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**WRITTEN OPINION REGARDING THE REQUEST FOR AN
ADVISORY OPINION ON “DIFFERENTIATED APPROACHES
TO PERSONS DEPRIVED OF LIBERTY”**

THE CASE OF TRANSGENDER PERSONS IN DETENTION

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ABSTRACT

This submission to the Inter-American Court in relation to the request of advisory opinion presented by the Inter-American Commission on the topic of “differentiated approaches to persons deprived of their liberty’ focuses on the specific situation of transgender persons in detention. The signatories are a group of academics with specific expertise on gender and law, and detention law, and explore five main areas: the placement and accommodation of transgender persons in detention, including the complexities arising from sex-segregated facilities for non-binary persons; the protection from violence and discrimination, including the role of prison personnel; issues relating to the lack of recognition of trans gender identities and limitations to gender expression; the right of transgender persons in detention to adequate health care; and finally, the need of a *transformative* rehabilitation of transgender persons in detention that takes into account their long-lived structural discrimination. Based on their observations, they conclude with five recommendations for the Honourable Court to consider in its deliberations.

Este escrito de observaciones para la Corte Interamericana de Derechos Humanos en relación al pedido de opinión consultiva presentado por la Comisión Interamericana de Derechos Humanos sobre “Enfoques diferenciados en materia de personas privadas de su libertad” se concentra en la situación específica de las personas transgénero en detención. Las aquí firmantes son un grupo de académicxs con especialización las áreas de género y derecho, y detención, y exploran cinco áreas principales: la ubicación y condiciones de alojamiento de las personas trans en detención, incluyendo la complejidad que resulta de la segregación sexual de los centros de detención en relación a las personas no binaries; su protección contra la violencia y discriminación, con atención en el rol del personal penitenciario; problemáticas relacionadas con la falta de reconocimiento del género autopercebido y las limitaciones a la expresión de género; el derecho de las personas trans en detención a una atención de salud adecuada; y por último, la necesidad de entender la rehabilitación de las personas trans en detención desde una perspectiva *transformadora* que toma en cuenta la desigualdad estructural en que llevan adelante sus vidas. En base a sus observaciones, este escrito concluye con cinco recomendaciones para la consideración de la Honorable Cámara en sus deliberaciones.

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1. PROFESSIONAL BACKGROUND AND INTEREST IN THE HUMAN RIGHTS PROTECTION OF TRANSGENDER PERSONS IN DETENTION

As legal experts on the topics of gender discrimination and violence, transgender rights and detention law from the University of Utrecht, The Netherlands, *Dr. Lorena P. A. Sosa*, *Dr. Marjolein van den Brink*, *Dr. Pauline Jacobs*, and *Ms. Mina Burnside*, respectfully submit this statement regarding the human rights protection of transgender persons in detention, which briefly summarizes our research findings in the past years on transgender rights and detention, for the consideration of the Honourable Inter-American Court of Human Rights in relation to the Inter-American Commission request for an advisory opinion on the “Differentiated Approaches to Persons Deprived of Liberty”.

Lorena Sosa is Assistant Professor in human rights and international law at the Netherlands Institute of Human Rights (SIM) at Utrecht University, and a senior researcher at the Utrecht Centre for European Research into Family Law (UCERF). Her research explores the limits of human rights in relation to gender and intersectional discrimination and violence, and is characterised by its comparative and socio-legal approach. In 2015, she was the recipient of the Max van der Stoel award on Human Rights for her dissertation on intersectionality and gender-based violence, and received two prestigious grants, a Marie Skłodowska-Curie by the European Commission (2017) and by the Dutch Scientific Organisation (NOW, 2018), for her current research project on gender-based violence against trans and intersex persons (‘Safe & Proud’). A first stage of the research was carried out in the Instituto de Investigación de Estudios de Género (IIEGE) in the University of Buenos Aires under the guidance of Diana Maffia, and now it comparatively explores the applicable frameworks at the United Nations, the Council of Europe and the Inter-American system. In this project, institutional violence takes prevalence over inter-personal violence, challenging traditional cisnormative configurations of gender-based violence. She previously worked for five years in the International Victimology Institute Tilburg (INTERVICT) and participated on several research projects on gender-based violence for the European Commission.

Marjolein van den Brink is also Assistant Professor in human rights and international law at the Netherlands Institute of Human Rights (SIM) at Utrecht University, and a senior researcher at the Utrecht Centre for European Research into Family Law (UCERF). An important and recurring theme in her academic work is the nexus between (in)equality, human rights and gender (in a broad sense); currently she particularly focuses on personal status and family law issues. The recent publication of the special issue of the International Journal on Gender, Sexuality and Law, on ‘[Bodies, identities, and gender regimes: Human rights and legal aspects of gender identity registration](#)’, that she co-edited, is a case in point. In the last few years, she (co-)authored various commissioned reports related to the issue of legal gender and gender registration. Examples are ‘[Trans and Intersex Equality Rights in Europe](#)’ (2018), commissioned by the European Union Equality Law Network, and several reports commissioned by, among others, the Dutch Ministry of Justice and Security on issues related to gender identity and sex registration. The latest of these focused on the question how

to [reduce instances of ‘unnecessary sex registration’](#), and was sent to parliament in July 2020. Previously, and outside academia, she worked for a human rights NGO, and for an advisory council to the Dutch national government. Between 2001 and 2010 she was a commissioner of the national equality body, now the National Human Rights Institute (*College voor de Rechten van de Mens*).

Pauline Jacobs is Assistant Professor in criminal law and criminal procedure at the Willem Pompe Institute for Criminal Law and Criminology of Utrecht University, member of the Dutch [Council for the Administration of Criminal Justice and Protection of Juveniles \(*Raad voor Strafrechtstoepassing en Jeugdbescherming, RSJ*\)](#), department administration of justice, and a member of the expert pool of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe. She specializes in the field of criminal law and criminal procedure and human rights, with a focus on penitentiary law. Her areas of expertise include pre-trial detention, the legal position of prisoners, the life-term prison sentence, and the international human rights norms in relation to detention. She recently finished two projects financed by the EU, on pre-trial rights for remand prisoners within the EU ('pre-trial rights for remand prisoners') and on the use of alternatives to pre-trial detention ('DETOUR, towards pre-trial detention as ultima ratio'). Her current research focuses on transgender prisoners from a socio-legal approach and falls under the cluster on Empirical Research Institutions for conflict resolution (ERI). In 2019 and 2021 Pauline was appointed as the Dutch national expert for the Capstone project in Kazakhstan, funded by the Netherlands Embassy and executed by Penal Reform International (PRI), which develops human rights research skills by training professors and students in the promotion of human rights.

Mina Burnside is a PhD candidate at Utrecht University with the Institute for Cultural Inquiry (ICON) and a member of the Netherlands Research School of Genderstudies (NOG). She specializes in Transgender Studies, specifically on issues of gender registration and trans temporalities. Mina uses her experiences with medical and legal gender transition as a migrant as the impetus for her research focus; she inadvertently has three legal gender markers in two countries. Her research explores how transgender subjects relate to new state technologies of gender categorization. Mina has worked with Dr Lorena Sosa on her NWO-funded project 'Proud and Safe'. This project included research fieldwork at CEDAW Session 74 and quantitative longitudinal analysis of anti-gender movements in the Council of Europe States.

The forthcoming advisory opinion will establish general principles regarding on core issues that we have professionally and academically focused on for several years. We have followed and greatly welcomed the work of the Court (and the Commission) in promoting an integral and progressive interpretation of the American Human Rights Convention and other OAS Human Rights instruments, particularly in relation to gender equality and LGBT rights. This advisory opinion will deepen these developments and have widespread effects on the trans collective, if the Court acknowledges that detention is, unfortunately, a highly probable experience of trans persons in most States in the region due to the entrenched inequality and lack of opportunities.

We believe that the knowledge we have gained through our years of academic and advocacy work can aid the Honourable Court in its reflections.

2. INTRODUCTION

On November 25th, 2019, the Interamerican Commission of Human Rights (hereinafter, ‘The Commission’) submitted a request to the Interamerican Court for an advisory opinion pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter “the American Convention”) and Article 70 of the Court’s Rules of Procedure, on the differentiated obligations that the principle of equality and non-discrimination imposes on the States in the context of the deprivation of liberty of groups that are in a special situation of risk, such as pregnant women, in postpartum or breastfeeding; Lesbian Gay Bisexual Transgender (LGBT) persons; indigenous people; older persons, and children living in prison with their mothers. While all most, if not all, persons in detention in the Americas find themselves in extremely precarious conditions, the Commission’s special interest on these groups is motivated by the disproportionate impact that imprisonment has on certain individuals due to the absence of a differentiated approach towards them, preventing their enjoyment of human rights and placing them in situations that jeopardize their life and personal integrity.¹

Within the LGBT collective, our petition will focus exclusively on transgender prisoners.² We believe that transgender prisoners call for close attention since specific forms of criminalization have emerged in the region that had the effect of increasing the trans population in prisons. In its 2015 report on Violence against LGBTI in the Americas, the Interamerican Commission highlighted the negative impact of legislation criminalizing non-normative gender identities on the human rights of LGBTI persons. Similarly, other types of legislation which do not directly criminalize trans persons, is construed and applied to discipline them. Examples of these indirect forms of selective criminalization are laws ‘protecting public morals’, prohibiting vagrancy and loitering, or ‘indecent’, ‘lewd’ or ‘provocative conduct.’³ Finally, there are some criminal laws that disproportionately affect trans persons. The criminalization of sex work is one example. The Commission has received information that many trans sex workers are arbitrarily arrested based on their gender identity and/or expression.⁴ However, a more recent phenomenon relates to the criminalization of drug trafficking. For instance, Malacaza points out that, despite recent advancements in Argentinian law regarding trans identities and migration, drug

¹ ‘Detention’ entails in this respect the imprisonment ordered by a judicial authority as a result of involvement or presumed involvement in the perpetration of offenses or violations of the law that takes place in the prison system, under prison authorities, and characterized by a prolonged stay.

² In this statement, ‘transgender’ or ‘trans’ will be used as the umbrella term to describe the different variants of gender identity (including transsexuals, travestis, transformistas, among others), whose common denominator is that their sex assigned at birth does not match that person’s gender identity.

³ Inter-American Commission of Human Rights, ‘Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas’ (2015) para 86.

⁴ *ibid* 94.

trafficking laws and security policies are reconfigured in such a way that they disproportionately affect trans and migrant persons. As a result, trans persons are prosecuted with increasingly more serious crimes and longer sentences, and facing pretrial detention as a rule.⁵ In a similar view, the IACHR observes that the strategies adopted by various countries in the region to combat organized crime have led them to include exceptions to the maximum time limits allowed by law for pretrial detention in relation to certain crimes – such as drug offenses, for example– and to make pretrial detention mandatory for certain criminal behaviours, such as unlawful association.⁶

The criminalization of trans persons, directly or indirectly, reveals that, despite the advancement in relation to LGBT rights,⁷ the inherently cis-heteronormative nature of repressive systems prevails, and the control and disciplining of non-normative groups continues.⁸ Stanley and Smith, point out that “among the most volatile points of contact between state violence and one’s body is the domain of gender”⁹. Hence their suggestion that “as a project dedicated to radical deconstruction, [the abolition of the prison system] must also include at its centre a reworking of gender and sexuality that displaces both heterosexuality and gender normativity as measures of worth.”¹⁰ While we do not advocate the abolition of the prison system in this statement, we agree with Spade’s suggestion to critically assess the promises of legal recognition and inclusion that emerge with regard to systems that are the ultimate sources of state violence and technologies of population control, such as the prison system. Reforming the prison system alone will not fully repeal the discriminatory nature of the nation-state. It is in this awareness that we problematize the current institutional arrangements and some of the main issues affecting trans persons in prisons. Our suggestions aim to address

⁵ Laurana Malacalza, “‘Narcotravestis’, Proceso Creciente de Criminalización de Mujeres Trans y Travestis’ in Blas Radi and Mario Pecheny (eds), *Travestis, mujeres transexuales y tribunales: hacer justicia en la CABA* (Editorial Jusbaire 2018) 157–158.

⁶ Inter-American Commission of Human Rights, Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas (2017), para 221.

⁷ See Inter-American Commission of Human Rights, ‘Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas’ (2018).

⁸ The disciplinary nature of Criminal Law in relation to women has been also examined at length, see: Haydée Birgin and Alessandro Baratta (eds), *Las Trampas Del Poder Punitivo: El Género Del Derecho Penal* (Biblos 2000); Angela Yvonne Davis, *How Gender Structures the Prison System* (2003).

⁹ Eric a Stanley and Nat Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press 2011) 4.

¹⁰ *ibid* 8. On the abolition of the prison system, see: Angela Yvonne Davis, *Are Prisons Obsolete?* (2003); Angela Y Davis, ‘Deepening the Debate over Mass Incarceration’ [2014] *Socialism and Democracy*. On queer abolitionist politics, see: Eric A Stanley, Dean Spade and Queer (In)Justice, ‘Queering Prison Abolition, Now?’ (2012) 64 *American Quarterly* 115. For doctrinal discussions in relation to abolitionism in the Americas, see: Ezequiel Kostenwein, ‘La Isla Desierta: El Abolicionismo Como Un Posible’ (2017) 12 *Crítica Penal y Poder* 126; Maximiliano E Postay (ed), *El Abolicionismo Penal En América Latina : Imaginación No Punitiva y Militancia* (Del Puerto 2012); Massimo Pavarini, ‘Estrategias de Lucha: Los Derechos de Las Personas Detenidas y El Abolicionismo’ (2011) 1 *Crítica Penal y Poder* 307; Hugo Alejandro Haimovich, ‘Abolicionismo y Deliberación: Una Teoría Democrática Para El Abolicionismo Penal’ [2006] *Pensamiento Penal*.

practical issues while protecting their human rights in the best possible way, and connect the rehabilitation of persons in detention with the reparation of the states' failure to properly protect and include the trans collective.

In this petition, we will elaborate on five areas of concern that emerge in relation to trans persons in detention, four of them highlighted by the Commission in its initial request to the Court, and one additional aspect that we deem particularly relevant considering the general situation of transgender persons in the region. We will thus elaborate on allocation and accommodation of prisoners (3.1), protection from violence and discrimination (3.2), gender identity recognition (3.3), health (3.4), and we finally address rehabilitation as an opportunity to revert the structural lack of access of transgender persons to basic human rights (3.5). The aim is to share with the Court some of the experiences in the European Human Rights System in relation to detention and prison standards, highlight some of the tensions that emerge, reflect on possible alternatives, and when appropriate, suggest modifications to the standard prison accommodation based on the principle of equality. We conclude with a final reflection (4).

3. OBSERVATIONS REGARDING THE SITUATION OF TRANSGENDER PRISONERS: EXISTING STANDARDS AND MAIN ISSUES

3.1. ALLOCATION AND ACCOMMODATION

Although in the European context prisoners do not have a right to choose where to be detained, two main principles generally guide the allocation of prisoners. Firstly, the European Prison Rules (EPR) establishes that prisoners should be allocated in proximity to the tribunals that have jurisdiction on their case and sentencing.¹¹ These precautions aim at facilitating the continuation of judicial procedures and monitoring, yet access to tribunals is also connected to the right to an effective participation in domestic judicial proceedings (Article 6 of the European Convention on Human Rights – (ECHR)). In relation to transgender persons, this easy access to tribunals and legal counsel not only facilitates their participation in the criminal procedure, but may be determinant in the decision to pursue legal gender recognition procedures if they have not done so before detention, or helpful in connection to other legal procedures related to gender-identity or family status. We discuss these issues in more detail in section 3.3.

Secondly, prisoners should be allocated in the proximity to their home or family.¹² This principle aims at maintaining the contact between prisoners and their families or communities. Yet, this principle is also connected with principle 5 of the EPR which establishes that 'life in prison shall approximate as closely as possible the positive aspects of life in the community'.

¹¹ EPR rule 17.1.

¹² See for instance, UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*: resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.refworld.org/docid/5698a3a44.html> [accessed 29 October 2020], rule 59; EPR rule 17.2. This is in line with ECHR art. 8, and ECtHR *Vintman v. Ukraine*, 2014, 78.

This principle is referred to as the ‘normalisation principle’. Although the normalisation principle is not commonly connected to allocation, the allocation of prisoners in another province, or even a distant district within the same province, can directly affect their ‘normal’ life by preventing their contact with relatives and friends. Research shows that trans persons often desist from using public transport to avoid discrimination,¹³ which in combination with the economic hardships that the trans collective often face in the region may result very concrete material restraints to visit their friends in detention. If allocation in prisons closer to the prisoners’ home is not possible, bursary support and/or a reduction of transport fees for families and friends could be considered.

In relation to accommodation, the categorisation and separation of groups of prisoners in different institutions or within common institutions has become the general rule, as established in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).¹⁴ Similarly, the EPR refers to ‘the need to detain untried prisoners separately from sentenced prisoners; male prisoners separately from females; and young adult prisoners separately from older prisoners’ (rule 18.8). At domestic level, prisoners are usually separated based on this categorization. Similarly, the separation between young and older prisoners is also recommended by the United Nations Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).¹⁵

We will discuss safety and protection of transgender prisoners, including the role of risk assessment and especial protection measures, in 3.2.

SEX-SEGREGATED ACCOMMODATION

An aspect we deem of particular relevance is the effect of the separation of male and female prisoners, which most domestic jurisdictions impose, in relation to transgender and non-binary prisoners. Sex segregation raises several concerns in their regard. The Interamerican Commission has noted that trans persons are often placed in male or female pavilions based only on their genitalia and the sex assigned to them at birth – housing trans women in prisons for the male population, or trans men in prisons for the female population- without taking into account their gender identity or preference. Being kept in prisons designed for a population whose gender is not that with which the trans person identifies may put them, in particular the male-to-female transgender inmate, at a significant risk of being beaten, raped or even killed.¹⁶

¹³ See: <https://library.fes.de/pdf-files/bueros/quito/13868.pdf>;
http://www.sdp.gov.co/sites/default/files/linea_tecnica_movilidad_0.pdf.

¹⁴ Mandela Rules, rule 11.

¹⁵ Beijing Rules, Rule 26.3.

¹⁶ Scott Schweikart, ‘Appropriate Placement and Treatment of Transgender Prisoners: Constitutional Concerns and Arguments for Alternative Housing and Treatment Policies’ [2019] SSRN Electronic Journal 1, 6.

These placement practices are often a consequence of the general absence of laws on gender identity¹⁷ or the absence of appropriate means of identification and registration of prisoners at arrival.¹⁸ To prevent this, the Mandela Rules state that prison file management should enable the determination of the prisoners' 'unique identity, respecting his or her self-perceived gender'¹⁹ which should facilitate the placement of transgender detainees in facilities – male or female – according to their preferred gender identity. This is recommended regardless of whether preferred gender-identity recognition is legally possible in the domestic jurisdiction, thus, disconnecting the formal legal recognition and the institutional recognition.

The implications of sex-segregated practices on non-binary trans prisoners have been particularly addressed by the Committee of Ministers of the Council of Europe (Committee of Ministers) in the commentary to rule 18 of the EPR. They argue that 'prisoners who self-identify with a gender different from their biological sex and transgender prisoners may not fit the binary male and female accommodation categories and therefore require different arrangements.'²⁰ These arrangements are not considered in violation of the principle of equal treatment, since the 'ordinary' arrangements have a differential impact on the non-binary population.

Conflicts in relation to transgender persons whose genitalia or legal gender do not match their gender identity, and non-binary transgender persons reveal the limitations of sex segregation and brings the practice to the question. Girshick argues that 'the lack of understanding of transgender issues and the conflation of gender identity with sexual orientation turns prisons into sites of compounded punishment beyond punishment for the crimes committed.'²¹ It may also result in a violation to the human dignity since sex-segregated detention acts to change the gender identity or expression. Russell argues that single-sex detention acts as a form of conversion therapy for trans and gender diverse people by coercing detainees into adopting gender expression modes that do not align with their gender identity, and as such, constitute a form of inhuman treatment or torture.²²

¹⁷ IACHR, *Report on measures to reduce the use of pre-trial detention in the Americas*, OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 216, and Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2013, p. 76. However, genitalia-based placement appears to be common in the United States, see: Schweikart (n 12); Lori B Girshick, 'Out of Compliance: Masculine-Identified People in Women's Prisons' in Eric A Stanley and N Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press 2011).

¹⁸ Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 March 2015, para. 68.

¹⁹ SRM, Rule7(a).

²⁰ Revised Rules and Commentary to Recommendation Cm/Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2019 16.

²¹ Girshick (n 13) 203.

²² Cianán B Russell, 'Analysis of the Effects of Legal Sex Markers in Detention: Single-Sex Detention Facilities, Conversion Therapy, and Violations of Human Rights' 347.

Another common accommodation practice is to place LGBT persons in specially dedicated areas for populations with specific needs, such as the elderly or persons with disabilities. In some systems, trans persons are placed with HIV patients or with convicts of specific types of crime.²³ In this respect, the jurisprudence of the European Court of Human Rights (ECtHR) has established that if a difference in treatment pursues a “legitimate aim”, namely to provide HIV positive prisoners with more favourable conditions of detention compared with ordinary prisoners – such as improving their monitoring and treatment, protecting them against infectious diseases, providing them with better meals, longer exercise periods and access to their own kitchen and washrooms- it can be deemed legitimate and therefore not constitutive of inhuman or degrading treatment or discriminatory. However, the Court found in *Martzaklis and Others v. Greece* that despite the positive aim, the applicants the applicants were simply HIV-positive and had not developed AIDS, and, as such, did not need to be placed in isolation in order to prevent the spread of a disease or the infection of other inmates.²⁴ This practice may thus also result in the segregation of trans persons, yet if such accommodation is unavoidable due to prison (lack of) conditions, the EPR recommends to allow separated prisoners to ‘have as full a set of daily activities as possible’ (Rule 52.3).²⁵

The same consideration applies in cases where LGBT persons are placed in specially dedicated pavilions. Yet one more concern seems to emerge, and that is, the criteria to determine who could or should be placed in such a special pavilion. Sexual orientation and/or gender identity should be established in such a way that avoids pathologizing or reinforcing gender stereotypes. Self-identification could be the initial criteria, in combination with an assessment on the need for separate accommodation.

A final comment should be done in relation to how decisions regarding accommodation are made. While some systems rely on risk assessment, as we will discuss in section 3.2, in other countries it is the judge passing sentence who specifies the security of the regime (and placement) in which the prisoner should be held, usually based on the type of crime committed or the criminal record of the prisoner.²⁶ In cases where high security is not required, however, Rule 17.3 of the EPR establish that prisoners must be consulted on their wishes.²⁷ A similar approach may be used in relation to transgender prisoners, particularly those whose accommodation challenge sex segregating logics. This approach is in line with recommendation

²³ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, p. 155.

²⁴ *Martzaklis and Others v. Greece*, 2015, 67-75.

²⁵ Revised Rules and Commentary to Recommendation Cm/Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (n 16).

²⁶ See the Commentary to EPR, page 44.

²⁷ Rule 17.3 reads: ‘As far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another.’

of the Subcommittee on the Prevention of Torture²⁸ and the Commission, which call on States to take the measures needed to ensure that the decision on assignment of trans persons to centres of detention is made on a case- by-case basis and, whenever possible, trans persons should be able to have input to the respective decision.²⁹

PLACEMENT CONDITIONS

Overcrowding conditions are always central considerations in decisions about the accommodation of prisoners. The ECtHR has recognized that the conditions of collective accommodation, and certainly prison overcrowding, can constitute inhuman or degrading treatment or punishment and thus contravene Article 3 of the ECHR.³⁰ Yet the Court has stressed on many occasions that under Article 3 it cannot determine, once and for all, a specific number of square metres that should be allocated to a detainee in order to comply with the Convention. Instead, other relevant factors, such as the duration of detention, the possibilities for outdoor exercise and the physical and mental condition of the detainee, play an important part in deciding whether the detention conditions meet the guarantees of Article 3.³¹ However, When the personal space available to a detainee falls below 3m² of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises.³² Nevertheless, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers that 6 m² for a single occupancy cell and 4 m² per prisoner for those in multi-occupancy cells could count as a minimum required square footage of accommodation.³³

The ECtHR has held that access to properly equipped and hygienic sanitary facilities is of paramount importance for maintaining prisoners' sense of personal dignity. A truly humane environment is not possible without ready access to toilet facilities or the possibility of keeping one's body clean.³⁴ The EPR establishes similar rules:

‘19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

²⁸ Subcommittee on the Prevention of Torture, during a presentation before the Inter-American Commission on Human Rights, 23 October 2015 (157 Period of Sessions, Situación de derechos homanos de las personas LGBT privadas de libertad en América Latina).

²⁹ *ibid*, para 157.

³⁰ *Muršić v. Croatia* [GC], No. 7334/13, judgment of 20/10/2016.

³¹ *Muršić v. Croatia* [GC], 2016, 103; see also *Samaras and Others v. Greece*, 2012, 57; *Varga and Others v. Hungary*, 2015, 76.

³² *Muršić v. Croatia* [GC], 2016, 136-141.

³³ In 2015 the CPT stated the general rules concerning the size of cells: see <https://rm.coe.int/16806cc449>.

³⁴ *Ananyev and Others v. Russia*, 2012, 156.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

19.5 Prisoners shall keep their persons, clothing and sleeping accommodation clean and tidy.

19.6 The prison authorities shall provide them with the means for doing so including toiletries and general cleaning implements and materials.

19.7 Special provision shall be made for the sanitary needs of women.’

The ECtHR has considered that domestic authorities have a positive obligation to ensure a minimum level of privacy for prisoners under Article 8 of the ECHR³⁵ The lack of privacy resulting from the openness of the toilet area or difficulties to use a toilet due to overcrowding entails a violation of privacy,³⁶ and it can take a particularly heavy toll on persons who suffer a particular medical condition.³⁷ Deficient toilet accommodation can have particular implications for transgender inmates. Similar concerns arise in relation to the way showering is organised. The ECtHR has found that showering as a group, particularly if the number of functioning shower heads cannot accommodate all of prisoners, did not afford the detainees any elementary privacy.³⁸ Sex-segregated facilities, however, may not be the only solution if privacy concerns are appropriately addressed with other measures.

Regarding the ‘sanitary needs of women’, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) clarifies in Rule 5 that:

‘The accommodation of women prisoners shall have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.’³⁹

Similar sanitary conditions, particularly in relation to sanitary elements, may be required for pregnant, breastfeeding or menstruating transgender men, wherever they are accommodated.

³⁵ *Szafrański v. Poland*, 2015, 37-41.

³⁶ *Aleksandr Makarov v. Russia*, 2009, 97; *Longin v. Croatia*, 2012, 60.

³⁷ *Moiseyev v. Russia*, 2008, 124; *Lonić v. Croatia*, 2014, 76.

³⁸ *Ananyev and Others v. Russia*, 2012, 158.

³⁹ UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) : note / by the Secretariat*, 6 October 2010, A/C.3/65/L.5, available at: <https://www.refworld.org/docid/4dcbb0ae2.html> [accessed 10 November 2020] 5.

Additionally, transgender women may require the provision of sanitary materials not ordinarily provided in female prisons or pavilions.⁴⁰

3.2. PROTECTION FROM VIOLENCE AND DISCRIMINATION

At the European level, the European Court of Human Rights (ECtHR) has interpreted that article 3 of the ECHR creates a duty on States to protect the physical well-being of persons who find themselves in a vulnerable position by virtue of being within the control of the authorities, such as, for instance, detainees.¹ It developed a test in line with that article, for cases concerning State's positive obligations to protect prisoners from inter-personal violence. The authorities must take all reasonably steps to prevent real and immediate risks to the prisoners' physical integrity that the authorities had or ought to have had knowledge about, taking under examination all the circumstances of the case.⁴¹ In cases of inter-personal violence, this means that it must be established whether, in the particular circumstances of a case, the authorities knew or ought to have known that prisoners were at risk of being subjected to ill-treatment at the hands of their cellmates, and if so, whether the prison authorities, took reasonable steps within the limits of their official powers to eliminate those risks and to protect the first applicant from that abuse.⁴²

In relation to trans persons, States 'ought to know' of the increased risk of violence and retaliation against them. In this regard, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment has repeatedly noted that LGBT persons tend to be disproportionately subjected to torture and other forms of ill-treatment for transgressing gender barriers or for challenging predominant conceptions of gender roles.⁴³ Reports also indicate that LBT women are more likely to suffer sexual violence in detention settings.⁴⁴ In line with these findings, the Interamerican Court expressed in *the Matter of the Curado Prison Complex* with regard to Brazil that LGBT persons should not be detained in ways that would endanger their lives. With the intention to protect some prisoners from potentially more aggressive ones, prisoners are often separated into categories. For instance, the ECtHR held that foreign prisoners and minorities may face inter-ethnic motivated violence and persecution

⁴⁰ *DC v Turkey* (App No 10684/13); *Bogdanova v. Russia* (App Nr 63378/13).

⁴¹ *Pantea v. Romania*, 2003, 191-196; *Premininy v. Russia*, 2011, 84.

⁴² *Premininy v. Russia*, 2011.

⁴³ Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, 'Interim Report on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) paras 17–25; Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, 'Report on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in International Law to the Unique Experiences of Women, Girls, and Lesbian, Gay, Bisexual, Transgender and Intersex Persons' (2016) paras 13; 34–36. Similarly, Subcommittee on Prevention of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 'Ninth Annual Report' (2016) s 5.

⁴⁴ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, para. 148; United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity. A/HRC/29/23, May 4, 2015, para. 36.

by other prisoners, calling for separate accommodation to secure their physical well-being.⁴⁵ However, in the case of *X v. Turkey*, concerning the holding of a homosexual prisoner in total isolation for more than eight months to protect him from his fellow prisoners, the ECtHR found a violation of Article 14 in conjunction with Article 3 of the Convention because it considered that, although there were founded concerns for the prisoner's safety if he remained in a standard cell with other inmates, they were not sufficient to justify a measure of total isolation from other prisoners. This is particularly true since the prison authorities had taken his sexual orientation as a risk factor instead of performing a proper risk assessment of the applicant's safety. A person's total exclusion from prison life could thus not be regarded as justified.⁴⁶

A proper risk assessment is thus needed before deciding to separate trans prisoners, with solitary confinement as an extreme and temporary solution. In such assessment, it becomes crucial to determine who are the persons presenting the risks, since different measures should be adopted if these are inmates, guards or other prison personnel. The relevance of a proper risk assessment on all prisoners on grounds of safety as well as security has been underlined by the ECtHR in its case law. It has elaborated on risk assessment in relation to the potential risk pose by prisoners to others,⁴⁷ and also in relation to suicide risk.⁴⁸ In line with these decisions, the EPR and the SMR establish that prisoners shall be assessed as soon as possible after admission to determine the risk they would present to the community if they were to escape,⁴⁹ and whether they pose a safety risk to other prisoners, prison staff or other persons working in or visiting prison or whether they are likely to harm themselves.⁵⁰ This 'risk assessment' will guide the determination of prisoners' allocation and accommodation, and it must be reassessed at regular intervals.⁵¹ The Commentary to the EPR explains:

'Rule 51.3 lists the main objectives of security risk assessment. Criteria for such evaluation have been developed in many countries. They include: the nature of the crime for which the prisoner was convicted; the threat to the public were the prisoner to escape; previous history of attempting to escape and access to external help; the potential for threat to other prisoners and in the case of pre-trial prisoners, the threat to witnesses. Risk assessments in prison should take account of assessments made by other appropriate agencies, such as the police. [...]

⁴⁵ *Rodić and Others v. Bosnia and Herzegovina*, 2008, 69-73.

⁴⁶ *X v. Turkey*, 2012, 51-58.

⁴⁷ *Edwards v. the United Kingdom*, No. 46477/99, judgment of 14/03/2002; See also *Česnulevičius v. Lithuania*, No. 13462/06, judgment of 10/01/2012).

⁴⁸ *Shumkova v. Russia*, No. 9296/06, judgment of 14/02/2012.

⁴⁹ Recommendation Rec (2006)2-rev of the Committee of Ministers to member States on the European Prison Rules 2020 s 51.3.

⁵⁰ *ibid* 52.1.

⁵¹ *ibid*. Rule 51.5.

Yet our suggestion is not to merely implement an existing actuarial risk assessment consisting of a numerical scoring tool based upon their predicted risk for misconduct, since most of these tools are critiqued for their inability to capture gender and diversity issues.⁵² Moffat further points out that empirical analyses of risk tools show that the criteria for establishing levels of risk routinely pay little attention to gender, racial, or ethnic differences or to the differing social, economic, and political contexts in which these tools are deployed.⁵³ Similar concerns are relevant in the determination of the safety of trans persons and the risk they could pose to others, so in the adoption of any risk assessment tool attention should be paid to these elements, and additional criteria should be considered to predict gender stereotyping and homophobic behaviour. A comprehensive risk assessment that addresses potential misogynistic or homophobic behavior could contribute to prevent life threatening situations. Relevant stake holders, such as Human Rights Institutes, Gender Equality Agencies and dedicated NGOs, could contribute in the elaboration of the criteria to be taken into account towards a more comprehensive risk assessment.

Knowing the potential risk posed and faced by prisoners, several considerations can be made. The EPR Commentary suggest that the safety of prisoners, prison staff and all visitors do not necessarily call for the separation of prisoners. It notes:

There has been a growing tendency in some prison systems to separate categories of prisoners or individuals. Instead, prison authorities should strive to create environments in which all prisoners can be safe and free from abuse and should have a set of procedures that enable all prisoners to mix without fear of assault or other violence, namely to ensure that prisoners are able to contact staff at all times, including at night.⁵⁴

Instead, safety could be ensured and the risk of violence and other events reduced to a minimum by putting in place a proper set of procedures (52.2). This view is in line with the EPR recommendation to adopt ‘techniques of dynamic security’ which consists in relying more on an alert staff who interact with prisoners, are aware of what is going on in the prison and make sure that prisoners are kept active in a positive way, rather than depending on static security measures. Dynamic security is often described as “a concept and a working method by which staff prioritize the creation and maintenance of everyday communication and interaction with

⁵² See, for instance: Patricia Van Voorhis and others, ‘Women’s Risk Factors and Their Contributions to Existing Risk/Needs Assessment: The Current Status of a Gender-Responsive Supplement’ (2010) 37 *Criminal Justice and Behavior* 261; Carolyn Hoyle, ‘Will She Be Safe? A Critical Analysis of Risk Assessment in Domestic Violence Cases’ (2008) 30 *Children and Youth Services Review* 323.

⁵³ Kelly Hannah-Moffat, ‘Gridlock or Mutability: Reconsidering “Gender” and Risk Assessment’ (2009) 8 *Criminology & Public Policy* 209, 212.

⁵⁴ Revised Rules and Commentary to Recommendation Cm/Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (n 16).

prisoners based on professional ethics".⁵⁵ Its strength, the Commentary suggests, is that it is likely to be proactive in a way which recognizes a threat to security at a very early stage.

Such 'dynamic' approach to security puts a strong emphasis on prison staff. The relevance of their public service becomes evident, and consequently, Rule 8 of the EPR identifies prison staff at the centre of the whole process of implementing the rules and achieving the humane treatment of prisoners generally. Therefore, their recruitment, training and working conditions should enable them to maintain high standards in their care of prisoners. Prison staff's effective training and sensitization in relation to specific issues is essential, particularly in relation to gender stereotypes and heteronormativity, but also in relation to racism and other forms of negative stereotyping and discrimination.⁵⁶

3.3. GENDER IDENTITY RECOGNITION

(Legal) gender identity markers are inextricably linked to the other issues discussed in this statement, and in particular with the expression of gender, detention placement, and the recognition of family relations.

No explicit human right to legal gender identity recognition has so far been adopted at the international level. In the absence of national gender identity laws, detention systems disregard the name with which trans persons identify themselves, ban the use of clothes and bathrooms that match their preferred gender identity.⁵⁷

However, there is a clear international trend, especially visible in the Americas and Europe, but not limited to those regions, to allow people to change their legal gender, in some instances also other than as male or female. The Inter-American Court itself has found that states are obliged to "recognize, regulate and establish appropriate procedures" to guarantee such right.⁵⁸ Recognition of self-perceived gender is 'a basic right inherent to all persons based merely on their existence'.⁵⁹ Likewise, the European Court of Human Rights has stressed the importance

⁵⁵ Recommendation Rec (2006)2-rev of the Committee of Ministers to member States on the European Prison Rules (n 43).

⁵⁶ See, for instance, EPR rule 38 on the protection of ethnic and linguistic minorities, and the recommendation that prison staff be sensitised to the cultural practices of various minorities in order to avoid misunderstandings.

On human rights approaches to the training of prison personnel, see: https://www.prisonstudies.org/sites/default/files/resources/downloads/handbook_3rd_ed_english_v5_web.pdf.

⁵⁷ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, p. 76; Colombia Diversa, "*Muchas veces me canso de ser fuerte*": *ser lesbiana, gay, bisexual o trans en las cárceles de Colombia*, 2015-2016, p. 26.

⁵⁸ Advisory Opinion OC-24/17 of 24 November 2017 para 116.

⁵⁹ *Ibid*, para 106 with ref. to Constitutional Court of Colombia, Judgment T-063/15, section II No. 4.

of recognition of self-perceived gender identity for the right to personal development in a number of decisions.⁶⁰ The failure to acknowledge self-identified gender identity in prisons would therefore violate the right to the free development of personality and human dignity of trans persons.⁶¹ The fact that this right to recognition of gender identity has been recognised as essential for people's human dignity necessarily means that it cannot be denied in situations of detention.

The fundamental nature of the right to gender identity recognition implies that the right to recognition of self-perceived gender must be accommodated regardless of whether the person concerned has changed or wishes to change their legal gender marker or name. Transgender persons may not wish to change their gender marker for a plethora of reasons, for example because they may not wish to fulfil all conditions for such a change (e.g. divorce), because they identify outside the binary or because they perceive their gender identity as fluctuating and changeable.

If a transgender detainee decides they want to change their legal marker, the foundational character of the right to recognition demands that states must accommodate such a wish. Relevant in this regard is the recommendation of the European Committee on the Prevention of Torture that “the Austrian authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed institutions) have access to assessment and treatment of their gender identity issue and, if they so wish, to the existing legal procedures of gender reassignment. Further, policies to combat discrimination and exclusion faced by transgender persons in closed institutions should be drawn up and implemented.”⁶²

GENDER EXPRESSION

So far, clear rules on gender expression in prison settings are lacking. Rule 18 of the Nelson Mandela Rules provides that ‘In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly.’ The Rules also stipulate that clothing for prisoners ‘shall in no manner be degrading or humiliating.’ In combination with the importance of gender identity recognition for individuals, this must be understood to imply that the people concerned are also allowed to express that identity and accommodated in that respect, including in prison settings. Their wishes must be respected, unless very weighty reasons justify restrictions. Such restrictions, e.g. regarding dress, must always be proportionate.⁶³ This is not

⁶⁰ e.g. *Case of Goodwin v. The United Kingdom*, No. 28957/95, 11 July 2002; ECHR, *Case of A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13, and 52596/13, 6 April 2017.

⁶¹ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, p. 76; Colombia Diversa, “Muchas veces me canso de ser fuerte”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, 2015-2016, p. 26.

⁶² CPT Visit Austria 2014, CPT/Inf (2015) 34, para. 116.

⁶³ See ECtHR, *Donaldson v. the United Kingdom*, 2011, 20-33

only valid for transgender detainees, but for detainees of any gender, because the demand to conform to stereotypical gender roles, must be regarded as directly discriminating on the basis of sex as such. However, regarding trans inmates, limitations to their gender expression in prisons violates the right to the free development of their personality and human dignity. Moreover, obliging a detainee to adopt a gender expression with which they don't self-identify constitutes an interference with his right to respect for his private life guaranteed by Article 8 of the ECHR, particularly during leaves, visits outside of prison, and particularly, during contact with family since they may feel ashamed and humiliated, interfering with their family life.⁶⁴

PLACEMENT

Because of the binary, sex-segregated prison systems in most countries, in combination with the risks trans inmates may run, legal gender cannot be the sole basis for placement. However, relying entirely on self-identified gender – whether legally recognised or not – may in rare instances present a threat to other vulnerable groups of detainees, such as women.⁶⁵ Although it is likely that similar assaults may be committed by cisgender women, it cannot be ruled out that some cisgender men might declare their gender identity to be female in order to be placed in a women's prison. A few jurisdictions (Malta, Scotland) have started developing policies to allow for self-identification in the context of placement, whilst avoiding the above mentioned risks. In Scotland, 'the prison services have issued a policy in which it expects a case management conference that plays a crucial role in determining the placement of transgender persons. The transgender prisoner also enjoys the right to participate in these conferences, also accessible and open for participation from civil society.'⁶⁶

3.4. ACCESS TO HEALTH⁶⁷

Transgender prisoners have a unique set of health care requirements. Transgender prisoners may require hormone therapy and surgery, which can be essential to the safety and maintenance of their mental and physical health.⁶⁸ In the prison system, transgender prisoners are affected by higher rates of suicide and self-harm; high rates of HIV and other sexually transmitted

⁶⁴ On personal expression outside the prisons, see: *T.V. v. Finland*, 1994, Commission decision; *Giszczak v. Poland*, 2011, where a prisoner was not given adequate information about an obligation to wear prison clothes and chains as conditions of a prison leave.

⁶⁵ See e.g. <https://www.theguardian.com/uk-news/2018/oct/11/transgender-prisoner-who-sexually-assaulted-inmates-jailed-for-life>.

⁶⁶ Ekaterine Iakobishvili, *Exploring the applicability and limitations of international human rights law to the protection of transgender persons: a case study on detention*, [PhD diss. University of Essex], 3 October 2017, <file:///D:/detention/PhD%20on%20trans%20in%20detention%202018.pdf>, p. 319, citing Ulrika Westerlund and Richard Köhler, 'Human Rights and Gender Identity: Best Practice Catalogue', (2nd revised, TGEU 2017).

⁶⁷ Parts of the text below were already published as P. Jacobs, 'Health Care in Prison', in: A.P. den Exter (ed.), *European Health Law*, Antwerp: Maklu 2017, pp. 561-577.

⁶⁸ Schweikart 2018, p. 9-10.

infections; and negative consequences of self-administered substances for body modification, and complications from poorly performed sex reassignment interventions.⁶⁹ Additionally, transgender prisoners are at a higher risk of abuse by health care and prison staff: this includes verbal abuse and public humiliation, psychiatric evaluations, sterilisation and the manipulation of hormone therapy (either denying it or imposing it).⁷⁰ Thus, defining adequate health care for transgender prisoners is complex; their specific needs, increased risk and systemic risk factors means that they require specialized care. Any prison system that does not address these specific needs and requirements is inadequate in its protection of this vulnerable demographic.

In its case law, the European Court of Human Rights has established that the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 ECHR, imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.⁷¹ In the 2000 case of *Kudla*, the ECtHR ruled that that States have a positive obligation to ensure “that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.”⁷² In subsequent cases, the ECtHR has added that not only unsatisfactory conditions of detention such as overcrowding and unsatisfactory conditions of hygiene and sanitation, but also inadequate medical care can amount to degrading treatment as prohibited under Article 3 ECHR.⁷³

But what level of medical assistance must be offered in prison? The European Court has determined that the medical treatment must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. This means that every detainee must be guaranteed an ‘adequate level of health care’⁷⁴, which is defined by the European Court on a case-by-case basis. That standard should be “compatible

⁶⁹ Ibid

⁷⁰ LGBTI Persons Deprived of Their Liberty Toolkit p. 13

⁷¹ See, among others, *Mouisel v France* App no 67263/01 (ECtHR, 14 November 2002), *Hurtado v Switzerland* App no 17549/90 (ECtHR, 28 January 1994) and *Matencio v France* App no 58749/00 (ECtHR, 15 January 2004).

⁷² *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000, Grand Chamber), para 94. A similar approach was taken by the Human Rights Committee under Article 5, that ruled in the case of *Latsova versus Russian Federation* (a complaint concerning the death of a prisoner after a lack of medical care for his situation), that when States deprive people of their liberty, they have the responsibility to look after their life and health, even when the prisoner has not requested medical care in time. *Lantsova v. The Russian Federation*, Communication No. 763/1997, 26 March 2012.

⁷³ *Melnik v Ukraine* App no 72286/01 (ECtHR, 28 March 2006), para 111.

⁷⁴ *Blokhin v. Russia* [GC], 2016, 137; *Cara-Damiani v. Italy*, 2012, 66.

with the human dignity” of a detainee, but should also take into account “the practical demands of imprisonment”.⁷⁵

In this respect, the CPT has more fundamentally adhered to the principle of equivalence of health care in prisons with that in the outside community, stating that ‘A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.’⁷⁶ The principle of equivalence of care determines that prisoners have the right to a level of care equal to that which is provided to other citizens in a particular country.⁷⁷ This principle is a guiding principle in UN documents on health in prisons, and its importance is also highlighted by the World Health Organisation (WHO) and World Medical Association (WMA). To secure equivalence of care, among other things, the WHO emphasises that “[p]enitentiary health must be an integral part of the public health system of any country”.⁷⁸ The WMA and WHO have both issued documents that are of importance for specific health care issues in prisons, such as the Guidelines on HIV Infection and AIDS in Prison, and the Declaration for the Prevention of the Spread of Tuberculosis and Other Communicable Diseases.⁷⁹

Yet many countries in the world experience great difficulty in providing health care of a high standard to its citizens in the free society. Given the extreme health problems evident in prisons worldwide, the legal obligation of the State to safeguard the lives and well-being of people it holds in custody and the implications of poor prison health on overall public health, standards of prison health care that are merely equivalent to that in the community would in some cases fall short of human rights obligations and public health needs. For this reason, Lines suggests to move beyond the concept of equivalent standards of health care, and promotes standards that achieve equivalent objectives instead. In some circumstances, meeting this new standard will even require that the scope and accessibility of prison health services are higher than that outside prisons.⁸⁰ For instance, even before entering the prison system, trans persons are more prone to high levels of mental stress associated with systemic factors, such as higher rates of

⁷⁵ *Blokhin v. Russia* [GC], 2016, 137; *Aleksanyan v. Russia*, 2008, 140; *Patranin v. Russia*, 2015, 69).

⁷⁶ CPT/Inf(93), par. 38.

⁷⁷ See also H. Roscam Abbing, ‘Prisoners Right to Healthcare, a European Perspective’ (2013) *European Journal of Health Law* 12-15.

⁷⁸ World Health Organisation, Declaration on Prison Health as Part of Public Health, Moscow: 24 October 2003.

⁷⁹ WHO Guidelines on HIV Infection and AIDS in Prison. Issued in March 1993, Geneva & World Medical Association, Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases, adopted in October 2000.

⁸⁰ R. Lines, ‘From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons’ (2006) 2 *International Journal of Prisoner Health Care* 269.

unemployment, violence, drug abuse, lack of health care, homelessness, and social rejection.⁸¹ The commentary of the EPR points out that even in the circumstance that countries experience great difficulty in providing health care of a high standard to the population at large, prisoners are entitled to the best possible health care arrangements and without charge. Here, a referral is made to the CPT that has stated that even in times of grave economic difficulty nothing can relieve the state of its responsibility to provide the necessities of life to those whom it has deprived of their liberty.⁸²

The principle of equivalence of care that guides the provision of health care in prisons poses additional shortcomings for transgender prisoners since it may lead to validate the lack of gender affirming care in States where gender identity is not recognised and treatments are not provided, as it happens in many European and American states.⁸³ Their specific need for adequate care must be considered in line with research findings that shows that many transgender persons cannot be mentally healthy without access to proper transgender health care,⁸⁴ and, as Schweikart notes, “[t]he primary treatments sought for transgender individuals are hormone therapy and gender reassignment surgery.”⁸⁵ This tension between the provision of adequate health care and the lack of recognition of (trans)gender identities in domestic jurisdictions, both in prisons and the free society, shows the additional complexities that most, if not all States will face. Health care of trans persons in detention cannot be addressed by a traditional approach, and the positive obligations of States to ensure ‘equivalent results’ may require to go beyond the provision currently afforded to the general community in the free society. However, ‘differential treatment’ should be an urgent temporary measure. Instead, a last longing and transformative approach would require the passing of new legislation and policies addressing the underlying formal issues.

Finally, as pointed out in this section, there is also a strong overlap between health care and considerations on gender identity recognition. While gender affirming treatments appear directly connected with physical and mental health, Schweikart recommends to “abandon one-

⁸² Revised rules and Revised rules and commentary to recommendation CM/REC(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies with amendments adopted by the Committee of Ministers on ... [sic] 2019) d.d. 8 October 2018, p. 35, referring to the 3rd General Report of the CPT [CPT/Inf (93) 12], paragraphs 30-77.

⁸³ For example, during CEDAW 74 session, Bosnia and Herzegovina noted that it relies on the medical systems of neighbouring Croatia to provide transgender health care., the implication being that it has limited access to transgender health care vis a vis some Western EU states. Similarly, states like the Netherlands require medical diagnoses for treatment, where states like France do not.

⁸⁴ Bauer, Greta. Ayden Scheim, Jake Pyne, Robb Travers, and Rebecca Hammond. 2015. “Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada.” *BMC Public Health* v15, #525.

⁸⁵ *Ibid* p. 9

size-fits-all approaches to the medical treatment of prisoners with gender dysphoria.”⁸⁶ Eric Stanley reminds us that “gender identification is...culturally, generationally, and geographically situated.”⁸⁷ This means that, in addition to prisons providing differentiated health care based on whether a prisoner is transgender or cisgender, they may also have to further differentiate based on *local* gender identity. In fact, when applied to other regions, the term “transgender” itself may be an impediment to providing prisoners healthcare, especially to ones that have non-European gender identity formation. For example, in the Latin American context, *travesti* appears in Argentina, Brazil, Peru, and other Latin American contexts as an alternative, *sudaca*, gender identity, with specific health care needs. Alvaro Jarrín’s (2016) research shows how the medical industry in Brazil uses Anglophone identity discourses to delegitimize and withhold health care from *travesti* women who might not want the same medical and surgical outcomes as transgender women. Furthermore, a *muxe* may still have different health care and medical outcomes than a *travesti* as a third gender. This is to say nothing of the issue of language. For example, in Canada, Anglophone jurisprudence is incompatible with French law with regards to “gender” having no French correlation.⁸⁸ Thus, adequate health care for transgender prisoners must also keep these varying contextual differences in mind since these create different health care needs and outcomes for all persons under the transgender umbrella. The local conceptualizations of gender identities will impact the array of potential health care needs that the notion of ‘adequate health care’ should cover.

3.5. REHABILITATION AND REPARATION

Article 10.3 of the International Covenant on Civil and Political Rights (ICCPR) specifies that, “The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. The principle of rehabilitation is a well-established principle in detention law, even supported by the more traditional punitive approach. In recent years, a heavier emphasis has been placed at the European level on the need to strike a proper balance between the punishment and rehabilitation of prisoners, in line with article 3 and 8 of the ECHR.⁸⁹ In *Vinter and Others v. the United Kingdom* [GC]⁹⁰, and *Harakchiev and Tolumov v. Bulgaria*⁹¹, the ECtHR insisted that the emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies.

⁸⁶ Ibid p. 10

⁸⁷ *Captive Genders*, 5

⁸⁸ Namaste, Viviane. 2005. *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism*.

⁸⁹ *Mastromatteo v. Italy* [GC], no. 37703/97, 72, ECHR 2002-VIII; *Schemkamper v. France*, no. 75833/01, 31, 18 October 2005; and *Maiorano and Others v. Italy*, no. 28634/06, 108, 15 December 2009.

⁹⁰ *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, 111-116, ECHR 2013 (extracts).

⁹¹ *Harakchiev and Tolumov v. Bulgaria* (nos. 15018/11 and 61199/12, s 243-246, ECHR 2014 (extracts)).

The overall aim of rehabilitation is the reintegration of inmates into society, whether it is framed as re-socialisation, social rehabilitation, or desistance. Reintegration should be construed broadly, not only to refer to a lack of recidivism, but also to a better quality of life for prisoners and an increase in their ability to function effectively in free society. To such end, there are several aspects that fall under the aim of rehabilitation, as noted in previous sections. The Mandela Rules establish that, ‘From the beginning of a prisoner’s sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner’s rehabilitation and the best interests of his or her family.’⁹²

In line with the Mandela Rules, the European Court has also emphasised the principle of rehabilitation in connection to the detainees’ right to respect for family life, calling on authorities to enable them or, if need be, assist them in maintaining contact with their close family.⁹³ The Inter-American Commission has noted that some legal frameworks only allow visits to be made by “family”, “spouses” or “permanent companions.” This limited scope may result in a violation to the right to receive intimate visits of lesbian and gay individuals in countries where same sex unions cannot be legally recognized.⁹⁴ In the case of *Marta Lucía Álvarez Giraldo v. Colombia*, the Commission found the denial of the right to an intimate visit based on the victim’s sexual orientation to be a disproportionate restriction, contrary to the American Convention.⁹⁵ In this regard, the Mandela Rules establish that, where conjugal visits are allowed, ‘this right shall be applied without discrimination’.⁹⁶ In relation to trans inmates, a broad and flexible notion of ‘family’ and ‘partner’ is needed, to allow non-registered partnerships and filiation (children, etc) to still visit and contact them. In addition, in many cases, trans inmates have severed relations with their ‘biological’ family because of their rejection towards their gender identity, and it is the contact with their friends and allies that is preferred.

Also, as mentioned in previous sections, decisions on the ‘allocation’ of detainees will have direct bearing on their future reintegration to society.⁹⁷ Similarly, dividing the prisoners into

⁹² *Mandela Rules*, Rule 107.

⁹³ *Khoroshenko v. Russia [GC]*, 2015.

⁹⁴ *Of the 34 Member States of the OAS, only eight of them regulate [same-sex] cohabitation unions, civil unions or de facto unions. Inter-American court of human rights (IACHR). Advisory opinion OC-24/17 of November 24, 2017. Series A No 24.*

⁹⁵ *IACHR, Report No. 122/18, Case No. 656. Merits (Publication). Marta Lucía Álvarez Giraldo v Colombia, October 5, 2018, para. 184.*

⁹⁶ *Mandela Rules*, 58(2).

⁹⁷ See: *Mandela Rules*, Rule 59; *EPR rule 17.1*.

classes is tolerated, if this will facilitate their treatment with a view to their social rehabilitation.⁹⁸

In relation to the skills and abilities that inmates may acquire while in detention, the Mandela Rules establish that sufficient ‘work of a useful nature’ shall be provided⁹⁹ to maintain or increase the prisoners’ ability to earn an honest living after release¹⁰⁰, always in line with the protection of general labour rights. The European Court has noted that prison work differs from the work performed by ordinary employees in many aspects in that it serves the primary aim of rehabilitation and resocialisation.¹⁰¹ It is for this reason that it is required that working hours shall leave sufficient time for education and other activities required as part of the treatment and rehabilitation of the inmates.¹⁰² Similarly, ‘Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners’.¹⁰³ It should be noted that, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.¹⁰⁴

This suggests that, besides supporting the idea that a person who committed a crime can be ‘reformed’ and re-enter society, the principle of rehabilitation introduces, albeit limitedly, a human rights perspective into crime responses by incorporating entitlements in relation to physical and emotional wellbeing, education and labour. In relation to trans prisoners, however, the idea of ‘reinsertion’ in society seems inadequate since in most States, trans persons are structurally and systematically marginalized. The failure of State to respect the human rights of trans persons to education, health, work, and their gender identity has been well documented, among others, by the Inter-American Commission. Their ‘rehabilitation’ thus calls for allowing access to resources and services they may never had before. In that sense, ‘rehabilitation’ of transgender detainees resembles the Inter-American Court’s position in relation to the need for integral and gender-sensitive reparations , since the Court’s concept of adequate reparations highlights that, when violations occur in a context of structural discrimination, reparations cannot simply return to the situation existing before the violation took place (one of discrimination).¹⁰⁵ Instead, the Court has clarified, reparations should aim to transform or change the pre-existing situation. The structural discrimination that the trans collective experience throughout their lives in the majority of the States in the Americas calls for a transformative and integral conception of rehabilitation as well. This expansion is in line with

98 Mandela Rules, Rule 93.1(b).

99 Mandela Rules 96.2.

100 Mandela Rules Rule 98.1.

101 *Stummer v. Austria* [GC], 2011.

102 Mandela Rules, 102 (2).

103 Mandela Rules 98.2.

104 Mandela Rules 104.2.

105 *González et al. (“Cotton Field”) v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 205 (16 Nov. 2009), 450.

a progressive interpretation of the principle of equality enshrined in articles 1.1 y 24 the Inter-American Convention, as encouraged by article 29 (b), and the Inter-American system's transition towards substantive equality approach.¹⁰⁶

4. CONCLUSION

This request by the Inter-American Commission on Human Rights for an Advisory Opinion on Differentiated Approaches to Persons Deprived of Liberty provides a unique opportunity for the Court to consolidate the transformative framework in relation to gender identity that it has put forward in its case law and Advisory Opinion OC-24/17 of 24 November 2017, and mainstream their principles in relation to the protection of human rights in detention.

Based on the arguments and standards presented in the previous sections, the signatories of this Statement hold that, not only is a differentiated approach to transgender detainee's not in violation of the principle of equality enshrined in articles 1 and 24 of the American Convention of Human Rights, but is required in a substantive equality approach as the one that the Honourable Court has developed in recent years. However, the detention of trans gender persons reveals shortcomings and violations of human rights against the trans collective in the free society as well, acting as an amplifier of existing structural inequality in our societies. In that sense, while some differential measures are needed, long-term and sustainable measures that revert that situation in the free society are also recommended.

Drawing from the norms, practices and experiences at the international and European level, the signatories respectfully invite the Court to consider 5 key aspects in its deliberations:

1. Take the preferred gender identity of the detainee as starting point for decisions on allocation and accommodation, even when such gender identity has not been legally recognized, and call on states to adopt the necessary policies and legislation.
2. Document the risk of violence and discrimination against the trans collective and encourage comprehensive risk assessments that besides usual risk indicators also address prejudiced behaviour against trans prisoners to prevent life threatening situations.
3. Respect the gender identity expression of trans persons, and make sure that detainees can, if they so desire, initiate procedures of legal identity recognition when available.
4. Define adequate health care in line with the principle of equivalence of objectives, rather than equivalence of care, and recognise the importance of gender-affirming therapies for the physical and mental well-being of trans detainees.

106 Paola Pelletier Quiñones, 'La "Discriminación Estructural" En La Evolución Jurisprudencial de La Corte Interamericana de Derechos Humanos' (2014) 60 Revista Instituto Interamericano de Derechos Humanos (IIDH) 205; Víctor Abramovich, 'De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones En El Sistema Interamericano de Derechos Humanos' (2009) 6 Revista SUR Revista Internacional de Derechos Humanos 7.

5. Take a transformative approach to the rehabilitation of trans detainees that acknowledges and attempts to counter the lack of access to education, labour and health, affecting trans persons throughout their lives.

5. CONCLUSIONES (SPANISH VERSION)

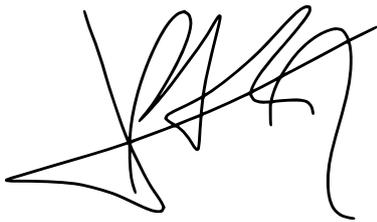
Esta solicitud de la Comisión Interamericana de Derechos Humanos para elaborar una Opinión Consultiva sobre Enfoques Diferenciados hacia las Personas Privadas de Libertad, representa una oportunidad única que permite a la Corte consolidar su marco transformador en el ámbito de identidad de género. Este marco ha sido introducido ya en su jurisprudencia y su Opinión Consultiva OC-24/17 de 24 de noviembre de 2017. Además, esta nueva Opinión Consultiva brinda la oportunidad de incorporar los principios de protección de los derechos humanos que la Corte ha desarrollado en relación a situaciones de detención.

Basándonos en los argumentos y estándares presentados en los apartados anteriores, las firmantes de este escrito sostienen que un enfoque diferenciado de las personas trans detenidas no solo no viola el principio de igualdad determinado en los artículos 1 y 24 de la Convención Americana de Derechos Humanos, sino que se requiere para un enfoque de igualdad amplio y sustantivo como el que la Honorable Corte ha ido desarrollando en los últimos años. Sin embargo, la detención de personas trans-género también revela las deficiencias y violaciones de los derechos humanos contra el colectivo trans en la sociedad libre, actuando como un amplificador de la desigualdad estructural existente en nuestras sociedades. En ese sentido, si bien son necesarias ciertas medidas diferenciales, también se recomiendan medidas a largo plazo que sean sostenibles y que restituyan esta situación en la sociedad libre.

Partiendo de las normas, prácticas y experiencias en el marco internacional y europeo, las aquí firmantes invitamos respetuosamente a la Corte a considerar 5 aspectos clave en sus deliberaciones:

1. Tomar el género autopercebido como punto de partida para las decisiones sobre ubicación y alojamiento de las personas en detención, incluso cuando dicha identidad de género no haya sido reconocida legalmente, y solicitar a los estados que adopten las políticas y la legislación necesarias. En este mismo sentido, debe tenerse especial consideración en relación a las personas no-binarias y la actual segregación sexual carcelaria.
2. Documentar el riesgo de violencia y discriminación que enfrenta el colectivo trans, y fomentar las evaluaciones de riesgo que, además de los indicadores de riesgo habituales, también consideren los prejuicios discriminatorios contra las personas trans para prevenir situaciones que pongan en riesgo la vida de aquellas en detención.
3. Respetar la expresión de identidad de género de las personas trans en detención y asegurarse de que puedan, si así lo desean, iniciar procedimientos de reconocimiento de identidad legal cuando sea posible.

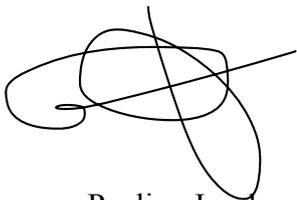
4. Concertar una atención de salud adecuada de acuerdo con el principio de equivalencia de objetivos, en lugar de equivalencia de atención, y reconocer la importancia de terapias de afirmación de género para el bienestar físico y mental de las personas trans detenidas.
5. Adoptar un enfoque transformador para la rehabilitación de personas trans detenidas que reconozca y tenga como objetivo contrarrestar la falta de acceso a la educación, el trabajo y la salud que afecta a las personas trans a lo largo de su vida.



Lorena P.A. Sosa



Marjolein v.d. Brink



Pauline Jacobs



Mina Burnside