



Violence against indigenous women deprived of liberty and in contact with law enforcement officials

APT's Contribution to UN Special Rapporteur Report

09 February 2022

Introduction

1. This document by the Association for the Prevention of Torture (APT, www.apt.ch) aims to contribute to the report of the UN *Special Rapporteur on Violence Against Women on **violence against indigenous women and girls***, to be presented at the 50th session of the Human Rights Council. The APT welcomes the opportunity to contribute to this important and necessary report.
2. The Gender Equality Observatory for Latin America and the Caribbean, in its report on *Indigenous Women in Latin America* highlighted the great exposure of indigenous people to the phenomenon of violence in its various dimensions, and the particularly intense impact it has on indigenous women. The report stated that **violence against indigenous women** should not be understood as a pathology of individuals and victims, "but as a **violation of human rights of universal scope**".¹
3. According to the Inter-American Commission on Human Rights (IACHR), **indigenous women tend to experience more physical, psychological and sexual violence in specific contexts**. Violence against indigenous women often takes place in armed conflict; during the implementation of major development, investment and extractive projects; in the militarisation of indigenous lands; and in the context of their work as human rights defenders.²
4. However, limited information³ is available on the various types of violence faced by indigenous women in contact with law enforcement agencies, and when they are deprived of liberty. The purpose of this submission is to share APT's analysis about the main risks of violence, torture and ill-treatment faced by indigenous women deprived of their liberty in the context of the criminal justice system.

¹ Comisión Económica para América Latina y el Caribe (CEPAL). *Mujeres Indígenas en América Latina: dinámicas demográficas y sociales en el marco de los derechos humanos*. Naciones Unidas, octubre de 2013.

² IAHRC, *Indigenous Women*, (17 April 2017), OAS Doc 44/17, §8, available at: <https://www.oas.org/en/iachr/reports/pdfs/IndigenousWomen.pdf>

³ APT, *Blog Opening the door to justice for indigenous women deprived of liberty*, (09 August 2021), available at: <https://www.apt.ch/en/blog/opening-door-justice-indigenous-women-deprived-liberty-0>

A. Indigenous women and deprivation of liberty: root causes of harmful impact on persons

5. Deprivation of liberty itself - be it in prisons, police stations among other settings - constitutes a strange and imposed cultural element for indigenous persons. Its main negative effect on members of indigenous groups or communities is the **acculturation** and the **disintegration of their links between individuals, communities and ancestral lands**.⁴

6. Places of deprivation of liberty are structured in such a way that the cultural and spiritual identity, cosmovision, traditions, medicinal practice, and other specific needs of indigenous people are overlooked. In that sense, the *UN Subcommittee on Prevention of Torture (SPT)* has observed that **indigenous people deprived of liberty must adapt to conditions that are estrange to their way of life**. As a result, they are **subjected to double punishment**, which may lead, in many cases, to cruel, inhuman, or degrading treatment.⁵

7. The SPT has also stated that the mere fact of depriving someone of his/her liberty is a punishment that hardly appears in the repertoire of indigenous justice. The link with the community is a determining factor in the structuring of the individual and collective identity of its members. In this context, prison is a direct attack on this relationship. According to the SPT, for many indigenous people, deprivation of liberty in prisons constitutes cruel, inhuman and degrading treatment, if not even a form of torture.⁶ Strengthening indigenous justice and its forms of social control and sanction for non-compliance with its laws can be an adequate mechanism for the prevention of torture and cruel, inhuman and degrading treatment of indigenous detainees.⁷

8. The Public Criminal Defense Service in Chile has identified that "foreign indigenous women prisoners present a series of difficulties in coping with their imprisonment, [...] as **they enter a system designed ideologically, physically and in its normative scheme for men**, which also does not consider the foreign or indigenous variable". Amongst the main difficulties faced by indigenous women deprived of liberty are: limited or no communication with their families or other loved ones in the outside world; material precariousness; lack of support networks; and discrimination.

In **Mexico**, for example, indigenous women are unlikely to receive either family visits or phone calls because of the prohibitive costs these impose on impoverished communities living at great distance from the prison. Researchers found that 24 per cent of indigenous women

⁴ Cruz Rodríguez, M., Montaña Granados, J. A., & Ayala Sandoval, M. C. (2020). Indígenas en prisión. La imposición estatal de la cárcel y el deber de respetar la justicia indígena en Colombia. *Cambios Y Permanencias*, 11(2), 319–365. Recuperado a partir de <https://revistas.uis.edu.co/index.php/revistacyp/article/view/11702>

⁵ SPT, Report on the visit of the Subcommittee on Prevention of Torture (SPT) to Mexico, (31 May 2010), UN Doc CAT/OP/MEX/1, §255, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fMEX%2f1&Lang=en

⁶ SPT, Inputs from the Subcommittee on Prevention of Torture to the Inter-American Court of Human Rights on the Advisory Opinion on Differential Aspects of Deprivation of Liberty, (2020) available at: https://www.corteidh.or.cr/sitios/observaciones/OC-29/16_SPT_ONU.pdf

⁷ Ibidem

were visited by their family just once a year. They concluded that this abandonment impedes rehabilitation.⁸

B. Structural factors and over- representation of indigenous women deprived of liberty

9. Discrimination is reflected in the criminal justice system. In some countries, indigenous people are overrepresented in every stage of criminal processes, from arrest to serving of prison sentences. For example:

- In **Costa Rica**, although the indigenous population represents only 2% of the overall population, 14% of the total number of people incarcerated belong to an indigenous community.⁹
- In **Chile**, a study comparing the rate of pre-trial detention with the variables of poverty and belonging to the Mapuche community found that people with lower incomes are between 3.3% and 9.5% more likely to be subject to pre-trial detention than other groups in situations of lesser vulnerability. In turn, for people of the Mapuche community, they face 25% more chances to experience pre-trial detention than non-Mapuche people.¹⁰

The reasons for overrepresentation of indigenous people in detention vary in detail and multiplicity in different contexts. Nevertheless, some factors are common to most countries where overrepresentation exists: the direct or indirect discrimination in legislation, policies, law enforcement strategies, and other practices; long -term dispossession, socioeconomic marginalization and poverty; intergenerational trauma; individual and institutional racism and discrimination; overpolicing of indigenous communities; insufficient access to legal counsel; lack of effective judicial review; limited access to information; and language barriers.¹¹

10. The legacy of **colonisation** and **systemic marginalisation**, ensuing high levels of poverty, dire financial and social stress, and significant gaps in opportunities and well-being between indigenous and non-indigenous women, leading to exposure to alcohol and drug use, aggravates the disproportionate incarceration of indigenous women.¹²

⁸ Bastick, M, Women in Prison, A commentary on the Standard Minimum Rules for the Treatment of Prisoners, Quaker United Nations Office, p. 73, citing Taylor, R., Women in prison and children of imprisoned mothers (Quaker United Nations Office, Geneva), p. 19.

⁹ Jiménez Z., Ligia. 2017. La población indígena privada de libertad en Costa Rica entre los años 2013-2016. Esbozos en un estado pluricultural y multiétnico; en Revista Digital de la Maestría en Ciencias Penales. Número 10. Año 10. ISSN 1659-4479; p. 15.

¹⁰ Estudio FEN.

¹¹ UN, Report of the Special Rapporteur on the rights of indigenous peoples, (02 August 2019), UN Doc A/HRC/42/37, §42, available at:

<https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx>

¹² UN, Report of the Working Group on the issue of discrimination against women in law and in practice, (15 May 2019) UN Doc A/HRC/41/33, §62, available at:

<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Annualreports.aspx>

This overrepresentation of indigenous people in detention leads to an even higher overrepresentation of indigenous women, considering that in many countries the women prison population is low:

- In **Australia**, indigenous women are imprisoned more than 20 times the rate of non-indigenous women.¹³
- In **Canada**, the proportion of indigenous women in Federal custody was near 50% of all federally-sentenced women in 2021.¹⁴

11. Furthermore, there are large numbers of indigenous women in prison serving short sentences for non-violent offences, who are on remand and pose minimal risk in terms of community safety.¹⁵ The *UN Committee of the CEDAW* has recommended developing programmes that address the needs of women in prison and promote alternatives to detention, especially for indigenous women who are detained for minor offences.¹⁶

12. The *UN Special Rapporteur on the Rights of Indigenous People* and the *UN Working Group on the issue of discrimination against women in law and in practice* identified that disproportionate criminalisation of indigenous women is due to several factors:

- **Violence.** As indigenous women, they may face **higher rates of violence** and greater exposure to incarceration. Violence has been found to play a significant role in the lives of indigenous women, contributing to the likelihood of their involvement with the criminal justice system.⁸

- **Stereotyping.** Indigenous women suffer specific and deeply damaging stereotypes. As a result, they are disproportionately targeted by law enforcement for control. They may be scapegoated as “lazy, criminal and deviant”, this to justify the perpetuation of structures of exploitation leading to perceptions of them as a “social problem” or a dangerous threat, to be met with punishment rather than compassion or justice.¹⁷

¹³ Australian Government, Pathways to Justice-Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), Incidence, (11 January 2018). Available at:

<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/11-aboriginal-and-torres-strait-islander-women/incidence/>

¹⁴ Office of the Correctional Investigator, Proportion of Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement, (17 December 2021), available at: <https://www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx>

¹⁵ NEWS, Urgent action needed over high proportion of indigenous women in prison, report says, (30 March 2020), available at: <https://www.abc.net.au/news/2020-03-31/urgent-action-needed-over-indigenous-women-in-jails/12103372> See also,

¹⁶ UN, Concluding observations on the eighth periodic report of Australia, (25 July 2018), UN Doc CEDAW/C/AUS/CO/8, §55 (a), available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fAUS%2fCO%2f8&Lang=en

¹⁷ *Ibidem*, §27.

- **Poverty.** In many jurisdictions, indigenous women are not only more likely to be poorer than other women owing to intergenerational cycles of systemic oppression but are also more likely to experience detention for issues such as the inability to pay off debts or petty offenses such as theft.¹⁸

C. Indigenous women are in situations of heightened risk of torture and ill-treatment

13. All persons who come into contact with law enforcement and the criminal justice may be placed in a situation of vulnerability and face heightened risks of torture and other ill-treatment. Indigenous women often face integrated oppressive structures of discrimination that expose them to severe risks of suffering torture and other ill-treatment. A number of violations of the rights of indigenous women and girls in contact with law enforcement officials have been documented, including: young girls pepper-sprayed and tasered; a 12-year-old girl attacked by a police dog; a 17-year-old punched repeatedly by an officer who had been called to help her; women-strip-searched by male officers; and women injured due to excessive force used during arrest.¹⁹

14. The *Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*²⁰ has received disturbing accounts from indigenous people who claim to have been subjected to various forms of physical and psychological abuse while in detention. This situation was even more serious in the case of indigenous women.

15. In contexts of deprivation of liberty, it has been observed that indigenous women face the following risks:

- **Solitary confinement.** According to the *Nelson Mandela Rules*, solitary confinement refers to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Indefinite or prolonged solitary confinement (more than 15 days) amount to torture and are prohibited (Rule 43). In some countries, indigenous people, and especially **indigenous women are disproportionately subjected to solitary confinement** and to harsher disciplinary sanctions due they are classified to be at higher risk than other prisoners, using risk assessment tools that fail to take into account their

¹⁸ *Ibidem*, §52.

¹⁹ HRW, Summary of Findings, Human Rights Watch's research in Northern British Columbia and Saskatchewan, available here: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/P03P03P0201_Toronto_Exhibit_27_Deif.pdf

²⁰ UN, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, (12 August 2004), UN Doc A/59/258, §30, available at: <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx>

histories and life experiences.²¹ For example, in Canada, indigenous women make up 50% of federal segregation placements.²²

- **Body searches.** Strip and invasive body searches, are common practices and can constitute ill-treatment when conducted in a disproportionate, humiliating or discriminatory manner.²³ For indigenous women, it has been registered that they are strip searched twice as often as non-indigenous women in Australia.²⁴
- **Detention conditions.** The indigenous population deprived of liberty often find themselves in more precarious living conditions than the rest of the prison population. Furthermore, discrimination against members of indigenous communities in the closed and coercive environment of prisons can also lead to violence against such groups by other prisoners and their harsher treatment by police or prison staff.²⁵
- **Sexual and Gender Based Violence (SGBV).** Cases ruled by the *Inter-American Court of Human Rights* of *Rosendo Cantu et. al. v. Mexico*²⁶ and *Fernández Ortega v. Mexico*²⁷ revealed that when indigenous women are in contact with law enforcement agencies, they face increased risks of being victims of gender-based sexual violence, such as rape that constitutes torture. In both cases, the Court referred to the way in which the State hindered the women victims' access to justice by not providing them with the care that they required. In addition, given the systemic racism and their perceived lack of

²¹ OKT, Solitary confinement and federally sentenced indigenous women: a moment for change, available at: <https://www.oktlaw.com/solitary-confinement-federally-sentenced-indigenous-women-moment-change/>

²² Native associations of Canada, Indigenous women in solitary confinement: Policy Backgrounder, (August 2017), page 4, available at: <https://www.nwac.ca/wp-content/uploads/2017/07/NWAC-Indigenous-Women-in-Solitary-Confinement-Aug-22.pdf>

²³ UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/ 31/57, (05 January 2016), §23, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement>

²⁴ See:

- News, Indigenous women strip-searched twice as often inside Canberra's jail in recent months, (01 July 2021), available at: <https://www.abc.net.au/news/2021-07-02/act-indigenous-women-strip-searched-twice-as-often-jail/100259182>
- The Guardian, indigenous women sues ACT over forced strip search her legal team alleges amounts to "torture", available at: <https://www.theguardian.com/australia-news/2021/nov/26/indigenous-woman-sues-act-over-forced-strip-search-her-legal-team-alleges-amounts-to-torture>
- APT, Podcast on women and prison driving change body searches, available at: <https://www.apr.ch/en/resources/publications/women-and-prison-driving-change-body-searches>

²⁵ UNODC, Handbook of prisoners with special needs, (2009), page 57, available at: https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

²⁶ Corte IDH. *Caso Rosendo Cantú y otra vs. México*. Excepción Preliminar, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2010, Serie C No. 216, párr. 174. https://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf

²⁷ Corte IDH. *Caso Fernández Ortega y otros vs. México*. Fondo, Reparaciones y Costas, Sentencia de 30 de agosto de 2010, Serie C No. 215, párr. 200.

credibility, indigenous women who have been sexually abused, and who reported to the police are not believed.²⁸

16. Programmes that address the gender-specific needs of indigenous women and their cultural, spiritual and religious requirements are lacking in the large majority of prison systems.²⁹ They also have less access to prison programmes, work activities, education or access to early release measures.³⁰

17. This exposure to systemic discrimination on the basis of gender and ethnicity, creates and environment where the risks to endure violence, torture and ill-treatment arise. This is particularly true, during and after deprivation of liberty. Such violence ranges from sexual violence to specific forms of dispossession and isolation from their families, communities and ancestral lands.

Suggested recommendations:

Deprivation of liberty has a differentiated impact on indigenous women as it distances them from their communities, ancestral lands, customs and ways of life. The over-representation of indigenous women in prisons in some countries is indicative of the structural discrimination that persists in the criminal justice system towards them, and that in many cases the violence they have experienced before imprisonment is reiterated in deprivation of liberty or when in contact with law enforcement officials. Although information on indigenous women in detention is not available in some countries, this briefing provided evidence of certain patterns of violence and discrimination against indigenous women in detention.

In light of the above, the APT suggests the following recommendations targeted to States:

- **Prevention of violence in detention.** Address factors that increase the likelihood of violence and discrimination in detention towards indigenous women through relevant legal and policy measures, including the collection of official statistics on violence in a systematic, rigorous, transparent and disaggregated manner targeted to indigenous women deprived of liberty.
- **Training.** Provide regular and adequate training regarding the prevention of violence and discrimination towards indigenous women - including indigenous women deprived of liberty - to judges, public defenders, prosecutors, police officers and other law enforcement officials, to ensure that, in the performance of their duties, public servants fully respect the dignity and physical and psychological integrity of indigenous women.

²⁸ Murphy, Jodie, Sexual Assault: indigenous women's experiences of not being believed by the police, (01 June 2021), available at: <https://journals.sagepub.com/doi/full/10.1177/10778012211013903>

²⁹ UNODC, Handbook of prisoners with special needs, (2009), page 57, available at: https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

³⁰ Lillo, Rodrigo. "El impacto de la prisión preventiva en las personas indígenas". Revista 93, Defensoría Penal Pública. No. 20, septiembre 2019, pp. 34-37. http://www.dpp.cl/resources/descargas/revista93/2019-16-10/tabla_de_emplazamiento-1_N20.pdf

- **Access to justice**
 - Ensure the development of a coherent system of safeguards in law and in practice as a measure to help reducing the risk of ill-treatment in the first moments of detention, including ensuring access to gender and intercultural - sensitive legal aid services as soon as possible upon arrest.
 - Establish the figure of specialised indigenous public defenders or experts in indigenous law to adequately represent the interests of indigenous people. For instance, in some countries, there are **intercultural facilitators** who provide specific support to the public defenders and facilitate the communication among the defendant, the defender and the community. The facilitator also speaks the indigenous language of indigenous parties involved.
 - Promote the use of linguistic and cultural interpreters within the criminal justice system, in line with the *International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)*. The Convention provides that measures should be taken to ensure that indigenous persons can understand and be understood during legal proceedings, and where necessary through the provision of interpretation or by other effective means.³¹
 - Effectively enforce the active participation of indigenous women in the system of administration of justice and in the development of approaches to reparations.
 - Provide judges with legal tools for the application of international law standards for the protection of indigenous women's rights.
- **Detention conditions.** Effectively enforce the incorporation of some elements of the indigenous cosmovision in prison management, in particular when it comes to determining permissions, departures or prison benefits. Additionally, in line with Rule 54 of the *United Nations for the Treatment of Women Prisoners and Non-custodial Measures (the Bangkok Rules)*, States shall review pre- and post-release services to ensure that they are appropriate and accessible to indigenous women deprived of liberty, in consultation with the relevant groups.³²
- **Use of non-custodial measures.** Address the issue of disproportionate incarceration of indigenous women, including by increasing the use of non-custodial measures in accordance with *Rules 57 and 58 of the Bangkok Rules*.

³¹ Article 12, Indigenous and Tribal Peoples Convention (No. 169), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A12

³² See Rules 54 and 55 related to minorities and indigenous groups of the *United Nations for the Treatment of Women Prisoners and Non-custodial Measures (the Bangkok Rules)*, available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

- **Detention Monitoring**

- When the detention of indigenous women is unavoidable, establish or maintain independent and regular detention monitoring, to ensure that the full range of the indigenous women's needs, whether medical, physical, psychological, cultural, spiritual or educational, including living conditions are adequate for them are guaranteed in practice.
- Ensure independent oversight of places of deprivation of liberty with a gender and intercultural perspective, in particular through ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and establishment of National Preventive Mechanisms (NPMs).

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