



**Advisory Opinion of the Inter-American Court of Human Rights on  
“Differentiated Approaches to Persons Deprived of Liberty”, under  
Article 64(1) of the American Convention on Human Rights.**

The Office of the Special Representative of the Secretary-General on Violence against Children would like to thank the Inter-American Court of Human Rights for the opportunity of contributing to the drafting process of its Advisory Opinion on “Differentiated Approaches to Persons Deprived of Liberty”.

The Advisory Opinion represents an extraordinary opportunity to enhance awareness and strengthen the safeguard of the human rights of one of the most vulnerable groups of children such children living with their parents or primary caregivers in prisons.

The Office of the SRSG VAC would like to submit to the attention of the Inter-American Court of Human Rights the following relevant child rights dimensions:

1. The Advisory Opinion of the IACHR shall consider key international standards in this domain including:
  - a. Convention on the Rights of the Child
  - b. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders<sup>1</sup>
  - c. The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo rules) 1990, specifically 8(2)

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<sup>1</sup> [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf)

- d. General Comment 1 (article 30 of the African Charter on the Rights and Welfare of the Child) on Children of incarcerated and imprisoned parents and primary caregivers.
2. The **Global Study on Children Deprived of Liberty**<sup>2</sup> includes a specific chapter addressing the safeguard of children living in prisons with their primary caregivers. (see Chapter 10). This chapter compiles good practices and examples on the safeguard of children living with their parents and caregivers in prisons.
3. **Integration of a child rights approach into the penitentiary system.** The Advisory Opinion is a crucial opportunity to highlight the urgency of integrating a child rights approach into the penitentiary system. It should establish requirements to ensure that all decisions are guided by the principles of the best interest of the child, nondiscrimination, development and mental well-being, participation of children and the principle of doing no harm. The Special Representative has given special attention to this issue in her publications addressing child rights and the penitentiary system.<sup>3</sup>
4. The request submitted by the Inter American Commission on Human Rights explicitly seeks for guidance in relation to children who live with their mothers in prison. However, it is important to stress that there are children living in prisons with their fathers as well. For example, in the Americas this is allowed in Bolivia. Therefore, the Advisory opinion shall consider addressing the situation of ***children living with their parents and primary caregivers in prisons*** – not only those living with their mothers in prisons-.

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<sup>2</sup> <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>

<sup>3</sup> Children speak about the impact of deprivation of Liberty: the case of Latin America  
[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children\\_speak\\_about\\_deprivation\\_of\\_liberty.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children_speak_about_deprivation_of_liberty.pdf)

Booklet “Aportes para integrar el enfoque de derechos de la niñez en el sistema penitenciario”

[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children\\_declarations/child\\_participation/aportesparaintegrarelfoquedederechosdelaninezenelsistemapenitenciario.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children_declarations/child_participation/aportesparaintegrarelfoquedederechosdelaninezenelsistemapenitenciario.pdf)

Booklet “Por sus derechos. Human rights of children with a mother, father or a caregiver deprived of liberty”.  
[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children\\_declarations/child\\_participation/file\\_operadores4.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/children_declarations/child_participation/file_operadores4.pdf)

5. **A child's right to a family.** As the United Nations Committee on the Rights of the Child<sup>4</sup> has stated "every child has the right to stay and grow up with his/her parent(s). Furthermore, a child has the fundamental right to grow up in a family and social environment conducive to his/her development. Decisions in relation to a child with a parent or caregiver in prison should always be made on an individual basis and with due consideration to the best interests of the child(ren) affected."
6. **Child rights assessments.** It is essential to ensure a child rights based individual assessment before, during and after decisions related to children living in prison with their parents and caregivers. This assessment should ensure the best decision based on the best interest of the child reducing to the minimum the impact of separation from the caregiver and the impact of living in detention facilities and in prisons.
7. **Life cycle approach.** The United Nations Committee on the Rights of the Child has kept the issue of early childhood development high on its agenda and has underlined that "babies and young children are at higher risk due to the immaturity of their developing brain and their complete dependency on adults." The first three years of life represent the time when the brain develops faster and is more easily affected by external experiences leading to childhood trauma. This is a time of opportunities to support a person's full capacity that will impact society's development and therefore, children must live with their parents or caregivers and when this must happen in prisons special measures should be taken to respond to their special needs during early childhood.
8. **Non-custodial measures.** Ensure legal availability of non-custodial measures for caregivers in conflict with the law, including specific emphasis on the needs of minority groups and foreign nationals. Non-custodial measures should be prioritized when considering possible sentences or pre-trial measures, in situations where

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<https://ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf> paragraphe 10

detention would negatively affect the rights of the incarcerated person's child(ren). Due consideration should be given to all possible alternatives, such as living with other family members or community-based initiatives, prior to placing a child in a detention facility with his/her parent. Such alternatives should be rigorously assessed on an individual basis and in accordance with the Guidelines for the Alternative Care of Children, while considering the best interests of the child, as institutionalized care might not always be a suitable alternative for children.

9. **Migrant children and their families.** The Global Study on Children Deprived of Liberty and the Joint General Comments 22 and 23 of the Committee on the Rights of the Child established that detention of children for migration-related reasons must always be prohibited – it is never in the best interests of the child nor considered a measure of last resort. States must expeditiously cease the immigration detention of migrant children and adopt alternatives to detention fulfilling the best interests of the child. Detention of children based on either their or their parents' migration status, or due to the lack of documentation, is never in the best interests of the child and constitutes a clear child rights violation.
10. **Special measures for children living with their parents and caregivers in prisons.** When it is in the best interest of the child to live with their parents or primary caregivers in prison, at minimum health care, education, food, protection and playgrounds, should be provided to children. This includes early childhood education. Parents and caregivers should have access to adequate support to practice positive parenting. The child's contact with other parents and relatives outside prison should also be supported.
11. **Child participation.** All measures that affect children should take into account children's views and experiences according to their age and maturity.

12. **Gender dimension.** States must integrate a gender approach into the penitentiary system that ensure adequate conditions during pregnancy, birth delivery, breastfeeding/nursing.
13. **Ensure reliable statistical data** on children living with their primary caregivers in prisons.
14. Provide **mandatory training on human rights, gender and child rights** should be provided to all staff working in prisons. Training and awareness raising on child rights should also include judges and staff working on the criminal justice system.
15. Ensure efficient **coordination between the national child protection system and the penitentiary system** regarding children living with their primary caregivers in prisons.
16. Regular assessment of the child's situation should be conducted.
17. Establish autonomous and **independent oversight, inspection and monitoring mechanisms** to ensure that detention facilities and prisons in which children are live with their parents and caregivers inspected by autonomous and independent monitoring mechanisms to prevent and address any incident of violence, such as national human rights institutions, ombudspersons or inspecting judges. Visits must be carried out in accordance with the principle of confidentiality to protect children and their caregivers from harassment or reprisals and also include an option for unannounced visits.
18. States should also **ensure accountability** for violations of children's rights living with their parents and caregivers in prisons.
19. When according to their age children should leave their incarcerated caregiver, States must establish protocols and clear procedures to **ensure adequate preparation for the transition and separation of the child from the caregiver.** States should also ensure that

children who leave their incarcerated parents keep relationships after their exit (through visits, phones, child friendly spaces).