

## Urgent Appeal

### **Abusive searches in prison facilities in the State of São Paulo**

9th February 2023

**Submitted to the following United Nations Special Procedures and the Inter-American Commission on Human Rights Special Rapporteurs:**

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## 1. Introduction

*"Staff making jokes with the visitor, in case of a woman having her period they don't let her in with 1 pads to change during the day"*

*[...] "The staff told me to force myself to defecate to see if there were drugs inside my vagina".<sup>1</sup>*

We submit this urgent appeal calling attention to the **imminent risk of abusive search procedures being formally endorsed by São Paulo Court of Justice, impacting on the dignity and fundamental rights of prisoners and their visitors in detention facilities across São Paulo state in Brazil.**

As the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) has already discussed in a previous visits reports (2011 and 2016) regarding the situation in Brazil, relatives and individuals visiting inmates have been “subjected to invasive body-cavity searches that, despite being banned in several states, continue to occur despite studies indicating that contraband is found in only a very small number of searches and despite the availability of alternatives such as electronic scanning devices.”<sup>2</sup>

In this sense, the issue has already been brought to the attention of the Inter-American Commission on Human Rights on several occasions. Specifically, the situation of the State of São Paulo was addressed in a thematic hearing held in October 2015 and, in 2018, when Conectas and other partners held a working meeting with commissioners denouncing the maintenance of the practice by the Brazilian State.

Unfortunately, the delay in establishing legal understandings to completely ban this practice from Brazilian prison system impacts the right to family visits and endorses abusive treatment, humiliations and gender oppression, as explained by the former Special Rapporteur on Torture and other cruel,

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<sup>1</sup>Some of the countless anonymous reports of women who, when visiting loved ones in prison facilities, experienced the abusive search, according to Amparar Association's document “Technical Note on the rights violations faced by visitors of imprisoned persons in prison units in the state of São Paulo - ACP No.: 1020194-54.2014.8.26.0053” (in portuguese, “**Nota técnica da Associação Amparar sobre as violações de direitos enfrentadas pelas pessoas visitantes de pessoas presas nas unidades prisionais do estado de São Paulo - ACP nº: 1020194-54.2014.8.26.0053**”), which is a fundamental document of this urgent appeal.

<sup>2</sup>Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, **Visit to Brazil undertaken from 19 to 30 October 2015: observations and recommendations addressed to the State party**, 16 february 2017, CAT/OP/BRA/3, paragraph 39.

inhuman or degrading treatment or punishment, Juan Ernesto Mendez, during an interview to Conectas Human Rights in 2014.<sup>3</sup>

In this regard, the São Paulo Court of Justice is currently facing an important judgement that will affect the legal basis to be applied in São Paulo's prisons: **Civil Public Action nº 1020194-54.2014.8.26.0053**. This consists of a crucial case, which may lead to a milestone of how the dignity of visitors is treated by authorities in detention facilities. If the Court votes for the maintenance and expansion of abusive searches, the structural violence against women, minorities and black people will be increased, despite the fact that the National Congress is discussing a bill that proposes a different approach considering human rights standards. The defence of abusive searches has been made based on an absolutely biased interpretation which criminalises target groups and their families. This practice can be seen as a degrading and humiliating police procedure that has hindered visitors to maintain contact with prisoners.

It is worrying that, without question, São Paulo Justice Court representatives may defend an abusive practice that violates international standards, dignity and fundamental rights and the right to family visits. So, Associação de Amigos(as) e Familiares de Pessoas Presas - AMPARAR, Conectas Direitos Humanos, Instituto de Defesa do Direito de Defesa, Instituto Terra, Trabalho e Cidadania - ITTC, Mecanismo Nacional de Prevenção e Combate a Tortura, Specialized Center for Prison Situations (NESC) of the Public Defender's Office of the State of São Paulo, Pastoral Carcerária Nacional - CNBB, Rede Justiça Criminal and World Organisation Against Torture - OMCT present this **appeal to demonstrate the urgency and severity in this situation, specifically requesting communications on the impending decision of the aforementioned judgement**

## 2. The practice of abusive search

In this section, we explain the seriousness and urgency of the issue and its relationship with international treaties to which Brazil is a signatory, having incorporated several provisions into its domestic legal system. In general, there are two main points that show that the abusive search of visitors in prisons violates the Constitution and international standards on human rights, according to Criminal Justice Network (RJC)'s technical analysis.<sup>4</sup> First, the **existence of the abusive search constituted a double human rights violation**, as it restricts the fundamental rights of the person deprived of liberty and also the rights of their family members. Second, **the submission of a person to abusive search is a degrading treatment that can be considered as torture**.

In line with the aforementioned technical analysis, which is a base document of this urgent appeal, it is necessary to characterise what the practice of the abusive search is about, also called “intimate search”. This consists of the procedure of searching people visiting prisons through total or partial stripping,

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<sup>3</sup>Conectas Direitos Humanos, **UN says abusive search is cruel treatment**, 26 may 2014, <https://www.conectas.org/en/noticias/un-says-abusive-search-is-cruel-treatment/>.

<sup>4</sup>Rede de Justiça Criminal, **Parecer Técnico sobre a inconstitucionalidade da revista Íntima de visitantes que ingressam em estabelecimentos penais**, 2020, [PARECER TÉCNICO Revista Vexatória ARE 959.620.pdf \(strikinglycdn.com\)](https://www.parecerjuridico.org.br/revista-are-959-620.pdf)

with inspection of body cavities, including genitals, which can use mirrors and require repetitive physical efforts such as squats and others. In a detailed technical document, Associação de Familiares e Amigos de Presos/As (AMPARAR) highlights that “the abusive search has been happening both during the intimate search, through invasive procedures, squatting, among other situations already reported in this lawsuit, which continues to occur in the state of São Paulo, even with the implementation of body scanners - albeit less frequently - as from the imposition of other constraints based on gender, race and other social markers, such as the prohibition of entry of visitors who use intrauterine device (IUD), the exposure and/or problems faced during the search due to menstrual flow and the use of absorbents, prohibition of entry into prison units because of the use of braids and dreadlocks, among other situations.”<sup>5</sup>

Data collected in the report entitled “Abusive Search: a constant practice”,<sup>6</sup> made by several human rights organisations, demonstrate the practice of degrading strip searches is not restricted to the State of São Paulo, but that it occurs throughout the country. According to the survey, in Brazil, in 2021, 48.7% of family members were subjected to intimate searches even with the installation of a body scanner, with 41.2% stating that even after going through the body scanner they were forced to go through the search intimate area, and 37.8% of people stated that they had already been forced to crouch over a mirror and open the cavities of their private parts with their hands, as a prerequisite to enter the prison unit. This reveals the seriousness and urgency that the theme needs to be tackled.

## **2.1 Abusive searches are an inhibiting factor for visiting prisons**

This practice occurs in a context of visitor lines made up of almost all women, the majority of whom are black and poor, as attested by the RJC research “Abusive search: a constant practice”: “This portrait opens up the content of violence against women's bodies that structures the abusive search, already characterized by other studies as institutionalized rape, as it violates sexual dignity, and institutional gender violence [...] Seen as suspicious in advance, thousands of women face a ‘body line’, where the search of their bodies leaves marks that are difficult to be forgotten throughout life. Children and the elderly are not spared, along with all family members, and with that they are faced with a choice in which no path is devoid of illegitimate and unacceptable suffering: either they go through the trauma of their bodies being searched by people who see them as suspects beforehand, or stop visiting their family members, giving up the family life that nurtures relationships”.<sup>7</sup> The research concluded that, in São Paulo, intimate search affects mostly women, who are 75% of all visitors. Based on reports from family members, it is clear that the practice humiliates and, thus, inhibits visits. In many cases, the prisoner asks his family not to visit him because he cannot bear to have his relatives in these abusive searches.

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<sup>5</sup>AMPARAR, *Nota técnica da Associação Amparar sobre as violações de direitos enfrentadas pelas pessoas visitantes de pessoas presas nas unidades prisionais do estado de São Paulo - ACP nº: 1020194-54.2014.8.26.0053*, 2023, page 1

<sup>6</sup>Rede de Justiça Criminal, *Revista vexatória: uma prática constante*, 2021.

<sup>7</sup>Rede de Justiça Criminal, *op. cit.*, 2021, page 2.

AMPARAR's technical note indicates that, during Covid-19 pandemic, the Department of Penitentiary Administration implemented the Family Connection, a special program to arrange virtual visits. Even so, there were violations and reprisals against the families, because the hybrid modality in São Paulo state remained to be a practice of "embarrassment experienced by the families of prisoners, such as the presence of prison officers during the virtual call, cancellation of visits due to the person's clothing in front of the video, penalty for the family and for the person arrested due to babies or children appearing on camera among other violations."<sup>8</sup>

From the above, it can be concluded that the abusive search inhibits and hinders the visitation of prisoners and, therefore, violates their rights from a legal and conventional perspective, as attested by the National Policy for the Care of Persons Returning from the Prison System, published by the National Council on Justice in 2020.<sup>9</sup> In the Brazilian legal system, the Penal Enforcement Law<sup>10</sup> states in art. 41 that the person deprived of liberty is guaranteed the right to visit spouses, companions, relatives and friends on certain days. Because "contact between persons deprived of liberty and their families is not only an opportunity for contact with the outside world, but also a **necessity given the fundamental role played by family members in providing affective, emotional and material support**. This material dimension is particularly important in the Brazilian context, in which people deprived of their liberty cannot count on the State to provide all the items they need to maintain their health and dignity - such as items of hygiene, cleaning, medication, food, clothing - and depend on the delivery of these items by their families."<sup>11</sup>

Thus, it is the responsibility of the State to provide the necessary measures to guarantee the full realisation of this right, as the Inter-American Court of Human Rights concluded in the case of *Norín Catrimán y otros (Dirigentes, Miembros y Activista del Pueblo Indígena Mapuche) Vs. Chile*, paragraph 407. According to RJC: "The loss of contact between persons deprived of liberty and their families has been recognized by the Inter-American Court of Human Rights as grounds for holding a state internationally responsible for a violation of human rights. In this regard, we highlight the case of *López y otros v. Argentina*, sentenced in 2019, in which the Court analysed human rights violations committed in the context of the transfers of four detainees to prison units far from their families. In this case, the Court found that even if the transfers had a legitimate purpose - which was to improve prison conditions while serving their sentence - they still violated the American Convention because of the disproportionate way in which they affected contact with their families.

Indeed, the Court verified, from the perspective of the imprisoned persons, a violation of the right to have their physical, psychological and moral integrity respected (art. 5.1), the right to not be subject to

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<sup>8</sup>AMPARAR, *op. cit.*, 2023, page 2

<sup>9</sup>Departamento Penitenciário Nacional. **Política nacional de atenção às pessoas egressas do sistema prisional**, 2020, pages. 40-43, [https://www.cnj.jus.br/wpcontent/uploads/2020/09/Pol%C3%ADtica-Nacional-de-Aten%C3%A7%C3%A3o-%C3%A0-s-PessoasEgressas-do-Sistema-Prisional\\_eletronico.pdf](https://www.cnj.jus.br/wpcontent/uploads/2020/09/Pol%C3%ADtica-Nacional-de-Aten%C3%A7%C3%A3o-%C3%A0-s-PessoasEgressas-do-Sistema-Prisional_eletronico.pdf)

<sup>10</sup>Brasil, **Lei nº 7.210, de 11 de julho de 1984**, 1984, [https://www.planalto.gov.br/ccivil\\_03/leis/17210.htm](https://www.planalto.gov.br/ccivil_03/leis/17210.htm).

<sup>11</sup>Rede de Justiça Criminal, *op. cit.*, 2020, page 13. [PARECER TÉCNICO Revista Vexatória ARE 959.620.pdf](https://www.strengtheningjustice.org/pt-br/revista-vexatoria-are-959620.pdf) ([strikinglycdn.com](https://www.strengtheningjustice.org/)).

arbitrary or abusive interference in their private life or that of their family (art. 11.2) and the right to a family (art. 17.1). For the Inter-American Court, the intense impact on family relations due to the measures adopted by the State undermined the legitimacy of the penalty. This is because, according to the American Convention, the essential purpose of punishment is the reformation and social rehabilitation of the convicted - provided for in article 5.6 of the American Convention on Human Rights (ACHR) - for which the family plays a central role. This was not the first opportunity to assess a violation of the ACHR due to prison conditions that are incompatible with the purpose of social reintegration, but it was a paradigmatic pronouncement in the sense of recognizing that the lack of contact with the family due to disproportionate - albeit legitimate - state measures can be grounds for international responsibility for violating the re-socializing purpose that punishment should have.”<sup>12</sup> RJC highlights that this humiliating police procedure impacts family rights so that 34,5% of the visitors are no longer doing the visits and 66,6% are not bringing their children. This situation represents a violation of the right to access family life without arbitrary intrusions into private life. “For children, this separation from their parents is a situation that can generate a strong sense of abandonment and cause a lot of suffering.”<sup>13</sup> Besides the terror and embarrassment of enduring this absolutely offensive procedure to the most basic right of a human being, any attempt by these relatives to demand the security agents to respect their dignity may be met with retaliation by the prison management, such as the suspension of visiting rights.

## **2.2 Abusive search as a practice of torture and other forms of inhuman and degrading treatment**

As to the second main point, there is a legal understanding that the intimate search is a practice that can be considered torture. It is "important to remember that the intimate search as a practice that exposes the naked bodies of women to inspection of their genitals can also be a re-victimization experience for people who have already been victims of sexual violence. This is a scenario that certainly affects a relevant number of women, since a survey by the Brazilian Public Safety Forum found that in the 12 months prior to the survey, 27.3% of Brazilian women reported having been victims of some type of sexual violence, that is, 16 million women. In this case, the suffering generated by the intimate search is even more intense.”<sup>14</sup>

“To understand why the intimate search may be considered torture, one must consider that the definition of torture does not correspond to a list of prohibited techniques or practices, but rather to the articulation of certain elements that characterize it. The internationally validated criteria for determining whether a practice is torture are: i) it must be done intentionally; ii) it must be done for a specific purpose; iii) it must result in suffering. Since it is common ground that it is an intentional practice, two elements remain to be analysed: the suffering imposed and the existence of a purpose. [...] Regarding the degree of suffering, while Law 9455/97 and the UN Convention against Torture (CAT) mention a gradation of this suffering ("intense suffering" in item II of art. 1 of Law 9455/97 and

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<sup>12</sup>*Ibid.*, page 14.

<sup>13</sup>*Ibid.*, page 17.

<sup>14</sup>*Ibid.*, page 25.

"acute pain or suffering" in art. 1.1 of CAT), the Inter-American Convention to Prevent Torture does not textually require a determined degree of suffering in order to recognize torture. Even so, in the evaluation of the concrete case, the Inter-American Court usually measures the degree of affectation generated by the conduct, which does not mean that torture needs to leave severe bruises and visible marks. Looking at the effects of the intimate search, it is difficult to deny that it generates suffering. In most accounts women describe feelings of humiliation and powerlessness. [...] Returning to the reports of the intimate search it is possible to identify three elements that can configure the existence of a certain purpose in its practice: (i) the discriminatory character, since, firstly, among all the people who enter a prison unit to visit, the intimate search is only made on the family members of the prisoners, and, secondly, it is a practice that affects mostly women; [...] (ii) the existence of a perception that visitors should be punished for the crimes of their imprisoned family members [...]; (iii) the fact that the intimate search is a practice articulated to a set of measures that affect and deconstruct the very identity of the person visiting a family member in prison."<sup>15</sup>

In this sense, "in the 2006 Castro Castro Penal Case, the Inter-American Court analysed several violations committed in a penitentiary in Peru, including the intimate search of female detainees and visitors. For the Court, a vaginal search cannot be the primary measure for maintaining security in a prison and, in this sense, constitutes a form of violence against women. The Court resorted to the Inter-American Convention to Prevent and Punish Torture to conclude that the vexatory search with genital touching is a sexual violence and, by virtue of its effects, constitutes torture. In addition, the UN Special Rapporteur on Torture, referring specifically to the protection of women against torture, stated that nudity, invasive body searches, insults and humiliation of a sexual nature constitute violence against women and that, in light of the expansion by international tribunals of the notion of sexual crimes against women, invasive vaginal examinations can amount to torture by virtue of their effects."<sup>16</sup>

It can be observed that both in the Commission and in the Court, there is already jurisprudence affirming that the vexatious search offends the inherent dignity of the human being, as set forth in articles 5 and 11 of the ACHR. In 1989, the Commission received a complaint against the Government of Argentina regarding the situation of a woman and her 13-year-old daughter who were forced to completely undress and have their genitals inspected upon entering a prison establishment. The case received the number 10.506 and the Commission's report n° 38/96, published in 1996, refutes the argument of the need to conduct searches in the name of public safety, stating that vexatious searches violate rights protected by the American Convention on Human Rights. In that case, it was recommended by the Commission that the Government of Argentina adapt its internal laws to the Inter-American Convention and also that it correctly compensate victims of abusive body inspection.

"It must be recognized that the intimate search is a practice incompatible with the Federal Constitution of 1988 and with the international human rights treaties ratified by Brazil and, as such, must be abolished. In fact, the Inter-American Court has already issued an order directly to Brazil to cease the intimate searches of visitors in the context of the provisional measures in the matter of the Curado

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<sup>15</sup>*Ibid.*, pages 22-26.

<sup>16</sup>*Ibid.*, 2020, page 29.

Penitentiary Complex. In the Resolution of May 22, 2014, the Court considered the seriousness of the vexatious search and determined that, in the short term, the State should eliminate the ‘practice of humiliating searches that affect the intimacy and dignity of visitors’.<sup>17</sup>

### 3. Civil Public Action nº 1020194-54.2014.8.26.0053 - São Paulo Court of Justice

The dignity of the human person, being — more than a right — a foundation of the Republic established in the Constitution, becomes a lens through which the other rights subsequently known must be interpreted. Despite their recognized immediate effectiveness, the fundamental right to intimacy, privacy, and physical and psychological integrity can also find dimensions of their realisation in infra-constitutional norms. In this sense, in 2014, Conectas Human Rights filed a public civil action to guarantee and enforce the irrevocable rights to intimacy, privacy, physical and psychological integrity, and, above all, human dignity, which are systematically violated during the abusive searches, which women, children, men, the elderly are submitted to visit family members in the Provisional Detention Centers I and II in Guarulhos, in the state of São Paulo. Based on reports and complaints from families subjected to such practice since at least 2011 and with the addition of technical notes and evidence collected in inspections by our organisations, the mentioned **public civil action, no. 1020194-54.2014.8.26. 0053, demands the recognition of the civil liability of the state of São Paulo for the moral damages caused to people who on May 20, 2014, and in the three years before the filing of the public civil action, were forced to be subjected to the procedure of intimate search, ordering the state of São Paulo to pay an amount corresponding to the compensation.**

According to the Specialized Center for Prison Situations (NESC) of the Public Defender's Office of the State of São Paulo, “despite the installation of body scanner equipment by the Penitentiary Administration Secretariat in recent years, several complaints [...] reporting visitors submitted to abusive searches and other humiliating procedures in a systematic way in the prison units of the state of São Paulo [...] As if that were not enough, the lack of regulation and technical knowledge for the use of the scanner equipment continues to lead to several violations and searches that cause serious embarrassment.”<sup>18</sup> More than nine years have passed since the violations reported in the public civil action and the practice of abusive search continues to be a tonic in the entry procedures in the provisional detention centers of the State of São Paulo. As NESC pondered in its request to join the public civil action as plaintiff’s legal assistant, the authorities repeatedly disregard and violate State Law No. 15.552/2014<sup>19</sup> and Resolution No. 05/2014 and No. 28/2022 of the National Council on Criminal and Penitentiary Policy, which establish a prohibition on such practice in prisons. In regard to statistics, it is important to note — as reported by NESC from its inspections in prisons in São Paulo — “although body scanners have already been installed in the prison units of the state of São Paulo, the weekly logic of humiliation, violence and arbitrariness still permeates the search of visitors in prison

<sup>17</sup> *Ibid.*, pages 30-31.

<sup>18</sup> NESC, **Pedido de ingresso para atuar como assistente litisconsorcial da parte autora na ACP 1020194-54.2014.8.26.0053**, 2023, page 3

<sup>19</sup> São Paulo, **Lei nº 15.552, de 12 de agosto de 2014**, 2014, <https://www.al.sp.gov.br/repositorio/legislacao/lei/2014/lei-15552-12.08.2014.html>.



units in São Paulo. There are 181 (one hundred and eighty one) prison units in all and 03 (three) more are under construction. Brazil is the third country, in absolute numbers, that incarcerates more people in the world. In the ranking of the largest female prison population, we occupy the fourth position. The State of São Paulo, in turn, has almost one third of the incarcerated population in the country: there are more than two hundred thousand people imprisoned, 60.18% of whom are black, 42.88% young, and 44% have low schooling (incomplete elementary education).<sup>20</sup>

On February 14, 2023, the trial of the public civil action is scheduled to continue, in which there is a possible decision by the São Paulo Court of Justice to deny recognition of the violations and to maintain the practice of abusive search in prisons despite research, inspections and reports from family members and organisations. This will continue to systematically violate the rights of people deprived of their liberty, of visitors, especially women who are the most violated in this procedure, which contains all the requirements to be considered a possible form of torture. It is urgent that the authorities are held accountable and compensate the victims, both individually and collectively.

#### 4. Urgent Appeal

We present information on this urgent appeal to the special procedures of the United Nations and the Special Rapporteurships of the IACHR to investigate and demand immediate measures by the São Paulo Court of Justice authorities on the abusive search practices that **endangers the dignity of families and other visitors**, in violation of international human rights standards.

In the light of the facts denounced, the subscribing civil society organisations request the special procedures of the UN and the Special Rapporteurships of the IACHR, through communication with the competent bodies, to urge the Brazilian authorities, in particular the São Paulo Court of Justice members and the Supreme Court to:

- a) to refrain from supporting legal measures and decisions that may allow, under any pretext, the maintenance of the abusive search in São Paulo;
- b) to immediately recognize that the practice of abusive searches is unconstitutional and must be abolished in São Paulo without delay because of the risk of torture it entails, in order to follow international human rights standards in respect to the dignity of families and persons deprived of liberty;
- c) to receive civil society organisations, especially family members' organisations to address the demands and complaints that visiting persons, especially women, have about prison entry procedures;
- d) to urgently take state actions that generate a change in the behavior and continuous training of the employees who perform this function, as well as of the inspection mechanisms;

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<sup>20</sup>NESC, *op. cit.*, page 13.

- e) to ensure that electronic equipment emitting ionizing radiation is properly used by qualified professionals, pursuant to Federal Law No. 7,394/85, bearing in mind that only radiology technologists have legal permission to handle this type of equipment;
- f) to recognize that, although its replacement by mechanical searches is recommended, the end of intimate searches cannot be specifically conditioned to the existence of body scanner equipment in prisons;
- g) to ensure that the use of a body scanner or any other technological means does not authorise an intimate search of visitors, even when there is a suspicion of carrying illicit objects. And ensure that the use of a body scanner does not authorise a body cavity inspection;
- h) to establish guidelines so that, in case of founded suspicion after an electronic search, only a hand search of the person's clothing, and without stripping, will be used and authorised;
- i) to guarantee collective moral damage compensation and also individual compensation for the victims who have suffered from the abusive searches over the last decades;
- j) to ensure that the physical and psychological integrity of visitors is ensured, who must be treated with dignity and courtesy, and cannot under any circumstances be subjected to any type of humiliating, inhuman or degrading treatment;
- k) to ensure that visitors who are referred to carry out medical procedures/exams, obtain access to a report/descriptive certificate on the condition/result of their evaluation, which must be issued and signed immediately by the health professional responsible for the care.

Besides, we also request that the UN special procedures issue a joint press release calling attention to the seriousness of the situation and expressing the Rapporteurs' opinion on the incompatibility of this invasive practice with human rights. Finally, we request that, in accordance with article 41 (b and d) of the American Convention on Human Rights and article 18 of the Commission's Statute, the Inter-American Commission on Human Rights Special Rapporteurs send **letters and requests for information, as soon as possible, demanding explanations and more details regarding the Civil Public Action nº 1020194-54.2014.8.26.0053 trial in São Paulo Court of Justice** as well as to question the data published by the authorities of São Paulo about the practice of intimate searches.

**Signed by:**

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