



Joint Submission to the UN Special Rapporteur on torture for her upcoming report on “ Current issues and good practices in prison management”

29 November 2023

The #UnitedAgainstTorture consortium brings together the World Organisation Against Torture ([OMCT](#)), the Association for the Prevention of Torture ([APT](#)), the International Federation of ACATs ([FIACAT](#)), the International Rehabilitation Council for Torture Victims ([IRCT](#)), [Omega](#) Research Foundation and [REDRESS](#).¹

The members of the #UnitedAgainstTorture consortium and the civil society networks represented welcome the possibility to provide this joint submission to inform the UN Special Rapporteur on torture’s upcoming report on “Current issues and good practices in prison management”.²

The submission provides for a consolidated compilation of contributions from UATC members, drawing upon their diverse expertise and varied areas of work. The contributions included in this written input focus on:

1. measures to reduce prison overcrowding;
2. laws, policies, special measures and management innovations for vulnerable groups in prisons;
3. the importance of independent oversight and the role of National Preventive Mechanisms (NPMs);
4. the regulation of the use of pre-trial detention;
5. the discriminatory effects of imprisonment on the poor and marginalised sections of the population;
6. the situation of persons sentenced to death;
7. the right to consular assistance as best practice in preventing torture in detention;
8. access to information;
9. access of civil society organisations to places of deprivation of liberty;
10. communication of persons deprived of liberty with the outside world;
11. future public health crises;
12. the use of less lethal weapons in juvenile justice settings;
13. the regulation of the use of force in places of detention; and
14. the retention of and access to CCTV and other audiovisual materials.

¹ More details can be found [here](#).

² See Calls for input, available at <https://www.ohchr.org/en/calls-for-input/2023/current-issues-and-good-practices-prison-management-thematic-report-special>.

These themes are addressed below and are organized by its main contributor.

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I. APT

The APT contribution focuses on three main issues:

1. Measures to reduce prison overcrowding;
2. Laws, policies, special measures and management innovations for vulnerable groups in prisons; and
3. The importance of independent oversight and the role of National Preventive Mechanisms (NPMs)

A. Measures to reduce prison overcrowding

Overcrowding³ in prisons stands out as one of the most significant challenge to prison systems. Its repercussions range from potential life-threatening situations to inadequate detention conditions, thereby compromising access to health care and other fundamental rights. As international and regional human rights mechanisms consistently stated, situations of overcrowding combined with unhealthy conditions in the accommodation and a lack of space may also constitute a form of ill-treatment or even torture.⁴

Various factors contribute to overcrowding, including punitive criminal justice policies (for example on drugs), the excessive use of pre-trial detention, the incarceration of individuals for minor offenses, a low utilization of bail and alternative forms of release, and the limited adoption of non-custodial alternatives.

Current responses to prison overcrowding have been largely inadequate, emphasizing the urgent need for comprehensive structural solutions.⁵ Unfortunately, the prevailing trend of constructing new prisons as a response falls short of providing a genuine lasting solution. One-size-fits-all approaches are similarly ineffective.

Given this backdrop, this submission underscores **the urgent need for a holistic and structural approach to reduce overcrowding and address its far-reaching consequences**. The significance of embracing such an approach also aligns with the 2021 United Nations System Common Position on Incarceration, aiming to promote prison reform and fair treatment of offenders as an integral part of the 2030 Agenda for Sustainable Development, in particular with regard to Sustainable Development Goal 16, on peace, justice and strong institutions, as well as Goal 3, on good health and well-being, Goal 5, on gender equality, and Goal 10, on reduced inequalities.⁶

³ Overcrowding refers to situations where prison occupancy rates exceeds 100 per cent.

⁴ UN treaty bodies and special procedures stated that overcrowding in prison may amount to torture and ill-treatment. For instance, in relation to Brazil, see UN Subcommittee on Prevention of Torture (SPT), *Visit to Brazil undertaken from 19 to 30 October 2015: observations and recommendations addressed to the State party*, CAT/OP/BRA/3, 16 February 2016, para. 46; and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report on his mission to Brazil*, A/HRC/31/57/Add.4, 29 January 2016, paras. 113-114. In relation to Togo, see SPT, *Visit to Togo conducted 1 to 10 December 2014: findings and recommendations for the State party*, CAT/OP/TGO/1, 28 April 2016, para 30. At the regional level, the issue of overcrowding has been addressed by several human rights bodies. In Europe, see e.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Combating prison overcrowding*, Extract from the 31st General Report of the CPT published on 21 April 2022, CPT/Inf (2022) 5 – part, para. 86. In Africa, see e.g., African Commission on Human and People's Rights (ACoMHPR), Resolution on conducting a Study on Prisons and Conditions of detention in Africa, ACHPR/Res.557 (LXXV) 2023; ACoMHPR, Resolution on Prisons and Conditions of Detention in Africa - ACHPR/Res.466(LXVII) 2020.

⁵ See e.g., UNODC/ICRC Handbook on Strategies to reduce overcrowding, 2013, available at https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.

⁶ United Nations System Common Position on Incarceration, April 2021. See pp. 5-6, 7, 9, and 17, available at https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf

In this context, the APT wishes to highlight the below compilation of good practices aiming at reducing overcrowding in prisons, from the Latin America, Africa and South East Asia regions.

For Europe, we just refer to the European Committee for the Prevention of Torture (CPT) recommendation to establish thresholds: 'there should be an absolute upper limit for the number of prisoners ('*numerus clausus*'), in order to guarantee the minimum standard in terms of living space, namely 6m² per person in single cells and 4m² per person in multiple occupancy cells'.⁷

1. Latin America

In Latin America, many countries have high-rates of imprisonment leading to overcrowding, poor prison conditions and systemic violence. The root causes of high rates of imprisonment haven't change in years.⁸ Although the pressure put on prisons can be temporarily alleviated by expanding the prison estate, if the underlying causes of high imprisonment rates remain unchanged, new prisons will be rapidly filled.⁹ As a result, prison occupancy rates in some countries exceeds 100 per cent (overcrowding). The highest rates are found in Guatemala (293.2%), El Salvador (236.7%), Bolivia (263.6%), and Peru (225.1%).¹⁰ In Brazil, the prison system holds a deficit of 167.000 vacancies, amounting to a occupancy rate of 135%.¹¹

In 2013, the Inter-American Commission on Human Rights (IACoMHR) recommended that Latin American States rationalize the use of pre-trial detention, and the implementation of non-custodial sentences and provisions for early release.¹²

Additionally, it's worth noting that in a 2018 case on provisional measures against Brazil, the Inter-American Court of Human Rights (IACtHR) proposed a solution to address incarceration in overcrowded prisons characterised by degrading and inhumane conditions. The solution involved linking the length of prison sentences to the living conditions of detainees. Specifically, the Court ordered Brazil to calculate the length of imprisonment "at the rate of two days per day of actual deprivation of liberty in degrading conditions", essentially counting each day as two in order to mitigate the impact of harsh conditions and reduce the overall length of the sentence. The rationale behind the adoption of this standard, known as "double

⁷ CPT, Combating prison overcrowding, Extract from the 31st General Report of the CPT published on 21 April 2022, CPT/Inf (2022) 5 – part, para. 102, available at <https://rm.coe.int/cpt-standard-combating-prison-overcrowding/1680a64461>.

⁸ These many include the overuse of pre-trial detention, the historical practice of arrest to investigate, and the war on drugs.

⁹ UNODC, *Handbook on strategies to reduce overcrowding in prisons*, 2010, p. 9. See also Banco Interamericano de Desarrollo, *Cuatro propuestas para que la crisis carcelaria quede en el pasado*, 3 February 2016, available at: <https://blogs.iadb.org/seguridad-ciudadana/es/cuatro-propuestas-para-que-la-crisis-carcelaria-queda-en-el-pasado/>

¹⁰ World Prison Brief, *Highest to Lowest – Occupancy level (based on official capacity)*, available at: https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=18. See also The Economist, *Latin America's prisons are overcrowded and violent*, 16 February 2023, available at: <https://www.economist.com/the-americas/2023/02/16/latin-americas-prisons-are-overcrowded-and-violent>.

¹¹ Brazil holds the third biggest prison population in the world, falling behind only from the United States and China. According to the most recent data published by the National Secretariat of Penal Policies, there are currently 839.672 persons in the prison system in the country. From those, 649.592 are in detention facilities and 190.080 are serving house arrest. 27.375 are women (which amounts to 4.25% of the prison population). The current rate of pre-trial detention is 25.5%. Approximately 60% of the prison system population have been indicted for drug related offenses, and 68% are black. See Secretaria Nacional de Políticas Penais, SISDEPEN 2023, available at: <https://www.gov.br/senappen/pt-br/servicos/sisdepen>.

¹² IACHR, *Report on the Use of Pretrial Detention in the Americas*, 2013, para. 326, Recommendation C "Legal framework and application of pretrial detention.", available at <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf>

counting each day served", is rooted in the belief that compensatory measures are necessary when individuals are held in unlawful detention conditions. The Court justified this decision by emphasizing the urgent need to reduce the prison population, arguing that current sentences are harsher than required by law. Importantly, the Court also noted that overcrowding constitutes the "unlawful and painful infliction of the sentence being carried out" highlighting the illegality of the time served as a sentence.¹³

Given this context and precedents, in recent years many Latin American countries have implemented **policies and strategies**, including **legislative, administrative, and judicial measures**, aimed at reducing the high rates of detention throughout criminal proceedings and sentencing.

a) Legislative measures expanding alternatives to pre-trial detention

Legislative measures that focus on alternatives to pre-trial detention play a critical role in progressively reducing overcrowding. In light of this, some States have recently amended their legislation to expand the list of alternatives to pre-trial detention.

In **Argentina**, article 210 of the Criminal Procedure Code provides for measures to ensure the presence of the accused person or to avoid obstructing the investigation. Measures include: (i) the accused's promise to submit to the proceedings; (ii) the obligation to submit to the care or supervision of a specific person or institution; and (iii) the prohibition to leave the territory where he/she is without prior authorisation. The Code also provides for the use of pre-trial detention but only when the above measures are insufficient.¹⁴

In **Brazil**, the Criminal Procedure Code was amended in 2011 in order to provide a list of alternative measures available to judges in article 319.¹⁵ The list is comprised of nine measures, which include: (i) periodic presentation before the court, under the conditions set by the judge; (ii) bail; (iii) prohibition of leaving the home district; and (iv) electronic monitoring.¹⁶

¹³ IACtHR. *Resolução da Corte Interamericana de Direitos Humanos de 22 de novembro de 2018. Medidas Provisórias a respeito do Brasil. Assunto do Instituto Penal Plácido de Sá Carvalho*, para. 120.

¹⁴ See Argentina, Código Procesal Penal Federal, Decreto 118/2019, at <https://servicios.infoleg.gob.ar/infolegInternet/anexos/315000-319999/319681/norma.htm>

¹⁵ Brazil, Código de Processo Penal (Decreto-Lei nº 3.689 de 3 de outubro de 1941, alterado pela Lei nº 13.769, de 19 de dezembro de 2018), available at <https://www.wipo.int/wipolex/en/text/503943>.

¹⁶ Figures however show that the legislative reform did not reach significant impact on reducing pre-trial detention rates (at least not as expected). Between 2011 to 2016 the number of persons in pre-trial detention continued to grow steadily, ranging from around 35% to 40% of the prison population. See Ministério da Justiça e Segurança Pública, Departamento Penitenciário Nacional, Levantamento Nacional de Informações Penitenciárias, *Atualização-Junho 2016*, p. 14. Nevertheless, from 2016 to 2023, the rate of pre-trial detention in Brazil appears to be leveling off and even decreasing. One factor that may have contributed to this positive change is the introduction of judicial review hearings for detention in 2015, as required by the International Covenant on Civil and Political Rights (Article 9.3) and the American Convention on Human Rights (Article 7.5). Since then, this practice has been adopted nationally and included in the Code of Criminal Procedure (art. 310). The data show that between 2015 and 2018, the number of pre-trial detentions decreased slightly, reaching a plateau after more than seven years of continuous increase. Furthermore, from 2019 to 2023, the rate started to decrease continuously. See National Secretariat of Penal Policies, SISDEPEN, 20023, available at: <https://www.gov.br/senappen/pt-br/servicos/sisdepen>. Such a change in the pattern could be explained by the implementation of judicial control detention hearings in the country, combined with the rise of the COVID-19 pandemic, during which there were advocacy efforts towards desincarceration and avoiding placing people in closed detention facilities. These elements may be the main factors in explaining this new pattern. Currently, the use of pre-trial detention accounts for 25.48% of the prison population, which is still high.

In **Ecuador**, article 522 of the Comprehensive Organic Criminal Code provides for the application of four types of alternative measures to pre-trial detention, such as: (i) prohibition on leaving the country; (ii) periodic appearance before a designated authority or institution; and (iii) house arrest and electronic monitoring mechanism for criminal matters.¹⁷

In **Mexico**, article 155 of the Code of Criminal Procedure provides for thirteen precautionary measures other than pre-trial detention, including: (i) periodic appearance before a judge or other competent authority; (ii) confiscation of assets; and (iii) prohibition to leave the country without authorisation.¹⁸ Article 156 of the Code provides that the Public Prosecutor's Office must take into account the criterion of minimum intervention when imposing precautionary measures.

In **Peru**, the Ministry of Justice and Human Rights found that only 10% of the cases that entered the criminal justice system between 2006 and 2013, were resolved through alternative mechanisms to trial.¹⁹ Article 68 of the Peruvian Criminal Code provides for exemption from punishment in cases where the deprivation of liberty does not exceed two years or is accompanied by a penalty involving the restriction of rights or a fine if the officer's responsibility is minimal.²⁰

b) Administrative measures

Along with legal reforms, **administrative measures** contribute significantly to reduce overcrowding. Several good practices in this regard can be observed in the Latin America region.

In 2015, **Argentina** adopted Resolution N° 1370 of 2015, which established the Assistance Program for Persons under Electronic Monitoring, and Resolution N° 86/2016, which expanded the geographic scope of the program.²¹ There is a Directorate for the Assistance of Persons under Electronic Monitoring, whose purpose is to oversee the implementation of the electronic surveillance mechanism for accused or convicted persons under house arrest and other forms of detention or serving sentences.²²

In 2021, in **Brazil**, the National Council of Justice introduced an administrative methodology based on the concept of *numerus clausus*. This methodology is designed to ensure compliance with prison capacity and equip judicial actors and prison administrations with tools to achieve this goal. Referred to as the "Central Vacancy Regulation",²³ the initiative provides a set of tools intended to enhance the management of the prison population by curbing inflow, expanding release measures, and rigorously adhering to established prison capacity limits. The proposed methodology seeks to ascertain and define the actual capacity limit (a

¹⁷ Ecuador, Código Orgánico Integral Penal (modificado hasta el 14 de febrero de 2018), available at <https://www.wipo.int/wipolex/en/text/513431>

¹⁸ México, Código Nacional de Procedimientos Penales, available at: <https://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP.pdf>

¹⁹ Peru, La ley. Noticias legales. *Enfocar mejor la política criminal: mucha prisión preventiva y pocas salidas alternativas*, 2021, available at: https://laley.pe/2021/03/01/enfocar-mejor-la-politica-criminal-mucha-prision-preventiva-y-pocas-salidas-alternativas/#_ftn4

²⁰ Peru, Código Penal peruano actualizado 2023, available at: <https://lpderecho.pe/codigo-penal-peruano-actualizado/>

²¹ CAT, *Concluding observations on the combined fifth and sixth periodic reports of Argentina*, CAT/C/ARG/CO/5-6, para. 5.

²² Argentina, Ministerio de Justicia y Derechos Humanos. *Asistencia de personas bajo vigilancia electrónica*, available at: <https://www.argentina.gob.ar/la-justicia-argentina/asistencia-de-personas-bajo-vigilancia-electronica>. Furthermore, see https://www.argentina.gob.ar/sites/default/files/2020/11/informe_prision_domiciliaria_y_vigilancia_electronica_2020_0.pdf.

²³ Conselho Nacional de Justiça, Programa das Nações Unidas para o Desenvolvimento, Departamento Penitenciário Nacional, Central de Regulação de Vagas, *Manual para Gestão da Lotação Prisional*, 2021, available at: <https://www.cnj.jus.br/wp-content/uploads/2022/03/manual-central-de-regulacao-de-vagas-1.pdf>.

cap) for each prison unit. It includes instruments for controlling the number of persons admitted to the system, such as a waiting list (or preventive *numerus clausus*) and a precautionary early release measure as a means to alleviate overcrowded prison facilities.²⁴

In **Colombia**, Document 3828 of the National Council on Economic and Social Policy, as adopted in 2015, states that the measures to overcome the problems of the prison system include those aimed at creating alternatives to imprisonment, and rationalizing the use of pre-trial detention.²⁵

c) *Judicial measures*

Judges play an important role in the implementation of alternative measures to pre-trial detention (i.e., bail, house arrest and supervised release), **as well as in the imposition of non-custodial sentences** (i.e., fines, suspended sentences, deferred sentence, home detention, community sentences and service orders), and in the implementation of early release schemes.

In this context, it is worth noting that most recently important steps have been taken towards the abolition of mandatory pre-trial detention in **Mexico**.²⁶ In July 2023 a regional body of the Federal Judiciary endorsed a binding legal precedent, effectively abolishing mandatory pre-trial detention in 18 states of the Republic. This include Nuevo León and Mexico City, aligning with an important ruling from the IACtHR.²⁷

2. Africa

Prison overcrowding is a long-standing issue of concern in the African region. In June 2023, the African Commission on Human and People's Rights (ACHPR) has adopted a *Resolution on conducting a Study on Prisons and Conditions of detention in Africa*, in response to persistent reports of human rights violations in African prisons and detention centres, including with regard to overcrowding.²⁸ Significantly, the matter of overcrowding was previously tackled by the ACHPR through the 2015 Guidelines on the Conditions of

²⁴ This proposed early release measure has the legal nature of an extraordinary judicial measure, without a specific legal provision, based mainly on the needs imposed by the context of overcrowding.

²⁵ Inter-American Commission on Human Rights, *Measures to Reduce Pretrial Detention*, 2017, para. 67 available at: <https://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf>

²⁶ In Mexico, 40% of persons deprived of liberty are in pre-trial detention, due to the existence of a mandatory pre-trial detention system. According to the IACtHR this system is violating the personal liberty and the presumption of innocence due to the application of investigatory and mandatory pretrial detention. See Courthouse News Service, *Inter-American Court: Mexico's mandatory pretrial detention violates human rights*, 27 January 2023, available here: <https://www.courthousenews.com/inter-american-court-mexicos-mandatory-pretrial-detention-violates-human-rights/>. The Mexico's Supreme Court ruled on a case attempting to eliminate mandatory pretrial detention this past September, but the initiative spearheaded failed to receive enough votes to rule it unconstitutional. A second initiative to reform the mechanism in October likewise failed. In October 2023, the *UN Working Group on Arbitrary Detention* stated that mandatory pre-trial detention must be abolished as soon as possible. UN, *Arbitrary detention still widespread in Mexico, rights expert warns*, 2 October 2023, available here: <https://news.un.org/en/story/2023/10/1141762>

²⁷ El Imparcial, *Poder Judicial Federal elimina la prisión preventiva en 18 estados; jueces recibirán amparos*, 15 July 2023. Available at: <https://www.elimparcial.com/mexico/Poder-Judicial-Federal-elimina-la-prision-preventiva-en-18-estados-jueces-recibiran-amparos-20230715-0016.html>. See also IACtHR, case of Tzompaxtle Tecpile et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 7, 2022. Series C No. 470, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_470_esp.pdf

²⁸ See ACHPR/Res.557 (LXXV) 2023. Available at: <https://achpr.au.int/en/adopted-resolutions/557-resolution-conducting-study-prisons-and-conditions-detention>

Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)²⁹ and the 2018 Principles on the Decriminalisation of Petty Offences in Africa.³⁰

This section will specifically address recently adopted measures to reduce overcrowding in a chosen set of African states, namely Morocco, Rwanda, Senegal, South Africa, and Togo.

In fact, overcrowding is a prevalent issue in all these countries. In Morocco, recent data indicate that the prison system has exceeded its intended capacity by over 60%.³¹ Despite a reduction in the number of inmates over the last years, in Rwanda the prison population still exceeds the capacity by over 138.1%.³² In a similar vein, in Senegal, overcrowding has reached a level of 155% as of April 2023.³³ In South Africa, the prison system is currently operating at an occupancy rate of 143%, with a staggering overcrowding rate of 43.06% at the beginning of 2023.³⁴ Finally, with a pre-trial detention rate of 63% (as a proportion of the total prison population), Togo is one of the most affected country by over-crowding in the world.³⁵ In

²⁹ Luanda Guidelines, 2015, available at

[https://elearning.icrc.org/detention/es/story_content/external_files/Directrices%20sobre%20condiciones%20de%20detenci%C3%B3n%20de%20custodia%20y%20de%20Detenci%C3%B3n%20Provisional%20en%20Africa%20\(2014%20\).pdf](https://elearning.icrc.org/detention/es/story_content/external_files/Directrices%20sobre%20condiciones%20de%20detenci%C3%B3n%20de%20custodia%20y%20de%20Detenci%C3%B3n%20Provisional%20en%20Africa%20(2014%20).pdf).

³⁰ Principles on the Decriminalisation of Petty Offences in Africa, 2017, available at <https://achpr.au.int/index.php/en/node/846>

³¹ The problem of prison overcrowding in Morocco has raised significant concerns in recent years. In August 2023, The General Delegation for Prison Administration and Reintegration (DGAPR) revealed an unprecedented figure, with 100,004 detainees being held within a system originally designed for 64,600. See Agence Marocaine de Presse, August 2023, *DGAPR Calls on Judicial, Administrative Authorities to Find Solutions to Prison Overcrowding Problem*, at <https://www.mapnews.ma/en/actualites/social/dgapr-calls-judicial-administrative-authorities-find-solutions-prison-overcrowding>. Furthermore, the Moroccan Prisons Observatory points out that a substantial contributing factor to this issue is the fact that 44% of the detainees are in pre-trial detention. This overreliance on pre-trial detention, combined with prolonged detention periods, adds further strain to an already overcrowded prison system. See also Sara Ibriz, August 2023, *Surpopulation carcérale. L'observatoire des prisons propose des mesures d'urgence en attendant la réforme* <https://medias24.com/2023/08/16/surpeuplement-carceral-lobservatoire-des-prisons-propose-des-mesures-durgence-en-attendant-des-reformes/>.

³² World Prison Brief, August 2023 <https://www.prisonstudies.org/country/rwanda>. Overcrowding has been a prevalent issue in Rwanda's prison system since the 1994 Genocide against the Tutsis. As an illustration, in 1995, the Central Prison of Kigali exceeded its capacity by a staggering 1,600%. See: Abdun, Lulu, *Rehabilitation and Reintegration of Genocide Ex-Prisoners: Understanding the Correctional Role of Prisons in Rwanda*, 2017, Independent Study Project (ISP) Collection, 2689. https://digitalcollections.sit.edu/isp_collection/2689. Despite a reduction in the number of inmates over the last years, one of the primary reasons for the current high rate of imprisonment is the extensive use of pre-trial detention, accounting for 18% of the prison population, mainly for common law offenses. Additionally, the prolonged pre-trial detention period is a concern, with some detainees waiting for more than six months before their trials. See Transparency International Rwanda, *Policy Research on the Implementation of Alternatives to Imprisonment in Rwanda*, August 2022, available at: https://tirwanda.org/IMG/pdf/final_report_policy_research_on_the_implementation_of_alternatives_to_imprisonment_in_rwanda.pdf

³³ In Senegal, prison overcrowding has emerged as a substantial issue over the past two decades. In the last twenty years, the inmate population in Senegal's prisons has experienced a twofold increase. More precisely, the number of inmates has risen from 4,891 in 1999 to 11,547 in 2019. This substantial growth has far surpassed the existing detention capacity of 4,924, frequently causing the prison population to reach heights of up to 12,000 detainees. See Souleymane Diassy, Fiche d'info : Cartographie de l'environnement carcéral au Sénégal, Africa Check May 2023, available at: <https://africacheck.org/fr/fact-checks/fiches-dinformation/prisons-senegal-crimes-securite-justice-criminalite-statistiques-informations-rebeuss#:~:text=Prisons%20surpeupl%C3%A9es,est%20souvent%20point%C3%A9e%20du%20doigt>.

³⁴ World Prison Brief, April 2023, South Africa, available at: <https://www.prisonstudies.org/country/south-africa>. According to latest data, South Africa, has 212,286 inmates within 243 correctional centres and 218 community centres managed by the Department of Correctional Services. This alarming overcrowding issue has been further exacerbated by the recent loss of 3,024 beds due to a fire incident at the Kutama-Sinthumule maximum security prison, which pushed the overcrowding rate to 47.06% in August 2023. See Dovahani Nengovhela, August 2023, *Sharp surge in prison overcrowding after fire at Kutama-Sinthumule*, <https://www.citizen.co.za/review-online/news-headlines/2023/08/31/nearly-600-prisoners-still-waiting-to-be-transferred/>.

³⁵ World Prison Brief, Togo, <https://www.prisonstudies.org/country/togo>. See also OSF, *Presumption of Guilt*, p. 19, available at <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf>

particular, the excessive use of pre-trial detention contributes significantly to the severe overcrowding in the country's 13 prisons, which are at 182% of capacity.³⁶

a) Reform of criminal justice system

As in other regions, the need for **comprehensive criminal justice system reform** has become increasingly urgent in Africa, particularly to address overcrowding in detention.

In this context, **Rwanda** has taken significant measures to address the issue of prison overcrowding in a comprehensive and structural manner.³⁷ In January 2023, the government introduced two key policies aimed at reforming the country's justice system: the [Criminal Justice Policy](#) and the [Alternative Dispute Resolution Policy](#).³⁸ These policies are expected to address persistent challenges, particularly the issue of overcrowding in the prison system, which has been a long-standing problem in Rwanda.

- The Criminal Justice Policy seeks to alleviate these challenges by promoting the use of non-custodial methods of dealing with detained and convicted persons. This includes the introduction of alternatives to imprisonment, such as Global Positioning System (GPS) bracelets, community service, and fines. The policy also aims to shift Rwanda's prison system from a punitive approach to a more rehabilitative and corrective one. This shift will involve equipping prison officers with the necessary knowledge and skills to positively influence inmates, preparing them with the right skills, knowledge, and a more constructive outlook for their reintegration into society.
- The Alternative Dispute Resolution Policy instead prioritizes non-litigious approaches to conflict resolution. Under this policy, the Ministry of Justice can assign certain cases to be resolved by mediators (Abahuza), conciliators (Abunzi), or arbitrators, rather than taking them to court. Conciliators advise disputants on how to reach an amicable settlement, often proposing solutions while leaving the final decision to the parties involved. Mediators primarily facilitate negotiations between disputing parties and do not provide advice on the merits of the case, unless specifically requested or in complex cases. These measures are expected to modernise the justice system and improve conflict resolution practices in Rwanda.

b) Legislative measures

On the African continent, important **legislative measures** have also been taken to introduce alternatives to imprisonment.

In **Morocco**, in response to prison overcrowding related concerns, the Parliament took an important step in October 2023 with the approval of Bill No. 43.22, which focuses on alternative sentencing measures. This

³⁶ CAT, Concluding Observations on Togo, [CAT/C/TGO/CO/3](#), para 24.

³⁷ Interesting to note that in Rwanda, overcrowding is not due to excessive use of pre-trial detention, as with 14% of overall prison population it is one of the lowest in Africa.

³⁸ Rwanda Ministry of Justice, *Alternative dispute resolution and criminal justice policies will significantly promote rule of law*, January 2023, available at <https://www.minijust.gov.rw/news-detail/alternative-dispute-resolution-and-criminal-justice-policies-will-significantly-promote-rule-of-law> .

legislative initiative aims to address minor offences by adopting a rehabilitative approach and promoting civic engagement.³⁹ The law introduces a range of alternative sanctions for non-violent offences, including community service, electronic monitoring, daily fines, certain restrictions on rights, as well as measures for supervision, reparation, and rehabilitation.

Togo has drafted a revised version of the 1983 Code of Criminal Procedure which yet awaiting approval by Parliament.⁴⁰ The text, which is intended to be resolutely innovative and adapted to current challenges, should significantly improve the efficiency of the criminal justice system. If adopted, it could have a significant impact on the situation of persons in pre-trial detention and the overcrowding in the country.⁴¹ In this context, however it should be noted that Togo has already adopted a number of legislative measures concerning non-custodial measures and overcrowding, but these measures are not systematically applied in practice.⁴² Relevant measures include: (i) criminal mediation;⁴³ (ii) criminal settlement;⁴⁴ (iii) waiver of sentences;⁴⁵ (iv) suspension of sentences;⁴⁶ (v) postponement of sentences;⁴⁷ and (vi) community services.⁴⁸

c) *Administrative measures*

³⁹ BNN, *Morocco's New Approach to Combating Prison Overcrowding: A Closer Look at Bill n°43.22*, November 2023, available at <https://bnn.network/breaking-news/crime/moroccos-new-approach-to-combating-prison-overcrowding-a-closer-look-at-bill-n43-22/>.

⁴⁰ See Togo First - Actualité économique au Togo, 21 May 2022, [Bracelet électronique, travaux d'intérêt général : quelques précisions sur le nouveau code de procédure pénale envisagé.](#)

⁴¹ The SPT has noted that the draft code provides for the appointment of liberty and detention judges who will be responsible for deciding on the imposition of pre-trial detention and related requests for release. Provisions in the draft Code of Criminal Procedure also address the need to implement alternatives to sentencing as provided for in the Penal Code. SPT, Visit to Togo conducted 1 to 10 December 2014: findings and recommendations for the State party, [CAT/OP/TGO/1](#), 28 April 2016, paras 112-114.

⁴² Fatai Offanlake, *Les mesures alternatives à l'incarcération au Togo*, Le Groupe MONTESQUIEU, 26 July 2017, available at <https://groupe-montesquieu.blogspot.com/2017/07/les-mesures-alternatives-lincarceration.html>.

⁴³ Penal mediation is an alternative measure to prosecution that is generally applied to minor offences or offences committed by minors. It is provided for in article 59 of the Togolese Criminal Code and articles 311, 312, 313 and 314 of the Togolese Children's Code. See Loi n°2015-010 du 24 novembre 2015 portant nouveau code pénal, available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104616/127692/F-194593081/TGO-104616.pdf>; Loi n°2007-017 du 6 juillet 2007 portant code de l'enfant, <https://www.ilo.org/dyn/natlex/docs/SERIAL/81964/95152/F1737117949/code%20enfant.pdf>. According to article 59 of the Togolese Criminal Code, criminal mediation is a mechanism aiming at achieving conciliation between the offender or his/her legal representative and the victim or his/her legal representative or his/her successors in title. Its purpose is to halt the effects of criminal proceedings, to ensure compensation for the damage caused to the victim, to put an end to the disorder resulting from the offence, and to contribute to the rehabilitation of the offender. Criminal mediation is proposed by the public prosecutor who may mediate directly or delegate the task to a penal mediator. In accordance with article 312 paragraph 3 of the Togolese Children's Code, minors who have committed offences also benefit from criminal mediation.

⁴⁴ Article 61 of the Togolese Criminal Code provides for a criminal settlement. This is a procedure that allows the public prosecutor to propose an alternative to imprisonment (fine, withdrawal of driving licence, etc.) for minors or adults who have committed certain offences, as long as no criminal proceedings have been initiated. This procedure avoids a trial for the offender.

⁴⁵ This alternative to imprisonment is provided for in article 96 of the Togolese Criminal Code and stipulates that an offender who admits guilt and makes reparation for the damage caused to the victim may not be sent to prison.

⁴⁶ A suspended sentence allows the execution of a prison sentence to be suspended in whole or in part by the judge. The suspended sentence imposed by the judge may not exceed 3 years. See article 97 of the Togolese Criminal Code.

⁴⁷ If the judge finds that the damage caused by the offender is in the process of being repaired and that the disturbance caused by the offence will cease, the judge may decide to postpone the sentence, in accordance with article 100, paragraph 1, of the Togolese Criminal Code.

⁴⁸ Community service has an educational character and is therefore generally accepted by public opinion. It is provided for in article 82 of the Togolese Criminal Code.

Important **administrative measures** that aim at reducing overcrowding have similarly been adopted most recently in some African countries.

Senegal has made commendable progress in tackling prison overcrowding. One notable development is the introduction of Global Positioning System (GPS) bracelets in November 2022. This innovative initiative provides an alternative to traditional incarceration and aims to reduce overcrowding by allowing non-custodial sentences for certain offenders. The use of GPS bracelets promotes rehabilitation and reintegration while reducing the burden on prison facilities.⁴⁹

South Africa has long struggled with severe prison overcrowding issues. In response to this crisis, President Cyril Ramaphosa took a major step towards addressing overcrowding by approving remissions for non-violent offenders in August 2023.⁵⁰ President Ramaphosa's remissions have played a crucial role in reducing the overcrowding rate to 38% by October 2023.⁵¹

3. South East Asia

Prison overcrowding remains a pressing issue in the South East Asian region, exacerbated by one of the highest rates of individuals in pre-trial detention worldwide.⁵² Noteworthy developments in this context include the following State practices to reduce overcrowding.

In the **Philippines**, the government has initiated measures to alleviate congestion in courts and judicial processes. These efforts involve the release of inmates, the provision of comprehensive services to free detention prisons, and humanitarian releases targeting the elderly and individuals facing various issues. Additionally, there is a comprehensive reform of penal facilities, with a strategic transfer of these facilities to different regions based on maximum, medium, and low-security criteria to effectively address the challenge of overcrowded prisons.⁵³

Meanwhile, in **Thailand**, significant steps have been taken to address the issue. The government amended its Narcotics Code in December 2021, removing cannabis from the list of scheduled substances. This move decriminalized cannabis in Thailand, leading to the release of 2,006 prisoners, the reduction of sentences

⁴⁹ Mamadou Diop, *Bracelet électronique : les autorités pénitentiaires déjà satisfaites*, February 2023, available at <https://cio-mag.com/bracelet-electronique-les-autorites-penitentiaires-deja-satisfaites/>.

⁵⁰ South African Government, *President Cyril Ramaphosa approves remission of non-violent offenders in South Africa*, August 2023, <https://www.gov.za/speeches/president-cyril-ramaphosa-has-approved-remission-non-violent-offenders-south-africa-11-aug>.

⁵¹ Lindsay Dentlinger, *The Judicial Inspectorate of Prisons (JICS) says it remains concerned about dire overcrowding in the country's prisons*, October 2023, <https://ewn.co.za/2023/10/13/jics-concerned-about-overcrowding-in-sa-s-prisons>.

⁵² Penal Reform International, *Global Prison Trends 2022*, pp. 8-10, available at <https://www.penalreform.org/global-prison-trends-2022/imprisonment-and-overcrowding/>.

⁵³ See Riyaz ul Khaliq, *Philippines president orders 'decongestion' of prisons Ferdinand Marcos Jr. says people 'languishing in jail because they can't afford services of good lawyers'*, 10 January 2023, available at [https://www.unodc.org/roseap/philippines/2023/04/read-your-way-out/story.html](https://www.aa.com.tr/en/asia-pacific/philippines-president-orders-decongestion-of-prisons/2784157#:~:text=Philippines%20President%20Ferdinand%20Marcos%20Jr,who%20are%20eligible%20for%20parole; See also UNODC, UNODC's 'Read Your Way Out' Project supports government in decongesting jails through reading, 12 April 2023, available at <a href=).

for 20,210 individuals, and, as of the year-end in 2022, 80,867 prisoners awaiting decisions for sentence reduction.⁵⁴

B. Laws, policies, special measures and management innovations for groups in situations of vulnerability

Prison disproportionately affects people who suffer from conditions of disadvantage, inequality, structural and intersectional discrimination. This is the case of women, persons with disabilities, indigenous people, Afro-descendant people, LGBTQIA+ people, among others. They are often imprisoned because of their precarious socio-economic situation and discrimination. At the same time, prison reproduces and exacerbates marginalisation and patterns of discrimination, exposing them to greater vulnerability and risks to their protection and well-being when deprived of their liberty. Moreover, prison affects not only people deprived of their liberty, but also their families and communities (i.e. through economic impact, weakened family ties, stigma, domino effect leading to contact with the criminal justice system).

Against this background, this submission highlights that **recognizing the unique challenges faced by groups in situations of vulnerability in prison is paramount to fostering a just and inclusive criminal justice system.**

Responding to the needs of groups in situations of vulnerability in detention requires a **multifaceted and differentiated approach** that addresses the full range of laws, policies, and measures within the criminal justice system:

1. First, the focus should **shift towards non-custodial measures** and the **enhancement of prison management protocols to ensure a more humane and rehabilitative approach for groups in situations of vulnerability;**
2. Second, **intersectionality and culturally appropriate interventions** should be put in place. Acknowledging the diverse backgrounds and identities within groups in situations of vulnerability is critical to ensuring that the laws and policies implemented are not only effective but also sensitive to the specific challenges faced by each person. This requires a nuanced understanding of the intersections between various aspects of identity, such as gender, ethnicity, and sexual orientation, to tailor interventions that truly address the multifaceted nature of vulnerability.
3. Third, an essential component in protecting the rights of persons in situations of vulnerability is the implementation of **robust risk assessment mechanisms**. Such assessments play a pivotal role in comprehensively understanding and addressing vulnerabilities, thereby safeguarding the rights of these individuals. By having informed placement based on thorough risk assessments, authorities can ensure that the interventions are tailored to the specific needs and vulnerabilities of each person, promoting a more just and humane criminal justice system.

⁵⁴ Legal Affairs Division of Department of Corrections, Statistics of convicted prisoners who filed petition for their sentences to be adjusted under the New Narcotics Code, 30 October 2022 [in Thai].

In essence, the focus on laws, policies, and measures addressing groups in situations of vulnerability is not only about recognizing their unique challenges but should also about promoting alternatives to detention that respect their rights and dignity. The implementation of intersectional and culturally appropriate approaches, coupled with effective risk assessment mechanisms, further serves as a foundation for building a criminal justice system that is not only just but also empathetic to the diverse needs of all individuals within society.

Within this framework, the below sections underscore the legal foundation supporting the aforementioned approach, alongside providing for a compilation of good practices concerning the management of special groups in situations of vulnerability in prison, including special or alternatives arrangements drawn from the regions of Latin America and Asia Pacific.

1. Legal basis

Prison policies and procedures should adopt a differentiated approach, based on the principle of non-discrimination clearly set out in international and regional standards, in order to identify and address the specific needs of particular groups or persons deprived of their liberty.

In this regard, the *Nelson Mandela Rules* are a key reference for prison authorities as they clarify the principle of non-discrimination by stating that "in order to put the principle of non-discrimination into practice, prison administrations shall take into account the individual needs of prisoners, in particular the most vulnerable categories of prisoners. Measures to protect and promote the rights of prisoners with special needs are necessary and shall not be considered discriminatory".⁵⁵ In a similar vein, the *Bangkok Rules* point out that, in order to put into practice the principle of non-discrimination, "account shall be taken of the distinctive needs of female prisoners."⁵⁶ For its part, Principle 5(2) of the *Body of Principles for the Protection of All Persons Subjected to Any Form of Detention or Prison* states that special measures to address the special needs of detained women and other categories shall not be considered discriminatory.⁵⁷

At the regional level, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* also develop the principles of equality and non-discrimination.⁵⁸ It is also worth noting that, in 2022, the IACtHR issued the *Advisory Opinion 29/2022 on Differentiated Approaches with Regard to Certain Groups of Persons Deprived of their Liberty*, which states that the application of a differentiated approach to prison policy makes it possible to: (i) determine how the characteristics of the group and the prison environment affect the guarantee of the rights of certain groups of persons deprived of their liberty; and

⁵⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 2(2), available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

⁵⁶ UNODC, The Bangkok Rules, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary, I. Rules of general application 1. Basic principle [Supplements rule 6 of the Standard Minimum Rules for the Treatment of Prisoners] Rule 1, available at https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.

⁵⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, adopted by the UN General Assembly resolution 43/173, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention>.

⁵⁸ IAComHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by IAComHR Resolution 1/08 at its 131st regular session, held March 3-14, 2008, (Principle II).

(ii) identify the specific risks of violation of rights, in order to define and implement a set of specific measures aimed at overcoming (structural and intersectional) discrimination.⁵⁹

Similar provisions are also reflected in a number of standards applicable to the African continent, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),⁶⁰ the African Charter on the Rights and Welfare of the Child,⁶¹ the Kampala Declaration on condition of detention,⁶² and the Guidelines on the Conditions of Arrest, Police Custody, and Pre-Trial Detention in Africa, known as the Luanda Guidelines.⁶³

2. Special or alternative arrangements for groups in situations of vulnerability

a) Exceptionality of prison and measures to reduce imprisonment of vulnerable groups

Imprisonment should be an exceptional measure, especially in cases of persons belonging to groups in situations of vulnerability.

The UN Subcommittee on Prevention of Torture for the Prevention of Torture (SPT) has explained that the ties of indigenous persons to their community "determine the structure of the individual and collective identity of community members".⁶⁴ Deprivation of liberty may therefore constitute a cruel, inhuman, or

⁵⁹ IACtHR, Advisory Opinion OC-29/22 of May 30, 2022, requested by the Inter-American Commission on Human Rights, *Differentiated Approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other instruments concerning the protection of human rights)*, para. 68. Available at [seriea_29_eng.pdf \(corteidh.or.cr\)](https://www.corteidh.or.cr/docs/opinion/seriea_29_eng.pdf). The groups covered by the Advisory Opinion are: children living in detention centers with their mothers or primary caretakers; LGBTI persons deprived of liberty; persons belonging to indigenous peoples deprived of liberty; and older persons deprived of liberty.

⁶⁰ Maputo Protocol, article XXIV para B stating that "Ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity", available at https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf;

⁶¹ African Charter on the Rights and Welfare of the Child, in its Article 17 para A and B states that "a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment (b) ensure that children are separated from adults in their place of detention or imprisonment" and also highlights safeguards at para C, available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf.

⁶² See Kampala Declaration on condition of detention, 1996: introduction reading: "Bearing in mind that some groups of prisoners, including juveniles, women, the old, the mentally and physically ill, are especially vulnerable and require particular attention. Bearing in mind that juveniles must be separated from adult prisoners and that they must be treated in a manner appropriate to their age, Remembering the importance of proper treatment for female detainees and the need to recognise their special needs"; see also point 8 stating that: "special attention should be paid to vulnerable prisoners and that non-governmental organisations should be supported in their work with these prisoners," available at <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf>.

⁶³ See Luanda Guidelines, Section 7 dedicated to persons in situations of vulnerability, available at [https://elearning.icrc.org/detention/es/story_content/external_files/Directrices%20sobre%20condiciones%20de%20detenci%C3%B3n%20de%20custodia%20y%20de%20Detenci%C3%B3n%20Provisional%20en%20Africa%20\(2014%20\).pdf](https://elearning.icrc.org/detention/es/story_content/external_files/Directrices%20sobre%20condiciones%20de%20detenci%C3%B3n%20de%20custodia%20y%20de%20Detenci%C3%B3n%20Provisional%20en%20Africa%20(2014%20).pdf).

⁶⁴ SPT, Sixth Annual Report, CAT/C/50/2, 23 April, 2013, para. 93. Similarly, the Constitutional Court of Bolivia has stated that deprivation of liberty is a practice contrary to the values and worldview of indigenous peoples, which results in "the loss of a member of the community." See Technical report 120/2015 of March 24, 2015, of the Technical Secretariat of the Constitutional Court of Bolivia and Constitutional Judgment 1189/2017-S1, 24 October 2017.

degrading treatment or punishment and even a form of torture for indigenous people.⁶⁵ In this respect, it is also important noting that article 10 (2) of Convention No. 186 on Indigenous and Tribal Peoples Convention, states that “preference shall be given to methods of punishment other than confinement in prison”.⁶⁶

In relation to persons with mental health conditions and psychosocial disabilities, when they are imprisoned they face the risk of being automatically allocated in isolation or solitary confinement by prison authorities in contravention of international standards, like Rule 45 of the *Nelson Mandela Rules*, that state “the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures”.

Additionally, the *Bangkok Rules* state that the *Tokyo Rules* shall guide the development and implementation of appropriate responses to women offenders.⁶⁷ Gender-responsive options for diversionary measures and pretrial and sentencing alternative shall be developed within the States legal systems. However, since 2000 the number of women in prison has more than doubled and there has been slow progress to reverse the trend.⁶⁸

Below are some recent examples of measures introduced to reduce the incarceration of the above mentioned groups in situations of vulnerability.

In **Brazil**, in 2018, a ruling by the Supreme Court in a collective *habeas corpus* proceeding, granted the replacement of pre-trial detention with house arrest for all pregnant women and women who are mothers of children up to 12 years old and who have not committed a violent crime.⁶⁹ While the impact of the ruling yet remains limited,⁷⁰ it is important to note that the ruling explicitly mentioned the Bangkok Rules, which urge states to prioritize judicial approaches that encourage the utilization of non-custodial alternatives.⁷¹ The ruling also reinforced a national legislation from 2016, recognized as the Legal Framework for Early Childhood (Law 13.257/2016). This legislation amended the Criminal Procedure Code (article 318, IV, V, and VI), broadening the scope for precautionary house arrest. This expansion particularly applies to pregnant women, mothers of children up to 12 years old, or individuals responsible for people with disabilities.⁷² It is

⁶⁵ SPT, Sixth Annual Report, CAT/C/50/2, supra, para. 93.

⁶⁶ Indigenous and Tribal Peoples Convention, 1989 (No. 169). Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

⁶⁷ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 2(2), available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

⁶⁸ Helen Fair and Roy Walmsley, *World Female Imprisonment List*, fifth edition, Institute for Crime & Justice Policy Research (ICPR), 2022, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf; Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2023*, pp. 11-13; 20, available at: <https://cdn.penalreform.org/wp-content/uploads/2023/06/GPT-2023.pdf>

⁶⁹ See Supremo Tribunal Federal, 2a Turma, Habeas Corpus Coletivo 143.641/2018, available at <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15338809875&ext=.pdf>.

⁷⁰ The ruling left a loophole for judges to disregard it in the case of ‘very exceptional situations’, without specifying what these would be, leading to various degrees of arbitrariness and discretion in the application of the decision by local courts. See p. 33, <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15338809875&ext=.pdf>.

⁷¹ Ibid, p. 6, <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15338809875&ext=.pdf>.

⁷² Despite progress made at the judicial and legislative level, data yet reveal that 31.6% of pregnant women presented before a judge during detention hearings in 2020 were still sent to pre-trial detention instead of being granted a precautionary house arrest or another non-custodial measure. Frequently, having a previous criminal record increases the chance of pre-trial incarceration. This pattern reveals that decisions are commonly permeated by a bias towards greater punishment of women who are not primary in the system

also worth noting that in 2020, the National Council of Justice implemented an administrative norm urging judges to ensure the application of the "exceptionality of pre-trial incarceration" principle to lesbians, trans women, trans men, and travestites.⁷³

In **Colombia**, a new law was signed in early 2023 that promotes alternatives to imprisonment for women with care responsibilities who have been sentenced up to eight years in prison, replacing prison sentences with unpaid community service. This law can be applied retroactively and could lead to the release of around 5'000 women.⁷⁴

In **Costa Rica**, as of December 2022, 49% of women serving sentences were convicted of drug-related offences.⁷⁵ Until 2013, women who attempted to bring drugs into a prison were sentenced between 8 and 20 years' imprisonment. Following the entry into force of Article 77 bis of the *Law on Narcotic Drugs, Psychotropic Substances, Drugs of Unauthorised Use, Related Activities, Money Laundering and Financing of Terrorism (Law 8204)*,⁷⁶ women have the possibility of paying for their crime in a different way, as long as their action is related to their economic, psychological and social situation, as demonstrated by a psychosocial study that can be requested by the Public Prosecutor or the Public Defence.

In **Mexico**, the federal government announced that it had approved the release from prison of five convicted persons under the Amnesty Law adopted in 2020. The Amnesty Law grants persons imprisoned for committing certain crimes the right to apply for amnesty, provided they meet the applicable requirements, including those living in poverty, women prosecuted for abortion, and indigenous people or Afro-descendant people.⁷⁷

In **New Zealand**, given the over-representation of indigenous people at all stages of the criminal justice system,⁷⁸ the Department of Corrections has included in its strategic plan the achievement of better outcomes and a reduction in the overall proportion of indigenous people in prison.⁷⁹

regardless of their pregnancy status. See Conselho Nacional de Justiça, Diagnóstico Nacional de Primeira Infância, Brasília, 2022, p. 39, available at: <https://www.cnj.jus.br/wp-content/uploads/2023/04/relatos-da-invisibilidade-relatorio-qualitativo-2909.pdf>.

⁷³ Conselho Nacional de Justiça, RESOLUÇÃO No 348, DE 9 DE OUTUBRO DE 2020, article 10, I.

⁷⁴ Corte Constitucional de Colombia, Sentencia C256-22, July 2022, available at:

<https://www.corteconstitucional.gov.co/comunicados/Comunicado%2022%20-%20Julio%206%20de%202022.pdf>

The Bill is available at:

<https://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/proyectos%20de%20ley/2023%20-%202024/PL%20093-23%20Servicios%20Aereos.pdf> Published law:

http://www.secretariassenado.gov.co/senado/basedoc/ley_2292_2023.html

⁷⁵ WOLA, *La reducción del encarcelamiento de mujeres a través de reformas a la legislación sobre droga en Costa Rica*, available at <https://www.wola.org/wp-content/uploads/2017/05/DONE-2-Costa-Rica-77bis-SPA-FINAL-.pdf> NE #2 Costa Rica 77bis SPA FINAL .indd (wola.org)

⁷⁶ See Law on Narcotic Drugs, Psychotropic Substances, Drugs of Unauthorised Use, Related Activities, Money Laundering and Financing of Terrorism (Law 8204), at

http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=48392&nValor3=93996&strTipM=TC.

⁷⁷ Mexico, Ley de Amnistía, available at: https://www.diputados.gob.mx/LeyesBiblio/pdf/LAmn_220420.pdf

⁷⁸ See Ministry of Justice "Hāpaitia te Oranga Tangata | Safe and Effective Justice", 2 February 2023, available at

<https://www.justice.govt.nz/justice-sector-policy/key-initiatives/hapaitia-te-oranga-tangata/#:~:text=M%C4%81ori%20are%20overrepresented%20at%20every,of%20the%20New%20Zealand%20population>.

⁷⁹ Ara Poutama Aotearoa | Department of Corrections, *Hokai Rangī 2019 – 2024* available at

<https://www.corrections.govt.nz/resources/strategic-reports/corrections-strategic-plans/hokai-rangi>.

In **Hawaii**, there are no girls and women between the age of 15 and 24 in prison, thanks to the development of community-based alternatives and rehabilitation for girls and young women.⁸⁰

b) *Prison statistics and census*

The generation of comprehensive, accurate and accessible data on prison systems is fundamental for effective prison planning and management.⁸¹ Data generation is also important to take into account the different dimensions and complexities involved in any human rights protection situation, including prison management. In this sense, relevant consideration should be given to groups in situations of vulnerability in order to have an overview of the nature of the population living in prisons and to know their specific needs in order to take measures to address them. In this regard, there are some examples of prison statistical systems in Latin America that include indicators of people in a situation of vulnerability:

- The **IACtHR** has emphasized that achieving the goal of addressing the unique challenges faced by various vulnerable groups requires the incorporation of accurate data in the formulation of prison policies. This data is crucial for highlighting their specific needs and implementing targeted initiatives.⁸²
- **Argentina** has a National System of Statistics on the Execution of Sentences, which shows the country's prison statistics. It also shows the evolution and characteristics of the population deprived of liberty in prisons and police units. It includes information disaggregated by gender, age, gender identity and expression, and children living with their mothers in prison.⁸³
- In 2019, **Brazil** published its first official census of people of diverse sexual orientations and gender identities deprived of liberty. The census revealed that 20% of prisons have specific cells or wings for LGBTI+ detainees.⁸⁴
- In 2023, **Ecuador** published a prison census, which showed that almost one-sixth of persons deprived of liberty had not yet been sentenced, including disaggregated information on gender

⁸⁰ Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2023*, p. 13.

⁸¹ Statistical Conference of the Americas ECLAC, *Working Group. Statistics on prison system*. Available at: https://www.cepal.org/sites/default/files/presentations/ce21-10_compilacion-experiencias-estadisticas-sistemas-penitenciarios-inegi.pdf See also: <https://www.cdeunodc.inegi.org.mx/index.php/2023/07/04/recommendations-are-presented-to-improve-statistical-capacities-in-prison-systems-in-latin-america-and-the-caribbean-a-new-challenge-is-to-implement-them/>

⁸² IACtHR, Advisory Opinion OC- 29/22 Requested by the IACHR on differentiated approaches with respect to certain groups of persons deprived of liberty, para. 70.

⁸³ Argentina, Ministerio de Justicia. *Sistema Nacional de Estadísticas sobre Ejecución de la Pena*. Available at: <https://www.argentina.gob.ar/justicia/politicacriminal/estadisticas-e-informes/sneep-2022>

⁸⁴ The census mapped 4.746 persons of diverse sexual orientations and gender identities in prisons in Brazil (this figure most likely is underreported. The actual figure should be much higher as not all prison administrations in the country provided the information requested and often LGBTI+ persons do not come out for fear of intimidation or retaliation). See Ministry of Women, *Family and Human Rights, LGBT nas prisões do Brasil: Diagnóstico dos procedimentos institucionais e experiências de encarceramento*, 2020, pp. 17, 20, available at: <https://www.gov.br/mdh/pt-br/assuntos/noticias/2020-2/fevereiro/TratamentopenaldepessoasLGBT.pdf> It is also worth noting that in 2023, the National Preventive Mechanism of Brazil also published a thematic monitoring report pointing out human rights violations and the situation of heightened vulnerability LGBTI+ detainees are subjected to in detention. The report also identified some indicators and mapped such indicators in the different prison systems in Brazil. See National Mechanism to Prevent and Combat Torture and SOMOS, *Relatório Nacional de Inspeções-População LGBTI+ privada de liberdade no Brasil*, 2023, available at: <https://mnpctbrasil.files.wordpress.com/2023/09/relatorio-nacional-lgbti.pdf>.

and age. The President announced that the census would be used to help the government to formulate a new public policy to tackle overcrowding.⁸⁵

- In 2017, **Mexico** developed a census of indigenous people deprived of liberty which made it possible to establish that indigenous people represented 3.8% of the national prison population.⁸⁶ Mexico also produces monthly statistics on the population at the national level, including statistics on the population with mental disabilities, women, indigenous people among others.⁸⁷

c) *Separation, risk assessment and classification*

Separation of different categories of persons deprived of liberty, risk assessment upon admission and classification are all key tools for good prison management and are particularly important in relation to persons in situations of vulnerability, as they enable their specific needs to be identified and met.

The principle of separation requires that persons deprived of liberty belonging to different groups to be placed in different establishments or in different sections within the establishment, e.g. women to be separated from men, children from adults, pre-trial detainees from sentenced detainees. Certain persons deprived of liberty may be at risk of violence and abuse by fellow detainees because of their age, health condition, ethnicity, sexual orientation, gender identity and other factors. In such cases, protective measures may lead to their physical separation. However, such measures should not be systematic or discriminatory towards certain groups, should be regularly reviewed, should be taken with the consent of the person concerned and should not result in reduced access to services and care, or a deterioration in the material conditions of detention.⁸⁸

In order to make informed decisions when dealing with persons deprived of liberty in situations of vulnerability, it is essential that classification is made on a case-by-case basis, through careful and comprehensive risk assessments carried out by multidisciplinary teams upon admission to prison, in order to identify age, profile, type of offence committed, specific needs, abilities and preferences.

In **Brazil**, a positive initiative has been implemented to address this issue. Administrative norms issued by both the National Penitentiary Department⁸⁹ and the National Council of Justice⁹⁰ recommend the establishment of dedicated cells or wings for individuals with diverse sexual orientations and gender identities. Moreover, these norms emphasize that prison and judicial authorities should consult the detained person about their preference for placement before making any decisions. Further, the judiciary should ensure that legal procedures respect each individual's self-defined gender identity.⁹¹

⁸⁵ JURIST, *Ecuador census reveals 1/6 prisoners have not yet received criminal sentences*, 22 July 2023, available here: <https://www.jurist.org/news/2023/07/ecuador-census-reveals-1-6-prisoners-have-not-yet-received-criminal-sentences/> .

⁸⁶ México, Censo de Población Indígena Privada de la Libertad 2017, available at: https://www.gob.mx/cms/uploads/attachment/file/417660/cdi-censo-poblacion-id_gena-privada-libertad-2017.pdf

⁸⁷ Gobierno de México, Cuaderno Penitenciario, available at: <https://datos.gob.mx/busca/dataset/cuaderno-estadistico-penitenciario>

⁸⁸ APT, *Separation of Detainees*, Detention Focus Database, available at: <https://www.apt.ch/knowledge-hub/dfd/separation-detainees>

⁸⁹ Ministério da Justiça e Segurança Pública, Nota Técnica n.º 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, 2018, para. 33.

⁹⁰ Conselho Nacional de Justiça, Resolução N. 348/2020, article 8.

⁹¹ Conselho Nacional de Justiça, Resolução N. 348/2020, article 4.

d) *Situation of LGBTQIA+ persons in detention*

(1) Placement

In practice, a common response by prison systems to protect LGBTQIA+ people in detention is to separate them from the rest of the prison population. It is worth noting that, while separation may be necessary to ensure the safety of the individuals concerned, access to prison services should be guaranteed at all times and this measure cannot be a long-term solution to the problem of homophobic and transphobic violence in prison. It is also crucial not to presume that LGBTQIA+ people in prison uniformly prefer to be separated from other inmates. Moreover, it is important to involve individuals in decisions regarding their placement, ensuring their active participation. Consequently, decisions about placement should not be irrevocable and those in detention who identify as LGBTQIA+ should be granted the opportunity to appeal such decisions.

In this regard, it is also worth noting that the IACtHR has stated that “[...] the placement of LGBTI persons in a prison must be determined by State authorities according to the particularities of each prisoner and his or her specific risk in the special context of each State, always taking into account as principal guidelines respect for gender identity and expression; the avoidance of any situation that produces problems of coexistence; the participation of the person involved, and the protection against violence against him or her and in comparison to the other prisoners. Each installation or prison administration should have the technical and multidisciplinary professional team that rationally determines the most appropriate and adequate placement of persons deprived of liberty in accordance with their self-perception and sexual orientation [...]”.⁹²

(2) Modification and/or developments of internal prison rules and protocols

Over the last years, some prison authorities have either amended or developed new internal prison rules or protocols that shed light on the treatment of LGBTQIA+ persons when they are deprived of liberty.

In some cases, this led to development of recommendations for prison authorities to take into consideration the choice and gender identity of individuals prior to their detention, as well as their sexual orientations.

⁹² IACtHR, *Differentiated approaches with respect to certain groups of persons in detention*, Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29, para. 247-248. See, similarly, Report of the Special Rapporteur on summary executions, Report of the Special Rapporteur on summary or arbitrary executions, Agnes Callamard, on the adoption of a gender approach with respect to arbitrary executions, A/HRC/35/23, 8 June 2017, para. 110(e).

For example, in **Bolivia**⁹³ and **Chile**,⁹⁴ authorities have issued protocols and manuals to address the situation of trans and LGBTQI+ people. Moreover, in **Uruguay**, the National Rehabilitation Institute - the authority responsible for managing the prison system - published a booklet on the rights of LGBTQIA+ persons in prison in 2023. The booklet will be distributed during prisoners entry interviews, and workshops will be held in prisons to disseminate the information.⁹⁵

In other cases, authorities focused on issues related to contact with the outside world.

For instance, in 2016, **Colombia** adopted the General Regulations of National Prison Facilities, under the responsibility of the National Penitentiary Institute (INPEC), which stipulates that no penitentiary institution may deny the right to intimate visits on the grounds of sexual orientation or gender identity of the person deprived of liberty.⁹⁶

In addition, the Guidelines for the care of LGBTI persons in the prison system adopted in 2018 by the **Costa Rica** Ministry of Justice and Peace, state that "the right to intimate visits provided for in the prison regulations will be guaranteed to people of diverse sexual orientation, expression or gender identity under the same conditions as the rest of the prison population. However, the necessary measures must be adopted to guarantee the confidentiality of the sexual orientation and gender identity of the person deprived of liberty".⁹⁷

Similarly, in **Paraguay**, the Ministry of Justice has issued a Protocol for the care of indigenous persons deprived of their liberty, which stipulates that indigenous persons shall not be subjected to work activities against their will and that, whenever possible they shall be assigned to less restrictive spaces or environments.⁹⁸

e) *Creation of gender and/or human rights units*

In Latin America, establishing human rights and/or gender units within the prison system plays a pivotal role in promoting positive practices aimed at ensuring and safeguarding the rights of individuals in detention, especially those facing heightened vulnerability. Nevertheless, it is crucial to emphasize that these units should be overseen by civilian personnel possessing a profound understanding of human rights to facilitate meaningful change and impact on the protection of vulnerable people.

⁹³ Bolivia, Ministerio de Gobierno, *Protocolo de Atención Integral de Personas LGBTI+ Personas Privadas de Libertad*, 2021. Available at: <https://data.miraquetemiro.org/sites/default/files/documentos/Protocolo%20de%20Atenci%C3%B3n%20Integral%20de%20Personas%20LGBTIQ+%20Privadas%20de%20Libertad.pdf>

⁹⁴ Chile, Gendarmería de Chile, *Resolución 5716 por la que se aprueba disposiciones que instruyen sobre el respeto y garantía de la identidad y expresión de género de las personas trans privadas de libertad*, 2020, available at: <https://www.movilh.cl/wp-content/uploads/2021/01/gendarmeria-protocolo-trans-movilh.pdf>

⁹⁵ Uruguay, Debate. *El INR lanzó una guía para orientar a personas LGBTI+ privadas de libertad sobre sus derechos*, May 2023, available at: <https://www.debate.com.uy/actualidad/El-INR-lanzo-una-guia-para-orientar-a-personas-LGBT-privadas-de-libertad-sobre-sus-derechos-20230527-0007.html>

⁹⁶ Resolution 006349 by which the General Regulations of National Prison Facilities of the National Order-ERON are issued by INPEC, 19 Dec. 2016, Article 71 (1).

⁹⁷ Ministry of Justice and Peace of Costa Rica, Guidelines for the care of persons with diverse sexual orientation, expression or gender identity, attached to any of the levels of the Costa Rican prison system, 2018, Article 31.

⁹⁸ Paraguay, Ministerio de Justicia. *Resolución N° 480 por el cual se aprueba el protocolo de atención a personas indígenas privadas de libertad*. Available here: https://www.derechoshumanos.gov.py/application/files/3515/3554/5255/Protocolo_Indigena.PDF

Good practices in this regard include the case of **Chile** where a human rights unit has been established within the prison system and has worked to promote the adoption of guidelines on the appropriate treatment of trans persons and persons with disabilities.⁹⁹ Similarly, in **Uruguay**, the Ministry of Interior has created a National Directorate for Gender Policies¹⁰⁰, which is in charge of the Gender and Diversity Department of the National Rehabilitation Institute. The department works on the creation of protocols, provides guidance on the rights of LGBTI+ persons, and conducts risk analyses in cases of women and LGBTI+ persons deprived of their liberty.¹⁰¹

C. Oversight: the role of national preventive mechanisms and other monitoring bodies/institutions

Independent oversight of places of deprivation of liberty is recognised as one of the most effective preventive measures to protect the rights of persons deprived of liberty. In particular, through their visits to all places of detention, their private interviews with persons deprived of liberty, and their unrestricted access to all relevant documentation, National Preventive Mechanisms (NPMs) established under the OPCAT can observe first-hand the conditions and treatment of persons deprived of liberty, identify the risks to which they are exposed, the good practices in prison management and the deficiencies in standards and procedures. These bodies make recommendations, publish reports and engage in constructive dialogue with the authorities, driving changes in laws, detention policies, regulatory frameworks and practices.

In addition, **it is clear from the practice and experience of NPMs that, by bringing an external and independent eye to prison management practices they can often identify serious differences in practices, policies and procedures within the same institution or between different institutions of the same type in the same jurisdiction.** In the case of the **Norwegian NPM**, for example, it was evident that, simply informing the authorities that such significant differences existed was enough to kickstart a process of change.¹⁰²

Furthermore, recent evidence shows that the **growing strength of transnational NPM networks has facilitated the exchange of numerous good practices**, including in relation, for example, to how the prison system can improve staff recruitment and retention post-COVID, as happened recently in a bilateral between the **NPMs of New Zealand and the United Kingdom**.¹⁰³ It is likely that, in the absence of such oversight networks, prison administrations would be significantly slower to identify such practices and solutions themselves.

⁹⁹ Gendarmería de Chile, Resolución 5716 que instruye sobre el respeto a la identidad de género y expresión de género, 2020, available at: [gendarmeria-protocolo-trans-movilh.pdf](#).

¹⁰⁰ Reglamento del artículo 56 de la Ley 19 889, que crea la Dirección Nacional de Políticas de Género del Ministerio del Interior. Available at: <https://www.impo.com.uy/bases/decretos/63-2021/2>

¹⁰² Information retrieved from bilateral exchanges between the APT and the Norwegian NPM in 2023.

¹⁰³ Information retrieved from bilateral exchanges between the APT and the UK and New Zealand NPMs in 2023.

D. Annex

A) Further readings on good practices in Latin America:

- APT, Observations to the Inter-American Court of Human Rights on the request for an advisory opinion submitted by the IACHR. Differentiated Approaches to Persons Deprived of Liberty, 2020. Available at: https://www.apt.ch/sites/default/files/publications/Joint_Submission_LGBTI_Persons_2020_FINAL_EN.pdf
- El Pacto, Catálogo de medidas alternativas a las penas privativas de libertad, 2019. Available at: <https://www.elpaccto.eu/wp-content/uploads/2019/09/Catalogo-Medidas-Alternativas.pdf>
- Inter-American Court of Human Rights, Advisory Opinion 29-2022 of May 30, 2022 requested by the Inter-American Commission on Human Rights. Differentiated approaches with respect to certain groups of persons deprived of liberty. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_29_eng.pdf
- Inter-American Commission on Human Rights, Measures to Reduce Pretrial Detention, 2017. Available at: <https://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf>
- Inter-American Commission on Human Rights, Practical Guide to Reduce Pretrial Detention. Available at: <https://www.oas.org/en/iachr/reports/pdfs/GUIDE-PretrialDetention.pdf>
- Inter-American Commission on Human Rights, Women Deprived of Liberty in the Americas, 2023. Available at: https://www.oas.org/en/iachr/reports/pdfs/2023/Informe-Mujeres-privadas-libertad_ENG.pdf
- Responses of the Prison System during COVID-19 in Latin America <https://www.apt.ch/knowledge-hub/publications/covid-19-justice-and-deprivation-liberty-latin-america-and-caribbean>

B) Further readings on persons in situations of vulnerability

- APT resources:

Detention Focus Database: <https://www.apt.ch/knowledge-hub/dfd>

Women in detention: Body searches - Improving protection in situations of vulnerability:

<https://www.apt.ch/knowledge-hub/publications/women-detention-body-searches>

Violence against indigenous women deprived of liberty and in contact with law enforcement officials - Contribution to UN Special Rapporteur Report: <https://www.apt.ch/knowledge-hub/publications/violence-against-indigenous-women-deprived-liberty-and-contact-law>

Older persons deprived of liberty: addressing the risks of torture and ill-treatment: Contribution to UN Independent Expert Report, available at: <https://www.apt.ch/knowledge-hub/publications/older-persons-deprived-liberty>

APT/PRI, Older persons in detention: A framework for preventive monitoring: <https://www.apt.ch/knowledge-hub/publications/older-persons-detention-framework-preventive-monitoring>

Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide:

<https://www.apt.ch/knowledge-hub/publications/towards-effective-protection-lgbti-persons-deprived-liberty-monitoring>

Observations to the Inter-American Court of Human Rights on the request for an advisory opinion submitted by the IACHR. Differentiated Approaches to Persons Deprived of Liberty, 2020. Available at: https://www.apt.ch/sites/default/files/publications/Joint_Submission_LGBTI_Persons_2020_FINAL_EN.pdf

- Other resources

Office of the Correctional Investigator of Canada, *Annual Report 2022-2023*, which includes a specific section on indigenous issues in federal corrections, available at: <https://oci-bec.gc.ca/sites/default/files/2023-10/Annual%20Report%20EN%20C3%94C3%87C3%B4%20Web.pdf>

National Mechanism to Prevent and Combat Torture of Brazil (MNPCT), National inspection report on the LGBTI+ population deprived of liberty in Brazil (2023): National Mechanism to Prevent and Combat Torture (MNPCT): <https://mnpctbrasil.files.wordpress.com/2023/09/relatorio-nacional-lgbti.pdf>

National Preventive Mechanism of Peru, Conditions of detention of LGBTI persons in 23 Peruvian prisons: Analysis and recommendations to prevent torture and ill-treatment (2023), available at: <https://www.defensoria.gob.pe/wp-content/uploads/2023/04/CONDICIONES-DE-INTERNAMIENTO-DE-LAS-PERSONAS-LGBTI-EN-23-C%C3%81RCELES-DEL-PER%C3%9A.pdf>

II. FIACAT

Dans le cadre de cette contribution, la FIACAT souhaiterait aborder plusieurs aspects relatifs à la gestion des prisons : l'encadrement du recours à la détention préventive, l'impact discriminatoire de la détention sur les populations pauvres et marginalisées et la situation des personnes condamnées à mort.

1. L'encadrement du recours à la détention préventive

Depuis de nombreuses années, les ACAT ont travaillé sur la prévention et la lutte contre la torture et autres peines et traitements cruels, inhumains ou dégradants dans les lieux privés de liberté et notamment en prison.

C'est à partir des visites de prison des membres ACAT au niveau national que la FIACAT et son réseau ont fait le constat que les prisons africaines étaient pour la majorité surpeuplées. Cette surpopulation a pour conséquence des conditions de détention assimilables à des traitements cruels, inhumains ou dégradants voire à de la torture et contrevient au droit des personnes détenues d'être traitées avec humanité et avec le respect de la dignité inhérente à la personne humaine protégée par l'article 10 alinéa 1 du Pacte international relatif aux droits civils et politiques. En effet, elle engendre une insuffisance alimentaire et une dégradation des conditions d'hygiène, une prise en charge sanitaire incomplète, une incapacité à favoriser la réinsertion des personnes détenues, des obstacles à la réalisation de la mission de service public des agents pénitentiaires etc.

Les observations des ACAT ont été plus loin puisqu'elles ont également constaté que cette surpopulation était notamment due à fort taux de personnes en attente de jugement.

La détention préventive s'applique à une personne présumée innocente et représente une atteinte à son droit à la liberté et à la sécurité, il s'agit donc d'une mesure exceptionnelle « *de dernier ressort* » qui doit être strictement encadrée. Elle ne peut être décidée et mise en œuvre que dans des cas préalablement déterminés par la loi, si cela est nécessaire et en l'absence d'autre alternative. Pour être légale, la détention préventive doit également respecter les garanties procédurales qui l'entourent. Ces garanties sont notamment relatives à la compétence de l'autorité qui ordonne la détention, à la motivation de celle-ci et aux délais légaux à respecter.

Or cette mesure exceptionnelle est devenue la règle dans de nombreux pays où les personnes détenues en attente de jugement représentent une part importante voir la majorité de la population carcérale comme en témoignent les statistiques carcérales. A titre d'exemple, dans plusieurs prisons du Congo les détenus en attente de jugement représentaient la majorité de la population carcérale. Ainsi, selon les statistiques de l'administration pénitentiaire le taux de détention préventive était de 78% à la prison de Brazzaville (mars 2023), 68% à la prison de Pointe Noire (décembre 2022), 63% à la prison de Ouesso (décembre 2022), 74% à la prison de Mouyondzi (août 2022), 62% à la prison de Sibiti (août 2022). Similairement, à Madagascar, la plus grande prison du pays, la prison d'Antanimora située dans la capitale affichait un taux de détention préventive de 58% en avril 2023.

Dans de nombreux cas, au-delà d'être systématique la détention préventive devient également abusive car elle est prononcée et appliquée en violation des règles qui l'encadrent, notamment en cas de : non-respect

des délais légaux, ordonnance adoptée en dehors des motifs prévus par la loi, absence de motivation des décisions de justice (placement en détention et prolongation de la détention), absence de compétence de l'autorité ayant pris cette décision, absence de notification à la personne concernée etc.

Les causes de ce phénomène sont multiples : manque de synergie entre les acteurs de la chaîne pénale, manque d'indépendance du système judiciaire, formations initiale et continue insuffisantes, manque de moyens humains et financiers, corruption systémique, etc.

La FIACAT et les ACAT ont décidé de s'attaquer à ce problème par la mise en œuvre d'un programme de lutte contre la détention préventive. Dans le cadre de ce projet, plusieurs bonnes pratiques ont pu être identifiées.

Tout d'abord, les règles encadrant la détention préventive sont souvent méconnues ou font l'objet d'interprétation divergentes du fait du manque de formations initiale et continue. Pour y remédier, il est essentiel de réunir tous les acteurs de la chaîne pénale ainsi que la société civile pour qu'une compréhension collective des règles puisse être arrêtée. En effet, cela facilite également la collaboration *a posteriori* et prévient les risques de dissension relatifs à l'interprétation des dispositions légales et des procédures. Dans le cadre du programme de la FIACAT cela s'est matérialisé par plusieurs guides élaborés collectivement avec les autorités nationales, l'administration pénitentiaire, l'administration judiciaire et les organisations de la société civile. Ces guides ont été élaborés au [Bénin](#), en [Côte d'Ivoire](#), au [Congo](#), à [Madagascar](#), en [République démocratique du Congo](#) et au [Tchad](#). La méthodologie d'élaboration de ces guides et leur utilité ont fait leur preuve puisque à plusieurs reprises les autorités de ces pays se sont approprié ces guides ; à l'instar des autorités congolaises qui y ont même fait référence dans leur rapport national pour leur troisième Examen Périodique Universel¹⁰⁴.

Ce programme a également démontré son efficacité grâce à la synergie entre les différents acteurs. En effet, les membres du personnel de l'administration pénitentiaire et de l'administration judiciaire doivent nécessairement travailler ensemble et collaborer afin de garantir le respect des garanties judiciaires entourant la détention préventive. Cependant, souvent ces personnes ne se connaissent pas et n'arrivent pas à travailler ensemble voire même il existe une certaine défiance entre elles. Parmi les témoignages recueillis par les ACAT, certains membres de l'administration pénitentiaire ont fait part de leur crainte de se retrouver sanctionner s'ils libéraient une personne dont le mandat de dépôt avait expiré. Pour y remédier des rencontres régulières entre ces acteurs sont nécessaires. Les réunions trimestrielles et ateliers mis en place dans les pays d'exécution du programme ont été fortement appréciés de ce fait. Ces rencontres ont permis à ces différents acteurs de se connaître, de mettre en place des canaux de communication et de mieux comprendre leur travail respectif et les difficultés et obstacles qu'ils peuvent rencontrer.

Malgré cela, il ne peut être mis fin à cette pratique systématique et abusive de la détention préventive que par une politique forte de la part des autorités de sanctionner toute violation des garanties judiciaires et de prioriser des mesures alternatives à la détention. De fortes prises de positions publiques et internes, à l'instar de ce qui a pu avoir lieu au Congo et à Madagascar, représentent une première étape, même si insuffisante. En effet, au Congo, une circulaire, N°919 /MJDHPPA-CAB¹⁰⁵, a été adoptée par le ministre de la Justice le 7

¹⁰⁴ Conseil des droits de l'Homme, Rapport national présenté conformément au paragraphe 5 de l'annexe à la résolution 16/21 du Conseil des droits de l'Homme - Congo, [A/HRC/WG.6/31/COG/1](#), 14 septembre 2008, para 119.

¹⁰⁵ Annexe 1 - Circulaire n°919-MJDHPPA du 7 août 2017 - Congo

août 2017 et adressée à Messieurs le Procureur général près de la Cour suprême ; les Procureurs généraux près les cours d'appel ; les Procureurs de la République près les tribunaux de grande instance pour amener ces derniers au strict respect des dispositions légales entourant la détention préventive. A Madagascar, le 24 juillet 2019, le premier ministre Christian NTSAY a dénoncé les mauvaises conditions de détention et la détention préventive abusive au sein des prisons malgaches à l'occasion de sa visite de la prison d'Ambalatavoahangy à Toamasina. Par la suite, c'est le Président de la République, Andry RAJOELINA, qui a dénoncé l'importante surpopulation carcérale et le fort taux de détenus en attente de jugement dans la prison d'Antanimora lors de sa visite le 31 octobre 2019.

2. L'impact discriminatoire de la détention sur les populations pauvres et marginalisées

Une autre problématique identifiée par la FIACAT et les ACAT est le traitement discriminatoire des populations pauvres et marginalisées dans le cadre de la détention.

Dans une étude menée par la FIACAT, l'ACAT Côte d'Ivoire et le CERDAP² de 2018 à 2020 sur la détention préventive en Côte d'Ivoire, il avait été constaté qu'il existait une surreprésentation de la main-d'œuvre non employée âgée de 25 à 35 ans dans le milieu carcéral¹⁰⁶. En outre, il ressortait qu'au moins un tiers des personnes en détention préventive interrogées était sans instruction et la moitié n'avait pas dépassé le niveau primaire élémentaire, le profil apparaissant le plus fréquemment étant celui d'une personne prévenue analphabète. De surcroît, si le droit à un avocat est une garantie essentielle au droit à un procès équitable et un moyen de lutter contre les détentions arbitraires, plusieurs difficultés d'accès à un avocat avaient été identifiées liées à l'ignorance des procédures mais également au manque de capacités financières des personnes prévenues et à la méconnaissance de l'assistance judiciaire¹⁰⁷ impactant donc particulièrement les populations pauvres, analphabètes ou avec un niveau d'éducation faible. Enfin, l'étude constatait également qu'un des obstacles au dépôt d'une demande de liberté provisoire était le fait que la personne concernée ne disposait pas de l'argent nécessaire pour un tel dépôt¹⁰⁸. Cet obstacle financier est une matérialisation de plus du traitement discriminatoire des personnes en situation de pauvreté dans le contexte de la détention.

Une étude subséquente sur la détention des femmes et des mineurs en Côte menée par les mêmes auteurs entre 2021 et 2022 tiraient des constats similaires. Ainsi, il ressortait de cette étude que 81% des femmes détenues interrogées n'avaient pas de diplôme et que 64% n'avaient même aucun niveau d'étude¹⁰⁹. En outre, cette étude s'est aussi penchée sur les infractions pour lesquelles les personnes étaient détenues. Elle a alors constaté que plusieurs personnes détenues l'étaient pour des infractions qualifiables de petite délinquance ou de délinquance quotidienne (tels que le vol simple, la détention illicite de drogues ou de produits pharmaceutiques, la mendicité, etc.) . A ce titre, une réflexion devrait être menée sur la nécessité de recourir à la détention dans de telles situation et de trouver un équilibre entre la durée et les conditions de détention et la gravité des faits reprochés¹¹⁰. En outre, une attention devrait être portée sur l'existence

¹⁰⁶ FIACAT, ACAT CI et Cerdap², [Présumé.e innocent.e ? Etude sur la détention préventive en Côte d'Ivoire](#), p.33

¹⁰⁷ FIACAT, ACAT CI et Cerdap², [Présumé.e innocent.e ? Etude sur la détention préventive en Côte d'Ivoire](#), p. 76 et 77

¹⁰⁸ FIACAT, ACAT CI et Cerdap², [Présumé.e innocent.e ? Etude sur la détention préventive en Côte d'Ivoire](#), p.81

¹⁰⁹ FIACAT, ACAT CI et Cerdap², [Vivre l'enfer\[mement\] : Regard sur la détention des femmes et des mineur.es en Côte d'Ivoire](#), p.26 et 27

¹¹⁰ FIACAT, ACAT CI et Cerdap², [Vivre l'enfer\[mement\] : Regard sur la détention des femmes et des mineur.es en Côte d'Ivoire](#), p.18

d'infractions sexo-spécifiques. S'il n'existe encore que peu de recherches et de littératures sur la situation des femmes et des mineures en détention, des observations préalables démontrent qu'il existe bien une disparité entre les motifs d'écrou entre les hommes et les femmes certaines infractions n'étant mobilisées que pour les femmes. A titre d'exemple concernant la Côte d'Ivoire, la chercheuse Bénédicte Fisher mentionnaient entre autres les infractions de charlatanisme et la sorcellerie¹¹¹.

Pour remédier à ce traitement discriminatoire des populations pauvres et marginalisées, il est nécessaire de repenser la détention et ne plus y avoir recours systématiquement. A ce titre, certains comportements doivent être décriminalisés. Une campagne visant à décriminaliser la pauvreté et le statut a été lancée en 2014 avec un premier accent sur la décriminalisation des infractions mineures en Afrique¹¹². Parmi les initiatives menées en ce sens, il convient de mentionner les Principes relatifs à la dépénalisation des infractions mineures en Afrique, adoptés par la Commission Africaine des Droits de l'Homme et des Peuples (CADHP)¹¹³ en 2018 lors de sa 63^{ème} session ordinaire. Ces principes relèvent que les infractions mineures sont contraires au droit à l'égalité et la non-discrimination puisqu'elles ciblent ou ont un impact disproportionné sur les personnes pauvres, vulnérables, les populations-clés ou selon le genre comme susmentionné. Elles contreviennent également au respect de la dignité humaine et à l'interdit de la torture et des peines ou traitements cruels, inhumains ou dégradants car elles contribuent à la surpopulation carcérale. Les principes relèvent également le fait que ces infractions sont contraires au droit à la liberté et la sécurité de la personne et l'interdiction des arrestations et détentions arbitraires. En effet, ces principes dénoncent les définitions souvent trop vagues et trop générales de ces infractions. Pour y remédier, les principes recommandent donc de dépénaliser les comportements définies de manière trop vague ou par des termes ambigus mais également de prévoir des alternatives à la détention pour les infractions mineures en recourant notamment à « *la déjudiciarisation des affaires impliquant des infractions mineures et le recours au service communautaire, aux programmes de traitement communautaires et aux mécanismes alternatifs de règlement des litiges, comme la médiation, ainsi que le recours à des alternatives reconnues et efficaces conformes aux normes internationales relatives aux droits humains et la déclaration de certaines infractions comme ne justifiant pas une arrestation* ».

3. La situation des personnes dans le couloir de la mort

Dans le cadre de son engagement contre la torture, la FIACAT travaille également en faveur de l'abolition de la peine de mort et a étudié les violations de l'interdit de la torture et des peines ou traitements cruels, inhumains ou dégradants dans le couloir de la mort.

a. Conditions de détention des condamnés à mort

Si les conditions de détention des personnes condamnées à mort recouvrent des réalités très distinctes en fonction de leur lieu d'incarcération, qu'elles fassent l'objet d'un régime pénitentiaire spécifique ou qu'elles

¹¹¹ FIACAT, ACAT CI et Cerdap², [Vivre l'enfer\[mement\] : Regard sur la détention des femmes et des mineur.es en Côte d'Ivoire](#), p.20

¹¹² Pour plus d'information voir <https://decrimpovertystatus.org/>

¹¹³ Commission Africaine des Droits de l'Homme et des Peuples, [Principes sur la dépénalisation des infractions mineures en Afrique](#), 25 octobre 2018.

soient placées parmi les autres personnes détenues, toutes sont particulièrement exposées à des traitements considérés incompatibles avec l'interdit de la torture.

L'Ensemble de règles minima des Nations unies pour le traitement des détenus (Règles Mandela) garantit aux personnes privées de liberté des conditions de détention dignes et humaines. Néanmoins en pratique de nombreuses règles ne sont pas respectées, notamment celles concernant les personnes condamnées à mort.

À titre d'exemple, la Règle n°43, interdisant les sanctions ou les restrictions disciplinaires comme l'isolement cellulaire à durée indéterminée ou prolongée, le placement d'une personne détenue dans une cellule sombre ou constamment éclairée¹¹⁴, fait l'objet de violations récurrentes aux États-Unis. Dans l'affaire *Virgilio Maldonado Rodriguez c. États-Unis*, la Commission interaméricaine s'est prononcée sur le cas d'une personne ayant passé quinze ans dans le couloir de la mort dans un isolement complet et sans aucune exposition à lumière naturelle et a estimé ce traitement inhumain et cruel. De même, dans l'affaire *Pete Carl Rogovich c. États-Unis*¹¹⁵, la Commission interaméricaine des droits de l'Homme a considéré que certaines conditions spécifiques de détention subies par un condamné à mort relevaient d'un traitement cruel : cellule sans fenêtre et sans accès à la lumière du jour, où l'éclairage est constamment allumé même la nuit et où les détenus ne sont autorisés à sortir de leur cellule que trois fois par semaine pour une durée maximale de deux heures. Elle a également souligné que M. Rogovich faisait l'objet d'un isolement prolongé principalement en raison de son statut de personne condamnée à mort et que cela était constitutif d'une peine cruelle, infamante et inhabituelle¹¹⁶. Elle a fait le même constat dans l'affaire *Ramiro Ibarra Rubi c. États-Unis*¹¹⁷ où le requérant était soumis à l'isolement cellulaire et privé d'interactions sociales. Enfin, dans l'affaire *Dial y Otro c. Trinidad y Tobago*¹¹⁸, la Cour interaméricaine des droits de l'Homme a considéré que deux personnes détenues dans le couloir de la mort ont subi des souffrances mentales, constituant un traitement cruel, inhumain et dégradant aux termes de l'article 5.2 de la Convention américaine relative aux droits de l'Homme, du fait de conditions de détention incompatibles avec les normes internationales.

b. Dans l'attente de l'exécution

En 2012, l'ancien Rapporteur spécial sur la torture, Juan Méndez, a défini le syndrome du couloir de la mort comme un ensemble de circonstances, dont « *les longues périodes d'attente anxieuses durant lesquelles les condamnés à mort sont maintenus dans l'ignorance du sort qui leur est réservé, l'isolement et l'absence quasi totale de contacts, voire le régime carcéral imposé aux prisonniers* » qui produisent de graves traumatismes mentaux et des souffrances physiques¹¹⁹. La détention au secret, le placement à l'isolement et l'exclusion sociale peuvent également caractériser le syndrome du couloir de la mort et avoir des effets sur les

¹¹⁴ [Ensemble de règles minima des Nations Unies pour le traitement des détenus](#), Règle n°43 : « 1. En aucun cas les restrictions ou sanctions disciplinaires ne peuvent constituer des actes de torture ou autres peines ou traitements cruels, inhumains ou dégradants. Les pratiques suivantes, en particulier, sont interdites: a) Isolement cellulaire pour une durée indéterminée; b) Isolement cellulaire prolongé; c) Placement d'un détenu dans une cellule obscure ou constamment éclairée; (...) ».

¹¹⁵ Commission interaméricaine des droits de l'Homme, [Pete Carl Rogovich c. États-Unis](#), n°461/21, affaire 13.394, para. 96, 31 décembre 2021.

¹¹⁶ Commission interaméricaine des droits de l'Homme, [Pete Carl Rogovich c. États-Unis](#), n°461/21, affaire 13.394, para. 86, 31 décembre 2021.

¹¹⁷ Commission interaméricaine des droits de l'Homme, [Ramiro Ibarra Rubi c. États-Unis](#), n°456/21, affaire 13.829, para. 122, 31 décembre 2021.

¹¹⁸ Cour interaméricaine des droits de l'Homme, [Dial y Otro c. Trinidad y Tobago](#), para. 66 et 79, 21 novembre 2022.

¹¹⁹ Assemblée Générale des Nations unies, [Rapport intérimaire du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants](#), A/67/279, para. 58, 9 août 2012.

personnes détenues allant de diverses formes d'anxiété, de stress et de dépression à des troubles cognitifs et des tendances suicidaires¹²⁰, en violation de l'interdiction de la torture¹²¹.

La criminologie a aussi confirmé que le syndrome du couloir de la mort engendre un sentiment d'abandon, qui conduit à la « mort de la personnalité », dont les symptômes sont la dépression, la perte du sens de la réalité et la détérioration physique et mentale, qui peuvent entraîner de graves distorsions de la personnalité et un déni de la réalité¹²². Ainsi, le traumatisme psychologique est une conséquence inévitable de l'imposition de la peine de mort selon les auteur·rices¹²³.

Dès 1989, dans l'affaire *Soering c. Royaume-Uni*, la Cour européenne des droits de l'Homme (CEDH) a considéré qu'une longue période passée dans le couloir de la mort « avec l'angoisse omniprésente et croissante de l'exécution de la peine capitale » exposerait la personne condamnée à « un risque réel de traitement dépassant le seuil » de l'article 3 de la Convention européenne des droits de l'Homme¹²⁴. Des jurisprudences similaires continuent d'être prononcées par une multitude de juridictions régionales, notamment par la CEDH¹²⁵, la Commission interaméricaine des droits de l'Homme¹²⁶, la Cour interaméricaine des droits de l'Homme¹²⁷ et la Cour africaine des droits de l'Homme et des peuples¹²⁸.

Le Comité des droits de l'Homme considère qu'une procédure judiciaire prolongée, si elle ne constitue pas en soi un traitement cruel, inhumain ou dégradant, surtout lorsque le condamné se prévaut des voies de recours, peut constituer une violation de l'article 7 du Pacte selon l'auteur, les conditions spécifiques de détention et le caractère odieux de la méthode d'exécution proposée¹²⁹. De même, le Comité contre la torture a affirmé que les retards dans les procédures de recours aux États-Unis maintiennent les prisonnier·es condamnés·es à mort dans une situation d'angoisse et d'incertitude pendant de nombreuses années, ce qui peut constituer une torture dans certains cas¹³⁰.

¹²⁰ Conseil des droits de l'Homme des Nations unies, [Rapport du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumain ou dégradants](#), A/HRC/43/49, para. 59, 20 mars 2020.

¹²¹ Groupe de travail sur la détention arbitraire du Conseil des droits de l'Homme des Nations unies, [Avis 32/2019, concernant Saeed Malekpour \(République islamique d'Iran\)](#), A/HRC/WGAD/2019/32, para. 40, 9 septembre 2019.

¹²² Johnson, Robert. *Condemned to die: Life under sentence of death*, New York, Elsevier, 1981.

¹²³ N Bojosi, Kealeboga, « [The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment](#) », *African Human Rights Law Journal*, vol. 4, no. 2, p. 303-333, 2004.

¹²⁴ Cour européenne des droits de l'Homme, [Soering c. Royaume-Uni](#), requête n°14038/88, para 111, 7 juillet 1989.

¹²⁵ Cour européenne des droits de l'Homme, [Einhorn c. France](#), requête n°71555/01, para. 26, 16 octobre 2001.

¹²⁶ Commission interaméricaine des droits de l'Homme, [Russell Bucklew c. États-Unis](#), n°71/18, affaire 12.958, para. 91, 10 mai 2018 et Cour interaméricaine des droits de l'Homme, [Hilaire, Constantine et Benjamin et al. c. Trinidad et Tobago](#), para. 168, 21 juin 2002. Commission interaméricaine des droits de l'Homme, [Marlin Gray c. États-Unis](#), n°462/21, affaire 12.505, para. 64, 31 décembre 2021 ; Commission interaméricaine des droits de l'Homme, [Manuel Valle c. États-Unis](#), n°453/21, affaire 13.339, para.63, 31 décembre 2021 ; Commission interaméricaine des droits de l'Homme, [José Trinidad Loza Ventura c. États-Unis](#), n°454/21, affaire 13.478, para.100, 31 décembre 2021.

¹²⁷ Cour interaméricaine des droits de l'Homme, [Ruiz Fuentes y otra vs. Guatemala](#), para. 137, 10 octobre 2019 ; Cour interaméricaine des droits de l'Homme, [Valenzuela Ávila vs. Guatemala](#), para. 207, 11 octobre 2019 ; Cour interaméricaine des droits de l'Homme, [Rodríguez Revolorio vs. Guatemala](#), para. 96, 14 octobre 2019 ; Cour interaméricaine des droits de l'Homme, [Girón y otro vs. Guatemala](#), para.88, 15 octobre 2019.

¹²⁸ Cour africaine des droits de l'Homme et des Peuples, [Marthine Christian Msuguri c. République-unie de Tanzanie](#), requête 052/2016, para. 112 – 116, 1^{er} décembre 2022.

¹²⁹ Comité des droits de l'Homme des Nations unies, [Kindler c. Canada](#), CCPR/C/48/D/470/1991, para. 15.3, 30 juillet 1993.

¹³⁰ Comité contre la torture des Nations unies, [Observations finales concernant les troisième à cinquième rapports périodiques des États-Unis d'Amérique, soumis en un seul document](#), CAT/C/USA/CO/3-5, para. 25, 19 décembre 2014.

III. REDRESS

REDRESS contribution focuses on the right to consular assistance as best practice in preventing torture in detention.

Recommendation: The Special Rapporteur should recognise in her report that consular protection is an important safeguard against the torture of ill-treatment of nationals detained abroad, recognise that consular assistance is a human right, and recommend that States incorporate all relevant provisions of the Vienna Convention on Consular Relations into their domestic legal systems.

Evidence suggests that State hostage taking is an increasing problem globally. Arbitrary detention is also a growing phenomenon, increasing the likelihood that citizens become pawns in State-to-State relations.¹³¹ Individuals detained abroad are particularly vulnerable to torture, ill-treatment and other serious human rights violations from the first moment they are detained, especially in States with weak law enforcement and lack of rule of law, while safeguards in the first hours and days of detention have the strongest impact on the incidence of torture.¹³²

Under international law, States have a right to provide consular protection to their detained nationals, to ensure that basic needs are met and fundamental human rights are respected. Consular protection (also called consular assistance) can act as a humanitarian safeguard and provide a crucial – and sometimes the only – link between the detainee and the outside world. It can help prevent human rights violations, including torture or other prohibited ill-treatment.

Article 5 of the Vienna Convention on Consular Relations (VCCR) provides the basis under international law for “protecting” the interests of a State and its nationals as well as for a State to help and assist its nationals abroad. Both States and individuals are afforded “rights” under Article 36 of VCCR. This includes, inter alia, the right of the sending State to be notified of a national’s arrest or detention “without delay”, and to communicate and visit their nationals in detention (subject to the individual’s consent). Individuals have the right to, inter alia, communicate with and have access to consular officers. The United Nations Working Group on Arbitrary Detention (UNWGAD) has stated that consular protection rights are “primarily a preventative mechanism, which constitutes an important safeguard for individuals who are arrested and detained in a foreign State to ensure that international standards are being complied with” and would reduce the risk of torture.¹³³ The UN Special Rapporteur on extrajudicial and summary or arbitrary executions has recognised the importance of consular assistance as a protection for detained foreign nationals who are “particularly vulnerable to human rights violations”,¹³⁴ and concluded that “[i]t is considered to be settled in international law that consular assistance is a human right”.¹³⁵

¹³¹ UK Parliament Foreign Affairs Select Committee, [“Stolen years: combatting state hostage diplomacy: Sixth Report of Session 2022-23”](#), 28 March 2023.

¹³² Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press, 2016), p. 2.

¹³³ Report of the Working Group on Arbitrary Detention, A/HRC/39/45 (2 July 2018).

¹³⁴ UNGA, “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Application of the death penalty to foreign nationals and the provision of consular assistance by the home State”, A/74/318 (20 August 2019), paras. 20, see also paras 20-43.

¹³⁵ *Ibid.*, para 31.

However, not all States have integrated consular protection into their domestic legal systems. The UK, for example, has ratified the VCCR, but it did not incorporate Article 36 into domestic UK law as part of the Consular Relations Act 1968 which it used to introduce some other VCCR provisions. As a result, the UK provides consular protection as a matter of government policy, based on discretion rather than law. The wide discretion exercised by the UK government has led to criticism from survivors of torture perpetrated during detention abroad, their families, and civil society organisations.¹³⁶ They complain of a lack of effective consular protection, including failures to respond to allegations of ill-treatment, delayed or infrequent consular visits, a lack of prompt follow-up with detaining authorities, an insufficient insistence on privacy during consular visits, or (in the case of dual nationals) on gaining access at all.

Case study: Client of REDRESS and UK national, Jagtar Singh Johal, was tortured after being arrested and detained by police in Punjab, India. He alleges that immediately following his arrest he was subjected to interrogation and torture for a number of days, with Indian police applying electric shocks to his ears, nipples and genitals, forcing his limbs into painful positions, depriving him of sleep, and threatening to shoot him and burn him alive.¹³⁷ British consular officers were denied consular access to Jagtar for a duration of two weeks following his arrest, and they were unable to visit him in private, decreasing the opportunity to mitigate the risk of torture.

The Special Rapporteur should recognise in her report that consular protection is an important safeguard against the torture or ill-treatment of nationals detained abroad, reiterate the conclusion of other Special Procedures that consular assistance is a human right, and recommend that States incorporate all relevant provisions of the VCCR into their domestic legal systems, to:

- Prevent violations, by identifying and acting on warning signs of potential violations (including, for example, signs of torture) or an imminent risk of such violations;
- Seek to ensure that other procedural safeguards are in place (for example, access to a lawyer), to mitigate the risk of further violations;
- Ensure that its nationals can obtain redress, including reparation, for violations; and
- Send a powerful message that citizens must be treated in accordance with international human rights standards.

¹³⁶ REDRESS, "[Beyond discretion: the protection of British nationals abroad from torture and ill-treatment](#)", January 2018.

¹³⁷ REDRESS, Jagtar Singh Johal, available at: [Jagtar Singh Johal | Redress](#)

IV. OMCT

OMCT contribution focuses on three principles that constitute essential and indispensable pillars to promote and fulfill the respect for the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment in prison systems across the world.

The submission lays out international standards, the reasons underlying the relevance of these principles as well as action-oriented recommendations.

The input shared is based on reflections and lessons from the pandemic, that extend beyond Covid-19 and apply also in ordinary times, captured in various publications, including three Guidance Notes published in 2022. The Guidance Notes draw on research, collaboration and consultations by OMCT, spanning a year and a half, with over 70 civil society organisations (CSOs), National Preventive Mechanisms (NPMs), associations of relatives and lawyers, under the guidance of the OMCT Covid-19 Crisis Action Group.¹³⁸ This is an advisory body composed of 13 experts from diverse backgrounds, including prevention of torture, criminal justice, public health, women's rights, children's rights, among others¹³⁹.

- (1) Access to information;
- (2) Enabling access of civil society organisations to places of deprivation of liberty;
- (3) Communication of persons deprived of liberty with the outside world.

Finally, drawing upon the above-mentioned key principles and the lessons learnt during the Covid-19 pandemic, a set of action-oriented recommendations will be provided to ensure better preparedness for future public health crises (4).

As stated by Susanna Marietti, Director of the Italian NGO Antigone and member of the OMCT Detention Covid-19 Crisis Action Group, during a briefing with the Subcommittee on Prevention of Torture held in November 2022: "good ordinariness is much more effective than any emergency procedure. The most dramatic damages that have been done by Covid-19 to prisons around the world have been due to bad management of the former ordinariness". As highlighted by the SPT, in exceptional circumstances, "the overriding criterion must be that of effectiveness in securing the prevention of ill-treatment of those subject to detaining measures".¹⁴⁰

1. Access to information

Scoping the problem

¹³⁸ The OMCT Covid-19 Crisis Action Group (2021-2022) brought together 13 key experts and practitioners with vast knowledge of the array of normative and practical challenges that affect persons deprived of liberty. The members were: Uju Agomoh (Nigeria), Nayomi Aoyama González (Mexico), Sarah Belal (Pakistan), Adam Bodnar (Poland), Enrique Font (Argentina), Osman Işçi (Turkey), Nika Kvaratskhelia (Georgia), Mohamed Lofty (Egypt), Sabrina Mahtani (Sierra Leone, United Kingdom), Susanna Marietti (Italy), Ranit Mishori (United States of America), Om Prakash Sen Thakuri (Nepal), Ana Racu (Moldova).

¹³⁹ See *Breaking the walls of silence. Access to information for detainees in a world with Covid-19*. Covid-19 and detention series, Impacts, lessons and urgent actions. Guidance note no. 1. April 2022. Accessible at https://www.omct.org/site-resources/legacy/Guidance-Note_1_English.pdf; *Breaking the walls of isolation. Restoring contact with the families in a world with Covid-19*. Covid-19 and detention series, Impacts, lessons and urgent actions. Guidance note no. 2. April 2022. Accessible at https://www.omct.org/site-resources/legacy/Guidance-Note_2_English.pdf; *(Re)opening prisons doors to civil society. A catalyst for improving detention conditions*. Covid-19 and detention series. Impacts, lessons and urgent actions. Guidance note no. 3. December 2022. Accessible at https://www.omct.org/site-resources/legacy/Guidance-Note_3_monitoring_EN.pdf

¹⁴⁰ SPT, *Advice to States parties and National Preventive Mechanisms relating to the Coronavirus Pandemic*, 25 March 2020, para. 14(17).

Prison administrations have traditionally lacked transparency and often fail to provide effective access to information to persons deprived of liberty, including on the rules and regulations affecting basic areas of life in prison such as the visitation system, access to health care and prison labour.

The Covid-19 pandemic laid bare the heightened importance of information in times of crisis and brought to the fore systemic and profound flaws and gaps in this regard.¹⁴¹

The failure by authorities to disseminate information concerning health and other public interest information remains a major challenge and concern. The lack of access to information and collective isolation that detainees face in many countries, which preceded Covid-19 but worsened since, have grave implications for upholding the absolute prohibition of torture and other ill-treatment.

The importance of guaranteeing access to information

Opacity is an important risk factor for tensions and violence in prison. Increased access to information for detainees and family members is a crucial factor to making prisons safer and more secure to persons deprived of liberty, staff and visitors.

Many criminal justice institutions believe that security will be compromised if the public is permitted to know how these institutions perform.¹⁴² On the contrary, shielding information from the public view undermines the efforts towards transparency and may lead to increased tensions and distress over systemic opacity.

The lack of collection and publication at the public level of reliable, transparent and up-to-date data prevents the development of effective responses to mitigate the risk of torture and other ill-treatment, as well as for the prevention and mitigation of the spread of infectious diseases in prisons.

Civil society organisations and monitoring bodies have reported particular difficulties in obtaining information corresponding to local and remote prisons. It is crucial that ministries in charge of the penitentiary systems, with the support of public health authorities, collect, centralise and publicise information from all prisons. To this end, local prisons and other places of detention must cooperate by collecting and sharing their data with the relevant State / central authorities.

International standards

Pursuant to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), prison administration should provide access to information concerning prison regulations, legal proceedings and the prisoners' rights and obligations, including applicable disciplinary sanctions. This information must be provided in a language that the detained person is able to understand.¹⁴³

¹⁴¹ State and prison authorities failed to disseminate information concerning health and other public interest information, including the number of active cases, protocols and restrictions in place, vaccination plans and levels of coverage, as well as disaggregated data that would have enabled an assessment of individual exposure to the virus and other risks in detention. This lack of information had a negative impact on the health of detainees. For instance, the lack of accurate information and education about the Covid-19 vaccines, coupled with high levels of mistrust, led to high rates of vaccine hesitancy and refusal among persons deprived of liberty. Find more details in OMCT, Guidance Note no. 1.

¹⁴² Geraghty S. & Velez M., '[Bringing transparency and accountability to criminal justice institutions in the South](#)', *Stanford Law & Policy Review*, Vol. 22:2, 2011, p. 455.

¹⁴³ See Rules 53, 54, 55.1, 55.2, 55.3.

Similar standards to ensure access to information for children detained are enshrined in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.¹⁴⁴ The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide specific standards for women detained, including access to information on gender-specific health conditions.¹⁴⁵ With regard to public health emergencies, the Aarhus convention stresses the importance of immediate dissemination of health information to members of the public who may be affected.¹⁴⁶ It is noteworthy to highlight that information saves lives and the right to access information during a health emergency equally applies to and protects persons deprived of liberty.

During the Covid-19 pandemic, international and regional bodies issued recommendations on the need to provide persons deprived of liberty with relevant information.

In March 2020, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) urged States and NPMs to ensure that "*all detainees and staff receive reliable, accurate and up-to-date information concerning all measures being taken, their duration and the reasons for them*".¹⁴⁷

In April 2020, the Inter-American Commission on Human Rights stressed that States should: "*proactively report in detail on the impact of the pandemic and on emergency spending, and do so in an open format accessible to all vulnerable groups, in accordance with best practices internationally*".¹⁴⁸

During the Covid-19 pandemic, the pressure and advocacy from civil society organisations (CSOs), relatives of detainees (often organised through networks) and monitoring and oversight bodies prompted increased openness and disclosure of periodic information in many countries.¹⁴⁹

Recommendations

Increased and sustained disclosure of information should be a key guiding principle and goal for prison management, in normal times and in the context of the management of public health crises and other emergencies.

State and prison authorities should implement the following recommendations:

- Increase levels of transparency in the prison management by ensuring communication channels with detainees and their relatives on prison rules, regulations, policies, procedures, particularly those concerning their rights and obligations (use of solitary confinement, prison labour, visits, etc). In times of public health crisis, these channels of communications should enable sharing updates about pandemic-related data, measures and restrictions;

¹⁴⁴ See Rules 24 and 25.

¹⁴⁵ See Rules 2 and 17.

¹⁴⁶ United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998, in force 30 October 2001.

¹⁴⁷ SPT, *Advice to States parties and National Preventive Mechanisms relating to the Coronavirus Pandemic*, 25 March 2020, para. 9 (17).

¹⁴⁸ Inter-American Commission on Human Rights, Resolution No. 1/2020, Pandemic and Human Rights in the Americas, 10 April 2020, para. 28. See also African Commission on Human and Peoples' Rights (ACHPR) 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa', 2020.

¹⁴⁹ OMCT, Guidance no. 1, provides numerous examples of strategies developed by CSOs.

- Ensure that each prison administration from now on has a public and accessible protocol which specifies the steps it will take (regular press conferences, bulletins, agreement with National Preventive Mechanism) to guarantee transparency in the event of a public health emergency;
- The following information should be made easily accessible on the institution’s website and on community notice boards to all persons deprived of liberty, in a manner that respects and reflects their level of literacy and their native language:
 - a) Basic information on the nature of specific health risks, such as contagious diseases and viruses, how they spread, their health impact, preventive measures;
 - b) Regular information and updates should be provided on the health status of detainees affected by those diseases and on the measures taken to guarantee their health and prevent the contamination of others, including measures of isolation and quarantine;
 - c) Timely updates on changes in the protocols of each place of detention and explanation of reasons for any restrictions;
 - d) Relevant forms to be filled out concerning the activation of claims and procedures related to their rights in detention and existing possibilities for temporary and early release schemes.
- Prison administrations should collect and publicise the following information at the public level:
 - a) Laws, executive orders and specific protocols issued by each place of detention to prevent and contain contagious diseases by persons deprived of liberty, those working in places of detention and in the surrounding community;¹⁵⁰
 - b) Protocols on the entry of persons and items, restrictions previewed or in force regarding, among others, communication with the outside world and transfers;
 - c) Data on the number of cases of Covid-19 and other contagious diseases among detainees and staff. Such data should include, among other data points: cumulative number and number of currently active cases, case numbers and rates by gender, ethnicity, age, medical history, number of people in isolation or quarantine in the facilities;
 - d) Total number of vaccine doses (and type) and number of both partially and fully vaccinated eligible detainees and staff in places of deprivation of liberty;
 - e) Statistics and reports about the mental health of persons deprived of liberty and about the specific policies and protocols designed to mitigate the impacts of segregation upon the mental health of detainees and their families.¹⁵¹

¹⁵⁰ E.g., including information regarding the specific measures taken for the prevention of the spread of coronavirus, like screening and testing procedures for new prisoners and disinfection and biosecurity measures in cells and common facilities, etc.

¹⁵¹ See, among others, recommended metrics and features for Covid Data Dashboards in: Deitch M. & Bucknall W, [Hidden Figures: Rating the COVID Data Transparency of Prisons, Jails and Juvenile Agencies](#), Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin, March 2021, p. 7.

All data should be updated daily, be disaggregated by facility and by age, gender, ethnicity, disability, country of origin, type of facility, facility ownership and socioeconomic status.

- Central State authorities need to make sure that all places of detention within the prison system, including local and remote prisons, share and publicise health related information to avoid gaps and asymmetry in information and enable appropriate mitigation responses in all regions of the country. The same applies to data related to cases of torture and other ill-treatment reported.

2. Enabling access of CSOs to prisons

Scoping the problem

No access to information and transparency of places of detention can be ensured without effective external scrutiny mechanisms. Day to day operations and the management of places of detention need to be in the public domain to allow social control, oversight and accountability, an indispensable condition to keep the risk of torture and other ill-treatment at low levels and uphold dignified detention conditions.

Persons deprived of liberty are in a position of extreme vulnerability due to the lack of visibility in the public sphere and the absolute dependence on and control by the institution in charge of their custody. Their “invisible” character was dramatically accentuated during The Covid-19 pandemic with the implementation of closure policies adducing health protection reasons, which have served as a pretext to stiffen bans and restrictions on CSO access to places of detention.

In this setting, allowing regular and independent monitoring is key to reducing the likelihood or risk of torture and other ill-treatment in closed institutions, particularly prisons that are, by definition, out of the public eye.¹⁵² This equation lies at the foundation of the system set up through the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment_(OPCAT).¹⁵³

The COVID-19 example and lasting effects on prison management

NMPs, CSOs, lawyers, families and the media struggled to [access information](#) on conditions of detention and resume visits to places of detention¹⁵⁴ since Covid-19 was declared a global pandemic on 11 March 2020.

While, in some countries, restrictions lasted for a short period and independent monitoring bodies, including NPMs and civil society organisations, were able to regain access relatively quickly, the disruption of regular monitoring work **is still affecting a number of countries**.¹⁵⁵

¹⁵² APT, [Monitoring places of detention: A practical guide](#), 2004, pp. 26-27.

¹⁵³ United Nations General Assembly, [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), adopted by resolution A/RES/57/199, on 18 December 2002, entry into force on 22 June 2006.

¹⁵⁴ In the present Guidance Note, the term “place of detention” is used interchangeably with the term “place of deprivation of liberty” and it covers all places of detention pursuant to the definition contained in Article 4 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). “Person deprived of liberty” is used interchangeably with the term “detainee”.

¹⁵⁵ In **Benin**, a blanket ban on visits is still in place (although authorities have said that it will soon be lifted) including in places where children are deprived of liberty, according to the organisation ESAM, that was able to monitor places of detention for at least 10 years without interruption. In **Cameroon**, CSOs that used to be permitted the entry before Covid-19, including Center for human rights and democracy in Africa, had not been able to obtain an authorisation from the Penitentiary Administration since March 2020 until recently.

Many NPMs played a crucial role during the Covid-19 pandemic, from its very early stages, in upholding the health, safety and personal integrity of persons held in places of detention and the staff, through an active and creative preventive monitoring approach. Also noteworthy is the [Protocol for national preventive mechanisms undertaking on-site visits during the coronavirus disease \(COVID-19\) pandemic](#) published by the SPT to encourage and facilitate national preventive mechanisms to continue or restart on-site, safe and effective visits during the pandemic, as well as the [two Advices](#) related to Covid-19.

Yet, the Covid-19 pandemic laid bare pre-existing challenges and gaps, with many NPMs, NHRIs and other State monitoring mechanisms stopping their main functions or facing a very limited operational capacity, due to a wide range of reasons, including: structural under-resourcing curtailing the staff and resource capacity, concerns regarding their independence and autonomy or the existence of cumbersome administrative procedures or lack of cooperation from the authorities limiting their ability to respond quickly to the health emergency.

In this context, **civil society organisations across the globe stepped in to fill the information gap and provide an urgent response to immediate needs arising from the Covid-19 virus and the restrictions ordered to control the spread of the virus in places of detention.**¹⁵⁶ In parallel, where NPMs or NHRIs were under-resourced or discontinued their functions, CSOs embraced an all-important watchdog role and called on them and on State authorities to bring their Covid-19 response into line with international human rights standards.

There is a broad range of CSOs that develop and implement specific projects for the provision of services and humanitarian assistance inside places of detention, such as educational, health, religious and professional programmes. Such organisations may not necessarily have a human rights or monitoring mandate but are also essential to ensure the dignity and well-being of detainees.

Arguments in favour of CSO access

Transparency, safety and legitimacy of prison management

As stated by the Special Rapporteur on torture, in order to establish and maintain independent monitoring, oversight and accountability mechanisms for the prevention of torture and corruption, *"States should provide a transparent and safe environment enabling and protecting the monitoring, reporting and advocacy activities of civil society organizations, human rights defenders and whistle-blowers and ensure their unhindered access to individual witnesses, victims or their relatives"*.¹⁵⁷

Transparency increases the legitimacy of the management of places of detention and the public confidence in these institutions¹⁵⁸ and it is a crucial requirement for the achievement of target 16 of the Sustainable Development Goals, with target 16.6 enshrining the importance of developing effective, accountable and transparent institutions at all levels.

¹⁵⁶ OMCT, [Challenging detention and torture in times of Covid-19: Promising practices from human rights litigators and advocates from around the world](#), February 2022.

¹⁵⁷ United Nations General Assembly, Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 16 January 2019, A/HRC/40/59, p. 19. See also United Nations Convention against Corruption, Chapter 2, Article 13.

¹⁵⁸ The Association for the Prevention of Torture (APT), *Monitoring places of detention, a Practical Guide*, 2004, p. 27.

It is also worth highlighting that the findings of independent monitors are also critical for journalists and media outlets covering places of detention, who often see their access to sites of detention restricted. The sharing of first-hand information allows them to raise greater public awareness of the impacts of detention.

Expertise

Detention authorities engaging with civil society organisations can benefit from valuable evidence-based knowledge which draws on accumulated experience as practitioners in the human rights, detention and criminal justice fields. Detention institutions often recognise and value the benefits of high levels of cooperation with civil society actors, which can lead to the improvement of conditions of detention and the elimination of risks for the personal integrity of detainees and staff.

Likewise, NPMs and NHRIs often benefit from the involvement of civil society experts in detention-related activities, including collaboration and trainings in interview techniques, visiting procedures, the detection of signs and risks of torture and other ill-treatment, report writing or outreach activities.¹⁵⁹

Ability to react and respond quickly to crises and needs

CSOs show a great level of responsiveness and adaptability to address a wide array of needs and act fast in the context emergencies, including public health crises, in the prison system, through multi-layered responses.

a) Immediate needs: many organisations fill urgent gaps by addressing protection, health, material and psychosocial needs faced by persons deprived of liberty, through a combination of in-person and virtual strategies, and by joining efforts with other essential interveners, including family members, lawyers, medical personnel, social workers and NPMs / NHRIs. Relief and emergency efforts include the collection of medical supplies and equipment, protective gear, training of detention staff on infection prevention and control, and distribution of food supplies.

b) Emotional support: CSOs have been identified as a great source of moral and emotional support for detainees, and also for the families of those held behind bars. The possibility to receive visits from persons caring about one's well-being and conditions of detention, who often advocate on their behalf, taking into account the limited options of detainees to be connected to the outside world, is crucial.

c) Detection of signs and risks of torture and other ill-treatment: CSOs play a vital role in the detection and collection of signs and allegations of torture and other ill-treatment, which often entails close collaboration with NPMs and other oversight bodies. This is particularly the case when organisations have been able to build a bond of trust with detainees and are linked to community-based support networks, relatives' associations and the like.¹⁶⁰ CSOs are key to channelling and processing complaints, and liaising with experts with whom an inter-disciplinary follow-up can be ensured (lawyers, psychologists, doctors and social workers).

¹⁵⁹ The collaboration between CSOs and NPMs can take different forms. CSOs can be part of the NPM or integrate NPM consultative or advisory bodies. When CSOs do not have a formal role within the NPM structure, collaboration can be formalised through a memorandum of understanding that may include the articulation of CSOs visiting places of detention jointly with or in collaboration with NPMs, or more informal agreements or dynamics.

¹⁶⁰ As an illustrative example, *Antigone* reports having been the first entity to be able to file a criminal complaint and become a civil party in the trial for the alleged mass beating in the [prison of Santa Maria Capua Vetere](#) (Campania), which led to the indictment of 105 people including police officers and civil staff in the largest trial for torture in Europe, thanks to trust gained by the association, which led many prisoners and family members to report the violence they have suffered to them.

d) **Legal and advocacy strategies:** CSOs push for the adoption of short- and long-term measures to address systemic challenges in criminal justice systems. They develop strategies to hold their governments accountable for an abusive use of emergency powers. An overview of legal and advocacy strategies developed by CSOs to hold governments to account for ineffective or undemocratic crisis responses can be found in the OMCT report [Challenging detention and torture in times of Covid-19: Promising practices from human rights litigators and advocates from around the world](#) (February 2022).

The view of anti-torture UN treaty bodies

On multiple occasions, the UN Committee against Torture (CAT) has raised the importance of the monitoring work of CSOs in places of detention during the review of States' compliance with the obligations enshrined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

In light of reported obstacles in gaining access to prisons to undertake monitoring activities, including denial of access, refusal of accreditation or other administrative restrictions and obstacles, the CAT has recommended that States take all appropriate steps to enable CSOs to carry out periodic, independent, unannounced and unrestricted visits to places of detention¹⁶¹ including by granting access to all detention facilities in the country,¹⁶² guaranteeing that CSOs can speak with detainees in private,¹⁶³ and ensuring that monitors can report publicly on their findings.¹⁶⁴

In the same vein, the SPT stressed that the role of NPMs, national human rights and ombudsman institutions with a preventive mandate is *"supported and complemented by civil society, which also plays an important role in ensuring transparency and accountability by monitoring places of detention, examining the treatment of detainees and by providing services to meet their needs"*.¹⁶⁵ As an illustration, the SPT encouraged the NPM in Tunisia to collaborate with CSOs by *"ensuring that visits to places of detention cover the entire national territory, but also by organizing awareness campaigns and training activities for the prevention of torture"*.¹⁶⁶

Best practices

Among the numerous examples identified by the SOS-Torture Network, the following two examples attest to the importance of fostering collaboration with CSOs, including by facilitating their access to places of detention and the direct and confidential contact with detainees.

In Italy, [Antigone](#) has been authorised by the Ministry of Justice to visit all adult detention facilities since 1998 and all juvenile facilities since 2008. *Antigone* conducts around 100 visits a year and publishes periodic reports that are a great tool to enhance transparency and formulate action-oriented recommendations. According to the Director of *Antigone*, Ms. Susanna Marietti, **"States should grant access to prisons to civil society organisations with a monitoring mandate or expertise. CSOs are complementary and do not overlap with the work of the NPMs but rather support it"**. During the pandemic, *Antigone* helped hundreds of prisoners to submit applications for home detention or for other needs and provided advice to the prison administration on the management of Covid-19 outbreaks. Given its knowledge of prisons, over the years

¹⁶¹ Concluding observations of [Cameroon](#) (2010), [Bolivia](#) (2013), [Thailand](#) (2014), [Panama](#) (2017), [Tajikistan](#) (2018), [Maldives](#) (2018), [Benin](#) (2019), [Uzbekistan](#) (2020), [United Arab Emirates](#) (2022).

¹⁶² [Concluding observations of Belarus](#) (2011).

¹⁶³ [Concluding observations of Canada](#) (2018).

¹⁶⁴ [Concluding observations of Uzbekistan](#) (2020).

¹⁶⁵ SPT, The approach of the Subcommittee on Prevention of Torture to the concept of prevention, CAT/OP/12/6, 30 December 2010, 5(h).

¹⁶⁶ SPT, Recommendations and observations addressed to the national preventive mechanism of Tunisia, CAT/OP/TUN/2, 11 August 2017.

Antigone has repeatedly been able to suggest improvements to the Italian penitentiary system, as recently in the case of reform proposals discussed by the Ministerial Commission on Prison Reform.

In **Pakistan**, [Justice Pakistan Project](#) (JPP) has provided expert advice to detention authorities and other actors of the criminal justice system to speed up the reduction of overcrowding and improve conditions of detention during the pandemic and in the long term. JPP developed a “system for allocating levels of care”, or vulnerability grading index, to enable individual prisons to reduce prison overcrowding, by identifying the most vulnerable prisoners according to the index and by encouraging the release of those identified to bring prisons down to a rate of occupancy that would enable effective social distancing. JPP also issued [policy recommendations](#) on these issues and an action plan for prison authorities on preventing and managing outbreaks of Covid-19 in prisons. All these efforts led to immediate releases and long-term decarceration initiatives.

In **Colombia**, in the context of the entrenchment of restrictions on access to places of detention, the Constitutional Court issued a ruling in June 2022¹⁶⁷ to address the failure to execute judgment T-388 (2013), which had declared an “unconstitutional state of affairs” in the prison system.¹⁶⁸ **The 2022 ruling orders the ministry of justice and the national penitentiary system (INPEC) to guarantee the access of civil society organisations, engaged in the monitoring of the implementation of the 2013 judgment, to prisons.**

In particular, the Court indicates that human rights organisations need to be ensured “**the permanent and timely possibility to enter the ERONs [prisons of the national penitentiary system] and access information on the prison and penitentiary system**” to be able to feed the Court with a vital source of information. The Court considers CSOs, along with State oversight bodies (notably the Ombudsman’s Office and the *Procuraduría General de la Nación* - Office of the Inspector General -),¹⁶⁹ essential in the periodic reporting process on the status of implementation of judgment T-388. The Court alludes to the secluded nature of penitentiary institutions, exacerbated during the Covid-19 pandemic, to justify the need to grant unrestricted access to prisons to human rights organisations.

In **Nepal**, in the context of the blanket restrictions on access to children deprived of liberty, the CSO “Advocacy Forum-Nepal” collaborated with detention authorities to organise remote monitoring visits in child correction homes and coordinated the organisation of a health camp with medical consultations in detention centres for detained children, which improved their health conditions.

Recommendations

CSOs working for the rights of persons held behind bars face, all too often and in too many places, obstacles and exclusion preventing their access to places of detention. Prison doors are closed to CSOs, impeding inspection, direct contact with detainees and engagement with staff and detention authorities.

Prison authorities should implement the following recommendations to enable effective access of CSOs to all places of deprivation of liberty within the penitentiary system:

- Take the necessary steps to enable CSOs to carry out periodic, independent and unrestricted visits;

¹⁶⁷ Corte Constitucional de Colombia, [Auto 896/22](#), 30 June 2022.

¹⁶⁸ T-388 arises out of multiple individual *tutela* suits claiming violations of the rights of persons deprived of liberty. *Tutela* suits are the equivalent to the *amparo* in other Latin American countries, which are judicial suits aimed at protecting fundamental rights. The Constitutional Court can issue collective *tutela* judgments protecting a specific group of people or when there are persistent and widespread human rights affecting multiple persons which require coordinated action by multiple State bodies.

¹⁶⁹ Colombia has not ratified the OPCAT.

- Ensure the adoption of normative and institutional guarantees and regulations to grant CSOs access, preventing arbitrary or unlawful restrictions, authorising them to undertake visits in the conditions described in the first recommendation, as well as to conduct interviews with detainees in private; to guarantee their access to information; and to carry out actions and provide services in favour of the rights of detainees;
- Guarantee that rules and regulations adopted on CSO access to places of deprivation of liberty are transparent and include objective and reasonable criteria as well as safeguards to prevent that decisions are left to the subjective assessment of detention managers;
- Provide training programmes for staff working in detention facilities on the value of transparency in places of detention and the importance of allowing and promoting external scrutiny;
- Promote collaboration, coordination and complementarity of CSOs with NPMs and other State monitoring bodies;
- Promote transparency and meaningful involvement of CSOs, NHRIs and NPMs over policies, legal and administrative framework, budget building relating to detention, through participatory processes, open data and information sharing;
- Ensure that places of detention are open as much as possible to the media, to enable the wide dissemination of information and the sensitisation of public opinion;
- Ensure that in times of crisis or emergency, including health emergencies, independent national and international monitors are afforded the institutional guarantees necessary for their efficient functioning and access to places of detention, including through their recognition as “essential workers”, given the heightened risk of torture and other ill-treatment. Such guarantees should be incorporated in emergency preparedness and response protocols adopted by detention authorities, which must be public.

3. Communication with the outside world

Scoping the problem

In response to the Covid-19 pandemic, contact with the outside world was drastically suppressed or reduced by prison authorities. It was a global trend, shutting down prisons to prevent the entry and spreading of the virus.

Yet, even before the pandemic, limited access to the world was already a serious and widespread problem across prison systems. At the present moment, the prolongation of measures restricting rights, in particular the contact with the outside world, which were adopted or hardened in the context of the Covid-19 pandemic, is still a cause for serious concern.

The most common limitations or restrictions affect the number and length of visits, particularly of family members and loved ones, as well as the exclusion of certain groups. Those measures include: a reduced number of visitors allowed per detainee (e.g. only one person at a time); short time allowed per visit; the exclusion of children, older people, persons with diabetes and pregnant women; visits being conditional upon the approval of authorisation; additional requirements (including PCR test, Covid-19 vaccination certificate) and increased delays due to Covid-19 protocols.

Why is it crucial to ensure meaningful contact with the outside world

Family contact is often the only window to the outside world and it is, thus, crucial in the detection and reporting of allegations of torture and other ill-treatment.

Communication with the outside world and, in particular, with family members and support structures, constitutes also the most essential pillar for the mental and emotional well-being (and often material assistance) of persons deprived of liberty, as identified in various scientific studies.

Health consequences

These studies have analysed and shed light on the impact that limited or suspended contact with significant others has on the mental health of persons deprived of liberty and their families. Several papers have focused on the effects of a sustained lack of contact, in particular physical contact, on children with their parents in detention. Others have described the devastating impact of the loss of family contact, especially with their children, on women deprived of liberty.

Increased levels of stress, anxiety and depression have been documented in persons deprived of liberty that are deprived of any meaningful contact with the outside world.¹⁷⁰ For relatives outside, worrying behavioural and emotional difficulties have been documented in children. These include increased anxiety and distress, loss of appetite and eating disorders, nightmares and sleeping problems, and increased aggressiveness, caused, among other factors, by the children's separation anxiety and fear of losing contact with their imprisoned parent. Experts agree that in-person visits are vital to maintain the affection, emotional ties and balance between family members, especially with children vis à vis their parents and vice versa. "Contact visits, when the parent and child can see each other in person and can hug and hold hands, are the most meaningful form of social interaction supporting family relationships".¹⁷¹

Risk factor for violence

Increased tensions and prison riots have been associated with the reduction of visits and family contact. This is due to the negative impact on the mental health and emotional well-being of persons deprived of liberty.¹⁷² Restoring and maintaining meaningful contact with families outside would address a key risk factor for violence amongst detainees and against or involving staff of places of deprivation of liberty.

As stated by health experts in a recent [academic paper](#), both social isolation and poor mental health are risk factors for violence and self-inflicted harm.¹⁷³ Thus, an environment that facilitates visits and frequent contact with families also leads to improved conditions to ensure the well-being, physical and mental integrity of staff working in detention facilities.

¹⁷⁰ Among the studies that have documented the deterioration of mental health due to reduced visitation, see: Minson, S., ['The impact of COVID-19 prison lockdowns on children with a parent in prison'](#), University of Oxford, 2021, p. 12.

¹⁷¹ Monash University, ['Maintaining family contact during COVID-19: Describing the experiences and needs of children with a family member in prison'](#), October 2020, p. 3.

¹⁷² Johnson L et al ['Scoping review of mental health in prisons through the COVID-19 pandemic'](#), *BMJ Open*, Vol. 11, Issue 5, 2021, p. 5.

¹⁷³ Zweig S et al ['Ensuring rights while protecting health: The importance of using a human rights approach in implementing public health responses to COVID-19'](#), *Health and Human Rights Journal*, Volume 23/2, December 2021, pp. 173-186.

In a public hearing before the Inter-American Commission on Human Rights in October 2021, a group of 15 prominent human rights organisations (composing the OMCT-led Litigators' Group against Torture in Latin America), from 10 different countries in Latin America, expressed concern about the fact that:

*"The wide and drastic scope of the measures that continue to limit communication with the outside world of persons deprived of liberty in the context of the pandemic has generated a situation of isolation and disconnection, which in many cases has remained for 19 months, with dramatic consequences for mental health and family and social well-being, **with a very worrying increase in suicides and violence in the prison context**".*¹⁷⁴

Recidivism rates and post-release adjustment

The reduction and lack of contact between persons deprived of liberty and their families has also long-lasting and wide-ranging effects on societies as a whole. Visits are key to maintaining family and social ties and have been linked to reduced recidivism rates¹⁷⁵, better post-release adjustment and easier community integration¹⁷⁶.

As specified in the visiting guidelines of the Department of Corrections from Washington State (United States), in relation to the Extended Family Visit Program (EFV),¹⁷⁷ visits are intended "to support building sustainable relationships important to inmate re-entry, as well as provide incentive for those serving long-term sentences **to engage in positive behavioral choices, therefore reducing violent infractions**".¹⁷⁸

International standards

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment enshrine the right of a detained or imprisoned person "to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations".¹⁷⁹ The United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules") state that prisoners shall be allowed to communicate with their family and friends at regular intervals, by receiving visits and by corresponding in writing and using telecommunication, electronic, digital and other means.¹⁸⁰

¹⁷⁴ Inter-American Commission of Human Rights, [Public Hearing](#) 'The situation of persons deprived of liberty in the Americas', requested by the Litigators' Group against Torture in Latin America, 28 October 2021.

¹⁷⁵ Johnson L et al '[Scoping review of mental health in prisons through the COVID-19 pandemic](#)', *BMJ Open*, 2021, Issue 5, 2021, p. 5.

¹⁷⁶ Monash University, [Maintaining family contact during COVID-19: Describing the experiences and needs of children with a family member in prison](#), October 2020, p. 4.

¹⁷⁷ For visits in prison facilities between inmates and his/her immediate family member(s) in a private housing unit (which may last up to 48 hours).

¹⁷⁸ <https://www.doc.wa.gov/corrections/incarceration/visiting/prison-visits.htm>

¹⁷⁹ United Nations General Assembly, [United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), Resolution 43/173, adopted on 9 December 1988, Principle 19.

¹⁸⁰ United Nations General Assembly, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\)](#), Resolution 70/175, adopted on 17 December 2015, Rule 58.

Visits to persons deprived of liberty are seen as “an important prerequisite to ensuring their mental well-being and social integration”.¹⁸¹ They are also crucial for the well-being of the families of persons deprived of liberty and to ensure the right to family life.¹⁸²

It is also key to recall that this right is framed as a cornerstone to ensure the dignity of persons deprived of liberty. Rule 43 (“Mandela Rules”) lays out prohibited sanctions and restrictions pursuant to the **absolute prohibition of torture and other ill-treatment** under international law:

“Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order” (43(3)).

International standards related to the treatment of women and children deprived of liberty address the right to visits in greater detail. Visits between detained parents and their children should take place in a visiting environment that permits open contact (without glass partition, offering an opportunity for affection and intimacy) and encourages extended visits, where possible.

To meet these requirements, total bans on visits should always be the last resort and exclusively applied when less harmful alternatives do not exist. When applied, these measures should be limited in time and subject to periodic judicial review. Further, the norms and regulations containing these restrictions should be accessible and communicated swiftly to families and other visitors in all official and widely spoken languages, so that they are aware of the rules and can act and plan accordingly. Temporary suspension of on-site prison visits needs to be coupled with local risk assessments and consider the specific and disproportionate impact on different types of prisoners.¹⁸³

In times of public health crisis, such as the Covid-19 pandemic, family visits should be facilitated in safe conditions. To this aim, visiting guidelines and protocols following pandemic plans should be publicly available and communicated to the families and external contact persons. Basic measures to be included in safety protocols to mitigate the risk of infectious diseases transmission during in-person visits to places of detention may vary depending on the public health risk level and the type of visit. These can include mandatory face mask wearing for all visitors over a certain age, unless exempt; hand washing and use of hand sanitizer in relevant areas; local social-distancing requirements; symptom screening questionnaire; temperature checks; and a proof of a negative test ideally offered on site and free of charge. In addition, contact visits in visiting rooms which permit informal communication and (limited) physical contact should be prioritised, encouraged and facilitated. Visiting facilities should be comfortable, pleasant and child-friendly. Cubicles¹⁸⁴, where physical contact is impossible, should be avoided as much as possible, unless required for security or public health safety.

¹⁸¹ United Nations Office on Drugs and Crime, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders with their Commentary](#) (‘The Bangkok Rules’) (2011), Rule 43.

¹⁸² See, among others, Inter-Agency Standing Committee (OHCHR and WHO), [Covid-19: Focus on persons deprived of liberty](#), March 2020.

¹⁸³ World Health Organization, Regional Office for Europe, ‘Preparedness, prevention and control of Covid-19 in prisons and other places of detention’, 15 March 2020, pp. 21-22.

¹⁸⁴ Visitors sit on one side and detainees on the other, separated by a transparent barrier.

An increasing number of countries has promoted and established alternative means of communication with relatives and lawyers of persons deprived of liberty. This has been achieved by increasing the frequency of telephone calls, making available secured mobile telephones, purchasing and setting up video-conference systems via tablets and/or laptops and, sometimes, including the accommodation of specific facilities to conduct the video calls.

Yet, limitations persist, with significant differences among countries due to, among other factors, the global disparities caused by the digital divide.¹⁸⁵ There have been many reported difficulties and frustrations with remote contact options, including the poor and uneven quality of video-conference systems, cell phones and/or internet connections, which results in poor quality of sound and image with echoes, background noises and disruptions to calls. There are also issues with the high costs that are incurred by inmates through video-calls and calls, the limited access and durations of video-calls and calls, the protracted bureaucratic procedures that must be completed in order to book them and, also, sudden changes and delays. Additionally, such technologies may not be an option for many, even if the hardware exists and the internet connections are adequate, due to low tech literacy. Thus, while many countries have experimented with video setups, particularly to allow judicial hearings, the situation remains precarious in a good number of them and implies a *de facto* deprivation of communication for many persons deprived of liberty.

Another major concern is the lack of confidentiality of remote communications. This shuts the door on any opportunity for intimate conversations and interferes with the privacy that enables informal communication, as they are subject to surveillance and monitoring.

Video calls present a range of possibilities, but they have been reported to be deficient in meeting the developmental needs of children, when their functioning is not fit for purpose. Apart from the poor quality and availability, visits often end abruptly or cut off, leaving family members disrupted and frustrated. A more child-focused approach would improve remote visits, including frequent access to phones (for video calls) during, before and after school time, phone calls at night to say goodnight and more frequent and lengthier periods of video calls. When it comes to children deprived of liberty, at least 30 minutes of phone communication per day should be facilitated, video being preferable, with communication guidelines being tailored to the age of children.

Recommendations

In the aftermath of the Covid-19 pandemic, it is crucial to avoid the crystallisation of closure policies and to ensure that State and prison authorities allow family visits and regular contact to preserve the dignity and mental and physical health of persons deprived of liberty, prevent torture and ill-treatment, reduce violence and ensure reintegration into society.

State and prison authorities should implement the following recommendations to ensure effective communication of persons deprived of liberty with the outside world:

- Lift Covid-19 related closure policies affecting family contact in detention facilities as appropriate, in line with the removal of restrictions for the general population;
- Ensure in-person visits in all places of deprivation of liberty is the main form of contact of persons deprived of liberty with their families and other external contact persons;

¹⁸⁵ From the [Organisation for Economic Cooperation and Development \(OECD\)](#): the digital divide is the “gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard to both their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities.”

- Ensure that restrictions on family contact in all places of deprivation of liberty ought to be justified, short-term and exceptional, and subject to periodic judicial oversight;
- Ensure detained children are under no circumstance prevented from frequent and meaningful contact with their families and that visits are tailored to the needs of children based on their developmental stage, including the specific needs of children with disabilities;
- Promote video calls and remote communication systems as a complementary means for detainees to secure meaningful and regular contact with the outside world, including by providing support to individuals with low technology literacy;
- Provide remote communication equipment and facilities to all persons deprived of liberty without discrimination, on a frequent basis, free of charge and in an environment ensuring some level of privacy;
- Ensure remote communication equipment and facilities are child-friendly and allow for effective videoconferencing with children that meets their developmental needs;
- In times of public health emergency, adopt and implement protocols and measures that provide the conditions which enable in-person family visits in a safe environment (adequate facilities to ensure privacy, free of charge testing, symptom screening questionnaire, personal protective equipment);
- Provide access to mental health services to persons deprived of liberty who have been subject to isolation from their families and social networks and allocate them compensatory measures.

4. Ensuring better preparedness and response to future emergencies

Human rights standards took a backseat as governments fought and continue fighting the propagation of the Covid-19 virus in places of detention, with devastating consequences on the lives of persons deprived of liberty and their families. In a [briefing](#) published a year ago as an early reaction to the first monkeypox cases confirmed behind bars, key principles, best practices and recommendations were laid out, drawing on the [lessons](#) from the Covid-19 pandemic.

Authorities and prison administrations should adopt protocols and measures to provide adequate responses, guided by a human rights-based approach, to public health emergencies. Prison authorities should not wait to engage in preparedness to public health and other type of emergencies that may arise.

As stated by Ranit Mishori¹⁸⁶, member of the Covid-19 Crisis Action Group, during the briefing held with the SPT in November 2022:

“Now is the time to prepare for what will certainly come next. There is a human-rights based, practical – and ethical – imperative to engage in preparedness *now*”.

¹⁸⁶ Dr. Ranit Mishori is a professor of family medicine at Georgetown University in Washington, DC, a Senior Medical Advisor to Physicians for Human Rights, and a correctional health expert advising OMCT.

Mass incarceration accelerates the spread of contagious viruses. According to various [studies](#), persons in closed institutions were at least 5,5 times more likely to become infected by the Covid-19 virus and three times more likely to die. Criminal justice systems should step up their efforts to decongest prisons and other places of detention by favouring alternatives to incarceration and by abandoning punitive responses to drug use and other non-violent, often petty, offences, which disproportionately hit impoverished, racialised and marginalised populations.

The assessment of the impact of protracted closure policies in places of deprivation of liberty has led to the identification of the following lessons:

- The use and prolongation of Covid-19 related measures is arbitrarily restricting the rights of persons deprived of liberty and the access to detention facilities by relatives, lawyers and independent monitors;

Lockdowns and bans on visits should be a measure of last resort, be established by law, for a limited period of time and subjected to regular judicial review, as they touch on fundamental rights (communication with the outside world, right to family life and privacy, absolute prohibition of torture and other ill-treatment).

- Isolation has taken an enormous toll on the emotional well-being of detainees, particularly children, and their families outside detention walls, and the restricted access to information led to increased risks of tensions and violence in places of deprivation of liberty;
- As stated by the United Nations Subcommittee on Prevention of Torture, areas of isolation inside places of deprivation of liberty should not correspond to places of solitary confinement. The social isolation should be mitigated by using means to ensure family and social contact;
- Use of technology and remote communication can help immensely in reducing prison isolation, without harming safety and security in detention facilities.

In light of the above, the following actions should be implemented by prison authorities in order to increase levels of preparedness and response in emergencies:

- Urge the adoption of human rights-compliant emergency preparedness and response plans and protocols by prison authorities, which should be the result of a participatory and inclusive design process. Such protocols should establish guarantees for the effective functioning of independent monitoring bodies in times of emergency;
- Ensure that places of detention provide timely, accurate, culturally and linguistically appropriate information to persons deprived of liberty about any emergency affecting the facility, including (when related to a health emergency) about prevention, treatment and any public health measures being undertaken;
- Take measures to decongest prison and other places of detention as a primary method to reduce the risk of exposure to contagious diseases, by favouring alternatives to incarceration, and releasing those who pose less risks to society, in a manner that avoids release into unstable situations (housing, food, healthcare);
- Promote the use of new technologies in all places of detention:
 - to ensure remote communication between prisoners and families as a complementary means of contact;
 - to augment and support medical, cultural, religious, educational, and work needs of those deprived of liberty;

- to enable external oversight and monitoring;
- Promote increased complementarity and collaboration frameworks between CSOs, NPMs, and other relevant stakeholders;
- Advocate for the revision and update of international rules and standards on the treatment of persons deprived of liberty – such as the Mandela Rules – in a manner that is informed by lessons learnt during the Covid-19 pandemic, including on issues related to access to information and external scrutiny, health standards and medical services, the notion of equivalency and the principle of non-discrimination, and the use of solitary confinement, among other issues.

V. OMEGA RESEARCH FOUNDATION

Omega Research Foundation contribution focuses on the use of lethal weapons in juvenile settings, the regulation of the use of force in places of detention; and the retention of and access to CCTV and other audiovisual materials.

Less lethal weapons in juvenile justice settings

We are concerned that less lethal weapons are carried and used in some juvenile justice settings, some of which are inappropriate for use in enclosed spaces. The presence of less lethal weapons in such settings runs the risk of creating a prison-like environment, as well as posing a risk of ill-treatment or even torture. The Havana Rules provide that instruments of restraint and force can only be used in exceptional circumstances, and, more specifically, that “the carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained”.¹⁸⁷

In 2023 it was reported that the UK Ministry of Justice was proposing introducing the routine carry of PAVA riot control agent irritant sprays into the children’s custodial estate, with a decision due in late 2023.¹⁸⁸ PAVA is a synthetic pepper irritant spray. It was also reported that stun grenades or “flashbangs” had been used in some of the five Young Offender Institutions (YOI) in England and Wales, which had struck children, and in addition that ‘General Purpose Dogs’ had been deployed in one YOI.¹⁸⁹ In England and Wales these dogs are German Shepherds or Belgian Malinois deployed by a senior prison management decision as ‘deterrence’ during incidents.¹⁹⁰

We are concerned that as well as being inappropriate in juvenile settings, there is no UK public process of consultation on the proposal to introduce weapons and equipment into the UK custodial system. Nor is there a published process for the selection, testing, medical safety review, risk or impact assessments relating to weapons and equipment, nor any independent oversight for any such decisions made by UK’s HM Prison and Probation Service.

In Brazil, Omega has assisted the National Mechanism for the Prevention and Combat of Torture – *Mecanismo Nacional de Prevenção e Combate à Tortura* (MNPCT) in documenting the presence of large quantities of less lethal weapons in many juvenile justice detention centres, as well as frequent acts of violence against children by detention centre staff and special intervention forces.

For example, following an inspection in the State of Santa Catarina in April 2023, the MNPCT denounced the punitive approach in the Joinville *Centro de Atendimento Socioeducativo*, reporting the “constant use of handcuffs in any external movement of the adolescents, the frequent use of pepper spray, electric shock

¹⁸⁷ Havana Rules, Rule 63-65.

¹⁸⁸ *Pepper spray could be used at young offender institutions in England and Wales*, 26/09/2023, <https://www.theguardian.com/uk-news/2023/sep/26/pepper-spray-young-offender-institutions-england-wales>

¹⁸⁹ *Monthly Newsletter July 2023*, Alliance for Youth Justice AYJ, <https://www.ayj.org.uk/news-content/ayj-monthly-newsletter-october-2022-egrc-2a6gj-6nmmd>, and <https://committees.parliament.uk/writtenevidence/125786/html/>

¹⁹⁰ HMPPS DOGS SUPPLEMENTARY GUIDANCE (undated), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004142/prison-dogs-supplementary-guidance.pdf

devices and other weapons”.¹⁹¹ During the same visit, the MNPCT documented numerous allegations of the use of instruments of restraint to place children in stress positions, by placing them face-down, cuffing their ankles, handcuffing them behind the back and using a third instrument to connect both devices. Children alleged being subjected to kicks and slaps while restrained in this manner, as well as being intimidated with dogs.¹⁹²

Regulation of the use of force in places of detention

The UN Basic Principles on the use of force and firearms (hereinafter, “UN BPUFF”) establishes this obligation in its first principle: “Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.” The UN Human Rights Committee (hereinafter, “UN HRC”) has emphasised that the prohibition of torture and other ill-treatment must form an integral part of the operational rules and ethical standards to be followed by law enforcement personnel and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment.¹⁹³

States are obliged to regularly review such rules and standards. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each State Party to “**keep under systematic review** interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”¹⁹⁴ (Emphasis added.)

International human rights law and standards establish some minimum criteria which should be addressed in legal instruments which regulate the use of force. Complying with these requirements should be considered the bare minimum obligation of states to ensure that their norms on the use of force help prevent rather than facilitate human rights violations. Regulatory frameworks on the use of force in places of detention should set out:

- The types of instruments and techniques which may be used, subject to them having undergone a legal review;
- The circumstances and environment in which each type of instrument may be used;
- The limitations on the use of weapons in order to minimize injury;
- Risks associated with the use of authorised instruments and techniques and ways to mitigate these;
- Weapons which are prohibited due to the unjustifiable level of risk they pose, including the use of crowd control weapons in enclosed spaces;
- The minimum required content and duration of initial and refresher training courses for accreditation;
- Rules governing the actions of special intervention forces;
- Mechanisms to oversee the carrying and use of weapons and ammunition;
- Obligatory reporting requirements for every incident involving the use of force including less lethal weapons, also including data collection, storage and publication requirements;

¹⁹¹ Brazilian National Mechanism for the Prevention and Combat of Torture , Relatório de inspeções regulares no estado de Santa Catarina, 2023, <https://mnpctbrasil.files.wordpress.com/2023/10/relatorio-santa-catarina-.pdf>, para. 105.

¹⁹² Ibid, para. 101.

¹⁹³ General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session, 1992, para. 10.

¹⁹⁴ Article 11.

- Clear administrative disciplinary sanctions for non-compliance with use of force norms;
- Requirements for providing access to regulations to persons deprived of their liberty and the wider public.

In 2021, Omega and Justiça Global published a Technical Note analysing rules on the use of force in the juvenile and prison system in Brazil's states.¹⁹⁵ We found that use of force rules were not in conformity with international standards. Deficiencies included:

- The absence of use of force protocols in many states;
- The authorization of equipment and munitions unsuitable for use in enclosed spaces (e.g. stun grenades);
- Generic rules, lacking in specificity;
- The absence of robust systems of oversight and accountability.

There have been noteworthy efforts to address the aforementioned deficiencies. In 2020, the National Human Rights Council – *Conselho Nacional de Direitos Humanos* (CNDH), building on the work of the MNPCT, issued a recommendation, instructing federal and state authorities regulate the use of less lethal weapons in the penitentiary system.¹⁹⁶

The UN Standard Minimum Rules for Treatment of Prisoners is one of the core international instruments for protection of prisoners' rights. However, when the Rules were updated, and adopted in 2015 as the Nelson Mandela Rules, the provisions on use of force (previously Rule 54, now Rule 84) were not updated. Rule 84 remains out of step and non-compliant with other use of force standards, notably the Basic Principles on Use of Force and Firearms by Law enforcement Officials. There is a need for the provisions on use of force in the Mandela Rules to be further strengthened.

We recommend that the SRT requests all national laws relating to use of force, as well as any guidance, policies and procedures that governing or regulating their use. In addition details or inventories of all weapons and equipment held or used in each place of detention or by each institution or police / security agency. Alongside this, that human rights monitoring bodies ensure they are granted full unrestricted access to any stores or armouries, in order to inspect such weapons and equipment, and to assist in ensuring no prohibited weapons or equipment are in use.

Retention of and access to CCTV and other audiovisual materials

It is important that places of detention have clear policies concerning the retention of CCTV footage and other audiovisual materials. Footage should normally be deleted after a set amount of time in order to protect the right to privacy. However, footage relating to incidents involving violence or allegations of abuse should be retained for a longer period, particularly given the reluctance which people deprived of their liberty often have in denouncing such incidents for fear of reprisal.

UK prison guidance establishes that recorded material should only be kept for longer than 30 days when it is necessary to do so. The Guidance establish mandatory retention periods for footage pertaining to certain types of incidents, including: *"CCTV footage relating to Use of Force incidents should be kept for 6 years;*

¹⁹⁵ <https://omegaresearchfoundation.org/publications/brazil-technical-memorandum-regulation-use-force-prison-and-socioeducational-systems>

¹⁹⁶ <https://www.gov.br/mdh/pt-br/acao-a-informacao/participacao-social/conselho-nacional-de-direitos-humanos-cndh/Recomendacao12.pdf>

*CCTV footage relating to a death in custody should be kept for 6 years”.*¹⁹⁷ The Guidance also provides that: *“If an incident takes place within a cell and there is no footage of in-cell events, footage captured on the landing before, during and after the alleged incident should not be routinely deleted.”*

In Brazil’s Federal District, Portaria No. 288, of 2 September 2021, establishes the obligation for prison management to preserve images and videos for a minimum of 30 days whenever the use of less lethal weapons causes injuries or death.¹⁹⁸ While the creation of this clear obligation facilitates effective oversight, the minimum period of 30 days for the retention of images and videos of this nature is far too short and should be extended.

It is crucial that independent monitors and judicial authorities are provided with prompt access to footage captured by CCTV or body-worn video. In certain circumstances, failure to facilitate such access could be considered complicity in torture.

¹⁹⁷ UK Ministry of Justice, HM Prison & Probation Service, ‘Use of CCTV (Overt Closed-Circuit Television system) Prison Guidance’, 2021, available at <https://www.gov.uk/government/publications/use-of-cctv-overt-closed-circuit-television-system-policy-framework>.

¹⁹⁸ https://www.sinj.df.gov.br/sinj/Norma/9a0199cc35044e8784c31a7b3335e7926/Portaria_288_02_09_2021.html