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INTERNATIONAL**

Discrimination and violence against transgender and gender-diverse people in detention

Submission to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Introduction

Outright International works with partners around the globe to strengthen the capacity of the lesbian, gay, bisexual, trans, intersex, and queer (LGBTIQ) human rights movement, document and expose human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies, and civil society partners. Outright holds consultative status at the United Nations where it serves as the secretariat of the UN LGBTI Core Group.

This submission is a response to call for inputs from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment for inputs for the upcoming thematic report on current issues and good practices in the management of prisons, including pre-trial detention facilities. This is intended to inform the Special Rapporteur on torture's report that will be presented to the 55th session of the Human Rights Council in February 2024. This submission focuses on the experiences of transgender and gender-diverse people in detention settings, globally.

International legal standards

International human rights law standards are applicable to all without distinction. Each individual is entitled to their human rights without discrimination, including on the basis of sexual orientation, gender identity and expression, and sex characteristics.¹ States must respect, protect, and fulfill their human rights obligations.

Several international human rights standards make up the universal framework related to detention. The right to security of person enshrined in Article 9 of the

¹ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).



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International Covenant on Civil and Political Rights, which “protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained,”² extends to everyone, including lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) persons.³ International standards on the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“Bangkok Rules”) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), mandate fair and humane treatment and apply to all prisoners without discrimination.

There is growing recognition of the need for prison and detention settings to consider gender identity in the housing of prisoners and detainees. The Nelson Mandela Rules require prisons to record in their file management systems upon admission of prisoners “precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender.”⁴ In addition, in 2017, the Special Rapporteur on extrajudicial, summary or arbitrary executions recommended that States ensure “that judicial and prison authorities, when deciding allocation of a transgender person to either a male or female prison, do so in consultation with the prisoner concerned and on a case-by-case basis. Safety considerations and the wishes of the individual must be paramount.”⁵

International standards also require that gender-specific needs be taken into consideration in detention. The Bangkok Rules require States to address the gender-specific needs of prisoners, including general and mental healthcare services, HIV prevention, treatment, care and support, and protection and support from gender-based violence and sexual abuse.⁶ The Special Rapporteur on extrajudicial, summary or arbitrary executions also stressed the fatal consequences suffered by transgender women in detention due to the “discrimination in and denial

² International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

³ *Ibid.*, par. 3.

⁴ United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/RES/70/175, Rule 7(a), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

⁵ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, U.N. Doc. A/HRC/35/23, par. 46, https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session35/Documents/A_HRC_35_23_AEV.docx.

⁶ United Nations General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, A/RES/65/229, Rules 10-17, https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.



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of access to essential services.”⁷ The UN Committee on Migrant Workers has recognized that LGBTIQ persons have specific needs and are highly vulnerable to exploitation, abuse and violence in detention, which may sometimes amount to torture⁸ and urged States to avoid detaining LGBTIQ migrants.⁹ It also affirmed the separation of persons in detention based on gender, “taking into consideration the particular needs of [LGBTIQ] persons.”¹⁰ In addition, the Committee on the Rights of the Child asserted that “gender-sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity” during their entire contact with the criminal justice system, including pre-trial custody and detention.¹¹

Challenges transgender and gender-diverse people face in detention

A. Abusive and discriminatory detention practices

Transgender and gender-diverse people face various forms of abuse and discrimination in detention. According to a national survey on anti-transgender discrimination in the United States in 2015, 20% of surveyed transgender and gender-diverse people who were in jail, prison or juvenile detention reported being sexually assaulted by correctional officers or other inmates, while 23% were physically assaulted.¹² An alarming 11% were sexually assaulted by facility staff, which was five to six times higher than the rate of sexual assault by facility staff for the general incarcerated population in the country.¹³ In addition, 51% of that number reported that they were sexually assaulted more than once.¹⁴ This pattern of abuse was confirmed by the findings of the federal government that, from 2007 to 2011, around 34% of transgender and gender-diverse inmates experienced sexual

⁷ Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, par. 46.

⁸ Committee on Migrant Workers, *General comment No. 5 (2021) on migrants’ rights to liberty and freedom from arbitrary detention and their connection with other human rights*, U.N. Doc. CMW/C/GC/5, par. 24, accessed November 12, 2023, <https://daccess-ods.un.org/tmp/4795367.12169647.html>.

⁹ *Ibid.*, par. 45.

¹⁰ *Ibid.*, par. 83(b).

¹¹ Committee on the Rights of the Child, *General comment No. 24 (2019) on children’s rights in the child justice system*, U.N. Doc. CRC/C/GC/24, par. 40, accessed November 12, 2023, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2FPPRiCAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3Q GKUxFivhToOfjGxYjV05tUAlgpOwHOJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vj%2Bf0RPR9UMtGkA4>.

¹² National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, December 2016, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, 191.

¹³ *Ibid.*, p. 191.

¹⁴ *Ibid.*, p. 192.



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harassment in local, state and federal prisons, compared to around 4% of cisgender inmates.¹⁵

Transgender and gender-diverse people are often housed in detention facilities that do not match their gender identity. For example, in the United Kingdom, a government report stated that out of the 168 transgender women in prison in March 2022, 162 were held in male facilities. An additional 19 transgender detainees who identified as non-binary or another gender identity other than male were also held in male prisons.¹⁶ In Thailand, as of 2018, there were 4,000 transgender people in detention, generally housed in facilities that did not match their gender identity, even if they had undergone gender-affirming surgeries.¹⁷ In India, the majority of prison facilities that participated in a study in 2020 reported that they place transgender prisoners “based on the advice of the medical officer,” which almost always means that the decision is based on the prisoner’s genitalia.¹⁸ This is also the policy in countries like Brazil, Honduras, Mexico, and Argentina.¹⁹

Failing to recognize transgender prisoners’ gender identities in housing decisions can expose them to abuse and violence.²⁰ In 2019, in the United Kingdom, out of the 119 transgender women housed in male prisons in England and Wales,²¹ eleven transgender women reported being subjected to sexual assault.²² In the U.S., an instructive case study is that of Ashley Diamond, a trans woman who was assigned

¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, Washington, 2014, https://bjs.ojp.gov/content/pub/pdf/svpiri1112_st.pdf.

¹⁶ Ministry of Justice Official Statistics Bulletin, *Her Majesty’s Prison and Probation Service Offender Equalities Annual Report 2021/22*, London, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1119803/HMPPS_Offender_Equalities_2021-22_Report.pdf

¹⁷ United Nations Development Programme, “The Lives of Transgender People in Thai Prisons,” <https://www.undp.org/thailand/blog/lives-transgender-people-thai-prisons>.

¹⁸ Commonwealth Human Rights Initiative, *Lost Identity: Transgender persons inside Indian prisons*, 2020, <https://www.humanrightsinitiative.org/download/1606377171Lost%20Identity%20Transgender%20Persons%20in%20Indian%20Prisons.pdf>, 45.

¹⁹ Josefina Alfonsin and others, *Trans women deprived of liberty: Invisible stories behind bars*, https://www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars_Final-3.pdf, 13.

²⁰ Editors, “Classification and Housing of Transgender Inmates in American Prisons,” *Harvard Law Review* 127, no. 6 (April 2014): 127.

²¹ Ministry of Justice Official Statistics Bulletin, *Her Majesty’s Prison and Probation Service Offender Equalities Annual Report 2018/19*, London, 2019, <https://assets.publishing.service.gov.uk/media/5dde64a2ed915d015d9d6523/hmpps-offender-equalities-2018-19.pdf>.

²² Danny Shaw, “Eleven transgender inmates sexually assaulted in male prisons last year,” *BBC News*, May 21, 2020, <https://www.bbc.com/news/uk-52748117>.



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to a male prison facility by the Georgia Department of Corrections in October 2019. During detention, male inmates subjected her to fourteen instances of sexual assault within one year, including attempted rape, sexual coercion, and forced exposure to nudity.²³ In Hong Kong, a 2016 report revealed that transgender women prisoners were placed in male wards in a “maximum-security psychiatric centre” due to the pathologization of transgender identities, making them vulnerable to physical and sexual assault.²⁴ The non-governmental organization Midnight Blue reported that from 2013 to 2016 it received “desperate complaints” from around 40 transgender women inmates in Hong Kong for abuses in detention, including verbal and sexual assault by facility staff, forced shaving of hair, and body searches conducted by male staff.²⁵

While this submission focuses primarily on transgender people, Outright documented one case in Ghana in which police officers intentionally exposed an intersex woman to the risk of sexual violence in detention. In 2021, police raided a human rights workshop and arrested 21 human rights defenders. A trans person who was detained in the raid told Outright:

There was an intersex lady among us. During the compulsory strip and search, they just saw a male organ and immediately threw her into the male cell. She kept insisting that she had both genitalia and if only they would check again. We pleaded with them as well, but they refused. They were not willing to listen. If you tried to go against them, you’ll either be physically assaulted or verbally abused. I remember one of my colleagues getting a hot slap because she insisted that the intersex lady was a lady and she had to be at the female cell instead of the male cell. And the last thing we could hear was the police officer saying that if she claims she’s a woman, then the other cellmates in the male cell should show her what women go through. They were insinuating that the male persons in the cell should rape her.

Detention centers in numerous countries deny trans people the right to freedom of expression, including gender expression. In South Africa, in *September v.*

²³ Case of *Diamond v. Ward and others*, United States District Court for the Northern District of Georgia, Complaint of November 23, 2020, para. 9, <https://storage.courtlistener.com/recap/gov.uscourts.gand.283922/gov.uscourts.gand.283922.1.0.pdf>.

²⁴ Justin Heifetz, “Transgender prisoners in Hong Kong suffer sexual assault, denial of hormones,” *South China Morning Post*, July 27, 2016, <https://www.scmp.com/lifestyle/article/1994926/transgender-prisoners-hong-kong-suffer-sexual-assault-denial-hormones>.

²⁵ *Ibid.*



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Subramoney, a trans woman serving her sentence in a male prison was routinely denied her right to express her gender identity as a woman: prison officials prohibited her from wearing gender-appropriate clothing, forced her to cut off her braided hair, and confiscated her personal cosmetic items.²⁶ In Japan, the local prefectural bar association in Gifu warned the Kasamatsu prison for failing to comply with its request to allow a transgender man to express himself in a masculine way, going as far as having his hair cut “in a woman’s hairstyle” and forcing him to wear feminine underwear.²⁷

Transgender people can also be denied the right to choose an officer of the same gender to perform strip and intimate search practices, exposing them to sexual violence. In the case of *Meriwether v. Faulkner* in the United States, a trans woman who was housed in an all-male detention facility alleged that officers “repeatedly and unnecessarily required her to strip in front of inmates and other correctional officers solely so that they might view her unique physical characteristics.”²⁸ The district ruled these practices to be “maliciously motivated” and therefore unlawful.²⁹ Similarly, in *Shaw v. District of Columbia*, a trans woman who was in pre-trial custody was searched by male marshals who then groped her intimate parts and made sexually demeaning comments about her body in front of other male officers.³⁰

Trans and gender-diverse people are discriminatorily subjected to prolonged solitary confinement, which the Special Rapporteur on Torture decried as a form of torture in 2020.³¹ A recent government report on transgender inmates in American federal prisons from 2017 to 2022 shows that trans and gender-diverse persons are two to three times more likely to be put in solitary confinement than cisgender prisoners.³²

²⁶ Maria Claire Van Hout, “Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of September v Subramoney,” *Forensic Science International Mind and Law* 3 (December 2022): 100077.

²⁷ Fumiko Takaki, “Prison warned over treatment of transgender inmate,” *The Asahi Shimbun*, September 9, 2023, <https://www.asahi.com/ajw/articles/15001512>.

²⁸ Case of *Meriwether v. Faulkner*, United States Court of Appeals Seventh Circuit, Judgment of June 4, 1987, <https://casetext.com/case/meriwether-v-faulkner>.

²⁹ *Ibid.*

³⁰ Case of *Shaw v. District of Columbia*, District of Columbia Superior Court, Judgment of 2011, <https://casetext.com/case/shaw-v-dist-of-columbia>.

³¹ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/66/268, par. 21, accessed November 12, 2023, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>.

³² Federal Bureau of Prisons, *Transgender Inmate Report*, 2017, <https://www.thenation.com/wp-content/uploads/2023/07/Copy-of-Transgender-Inmate-Reports-2017-2022-Redacted-2-1.pdf>.



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This can be due to prison officials' lack of awareness and capacity to deal with transgender and gender-diverse prisoners, rather than for disciplinary reasons. This was the case of Claire Mercer, a trans woman who served time in a Michigan jail and was put in solitary confinement because "the jail had never dealt with a transgender inmate before."³³ As the American Civil Liberties Union asserted, solitary confinement can be discriminatorily "used to separate [LGBTI prisoners and detainees] from the general population."³⁴ Protecting vulnerable prisoners from threats to their safety can also be used as a justification for solitary confinement. This was the experience of Monserrath López, a trans woman from Honduras who sought asylum in the United States in 2014 and was placed in men's detention facilities despite declaring her gender identity as a trans woman. When she reported being sexually assaulted by a male detainee while showering, "a guard responded by threatening to place her in solitary confinement."³⁵ While some trans people may request being placed in solitary confinement for their own safety,³⁶ it is more often the case that it is applied automatically and without their consent.³⁷ Discriminatory solitary confinement practices against trans people negatively impact their health and well-being and can lead to adverse outcomes such as suicide, as Mexico's national public health institute found in prisons in Mexico City.³⁸

As a population vulnerable to discrimination from correctional staff, trans and gender-diverse people in detention experience significant challenges in accessing protection and redress from abuse. For example, in a report on trans women in men's prisons in the U.S. state of New York, legal advocates found existing correctional grievance procedures and institutional recourse for discrimination and abuse against transgender people to be lacking, insufficient, or inefficient, leading to

³³ ACLU Michigan, "Transgender inmate held in solitary confinement," 2019,

<https://www.aclumich.org/en/cases/transgender-inmate-held-solitary-confinement>.

³⁴ American Civil Liberties Union, Written Statement for the Hearing on Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, June 19, 2012,

https://www.prisonlegalnews.org/media/publications/aclu_testimony_before_senate_judiciary_committee_on_solitary_confinement_2012.pdf.

³⁵ Human Rights Watch, "Do You See How Much I'm Suffering Here?" Abuse against Transgender Women in US Immigration Detention, March 2016, https://www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf, IV.

³⁶ Federica Coppola, "Gender identity in the era of mass incarceration: The cruel and unusual segregation of trans people in the United States," *International Journal of Constitutional Law* 21, no. 2 (May 2023): 657,

<https://academic.oup.com/icon/article/21/2/649/7175197>.

³⁷ Gabriel Arkles, "Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention," *Temple Political & Civil Rights Law Review* 18, no. 2 (August 2012): 544, http://archive.srlp.org/files/segregation_Arkles.pdf.

³⁸ National Institute of Public Health (Instituto Nacional de Salud Pública, INSP), "Principales resultados de la encuesta de salud con sero-prevalencia de VIH a mujeres transgénero en la Ciudad de México," CIEE Resumen Ejecutivo 5, no. 3 (July 2014): 7.



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impunity for these acts.³⁹ Some transgender inmates may choose not to go through official redress procedures for fear of retaliation and further abuse from staff.⁴⁰ In India in 2021, transgender women housed in a male ward in Nagpur, Maharashtra, reported being routinely sexually assaulted by inmates and staff and reported these issues through six complaint letters in a confidential grievance box.⁴¹ However, they claimed that neither prison authorities nor the judiciary had come to their aid.⁴² Another trans woman described the situation in more hopeless terms: “protesting would mean only one thing – get raped.”⁴³

B. Lack of access to health services

Research from the United States and Latin America shows that trans and gender-diverse prisoners are often denied access to equitable, affirming, and gender-specific health services in detention.⁴⁴ One survey from the United States shows that transgender prisoners already suffer from higher rates of health issues, including depression, anxiety, and substance abuse.⁴⁵ Denial of access to gender-affirming care in detention settings can have lethal consequences to the health of transgender and gender diverse prisoners, one of the most extreme of which is “autocastration or surgical self-treatment.”⁴⁶ Despite these risks, in some cases, transgender people in detention in the U.S. have had to sue prisons just to get access to medically necessary services such as gender-affirming hormone therapy.⁴⁷ Prisons have imposed a range of barriers to gender-affirming care, in some cases requiring such a diagnosis of gender dysphoria or a previous intake or

³⁹ Sylvia Rivera Law Project, “It’s war in here” A Report on the Treatment of Transgender and Intersex People in New York State Men’s Prisons, 2007, <https://srlp.org/wp-content/uploads/2012/08/WarinHere042007.pdf>, 22.

⁴⁰ Ibid; Human Rights Watch, “Do You See How Much I’m Suffering Here?,” 12.

⁴¹ Sukanya Shantha, “Misgendering, Sexual Violence, Harassment: What it Is to Be a Transgender Person in an Indian Prison,” *The Wire*, February 11, 2021, <https://thewire.in/igbtqia/transgender-prisoners-india>.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Marie Claire Van Hout, Stephanie Kewley and Alyson Hillis, “Contemporary transgender health experience and health situation in prisons: a scoping review of extent published literature (2000–2019)”, *International Journal of Transgender Health* 21, no. 3 (June 2020): 258–306; Erin McCauley and others, “Exploring healthcare experiences for incarcerated individuals who identify as transgender in a southern jail,” *Transgender Health* 3, no. 1 (February 2018): 34–41.

⁴⁵ Silpa Maruri, “Hormone Therapy for Inmates: A Metonym for Transgender Rights,” *Cornell J Law Public Policy* 20, no. 3 (Spring 2011): 807-32; Ethan Rogers, Andrew Krajewski, and Stef Shuster, “The Disproportionate Mental Health Burden Among Incarcerated Transgender and gender-diverse People,” *J Correct Health Care* 29, no. 1 (February 2023): 39-46.

⁴⁶ George Brown, and Everett McDuffie, “Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States,” *Journal of Correctional Health Care* 15, no. 4 (2009): 287.

⁴⁷ Claire Nolasco Braaten and Michael Vaughn, “Litigation on Gender Confirmation Surgery and Hormonal Therapy among Trans Women Prisoners: Views from the U.S. Circuit Courts of Appeals,” *Women and Criminal Justice* 32, no. 1-2 (2022): 163-184.



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prescription.⁴⁸ A national survey on anti-transgender discrimination in the United States in 2015 found that 37% of respondents who were previously undergoing gender-affirming hormone therapy were denied access to this treatment during detention in jails, prisons, or juvenile detention centers.⁴⁹ For those in immigration detention in the U.S., despite a standing medical policy of the Immigration and Customs Enforcement (ICE) agency mandating access to hormone therapy for transgender women detainees who have previously accessed it, more than half of the respondents to a study by Human Rights Watch in 2016 reported not having access to the treatment for a period ranging from one to five months.⁵⁰ In Colombia, a 2016 report found that the majority of incarcerated trans women did not have access to gender-affirming health care.⁵¹

Due to lack of access to medically necessary gender-affirming hormone therapy, some transgender people resort to dangerous practices. A U.S. study reported incidents of autocastration by transgender women inmates with the purpose of reducing testosterone levels in at least six detention facilities in four states where access to gender-affirming hormone therapy is denied.⁵² A study in Latin America found that many transgender women in detention “have no other option for their transition process but to inject themselves with cooking or vegetable oil,” a practice intended to augment breasts.⁵³

Incarcerated transgender women are more vulnerable to HIV than non-incarcerated trans women and the general population.⁵⁴ Studies from Canada and the United States show that, access to sexual and reproductive healthcare and HIV prevention, treatment, and care in detention is already scarce.⁵⁵ However, a systematic review of

⁴⁸ Cynthia Osborne and Anne Lawrence, “Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?,” *Archives of Sexual Behavior* 45, no. 7 (2016): 1649–63; Sysney Tarzwell, “The gender lines are marked with razor wire: Addressing state prison policies for the management of transgender prisoners,” *Columbia Human Rights Law Review* 38 (2006): 167.

⁴⁹ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, 193.

⁵⁰ Human Rights Watch, “Do You See How Much I’m Suffering Here?,” 45.

⁵¹ Colombia Diversa, *Muchas veces me canso de ser fuerte”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia*, 2016, <http://www.colombiadiversa.org/carceles2017/documentos/INFORMECARCELES.pdf>, 57.

⁵² George Brown, and Everett McDuffie, “Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States,” *Journal of Correctional Health Care* 15, no. 4 (2009): 288.

⁵³ Josefina Alfonsin and others, *Trans women deprived of liberty: Invisible stories behind bars*, 14.

⁵⁴ Sari Reisner, Zinzi Bailey, and Jae Sevelius, “Racial/Ethnic Disparities in History of Incarceration, Experiences of Victimization, and Associated Health Outcomes among Transgender Women in the US,” *Women & Health* 54, no. 8 (2014): 750–67.

⁵⁵ Martha Paynter and others, “Sexual and Reproductive Health Outcomes among Incarcerated Women in Canada: A Scoping Review,” *Can J Nurs Res* 54, no. 1 (March 2022): 72–86; Mishka Peart and Andrea Knittel, “Contraception need and available services among incarcerated women in the United States: a systematic review,” *Contraception and Reproductive Medicine* 5, no. 2 (2020).



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studies in the United States and Australia also concluded that access to healthcare for transgender prisoners is also “uniformly more difficult than other prisoners”⁵⁶ due to “structural stigma, heteronormative culture, and lack of staff with specialized training,”⁵⁷ making it challenging for them to access comprehensive sexual and reproductive healthcare, including preventive care.

C. Case study: Torture and harassment of transgender people in pre-trial detention or makeshift prisons in Afghanistan

The takeover of Afghanistan by the Taliban in August 2021 has many LGBTIQ people in fear of their safety and lives. The United Nations Office for the Coordination of Humanitarian Affairs has reported that conflict dynamics have contributed to “opaque and non-inclusive judicial systems” and the institutionalization of extrajudicial killings, enforced disappearances, torture, and arbitrary detention.⁵⁸ Due to criminalization and stigma, LGBTIQ people are particularly at risk. The Taliban itself has reported publicly flogging people for alleged same-sex sexual relations have been reported and publicly endorsed by the Taliban.⁵⁹

Outright International and its partner organizations interviewed over 80 LGBTIQ Afghans in 2021 and 2022 and documented severe human rights abuses at the hands of the Taliban, including in detention settings. Survivors, many of them trans women, reported being arbitrarily detained in informal areas and subjected to abuse when detained in police stations.

For example, Hamrah, a 24-year-old transgender woman who worked as a dancer at weddings and other events, told Outright that in October 2021, Taliban soldiers shut down a village wedding party at which she was dancing. They took her to a “dark basement”,⁶⁰ blindfolded her, and beat her with whips, chains, and the butts of their guns. During her detention, soldiers punched her, spat in her face, and verbally

⁵⁶ Annette Bromdal, Amy Mullens, Tania Phillips, and Jeff Gow, “Experiences of transgender prisoners and their knowledge, attitudes, and practices regarding sexual behaviors and HIV/STIs: a systematic review,” *International Journal of Transgenderism* 20, no. 1 (2019): 4.

⁵⁷ *Ibid.*, p. 16.

⁵⁸ UN OCHA, Humanitarian Needs Overview, Afghanistan, p. 63, January 2023

⁵⁹ Outright International, A Mountain on My Shoulders 18 Months of Taliban Persecution of LGBTIQ Afghans, p.5, 14 February 2023, <https://outrightinternational.org/Afghanistan-Report2023>

⁶⁰ Outright International, A Mountain on My Shoulders 18 Months of Taliban Persecution of LGBTIQ Afghans, 14 February 2023, <https://outrightinternational.org/Afghanistan-Report2023, p. 21.>



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harassed her. Farzad, a 21-year-old transgender woman, told Outright that Taliban members stopped her in the street on the basis of her gender expression and took her to a police station, telling others “We got another *nar omad* [a derogatory term for trans women].”⁶¹ At the police station, Taliban members dragged her across gravel and whipped her. A guard released her the next day after forcing her to have sex with him. Another trans woman interviewed by Outright, Aryan, said that Taliban soldiers held her friend Riza at a police station for three days, tortured her, stripped her naked, and forced her to reveal the identities and addresses of other transgender women.

Recommendations

The UN Office of Drugs and Crime has developed comprehensive recommendations regarding the treatment of transgender people in prisons and other closed settings.⁶² Outright International endorses, in particular, the following UNODC recommendations:

- *Prison authorities should update national prison policies and standard operating procedures to make them consistent with human rights-based and gender-inclusive international standards and guidelines on the treatment of transgender people in prison.*⁶³
- *Transgender people in prison should have easy access to confidential and voluntary HIV testing and counselling that includes informed consent prior to testing, and post-test counselling. All transgender people living with HIV, including those who first test positive while in prison, should have immediate access to antiretroviral therapy, in line with international and national HIV guidelines.*⁶⁴
- *Housing decisions should be based on consultation with transgender persons and align with their preference. The housing decision for each transgender individual should be made on a case-by-case basis by prison directors, wardens and psychologists, and advocates of transgender people from civil society and community-led organizations, as well as external health*

⁶¹ Outright International, *A Mountain on My Shoulders 18 Months of Taliban Persecution of LGBTIQ Afghans*, p.22, 14 February 2023, <https://outrightinternational.org/Afghanistan-Report2023>

⁶² United Nations Office on Drugs and Crime, *Technical Brief: Transgender People and HIV in Prisons and Other Closed Settings*, 2022, https://www.unodc.org/documents/hiv-aids/2022/2225461_Transgender_HIV_E_eBook.pdf.

⁶³ *Ibid.*, p. 3.

⁶⁴ *Ibid.*, pp. 3-4.



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professionals who specialize in transgender health, and on the basis of a multifaceted analysis of the overall risks. This process should consider the individual's gender identity, health needs, including the need for treatment for HIV or other conditions, if necessary, housing preference, safety and security, as well as prevention measures to protect the individual from sexual violence, HIV and other STIs in prison.⁶⁵

- *[Hormone] therapy should be treated as a basic health need and thus be provided free of charge.⁶⁶*

In addition, Outright International recommends the following:

- National human rights institutions and other independent entities that monitor prison conditions should increase and support monitoring, documenting and reporting of human rights violations and gender-based violence against transgender and gender-diverse people in detention. They should ensure that stories and data are safely collected and reported, and disaggregated for sexual orientation, gender variance, and sex characteristics. It is imperative to avoid retraumatization of survivors and their identities and locations are securely protected from reprisals.
- States should enact prison policies that include explicit language prohibiting discrimination on the grounds of gender identity, gender expression, sexual orientation, and sex characteristics.
- States should repeal all laws and cease all practices according to which individuals are detained on the basis of their real or perceived gender identity or expression, sexual orientation, or sex characteristics.

⁶⁵ Ibid., p. 4

⁶⁶ Ibid., p. 5.