

Single-sex spaces in Prisons: Women's Rights and the prohibition of Cruel, Inhuman or Degrading Treatment

The following document is submitted by the undersigned academics from different countries in response to the call for input by the United Nations Special Rapporteur on Torture, addressing the 'current issues and good practices on prison management' as outlined in the thematic report of the Special Rapporteur on Torture. In the call for inputs, the Office of the Special Rapporteur on Torture indicates that its interest in receiving information on the levels of violence and absence of risk assessments for individuals who are held in prison or deprived of liberty. In particular, the call for input aims to gather information on laws and policies that seek to serve populations with special needs, such as women, in prison contexts.

We acknowledge that this call for inputs addresses a myriad of crucial questions concerning the rights of individuals deprived of their liberty. Each of these aspects holds significant importance. Our intent is to narrow our focus to a specific emerging issue, one that aligns with the collective academic pursuits of those who have endorsed this document: the impacts of self-identified gender recognition policies on the dignity, rights, and safety of women and girls in prison, especially with regard to their access to single-sex spaces. Nevertheless, we wish to express our commendation to the Office of the Rapporteur for their proposal to craft a thematic report encompassing a wide array of challenges, all of which hold equal significance.

As it will be shown throughout the document, States have continuously implemented laws and policies, simplifying the procedures for the recognition of gender-perceived identity. These policies can potentially have an impact on the guarantee of women's rights, especially with regard to single-sex spaces¹. For decades, prisons have had single-sex spaces as a measure aimed at preventing violence against women and guaranteeing privacy in particularly intimate spaces such as those destined for sanitary services and rest.

To underscore the present issue, this document will examine the current policies of various States concerning the management of prisons and gender identity recognition. Additionally, it will outline the primary risks associated with these policies in instances where adequate safeguards are not in place. This document underscores the importance of recognizing and addressing the diversity among women in prison. Our intention is not to limit the rights of any specific group, especially the right of the LGBTI+ community to live free from violence. Rather, the primary goal is to draw attention to the risks faced by all women in correctional facilities. We advocate for a thorough examination of the human rights impact on various vulnerable populations within prisons. Achieving this necessitates a meticulous diagnosis and the thoughtful design of policies that carefully balance competing rights and interests.

I. State measures concerning the detention conditions of individuals self-identified as transgender

¹ UN. Special Procedures. Statement by Ms. Reem Alsalem, Special Rapporteur on violence against women and girls in relation to the Gender Recognition Reform (Scotland) Bill which is currently before the Scottish Parliament. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=27681>; Women-only spaces and the right to exclude. Holly Lawford-Smith. <https://philpapers.org/archive/LAWWSA-4.pdf>.

One of the widely accepted norms in international law and State practice regarding prison management is the necessity for separated facilities for men and women. Historically, this has been an uncontroversial matter given the conventional understanding of these categories of prisoners as "male" and "female". However, in contemporary times, amidst ongoing discussions surrounding the nature of gender and the challenge to traditional binary gender norms, substantial debates have arisen concerning the separation of facilities based on biological sex. This contribution explores three prevalent models adopted by States giving consideration to gender identity issues, and outlines their implications on prison policies.

- a. **Self-identification based model:** Countries such as Canada² have adopted models where an individual's expression of self-identification gender holds legal significance. A key implication of these models is the ability to access spaces designated for either men or women based on their self-identified gender. In the realm of prisons, individuals with diverse gender identities or expressions in these countries have the autonomy to select their confinement location. This often results in individuals born male, who identify as women being transferred to female prisons³.
- b. **Model based on legally recognized gender:** The United Kingdom, Wales, and Mexico⁴, among others, adhere to a model grounded in the legal acknowledgment of gender. Under this approach, individuals are assigned to prison facilities or institutions based on the gender officially recorded in their birth certificate or other legally sanctioned documents that denote a change or establishment of gender⁵. It's noteworthy that in the case of Wales and the United Kingdom, legally recognized transgender women with a history of sexual offenses or who retain their birth genitals are accommodated in separate spaces within women's prisons⁶.
- c. **Model based on medical, social, and psychological assessments:** In countries like Spain, the penitentiary ministerial circular governing the treatment of the transgender population (which, to the best of our knowledge, has not been amended since the enactment of the "Trans Law") requires transgender individuals to apply for a transfer to correctional facilities.

² Bill C-16.

³ A. Kitzul, 'Reflections on the impact of gender self-identification policies in Canadian prisons' (8 February 2023) Macdonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230104_Prisons_and_gender_self-ID_Kitzul_COMMENTARY_FWeb.pdf.

⁴ HM Prison & Probation Service 'The Care and Management of Individuals who are Transgender' (31 October 2019, revised 31 March 2023) Ministry of Justice, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148946/transgender-pf.pdf, para. 4.8.

⁵ HM Prison & Probation Service 'The Care and Management of Individuals who are Transgender' (31 October 2019, revised 31 March 2023) Ministry of Justice, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148946/transgender-pf.pdf, para. 4.8.

⁶ This policy was enacted in response to several incidents involving sexual violence committed by individuals who, despite identifying as women, had a history of violence. See: HM Prison & Probation Service 'The Care and Management of Individuals who are Transgender' (31 October 2019, revised 31 March 2023) Ministry of Justice, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148946/transgender-pf.pdf, para. 4.8.

Subsequently, the prison system conducts a psychosocial evaluation to assess the appropriateness of the request⁷.

d. Model for establishing separate spaces for the transgender population:

In countries such as Brazil and Paraguay, specific accommodations have been instituted within correctional facilities for the transgender population⁸. In some other States, prison policies have been established to permit the transgender population to retain items that enable them to express their own identity, even though these items were initially prohibited in these correctional facilities⁹.

In these models, notable uncertainties arise concerning the treatment of individuals who self-identify as non-binary and/or having fluid gender identities, and cross-dressed individuals.

Moreover, even within States that have enacted specific normative policies, disparate judicial treatments persist. For example, in Brazil, despite the recommendation for the creation of exclusive spaces for the transgender population through Technical Notes, judicial orders have compelled transgender women to enter spaces exclusively designated for individuals born female¹⁰.

This matter, especially in States where the transfer of self-identified transgender individuals is allowed, whether based on self-identification or legal recognition, gives rise to significant questions that demand thoughtful consideration concerning women's and girls' right to live free from violence and discrimination. As will be elucidated in the final section, throughout history, the separation in prison facilities based on gender has been explicitly established as a measure to safeguard women's safety and ensure privacy. Nevertheless, current policies allowing the transfer of self-identified transgender individuals often lack safeguards to prevent the abuse of these policies by certain violent individuals, compromising the assurance of women's privacy.

II. Challenges arising from contemporary State policies impacting women's right to a violence-free existence and the prohibition of cruel, inhuman, and degrading treatment

Various policies implemented by States prompt discussions concerning potential security risks for women, particularly in light of the lack of data supporting the adoption of these policies. In this context, a complete absence of risk assessment that should be carried out for any inmate that has a history of violence against women or girls irrespective of how they identify, as well as of mitigation strategies compound these concerns. In the following section, we will provide a concise overview of some risks identified, acknowledging the substantial under-reporting of

⁷ Spain. Ministerio del Interior. Dirección General de Instrucciones Penitenciarias. Integración Penitenciaria de Personas transexuales: http://www.acaip.info/info/circulares/07_2006_transexuales.pdf.

⁸ Consejo Nacional para Combatir la Discriminación LGBT y el Consejo Nacional de Policía Penal y Penitenciaria. Resolución conjunta No.1 del 15 de abril de 2014. Nota técnica No.2 de 2018

⁹ Retrieved from: http://sise.cif.gob.mx/SVP/word1.aspx?arch=2954/29540000233837250005005002.pdf_1&sec=Juan_Pablo_Ale_mán_Izaguirre&svp

¹⁰ Brazil. Supreme Federal Tribunal. Interim measure for protection of fundamental right. 527 federal district. ADPF 527 MC/DF. Recovered from: [transgeneros-podem-cumprir-pena-prisoas.pdf \(conjur.com.br\)](https://www.conjur.com.br/transgeneros-podem-cumprir-pena-prisoas.pdf).

cases and the impossibility of conducting statistical analyses due to the dearth of reliable information in the public registries of States.

a. Security risks faced by women deprived of liberty

The right of women and girls to live free of violence is openly recognized¹¹, even within contexts of deprivation of liberty¹².

This section does not seek to stigmatize the transgender population, and of course, the risks presented herein are not intended to imply that transgender persons are more likely to commit violence or negate the fact that they experience violence themselves on intersecting grounds including their gender identity.

The primary concern highlighted in this report is the potential misuse of the rights granted to males, some with a documented history of violence against women, to gain access to women's prison facilities. This risk has already materialized in practice, with cases of sexual harassment occurring against multiple women¹³, and even sexual attacks by people who self-identified as transgender having been born male¹⁴, and who had a history of violence against women. Likewise, there have been cases of pregnancies inside prisons by people identified as transgender¹⁵.

In fact, one of these cases was already presented to the authorities by a woman deprived of liberty in the United Kingdom, who was allegedly sexually assaulted by a person self-identified as a transgender woman held in the same prison. The plaintiff requested a review of the prison policy, however, this policy remained in force. However, in the decision of the High Court of Justice, worrying data is evident in the English context: (a) there were 163 transgender prisoners, of whom 81 had been convicted of one or more sexual offenses¹⁶; (b) no records are kept of people deprived of liberty who are transgender and who already have legal recognition, so there is no data on the eventual violence committed by this population group¹⁷.

As mentioned in the preceding paragraph and further elaborated in the following section, a glaring absence of data exists regarding acts of violence committed by individuals who self-identify as transgender against women. Consequently, the evidence not only supports the acknowledgment of risks associated with these policies but also suggests the existence of underreported cases. This under-registration poses a challenge in formulating effective public

¹¹ Convention on the Elimination of all forms of Discrimination Against Women; Inter American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará); 2003 Protocol to the African Charter on Human and Peoples Rights on the Human Rights of Women.

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¹³ D. Shaw, 'Transgender Inmate in Prison for Rape of Young Girls is Accused of Sexual Assaults on Female Inmates' (1 June 2018) *Women are Human*, <https://www.womenarehuman.com/transgender-man-who-raped-young-girls-housed-in-womens-prison-jessica-winfield-nee-martin-ponting/>.

¹⁴ K. Finlay 'Transgender Inmate Charged with Sexual Assault at a Women's Prison' (24 August 2020) *Women Are Human*, <https://www.womenarehuman.com/transgender-inmate-charged-with-sexual-assault-at-a-womens-prison/>.

¹⁵ T. Gomez; L. Sela 'The Alicante prison ordered "two shower shifts" so that another trans person would not have sex with the inmates' (9 August 2023) <https://okdiario.com/espana/prision-alicante-ordeno-dos-turnos-ducha-que-trans-no-tuvieran-sexo-internas-11386299>

¹⁶ March/April 2019.

¹⁷ UK High Court of Justice [2021] CO/4198/2019, <https://fairplayforwomen.com/wp-content/uploads/2021/07/FDJ-v-SSJ-judgment-approved-as-handed-down-on-02.07.21-002.pdf>

policies, given the lack of reliable data on the transgender population within women's prisons, particularly in instances where legal recognition of their gender or sex change has occurred.

In addition to the actualization of these risks, leading to grave violations of human rights that, as will be elucidated, may either alone or cumulatively amount to cruel, inhuman, and degrading treatment against women, there are additional threats to the health, integrity, and well-being of women deprived of liberty when prison management policies neglect safeguards and fail to uphold single-sex spaces for them. The ensuing section outlines some of these risks.

First, the very presence of males has been shown to be detrimental to both their physical and mental well-being. The majority of female prisoners typically have histories as victims of sexual abuse, domestic violence or other forms of abuse perpetrated by males.¹⁸ In the UK for example, over half of women in prison have experienced emotional, physical, or sexual abuse as a child¹⁹, with similar numbers in Canada²⁰, and in Latin America²¹. Almost 66 percent of women in prison in the UK have experienced domestic violence²², 70 percent have mental health needs²³ and nearly 80 percent of women incarcerated in Scotland have had significant traumatic brain injuries of their intimate partners.²⁴ In Australia, it is estimated that around 90 percent of Aboriginal women in prison, representing the fastest-growing prison population in the country, have previously been a victim of family violence.²⁵ In Uruguay, 52% of women deprived of liberty who are mothers or pregnant have suffered gender violence²⁶. Female prisoners also have high rates of poor health²⁷, and there is a high degree of self-harm and self-mutilation in female prison populations²⁸.

The UN Working Group on Discrimination against Women has noted that the percentage of imprisoned women who have suffered abuse in childhood is twice that of men²⁹. This year, the Inter-American Commission on Human Rights in its Report "Women deprived of liberty in the

¹⁸ See for example Corston 'A review of women with particular vulnerabilities in the criminal justice system' (2007) London: Home Office.; Gelsthorpe, L. 'Women, crime and control. Criminology and criminal justice' (2010) 10(4), 375-386; Ogloff *et al* 'The identification of mental disorders in the criminal justice system' (2006) Canberra: Criminology Research Council.; Salisbury *et al* 'Gendered pathways: A quantitative investigation of women probationers' paths to incarceration' *Criminal Justice and Behavior* (2009), 36 (6), 541-566.

¹⁹ Prison Reform Trust 'Majority of women in prison have been victims of domestic abuse' (04 December 2017) <https://prisonreformtrust.org.uk/majority-of-women-in-prison-have-been-victims-of-domestic-abuse/>.

²⁰ Jo Phoenix "How gender self-identification policy places women at risk in prison" (Feb 2023) MacDonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230117_Rights_and_wrongs_Phoenix_PAPER_FWeb.pdf, 35.

²¹ "Quiénes son las mujeres que están en prisión en América Latina? Características y desigualdades de género. Safranoff y Tiravassi. 2017. Retrieved from: <https://celiv.untref.edu.ar/descargas/SafranoffTiravassi.pdf>.

²² Women in Prison 'Key Facts: Background on Women in Prison' (2022) <https://womeninprison.org.uk/about/key-facts>.

²³ *Id.*

²⁴ McMillan *et al* 'Associations Between Significant Head Injury and Persisting Disability and Violent Crime in Women in Prison in Scotland' *The Lancet: Psychiatry* 8, 6: 512-520 (2021) [https://www.thelancet.com/pdfs/journals/lanpsy/PIIS22150366\(21\)00082-1.pdf](https://www.thelancet.com/pdfs/journals/lanpsy/PIIS22150366(21)00082-1.pdf).

²⁵ A Braybrook and S Duffy, 'Calling for smarter approaches to violence, offending that address underlying causes of crime', Croaky (23 February 2017) <https://croakey.org/calling-for-smarter-approaches-to-violence-offending-that-address-underlying-causes-of-crime>

²⁶ Parlamento del Uruguay – Comisionado Parlamentario Penitenciario, Informe especial: prisión domiciliaria asistida para madres 61 con hijos a su cargo en el proceso penal, 28 de octubre de 2021

²⁷ See for example K Armstrong, E Baldry and V Chartrand, 'Human rights abuses and discrimination against women in the criminal justice system in New South Wales', *Australian Journal of Human Rights*, Vol. 12, No. 2, 2007, 203 at 206;

²⁸ See for example D Goulding, 'Violence and brutality in prisons: A West Australian context', *Current Issues in Criminal Justice*, Vol. 18, No. 3, 2007, 399 at 402.

²⁹ Grupo de Trabajo sobre la cuestión de la discriminación contra la mujer, *Mujeres privadas de libertad*

Americas” pointed out the intrinsic relationship between phenomena of patriarchal violence and the commission of crimes against women, being a determining factor in many cases and including multiple antecedents of repertoires of gender-based violence³⁰.

The information included in advance has led some experts to point out that prison in many cases becomes a temporarily safe space that distances women from the repertoire of gender-based violence. This is why for many, having single-sex spaces is a fundamental element for their rehabilitation. Therefore, the presence of transgender people who were born male can generate scenarios of mistrust in female victims of gender-based violence, who are traumatized by the male violence they have experienced, and thus affecting their rehabilitation process.³¹

Rhona Hotchkiss, a former governor of a female prison in Scotland attested to the retraumatizing effect of placing transgender prisoners born male in female prisons. Hotchkiss observed that the mere presence of male offenders amongst a population that has disproportionately suffered male violence causes retraumatization, particularly if those individuals are also present in any prison programs designed for women to address the male violence they have experienced.³² The facilitation of rehabilitation and stabilization is severely undermined when males are transferred to female prisons.

April Kitzul, former Parole Officer and Correctional Program Officer with Correctional Service Canada (CSC), highlighted that the mere presence of males is anxiety-provoking for female inmates – “they live in fear, worried for the safety of themselves or, in some instances, their children. Female inmates are acutely aware they cannot “just leave” the situation – they are in prison so there is no escape from this high-risk situation”. Kitzul emphasizes that the constant sense of worry and anxiety leads female inmates to use drugs “to relax” or take it out in another way that is counterproductive. He emphasizes that the risk of retraumatization is particularly high due to the presence of possibly violent trans-identified males, the constant sense of potential danger combined with the reality that they cannot escape in a prison setting.³³

In Australia, specifically in certain States like Victoria, authorities determine the placement of convicts based on their self-identified gender. The case of Lisa Jones in the State of Victoria exemplifies this inherent risk. Despite multiple convictions for sexual abuse and assault, Jones was housed in a female prison after self-identifying as a woman. In August 2022, female prisoners launched a petition to the Minister of Justice to have Jones removed and transferred to men’s prison, highlighting that upon learning of the convict’s transfer, “the mental well-being of many of the women was severely compromised”. The petition highlighted that they had become visibly upset as they were triggered and traumatized. Many women prisoners have been the victims of sexual assault and as a result, many “carry significant trauma associated

³⁰ CIDH. Informe temático. Mujeres Privadas de Libertad en las Américas. March 8th 2023.

³¹ Jo Phoenix “How gender self-identification policy places women at risk in prison” (Feb 2023) MacDonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230117_Rights_and_wrongs_Phoenix_PAPER_FWeb.pdf, 17.

³² Jo Phoenix “How gender self-identification policy places women at risk in prison” (Feb 2023) MacDonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230117_Rights_and_wrongs_Phoenix_PAPER_FWeb.pdf, 40.; BBC ‘Ex prison chief expresses concern about trans women in female jails’ (10 February 2020) <https://www.bbc.com/news/av/uk-scotland-51452489>.

³³ A. Kitzul, ‘Reflections on the impact of gender self-identification policies in Canadian prisons’ (8 February 2023) Macdonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230104_Prisons_and_gender_self-ID_Kitzul_COMMENTARY_FWeb.pdf, 4.

with this experience.” Those women residing in the same unit as Jones allege that they were initially told the inmate would be “locked down 23 hours a day”, but that ultimately the administration aimed for “a full living, working and socialization integration.” “We feel threatened, unsafe, distressed and traumatized with this current situation. Accordingly, we demand that (the inmate) be immediately removed from the Murray unit,” the petition says. The female prisoner’s petition has regrettably been ignored by authorities.³⁴

As demonstrated above, in instances where the presence of transgender individuals has been permitted in female prisons, there have been specific violations of the sexual integrity of incarcerated women, primarily by men with prior convictions for violent behavior against women. Moreover, even in cases where the risks to sexual integrity have not materialized, women deprived of liberty find themselves in an unfavorable environment for their resocialization, particularly those who have been victims of gender violence, constituting the majority of cases. This circumstance creates an adverse scenario for women, their rights, and the assurance of a life free from violence.

In certain States, measures have been implemented to protect women’s rights; however, in our view, these measures are deemed wholly insufficient and, in some cases, even violative of human rights. Some of these measures include: (a) conducting individual risk analyses for transgender inmates³⁵, and (b) excluding individuals with in tact-male genitalia or a history of sexual violence from women’s facilities³⁶. However, these measures give rise to at least two issues:

First, there are major problems in terms of articulating the risk assessment criteria, which often use vague or subjective criteria prone to inconsistent application and abuse. In England and Wales, the Ministry of Justice’s Operation Guidance on the Care and Management of Individuals who are Transgender includes a list of elements to be included in risk assessment, including offending history, anatomy including “considerations of physical strength and genitalia”, sexual behaviors and relationships, as well as “strength of confirmation of presented gender”.³⁷ While certain aspects of risk assessment can prove beneficial, others may pose challenges. Consequently, considering a person’s history of sexual violence in determining prison accommodations remains consistently relevant, aligning with the imperative of States to prevent all forms of violence against women.

³⁴ Reddix ‘AUS : Female Inmates Protest Transfer of Transgender Sex Offender’ (11 August 2022) <https://reddix.info/aus-female-inmates-protest-transfer-of-transgender-sex-offender/>; Queensland Parliament Documents ‘Harm of men claiming to be women’ (24 January 2023) pg 5 <https://documents.parliament.qld.gov.au/com/LASC-C96E/PPROLAB202-EF1C/Taken%20on%20Notice%20and%20Response,%20Womens%20Forum%20Australia.pdf>.

³⁵ Scottish Prison Service ‘Transgender prisoner management: urgent case review correspondence’ (9 February 2023) <https://www.gov.scot/publications/transgender-prisoner-management-urgent-case-review-correspondence/pages/recommendations/>.

³⁶ Fair Play For Women ‘Prison bosses put transgender sex offenders into female prisons because they need “association with other women”’ (16 May 2021) <https://fairplayforwomen.com/transgender-prison-policy/>.

³⁷ HM Prison & Probation Service ‘The Care and Management of Individuals who are Transgender: Operational Guidance’ (February 2023) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138982/transgender-pf-operational-guidance.docx, 14.

Second, these types of criteria perpetuate gender stereotypes. The UN Special Rapporteur on violence against women and girls³⁸, as well as other international organs³⁹, have called attention to the importance of combating gender stereotypes. As can be seen, criteria such as “the most feminine phenotypes” imply that the characteristics that are more socially accepted as feminine are perpetuated, excluding those women who have different physiological characteristics. These types of measures not only seem to be insufficient due to their vagueness, but are also contrary to the obligations of the State to prevent the use of gender stereotypes in the judicial and penitentiary systems⁴⁰.

Moreover, we have information on the distressing violence experienced by members of the LGBTI+ community in prisons globally, underscoring the imperative need for protective measures to uphold their rights. It has been specifically observed that transgender individuals in prison often fall victim to mistreatment and violence, necessitating preventative actions by States. Hence, this serves as an opportunity for the Special Rapporteur on Torture to provide recommendations that account for the diverse needs of the prison population, ensuring the maximal protection of rights for all individuals involved and implementing measures that safeguard their well-being.

b. Lack of data to support current prison policies in relation to the transgender population

As demonstrated and outlined in Section II of this document, various models exist for addressing the management of prisons concerning the transgender population. According to at least two of these models, measures are implemented that pose not only risks for women deprived of liberty but also a lack of reliable information, hindering the identification of lessons learned and good practices. These models include those based on self-identification and legal gender recognition.

It is worth highlighting that due to the nature of gender self-identification laws, prison statistics either do not reflect biological ‘sex at birth’, or no longer disaggregate data based on biological sex at all. Consequently, there is no way to accurately assess the number of transgender people in women’s prisons, as all records indicate them to be female unless they otherwise reported. For example, in Scotland, data is only collected on the basis of gender identity, not sex, meaning that it is *de facto* impossible to ascertain the number of transgender prisoners in women’s prisons.⁴¹

However, the existing information shows that there may be a significant risk of violence against women that is not being addressed. In general, it has been identified that the vast majority of

³⁸ United Nations Special Rapporteur on Violence against women and girls, its causes and consequences, Reem Alsalem. Official visit to Türkiye. 18 - 27 July 2022.

³⁹ CEDAW General Recommendations No. 19: Violence against Women (1992) and No. 24: Women and Health (1999)

⁴⁰ CEDAW. General Recommendation 35: “At the judicial level (...), all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women; and to strictly apply all criminal law provisions punishing this violence, ensuring all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law. The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women’s responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women’s right to the enjoyment of equality before the law, fair trial and the right to an effective remedy.”

⁴¹ Keep Prisons Single Sex ‘Excluding Female Offenders in Policy and Practice’ (November 2021) <https://kpssinfo.org/excluding-female-offenders-pdf/>, 21.

acts of sexual violence committed inside prisons are committed by men⁴². For this reason, separation based on sex has been established as a protection measure for women in prison. Now, in relation to the transgender population, for example in England (March/April 2019), it was identified that 51% of women self-identified as transgender women (and whose gender identity change has not been legally recognized) have been convicted at least once for sexual offenses before the imprisonment.⁴³ In Canada, a study identified that at least 29 transgender women (47%) had sexual offense histories, comprising the vast majority among “gender diverse offenders”.⁴⁴

In assessing the information needed to discern the potential impacts of prison management policies on women deprived of liberty within the transgender population, inadequacies exist in at least two dimensions: (a) the inability to identify the total population of transgender individuals in female prison facilities due to the cessation of recording biological sex once legal recognition a person’s self-identified gender, and (b) the impossibility of quantifying violations of women’s human rights perpetrated by transgender individuals in prisons, as this categorization becomes unattainable as a result of the legal recognition of gender change.

The lack of adequate information for identifying instances of violence, comprehending their root causes, and developing and implementing preventive measures hinders the fulfillment of States’ obligations to ensure the safety and rights of prisoners⁴⁵. Among others, the Special Rapporteur on Violence Against Women and Girls has referred on different occasions to the importance of keeping reliable records of the violence suffered by women⁴⁶. Likewise, in matters of torture and cruel, inhuman or degrading treatment, there is an international obligation for States to keep reliable records that allow the prevention of such conduct⁴⁷.

Ultimately, the absence of comprehensive information, including prison records and statistics, not only undermines efforts to prevent violence against women but may also prove ineffective in preventing violence experienced by the transgender population and those with diverse gender identities or expressions. This is because, by ceasing to maintain records based on sex or that indicate transgender or gender non-conforming identity, the violence suffered by this community becomes challenging to identify. Consequently, it becomes practically impossible to discern whether the violence has distinct causes or consequences for this population.

⁴² Ministry of Justice ‘Offender Management Statistics Bulletin, England and Wales – April to June 2023’ (26 October 2023) https://assets.publishing.service.gov.uk/media/65384d3a1bf90d000dd8454f/OMSQ_Q2_2023.pdf, 7; Jo Phoenix “How gender self-identification policy places women at risk in prison” (Feb 2023) MacDonald Laurier Institute, https://macdonaldlaurier.ca/wp-content/uploads/2023/02/20230117_Rights_and_wrongs_Phoenix_PAPER_FWeb.pdf, 34.

⁴³ UK Parliament ‘Question for Ministry of Justice - Prisoners: Transgender People’ (12 December 2022) UIN 108375, <https://questions-statements.parliament.uk/written-questions/detail/2022-12-12/108375>.

⁴⁴ Correctional Service Canada ‘Gender Diverse Offenders with a History of Sexual Offending’ (2022) https://www.csc-scc.gc.ca/research/005008-r442_O-en.shtml.

⁴⁵ UN. Human Rights Committee. General Comment No. 31. The nature of the general legal obligation imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting). Adopted on 29 March 2004 (2187th meeting).

⁴⁶ Report of the Special on violence against women, its causes and consequences. Combating violence against women journalists. A/HRC/44/52. Para. 93.m.; Report of the Special Rapporteur on violence against women, its causes and consequences, Reem Alsalem. Violence against indigenous women and girls. Para. 84.

⁴⁷ *Kisoki v. Sweden*, Committee against Torture, Communication 41/1996, views adopted on 8 May 1996.

The principle of equality and non-discrimination mandates that States implement positive measures to safeguard the rights of traditionally excluded or at risk groups⁴⁸, including women and the LGBTI+ community. However, these measures can only be effective if incidents of violence are accurately identified; otherwise, not only such measures may become entirely illusory, but they may also end up exacerbating the causes leading to these groups' experience of abuse.

III. International standards and the potential commission of cruel, inhuman, and degrading treatment in relevant matters

The principle of sex-separation in prison settings is established in relevant international human rights standards. In 1955, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Standard Minimum Rules for the Treatment of Prisoners (SMR), the intended purpose of which was to 'set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'. This set of rules, formally approved by the United Nations Economic and Social Council in 1957, enshrined the principle that '[t]he different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment,' and that '[t]hus, men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.' The 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as 'Mandela Rules'), adopted by the United Nations General Assembly following a revision of the SMR, have reaffirmed these provisions in their entirety.

The recognition of the need for female prisoners to be kept separate from males is also affirmed in the 1998 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), both of which stress that men and women shall be detained in separate institutions and that measures designed and applied solely to protect the rights, distinctive needs, and special status of women shall not be deemed discriminatory.⁴⁹ They acknowledge that these are necessary measures not just to protect women's dignity, privacy, safety, and well-being but also to accomplish substantive gender equality.⁵⁰ Various regional standards have reached the same conclusion.⁵¹

⁴⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004), para. 19, and "Recommendations of the Forum on Minority Issues" (A/HRC/10/11/Add.1, para. 12); Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs (ACFC/31DOC(2008)001, paras. 18 and 19).

⁴⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles, 1998) Principle 5.1; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, 2010) Rule 1; The UN Standard Minimum Rules for the Treatment of Offenders (Nelson Mandela Rules, 2015) Rules 2 and 11.

⁵⁰ See for example United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules, 2010) Rule 1.

⁵¹ Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines, 2014) Article 32.b(i)-(ii); *European Prison Rules (2006)* Rule 18.8; Principles and Best Practices on the Protection of Persons Deprived of Liberty in America (2018) Principle XIX.

In the context of armed conflict, this principle has been clearly and unequivocally expressed. The Third and Fourth Geneva Conventions of 1949⁵² stipulate that women, when deprived of their liberty, must be housed separately from men. This provision is further underscored in Additional Protocols I and II to the Geneva Conventions. Additionally, the International Committee of the Red Cross, in its study evaluating customary rules on international humanitarian law, after scrutinizing international regulations and State practices, concluded that it is a customary rule of IHL that: "Women who are deprived of their liberty must be held in quarters distinct from those of men, unless families are accommodated as family units, and they must be under the immediate supervision of women"⁵³.

These provisions largely aim to adhere to the principles of equality and non-discrimination, requiring an acknowledgment of the unique characteristics of certain population groups, particularly those historically marginalized, such as women. So, women have specific needs related to their biological sex and are often targets of sex-specific violence, carried out largely by males. The presence of people born male in prison settings exposes women to risks such as sexual and other forms of physical violence and harassment, as well as psychological abuse and other kinds of harm. Since prison settings are closed spaces, with many intimate spaces including sleeping accommodations and showers having to be shared, concerns for privacy, safety, and well-being are substantial. Hence, the provision of single-sex spaces in prisons is a necessary measure to protect and respect women's rights and constitutes a reasonable, objective, and legitimate differentiation. Failure by States to take the necessary measures to protect women in these contexts constitutes a violation of their rights.

a. State's failure to prevent violence against women in prison environments: Implications for cruel, inhuman, and degrading treatment

Failure to implement effective measures for preventing the violations of women's human rights outlined in previous sections of this written contribution may also amount to treatment that is cruel, inhuman, and degrading. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) mandates States Parties to guarantee that no one is subjected to torture or cruel, inhuman, or degrading treatment or punishment⁵⁴. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment further provides that States Parties "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment [...], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."⁵⁵ More specifically, as highlighted in General Comment No.2 of the Committee Against Torture, "State parties are obligated to eliminate any legal or other obstacles that impede the eradication of [...] ill-treatment; and to take positive measures to ensure that such conduct and any recurrences thereof are effectively prevented"⁵⁶.

Regarding the same issue, General Comment No. 20 of the Human Rights Committee asserts that there is no need for an exhaustive list of acts that may constitute cruel, inhuman, or

⁵² Third Geneva Convention, Article 25, fourth paragraph (cited in Vol. II, Ch. 37, § 99), Article 29, second paragraph, Article 97, fourth paragraph and Article 108, second paragraph; Fourth Geneva Convention, Article 76, fourth paragraph, Article 82, third paragraph, Article 85, fourth paragraph and Article 124, third paragraph.

⁵³ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*. Rule 119.

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 7.

⁵⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art. 16(1).

⁵⁶ Committee Against Torture, *General Comment No.2*, CAT/C/GC/2 (24 January 2008) para 4.

degrading treatment, noting there is no universally accepted definition for such treatment. However, the jurisprudence of regional human rights tribunals indicates that the central element for defining these forms of treatment is the surpassing of a threshold of severity, which is evident in the duration of suffering and its physical and psychological effects⁵⁷. In prison scenarios, these sufferings must exceed the threshold of suffering derived exclusively from the punishment of liberty deprivation⁵⁸.

The Inter-American Court of Human Rights has identified certain behaviors in prison contexts that may constitute cruel, inhuman, and degrading treatment, such as: (a) threats with enduring psychological effects⁵⁹, (b) lack of communication with family and the outside world⁶⁰, (c) and inadequate medical attention⁶¹. Regarding women, the need for a specific approach has been emphasized to assess whether a behavior results in intense suffering, qualifying as cruel, inhuman, and degrading treatment⁶². In this regard, it is evident that cases of cruel, inhuman, and degrading treatment arise when sexual or gender-based violence occurs due to the absence of safeguards regarding prison separation policies for transgender populations.

Sexual violence, particularly within prison settings, has been deemed a violation of the prohibition of torture, cruel, inhuman, and degrading treatment. This is attributed to the heightened vulnerability of women, the profound physical and psychological suffering resulting from such violence, and the psychological and physical aftermath⁶³. Even in cases where sexual violence has not occurred, threats and a sense of collective insecurity or violation of female inmates' privacy in the presence of individuals of the opposite sex in prison spaces have been acknowledged by the Special Rapporteur on Torture as forms of ill-treatment:

“Women and girls are at particular risk of sexual assault by male prisoners and prison staff, including rape, insults, humiliation and unnecessary invasive body searches. Added to the trauma of sexual abuse is the particular stigmatization women in these situations face, for instance for having engaged in extramarital sexual relations or due to the risk of pregnancy or of sexual abuse leading to the inability to have children. Sexual humiliation may occur when male guards watch female prisoners in intimate moments such as dressing or showering. The risk of sexual and other forms of violence can arise during transfers to police stations, courts or prisons, and particularly where male and female prisoners are not separated or when male staff transport female prisoners. Separating male and female detainees and ensuring that female detainees

⁵⁷ ECHR. *M.S.S vs. Belgium and Greece*. Application No.30696/09. Judgment January 21, 2011; Corte IDH. *Caso Caesar vs. Trinidad and Tobago*. Judgment, May 11, 2005.

⁵⁸ ECHR. *Gafgen v. Germany*. 22978. Judgment 1.6.2010.; IACTHR. *Caso Quispialaya Vilcapoma Vs. Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de noviembre de 2015. Serie C No. 308; Corte IDH. *Caso Rodríguez Revolorio y otros Vs. Guatemala*. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 14 de octubre de 2019. Serie C No. 387. Para 71.

⁵⁹ IACTHR. *Case Valle Jaramillo et al. vs Colombia*. Judgment November 27th, 2008.

⁶⁰ IACTHR. *Case Velásquez Rodríguez vs. Honduras*. Judgment July 29, 1988; IACTHR. *Case Espinoza González v. Perú*. Judgment November 20th, 2014.

⁶¹ IACTHR. *Case Vera Vera v Ecuador*. Judgment May 19th, 2011; IACTHR, *Case Penal Miguel Castro Castro v. Perú*. Judgment november 25th, 2006; Special Rapporteur on Torture. Report of the Special Rapporteur, 2008.

⁶² OHCHR, Gender Equality Policy (2011); Human Rights Council (HRC) resolution 23/25;

⁶³ Committee Against Torture, 36th Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, CAT/C/USA/CO/2, at ¶¶ 9, 32; Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/C/USA/CO/3/Rev.1, at ¶ 33.

are supervised by female guards and prison officials are key safeguards against abuse.”⁶⁴

It is deeply troubling that instances of sexual violence have occurred, but equally alarming is the encroachment on the safe spaces, free from gender-based violence, which has historically characterized the prison environment for women deprived of liberty.

We recognize the challenging circumstances faced by the transgender population in prisons, often subjected to behaviors constituting cruel, inhuman, and degrading treatment and necessary measures to prevent such occurrences (including the establishment of differentiated treatment safeguards, addressing specific needs, and maintaining accurate records documenting the causes and consequences of violence suffered by the transgender population), it cannot be ignored that the separation of prison facilities based on sex is and remains a fundamental safeguard mandated by international human rights law. This safeguard, embraced by various international legal instruments and shared across various cultures and traditions, has emerged as a central tenet, crucial even for the rehabilitation of women. In States where this separation has been neglected, prison policies have had significant repercussions on the physical and mental health of female inmates, exacerbated by cases of underreporting due to a lack of information. Consequently, it appears imperative to either maintain sex-based separation or establish adequate safeguards based on accurate information to protect the rights of women deprived of liberty.

b. States' obligation to ensure: comprehensive measures to prevent, investigate, prosecute, and punish instances of cruel, inhuman, and degrading treatment

The prohibition of cruel, inhuman, and degrading treatment gives rise to obligations of prevention, investigation, prosecution, and punishment⁶⁵. Concerning the duty of prevention, we contend that in countries where individuals born male are allowed to be housed in female facilities, this practice should be suspended without delay until there is sufficient information on its potential impacts on women. States have already identified risks to the physical and mental health of women, including instances of sexual violence. Consequently, it is imperative to implement effective measures that forestall the realization of such risks. Failing to take these measures would constitute a breach of Article 2.1 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment.

Furthermore, in cases where such cruel, inhuman, and degrading treatment has occurred, States have the duty to investigate, prosecute, and punish⁶⁶. These investigations must take into account the Principles relating to the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment, including (a) determining measures to prevent the acts from recurring, (b) clarifying the facts, and imposing appropriate sanctions, (c) initiating investigations *ex officio*, and (d) in any case, protecting victims from revictimization or threats.

Up to the present, there is a lack of sufficient information about the investigations conducted by States in cases of cruel, inhuman, and degrading treatment. Therefore, it is imperative to

⁶⁴ United Nations General Assembly. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. 5 January 2016. A/HRC/31/57.

⁶⁵ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

⁶⁶ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

delve deeper into this aspect. It is noteworthy that these investigations must be undertaken by assessing the specific human rights impact of non sex-separated prisons on women and girls, who are often victims of gender-based violence.

IV. Conclusions and recommendations

The growing trend of State laws and policies aimed at establishing criteria for the management of transgender individuals in prison settings has opened a timely debate about their potential impacts on incarcerated women. These policies may pose significant risks to the health and physical and psychological integrity of women (many of whom have been victims of gender-based violence throughout their lives), given the risks of sexual violence and the potential re-traumatizing impact of sharing their private spaces with individuals born males.

This document is based on the premise that the transgender population has experienced notable violations of their rights, underscoring the critical importance of de-stigmatization. Consequently, the following recommendations are put forth:

- 1) **Maintain or re-establish exclusive single-sex spaces for women and girls.** Ensure that relevant facilities are established and managed in accordance with relevant international standards regarding sex separation to guarantee the right to a life free from violence for women and girls and prevent cruel, inhuman, and degrading treatment in prison settings.
- 1) **Ensure the comprehensive and up-to-date collection of data on prison populations, categorized by sex.** This data is crucial for effectively monitoring instances of prison violence and abuse, as well as for informing the design, implementation, and evaluation of prison management measures.
- 1) **Take all necessary measures to prevent and eradicate existing prison conditions that may lead to or exacerbate the risk of cruel, inhuman, or degrading treatment or punishment.** Without prejudice to the principle of sex separation, this encompasses addressing risks for women and persons in situations of vulnerability, including those who identify as transgender, through the implementation of tailored measures that consider their diverse situations and conditions.

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