
November 25, 2019

REF.: Request for an advisory opinion

Sir,

I have the honor to write to you, on behalf of the Inter-American Commission on Human Rights, in order to submit to the Inter-American Court of Human Rights a request for an Advisory Opinion on "**Differentiated Approaches to Persons Deprived of Liberty,**" under Article 64(1) of the American Convention on Human Rights.

While thanking you for your attention to this request, accept, Sir the renewed assurances of my highest consideration.

Marisol Blanchard
Deputy Executive Secretary

Pablo Saavedra Alessandri
Secretary
Inter-American Court of Human Rights
San Jose, Costa Rica

Annex

**REQUEST FOR AND ADVISORY OPINION TO
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

DIFFERENTIATED APPROACHES TO PERSONS DEPRIVED OF LIBERTY

I. INTRODUCTION AND PURPOSE

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) submits to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) this request for an advisory opinion, pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Article 70 of the Court’s Rules of Procedure.

2. The **purpose** of this request is for the Inter-American Court to make a joint interpretation of several inter-American provisions concerning the differentiated obligations that the principle of equality and non-discrimination imposes on the States in the context of deprivation of liberty in order to address the situation of real inequality of groups that are in a special situation of risk. In particular, women who are pregnant, or postpartum and breastfeeding; LGBT persons; indigenous people; older persons, and children living in prison with their mothers.

3. As described below, in a context of the extreme vulnerability of individuals who belong to groups in special situations of risk – derived not only from the deplorable conditions of detention that characterize prisons in this region,¹ but also from the disproportionate impact of the lack of differentiated protection – it is pertinent and timely for the Inter-American Court to rule on these issues and provide guidelines for the States to comply adequately with their obligations in this area. In particular, in this request, the IACHR will analyze the main difficulties faced by individuals who belong to the groups that are the subject of this request; difficulties derived from the fact that the treatment they receive is, generally, the same as that provided to the rest of the prison population. Thus, added to the general deficiencies and difficulties to which those deprived of liberty are subjected, individuals who belong to these groups endure those arising from their inherent condition – owing to their age, sex, gender, race, sexual orientation, and gender identity or expression – and to the consequent absence of a differentiated approach. This results in problems that have a disproportionate impact on their imprisonment and that, in addition to preventing their enjoyment of human rights, may place those individuals who are the subject of this request in a situation that jeopardizes their life and personal integrity.

4. In this context, the identification of the rights involved and the respective development of standards to guarantee the principle of equality and non-discrimination for the individuals who are the subject of this request has great relevance for their protection.

¹ In this regard, by means of its different monitoring mechanisms, the IACHR has observed that, in general, the region’s prisons expose those deprived of liberty to risks to their life and integrity; in particular, because detention conditions are mainly characterized by alarming levels of overcrowding, the failure to separate those being prosecuted from those already sentenced, deficient infrastructure, and lack of hygiene and sanitary facilities, and decent places to sleep. Likewise, medical care is lax, the food is insufficient and with little nutritional value, there is scarce or inadequate access to water, and an absence of effective social rehabilitation programs.

This would respond to the special characteristics of the respective groups and ensure that, through a differentiated approach as regards the scope of the relevant State obligations, they would have the same access to all the services and rights as everyone else while deprived of their liberty.

5. In order to define the **scope** of this request, the Commission has confined itself to the analysis of one of the forms of deprivation of liberty established in the *Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas*; namely, imprisonment ordered by a judicial authority as a result of involvement or presumed involvement in the perpetration of offenses or violations of the law.² This focuses mainly on the deprivation of liberty that takes place in the prison system, under prison authorities, and that is characterized by a prolonged stay in prison. Therefore, this request for an Advisory Opinion does not refer to situations of deprivation of liberty that take place in police detention centers, in the custody of administrative authorities, that are generally of a transitory nature. In particular, the groups in a special situation of risk for whom the Commission is asking the Court to make a ruling in relation to this request for an advisory opinion are: (i) women who are pregnant, or postpartum and breastfeeding; (ii) LGBT persons; (iii) indigenous people; (iv) older persons, and (v) children living in prison with their mothers.

6. The scope of this request derives, above all, from two considerations: First, from the identification made by the IACHR through its different mechanisms of the differentiated impact faced by these persons during their imprisonment. Second, this diagnosis makes it necessary for the Court to analyze and develop the relevant standards. In this regard, based on an analysis of the Court's decisions, the Commission finds that it is necessary to analyze and develop the corresponding State obligations, in light of the inter-American standards. Within this framework, to determine the scope, the Commission has based its considerations on the fact that the indirect discrimination faced by the groups that are the subject of this request arises directly from their detention conditions, and not from their situation of vulnerability *per se*.

7. The IACHR will now provide some clarifications regarding the scope of this request, by delimiting the women who are the subject of the request, as well as other groups in a special situation of risk who have not been included in it. Regarding women deprived of liberty, the scope of this request is circumscribed to those who are pregnant, or postpartum and breastfeeding. This is because both the Court and the Commission have had occasion to rule on the general content of the rights of women deprived of liberty. In this regard, in the case of the *Miguel Castro Castro Prison v. Peru*, the Court ruled on the State obligations that arise from the particular difficulties faced by women in prison and the differentiated impact

² In this regard, the Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas establish that deprivation of liberty means:

"Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty"

IACHR, Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131, Document approved by the Commission at its 131st regular session held from March 3 to 14, 2008, General provision.

of sexual violence during imprisonment. Meanwhile, the IACHR has also had occasion to address the situation of the human rights of women deprived of liberty.³ In addition, the Commission is preparing a thematic report on this matter.

8. Meanwhile, adolescents who have come into contact with the criminal justice system are not considered to fall within the scope of this request either, because the juvenile justice system has specific characteristics that differ from the system for adults: it does not form part of national prison systems; it has its own institutions, organs and authorities, and is applicable only to children and adolescents in conflict with the law. Moreover, in the case of *José Gregorio Mota Abarullo et al. (Deaths at the San Félix Prison)* with regard to Venezuela, currently being processed by the Court, the Court will have the opportunity to rule on the content and scope of the obligation to ensure rights in relation to the prevention of acts of violence and other situations that may endanger the life and personal integrity of adolescents deprived of liberty. Likewise, Afro-descendant persons are not included in the scope of this request because, as the Commission has observed, the problems faced by this group of the population, in relation to their involvement in the criminal justice system and in their access to justice, arise mainly from the racial discrimination to which they are subjected. In the case of persons with disabilities, in the case of *Chinchilla Sandoval et al. v. Guatemala*, the Inter-American Court had occasion to rule on the social model relating to disability and the obligation of the State to ensure accessibility by making reasonable adaptations.⁴

9. Lastly, regarding the **content** of this request, it is divided into five sections. First, the IACHR presents the purpose, relevance, scope and content. Second, the IACHR makes a general analysis of the principle of equality and non-discrimination and its relevance in the context of deprivation of liberty by the adoption of differentiated approaches. Third, the IACHR analyzes the differentiated impact and disproportionately prejudicial effects on the persons deprived of liberty who are the subject of this request. Fourth, the Commission recapitulates the principal aspects of the decisions of the Court – in both its case law and in the sphere of provisional measures – with regard to each group that is the subject of this request in order to show that the questions raised in this request are different and innovative in relation to the Court's case law. Lastly, fifth, the IACHR outlines its conclusions with regard to the pertinence of this request and includes questions on the aspects it considers that the Court could develop.

10. The Commission reserves the right to submit its own considerations on the questions submitted when the Inter-American Court has established the procedure for this request for an advisory opinion and within the time frame established to receive contributions from the OAS organs, Member States, civil society, academia, and other interested parties.

11. The Commission designates Commissioner Joel Hernández García, and Executive Secretary, Paulo Abrão, to act as its delegates, and Marisol Blanchard Vera, Assistant Executive Secretary for Petitions and Cases, and Sofía Galván Puente, Jorge Humberto Meza Flores and Analía Banfi Vique, Executive Secretariat lawyers, will act as legal advisers.

³ IACHR, *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*. OEA/Ser.L/V/II/163. Doc. 105, July 3, 2017, para. 194 and ff.

⁴ I/A Court HR. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of February 29, 2016. Series C No. 312.

II. GENERAL CONCEPTUALIZATION: DIFFERENTIATED APPROACHES WITH REGARD TO DEPRIVATION OF LIBERTY IN LIGHT OF THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

12. The Inter-American Court has indicated that the notion of equality stems directly from the oneness of the nature of the human species and is inseparable from the essential dignity of the individual. Therefore, any situation is incompatible with this in which, because a certain group is considered superior it is treated with preference or, inversely, because it is considered inferior, it is treated with hostility or discriminated in a way that does not allow it to enjoy the rights recognized to those who are not considered to form part of that group. The Court's case law has indicated that, at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. Furthermore, it forms the basis for the legal structure of national and international public order and permeates the whole legal system.⁵

13. The principle of equality and non-discrimination should be understood in the sense that it incorporates two concepts: "[...] a negative concept related to the prohibition of arbitrary differences in treatment, and a positive concept related to the obligation of the States to create conditions of real equality vis-à-vis groups who have historically been excluded or who are at greater risk of being discriminated against.⁶ Regarding the first concept, the Inter-American Court has indicated that not every difference in treatment is discriminatory and that it is necessary to establish whether it has an objective and reasonable justification.⁷ This analysis is especially strict in the case of a difference in treatment based on one of the categories prohibited by Article 1(1) of the Convention.

14. Regarding the second concept, historically, certain groups have been subjected to discrimination and exclusion – for different reasons such as age, sex, ethnicity, sexual orientation, and gender identity and expression – that has prevented them from exercising their rights in the same conditions as others. Precisely, this situation of the historical discrimination and exclusion of a particular group means that this group may be a victim of prejudicial differentiated impacts of norms or practices that, even though they have a neutral appearance and are not intended to discriminate, are discriminatory owing to their effects. The Inter-America Court has referred to the concept of indirect discrimination and differentiated impact as follows:

The Court has indicated that the peremptory legal principle of equal and effective protection of the law and non-discrimination means that States must refrain from establishing discriminatory regulations or those with discriminatory effects on different groups of the population when exercising their rights.⁸ The Human Rights Committee,⁹

⁵ I/A Court HR. Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2016. Series C No. 315, para. 109.

⁶ I/A Court HR. Case of Furlan and family v. Argentina. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2012. Series C. No. 246, para. 267.

⁷ I/A Court HR. Proposed Amendment to the Naturalization Provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paras. 55 and 56.

⁸ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing: Case of the Yean and Bosico Girls v. Dominican Republic, para. 141, and Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, para. 88.

⁹ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Human Rights Committee, Communication No. 993/2001, Althammer v. Austria, August 8, 2003, para 10.2 ("that a violation of

the Committee on the Elimination of Racial Discrimination,¹⁰ the Committee on the Elimination of Discrimination against Women¹¹ and the Committee on Economic, Social and Cultural Rights¹² have all recognized the concept of indirect discrimination. This concept signifies that a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics.¹³

[...]

For its part, the European Court of Human Rights has also developed the concept of indirect discrimination establishing that, when a general policy or measure has an effect that is disproportionately prejudicial to a particular group, this may be considered discriminatory even if it was not specifically addressed at that group.¹⁴

15. Regarding deprivation of liberty, the IACHR's *Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas* and other instruments of the United Nations prohibit discrimination against persons deprived of liberty for different reasons, including: sex, gender, ethnic origin, age and sexual orientation.¹⁵ In particular, regarding the negative concept of the principle of equality and non-discrimination, these instruments establish that measures aimed at protecting the rights of persons deprived of liberty who belong to groups in a special situation of risk cannot be considered discriminatory.¹⁶

article 26 [equality before the law] can also result from the discriminatory effect of a rule or measure that is neutral at face value and without intent to discriminate"), and Human Rights Committee, General Comment No. 18, Non-discrimination.

¹⁰ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing, *Cf.* Committee for the Elimination of Racial Discrimination, Communication No. 31/2003, L.R. *et al.* v. Slovakia, March 7, 2005, para. 10.4.

¹¹ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing, *Cf.* Committee for the Elimination of Discrimination against Women. General Recommendation No. 25 on temporary special measures (2004), para. 1 ("Indirect discrimination against women may occur when laws, policies and programs are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women").

¹² I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing, *Cf.* Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009.

¹³ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing, Case of Nadege Dorzema *et al.* v. Dominican Republic. Merits, reparations and costs. Judgment of October 24, 2012. Series C No. 251, para 234.

¹⁴ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing ECHR, Case of Hoogendijk v. The Netherlands, No. 58641/00, First Section, 2005; ECHR, Grand Chamber, D.H. and Others v. Czech Republic, No. 57325/00, November 13, 2007, para. 175, and ECHR, Case of Hugh Jordan v. The United Kingdom No. 24746/94. May 4, 2001, para. 154

¹⁵ IACHR, *Principles and Best Practice on the Protection of Persons Deprived of Liberty in the America*, OEA/Ser/L/V/II.131, Document approved by the Commission at its 131st regular session held from March 3 to 14, 2008. Principle II "Equality and non-discrimination"; United Nations, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 2.1; UN, Body of Principles for the Protection of All Persons under Any Form Of Detention or Imprisonment. Resolution 43/173, of December 9, 1988, Principle 5.2, and UN. The United Nations Rules for the treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules). Resolution A/RES/65/229, March 16, 2011, Rule 1. "Basic principle."

¹⁶ IACHR. *Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas*, OEA/Ser/L/V/II.131, Document approved by the Commission at its 131st regular session held from March 3 to 14, 2008. Principle II "Equality and non-discrimination"; United Nations, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 2.2; UN, Body of Principles for the Protection of All Persons under Any Form Of Detention or Imprisonment. Resolution 43/173, of December 9, 1988, Principle 5.2, and UN. The United Nations Rules for the treatment of Women Prisoners and Non-custodial

16. Regardless of the situation of risk of those deprived of liberty – arising not only from the context of subordination to the State,¹⁷ but also from the deplorable detention conditions that characterize the region’s prisons – persons belonging to groups in a special situation of risk and who faced discrimination when they were free are more susceptible to be subjected to indirect discrimination based on the disproportionate risks and differentiated impacts that they face during their imprisonment. In this regard, in its 2012 and 2017 reports on preventive detention, the Commission indicated that the accumulation of problems arising from incarceration had a much greater impact on individuals who belong to groups in vulnerable circumstances, and that this impact was even more severe when they belonged to economically at-risk groups, because they were also victims of other forms of social exclusion.¹⁸

17. Persons deprived of liberty who belong to groups in a special situation of risk face disproportionately prejudicial effects owing to the existence of their special needs that are increased in prison and that stem from their particular condition, as well as to the consequent lack of differentiated protection. In addition, frequently, these individuals belong to more than one group in a special situation of risk, which results in numerous special needs and in greater vulnerability. Consequently, norms and practices that disregard this differentiated impact result in prison systems reproducing and reinforcing the patterns of discrimination and violence present in their life when they were free.

18. In this context, for States to comply with their special obligation to protect those who are in their custody and, in particular, to guarantee the principle of equality and non-discrimination, the Commission understands that States have an unavoidable obligation to adopt measures that respond to a differentiated approach which takes into consideration the particular vulnerabilities and factors that may increase the risk of acts of violence and discrimination in contexts of incarceration, such as gender, ethnicity, age, sexual orientation, and gender identity and expression. Such measures should also take into account the frequent intersectionality of these factors, which may heighten the situation of risk of those in prison.¹⁹

19. Based on the considerations in this section and as indicated previously, it is necessary that, in the context of this request for an advisory opinion, the Inter-American Court is able to rule on the differentiated obligations that the principle of equality and non-discrimination impose on States in order to address the situation of real inequality of the persons who are the subject of this request.

Measures for Women Offenders (Bangkok Rules). Resolution A/RES/65/229, March 16, 2011, Rule 1. “Basic principle.”

¹⁷ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II. Doc.64. December 31, 2011, para. 49.

¹⁸ IACHR, *Report on Measures Aimed at Reducing the Use of Pre-trial Detention in the Americas*, OEA/Ser.L/V/II.163 Doc. 105, July 3, 2017, para. 215, and IACHR., *Report on the Use of Pre-trial Detention in the Americas*, para. 128.

¹⁹ In this regard, see IACHR, *Report on Measures Aimed at Reducing the Use of Pre-trial Detention in the Americas*, OEA/Ser.L/V/II.163 Doc. 105, July 3, 2017, para. 215.

III. DIAGNOSIS REGARDING THE IMPRISONMENT OF PERSONS BELONGING TO GROUPS IN A SITUATION OF SPECIAL RISK

20. Based on its monitoring work, the Commission will now identify some aspects that reveal the differentiated impact and the disproportionately prejudicial effects, in the context of deprivation of liberty, with regard to women who are pregnant, or postpartum and breastfeeding, LGBT persons, indigenous people, older persons, and children living in prison with their mothers. It will do so in order to justify the need for the Court to make an interpretation that determines the differentiated approach and the scope of the States' obligations to guarantee the rights of these individuals and respond to their particular conditions of vulnerability which increase the risk that they may be subject to acts of discrimination.

1. Women who are pregnant, in postpartum period and breastfeeding

21. In general, the treatment received by women who are pregnant, and in postpartum period is almost the same as that received by other women who are deprived of liberty. Thus, to the general deprivations and difficulties faced by women in prison, are added those inherent in their situation as women who are pregnant and postpartum period who would require differentiated treatment to respond to their specific needs. The absence of a differentiated approach that responds to their particular condition may place them in a situation that violates their life and integrity and prevents them from enjoying their rights.

22. Regarding pregnant women, the Commission has information that the main problems they face in the context of deprivation of liberty include: (i) cursory prenatal medical care; (ii) insufficient and inadequate diet, owing to the deficiency in their nutritional requirements and the shortage of food;²⁰ (iii) lack of access to adequate clothing, putting them at risk of falls or tripping up which could hurt them or the fetus,²¹ and (iv) shackling during transfers. Furthermore, prison systems are characterized by little or outdated information on the situation of pregnant women.²²

23. In the case of the health care provided to pregnant women, the IACHR observes that there is a general consensus among the different sources that this is not specialized during pregnancy,²³ or is inadequate and insufficient.²⁴ In particular, the care provided to

²⁰ The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of The Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 13; Republic of Panama and UNODC, *Diagnóstico de la Situación de las Mujeres Privadas de Libertad en Panamá desde un enfoque de género y derechos*. Panama, 2015, p. 129; UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook*. 2nd Edition, 2014, p. 19.

²¹ The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of The Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 2

²² American Public Health Association, *Pregnancy Outcomes in US Prisons*. 2016-2017, April 2019.

²³ Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016, p. 16; Republic of Panama and UNODC, *Diagnóstico de La Situación de las Mujeres Privadas de Libertad en Panamá*, 2015, p. 82;

²⁴ ICRC, Pontificia Universidad Javeriana and CIDE, *Mujeres y prisión en Colombia. Desafíos para la política criminal desde un enfoque de género*, 2018, p. 91; Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, edited by Loretta J. Ross, Lynn Roberts, Erika Derkas, Whitney Peoples, and Pamela Bridgewater Toure (New York: The Feminist Press, 2017), p. 8, and The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of The Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 12; UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook*. 2nd Edition, 2014, p. 19.

pregnant women is characterized by scarce prenatal medical checkups,²⁵ failure to standardize care in the different prisons,²⁶ and absence of specialized treatment for complications associated with pregnancy, such as bleeding – often associated with miscarriages and fetal death.²⁷ Also, the women are not guaranteed their right to be informed about matters related to their condition.²⁸

24. This is of particular concern considering that, on many occasions, at the time of their arrest and incarceration, the women have not undergone prenatal checkups and, therefore, would require specialized care to see them safely through their pregnancies.²⁹ In addition, there is a significant possibility that their pregnancies are high-risk due not only to the conditions inherent in imprisonment,³⁰ but also taking into account the situation of exclusion that women who have become involved with the criminal justice system often face, such as poverty, a problematic drug use, violence and limited access to health care services.³¹ The lack of timely and adequate specialized care to prevent or treat the complications derived from pregnancy may have serious consequences that endanger the life of the mother and the well-being of the fetus, such as the risk of miscarriages, fetal death, and ectopic pregnancies.³²

25. Furthermore, during transfers for external visits to receive care, pregnant women are shackled.³³ And this is despite the fact that, for example, in several states of the United States there are laws prohibiting this.³⁴ In this regard, numerous medical authorities, including the American College of Obstetricians and Gynecologists and the American Medical Association have concluded that restraining women during pregnancy or after childbirth is dangerous.³⁵ In this regard, the practice of shackling a pregnant woman entails the risk of injury for her and for the fetus as a result, for example, of falls, high blood pressure, and obstructing the circulation and fetal movement. In addition, the shackles interfere with the medical examinations and care.³⁶

²⁵ CELS, Ministerio Público de La Defensa y Procuración Penitenciaria de La Nación, *Las mujeres en prisión. Los alcances del castigo*. Argentina, Siglo XXI editors, 2011, p. 180.

²⁶ American Public Health Association, *Pregnancy Outcomes in US Prisons, 2016-2017*, April 2019.

²⁷ Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, edited by Loretta J. Ross, Lynn Roberts, Erika Derkas, Whitney Peoples, and Pamela Bridgewater Toure (New York: The Feminist Press, 2017), p. 8.

²⁸ CELS, Ministerio Público de La Defensa y Procuración Penitenciaria de La Nación, *Las mujeres en prisión. Los alcances del castigo*. Argentina, Siglo XXI editors, 2011, p. 182.

²⁹ In this regard, see Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016.

³⁰ Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016, p. 16.

³¹ American Public Health Association, *Pregnancy Outcomes in US Prisons. 2016-2017*, April 2019.

³² According to Planned Parenthood, ectopic pregnancy is when a pregnancy grows outside the uterus, usually in the fallopian tubes. Planned Parenthood, *Ectopic Pregnancy*.

³³ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 57; UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook*. 2014, p. 20.

³⁴ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 57. In the specific case of Massachusetts, see The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law, 2016*, p. 1.

³⁵ The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law, 2016*, p. 4

³⁶ National Task Force on the Use of Restraints with Pregnant Women under Correctional Custody, *Best Practices in the Use of Restraints with Pregnant Women Under Correctional Custody* (Washington, DC: U.S. Department of Health and Human Services, 2012), 7-8. Cited in: Kristine Riley, y Ram Subramanian, *Overlooked: Women and Jails*

26. Women deprived of liberty who go into labor face diverse difficulties that represent a risk for their life and integrity, as well as for that of their offspring. These include, in particular: (i) lack of attention by prison medical personnel when they go into labor; (ii) giving birth in prisons in unhygienic conditions and without specialized assistance, and (iii) use of shackles. The IACHR has information that, in general, there are failures to identify when a woman goes into labor owing to the lack of relevant training or personnel.³⁷ As a result, the birth may occur in the prison cell, without specialized care and in unhygienic conditions; and this may cause problems for both mothers and newborns.³⁸ Likewise, during transfer to the hospital for the birth, and while birth occurs, women are usually shackled to the hospital bed.³⁹ And this is despite the serious complications that this practice may cause – such as hemorrhages or a reduction in the fetal heartbeat⁴⁰ – by limiting a woman's movement and adoption of different positions, and the prohibitions in this regard.⁴¹

27. Additionally, and among other matters, women who are in postpartum period and breastfeeding also face limited post-natal care,⁴² and a poor diet characterized by inadequate quantities and little nutritional value, which also affects the ability to breastfeed, and may endanger a woman's health⁴³ Similarly, prison staff are neglectful with regard to the general needs for psychological care that these women need and, in particular, the needs

in an Era of Reform. Nueva York, Vera Institute of Justice, 2016, p. 17. See also, Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016, p. 17, and *The Prison Birth Project and Prisoners' Legal Services of Massachusetts, Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 1.

³⁷ Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* (New York: The Feminist Press, 2017), pp. 8 and 10.

³⁸ See, UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition*, 2014, p. 19, and Julie Ashdown and Mel James, "*Women in Detention*", article in the *International Review of the Red Cross*, No. 877, March 2010, p. 13. In this regard, IACHR highlights the case of Tammy Jackson – a woman with a disability and in isolation – deprived of her liberty in the North Broward Bureau Jail, in Florida, United States. According to the county Public Defender, on April 10, 2019, Mrs. Jackson was in an isolation cell when she asked for medical assistance owing to her contractions. Approximately seven hours later, and without the required medical assistance she gave birth to a girl child. Information contained in request for information to the state based on Article 18 of the IACHR Statute, June 2019.

³⁹ Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* (New York: The Feminist Press, 2017), p. 10; *The Prison Birth Project and Prisoners' Legal Services of Massachusetts, Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 2; Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 57, and UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition*, 2014, p. 20.

⁴⁰ In this regard, see, UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition*, 2014, p. 20, and Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* (New York: The Feminist Press, 2017), p. 10.

⁴¹ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 57.

⁴² Cruz, L. R., Martínez Osorio, M., Chaparro González, N., Uprimny Yepes, R., and Chaparro Hernández, S, *Mujeres, Políticas de Drogas y Encarcelamiento: una Guía para la Reforma de Políticas en Colombia*. Dejusticia, 2016. Cited in: ICRC, Pontificia Universidad Javeriana and CIDE, *Mujeres y prisión en Colombia. Desafíos para la política criminal desde un enfoque de género*, January 2018, p. 91; Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, (New York: The Feminist Press, 2017), pp. 8, 10 y 11, and UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition* 2014, p. 19.

⁴³ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 52

related to the forced separation between the mothers and their newborns in most cases, between 24 and 40 hours after giving birth.⁴⁴ Moreover, and in the same way as pregnant women, immediately after giving birth, women are shackled to the hospital bed and during their respective transfers⁴⁵, despite the risks represented by shackling.⁴⁶

28. Lastly, and considering the importance of the period known as early childhood – which ranges from birth to eight years of age⁴⁷ – the IACHR also underscores the harm caused to the mothers deprived of liberty and to their children resulting, above all, from the fact that the region's prison systems do not have special measures that permit adequate contact between the mother and her child outside the prison. And this is despite the fact that this close connection could be crucial for their well-being and to avoid the traumatic long-term effects for both of them resulting from the separation.⁴⁸ In this regard, in the course of its monitoring work, mainly through its Rapporteurship on the Rights of Persons Deprived of Liberty, the IACHR has documented that this contact is affected mainly by: (i) the remoteness of women's detention centers; (ii) visiting difficulties – such as excessive bureaucracy and problems relating to searches, and (iii) absence of adequate spaces and conditions for visits.

2. Lesbian, Gay, Bisexual and Transgender Persons (LGBT)

29. According to information received by the IACHR, LGBT persons deprived of their liberty face disproportionate difficulties owing to the prejudices that exist, and based on their sexual orientation, gender identity or diverse sexual characteristics. As a result, the Commission has identified that these difficulties include: (i) exposure to a greater risk of violence; (ii) placement in prison units without considering gender identity; (iii) segregation within the prison itself; (iv) failure to acknowledge the gender identity and expression; (v) greater obstacles to intimate visits, and (vi) lack of access to adequate health care services.

30. Some of the most common ways in which violence against LGBT persons is expressed consists in the excessive use of force by guards, humiliating and degrading searches,⁴⁹ harassment by other inmates and prison staff, and attacks owing to the use of clothing that is considered not to comply with the perceived gender, or displays of affection with persons of the same sex. In this regard, the IACHR has information that same-sex couples are punished by guards for displaying affection with the excuse of maintaining internal

⁴⁴ Roth, Rachel, *She Doesn't Deserve to Be Treated Like This*: Prisons As Sites of Reproductive Injustice. Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* (New York: The Feminist Press, 2017), pp. 10 and 11, and Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016, p. 17.

⁴⁵ The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 2.

⁴⁶ The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, p. 1.

⁴⁷ In this regard, UNICEF has indicated that this stage is crucial for the cognitive, emotional and social development of children. This is because, during this stage, the brain develops the different neuronal interactions and connections that will be defined by what happens in their experiences and their surroundings. UNICEF, *Early Childhood Development in Latin America and the Caribbean*, 2019, p. 2.

⁴⁸ See, UNODC, *Handbook on Women and Imprisonment*. Criminal Justice Handbook. 2nd Edition 2014, pp.17 and 20,

⁴⁹ Body searches, for example, are times when LGBTI persons may be subjected to humiliating treatment. Those who are trans are denied the possibility of being able to choose the gender of the person who conducts the search and cases have been reported where they have been obliged to undress in front of prison staff merely so that the latter may look at their bodies. Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, p. 85.

order and discipline.⁵⁰ In addition, women deprived of liberty who are perceived as “masculine” are subjected to harassment, physical abuse and “forced feminization.”⁵¹ Similarly, LBT women are even more likely to suffer sexual violence.⁵² In this regard, there is information about cases of lesbian women being placed in cells with men as punishment for rejecting the sexual advances of prison guards, and that lesbian women run the risk of being subjected to “corrective rape” in order to rectify or modify their sexual orientation.⁵³ Furthermore, according to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, fear of reprisals and a lack of trust in the complaints mechanisms leads to under-reporting and renders invisible the different types of violence that LGBT persons suffer when they are deprived of liberty.⁵⁴

31. In relation to practices relating to **placement in detention centers**, the IACHR has observed that the general absence of laws on gender identity and differentiated protocols in the region means that trans persons are placed in male or female pavilions based only on their genitalia and the sex assigned to them at birth, without taking into account their gender identity or opinion.⁵⁵ For example, the IACHR has received information indicating that male trans persons prefer not to divulge their gender identity so that they will not be sent to a men’s prison.⁵⁶

32. Regarding **accommodation within prisons**, the IACHR observes that, even though practices in this area vary greatly and there is no common standard in the region, generally this results in segregation based on sexual orientation, gender identity and sexual characteristics that do not meet conventional patterns. In this regard, some of the practices identified to accommodate LGBT persons include locating them in areas earmarked for at-risk groups, such as the elderly or people with disabilities. However, this may also include accommodating them in pavilions specifically for LGBT persons, where the conditions are inferior to the areas for the rest of the prison population.⁵⁷ At times, these pavilions are similar to maximum security regimes.⁵⁸ LGBT persons are also segregated in pavilions for persons living with HIV or with individuals who have committed some type of sexual offense, and this

⁵⁰ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, p. 93; Penal Reform International (PRI) and Association for the Prevention of Torture (APT), *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, 2013, p.13

⁵¹ IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, November 12, 2015, para. 148; United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*. A/HRC/29/23, May 4, 2015, para. 36.

⁵² Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, pp. 62 and 76.

⁵³ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, p. 64

⁵⁴ Report of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez. A/HRC/31/57, February 24, 2016.

⁵⁵ In this regard, see IACHR, *Report on measures to reduce the use of pre-trial detention in the Americas*, OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 216, and Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2013, p. 76.

⁵⁶ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2019, p. 72.

⁵⁷ In general, these spaces are characterized by poor quality, overcrowding, unhygienic conditions, and lack of access to the services enjoyed by the rest of the prison population.

⁵⁸ IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, November 12, 2015, para. 148; United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals* 2015, para. 156; Penal Reform International (PRI) and Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide*, 2013, p. 12.

reinforces the stigmatization against them and increases the risk of violence.⁵⁹ There is also information about a practice of subjecting transgender women to prolonged isolation with the excuse of protecting them.⁶⁰

33. In addition, the **failure to acknowledge gender identity and expression** in prisons violates the right to the free development of personality and human dignity of trans persons. Thus, they face different problems, such as disregard of the name with which they identify themselves, the use of clothes or uniforms that do not match their gender identity, and the use of bathrooms that do not correspond to this.⁶¹ Similarly, trans women are forbidden to wear their hair long or to use make-up, aspects that reaffirm their gender expression.⁶² Regarding intimate visits, the fact that some legal frameworks only allow visits to be made by “family”, “spouses” or “permanent companions,” represents a significant obstacle for access to this right by lesbian and gay individuals in countries where their unions cannot be legally recognized.⁶³ Recently, in the case of *Marta Lucía Álvarez Giraldo v. Colombia*, the Commission ruled on the denial of the right to an intimate visit based on the victim’s sexual orientation as a disproportionate restriction that was contrary to the American Convention.⁶⁴

34. Regarding the **right to health**, the IACHR has ascertained that medical care does not address the specific needs of trans persons.⁶⁵ In particular, during its most recent on-site visits, the Commission has observed that prison medical units do not have hormonal medication or medical personnel trained to provide this treatment to those who wish to begin or continue their transition process.⁶⁶ In addition, in the cases where trans individuals are able to access such treatment of their own accord, the absence of differentiated protocols results in confiscation of these drugs or the refusal to allow them into the prisons, which compromises the transition process.⁶⁷ Furthermore, those who have resorted to sex reassignment surgery are refused access to adequate care to follow up on this process.⁶⁸

⁵⁹ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, para. 155.

⁶⁰ IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, November 12, 2015, para. 159. See also, Colombia Diversa, “*Muchas veces me canso de ser fuerte*”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, 2015-2016, p. 7.

⁶¹ Association for the Prevention of Torture, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide, 2019, p. 76; Colombia Diversa, “*Muchas veces me canso de ser fuerte*”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, 2015-2016, p. 26.

⁶² Colombia Diversa, “*Muchas veces me canso de ser fuerte*”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, p. 47.

⁶³ Association for the Prevention of Torture, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide, 2019, p. 89; Colombia Diversa, “*Muchas veces me canso de ser fuerte*”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, 2015-2016, p. 36.

⁶⁴ IACHR, Report No. 122/18, Case No. 656. Merits (Publication). Marta Lucía Álvarez Giraldo. Colombia. October 5, 2018, para. 184

⁶⁵ Colombia Diversa, “*Muchas veces me canso de ser fuerte*”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia, 2015-2016, p. 56.

⁶⁶ IACHR. On-site visits to Guatemala (July 2017), Honduras (July 2018), and Brazil (November 2018).

⁶⁷ Association for the Prevention of Torture, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide, 2019, p. 94; Ninth annual report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C /57/4, March 22, 2016, para. 65

⁶⁸ Association for the Prevention of Torture, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a Monitoring Guide, 2019, p. 102.

3. Indigenous people⁶⁹

35. In general, the IACHR observes that indigenous people who are deprived of liberty have specific needs – based on their ethnic origin, culture, traditions, religion and language – that are not met in prison.⁷⁰ Therefore, their incarceration has a disproportionate impact in relation to other individuals who are not members of an indigenous people or community, and this is reflected, for example, in the following aspects: (i) impossibility to preserve their cultural identity; (ii) repercussion of incarceration on their community sphere; (iii) greater exposure to discriminatory acts and violence; (iv) greater difficulty to have contact with the exterior, and (v) absence of support of interpreters and translators in their language.

36. Regarding the **repercussion of incarceration on the community sphere**, considering that indigenous people hold both individual and collective rights, any actions that violate their rights within detention centers not only affect them personally, but may also have an impact on their communities.⁷¹ The impact is even greater when those deprived of liberty exercised traditional roles in their communities, in areas such as health, spirituality and politics.

37. In relation to the **preservation of the cultural identity of indigenous people**, the IACHR observes that the absence of institutional actions addressed at the recognition, reinforcement and protection of indigenous cultural and social practices is a common denominator in prison establishments. Thus, prisons are characterized by the following factors: failure to provide places where indigenous people can keep up their traditions, customs and language;⁷² lack of cultural relevance of the medical care provided; prohibition to use cultural or ritual elements; enforced hair cutting; prohibition of access to and use of medicinal plants; absence or limitation of the use of traditional costume, and deprivation of appropriate food.⁷³ This has a significant impact by weakening the identity of indigenous people and encourages processes of uprooting and acculturation without allowing them the possibility of reacting which, in turn, affects their communities and their regions.⁷⁴

38. Regarding **exposure to acts of violence**, the IACHR notes that indigenous people are more likely to be victims of physical and verbal abuse by the prison staff and other individuals deprived of liberty. In this regard, members of indigenous peoples tend to suffer from beatings, humiliating treatment, intolerant comments, and individual and collective

⁶⁹ The deprivation of liberty of members of indigenous peoples may be the result of sentences resulting from ordinary justice, as well as from the administration of their own justice (customary law). As mentioned at the beginning of this document – in “Introduction and purpose,” this request only focuses on the deprivation of liberty of indigenous persons derived from violations of ordinary criminal law and, consequently, in prisons administered by the State.

⁷⁰ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 60

⁷¹ AsiLegal, *El acceso a la justicia de personas indígenas privadas de libertad en los estados de Chiapas y Oaxaca*, 2017, p. 24.

⁷² Instituto Nacional de Derechos Humanos (INDH), *Estudio de las Condiciones Carcelarias en Chile. Diagnóstico del Cumplimiento de los Estándares Internacionales de Derechos Humanos*, 2013, p. 174.

⁷³ Santiago Medina Villarreal *et al.*, *Situación de indígenas privados de libertad en establecimientos carcelarios: propuestas para un pluralismo igualitario*, 2016, pp. 18- 20.

⁷⁴ Santiago Medina Villarreal *et al.*, *Situación de indígenas privados de libertad en establecimientos carcelarios: propuestas para un pluralismo igualitario*, 2016, p. 5.

harassment.⁷⁵ In addition, discrimination based on their ethnic origin is reflected in different prison practices and by greater obstacles to accede to services such as: classification and permanence in institutions with greater security than necessary; inferior quality of the space assigned to them, with unofficial segregation of certain ethnic groups and their distribution in dormitories or cells with less favorable conditions; differentiated review procedures, and limited access to education, health care and prison programs.⁷⁶

39. As for **contact with the exterior**, the IACHR points out that the punishment of deprivation of liberty uproots indigenous prisoners, because it places them in prisons without taking into account the criteria of the connectivity or closeness to their family, or the village or territory to which they belong.⁷⁷ The family is the fundamental basis of indigenous society and of extreme importance for the well-being of the individual. The rupture of family and communities ties and the impossibility of fulfilling certain family obligations may cause special harm to the members of indigenous groups.⁷⁸ In addition, there is an evident lack of opportunities to carry out traditional work-related activities addressed at social reinsertion.⁷⁹

40. The Commission also notes that another problem faced by indigenous people is the **lack of immediate support from interpreters and translators**, which means that they do not have adequate interpretation assistance in disciplinary hearings and during prison activities or rehabilitation programs. Likewise, frequently, there are no copies of the prison rules and regulations in a language they understand, and they are not provided with reading material in their own language.⁸⁰

4. Older persons

41 Through its monitoring mechanisms, the IACHR has identified that difficulties remain to ensure the rights of older persons who are deprived of liberty that could be overcome by the adoption of a differentiated approach to their treatment. These difficulties have a disproportionate impact during their incarceration, and are reflected in the following aspects: (i) negligent medical care; (ii) inadequate accessibility in prisons; (iii) difficulty to preserve family ties; (iv) greater difficulty in social reinsertion, and (v) an inadequate diet for their age and any medical conditions they suffer from.⁸¹

⁷⁵ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 60.

⁷⁶ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series, 2009, pp. 60 - 61.

⁷⁷ For example, in Mexico, indigenous women rarely receive family visits or telephone calls owing to the expense this supposes for poverty stricken communities far from the prisons. Studies have recorded that 24% of indigenous women received only one family visit during the whole year, and have concluded that this neglect prevented their rehabilitation. Inter-American Commission on Women, Women and Drugs in the Americas. A policy working paper, 2014, p. 31. Meanwhile, in Chile, indigenous women from isolated rural areas who are deprived of liberty have very little or no communication with their families. In some of those geographical areas, there is no telephone and there are no specific physical addresses in order to communicate via ordinary mail. Paulina Hernández Badilla, Daniela Lara Escalona, Defensoría Penal Pública, *Protocolo de atención a mujeres indígenas extranjeras privadas de libertad en Chile*, 2015, p. 23.

⁷⁸ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 60.

⁷⁹ In this regard, Santiago Medina Villarreal *et al.*, *Situación de indígenas privados de libertad en establecimientos carcelarios: propuestas para un pluralismo igualitario*, 2016, p. 5.

⁸⁰ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 62. See also, Santiago Medina Villarreal *et al.*, *Situación de indígenas privados de libertad en establecimientos carcelarios: propuestas para un pluralismo igualitario*, 2016, pp. 18-20.

⁸¹ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 127. Prison Voice Washington, Correcting food policy in Washington Prisons: How the DOC Makes Healthy Food Choices impossible for Incarcerated People & What Can be Done, 2016, p. 2.

42. In the area of **health**, unlike younger people, older persons suffer from an increase in age-related illnesses, such as loss of hearing, vision, teeth and balance; decrease in muscle mass, and difficulty to regulate body temperature. This leads to difficulties to masticate food, deal with the different temperatures in prison, and move around.⁸² In this regard, the IACHR has identified a lack of adequate specialized care for the older person. Thus, prisons lack health care programs that respond to the physical and mental conditions of the elder and that are addressed at identifying and treating chronic age-related ailments, such as Alzheimer's disease, senile dementia, hypertension, respiratory diseases, diabetes, cancer, and liver diseases.⁸³ Furthermore, there is a lack of auxiliary medical equipment to help the elderly move around independently, such as walking frames, wheelchairs and canes.⁸⁴ The IACHR has also received information indicating that prisoners are not provided with dental prosthetic devices.⁸⁵ In addition, given the insufficiency of medicines and permanent lack of medical services within prisons, there is an increase in the phenomenon of accelerated aging, which consists in the elder having a mental age 10 to 15 years older than his or her physical age.⁸⁶

43. The IACHR also has information concerning serious deficits in **palliative care and hospice care**⁸⁷ for those with terminal and potentially fatal diseases, or who require long-term care owing to a significant loss of the essential skills to carry out basic activities.⁸⁸ Additionally, cases of elderly people who have not received humane treatment in the final moments before death have been reported.⁸⁹

44. Regarding **physical accessibility**, prisons have been built for a younger population, which means that older persons are unable to move around satisfactorily in

⁸² Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, January 27, 2012, p. 45 and 46; and Ramirez, Telesforo, *Envejeciendo en reclusión: un estudio de caso de los adultos mayores mexicanos en situación de cárcel*. Revista Kairos, Sao Paulo, 2009, p. 167

⁸³ UNODC. Handbook on Prisoners with special needs. Criminal Justice Handbook Series. 2009, p. 127, and Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, January 27, 2012, p. 73. These problems are under-diagnosed and mishandled; 40 to 60% of elderly people deprived of liberty have mental illnesses, but only one in three elderly people has access to treatment. The Osborne Association, *The High Costs of Low Risk: The Crisis of America's Aging Prison Population*, 2018, p. 23.

⁸⁴ CNDH, Mexico, Special report of the National Human Rights Commission on elderly people in prison of the Mexican Republic, September 30, 2017, p. 36. Office of the Ombudsman of the province of Buenos Aires, *Preocupa la situación de adultos mayores en cárceles bonaerenses*, October 25, 2018. See, for example: In Chile a case was reported of an elderly man with terminal cancer who died handcuffed to his hospital bed; "24 horas" *Familia de reo fallecido de Punta Peuco anuncia querrela criminal* [Family of deceased prisoner announces criminal complaint] March 1, 2017.

⁸⁵ Associated Press, Texas Prisons often deny dentures to inmates with no teeth, September 24, 2018.

⁸⁶ The Osborne Association, *The High Costs of Low Risk: The Crisis of America's Aging Prison Population*, 2018, p. 22.

⁸⁷ Hospice care may be offered in the same place or in another institution, and focuses on providing palliative care to those with a life prognosis of six months or less. National Institute on Aging, *What are palliative care and hospice care?*

⁸⁸ Medical staff rely on the corrections officers to identify problems with the elderly, even though they are not trained for this responsibility. Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, January 27, 2012, p. 63.

⁸⁹ Ramirez, Telesforo, *Envejeciendo en reclusión: un estudio de caso de los adultos mayores mexicanos en situación de cárcel*. Revista Kairos, Sao Paulo, 2009, p. 167. See, for example: In Chile a case was reported of an elderly man with terminal cancer who died shackled to his hospital bed; "24 horas" *Familia de reo fallecido de Punta Peuco anuncia querrela criminal* [Family of deceased prisoner announces criminal complaint] March 1, 2017; Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*. January 27, 2012, p. 86.

detention centers.⁹⁰ This relates to the difficulties they face in going up and down stairs, and being able to get into the higher bunks.⁹¹ Also, the overcrowding – characteristic of the region’s prisons – contributes to inadequate classification, location, and distribution of beds, which has a greater effect on the elderly owing to their decreased mobility.⁹²

45. Additionally, regarding **contact with the exterior**, older persons are usually confined in establishments far from their families or that impose visiting restrictions that fail to take into consideration the differentiated impact on them of the absence of stable family ties.⁹³ This is due, above all, to the fact that their closest family members may also be elderly, which increases the difficulties of visiting remote detention centers.⁹⁴ The loss of family ties may have a negative impact on the mental health of older people, resulting in an even greater isolation than that to which they are susceptible, and reducing the prospects of successful reinsertion after their time in prison.⁹⁵

46. Regarding **social reinsertion**, the Commission has observed that there is an absence of programs in this area focused on the elder. Thus, programs to impart information on digital tools and the new technologies, access to schooling after 60 years of age, and a differentiated approach to sports and cultural activities adapted to their abilities and expectations are practically non-existent.⁹⁶

5. Children living in prisons with their mothers⁹⁷

47. Protection of a child’s right to a family in the context of the deprivation of liberty of his or her principal caregiver continues to present a significant challenge for the States in the region. States have responded to this problem in two ways that entail serious harm to the rights of the child, either by keeping children outside or by allowing them to enter the prison accompanying their mothers. The IACHR has indicated that, if children are kept outside, the rupture of protective ties caused by the incarceration of women – who are usually those primarily responsible for childrearing and who are heads of single-parent households – means that their children are exposed to situations of poverty, marginalization and neglect, which

⁹⁰ Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*. January 27, 2012, p. 45. For example, in Mexico, 44% of elderly prisoners are located on the upper floors of prisons, or in upper bunks, and 29% lack access to aids to mobility such as handrails or ramps. CNDH Mexico, *Special report of the National Human Rights Commission on older persons in prison of the Mexican Republic*, September 30, 2017, p. 10.

⁹¹ See, Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*. January 27, 2012, pp 45 and 46.

⁹² International Human Rights Clinic of Harvard Law School. *Del portón para acá se acaban los derechos humanos: injusticia y desigualdad en las cárceles panameñas*, 2008, p. 49.

⁹³ In Colombia, Most women in the Jamundí Prison Complex come from Bogota and owing to the distance, have not been able to see their children for many years or have lost contact with them. Universidad del Rosario, *Adultos mayores privados de la libertad en Colombia*, SERES, Bogota, 2014, p. 200. In this regard, see, Office of the Ombudsman of the province of Buenos Aires, *Reglas de Brasilla y demás tratados internacionales en materia de prisión/reclusión de adultos/as mayores. Medidas morigeradoras de prisión*, 2018, p. 13.

⁹⁴ UNODC. *Handbook on Prisoners with special needs*. Criminal Justice Handbook Series, 2009, p. 128; Universidad del Rosario, *Adultos mayores privados de la libertad en Colombia*, SERES, Bogota, 2014, p. 167.

⁹⁵ UNODC. *Handbook on Prisoners with special needs*. Criminal Justice Handbook Series, 2009, p. 128.

⁹⁶ Ramirez, Telesforo, *Envejeciendo en reclusión: un estudio de caso de los adultos mayores mexiquenses en situación de cárcel*. Revista Kairos, Sao Paulo, 2009, p. 165; Office of the Ombudsman of the province of Buenos Aires, *Preocupa la situación de adultos mayores en cárceles bonaerenses*, October 25, 2018; The Osborne Association, *The High Costs of Low Risk: The Crisis of America’s Aging Prison Population*, 2018, p. 27.

⁹⁷ The IACHR has no information on adolescents living with their mothers in prison, therefore, this analysis is limited to children.

may, in turn, have long-term consequences such as involvement in criminal organizations or even institutionalization.⁹⁸

48. In the case of policies that allow children to remain with their mothers in prison, in light of the unsafe and deplorable conditions of detention that characterize the region's prisons, these children are evidently subjected to an inadequate environment for their development, and one which presents various obstacles to the exercise of their rights. This is because they are exposed to the usual problems of the prison environment, which include overcrowding, inadequate infrastructure, greater exposure to contagious diseases owing to the unhygienic conditions and negligent medical care, and physical and mental abuse due to the punitive regime of those who are detained.⁹⁹ In particular, considering the absence of a differentiated approach based on their age, the problems that children face when they live with their mothers in prison include: (i) obstacles to enjoying family life with their mother; (ii) barriers to community integration and establishing links with the exterior; (iii) inadequate health care, education and nutrition services, and (iv) subjection to entry and permanence procedures that are contrary to their interests.

49. Regarding the harm to the child's **family life**, this is often revealed by the loss of contact with the other parent as a result of the deprivation of liberty that frequently entails the difficulty or impossibility of leaving the center. To this are added obstacles relating to the distance of prisons, which are generally located in remote or inaccessible areas, and the difficulty of making visits. The loss of contact with the other parent and the separation means that, for such children, the only image of a male authority figure is generally that of the police and prison officials.¹⁰⁰ Moreover, according to available information, the child's **community integration and socialization** is impaired because he or she often grows up without any contact with the exterior world, rarely leaves prison, does not live with other children, and even is unaware of objects and surroundings that would be trivial for other children of the same age.¹⁰¹

50. Regarding the **right to health**, the unhealthy environment and the inadequate hygiene that is the general rule in detention centers in which children live with their mothers represent a greater risk that they contract diseases.¹⁰² Also, in general, prisons are characterized by the absence of spaces for medical care and specialized staff that allow children to receive the required pediatric monitoring for their overall development.¹⁰³ Moreover, an issue of equal concern relates to the **inadequate diet** that is usually prevalent in prisons. Thus, in addition to the fact that the diet is standardized for all the children, irrespective of their different ages and physical and biological development, it does not

⁹⁸ See IACHR *Report on Measures Aimed at Reducing the Use of Pre-trial Detention in the Americas*, OEA/Ser.L/V/II.163 Doc. 105, July 3, 2017, para. 201.

⁹⁹ In this regard, see UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition*, 2014, p. 17; UNODC, *Handbook on strategies to reduce overcrowding in prisons*, 2014, pp. 17, 21 and 22, and Corina Giacomello, *Niñas y niños que viven en prisión con sus madres: Una perspectiva jurídica comparada*. Supreme Court of Justice of the Nation, Mexico, p. 142.

¹⁰⁰ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 76.

¹⁰¹ In this regard, see, UNODC, *Handbook on Women and Imprisonment. Criminal Justice Handbook. 2nd Edition*, 2014, p. 17, and Corina Giacomello, *Niñas y niños que viven en prisión con sus madres: Una perspectiva jurídica comparada*. Supreme Court of Justice of the Nation, Mexico, p. 185.

¹⁰² UNODC, *Handbook on strategies to reduce overcrowding in prisons*, 2014, p. 21 and 22.

¹⁰³ Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report "Pathways to, conditions and consequences of incarceration for women." A/68/340, August 21, 2013, para. 56

provide the nutritional value they require for their stage of development.¹⁰⁴

51. In relation to the **right to education**, the IACHR notes that most detention centers in which children reside do not have childcare facilities or an adequate educational structure.¹⁰⁵ Over and above the structural issue, the IACHR has observed that the prison environment does not provide children with access to adequate pre-school and primary education, which means that they do not receive the incentives required for their overall development. Moreover, they are unable to interact with other children of their age, and often have lower levels of education than children who attend school outside the prison.¹⁰⁶

52. Furthermore, regarding the **procedures for admission and permanence of children in prison with their mothers**, the IACHR notes that these do not have uniform standards that should be applied and do not take into consideration the best interests of the child. This is because the respective policies focus on the child's age,¹⁰⁷ fail to establish the procedure to follow or the authority responsible for deciding on the permanence of the child, do not take into account other subjective aspects that are specific to each child, and do not place the child at the center of the decision-making process or the determination of his or her best interests based on the level of maturity and according to the principle of progressive autonomy.¹⁰⁸

IV RULINGS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

53. The differentiated impact of certain situations on groups in a situation of vulnerability or in a special situation of risk has been identified by the Inter-American Court in its case law, as well as in relation to provisional measures. The Court has underscored this differentiated impact with regard to, among others, women, children and adolescents, indigenous and Afro-descendant peoples, LGBTI persons, and people with disabilities. The Court has also referred to the intersectionality that exists between these groups and persons deprived of liberty.

54. In relation to this request for an advisory opinion, the Commission found that, in some of its rulings, the Court had referred to the differentiated impact of specific factual

¹⁰⁴ See, for example, Republic of Panama and UNODC, *Diagnóstico de la Situación de las Mujeres Privadas de Libertad en Panamá desde un enfoque de género y derechos*. Panama, 2015, p. 129.

¹⁰⁵ In this regard, see Corina Giacomello, *Niñas y niños que viven en prisión con sus madres: Una perspectiva jurídica comparada*. Supreme Court of Justice of the Nation, Mexico, p. 124; CELS, Ministerio Público de la Defensa y Procuración Penitenciaria de la Nación, *Las Mujeres en prisión. Los alcances del castigo*. Argentina, Siglo XXI editors, 2011, p. 185, and Martha Noel Rodríguez, "Mujeres madres en prisión en América Central." OHCHR, ILANUD *et al.*, 2005, p. 30.

¹⁰⁶ In this regard, see Julie Ashdown and Mel James, "Women in Detention," article in the International Review of the Red Cross, No. 877, March 2010, p. 18.

¹⁰⁷ For example, the Mexican National Law on Execution of Criminal Sentences allows women to keep the care and custody of their children who are under 3 years of age (Mexico. National Law on Execution of Criminal Sentences, updated to June 16, 2016, article 10, item VI); In Argentina, the maximum age for a child to remain with his or her mother who is deprived of liberty is 4 years (Argentina Law on Execution of the Sentence of Deprivation of Liberty. No. 24,660, June 8, 1995, article 195). In Brazil, the Law on Execution of Criminal Sentences allows children to remain with their mothers up to 6 months of age for breastfeeding, and up to 7 years of age in case of the greater need of the child (Brazil. Law No. 7,210 – Law on Execution of Criminal Sentences. July 11, 1984, arts. 83 and 89.).

¹⁰⁸ In this regard, see, Julie Ashdown and Mel James, "Women in Detention", article in the International Review of the Red Cross, No. 877, March 2010, p. 18; Corina Giacomello, *Niñas y niños que viven en prisión con sus madres: Una perspectiva jurídica comparada*. Supreme Court of Justice of the Nation, Mexico, p. 32, and CELS, Ministerio Público de la Defensa y Procuración Penitenciaria de la Nación, *Las Mujeres en prisión. Los alcances del castigo*. Argentina, Siglo XXI editors, 2011, p. 158.

situations on those who are the subject of this request. In addition, in some cases, it has ruled on the content of certain obligations that entail a differentiated approach to the scope of the obligations that the authorities must comply with to response to such situations.

1. Women who are pregnant, in postpartum period and breastfeeding

55. On November 25, 2006, the Inter-American Court delivered judgment in the case of the *Miguel Castro Castro Prison v. Peru*, relating to the excessive use of force during an operation in this prison that resulted in the death of dozens of those deprived of liberty, and numerous injuries.¹⁰⁹

56. Regarding the treatment that women deprived of liberty should receive, the Court referred to the opinion of the United Nations High Commissioner for Human Rights that pregnant women and women who were breastfeeding and who were detained should be provided with special conditions during their incarceration.¹¹⁰ Also, among “the serious detention conditions” identified by the Court, it indicated the lack of treatment for pre- and post-natal health care needs. The Court considered that “the harm and suffering endured by women in general and especially pregnant women and inmates who are mothers is particularly serious” and “severe incommunicado had particular effects on the inmates who were mothers.”¹¹¹ In addition, it referred to the obligation established by the International Committee of the Red Cross (ICRC) to ensure that the sanitary conditions of detention centers were adequate to maintain the health and hygiene of the prisoners, allowing them to make special arrangements for pregnant women who were detained.¹¹²

57. On February 24, 2011, the Inter-American Court delivered judgment in the case of *Gelman v. Uruguay*, related to the unlawful detention of Marla Claudia García in Argentina, her clandestine transfer to Uruguay, where she gave birth to a girl who was stolen and unlawfully handed over to a family, and the subsequent forced disappearance of María Claudia. All of this occurred in the context of the repressive coordination of Operation Condor during the dictatorships in the Southern Cone.¹¹³

58. The Court established that “the fact that María Claudia Garda was pregnant when she was detained constituted the condition of special vulnerability based on which there was a differentiated harm in her case.” It indicated that the purpose of her unlawful retention and eventual forced disappearance was “the instrumentalization of her body for the birth and breastfeeding of her daughter,” which revealed “a particular conception of a woman’s body that violated her free maternity,” which was even more serious if it was considered “that, in her case, it occurred in a context of disappearances of pregnant women and the unlawful appropriation of their children.”¹¹⁴ The Court qualified these facts as “one of the most serious and reprehensible form of violence against women.”¹¹⁵

¹⁰⁹ I/A Court HR, Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs. Judgment of November 25, 2006. Series C No. 160 (hereinafter “I/A Court HR, Case of the Miguel Castro Castro Prison v. Peru.”).

¹¹⁰ I/A Court HR, Case of the Miguel Castro Castro Prison v. Peru, para. 303.

¹¹¹ I/A Court HR, Case of the Miguel Castro Castro Prison v. Peru, Paras. 319 and 330.

¹¹² I/A Court HR, Case of the Miguel Castro Castro Prison v. Peru, para. 331,

¹¹³ I/A Court HR, Case of Gelman v. Uruguay. Merits and reparations. Judgment of February 24, 2011. Series C No. 221 (hereinafter “I/A Court HR, Case of Gelman v. Uruguay”).

¹¹⁴ I/A Court HR, Case of Gelman v. Uruguay, para. 97.

¹¹⁵ I/A Court HR, Case of Gelman v. Uruguay, para. 97.

59. In addition, in the provisional measures ordered in the *Matter of the Andean Region Prison* with regard to Venezuela, the Court emphasized “the State obligation to take into consideration the special attention that women who are deprived of liberty and who are pregnant or breastfeeding should receive during their detention”¹¹⁶

60. Lastly, in the judgment handed down in the above-mentioned case of the *Miguel Castro Castro Prison v. Peru*, the Court referred briefly to the situation of children detained in detention centers with their mothers or who visit the center, although this was from the perspective of the rights of women in their role as mothers. In this regard, the Court emphasized “the obligation of the State to take into consideration the special attention that women who are mothers should receive, which entails, among other measures, ensuring appropriate visits between mother and child.”¹¹⁷ In addition, the Court referred to the obligation established by the ICRC to make special arrangements for women prisoners accompanied by their children.¹¹⁸

2. LGBT persons

61. Among the provisional measures order in the *Matter of the Curado Prison Complex* with regard to Brazil, the Inter-American Court emphasized in its 2015 order “the State’s duty of protection vis-à-vis known situations of discrimination and risk” against LGBT persons and the particular urgency of taking all available measures to protect and ensure the enjoyment of the right to life and to personal integrity of these persons. The Court also took note of the “creation of a special space for LGBT persons to meet together.”¹¹⁹

62. In its 2016 order on the same matter, the Court referred to the provisions of the Handbook on Prisoners with Special Needs of the United Nations Office on Drugs and Crime (UNODC). In this regard, the Court established the following:¹²⁰

LGBT persons deprived of liberty should not be kept in cells with other prisoners who could endanger their lives. Those detained should be assured that their location avoids their marginalization, and also medical care and conjugal visits. That document also defines that prison staff should be duly trained to attend LGBT persons [...] Based on all the above and, in particular, the special vulnerability of LGBT prisoners to suffer physical and mental attacks in the Curado Prison Complex (including collective rape, discrimination, restriction of freedom of movement), the Court orders the State to adopt the necessary measures to guarantee the effective protection of the LGBT population deprived of liberty in this prison and to make the necessary structural changes to ensure their safety. Lastly the State must guarantee conjugal visit to the LGBT population [...].

63. Subsequently, in its 2017 order, the Court expressed its concern owing to the absence of concrete measures to protect the LGBT population deprived of liberty and reiterated their situation of vulnerability to suffer, among other matters, physical and mental attacks. In addition, the Court again referred to the UNODC Manual and indicated, in

¹¹⁶ I/A Court HR. *Matter of the Andean Region Prison* with regard to Venezuela. Request for provisional measures. Order of the Inter-American Court of Human Rights of September 6, 2012, para. 14.

¹¹⁷ I/A Court HR, *Case of the Miguel Castro Castro Prison v. Peru*, para. 330.

¹¹⁸ I/A Court HR, *Case of the Miguel Castro Castro Prison v. Peru* para. 331

¹¹⁹ I/A Court HR. *Matter of the Curado Prison Complex* with regard to Brazil, Provisional measures. Order of the Inter-American Court of Human Rights of October 7, 2015, para. 37

¹²⁰ I/A Court HR. *Matter of the Curado Prison Complex* with regard to Brazil, Provisional measures. Order of the Inter-American Court of Human Rights of November 23, 2017, paras. 57 and 58,

particular, that LGBT persons should not share cells with other inmates who signified a risk for their safety; that they should be ensured medical care and conjugal visits, and that prison staff should be duly trained to attend LGBT persons.¹²¹

64. Meanwhile, in the provisional measure in the matter of the *Placido de Sa Carvalho Penal Institute* with regard to Brazil, the Inter-American Court noted “with concern the information provided by the State that the Institute did not possess a separate wing for LGBTI persons.”¹²²

3. Indigenous people

65. On May 29, 2014 the Inter-American Court delivered its judgment in the case of *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, which related to the sentencing of three traditional authorities of the Mapuche Indigenous People, four members of the Mapuche people and one activist as authors of crimes classified as terrorism for claiming the rights of this people in the course of events that took place in 2001 and 2002.¹²³

66. In this case, the Court concluded that the adoption and maintaining of pre-trial detention was arbitrary and added that the decision had not taken into account “the condition of seven of the presumed victims as members of an indigenous people and, in particular, the position as traditional authorities of Norín Catrimán and Pichún Paillalao as Lonkos, and Ancalaf Llaupe as Werken, of their respective communities.”¹²⁴ In this regard, it also established that:¹²⁵

The States, to ensure the rights recognized in Article 7 of the Convention, in relation to Article 1(1) thereof, when interpreting and applying domestic law, must take into consideration the inherent characteristics that differentiate the members of the indigenous peoples from the general population and that comprise their cultural identity. Prolonged pre-trial detention may affect members of indigenous peoples in a different way owing to their economic, social and cultural characteristics that, in the case of leaders of the community, may also have negative consequences on the values, customs and traditions of the community or communities in which they exercise their leadership.

67. Meanwhile, regarding the deprivation of liberty of Ancalaf Llaupe more than 250 kms from his community and his family, the Court established that the State had violated the right to protection of the family. Referring to the State’s duty to facilitate, insofar possible, the transfer of those deprived of liberty to the prisons nearest to the place where their family resides, the Court established that in “the case of indigenous people deprived of liberty, the adoption of this measure is especially important in light of the significance of their connection with their place of origin and their communities.”¹²⁶

¹²¹ I/A Court HR. Matter of the Curado Prison Complex with regard to Brazil. Provisional measures. Order of the Inter-American Court of Human Rights of November 23, 2017, paras. 102 and 103.

¹²² I/A Court HR. Matter of the Placido de Sa Carvalho Penal Institute with regard to Brazil. Provisional measures. Order of the Inter-American Court of Human Rights of November 22, 2018, para. 66

¹²³ I/A Court HR. *Norin Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, Merits, reparations and costs. Judgment of May 29, 2014. Series C No. 279 (hereinafter “I/A Court HR. *Norin Catrimán et al. v. Chile*”).

¹²⁴ I/A Court HR. *Norin Catrimán et al. v. Chile*, para. 357.

¹²⁵ I/A Court HR. *Norin Catrimán et al. v. Chile*, para. 357.

¹²⁶ I/A Court HR. *Norin Catrimán et al. v. Chile*, para. 408.

68. On February 1, 2006, the Inter-American Court delivered its judgment in the case of *López Álvarez v. Honduras*,¹²⁷ on the arbitrary and unlawful detention of Alfredo López Álvarez, a member of the Garifuna community and of the Confederation of Indigenous Peoples, his detention conditions and the lack of due process to contest this situation. In this judgment, the Court referred to the prohibition of the Garifuna population of the Tela Detention Center where Mr. López Álvarez was detained from speaking their own language, a measure that the State had not justified.

69. In this regard, the Court established that this prohibition “harmed the individuality of the detainee and did not respond to safety conditions or necessary treatment.”¹²⁸ The Court considered that “observance of rules in the collective treatment of detainees within a prison does not grant the State, in exercise of its punitive powers, the authority to restrict, without justification, the liberty of people to express themselves in any way or in any language they choose.”¹²⁹ In this specific case, the Court established that the prohibition to speak his own language was especially serious because it represented “an element of the identity of Alfredo López Álvarez as a Garifuna.” Therefore, “the prohibition impaired his personal dignity as a member of this community.”¹³⁰ Accordingly, it determined that States “should take into consideration the factors that differentiate members of indigenous peoples from the general population and that comprise their cultural identity,” and that their language is “one of the most important elements of a people’s identity, precisely because it guarantees the expression, dissemination and transmission of their culture.”¹³¹

70. The Court concluded that “the restriction of the exercise of the freedom to speak Garifuna applied to some prisoner in the Tela Detention Center discriminated against Alfredo López Álvarez, as a member of the Garifuna community,” and this was incompatible with the rights established in Articles 13 and 24 of the Convention in relation to its Article 1(1).

4. Older persons

71. In its order of November 22, 2018, regarding the provisional measure relating to the *Placido de Sa Carvalho Penal Institute* with regard to Brazil, the Inter-American Court noted “with concern, the information provided by the State that the Institute does not possess a separate wing for the elderly.”¹³²

¹²⁷ I/A Court HR. Case of *López Álvarez v. Honduras*. Merits, reparations and costs. Judgment of February 1, 2006. Series C No. 141 (hereinafter “I/A Court HR. Case of *López Álvarez v. Honduras*”). Although the Garifuna community is a differentiated ethnic group, resulting from the syncretism of the Afro-descendant community with the indigenous community, the Commission has considered the situation of the Garifuna community of Central America and the Caribbean from the perspective of the standards applicable to indigenous peoples. In addition, the IACHR has highlighted that the Honduran Garifuna people has asserted its rights in Honduras as an indigenous people and has established that it is protected by ILO Convention 169. IACHR, Rights of Indigenous and Tribal Peoples to their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II, December 31, 2015, para. 81 and IACHR, Indigenous Peoples, Afro-descendant communities and natural resources, OEA/Ser.L/V/II. December 31, 2015 para. 28.

¹²⁸ I/A Court HR. Case of *López Álvarez v. Honduras*, para. 166

¹²⁹ I/A Court HR. Case of *López Álvarez v. Honduras*, para. 168.

¹³⁰ I/A Court HR. Case of *López Álvarez v. Honduras*, para. 169

¹³¹ I/A Court HR. Case of *López Álvarez v. Honduras*, para. 171

¹³² I/A Court HR. Matter of the *Placido de Sa Carvalho Penal Institute* with regard to Brazil. Provisional measures. Order of the Inter-American Court of Human Rights of November 22, 2018, para. 66

V. CONCLUSIONS AND SPECIFIC QUESTIONS

72. As noted, regarding the differentiated approaches that the State obligations should take into consideration in relation to the groups of persons who are the subject of this request, the Court has referred to matters of an isolated nature when determining the corresponding State responsibility in a case or the situation of risk involved when issuing provisional measures. However, **it has still not made a more comprehensive interpretation of the obligations based on the American Convention and treaties for which the Court has jurisdiction that would permit “the OAS Members States and organs to comply fully and effectively with their international obligations in this regard and define and develop public human rights policies,”** a premise regarding which the Court has found a request for an advisory opinion admissible on previous occasions.¹³³

73. Thus, the Commission understands that, with regard to indigenous peoples, the Court has referred, basically, to: (i) the special importance of the obligation to transfer them to the detention centers nearest to the place of residence of their family, given the importance of their connection with their place of origin and their communities; (ii) regarding the duration of pre-trial detention, the need to take into consideration the inherent characteristics that differentiate members of indigenous peoples taking into account that the prolonged duration of such detention may result in a differentiated harm and a negative impact on the community in which they exercise their leadership, and (iii) the unjustified prohibition to speak their own language in a detention center which is especially harmful in the case of indigenous people because their language is an element of their cultural identity that differentiates them from the general population. Despite this, in general, the Court has not developed other components that would allow the States to provide a comprehensive response that respects and ensures their rights, based on the preservation of their cultural identity, and their traditional customs and practices within a prison.

74. In the case of women deprived of liberty who are pregnant, in postpartum period and breastfeeding, although the Court’s case law has referred, in general, to the need for special and appropriate detention conditions and special arrangements, it has not specified what this differentiated treatment consists of, or what the specific obligations of the States are in this regard. In relation to LGBT persons deprived of liberty, in the context of its provisional measures, the Court has referred, in general, to the duty to prevent violence and avoid marginalization and the need to provide adequate medical care, and to allow conjugal visits.

75. However, it is still necessary to develop jurisprudential standards with regard to the differentiated approach that States should take with regard to older persons who are deprived of liberty, as well as to children who live in detention centers with their mothers. In the case of this last group, it is necessary to establish standards in order to determine the

¹³³ I/A Court HR. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1 of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para.22; I/A Court HR The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the right to life and to personal integrity (interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 24.

most favorable options, focusing the analysis on the special needs of children who are full subjects of rights and taking into account the best interest of the child.

76. Lastly, the Commission observes that, when analyzing the content of Article 24 of the Convention, in the case of *López Alvarado*, the Inter-American Court indicated that “the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that States must refrain from producing regulations that are discriminatory or that have discriminatory effects on certain groups of the population when exercising their rights,” and States must also “combat discriminatory practices and adopt the measures needed to ensure the right to equal protection before the law for everyone.”¹³⁴ Based on this understanding, the Commission considers that, in order to determine the scope of the differentiated or special obligations of the States, it is pertinent to examine closely the relationship between their observance with the principle of equality and non-discrimination with regard to the persons deprived of liberty that are the subject of this request.

77. Consequently, based on the diagnosis of the situation made previously under its monitoring functions, the Commission considers that it is essential to have an interpretation by the Court that examines further and develops, in light of the inter-American provisions, the more specific obligations that the States have in this matter in order to help them provide an effective and more comprehensive response to protect these persons, in equal conditions to the rest of the prison population. And this, taking into account the differentiated approach that should exist for the special situation of risk that these persons face in a context of deprivation of liberty and the State’s duty as guarantor of all those in its custody

78. The Inter-American Commission, therefore, poses the following questions:

A. General:

1. Regarding the protection of the rights of persons in a special situation of vulnerability such as women who are pregnant, postpartum and breastfeeding; LGBT persons; indigenous people; older persons, and children living in detention centers with their mothers: Is it possible to justify, based on Articles 24 and 1(1) of the Convention, the need to adopt differentiated approaches or measures to guarantee that their specific circumstances do not affect the equality of their conditions with the other persons deprived of liberty, as regards both their detention conditions, and the remedies filed to protect their rights in the context of the deprivation of liberty? If so, what are the specific implications of the content of the rights established in these articles on the scope of the correlative obligations of the States in this matter?

B. Regarding women deprived of liberty who are pregnant, in postpartum period and breastfeeding

In light of Articles 1(1), 4(1), 5, 11(2), 13, 17(1) and 24 of the American Convention on Human Rights, Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and other applicable inter-American instruments:

What specific obligations do the States have to guarantee that women deprived of

¹³⁴ I/A Court HR, *Caso López Álvarez v. Honduras*, para. 170.

liberty who are pregnant, postpartum and breastfeeding have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific obligations do the States have as regards to diet, clothing and access to medical and psychological care?
2. What are the minimum conditions that the State should guarantee during labor and while giving birth?
3. What safety measures should States take when transferring pregnant women that are compatible with their special needs?
4. In the context of deprivation of liberty, what is the scope of the right of access to information for women who are pregnant, postpartum and breastfeeding, as regards information on their special condition?

In cases of women deprived of liberty with very young children outside the prison: What specific measure should the States adopt to ensure that mother and child maintain a close connection in accordance with their special needs?

C. Regarding LGBT persons

In light of Articles 1(1), 4(1), 5, 11(2), 13, 17(1) and 24 of the American Convention on Human Rights, Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and other applicable inter-American instruments:

What specific obligation do the States have to guarantee that LGBT persons have adequate detention conditions in light of their particular circumstances? In particular:

1. How should States take into account the gender identity with which a person identifies himself or herself when determining the unit where they should be placed?
2. What specific obligations do States have to prevent any act of violence against LGBT persons deprived of liberty that do not involve segregation from the rest of the prison population?
3. What are the special obligations that States have with regard to the particular medical needs of transgender persons deprived of liberty and, in particular, if applicable, with regard to those who wish to begin or continue their transition process?
4. What special measures should States adopt to ensure the right to intimate visits of LGBT persons?
5. What particular obligations have States with regard to recording different types of violence against LGBT persons deprived of liberty?

D. Regarding indigenous people

In light of Articles 1(1), 4(1), 5, 12, 13 and 24 of the American Convention on Human Rights, and other applicable inter-American instruments:

What specific obligations do States have to guarantee that indigenous people have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their

- customs, traditions and diet?
2. What are the duties of the State in relation to medical care for indigenous people deprived of liberty, in particular with regard to their medicinal practices and traditional medicines?
 3. What special measures must States adopt in relation to the activities or programs implemented within prisons, as well as in disciplinary hearings, in light of the cultural and linguistic particularities of indigenous people?
 4. What special obligations do States have to prevent any act of violence with regard to indigenous people deprived of liberty?

E. Regarding older persons

In light of Articles 1(1), 4(1), 5, 17(1) and 24 of the American Convention on Human Rights, the provisions of the Inter-American Convention on Protecting the Human Rights of Older Persons, and other applicable inter-American instruments:

What specific obligations do States have to guarantee that older persons have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific measures should States take to ensure the right to accessibility and personal mobility in detention centers for older persons deprived of liberty?
2. What are the State obligations with regard to medical and psychological care for older persons deprived of liberty? In particular, what are the duties of the State in relation to any palliative care that such persons may require?
3. What measures should the States adopt to ensure that older persons deprived of liberty have contact with their family outside the prison?
4. What are the States' specific duties to guarantee full social reinsertion to older persons?

F. Regarding children living in detention centers with their mothers

In light of Articles 1(1), 4(1), 5, 17(1), 19 and 24 of the American Convention on Human Rights, and other applicable inter-American instruments, and the best interest of the child:

What are the specific obligation of the States to guarantee the rights of children living in prison with their mothers in light of their particular circumstances? In particular:

1. What specific measures should States take to ensure the right to family life of the child, including contact with the other parent?
2. What obligations does the State have with regard to access to the right to health and food of children living in detention centers with their mothers?
3. What are the State obligations to ensure the adequate development of children living in detention centers with their mothers, including the obligation relating to community integration, socialization, education and recreation?