 Rev.

¹⁰⁸ IACHR, *Report on the Situation of Persons Deprived of Liberty in the Americas*, *op. cit.*

138. In relation to the experiences of LGBTI people, the following particular characteristics of prison violence against this population have been identified:

- Manifestations of violence are based on the perpetrator's desire to "punish" various identities, expressions, behaviours or bodies¹⁰⁹. In this regard, the IACHR has identified that gay men or trans women deprived of their liberty may be subjected to situations of forced servitude or forced to provide "sexual services".
- In **Honduras**, the MNP-CONAPREV during its visits has reported that LGBTI people are subject to sexual slavery and forced labour, in the context of the militarisation that the country is going through. These practices are carried out with the acquiescence of the authorities, despite the existence of repeated complaints about these scourges to human dignity. In **Brazil**, the National Mechanism to Prevent and Combat Torture (MNPCT) has identified that LGBTI people suffer torture, ill-treatment, degrading and cruel treatment by prison officials who impose harsher and more perverse punishments on LGBTI people than on the rest of the population.
- LGBTI people face an increased risk of sexual violence such as rape or multiple sexual assaults¹¹⁰. In the case of lesbian women in prison, it has been documented that they are subjected to harassment, physical abuse and "forced feminisation" by custodial staff¹¹¹.
- LGBTI people are also subjected to other forms of violence such as verbal violence through homophobic and transphobic insults, mockery, the deliberate and incorrect use of pronouns with trans people in detention, as well as forced disclosure of sexual orientation and gender identity by staff or others in detention.
- Trans people face a unique exposure to violence by prison staff and other inmates, which can range from collective rape to intentional beating of breasts to damage implants, as recorded by the State Mechanism to Prevent and Combat Torture in Rio de Janeiro, **Brazil** (MEPCT/RJ).
- Expressions of affection between LGBTI people are categorised as "obscene acts" and in some cases they can be punished or threatened with disciplinary action to suppress and frighten.

139. From the above, it can be identified that acts of prison violence directed towards LGBTI people are not isolated events but rather a social phenomenon in a given context that includes, for its commission, the complicity of state agents and third parties (i.e. prison system staff and other persons deprived of their liberty). This violence is

¹⁰⁹ IACHR, *Report on Violence against Persons (...)*, *op. cit.*

¹¹⁰ UN, *Report of the Special Rapporteur on Torture, A/56/156*, *op. cit.*

¹¹¹ IACHR, *Report on Violence against Persons (...)*, *op. cit.*

specifically directed at people with non-normative sexual orientations and gender identities, known as *bias-based violence*¹¹².

140. Against this background, the Inter-American Court has expressed its concern about the absence of concrete measures to protect the LGBTI population in prison establishments. It has stipulated that in the case of this specific population **it is imperative to take into account the situation of vulnerability in which they find themselves**, *inter alia*, of suffering physical and psychological aggression (collective rape, discrimination, restriction of freedom of movement, among others)¹¹³.

141. In addition to all of the above, impunity prevails in cases of prison violence against LGBTI people.

- **Specific obligations of the State in relation to prison violence**

142. Derived from Article 1.1. of the American Convention, the State acquires two **general obligations of respect and guarantee**. On the one hand, respect implies a limit to the activity of the State, and the guarantee derives from the fact that the State must take all necessary measures to ensure that persons subject to its jurisdiction can effectively enjoy their rights. In view of this obligation, states must **prevent**, investigate, punish and redress any human rights violations.

143. As already mentioned, the State, by depriving a person of his or her liberty, assumes a specific commitment to respect and guarantee his or her rights, particularly the rights to life and personal integrity, which are non-derogable and necessary for the exercise of other rights.

144. In view of the above, the State has the **obligation to protect persons deprived of liberty** against acts of violence from any source¹¹⁴.

145. The IACHR has also indicated that the duty of the State to protect persons deprived of liberty is not limited solely to the enactment of regulations to protect them, nor is it sufficient that State agents refrain from acts that could cause violations of the life and physical integrity of persons detained. It has stated that **international human rights law requires the State to adopt all measures** within its power to guarantee the life and integrity of persons deprived of liberty¹¹⁵.

146. In this regard, the IACHR has also determined that the duty of the State to protect the life and integrity of every person deprived of liberty includes the **positive**

¹¹² María Mercedes Gómez, *Capítulo 2: Violencia por Prejuicio* in *La Mirada de los Jueces: Sexualidades diversas en la jurisprudencia latinoamericana*. Volume 2. Cristina Motta & Macarena Sáez, Bogotá: Siglo del Hombre Editores, Red Alas, 2008, p. 99.

¹¹³ Inter-American Court, Case of the Curado prison complex, Resolution of the Inter-American Court of Human Rights of 28 November 2018, para. 154.

¹¹⁴ IACHR, Report No. 67/06, Case 12.476, Merits, Oscar Elías Biscet et al.

¹¹⁵ IACHR, *Democracy and Human Rights in Venezuela*, Chapter VI, para. 826.

obligation to take all preventive measures to protect them from attacks or assaults that may come from the State's own agents or third parties, including other prisoners¹¹⁶.

147. In line with the above, the *Yogyakarta Principles* indicate that States shall establish protective measures for all persons deprived of their liberty who are vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression, and ensure, as far as reasonably practicable, that such measures do not entail more restrictions on their rights than those experienced by the general prison population (Principle 9).

148. The duty of prevention, according to the IACHR, covers all those measures of a legal, political, administrative and cultural nature that ensure that a possible violation of human rights is effectively considered¹¹⁷.

149. In this regard, the IACHR has observed that in order to comply with the duty to prevent violence against LGBTI people, States must develop cross-cutting strategies that include, amongst others: the **establishment of mechanisms for the collection of data to analyse the extent and trend of these types of violence; the design and implementation of public policies and educational programmes to eradicate existing stereotypes and stigma against LGBTI people**¹¹⁸.

150. The Inter-American Court, in the provisional measures on the Curado Penitentiary Complex in **Brazil**, ruled that in view of the situation of special vulnerability of LGBTI people deprived of their liberty to physical and psychological aggression, the Brazilian State should urgently adopt the necessary measures to guarantee the effective protection of this group and ordered the necessary **structural changes** to be made to that effect¹¹⁹.

151. In light of the above, and considering that segregation or protective isolation is not an appropriate measure to apply to individuals, as it may constitute a violation of the absolute prohibition of torture and ill-treatment, some of the non-segregated measures to prevent prison violence for LGBTI persons are presented below.

- **Data collection**

152. The IACHR has established that the States have committed themselves to producing data on homophobic and transphobic violence, with the aim of promoting public policies aimed at protecting the human rights of lesbian, gay, bisexual, trans and intersex persons, in various resolutions of the General Assembly of the Organisation of

¹¹⁶ IACHR, Report No. 41/99. Case 11.491 Fondo, Menores detenidos, Honduras, 1999, paragraphs 1136 and 140.

¹¹⁷ IACHR, *Report on Citizen Security and Human Rights*, 2009, para. 41.

¹¹⁸ IACHR, *Report on Violence against LGBTI Persons*, para. 391.

¹¹⁹ Inter-American Court., *Case of the Curadour Prison Complex*, Resolution of the Inter-American Court of Human Rights of 28 November 2018, para. 160

American States (OAS)¹²⁰. This duty to collect information stems from the consideration that it is not possible to implement and evaluate the impact of a public policy if the State itself does not generate the necessary information for this purpose¹²¹.

153. Data collection in relation to LGBTI persons in prison includes two dimensions. On the one hand, the careful collection of information **respecting the principles of confidentiality and privacy** allows for the identification of LGBTI persons deprived of their liberty and can be used for the formulation and implementation of prison policies that address their needs.

154. Regarding this practice, the Protocol for Action of Prison Personnel for the Care of LGBTI People in **El Salvador** provides that the Directorate General of Penal Centres, in coordination with the Information Technology and Development Unit and the Gender Coordination, must take relevant measures, in their information systems, to disaggregate and record statistical data regarding the population deprived of liberty in relation to sexual orientation, gender identity and gender expression. It also provides that appropriate personnel sensitized on the subject shall be designated.

155. In **Colombia**, the National Penitentiary and Prison Institute (INPEC) developed a census that it carries out through "the day of self-recognition of the LGBT population". However, in 2015 civil society organisations identified that the census had a structural problem in the registration of information and sub-registration, for the following reasons:

- The absence of a methodological line for collecting the information.
- Many people do not consider it necessary to make their sexual orientation or gender identity public, as they seek to protect themselves, fear stigmatisation, worry about violence or personal choice.
- It was recorded that 50% of the prisons had not carried out the census because they did not agree that it was a major requirement.
- No confidentiality and data protection protocol was used¹²².

156. On the other hand, there is the collection of information regarding the prevalence of hate violence in detention centres, which must be done carefully, taking into account the **inherent risks of re-victimisation, stigmatisation and abuse**¹²³.

157. In this regard, the SPT has expressed its concern about the lack of statistics on ill-treatment and torture on the grounds of sexual orientation and gender identity, which

¹²⁰ OAS, AG/RES. 2807 (XLIII-O/13), Human Rights, Sexual Orientation and Gender Identity and Expression, adopted at the fourth plenary session, June 6, 2013.

¹²¹ IPPDH, *Achieving Rights: guidelines for rights-based public policymaking*, p. 91.

¹²² Colombia Diversa, *Del amor y otras condenas: personas LGBT en las cárceles de Colombia* [From Love and Other Convictions: LGBT People in Colombian Prisons], 2015.

¹²³ APT and Penal Reform International, *LGBTI Persons Deprived of their Liberty: A Framework for Preventive Monitoring*, 2013.

is due to the absence of appropriate methods of self-identification, data collection and processing. It has even referred to the lack of information as a systemic problem, which results in the invisibility of the concerns and problems affecting LGBTI persons¹²⁴.

158. This type of data has the function of making it possible to better document the particular manifestations of violence towards this population in order to prevent it. It also allows the development of immediate care and prevention measures that can contribute to public policies in the area of prisons¹²⁵.

- **Risk assessments**

159. The SPT has found that the lack of institutional policies and methods of classification, risk assessment and detention means that, in some cases, trans women are held in male-only prisons where they are at high risk of rape¹²⁶.

160. In this regard, the IACHR has urged OAS Member States to adopt individualised risk assessments at the time of admission, as a measure to prevent violence against LGBT persons deprived of liberty,

161. In this regard, it should be noted that in the **US**, the Prison Rape Elimination Act (PREA, published in 2003) and its respective Prison and Jail Standards (PREA Standards, published in 2012)¹²⁷ require correctional authorities to proactively assess and document the risks of victimization and abuse, including for LGBTQ or intersex individuals.

162. The assessment is carried out during admission to the prison and on the occasion of any transfer. One of the minimum criteria for assessment is the self-perception of vulnerability, whether the person is perceived to be LGBTI or of a non-conforming gender, and whether he/she has experienced sexual victimisation, among other criteria.

163. The information obtained is used to inform decisions on placement, educational activities and work, which must be analysed on a case-by-case basis based on whether the placement will ensure the health and safety of people.

164. The PREA Standards also state that the location and schedule of activities for each trans or intersex person should be re-evaluated at least annually to check for threats to the person's safety.

165. Based on these Standards, the National Center for Transgender Equality developed a Policies to Increase Safety and Respect for Transgender Prisoners, which includes

¹²⁴ UN, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 59.

¹²⁵ IACHR, *Report on Violence against LGBTI Persons*, *Op. cit.* 164.

¹²⁶ *Ibid.*

¹²⁷ National PREA Resource Center, Prison and Jail Standards.

guidelines on how prison staff should respectfully conduct the risk assessment process¹²⁸.

166. It should be noted that the PREA Standards also state that persons deprived of liberty who are at high risk of sexual violence should not be involuntarily placed in segregation, after evaluating all possible alternatives and determining that they were not possible to protect the person.

167. In these cases, it is established that persons placed in protective segregation will have access to programme opportunities, privileges, education and work.

- **Training of prison staff**

168. The institutionalised acceptance that the abuse of persons in detention is a valid procedure requires a solid framework of prevention. This must be coupled with actions to eliminate prejudices ingrained in the prison system against LGBTI people. In this sense, the **training of prison staff must be undertaken responsibly** and not just as a mechanical exercise to fulfil a requirement.

169. The *Yogyakarta Principles* (Principles 9, 10 and 33) require States to undertake training and awareness raising programmes for prison staff and other public and private sector officials who are involved with prisons, on international human rights standards and the principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

170. In this regard, the *Nelson Mandela Rules* also provide that prison staff who are responsible for certain categories of prisoners, or who are assigned to other specialized functions, shall receive appropriate specialized training (Rule 76.2).

171. The design and implementation of training for staff working in prisons on LGBTI rights could consider the following¹²⁹:

- The strengthening of practical skills and the elimination of discriminatory attitudes in accordance with the human rights and dignity of persons in detention.
- Training should be provided on a regular and ongoing basis, in order to prevent discriminatory attitudes and practices and to address existing prejudices. Training should include specific content on sexual orientation and gender identity and expression.
- Training modules should be inspired by the Yogyakarta Principles and should be designed with the support of specialised non-governmental organisations.
- Training should aim to improve the ability to handle specific situations, for example, the placement of LGBTI people.

¹²⁸ National Center for Transgender Equality, *Policies to increase safety and respect for transgender prisoners. A guide for agencies and advocates.*

¹²⁹ APT, LGBTI Monitoring Guide, *Op. cit.* 109.

172. In practice, in **El Salvador** it is recorded that the Prison Academy must develop content related to sexual diversity, sexual orientation, gender identity and gender expression in accordance with international standards¹³⁰. In **Chile**, the Regional Court of Iquique determined that a relevant training centre for prison staff on issues related to gender identity, sexual orientation and gender expression was required, following acts of discrimination against trans women in prison. Similar measures have been established in various resolutions in **Costa Rica**¹³¹ and **Colombia**.

- **Other measures**

173. Other measures that may be considered include: independent and effective procedures for the submission of complaints about violation and abuse; adequate separation of different categories of persons; the establishment of early warning mechanisms to prevent crises and emergencies; the eradication of impunity by investigating and punishing all types of violence in accordance with the law¹³².

174. The investigation, prosecution and punishment of acts of torture and cruel, inhuman and degrading treatment against LGBTI people send a clear message to the population deprived of liberty that violence against LGBTI people is not tolerated¹³³.

175. Finally, the IACHR establishes that there cannot be any reason for the State to shirk its peremptory duty to protect the life and integrity of persons in its custody, who themselves lack effective capacity for self-determination and defense. In this regard, it states that the most effective way of guaranteeing the rights of persons deprived of liberty is the adoption of **preventive measures**, including those to control and reduce the factors of violence in prisons¹³⁴.

- **Specific considerations on the prevention of torture and ill-treatment**

176. The SPT, in developing the duty of prevention against torture and ill-treatment, has established that legislative, administrative and judicial measures must be taken to strengthen the protection of persons deprived of their liberty. In order for these measures to be effective, **a diligent risk assessment must be carried out, including the identification of the causes, forms and consequences of violence and discrimination**. It is essential to challenge preconceptions, stereotypes and prejudices regarding behaviour, physical appearance and perceived gender.

¹³⁰ Ibid.

¹³¹ Ministry of Justice and Peace of Costa Rica, Guidelines for the care of people with diverse sexual orientation, gender expression or gender identity, assigned to any of the levels of the Costa Rican Prison System.

¹³² IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXIII.

¹³³ IACHR, *Violence against LGBTI persons*, *op. cit.* par. 164.

¹³⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty*, *Op. cit.*

177. It is also essential to assess the context, taking into account the ethical principle of "do no harm", as isolated, decontextualized or intuitive actions can increase the risk of violence against LGBTI people¹³⁵.

178. The SPT has also emphasised that, in the case of LGBTI persons deprived of their liberty in any place of detention, State authorities must recognise the specific risks, identify those who are in a vulnerable situation and protect them through measures that do not involve isolation¹³⁶.

179. In light of the above, the following recommendations are made for the prevention of prison violence against LGBTI people:

180. Train and sensitise staff working in prisons on the risks of violence faced by LGBTI people deprived of their liberty - adolescents and adults - and their relationship to guaranteeing the right to equality and non-discrimination.

181. Take the necessary measures to ensure adequate separation of the prison population without discrimination, on a case-by-case basis, respecting personal dignity and where possible taking into account the views of LGBTI people on where they feel it is appropriate to be placed.

182. Establish early warning mechanisms to prevent crises or emergencies regarding prison violence originating from discriminatory grounds relating to sexual orientation, gender identity and expression.

183. Collect data carefully, and respecting the principles of confidentiality and privacy, on the prevalence of prison violence directed at LGBTI people, taking into account the inherent risks of re-victimisation, stigmatisation and abuse.

184. Undertake diligent risk assessments that include the identification of the causes, forms and consequences of violence and discrimination towards LGBTI persons deprived of their liberty, in order to make informed decisions in the prison environment.

185. Eradicate impunity by investigating and sanctioning all forms of violence directed at LGBTI people.

186. Take the necessary measures to prevent torture, cruel, inhuman or degrading treatment or any form of abuse, including the adoption of protocols and guidelines for prison staff (mainly security and custody staff).

¹³⁵ UN, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 71.

¹³⁶ Ibid.

187. Ensure that measures to protect LGBTI people deprived of their liberty are not assimilated to sanctions, or involve the denial of rights or benefits that impose undue restrictions on LGBTI people.

D. The right to health of LGBTI persons in detention

188. In this section, we present some considerations regarding the following question asked by the IACHR:

What are the special obligations that States have with regard to the particular medical needs of transgender persons deprived of liberty and, in particular, if applicable, with regard to those who wish to begin or continue their transition process?

189. In addition to the specific considerations relating to the needs of trans persons in detention, some considerations are also presented about the other people included in the LGBTI acronym.

190. The right to health of persons deprived of their liberty without discrimination is guaranteed in international law, both in regional and United Nations instruments. The right to health of persons deprived of their liberty includes medical treatment and preventive measures, and the level of health care must be at least equivalent to that available in the community¹³⁷.

191. The *Nelson Mandela Rules* set out the obligation of States to have a health care service within each prison that caters, in particular, for people with special health needs (Rule 25)¹³⁸.

192. The *Yogyakarta Principles*¹³⁹ (Principles 17 and 18) comprehensively address the right to health of LGBTI people and their protection from medical abuse. In terms of the right to health, Principle 17 states that "everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right".

193. Access to health also depends on informing people to make decisions about their care and treatment without discrimination on the basis of sexual orientation and gender identity, in addition to the obligation that all sexual and reproductive health

¹³⁷ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle X "Health"; UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Rules 24-35.

¹³⁸ UN, Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Rule 25.

¹³⁹ *Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sexual Characteristics to Complement the Yogyakarta Principles (YP + 10)*, 2017, Principles 17-18.

programmes and services be accessible to all without exception. This Principle also establishes the obligation to facilitate "access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support".

194. With regard to the protection of LGBTI persons from medical abuse, the *Yogyakarta Principles* (Principle 18) state, among other things, that States shall "ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed"¹⁴⁰.

195. In addition, the *Yogyakarta Principles* include specific standards relating to LGBTI persons in detention, stating that¹⁴¹:

"Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall: [...]

B. Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons based on their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy, and access to hormonal or other therapy, as well as to gender-reassignment treatments when desired. [...]

H. Adopt and implement policies to combat violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as [...] access to and continuation of gender affirming treatment and medical care [...]"

196. Despite international standards on the subject and important advances in public policies and specific guidelines at the national level, in general, access to health care is highly deficient in practice for the entire prison population in the Americas. This situation of deficiency in the prisons of the region has once again become very evident in the current context of the health emergency caused by the COVID-19 pandemic.

197. In addition, the prison population generally includes people who face higher risks of physical illness and mental health problems, physical and sexual violence, and problems related to drug use. Therefore, additional resources are usually required in

¹⁴⁰ Ibid, Principle 18 (f).

¹⁴¹ Ibid, Principle 9.

prisons to ensure greater health care, due to the higher incidence and prevalence of certain diseases.

198. In addition, some vulnerable persons in detention, such as LGBTI persons, may need specific health care, including mental health care, which needs to be addressed in an equivalent way to the community. Mental health care is particularly important for LGBTI people who have experienced sexual violence and other forms of abuse and trauma.

199. Among the normative and public policy progress in this area at the national level, it is worth mentioning, for example, the National Policy for Comprehensive Health for LGBT Persons adopted by the **Brazilian** Ministry of Health in 2011. It considers several access policies, including the articulation with state and municipal health secretariats to define health care strategies for LGBT people in prison, in accordance with the National Policy on Comprehensive Health Care for Persons Deprived of Liberty in the Prison System (PNAISP).

200. Below are some highlights of the National Comprehensive Health Policy for LGBT persons: a) access to the transitioning process; b) actions aimed at reducing the risks of problems derived from the prolonged use of female and male hormones for transvestites and transsexuals; c) reducing the damage to this population through the abusive use of medicines, drugs and medication; d) acting to limit the prejudices in the health service suffered by this population; e) guaranteeing the use of the social name of transvestites and transsexuals; f) acting in health prevention, seeking to reduce the mental health problems of the LGBTI population such as depression, suicide, among others; g) improving the technology used for the transitioning process of men and women; h) respecting the human rights of lesbian, gay, bisexual and trans people, reducing their stigma, considered in the social determination of suffering and illness; j) reducing the damage caused by suffering, pain and illness related to aspects of inappropriate corporal and psychological identity in relation to trans people and transvestites; l) articulating with the state and municipal health secretariats the definition of strategies to provide health care to LGBTI people in prison.

201. It is also worth considering the Joint Resolution 1/2014¹⁴² of the **Brazilian** National Council against Discrimination, which guarantees comprehensive health care for LGBTI persons deprived of their liberty, in accordance with the National Policy on Comprehensive Health Care for LGBT Persons and the PNAISP.

¹⁴² Presidency of the Republic of Brazil, National Council against Discrimination, Joint Resolution No. 1 of April 15, 2014, Art. 7
http://www.lex.com.br/legis_25437433_RESOLUCAO_CONJUNTA_N_1_DE_15_DE_ABRIL_DE_2014.aspx

202. However, as reported by the State Mechanism to Prevent and Combat Torture of Rio de Janeiro, **Brazil** (MEPCT/RJ) in its 2018 thematic report¹⁴³ on health in the prison system, in practice many difficulties remain for LGBTI persons to access health care in the terms set out by the National Policy.

203. **Argentina's** National Committee for the Prevention of Torture, in its ongoing monitoring of the situation of LGBTI persons in detention, also notes that the facilities do not have health professionals from outside the prison service. The number of professionals is scarce in relation to the total population held, especially considering that they are generally present at reduced hours and mostly perform passive guards. In terms of professional specialities, the staff is mainly composed of nurses and psychologists.

- **Initial medical assessments**

204. Due to the vulnerable situations of LGBTI persons in detention, it is essential that initial medical assessments are carried out confidentially and by qualified personnel who have been trained in the comprehensive health care of these groups.

205. In this regard, it is worth mentioning the Guidelines for the care of LGBTI people in the prison system adopted in 2018 by the **Costa Rican** Ministry of Justice and Peace¹⁴⁴, which guarantee the right to health for LGBTI persons. In particular, these guidelines state that "*both the initial medical examination that should be carried out on persons deprived of their liberty upon admission and the care of their health situation during their deprivation of liberty should take into account their particularities, including different sexual practices and psychological care for the effects caused by the discrimination to which persons of diverse sexual orientation, expression or gender identity are exposed, among others*". In addition, regarding medical personnel that provide care to LGBTI persons deprived of their liberty, the Guidelines establish that "*the Directorate General for Social Adaptation will ensure that medical personnel are trained to provide comprehensive health care to this population group*".

206. Initial medical assessments and access to adequate health care are strictly related to respect for LGBTI persons' sexual orientation, gender identity and expression,

¹⁴³ See State Mechanism for Preventing and Combating Torture in Rio de Janeiro, *Sistema em colapso: atenção a saúde e política prisional no estado do Rio de Janeiro* [Collapsing System: Health Care and Prison Policy in the State of Rio de Janeiro], 2018 (<https://drive.google.com/file/d/1N28jgO9itWLWt10rxi3dlgEdNUFIRxCw/view>), p. 125.

¹⁴⁴ Ministry of Justice and Peace of Costa Rica, *Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system*, 2018, Articles 33-38.

including their social name. As noted by the **Rio de Janeiro**¹⁴⁵ Mechanism to Prevent and Combat Torture, trans women and transvestites as well as trans men continue to enter prison units by their registration name. In some cases, even the nominal identification of LGBTI people is done at the moment of entering the unit, in front of the whole group of detained people. Due to the high level of homophobia in the prison system, this practice leads to few people identifying themselves as LGBTI. The lack of identification in itself already results in a lack of access to adequate health care for the LGBTI population.

207. In the same vein, the Committee for the Prevention of Torture in the **Province of Chaco, Argentina** has repeatedly requested information from the prison system about LGBTI persons deprived of their liberty. However, as there is no record of these groups, there are no specific procedures or protocols to guarantee medical care for people with non-normative gender identities.

- **Access to information**

208. Another important aspect to be mentioned in relation to health care for LGBTI persons in prison is access to information by patients on the diagnoses and results of examinations and clinical trials they have carried out, either at the time of their admission to the prison system or during their stay in prison. In this regard, it is important that LGBTI persons deprived of their liberty are guaranteed the right to information, in a timely manner, on the results of clinical tests carried out and on the diagnosis of any illness or physical or psychological condition requiring medical attention, as well as clear and detailed information on the treatment options available. In this regard, the fact that the Technical Note¹⁴⁶ adopted by the National Penitentiary Department of **Brazil** in March 2020 includes this aspect is highlighted as a good practice.

- **Sexual health programmes and prevention of sexually transmitted diseases**

209. In relation to sexual health programmes and prevention of sexually transmitted diseases, including HIV/AIDS, these should be an integral part of health care provided in prisons, without discrimination of any kind. Prison population includes many vulnerable groups, including victims of physical and sexual abuse, injecting drug users

¹⁴⁵ See State Mechanism for Preventing and Combating Torture in Rio de Janeiro, *Sistema em colapso: atenção a saúde e política prisional no estado do Rio de Janeiro* [Collapsing System: Health Care and Prison Policy in the State of Rio de Janeiro], 2018 (<https://drive.google.com/file/d/1N28jgO9itWLWt10rxi3dlgEdNUFIRxCw/view>), p. 125.

¹⁴⁶ Ministry of Justice and Public Security, National Penitentiary Department, Technical Note No. 7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJepen, 13 March 2020, para. 50 (file:///C:/Users/VFILIP~1/AppData/Local/Temp/copy2_of_sei_mj11156365notatcnica.pdf).

and alcohol dependents, and persons with mental health problems. This, together with poor prison conditions, violence among prisoners and risk behaviours such as drug injection and sexual contacts, makes it easier for diseases such as HIV, Hepatitis B and C, sexually transmitted diseases and tuberculosis to become more common in prisons.

210. In addition, in contexts where same-sex relationships are criminalized, making condoms and contraceptives available may be perceived as promoting criminal behaviour.

211. In detention contexts, public health considerations must always prevail. Therefore, all persons in detention should have access to information on safe sex and sexual and reproductive health and counselling services in a range of languages, and condoms and contraceptives should be available to all persons in detention, without discrimination on the basis of sex, sexual orientation, gender identity or expression, or any other factor.

212. Because of the stigma and discrimination to which LGBTI people in prison are exposed, it is very important that condoms, as well as information materials on sexual and reproductive health, are available to people in prison without having to request them from prison staff. Having to request can discourage LGBTI persons and can also expose them to the risk of discrimination and abuse¹⁴⁷.

213. With regard to the treatment of sexually transmitted diseases (STDs), including HIV/AIDS, the same principle of ensuring the same medical care as for people with the same characteristics in the community applies.

214. In this regard, the SPT, following its visit to **Chile** in 2016, has expressed concern about the lack of medical assistance provided to persons with HIV in the gay and trans ward of the Valparaíso prison, after having received complaints about the interruption in the delivery of medication to some of the detained people who were living with HIV. The SPT stressed that "when persons with HIV fail to take antiretroviral medicines, they are more likely to develop AIDS"¹⁴⁸.

215. The SPT has expressed similar concerns also in relation to its visit to **Panama** in 2017, noting that, in the case of health care for LGBTI persons, many of whom were living with HIV/AIDS, "there are many cases in which persons living with HIV/AIDS receive antiretroviral treatment but have extremely limited access to the prison doctor. This is problematic because such patients typically need more medical care for common

¹⁴⁷See APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, pages 98-100: https://www.apr.ch/sites/default/files/publications/lgbti_apr_es.pdf

¹⁴⁸ UN, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Chile from 4 to 13 April 2016: observations and recommendations to the State party. Report of the Subcommittee*, CAT/OP/CHL/1, 16 May 2017, para., 62, 128.

diseases, from which they are usually slow to recover; moreover, they do not appear to have the opportunity to consult an infectious disease specialist"¹⁴⁹.

216. The **Brazilian** National Mechanism to Prevent and Combat Torture (MNPCT), in its visits to prison units in several Brazilian states, has documented the lack of access of LGBTI persons to tests for the identification of COVID-19, as well as tests for Hepatitis, HIV/AIDS, and other sexually transmitted diseases, identifying especially the absence of anti-retroviral drugs.

217. In some contexts, it has been reported that LGBTI persons living with HIV are segregated from the rest of the prison population, allegedly in order to prevent the possibility of disease transmission¹⁵⁰. This practice is not an appropriate way of ensuring the health and safety of individuals and contributes to reinforcing stigma towards these groups.

218. The IACHR has pointed out that LGBTI persons can be victims of multiple discrimination when living with HIV, emphasizing the need to pay particular attention to discrimination on the basis of sexual orientation of people living with HIV. In this regard, the IACHR has urged States "to adopt any legislative, institutional, or other measures needed to prevent and eliminate discrimination against inmates with HIV/AIDS"¹⁵¹.

- **Specific health needs of trans persons**

219. Trans persons in detention have specific health care needs, which are often neglected by prison authorities. Trans persons in detention who are following or wish to initiate hormone therapy, or who have undergone gender reassignment surgery, are often denied the ongoing care they need, as observed by the IACHR in its recent visits, in particular to **Guatemala** (2017), **Honduras** (2018) and **Brazil** (2018)¹⁵².

220. When hormonal treatments are abruptly interrupted by deprivation of liberty, trans persons can suffer serious mental health problems. In addition, detainees who are denied treatment may resort to self-intervention, self-mutilation, or the use of hormones that can have very harmful and long-term consequences¹⁵³. In this regard, in **Honduras**, the MNP-CONAPREV has identified with concern that, once in prison,

¹⁴⁹ UN, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Panama from 20 to 26 August 2017: observations and recommendations to the State party. Report of the Subcommittee*, CAT/OP/PAN/1, 31 July 2018, para. 130.

¹⁵⁰ *Ibid*, para. 128.

¹⁵¹ IACHR, *Report on the human rights of persons deprived of liberty in the Americas*. OAS/Ser.L/V/II, doc. 64, 31 December 2011, para. 568.

¹⁵² IACHR, Request for an Advisory Opinion to the IACHR on Differentiated Approaches to Persons Deprived of Liberty, November 25, 2019, para. 34.

¹⁵³ See APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019, pages 101-102: https://www.apr.ch/sites/default/files/publications/lgbti_apr_es.pdf

persons receiving hormone treatment no longer have access to it, because it is not available in the prison environment. This leads to a serious deterioration in their health.

221. In particular, in countries where hormone therapy and gender reassignment surgery are available in the community, States should ensure that trans persons in detention have access to such treatment in prisons as well, based on the principle of equality in health care. Failure to do so jeopardizes the physical and psychological well-being of such persons and may therefore breach their duty of care.

222. Health personnel who care for persons deprived of liberty in prisons must be adequately trained to deal with the needs of LGBTI people. If adequate or sufficient capacity is not available in the health staff working in prisons, it is recommended that consultations be made available by professionals with relevant experience in the community.

223. In addition to hormone treatment, counselling and psychological support for LGBTI persons must also be guaranteed. In particular, trans persons experience very high levels of mental health problems compared to the general population, including anxiety, depression and eating disorders, with a high risk of suicide and self-harm¹⁵⁴.

224. The right to hormone treatment for trans persons in prisons has been recommended by several NPMs and LPMs in Latin America in their thematic or annual visit reports and is recognised in several national instruments.

225. An example of the above is the Joint Resolution 1/2014¹⁵⁵ of the **Brazilian** National Council against Discrimination, which guarantees hormone treatment and specific health care for trans persons deprived of their liberty.

226. The Technical Note¹⁵⁶ on procedures related to the detention of LGBTI people in the **Brazilian** prison system also guarantees access to the transitioning process for people deprived of their liberty.

227. Finally, we mention the Guidelines for the care of LGBTI people in the prison system adopted in 2018 by the **Costa Rican**¹⁵⁷ Ministry of Justice and Peace, which establish

¹⁵⁴ Ibid, page 103.

¹⁵⁵ Presidency of the Republic of Brazil, National Council against Discrimination, Joint Resolution No. 1 of April 15, 2014, Art. 7, sole paragraph:

http://www.lex.com.br/legis_25437433_RESOLUCAO_CONJUNTA_N_1_DE_15_DE_ABRIL_DE_2014.aspx

¹⁵⁶ Ministry of Justice and Public Security, National Penitentiary Department, Technical Note No. 7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJepen, 13 March 2020, para. 49:

file:///C:/Users/VFILIP~1/AppData/Local/Temp/copy2_of_sei_mj11156365notatcnica.pdf

¹⁵⁷ Ministry of Justice and Peace of Costa Rica, *Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system*, 2018, Articles 35, 38.

that the authorities should *"follow up on transgender and transsexual people deprived of their liberty who have already started their hormone treatment or who wish to do so in detention"*. In addition, these guidelines provide that *"the health service of each centre will refer to the Costa Rican Social Security Fund persons with diverse sexual orientation, identity or gender expression who are released and are under treatment for medical conditions, including hormone therapy or treatment for drug abuse, so that they can continue to have access to them when released"*.

228. Another good practice to highlight is **Malta's** prison policy on *"trans, gender variant and intersex inmates"*¹⁵⁸, which includes the following provisions, among others:

- *"Right to access medical assessment and treatment related to their gender identity, gender expression and/or sex characteristics. Any hormone medication (such as hormone tablets, injections and topical gels) an inmate is already receiving on prescription prior to imprisonment should be identified, recorded within the inmate's healthcare records and access continued in the same manner as any other prescribed medication would be continued within prison"*.
 - *"Access to hormones, hair removal, speech therapy or surgery as part of a process of transition while in prison should be taken in consultation with doctors (specialised in the fields of gender reassignment, endocrinology and/or surgery) applying the same principles as would be applied in relation to people at liberty"*.
 - *The fact of a trans, gender variant and intersex person's imprisonment, and the vulnerable situation in which that places them, means that every effort should be made by Correctional Services to ensure access to the required/requested medical treatment that assists the inmates in aligning their physical characteristics with their gender identity. Whenever an inmate requests such specialist assistance, the necessary arrangements to facilitate this should be undertaken promptly"*.
 - *"Access to trans, gender variant and/or intersex healthcare services should be guaranteed to inmates regardless of their legal gender identity"*.
- **Participation of LGBTI persons in decisions that affect them**

229. Finally, it is important to consult directly with LGBTI groups in order to understand their specific needs in prison and to develop standards that respond to their needs in an appropriate way. In this regard, the creation of the Working Group on Women and Girls Deprived of their Liberty within the **Rio de Janeiro** State Committee to Prevent and Combat Torture (CEPCT/RJ) represents a good practice. The group is composed not only of members of the CEPCT/RJ as public defenders and civil society organisations, but now also includes movements and organisations that work

¹⁵⁸ Malta Prison Policy, Correctional Services, *Trans, Gender Variant and Intersex Inmates Policy*, August 2016, 3.10 Access to Health Services.

specifically on gender issues, such as the LGBTI movement, movements that work on assisting women in detention, and that promote the policy of access to sexual and reproductive rights, among others. This working group has already carried out a number of discussions and strategies focusing on the specific reality experienced by people in detention, including a public debate on access to hormone treatment for trans persons in prison.

230. In view of the above, it is recommended that the principle of equality in health care be respected by ensuring that health care for LGBTI persons deprived of their liberty is at least equivalent to that available in the community.

231. Initial medical assessments should be conducted confidentially and by qualified personnel who have been trained in comprehensive health care for LGBTI persons.

232. LGBTI persons deprived of their liberty must be guaranteed the right to information, in a prompt manner, on the results of clinical tests carried out and on the diagnosis of any illness or physical or psychological condition requiring medical attention, as well as clear and detailed information on the treatment options available.

233. It is recommended that all persons in detention have access to information on safe sex and sexual and reproductive health and counselling services in a variety of languages, and that condoms and contraceptive methods be available to all persons in detention, without discrimination on the basis of sex, sexual orientation, gender identity or expression, or any other factor.

234. Sexual health programmes and prevention of sexually transmitted diseases, including HIV/AIDS, should be an integral part of health care provided in prisons, without discrimination of any kind.

235. It is recommended that condoms, as well as information materials on sexual and reproductive health, be made available to persons deprived of their liberty, without having to request them from prison staff.

236. Continuity of hormone treatment for trans people must be guaranteed, as well as the possibility of starting treatment in detention.

237. In countries where hormone therapy and gender reassignment surgery are available in the community, it is recommended that States ensure that trans persons in detention have access to such treatment in prisons as well, based on the principle of equality in health care.

238. Health personnel who care for people deprived of their liberty in prisons must be adequately trained to deal with the needs of LGBTI persons.

239. It is recommended that consultations by professionals with relevant experience in the community be made available to LGBTI persons in detention.

240. Counselling and psychological support for LGBTI persons in detention must be guaranteed.

E. Right to family and intimate visits

241. Below are some considerations regarding the following question asked by the IACHR in the request for an Advisory Opinion:

What special measures should States adopt to ensure the right to intimate visits of LGBT persons?

242. When a person is deprived of his or her liberty, contact with the outside world, in particular with family and friends, is of particular importance, especially for emotional and material support, but also for the safeguard it can represent, as well as being fundamental for re-socialization and re-entry into society. Therefore, maintaining contact with family and friends is a fundamental right of persons deprived of their liberty, which should not be restricted on the grounds of discrimination of any kind. In this regard, the concept of family should be interpreted in an inclusive manner to include also same-sex couples, as well as any other person with whom the detained person has a close relationship.

243. Family visits to persons deprived of liberty are an essential element of the right to family, established in Article 17(1) of the *American Convention on Human Rights* and, as such, must be guaranteed by States in their capacity as guarantors of the rights of persons in their custody¹⁵⁹.

244. The *Nelson Mandela Rules* establish the right of persons deprived of their liberty to maintain regular contact with family and friends without discrimination, including through family visits and intimate visits (Rule 58)¹⁶⁰.

245. The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* establish the right of persons deprived of liberty "to maintain direct and personal contact through regular visits with members of their family, legal

¹⁵⁹ IACHR, *Report on the human rights of persons deprived of liberty in the Americas*. OAS/Ser.L/V/II, doc. 64, 31 December 2011, para. 576-577.

¹⁶⁰ UN, *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, Rule 58.

*representatives, especially their parents, sons and daughters, and their respective partners*¹⁶¹.

246. The *Yogyakarta Principles* specifically establish the right of persons deprived of liberty to receive intimate visits, where they are permitted, on an equal basis, regardless of the sex of the partner (Principle 9)¹⁶².

247. LGBTI persons may be discriminated against in ensuring family and intimate visits, both in relation to visits between same-sex couples, as well as trans couples. For example, **Panama's** National Preventive Mechanism has found that while LGBTI persons detained in the prison system are allowed to have family visits under the same conditions as the rest of the prison population, as far as intimate visits are concerned the prison system only allows them between people of different sex, excluding same sex and/or trans couples.

248. In addition, children of couples with non-normative sexual orientation, gender identity or expression may also face discrimination. In this case, it is appropriate to stress that the best interest of the child should always prevail, and they should not be prevented from seeing their parents, whether because of discriminatory policies and/or attitudes on the part of officials in charge¹⁶³.

249. The right of LGBTI persons to have family visits on an equal basis with other persons deprived of their liberty also applies to the modalities and conditions of such visits. For example, visits may be restricted only in exceptional circumstances, such as an emergency. Restrictions must be justified and visits must be resumed as soon as possible.

250. Attempts should generally be made to keep persons in detention in the appropriate institution closest to the place of residence of their families. This can be problematic for LGBTI persons who are placed in special units given the limited number of such units available. Wherever possible, the preferences of the person in detention should be taken into account when making such decisions.

251. In addition, because of their sexual orientation as well as their gender identity and expression, LGBTI persons often experience situations of abandonment from their families and close environments. It is therefore important to ensure access to detention centres also to civil society organisations and associations that provide emotional and material support to LGBTI persons.

¹⁶¹ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OAS/Ser/L/V/II.131, Principle XVIII "Contact with the outside world".

¹⁶² Yogyakarta Principles, Principle 9 "The Right to Treatment with Humanity while in Detention", E.

¹⁶³ See APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019, pages 89-90: https://www.apr.ch/sites/default/files/publications/lgbti_apr_es.pdf

252. Regarding the modalities of visits, families and couples must be treated with respect by staff from the moment they arrive until they leave, without discrimination of any kind. This includes body searches or searches of LGBTI persons visiting their partners or family members in prison, who in practice are often subjected to intrusive and degrading searches. One measure of protection against such practices is to ensure that people are searched by staff of the same sex and, in the case of trans or intersex people, to ask whether they prefer to be searched by female or male staff. In any case, body searches or inspections, in the case of visits, should be prescribed by law, necessary for the circumstances, carried out in the least intrusive manner possible, and follow the appropriate modalities, as established by the *Nelson Mandela Rules* (Rule 60) and the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXI).

253. With regards to intimate visits, in countries where they are allowed, LGBTI persons often face discrimination. In some countries in the region, such as **Panama**, noted by the NPM, intimate visits are only allowed between partners of different sex. In many cases, the authorities claim reasons of prison policy and discipline. In other contexts, where same-sex unions cannot be legally recognized, lesbian and gay prisoners are often denied their right to intimate visits. In other contexts where there are no clear regulations, the decision to allow such visits could be left to the discretion of the prison director, often resulting in arbitrariness. In prison contexts characterised by high levels of corruption, and where persons deprived of their liberty have to pay to access intimate visits, LGBTI persons are often discriminated against because of their sexual orientation and gender identity and do not have access to such visits¹⁶⁴. Finally, in some contexts LGBTI couples held in the same unit or in different prisons are denied the right to intimate visits.

254. The SPT, in its report on the visit to Argentina, has pointed out that intimate visits should not depend on marital status and that the State should "*ensure that all persons deprived of their liberty are able to receive regular visits, including conjugal visits, regardless of whether the partnership is formally recognized by the State; such visits should not be restricted on grounds of sex, nationality, sexual orientation or for any other discriminatory reason*"¹⁶⁵.

255. The IACHR, in the case of *Marta Lucía Álvarez Giraldo v. Colombia*, has expressed itself on the right to intimate visits without discrimination based on sexual orientation, recommending that the Colombian authorities "ensure [...] that women and lesbian women are able to exercise their right to intimate visits, according to domestic law. In

¹⁶⁴ Ibid, p. 91.

¹⁶⁵ *Report of the visit to Argentina of the Subcommittee on Prevention of Torture and Other Cruel Treatment or Punishment, Inhuman or Degrading Treatment or Punishment, CAT/OP/ARG/1, 27 November 2013, para. 70.*

particular, to adopt protocols and directives aimed at state officials, including penitentiary authorities at all levels, with the purpose of ensuring this right; as well as to establish monitoring and inspection mechanisms for compliance"¹⁶⁶.

256. In 2016, **Colombia** adopted the *General Regulations of National Prison Facilities*, under the responsibility of the National Penitentiary Institute (INPEC), which establish that no penitentiary establishment may deny the right to intimate visits on the grounds of sexual orientation or gender identity of the person deprived of liberty (Art. 71, para. 1)¹⁶⁷.

257. In 2011, the Supreme Court¹⁶⁸ of **Costa Rica** ruled in favour of a person deprived of liberty who filed a complaint about the discriminatory nature of prison rules that provided that intimate visits only took place between heterosexual couples. Following this 2011 ruling, the rules were amended to ensure that same-sex couples were also able to access conjugal visits.

258. In addition, the Guidelines for the care of LGBTI persons in the prison system adopted in 2018 by the **Costa Rican** Ministry of Justice and Peace, state that "*the right to intimate visits provided for in the prison regulations will be guaranteed to people of diverse sexual orientation, expression or gender identity under the same conditions as the rest of the prison population. However, the necessary measures must be adopted to guarantee the confidentiality of the sexual orientation and gender identity of the person deprived of liberty*"¹⁶⁹.

259. Finally, in the case of **Brazil**, the National Council against Discrimination's Joint Resolution 1/2014¹⁷⁰ and the Technical Note¹⁷¹ on procedures related to the detention of LGBTI persons in the prison system guarantee the right to intimate visits for LGBTI persons deprived of their liberty. The Technical Note also establishes the right to intimate visits for LGBTI couples who are deprived of their liberty in the same unit.

¹⁶⁶ IACHR, Report No. 122/18, Case N°11.656. Report on Merits (Publication). Marta Lucía Álvarez Giraldo. Colombia. 5 October 2018, p. 56.

¹⁶⁷ Resolution 006349 by which the General Regulations of National Prison Facilities of the National Order-ERON are issued by INPEC, 19 Dec. 2016, Article 71 (1).

¹⁶⁸ *Action of unconstitutionality against Article 66 of the Technical Prison Regulations*, Executive Decree Number 33876-J, Exp: 08-002849- 0007-CO, Res. No. 2011013800.

¹⁶⁹ Ministry of Justice and Peace of Costa Rica, *Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system*, 2018, Article 31.

¹⁷⁰ Presidency of the Republic of Brazil, National Council against Discrimination, Joint Resolution No. 1 of April 15, 2014, Art. 6

http://www.lex.com.br/legis_25437433_RESOLUCAO_CONJUNTA_N_1_DE_15_DE_ABRIL_DE_2014.aspx

¹⁷¹ Ministry of Justice and Public Security, National Penitentiary Department, Technical Note No. 7/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJepen, 13 March 2020, paragraphs 44-45

file:///C:/Users/VFILIP~1/AppData/Local/Temp/copy2_of_sei_mj11156365notatcnica.pdf

260. In light of the above, it is recommended that the right to family and intimate visits be guaranteed to LGBTI persons, where the latter are allowed on an equal basis with the rest of the prison population.

261. The concept of family should be interpreted in an inclusive manner so that it can also include same-sex and trans couples, as well as any other person with whom the detained person is in a close relationship.

262. The right of children of same-sex couples to visit their parents in prison must be guaranteed.

263. LGBTI families and couples - or of LGBTI persons deprived of their liberty - must be treated with respect and without discrimination by staff.

264. Body searches of visiting LGBTI families and couples must meet criteria of necessity, reasonableness and proportionality.

265. In cases where LGBTI persons have no family or friendship ties, it is recommended that alternative means of fostering contact with persons outside the prison system are provided, for example by facilitating contact with voluntary visiting programmes such as civil society organisations that promote the rights of LGBTI persons. In these cases, the informed consent of the person deprived of liberty should always be sought.

IV. Other relevant issues identified

266. This section presents information on other relevant issues in relation to LGBTI persons in detention where risks of violence, torture and cruel, inhuman or degrading treatment or punishment have been identified.

A. Body searches

267. The State has an unavoidable duty to guarantee good order and internal security in places of deprivation of liberty. In this regard, searches or inspections of prison facilities are necessary for this purpose. However, these procedures must be carried out in accordance with protocols and procedures clearly established by law and in such a way that fundamental rights are respected. Otherwise, they may become a mechanism for punishment.

268. However, body searches are times when abuse is possible, and in particular for LGBTI persons, as they can involve nudity and physical contact, circumstances that increase the risks of humiliation, discrimination and abuse.

269. The Special Rapporteur on Torture has identified that *"humiliating and invasive body searches may constitute torture or ill-treatment, particularly for transgender detainees"*¹⁷².

270. International standards include specific provisions relating to body searches of persons deprived of liberty, establishing the obligation that such searches be based on the criteria of legality, necessity and proportionality, be carried out with respect for the dignity of persons deprived of liberty and by adequately trained personnel of the same sex. In addition, other alternative methods of inspection should be privileged and, where body searches are unavoidable, these should be carried out in two steps (first from the waist up, and then from the waist down) to avoid the person being completely naked. Finally, invasive body searches should be prohibited.

271. In this regard, the *Nelson Mandela Rules* require that searches *"shall not be used to harass, intimidate or unnecessarily intrude upon a prisoner's"* (Rule 51).

272. The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* establish that body searches should be governed by the principles of necessity, reasonableness, and proportionality and should be carried out *"under appropriate sanitary conditions by qualified personnel of the same sex, and shall be compatible with human dignity and respect for fundamental rights"*. In any case, intrusive vaginal and anal searches are prohibited. In addition, the use of alternative means of body searches, including through technological equipment, is encouraged¹⁷³.

273. The *Bangkok Rules* set out the obligation to take *"effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out only by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures"*. In addition, they provide that alternative methods, such as scanning, should be used¹⁷⁴.

274. Specifically in relation to LGBTI persons in detention, the *Yogyakarta Principles* state that States *"shall adopt and implement policies to combat violence, discrimination and other harms on grounds of sexual orientation, gender identity, gender expression, or sex characteristics faced by persons who are deprived of their liberty, including with respect to such issues as placement, body or other searches [...]"*¹⁷⁵.

¹⁷² Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 24 February 2016, para. 36.

¹⁷³ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXI "Bodily searches, inspection of installations and other measures".

¹⁷⁴ UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the "Bangkok Rules", Rule 19).

¹⁷⁵ Yogyakarta Principles, Principle 9. H.

275. Body searches are procedures that involve particular risks for intersex and trans persons deprived of their liberty. By providing for body searches to be conducted by staff of the same sex, international standards do not necessarily address the specific situations of these persons, especially if: their gender identity is not recognized by the authorities in charge; if they are in a process of transitioning; or if they are gender-fluid, i.e. they do not identify themselves with a single gender identity.

276. In practice, trans women are at risk of being searched by male staff despite identifying themselves as women, just as trans men are at risk of being searched by female staff despite identifying themselves as men. In addition, as reported by the **Rio de Janeiro** State Mechanism to Prevent and Combat Torture, in some contexts trans persons are subjected to humiliating body searches involving nudity, including collectively and in front of other persons deprived of their liberty.

277. In **Argentina**, in 2016, guidelines were developed on searches for trans persons in the Federal Penitentiary System. The guidelines stipulate that there should be alternatives to searches involving nudity and, if it cannot be avoided for good reason, prison staff should only supervise clothing and belongings, leaving health personnel to conduct the search themselves¹⁷⁶.

278. In **Colombia**, the General Regulations of Detention Facilities stipulate that trans persons in detention should be consulted on a case-by-case basis as to their preference on whether a male or female guard should carry out the search. It also includes guidelines on trans persons visiting the establishments¹⁷⁷.

279. In **Costa Rica**, the Guidelines for the care of LGBTI persons in the prison system establish the right of LGBTI persons to choose the gender of the persons in charge of carrying out body searches as well as the obligation that staff carrying out such searches are adequately trained. They also prohibit discriminatory body searches and those aimed at determining the status of the genitals of persons deprived of their liberty, and stipulate that staff who engage in such conduct will be subject to appropriate sanctions¹⁷⁸. In addition, institutional guidelines were adopted within the prison system to specifically regulate the searches of trans persons deprived of their liberty as well as visitors¹⁷⁹.

¹⁷⁶ Federal Penitentiary System, *Guía de procedimiento "visu médico" y de "control de registro" de personas trans en el ámbito del servicio central de alcaldías*, 2016.

¹⁷⁷ INPEC, *Reglamento General de los Establecimientos de Reclusión del Orden Nacional- ERON a cargo del INPEC*, 2016.

¹⁷⁸ Ministry of Justice and Peace of Costa Rica, *Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system*, 2018, Articles 22-23.

¹⁷⁹ Ministry of Justice and Peace, Directorate of Penitentiary Police, Circular No. 05-2017, 12 June 2017

280. In **Brazil**, the National Penitentiary Department has defined specific procedures related to body searches of LGBTI persons deprived of their liberty and visitors, also establishing the importance of replacing body searches with other alternative methods such as body scanners.

281. In view of the above, it is recommended that body searches of persons deprived of liberty and visitors be replaced, as far as possible, with other alternative methods, for example scanners.

282. Body searches of persons deprived of liberty and visitors must be carried out on the basis of the criteria of legality, necessity and proportionality.

283. Invasive body searches of prisoners and visitors must be prohibited by law.

284. Body searches of LGBTI persons should be carried out with respect for the dignity and privacy of the individual and by appropriately trained personnel.

285. LGBTI persons in detention and visitors have the right to choose the gender of the staff who carry out the body searches.

286. In the event that body searches involve nudity, and that it cannot be avoided for good reason, it is recommended that they be carried out in two steps (first from the waist up, and then from the waist down) to avoid the person being completely naked.

V. Considerations regarding the prevention of torture and other ill-treatment against LGBTI persons

A. The importance of the preventive approach for the protection of LGBTI persons in detention

287. The duty of the State to prevent is widely recognized under international law as being closely linked to the duty to respect and protect human rights.

288. According to Article 1.1. of the American Convention, the State acquires the obligations to respect human rights and to guarantee that persons subject to its jurisdiction can effectively exercise their rights. In view of this obligation, states have the duty to **prevent**, investigate, punish and redress any violation of human rights.

289. In the particular case of persons deprived of liberty, the State has a role to play in guaranteeing the rights of these persons due to the total control it exercises over them¹⁸⁰. The obligation to protect the rights of persons deprived of liberty from violations is closely linked to the obligation to prevent such violations. In this sense, the

¹⁸⁰ IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, *Op. cit.*

IACHR has emphasized that "*the most effective means of ensuring the rights of persons deprived of liberty is to adopt preventive measures*"¹⁸¹.

290. In relation to torture and other cruel, inhuman or degrading treatment or punishment, the State has the obligation to take all necessary measures, including legislative, administrative and judicial measures, to prevent such practices, including in contexts of deprivation of liberty¹⁸².

291. In practice, the prevention of violations of the rights of persons deprived of their liberty seeks to reduce the risks of such violations by addressing the root causes through a systemic analysis of institutions, policies, practices and laws.

292. In the specific case of LGBTI persons deprived of their liberty, the preventive approach is fundamental to ensuring the protection of their rights, as discriminatory patterns based on sexual orientation, gender identity and expression or non-normative sexual characteristics are deeply entrenched in society and are exacerbated in contexts of deprivation of liberty.

293. In this regard, the SPT has pointed out that the State's duty of prevention involves "*diligent risk assessment, including the identification of causes, forms and consequences of violence and discrimination*", as well as "*to question preconceptions, stereotypes and prejudice regarding conduct, physical appearance and perceived gender*"¹⁸³.

294. In practice, preventing any kind of violation of the rights of LGBTI persons in detention requires addressing the areas of risk, root causes and consequences of discrimination based on sexual orientation and gender identity. As discussed throughout this document, this involves, amongst other things: i) reforming those laws or regulations that criminalise or restrict the exercise of rights on the basis of persons' sexual orientation, gender identity and sexual characteristics, both within and outside the context of deprivation of liberty; ii) making visible the specific situation of LGBTI persons in detention; and iii) adequately addressing the specific needs of these groups in the context of deprivation of liberty.

¹⁸¹ *Ibid.*, para. 116.

¹⁸² See United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 2 and 16; Inter-American Convention to Prevent and Punish Torture.

¹⁸³ UN, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4, 22 March 2016, para. 72.

B. The role of independent monitoring bodies

295. Independent monitoring of places of deprivation of liberty is recognised as one of the most effective preventive measures to protect the rights of persons deprived of liberty¹⁸⁴.

296. In this regard, National and Local Preventive Mechanisms established under the Optional Protocol to the UN Convention against Torture (OPCAT) play a key role in contributing to ensure the protection of persons deprived of their liberty, including those in particularly vulnerable situations such as LGBTI persons.

297. Through their visits to places of detention, their private interviews with persons deprived of liberty, and their unrestricted access to all relevant documentation and records, NPMs and LPMs observe first-hand the conditions and treatment of these persons, identify the risks to which persons deprived of their liberty are exposed, as well as deficiencies in standards and procedures related to deprivation of liberty.

298. In addition, these bodies make recommendations, publish reports and engage in constructive dialogue with the authorities in charge, contributing significantly to raising awareness of their situation and making changes to detention policies, regulatory frameworks and practices.

299. It is therefore recommended that all Member States of the Organisation of American States, who have not yet done so, ratify the OPCAT and establish an independent national preventive mechanism to monitor the deprivation of liberty, including the needs of LGBTI persons in prisons.

300. In order to be able to carry out their mandate effectively, NPMs and LPMs must have the necessary resources and be able to exercise their powers without any interference or hindrance from the authorities.

301. Finally, the authorities of OPCAT States Parties should engage in dialogue with NPMs and LPMs on the implementation of the recommendations, including those aimed at protecting the rights of LGBTI persons deprived of their liberty.

¹⁸⁴ Richard Carver, Lisa Handley, *Does torture prevention work?*, Liverpool University Press, 2016.