

**WRITTEN OBSERVATIONS OF LAW**

**FOR THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**SUBMITTED BY**

**Impact Litigation Project of the Center for Human Rights and Humanitarian Law at  
American University Washington College of Law**

with regard to

**“Differentiated Obligations that the Principle of Equality and Non-discrimination Imposes on the  
States in the Context of Deprivation of Liberty”**

Pursuant to Article 73(3) of the  
Rules of Procedure of the Inter-American Court of Human Rights  
Washington, D.C. | 14 of January 2020

## Table of Contents

I.	Presentation of the Request	6
A.	Information about the Impact Litigation Project at American University Washington College of Law	6
B.	Interest in Submitting Legal Opinion	6
II.	Pregnant, Postpartum, and Breastfeeding Women subject to custody should be treated as a special group with specific needs	9
1.	International Human Rights Standards	11
a)	There is an international consensus towards the use of alternative measures to pretrial detention and prison sentences	14
b)	Pregnant and breastfeeding women need access to specific health care and nutritional services and food while custody	15
2.	Comparative Examples of Standards and Good Practices: Europe	19
III.	States must prohibit the use of restraints on pregnant women, especially during medical visits and during labor	20
1.	International Human Rights Standards	22
2.	Comparative Examples of Standards and Best Practices	23
a)	Europe	23
b)	United States	24
IV.	In the case of primary caregivers, States must use deprivation of liberty as a measure of last resort and must adopt policies related to children living with their parents while in custody based on the best interest of the child.	26
1.	International Human Rights Standards	27
2.	Comparative Examples of Standards and Best Practices	30
a)	Europe	30
b)	Africa	32
V.	Recommendations	34

## ABBREVIATIONS

*The following abbreviations are used in these observations:*

Commission, or IACHR	Inter-American Commission on Human Rights
Court, or IACtHR	Inter-American Court of Human Rights
OAS	Organization of American States
Mandela Rules	The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)
Bangkok Rules	United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women

CEDAW Committee

Committee on the Elimination of  
Discrimination against Women

ICESCR

International Covenant on Economic, Social  
and Cultural Rights

CESCR

Committee on Economic, Social and Cultural  
Rights

ICCPR

International Covenant on Civil and Political  
Rights

Protocol of San Salvador

Additional Protocol to the American  
Convention on Human Rights in the Area of  
Economic, Social and Cultural Rights

CRC

Convention on the Rights of the Child

Belém do Pará Convention

The Inter-American Convention on the  
Prevention, Punishment, and Eradication of  
Violence against Women

ACHR, Pact of San Jose

American Convention on Human Rights

## I. Presentation of the Request

### A. *Information about the Impact Litigation Project at American University Washington College of Law*

#### *Institution*

The Impact Litigation Project (ILP) is part of the Center for Human Rights & Humanitarian Law (CHRHL) at American University Washington College of Law (WCL). The Acting Dean of American University Washington College of Law is Professor Robert Dinerstein. The CHRHL is directed by Professor Macarena Sáez, and the Impact Litigation Project's Assistant Director is Ms. Katherine Holcombe. For information about the CHRHL, visit <https://www.wcl.american.edu/humright/center/>.

### B. *Interest in Submitting Legal Opinion*

The Impact Litigation Project of the CHRHL at American University Washington College of Law respectfully requests that this brief be admitted by the Inter-American Court of Human Rights ("IACtHR" or "Court"). This brief is submitted to the Court as a legal opinion on States' obligations to protect the human rights of persons deprived of liberty. This brief particularly focuses on the rights of pregnant, postpartum, and breastfeeding women, and children living in detention with their mothers.

The ILP seeks to promote the rule of law and democracy and works to strengthen the development of jurisprudence and international standards on human rights. As a project sponsored by an academic institution, ILP maintains a level of objective analysis that is conducive to promoting human rights in legal systems throughout the world. ILP has a substantial interest in the issues addressed in this brief, and these issues aptly fall within the realm of ILP's expertise. Specifically, ILP has a substantial interest in the promotion of rights that affect vulnerable individuals deprived of liberty.

On November 25, 2019 the Inter-American Commission on Human Rights (IACHR) submitted a request to the Court for an advisory opinion on the differentiated obligations that the principle of equality and non-discrimination imposes on States in the context of the deprivation of liberty. The Commission identified groups that were of particular risk for human rights violations: women who are pregnant, or postpartum and breastfeeding; LGBT persons; indigenous people; older persons; and children living in prison with their mothers. The scope of the request is limited to adults involved within the criminal justice system, to the extent that they are

imprisoned pursuant to the order of a judicial authority or due to a presumption that they were involved in the perpetration of a violation of the law.

Treatment of these identified groups is guided by the provisions of the *Principles and Good Practices on the Protection of Persons Deprived of Liberty in the Americas*. Every person deprived of liberty under the jurisdiction of the Court has the right to receive humane treatment with unrestricted respect for their inherent dignity and their fundamental rights. They further have the right to access judicial guarantees essential to protect their rights and freedoms.

Between 2000 and 2017, the number of women and girls in prison worldwide increased by approximately 53 percent.<sup>1</sup> In Guatemala, the number of women and girls in prison increased by over 500 percent.<sup>2</sup> This increase was similar in Brazil at 550 percent, and in El Salvador at over 1000 percent.<sup>3</sup> Research indicates that female offenders are often incarcerated for non-violent crimes.<sup>4</sup> The steady increase in the number of women in prison in Latin America has correlated with an increase in greater penalties and prosecution for drug offenses.<sup>5</sup> Female prisoners incarcerated for drug offenses make up about seventy-five to eighty percent of female prisoners in Ecuador, seventy percent in Argentina, and seventy-five to eighty percent in federal prisons in Mexico.<sup>6</sup> Studies show that between seventy and eighty percent of incarcerated women in Latin America are mothers and a high percentage of them are single heads of households.<sup>7</sup> Women in prison tend to be poorer than incarcerated men, and larger percentages of women were without income at the moment they committed their crime.<sup>8</sup> Data shows that it is impossible to treat incarcerated women as individuals with no dependents when most of them tend to be primary

---

<sup>1</sup> World Prison Brief, World Female Imprisonment List, *Women and girls in penal institutions, including pre-trial detainees/remand prisoners*, 4th ed. (2017)  
[https://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_female\\_prison\\_4th\\_edn\\_v4\\_web.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf)  
(last accessed 2 November 2020).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Coletta A. Youngers, Teresa Garcia Castro, and Maria (Kiki) Manzur, *Report: Women Behind Bars for Drug Offenses in Latin America*, Washington Office for Latin America, Nov 2020, 5; Ana Safranoff and Antonella Tiravassi, *Incarcerated Women in Latin America: Characteristics and Risk Factors Associated with Criminal Behavior*; Inter-American Development Bank, April 2018, 7,  
<https://publications.iadb.org/publications/english/document/Incarcerated-Women-in-Latin-America-Characteristics-and-Risk-Factors-Associated-with-Criminal-Behavior.pdf> (last accessed 2 November 2020).

<sup>5</sup> International Drug Policy Consortium, *Women, drug offenses and penitentiary systems in Latin America*, October 2013, 1. [http://fileserv.idpc.net/library/IDPC-Briefing-Paper\\_Women-in-Latin-America\\_ENGLISH.pdf](http://fileserv.idpc.net/library/IDPC-Briefing-Paper_Women-in-Latin-America_ENGLISH.pdf) (last accessed 2 November 2020).

<sup>6</sup> Ibid.

<sup>7</sup> Ana Safranoff & Antonella Tiravassi, *¿Quiénes son las mujeres que están en prisión en América Latina? Características y desigualdades de género*, Documento de Trabajo Nro. 002, Universidad Nacional de Tres de Febrero, December 2017, 7.

<sup>8</sup> Ibid.

caregivers.<sup>9</sup> On the contrary, the specific socio-economic context of incarcerated pregnant women and mothers shows that the realization of the right to equality, health, and family, as well as the protection of children whose mothers are deprived of liberty requires special treatment of this particular group of women.

According to a report by the Equal Justice Initiative, the number of incarcerated women in the United States increased more than 750 percent between 1980 and 2017.<sup>10</sup> This is a rate of growth twice as high as that of men.<sup>11</sup> Today, there are more than 225,000 imprisoned women.<sup>12</sup> The United States has the highest incarceration rate of women in the world.<sup>13</sup> Approximately 112,000 women are in federal and state prisons and another 110,000 in jails.<sup>14</sup> Only fifteen percent of incarcerated women are in federal prisons where they are protected by the new federal prohibition on using restraints.<sup>15</sup> Four percent of state and three percent of federal inmates said they were pregnant at the time of admission.<sup>16</sup> The majority of women are incarcerated for non-violent offenses, while the prevalence of incarceration disproportionately affects Black women, who are almost twice as likely to be incarcerated as white women.<sup>17</sup>

This intervention provides a legal analysis about the differentiated treatment that States must afford to pregnant, breastfeeding and postpartum women with regards to:

- The obligation to use alternatives to deprivation of liberty;
- The obligation to cover their medical and nutritional needs while in custody;
- The prohibition of shackling or placing other restraints while in custody; and
- The obligation to use the best interest of the child as the guiding principle when deciding on pretrial detention and sentencing of primary caregivers, as well as in relation to when and under what conditions children will be allowed to stay with their mothers in custody.

This brief also provides some comparative insights of standards and best practices that can assist the Court in its analysis.

---

<sup>9</sup> Youngers, Castro, and Manzur state that 87% of women in prison for drug related offenses are primary caregivers. See, *supra* note 4 at 5.

<sup>10</sup> Equal Justice Initiative, *Shackling of Pregnant Women in Jails and Prisons Continues* (2020). <https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues/>.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Maruschak, L. M., Berfzosky, M., & Unangst, J. (2015). *Medical problems of state and federal prisoners and jail inmates*, 2011–12 (NCJ 248491). Washington, DC: U.S. Department of Justice.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*



This legal opinion was drafted by AUWCL students Corrin Chow, Adela Gardavska, Aisha Green, Lauren LaVare, and Janice Lopez under the supervision of Professor Macarena Sáez.

## **II. Pregnant, Postpartum, and Breastfeeding Women subject to custody should be treated as a special group with specific needs**

Research has shown that women deprived of liberty in South America suffer from health problems related to their socioeconomic status, pre-prison experiences, and the exacerbation of preexisting health issues.<sup>18</sup> It also found that they suffer from inadequate hygienic conditions, lack of access to food, and violence from prison staff.<sup>19</sup> These conditions are exacerbated in the case of pregnant women who need specific health care services and access to appropriate nutrition plans. These are usually unavailable in the region.<sup>20</sup> In terms of hygiene, women experience a scarcity of showers, bathrooms, hot water, and basic personal hygiene items.<sup>21</sup> These conditions affect all women but become even more dangerous in the case of pregnant and breastfeeding women.

Women in prison also suffer from serious mental health issues.<sup>22</sup> In particular, women separated from their children tend to experience increased levels of anxiety.<sup>23</sup> Women who have recently given birth are also more susceptible to depression and need an environment conducive to bonding with their infant child and breastfeeding.<sup>24</sup> In many situations, women are not offered the privacy and comfort they need to breastfeed their infants, even though WHO and UNICEF strongly support breastfeeding as the exclusive method to feed newborns and infants for the first six months of life.<sup>25</sup> Amnesty International also reported that incarcerated women do not receive the appropriate medical service during birth, and are therefore forced to give birth in prison without any medical assistance.<sup>26</sup>

---

<sup>18</sup> CEJIL, *Women in Prison - Regional Report: Argentina, Bolivia, Chile, Paraguay, Uruguay* (2007) [https://www.cejil.org/sites/default/files/legacy\\_files/women\\_in\\_prison\\_0.pdf](https://www.cejil.org/sites/default/files/legacy_files/women_in_prison_0.pdf).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> United Nations Office of Drugs and Crime, *Women's Health in Prison: correcting gender inequity in prison health*, EUR/09/5086974 (2009), [https://www.unodc.org/documents/hiv-aids/WHO\\_EURO\\_UNODC\\_2009\\_Womens\\_health\\_in\\_prison\\_correcting\\_gender\\_inequity-EN.pdf](https://www.unodc.org/documents/hiv-aids/WHO_EURO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf) (last accessed 2 November 2020).

<sup>25</sup> World Health Organization, *Infant and young child feeding*, 24 August 2020 <https://www.who.int/news-room/fact-sheets/detail/infant-and-young-child-feeding#:~:text=WHO%20and%20UNICEF%20recommend%3A,years%20of%20age%20or%20beyond> (last accessed 4 November 2020).

<sup>26</sup> Amnesty Int'l, USA: "Not Part of My Sentence": *Violations of the Human Rights of Women in Custody*, AI Index AMR 51/35/98 (March 26, 2011).

Overcrowding is also a prevalent issue throughout the Americas that undermines the ability of prisons to meet the health needs of prisoners.<sup>27</sup> On average, in Latin America and the Caribbean prisons are operating at sixty percent over capacity.<sup>28</sup> Overcrowding tends to exacerbate mental health issues and increase rates of violence and self-harm.<sup>29</sup> Vulnerable groups, especially women and children, also tend to be more neglected in overcrowded prisons.<sup>30</sup> Severe prison overcrowding in Latin America and the Caribbean is worsened by food and water scarcity, limited beds, poor sanitation and hygiene, and violence.<sup>31</sup> Pregnant, postpartum, and breastfeeding women have a particular need for sanitary and hygienic conditions, but overcrowded prisons tend to be unsanitary and poorly ventilated, leading to the spread of lethal infectious diseases, including HIV, tuberculosis, pneumonia, and parasitic diseases.<sup>32</sup>

Due to the limited number of female prisons, in some countries, incarcerated women are housed in security levels that are disproportionate to their risk assessment undertaken on admission.<sup>33</sup> Classification and screening procedures that inadequately capture essential information increase the likelihood of women being placed in higher security levels.<sup>34</sup>

Additionally, many countries do not have special rules for breastfeeding or they have rules that do not take into consideration health guidelines on breastfeeding. In the United States, for example, federal laws allow breastfeeding mothers only three lactation breaks a day, and the supply of breast pumps is insufficient.<sup>35</sup> As a result, an unfriendly environment, lack of medical and mental support, inappropriate hygienic conditions and materials, discourage women from breastfeeding.<sup>36</sup> This may have a negative impact on their children, including their physical and mental development.<sup>37</sup> For example, some reports indicate that in Colombia, incarcerated women

---

<sup>27</sup> Penal Reform, *Ten-Point Plan to Reduce Prison Overcrowding* (2012) <https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf>.

<sup>28</sup> Katherine E. Limoncelli, Jeff Mellow, & Chongmin Na, *Determinants of Inter-country Prison Incarceration Rates and Overcrowding in Latin America and the Caribbean*, *International Criminal Justice Rev.* 2020, Vol. 30(1) 10-29.

<sup>29</sup> Penal Reform, *Ten-Point Plan to Reduce Prison Overcrowding* (2012) <https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf>.

<sup>30</sup> *Ibid.*

<sup>31</sup> Katherine E. Limoncelli, Jeff Mellow, & Chongmin Na, *Determinants of Inter-country Prison Incarceration Rates and Overcrowding in Latin America and the Caribbean*, *International Criminal Justice Rev.* 2020, Vol. 30(1) 10-29.

<sup>32</sup> *Ibid.*

<sup>33</sup> United Nations Office of Drugs and Crime [UNODC], *Handbook on Women and Imprisonment*, 35 (2014), [https://www.unodc.org/documents/justice-and-prison-reform/women\\_and\\_imprisonment\\_-\\_2nd\\_edition.pdf](https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf). (last accessed 28 October 2020).

<sup>34</sup> *Ibid.* at 34; see also Bastick, M., Quaker United Nations Office [QUNO], *Women in prison: a commentary on the Standard Minimum Rules for the Treatment of Prisoners* at 7 (July 2005), [https://www.peacewomen.org/sites/default/files/HR\\_Prisoners\\_QUNO\\_2008\\_0.pdf](https://www.peacewomen.org/sites/default/files/HR_Prisoners_QUNO_2008_0.pdf) (last accessed 28 October 2020).

<sup>35</sup> Rebecca J Schlafer, Laurel Davis, Lauren A Hindt, Lorie S Goshin, Erica Gerrity, *Intention and Initiation of Breastfeeding Among Women Who Are Incarcerated*, *22-1 Nursing for Women's Health*, 64, 67-74 (2018).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

do not receive adequate medical care during pregnancy, childbirth, or the postpartum period.<sup>38</sup> Also, health services have very low coverage and quality, as there are insufficient medical staff, and visits are kept extremely short.<sup>39</sup> Moreover, there is also a shortage of health-care professionals for women's sexual and reproductive health needs, as well as for children's health.<sup>40</sup>

## 1. International Human Rights Standards

The American Convention on Human Rights (ACHR) provides that all persons are entitled to equal protection, and all persons may exercise their human rights without discrimination “for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>41</sup>

The principle of equality and nondiscrimination is binding on the region pursuant to the Court's 2003 Advisory Opinion recognizing the principle as *jus cogens*.<sup>42</sup> The opinion further explains that “discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.”<sup>43</sup>

The fulfillment of the right to equality requires, in some instances, the implementation of specific measures and differentiated treatment, as in the case of incarcerated people. In the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, the Inter-American Commission on Human Rights (IACHR) defined discriminatory practices in relation to their effect on the rights of persons deprived of liberty.<sup>44</sup> The Commission further affirmed that measures to protect vulnerable groups are not considered discriminatory.<sup>45</sup> This is especially true in the case of special measures to protect pregnant women, nursing mothers, and children in the context of detention. Special measures are recognized by the United Nations General Assembly in the Body of Principles for the Protection of All Persons under Any Form of

---

<sup>38</sup> Colectivo de Abogados. 2009, *La salud sexual y reproductiva en las cárceles de mujeres en Colombia* (September 10) <http://www.colectivodeabogados.org/?La-salud-sexual-y-reproductiva-en>.

<sup>39</sup> Dejusticia, *Women, Drug Policies and Incarceration* (2016) [https://web.archive.org/web/20180908193120/https://www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_866.pdf](https://web.archive.org/web/20180908193120/https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_866.pdf).

<sup>40</sup> Ibid.

<sup>41</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

<sup>42</sup> Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. ¶ 101, (Sept. 17, 2003).

<sup>43</sup> Ibid.

<sup>44</sup> Inter-American Commission on Human Rights (IACHR), *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 13 March 2008, <https://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp> (last accessed 28 October 2020).

<sup>45</sup> Ibid.

Detention or Imprisonment.<sup>46</sup> The Office of the High Commissioner for Human Rights has explained: “The concept of equality means much more than treating all persons in the same way. Equal treatment of persons in unequal situations will operate to perpetuate rather than eradicate injustice.”<sup>47</sup>

Additionally, the International Covenant on Economic, Social and Cultural Rights (ICESCR) articulates a universal right to health that is nondiscriminatory in its application: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>48</sup>

In its Concluding Observations on the State of Georgia, the Human Rights Committee (HRC), affirmed that persons deprived of liberty are entitled to the right to health with regard to hygiene, diet, and conditions of detention under ICCPR articles 6 (“right to life”), 7 (prohibition of “inhuman or degrading treatment”), and 10 (“respect for the inherent dignity of the human person”).<sup>49</sup> The HRC has also interpreted the right to health to include access to timely care<sup>50</sup> as well as to mental health services.<sup>51</sup>

Although the ACHR does not include the right to health, it is recognized in Article 11 of the American Declaration of the Rights and Duties of Man<sup>52</sup> and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) recognizes both the right to health (Article 10) and the right to a healthy environment (Article 11).<sup>53</sup> In addition, the IACHR has explained that in the case of detainees with mental health issues, Article 5 of the ACHR, which guarantees the right to

---

<sup>46</sup> UN General Assembly Res. 43/173, *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, 9 December 1988, <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf> (last accessed 28 October 2020).

<sup>47</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 22, *Discrimination against Women: The Convention and the Committee*, February 1995, No. 22, <https://www.refworld.org/docid/47947740d.html> (last accessed 28 October 2020)

<sup>48</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, art. 12, 999 U.N.T.S. 3 (1966).

<sup>49</sup> UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : Georgia*, 15 November 2007, CCPR/C/GEO/CO/3, <https://www.refworld.org/docid/474aa4bf2.html> .

<sup>50</sup> UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Portugal*, 17 August 2003, CCPR/CO/78/PRT, 3, <https://www.refworld.org/docid/3f8d4d144.html>.

<sup>51</sup> UN Human Rights Committee (HRC), *Views Of The Human Rights Committee Under Article 5, Paragraph 4, Of The Optional Protocol To The International Covenant On Civil And Political Rights*, 13 March 1996, CCPR/C/74/D/684/1996, 7, <https://undocs.org/en/CCPR/C/74/D/684/1996>.

<sup>52</sup> Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948.

<sup>53</sup> Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 16 November 1999, A-52.

humane treatment, should be interpreted in accordance with the *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*.<sup>54</sup>

The relationship between the right to health and discrimination is material – discrimination can be both a cause and a consequence of poor health outcomes.<sup>55</sup> Women in prison generally have more specific health problems than male prisoners and tend to place a greater demand on the prison health service than men.<sup>56</sup>

The basic principle of nondiscrimination found in Rule 2 of the Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) includes the responsibility to take into account the specific needs of vulnerable populations.<sup>57</sup> The rules state that discriminatory practices cannot be eradicated unless the particular needs of pregnant, breastfeeding, and postpartum women are considered.<sup>58</sup> States, therefore, must ensure that pregnant women, breastfeeding women and those caring for young children, who are subject to deprivation of liberty, have access to the services and material goods that will allow them to enjoy the right to equality.

Though there is no specific convention that governs States' obligations to pregnant, postpartum, and breastfeeding women, guidelines have been established and proffered by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Committee on Economic, Social and Cultural Rights (CESCR), the United Nations General Assembly, and the Human Rights Council. The CEDAW Committee has referred to the rights of women deprived of liberty, especially concerning their right to health.<sup>59</sup> The CESCR has also read the right to health broadly, as encompassing the overall well-being of individuals.<sup>60</sup> Additionally, the UN has established specific guidelines for the treatment of persons deprived of liberty. In 1955, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Standard Minimum Rules for the Treatment of Prisoners.<sup>61</sup> In 2015, the United

---

<sup>54</sup> Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99 ¶54 (1999).

<sup>55</sup> Davis, Brigitte, *Discrimination: A Social Determinant of Health Inequities*, Health Affairs, 25 February 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200220.518458/full/>.

<sup>56</sup> Van den Bergh, B., Gatherer, A., Fraser, A., & Moller, L. Imprisonment and women's health: Concerns about gender sensitivity, human rights and public health. *Bulletin of the World Health Org.*, 89(9), 689-694 (2011).

<sup>57</sup> UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly*, Rule 2, 8 January 2016, A/RES/70/175, <https://www.refworld.org/docid/5698a3a44.html>

<sup>58</sup> UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)* 21 December 2010, A/RES/65/229, [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)

<sup>59</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I, <https://www.refworld.org/docid/453882a73.html>.

<sup>60</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

<sup>61</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.



Nations General Assembly revised the rules, coining them “the Nelson Mandela Rules.”<sup>62</sup> In 2010, the General Assembly also adopted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, or “the Bangkok Rules,” which clarified the applicability of the Mandela Rules to the treatment of women prisoners.<sup>63</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also explained how the Convention Against Torture applies to the treatment of women in prison in light of the challenges created by gender-based discrimination, including violence against women.<sup>64</sup>

- a) *There is an international consensus towards the use of alternative measures to pretrial detention and prison sentences*

The CEDAW Committee has noted that in the context of criminal justice systems, women face discrimination due to a failure to meet women-specific needs in detention.<sup>65</sup> Women deprived of liberty cannot choose what to eat, when to visit a doctor, and where and when to breastfeed. All basic health care during and after pregnancy can only be provided by the State. Because prisons are not equipped to serve the health care needs of pregnant women and women who are breastfeeding or caring for newborns, the best way to guarantee the right to health to these women and their children is to avoid criminal measures that require their deprivation of liberty.<sup>66</sup>

Rule 64 of the Bangkok Rules states “Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.”<sup>67</sup> Custodial measures, therefore, should be the exception and not the rule. This rule recognizes that prisons are not designed for pregnant women or women that are breastfeeding.<sup>68</sup> The Human Rights Council emphasized that, when sentencing a pregnant woman or mother with dependent children, States should prioritize non-custodial measures, taking into account the gravity of the

---

<sup>62</sup> UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175, <https://www.refworld.org/docid/5698a3a44.html> [hereinafter *Mandela Rules*].

<sup>63</sup> UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)* 21 December 2010, A/RES/65/229, [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).

<sup>64</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57.

<sup>65</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No. 33 on women’s access to justice*, U.N. Doc. CEDAW/C/GC/33 (August 3, 2015).

<sup>66</sup> *Bangkok Rules*, Preamble, A/RES/65/229.

<sup>67</sup> *Bangkok Rules*, Rule 64, A/RES/65/229.

<sup>68</sup> *Bangkok Rules*, Rule 64 Commentary, A/RES/65/229.

offense and the best interests of the child.<sup>69</sup> Similarly, the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders determined that “the use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories.”<sup>70</sup> In 2016, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recommended that States only consider imprisoning pregnant women when other alternatives are unavoidable or inappropriate given the particular circumstances.<sup>71</sup>

The Working Group on the issue of discrimination against women in law and in practice, considering the particular vulnerabilities of pregnant women and mothers, also recommended that States “allow non-custodial sentences for pregnant women and women with dependent children.”<sup>72</sup>

*b) Pregnant and breastfeeding women need access to specific health care and nutritional services and food while custody*

The ICESCR imposes a set of baseline obligations on States with respect to the right to health. This includes access to health facilities, especially for vulnerable groups; access to nutrition and safe drinking water; access to sanitation; and the equitable distribution of resources.<sup>73</sup>

Women who are pregnant should be given access to hygienic facilities and materials in accordance with their particular needs. Rule 18 of the Mandela Rules states that prisoners “shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”<sup>74</sup> Rule 18 was further explained by Rule 5 of the Bangkok Rules, which requires facilities to meet the hygiene needs of women in prison, including the provision of water for personal care, with special concern for women who are pregnant or breastfeeding.<sup>75</sup> Another provision within the scope of this obligation includes access to clean washing facilities.<sup>76</sup> The

---

<sup>69</sup> UN Human Rights Council, *Human rights in the administration of justice, in particular juvenile justice*, 25 March 2009, A/HRC/RES/10/2, [https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_2.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_2.pdf).

<sup>70</sup> UN General Assembly, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.144/28/Rev.1 (December 14, 1990) <https://www.ncjrs.gov/pdffiles1/Digitization/143341NCJRS.pdf>.

<sup>71</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57.

<sup>72</sup> UN Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice*, 8 April 2016, A/HRC/32/44.

<sup>73</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 31, The Right to Health*, June 2008, No. 31, <https://www.refworld.org/docid/48625a742.html>.

<sup>74</sup> *Mandela Rules*, Rule 18 A/RES/70/175.

<sup>75</sup> *Bangkok Rules*, Rule 5, A/RES/65/229.

<sup>76</sup> *Bangkok Rules*, Rule 5 Commentary, A/RES/65/229.

Working Group on the issue of discrimination against women in law and in practice has found that inadequate access to hygienic facilities and materials jeopardizes the dignity and health of women prisoners.<sup>77</sup> The CESCR interpreted the right to health in Article 12 of the ICESCR to extend not only to timely and appropriate healthcare, but also to safe and potable water, adequate sanitation, and a healthy environment.<sup>78</sup>

The reduction of food and water for women who are pregnant, breastfeeding, or postpartum as a form of punishment is prohibited under Rule 43 of the Mandela Rules.<sup>79</sup>

The CEDAW Committee explained that States have a duty under Article 12 of CEDAW to ensure women's right to safe motherhood, including the full range of services in connection with pregnancy and the postnatal period, finding that States should allocate the most resources possible to such services.<sup>80</sup> Similarly, General Comment 14 of the CESCR noted that Article 12 of the Covenant requires States to adopt measures to improve maternal health, including by providing postnatal care and the necessary resources to have a safe pregnancy and childbirth.<sup>81</sup> Women prisoners experience serious mental health issues during detention – for example, they are more likely to harm themselves or attempt suicide than male prisoners.<sup>82</sup> The Working Group on the issue of discrimination against women in law and in practice noted that women's mental health is significantly affected by concerns over their children, and this is especially true for women who are breastfeeding.<sup>83</sup> Women's mental health is also impacted by separation from their children.<sup>84</sup>

Rule 13 of the Bangkok Rules recognizes that there are times when women's mental health is more likely to be impacted, and further requires that staff become privy to these circumstances.<sup>85</sup> Women are more likely than men to suffer from mental health issues, and are particularly susceptible to mental stress when admitted to prison.<sup>86</sup> Women that are pregnant or have children

---

<sup>77</sup> UN Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice*, 8 April 2016, A/HRC/32/44.

<sup>78</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

<sup>79</sup> *Mandela Rules*, A/RES/70/175.

<sup>80</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I, <https://www.refworld.org/docid/453882a73.html>.

<sup>81</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

<sup>82</sup> UN Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice*, 12, 8 April 2016, A/HRC/32/44.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Bangkok Rules*, Rule 13, A/RES/65/229.

<sup>86</sup> *Ibid.* at Commentary.



face additional vulnerability when separated from a child including after the delivery of a child.<sup>87</sup> Prison staff should therefore be trained to identify women that demonstrate signs of mental health issues like depression or anxiety, so that their distinct needs can be met. This rule works in tandem with Rule 12 to ensure that mental health services are available to all women prisoners, whether they are identified or not.

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has elaborated that the right to health includes maternal, prenatal, and postnatal care under international instruments.<sup>88</sup> Pursuant to Rule 28 of the Mandela Rules, women in prison should have access to all necessary prenatal and postnatal care.<sup>89</sup> As explained by Rule 48 of the Bangkok Rules, this means women that are pregnant, breastfeeding, or postpartum should receive a health and nutrition program developed by a healthcare professional.<sup>90</sup> States are further required to provide pregnant and breastfeeding mothers free “adequate and timely food.”<sup>91</sup> This is consistent with Comments issued by the CESCR, which has stated that the right to health includes the provision of adequate food and nutrition.<sup>92</sup>

The CEDAW recognizes that pregnant women should be provided with services appropriate to their specific needs.<sup>93</sup> Under Article 12, States are called to “ensure” women have access to pregnancy related care, postnatal care, free services that may be necessary, and adequate nutrition for women that are pregnant or breastfeeding.<sup>94</sup>

Rule 10 of the Bangkok Rules requires that, in the healthcare context, States comply with a woman’s request for a female healthcare provider to the extent that it is possible.<sup>95</sup> Women’s specific needs should be determined through the “comprehensive screening” contemplated under Rule 6 of the Bangkok Rules.<sup>96</sup> In accordance with Rule 30 of the Mandela Rules, such screening should be completed as soon as possible after admission into the prison, with the objective of determining needs relevant to the woman’s physical and mental well-being.<sup>97</sup> A comprehensive screening would detail women prisoners’ reproductive health history, with

---

<sup>87</sup> Ibid. at Commentary.

<sup>88</sup> UN General Assembly, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental*, 3 August 2011, A/66/254, <https://undocs.org/A/66/254>.

<sup>89</sup> *Mandela Rules*, Rule 28, A/RES/70/175.

<sup>90</sup> *Bangkok Rules*, Rule 48, A/RES/65/229.

<sup>91</sup> Ibid.

<sup>92</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

<sup>93</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>94</sup> Ibid.

<sup>95</sup> *Bangkok Rules*, Rule 10, A/RES/65/229.

<sup>96</sup> *Bangkok Rules*, Rule 6, A/RES/65/229.

<sup>97</sup> *Mandela Rules*, Rule 30, A/RES/70/175.

particular focus on prior complications during pregnancy or delivery.<sup>98</sup> The health screening could also be used to determine the kind of counseling and postnatal care they may need. Keeping detailed health records enables facilities to respond to reproductive health complications without undue delay.<sup>99</sup> For example, a study seems to show that in the Dominican Republic, prisons under the New Prison Model, which seeks to implement the Mandela Rules, provide inmates with comprehensive medical exams and dental checks, avoid overcrowding, conduct psychological assessments of inmates, and offer different forms of counseling and therapy.<sup>100</sup>

The requirement of providing prisoners with need-specific individualized treatment, found in Rule 94 of the Mandela Rules, was clarified in its applicability to women who are pregnant, nursing mothers, and women with children in Rule 42 of the Bangkok Rules.<sup>101</sup> This Rule requires prison regimes to be flexible enough to respond to their needs.<sup>102</sup> The commentary provided by UNODC on Rule 42 delineates the broad scope of this responsibility, which may include, at a minimum, comfortable environments for women who need to breastfeed their children, parenting programs, and nutrition programs for women and their children.<sup>103</sup>

Under Rule 24 of the Mandela Rules, people in prison should “enjoy the same standards of health care that are available in the community.”<sup>104</sup> According to Rule 28, “in women’s prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.”<sup>105</sup> Following Rule 27, prisons shall also “ensure prompt access to medical attention in urgent cases” and for individuals in custody “who require specialized treatment shall be transferred to specialized institutions or to civil hospitals.”<sup>106</sup> Rule 27 also states, “where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.”<sup>107</sup>

---

<sup>98</sup> *Bangkok Rules*, Rule 6 Commentary, A/RES/65/229.

<sup>99</sup> *Ibid.*

<sup>100</sup> International Corrections & Prisons Association, *The New Prison Model in the Dominican Republic: research on a unique prison reform process*, <https://icpa.org/the-new-prison-model-in-the-dominican-republic-research-on-a-unique-prison-reform-process/> (last accessed Oct 29, 2020). We acknowledge that the note does not show the study and, therefore, we cannot assess the quality of the study and its findings.

<sup>101</sup> *Bangkok Rules*, Rule 42, A/RES/65/229.

<sup>102</sup> *Bangkok Rules*, Rule 42 Commentary, A/RES/65/229.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Mandela Rules*, Rule 24, A/RES/70/175.

<sup>105</sup> *Mandela Rules*, Rule 28, A/RES/70/175.

<sup>106</sup> *Mandela Rules*, Rule 27, A/RES/70/175.

<sup>107</sup> *Ibid.*

## 2. Comparative Examples of Standards and Good Practices: Europe

In July 2020, the European Prison Rules were amended to better reflect the international standards for the treatment of women. Specifically, the Committee of Ministers sought to incorporate the Bangkok Rules into the Council of Europe’s legal framework.<sup>108</sup> The new rules provide more specific protections for women. For example, the imposition of solitary confinement on women who are pregnant or breastfeeding was barred.<sup>109</sup> Additionally, women who have experienced abuse in prison are to be provided with specialized services depending on their needs.<sup>110</sup>

In *V.C. v. Slovakia*, the European Court of Human Rights (ECtHR) found that the absence of safeguards giving special consideration to the reproductive health of the claimant – who was a member of an at-risk group in Slovakia - was a failure by the State to comply with its obligations under Article 8 of the European Convention, which protects the right to private and family life.<sup>111</sup>

The European Parliament Resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life recommended that the deprivation of liberty of pregnant women be reserved as a measure of last resort.<sup>112</sup> When sentencing is being decided, special consideration should be given to the harmful effects of imprisonment on the health of pregnant women and prenatal life.<sup>113</sup> Some States have adopted the prioritization of non-custodial measures for women who are pregnant or have young children. In Sweden, prison sentences may be postponed for a reasonable period if an inmate is pregnant or breastfeeding.<sup>114</sup> In Italy, female inmates that are pregnant or have children under the age of six may only be detained in prison under exceptional circumstances, depending on the necessity of detention.<sup>115</sup>

---

<sup>108</sup> Council of Europe, Comm. of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 31.4, (adopted Jan. 11, 2016) (revised and amended Jul. 1, 2020), available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016809ee581](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581) (last accessed 18 November 2020).

<sup>109</sup> Ibid at Rule 16A.2.e.

<sup>110</sup> Ibid. at Rule 34.3.

<sup>111</sup> *V.C. v. Slovakia*, Eur. Ct. H. R. (2011), <http://hudoc.echr.coe.int/eng?i=001-107364>.

<sup>112</sup> European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)).

<sup>113</sup> Ibid.

<sup>114</sup> *Laws on Children Residing with Parents in Prison*, LIBRARY OF CONGRESS, Section on Sweden, <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php>, July 2014, footnote 401, citing § 12 SFS 1974:202 Beräkning av straffid [Calculation of Sentence], <http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-1974202-om-berakning-av-sfs-1974-202/>.

<sup>115</sup> Ibid.

The European Parliament further explained that, in light of international obligations under the UDHR and the ICCPR, pregnant women that are in prison should receive particular attention with respect to access to nutrition, hygiene, and health care, including prenatal and postnatal care.<sup>116</sup> One example of policies consistent with this Resolution and cited by it can be found in Finland, where all necessary health care is paid for by the government and inmates may access healthcare services outside of the prison if they cannot be provided within the prison.<sup>117</sup> A special provision further states that pregnant prisoners are to be sent to a healthcare facility outside the hospital for the delivery of a child.<sup>118</sup>

The obligation on European countries to ensure that pregnant and breastfeeding women have access to specific diets was confirmed in 2018 by the ECtHR. In a case against Turkey, the ECtHR found that prisoners with special diet needs were entitled to adequate nutrition in accordance with the needs of their condition.<sup>119</sup> The Court unanimously held that the failure to provide adequate nutrition for the health and wellbeing of a prisoner was a violation of Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment.<sup>120</sup> In the view of the Court, the denial of adequate nutrition was incompatible with human dignity. There is no doubt that pregnant and breastfeeding women need a special diet that can ensure their health and that of the newborn.

### **III. States must prohibit the use of restraints on pregnant women, especially during medical visits and during labor**

The use of restraints remains a common practice in many countries, including several states in the United States.<sup>121</sup> Amnesty International has reported several cases where the prison staff kept women shackled during labor, even after medical staff urgently asked them to unrestraint the person.<sup>122</sup> This inhumane practice is a violation of women's civil rights and poses several health risks.<sup>123</sup> First, the application of leg irons may cause imbalance while walking and therefore increases a risk of falls.<sup>124</sup> Such injury may result in placental abruption, abdominal trauma, maternal hemorrhage, and stillbirth.<sup>125</sup> Second, since hypersensitive conditions are common during pregnancy, shackled women with hypertension usually encounter serious problems,

---

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ebedin Abi v. Turkey, Eur. Ct. H. R. (2018), <http://hudoc.echr.coe.int/eng?i=001-181782>.

<sup>120</sup> Ibid.

<sup>121</sup> Jenni Gainsborough, Women in Prison, *International Problems and Human Rights Based Approaches to Reform*, 14 Wm. & Mary J. Women & L. 271 (2008) 290, <https://scholarship.law.wm.edu/wmjowl/vol14/iss2/5>.

<sup>122</sup> Amnesty International USA: *Rights for all: Not part of my sentence: Violations of the human rights of women in custody*, 81 (1999), <https://www.amnesty.org/en/documents/amr51/001/1999/en>

<sup>123</sup> Carolyn Sufirin, *Pregnancy and postpartum care in correctional settings*, American College of Obstetricians and Gynecologists (2014) 4, <https://www.ncchc.org/filebin/Resources/Pregnancy-and-Postpartum-Care-2014.pdf>.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

particularly if they experience an eclamptic seizure, during which they may suffer injuries related to the restraints.<sup>126</sup> Third, the use of shackles can result in unnecessary delays of potentially lifesaving measures in the event of an obstetric emergency, including abnormalities of the fetal heart rate that require prompt intervention and possibly urgent cesarean births.<sup>127</sup> Finally, preventing walking during the first stage of labor may prevent pregnant women from the benefits of birth acceleration and discomfort alleviation.<sup>128</sup> Immobilization also prevents the administration of epidural anesthesia.<sup>129</sup> Additionally, women subjected to restraints during childbirth also report mental distress, depression and trauma.<sup>130</sup>

The American College of Obstetricians and Gynecologists recommended that restraints be used in only exceptional circumstances within six weeks of postpartum.<sup>131</sup> The use of restraints ought to be assessed on individual risks and reasons for its use, and should consider the level and duration of using these devices.<sup>132</sup> If there is imminent risk of escape or harm, restraints must be the least restrictive to ensure safety.<sup>133</sup> In most other circumstances, no restraints should be applied around the legs because pregnant women are at high risk of falling.<sup>134</sup> Restraints should not apply pressure on the abdomen in order to keep the fetus from harm.<sup>135</sup> The American College of Obstetricians and Gynecologists lastly recommended creating a reporting system that is reviewed by an independent body, and an accountability mechanism for when the use of restraints is unjustified.<sup>136</sup>

Despite these recommendations, shackling is still a common practice in the United States.<sup>137</sup> By 2018, only twenty-three states had passed legislation prohibiting or limiting the use of restraints on pregnant women.<sup>138</sup> Some state legislation bans the use of shackles on women who are

---

<sup>126</sup> American College of Obstetricians and Gynecologists [ACOG], *Committee opinion no. 511: Health care for pregnant and postpartum incarcerated women and adolescent females*, 118(5) *Obstetrics & Gynecology* 1198–1202, 1200 (2011).

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> Carolyn Sufrin, *Pregnancy and postpartum care in correctional settings*, American College of Obstetricians and Gynecologists (2014) <https://www.ncchc.org/filebin/Resources/Pregnancy-and-Postpartum-Care-2014.pdf>.

<sup>130</sup> *Ibid.*

<sup>131</sup> American College of Obstetricians and Gynecologists [ACOG], *Committee opinion no. 511: Health care for pregnant and postpartum incarcerated women and adolescent females*, 118(5) *Obstetrics & Gynecology* 1198–1202, 1200 (2011).

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Melanie Kalmanson, *Innocent Until Born: Why Prisons Should Stop Shackling Pregnant Women to Protect the Child*, 44 Fla. St. U. L. Rev. 851 (2018).

<sup>138</sup> Ginette G. Ferszt, Michelle Palmer, Christine McGrane, *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, *Nursing for Women's Health*, at 18 (2018), <https://doi.org/10.1016/j.nwh.2017.12.005>.

transported to medical facilities during the birth.<sup>139</sup> Other states ban shackling only during labor and birth and in the immediate postpartum period.<sup>140</sup> However, due to the absence of reporting requirements, it is challenging to monitor implementation, despite the existing laws.<sup>141</sup> No accurate data exist about pregnancies and childbirth in prisons.<sup>142</sup>

In 2016, the Chilean Supreme Court decided that correctional staff had violated the rights of a woman who, while giving birth, was kept shackled during the trip to the hospital and during more than 15 hours of labor, despite being diagnosed with a high-risk pregnancy.<sup>143</sup> The Chilean Supreme Court not only stated that this treatment had violated the rights of the woman, but also addressed the intersectional discrimination, given that the woman was part of an indigenous community living in conditions of poverty.<sup>144</sup> In reaching its conclusions, the Court relied on CEDAW, the Belém do Pará Convention, and the UN Human Rights Committee.<sup>145</sup>

### 1. International Human Rights Standards

Article 16 of the Convention Against Torture requires States to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I.”<sup>146</sup> Similarly, according to Article 7 of the ICCPR, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>147</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that the shackling or handcuffing of pregnant women can amount to torture or ill-treatment.<sup>148</sup>

Rule 24 of the Bangkok Rules states that “instruments of restraint shall *never* be used on women during labor, during birth and immediately after birth.”<sup>149</sup>

---

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Corte Suprema de Chile, (Crimen) Apelación Amparo Pia Campos Campos por Lorenza Beatriz Cayuhan Llebul contra Gendarmeria de Chile, 1 de diciembre de 2016, <https://bibliotecadigital.indh.cl/handle/123456789/1005>.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>.

<sup>147</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, article 7, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

<sup>148</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57.

<sup>149</sup> *Bangkok Rules*, Rule 24, A/RES/65/229. Emphasis added



Regarding the Mandela Rules, Rule 47 provides that the use of chains, irons, or other instruments of restraint which are inherently degrading or painful shall be prohibited.<sup>150</sup> Other instruments of restraint “shall only be used when authorized by law and in the following circumstances: (a) as a precaution against escape during transfer provided that they are removed when the prisoner is before a judicial or administrative authority; (b) by order of the prison director, if other methods of control fail, in order to prevent the prisoner from self-injury, injury to others or from damaging property; in such instances, the director shall immediately alert the physician or other qualified health-care professionals and report to the higher administrative authority.”<sup>151</sup> Rule 48 provides three principles that apply in a situation where restraints are authorized in light of Rule 47 paragraph 2.<sup>152</sup> Summarized, these principles consider (1) the necessity of restraints to address the risks posed by unrestricted movement; (2) whether restraints are the least intrusive, necessary, and reasonable method of control; (3) the necessary time period of restraints used on a person. Specifically, Rule 48(2) states that “instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth.”<sup>153</sup>

2. Comparative Examples of Standards and Best Practices  
a) *Europe*

The usual practice of EU member states is to transfer pregnant women prisoners to hospitals. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Committee sometimes encounters examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynecological examinations or delivery.<sup>154</sup> The CPT has stated that such an approach is completely unacceptable and could be qualified as inhuman and degrading treatment, concluding that other means of meeting security needs should be utilized.<sup>155</sup>

Rule 68.7 of the European Prison Rules strictly prohibits the use of restraints: “Instruments of restraint shall *never* be used on women during labour, during childbirth or immediately after childbirth.”<sup>156</sup> Regarding security measures, European Prison Rule 34.1 states that specific gender-sensitive policies shall be developed and positive measures shall be taken to meet the distinctive needs of women prisoners in the application of these rules.<sup>157</sup> Rule 68.4 strictly

---

<sup>150</sup> *Mandela Rules*, Rule 47, A/RES/70/175.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Mandela Rules*, Rule 48, A/RES/70/175.

<sup>153</sup> *Ibid.*

<sup>154</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Women in prison*, CPT/Inf(2018)5 (2018) <https://rm.coe.int/168077ff14>.

<sup>155</sup> *Ibid.*

<sup>156</sup> Council of Europe, Comm. of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 68.7, (adopted Jan. 11, 2016) (revised and amended Jul. 1, 2020), available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016809ee581](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581) (last accessed 18 November 2020).

<sup>157</sup> *Ibid.* at Rule 31.4.

prohibits the use of handcuffs, restraint jackets and other body restraints, except as a necessary precaution against escape or as a protective measure of last resort against self-injury, injury to others, or serious damage to property.<sup>158</sup>

In the ECtHR case *Korneykova v. Ukraine*, the plaintiff alleged that she had been shackled in the maternity hospital during birth and that she and her newborn son subsequently were held in very poor conditions in a pre-trial detention center, without adequate medical care.<sup>159</sup> The Court found that shackling Ms. Korneykova during the six months of her pre-trial detention constituted inhuman and degrading treatment, as well as inadequate sanitary and hygiene arrangements for her and her newborn son, insufficient outdoor walks, and malnutrition during the postpartum period.<sup>160</sup>

In very exceptional circumstances, restraints have been considered pertinent by the ECtHR. In the case of flight risk prisoners, the ECtHR has stated that minimal restraints necessary to avoid escape, and assessed on a case-by-case basis, are in accordance with the European Convention of Human Rights.<sup>161</sup> In *Kleuver v. Norway*, the Petitioner alleged the use of restraints and body searches during her transfer between the prison and her prenatal medical appointments at the hospital were violative of Article 8 of the European Convention of Human Rights, which guarantees the right to respect for private life.<sup>162</sup> The Court held that the implemented security measures “did not exceed what could reasonably be considered necessary in the circumstances.”<sup>163</sup> The Court noted that there was “nothing to indicate that they were aimed at debasing or humiliating” the pregnant woman and there was credible evidence of the Petitioner’s flight risk as she had attempted a prior escape.<sup>164</sup> It is important to note that the Court’s decision emphasized the need of a case-by-case assessment of whether restraints are necessary, and these must only be considered as the last resort and only during the time necessary to avoid a flight risk. More importantly, all measures must ensure the respect for the dignity of the pregnant woman and custody personnel must use the least restrictive measure available.

b) *United States*

In 2007, the U.S. Marshals Service established policies and procedures for the use of authorized restraining devices, stating that restraints should not be used when a pregnant prisoner is in labor, delivery, or immediate post-delivery recuperation.<sup>165</sup> In 2008, the Federal Bureau of Prisons

---

<sup>158</sup> *Ibid.* at Rule 68.4.

<sup>159</sup> *Korneykova v. Ukraine*, App. No. 39884/05 (2012).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Kleuver v. Norway*, App. No. 4587/99 3, 2-14 (2002).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.* at 10.

<sup>164</sup> *Ibid.*

<sup>165</sup> U.S. Marshals Service, *Restraining devices*, Washington, DC: USMS (2010)

[http://www.usmarshals.gov/foia/Directives-Policy/prisoner\\_ops/restraining\\_devices.pdf](http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/restraining_devices.pdf).



ended the practice of the use of restraints on pregnant inmates as a matter of routine in all federal correctional facilities.<sup>166</sup> The American Correctional Association also approved standards opposing the shackling of female inmates during active labor and delivery.<sup>167</sup> These standards also indicated that before active labor and delivery, the restraints should not put the woman or the fetus at risk.<sup>168</sup> In 2010, the National Commission on Correctional Health Care adopted a position opposing the use of restraints.<sup>169</sup> These standards served only as guidelines, and State and local prisons and jails were not required to follow either the Federal Bureau of Prisons policy or the National Commission on Correctional Health Care standards.<sup>170</sup> However, several states have enacted policies prohibiting the use of restraints.<sup>171</sup> Despite progress, most states fail to limit the use of restraints.<sup>172</sup>

At the federal level, the First Step Act of 2018 (Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act)<sup>173</sup> prohibits the use of restraints on pregnant women, unless the woman “is an immediate and credible flight risk that cannot reasonably be prevented by other means, poses an immediate and serious threat of harm to herself or others that cannot reasonably be prevented by other means, or a healthcare professional responsible for the health and safety of the prisoner determines that the use of restraints is appropriate for the medical safety of the prisoner.”<sup>174</sup> For situations in which restraints are allowed, the legislation mandates the use of the least restrictive restraints necessary. *Nelson v. Correctional Medical Services*<sup>175</sup> constitutes a landmark decision, where the United States Court of Appeals for the Eight Circuit held that the shackling of a prisoner during labor and delivery violated the Eighth Amendment by subjecting her to cruel and unusual punishment.<sup>176</sup>

---

<sup>166</sup> Federal Bureau of Prisons, *Escorted trips. Program Statement No. 5538.05*, Washington, DC: BOP (2008) [http://www.bop.gov/policy/progstat/5538\\_005.pdf](http://www.bop.gov/policy/progstat/5538_005.pdf).

<sup>167</sup> American Correctional Association, *Public correctional policy on use of force*. Alexandria (VA): ACA (2010) [https://www.aca.org/government/policyresolution/view.asp?ID=48&origin=results&QS='PoliciesAndResolutionsYMGHFRName=force&reversesearch=false&viewby=50&union=AND&startrec=1&top\\_parent=360](https://www.aca.org/government/policyresolution/view.asp?ID=48&origin=results&QS='PoliciesAndResolutionsYMGHFRName=force&reversesearch=false&viewby=50&union=AND&startrec=1&top_parent=360).

<sup>168</sup> *Ibid.*

<sup>169</sup> National Commission on Correctional Health Care, *Restraint of pregnant inmates. Position statement*, Chicago (IL): NCCHC; (2010) [http://www.ncchc.org/resources/statements/restraint\\_pregnant\\_inmates.html](http://www.ncchc.org/resources/statements/restraint_pregnant_inmates.html).

<sup>170</sup> Rebecca Project for Human Rights, National Women’s Law Center, *Mothers behind bars: a state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children*. Washington, DC: Rebecca Project; NWLC (2010) <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> H.R.5682 - FIRST STEP Act, 115th Congress (2017 - 2018).

<sup>174</sup> 18 U.S.C. § 4322 (2018).

<sup>175</sup> *Nelson v. Correctional Medical Services*, 533 F.3d 958 (8th Cir. 2008).

<sup>176</sup> Griggs, Claire Louise, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, J. of Gender, Soc. Pol’y & L. 20 (1), 247–271 (2011).

**IV. In the case of primary caregivers, States must use deprivation of liberty as a measure of last resort and must adopt policies related to children living with their parents while in custody based on the best interest of the child.**

Prisons and detention centers are not places designed with children in mind and are not appropriate spaces for children. Unfortunately, many times, there is no other option and many children in the region live in the same conditions of deprivation of liberty along with their caregivers, especially in the case of mothers.<sup>177</sup> This is the case of newborns and young children when there are no other relatives or adults with the conditions to care for these children. There is not a uniform rule in Latin America regarding the age limit for children to stay in custody with their mothers and the situation vary greatly from country to country.<sup>178</sup> What does not change, is that the majority of prisons and detention centers do not have the conditions to guarantee a healthy and safe environment for children.

States must ensure children living with their mothers in detention receive proper nutrition and health care in line with the best interest of the child. Poor living conditions are a common problem in Latin American prisons.<sup>179</sup> Prisoners often lack access to basic needs like water and electricity, and they are forced to take matters into their own hands through renting cells or controlling the supply and management of basic necessities.<sup>180</sup> Overcrowding plays a huge role in these issues and is prevalent in the prisons of many states.<sup>181</sup> In 2010, Ecuador had an overcrowding rate of over thirty-nine percent, El Salvador had a rate of 168.02 percent, Guatemala had a rate of over fifty-nine percent, and Venezuela had a rate of 157.03 percent.<sup>182</sup> In El Salvador, one particularly overcrowded prison contained 1,700 women prisoners in 2013, with 300 of them “struggling to provide their children with a family-like environment.”<sup>183</sup>

In the United States nine states have prison nursery programs which allow mothers to remain with their infants for 12 to 36 months after birth.<sup>184</sup> Most women, however, birth in prisons without a nursery program and are separated from their babies between forty-eight and seventy-

---

<sup>177</sup> Dorigo, M. E. Mothers Behind Bars: Reflecting on the Impact of Incarceration on Mothers and their Children. In C. f. Law, *Gender Perspectives on Torture: Law and Practice* (pp. 239-256). Washington: Center for Human Rights & Humanitarian Law Washington College of Law, 2015, 247; Giacomello, C., *Niñas y niños que viven en prisión con sus madres Una perspectiva jurídica comparada*. Mexico: Suprema Corte de Justicia de la Nación, Serie Derechos Humanos N.5. (2018).

<sup>178</sup> Ibid.

<sup>179</sup> Francisco Javier de Leon Villalba, *Imprisonment and Human Rights in Latina America: An Introduction*, 98 *Prison J.* 17, 30, 31 (2017).

<sup>180</sup> Ibid. at 33.

<sup>181</sup> Ibid. at 30.

<sup>182</sup> Ibid. at 31.

<sup>183</sup> Laws on Children Residing with Parents in Prison, Library of Congress, <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/international-policy.php>.

<sup>184</sup> Rebecca J Shlafer, Laurel Davis, Lauren A Hindt, Lorie S Goshin, Erica Gerrity, *Intention and Initiation of Breastfeeding Among Women Who Are Incarcerated*, 22-1 *Nursing for Women's Health*, (2018), 67.

two hours after birth.<sup>185</sup> In addition, states that have prison nursery programs generally allow the children to remain with their mothers for no longer than six months of age.<sup>186</sup>

Despite prisons installing child-care facilities, in Colombia mothers have limited access to them, lack prior knowledge of the conditions in which their children will be housed, and are unable to become actively involved in child rearing.<sup>187</sup> Furthermore, when their children turn three, the child must be sent to live with a family member or an external institution.<sup>188</sup> This rupture generates long lasting consequences in children and contributes to broken family units.<sup>189</sup>

A report from DeJusticia states that children who are born in prison in Colombia and who must live the first days of their lives under conditions of detention are sometimes treated as prisoners.<sup>190</sup> The report also cites findings from the Colombian Ombudsman's Office outlining the undesired consequences for children under three whose mothers are behind bars, stating that many children whose mothers are deprived of liberty end up with relatives of institutionalized with the Colombian Family Welfare Institute.<sup>191</sup>

According to research done by CEJIL in prisons of Argentina, Bolivia, Chile, Paraguay and Uruguay, “a great deal of Latin American legislation permits mothers in prison to keep young children with them until a certain age, however the majority of establishments do not have nurseries nor programs of special care for these children.”<sup>192</sup>

## 1. International Human Rights Standards

The international community relies on the Convention of the Rights of the Child (CRC) as guiding interpretation of the standard of living for children residing with their parents in detention.<sup>193</sup> Article 9 of the CRC requires that its parties “ensure that a child shall not be

---

<sup>185</sup> Ibid at 68.

<sup>186</sup> Institute for the Advancement of Breastfeeding and Lactation Education, *Breastfeeding During Incarceration in the USA* (May 2018) <https://lacted.org/questions/breastfeeding-during-incarceration-in-the-usa/#:~:text=It%20is%20a%20federal%20law,breaks%20three%20times%20a%20day>.

<sup>187</sup> UNIFEM, *Mujeres y prisión en Colombia: Análisis desde una perspectiva de derechos humanos y género* (2006) <http://bdigital.unal.edu.co/54279/>.

<sup>188</sup> Sánchez-Mejía, Astrid, Rodríguez Cely, Leonardo, Fondevila, Gustavo and Morad Acero, Juliana, *Mujeres y Prisión en Colombia: Desafíos para la Política Criminal desde un Enfoque de Género*, CIDE, Pont Univ Javeriana, CICR, (2018), 16.

<sup>189</sup> Ibid.

<sup>190</sup> Dejusticia, *Women, Drug Policies and Incarceration* (2016).

<sup>191</sup> Ibid.

<sup>192</sup> Center For Justice & International Law (CEJIL), *Women in Prison. Regional Report: Argentina, Bolivia, Chile, Paraguay, Uruguay* (2006) [https://www.cejil.org/sites/default/files/legacy\\_files/women\\_in\\_prison\\_0.pdf](https://www.cejil.org/sites/default/files/legacy_files/women_in_prison_0.pdf).

<sup>193</sup> UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74, <https://www.refworld.org/docid/3b00f03d30.html> (last accessed 28 October 2020).

separated from his or her parents against their will.”<sup>194</sup> Parties are required to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”<sup>195</sup> These rights coincide with Article 17 of the ACHR and emphasize the importance of the family unit even in the prison environment.<sup>196</sup>

The “best interest of the child” standard is further outlined in the Mandela Rules.<sup>197</sup> Rule 29 states that a decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned.<sup>198</sup> Where children are allowed to remain in prison with a parent, the rules call for internal or external childcare facilities staffed by qualified personnel; the child is recommended to stay in this open location when they are not in the care of their parent.<sup>199</sup> The Mandela Rules further require child-specific health-care services, including health screenings, upon admission as well as ongoing monitoring of their physical and mental development by specialists.<sup>200</sup> Most importantly, children residing with a parent shall never be treated as prisoners.<sup>201</sup> The Bangkok Rules also emphasize this standard.<sup>202</sup> Rule 49 states, any decision made regarding allowing children to live with their imprisoned mothers should be made “based on the best interests of the children” and emphasizes that these children “shall never be treated as prisoners.”<sup>203</sup> This rule aligns with Article 5 of the ACHR by ensuring that children are not punished as criminals just because they are living with their imprisoned mothers.<sup>204</sup>

With regards to conditions for children living with their mothers in custody, States are obligated to provide high standards of nutrition and health. The Convention of the Rights of the Child states that children have the right to have the highest standard of health.<sup>205</sup> The CRC further outlines that children cannot be deprived of access to health care services.<sup>206</sup> Within Article 24 of the CRC, the convention outlines the state’s responsibility in upholding the health of a child.<sup>207</sup> States must ensure provisions of medical assistance and health care are available to children and

---

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, <https://www.refworld.org/docid/3ae6b36510.html> (last accessed 28 October 2020).

<sup>197</sup> *Mandela Rules*, A/RES/70/175.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid; *see also* Irena Gabunia, *Children of Women in Prison*, **Penal Reform Int’l** (2019), <https://www.penalreform.org/blog/children-of-prisoner-mothers/>.

<sup>202</sup> *Bangkok Rules*, Rule 49, A/RES/65/229.

<sup>203</sup> Ibid.

<sup>204</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, <https://www.refworld.org/docid/3ae6b36510.html> (last accessed 28 October 2020).

<sup>205</sup> *CRC*, 7 March 1990, E/CN.4/RES/1990/74.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid. at Art. 24.

have an obligation to prevent malnutrition.<sup>208</sup> Article 27 recognizes that children have a right to an adequate standard of living that focuses on “the child's physical, mental, spiritual, moral and social development.”<sup>209</sup>

According to the Joint Statement by the UN Special Rapporteurs, States should take all necessary measures to support and protect breastfeeding.<sup>210</sup>

“Breastfeeding is a human rights issue for both the child and the mother. Children have the right to life, survival and development and to the highest attainable standard of health, of which breastfeeding must be considered an integral component, as well as safe and nutritious foods. Women have the right to accurate, unbiased information needed to make an informed choice about breastfeeding. They also have the right to good quality health services, including comprehensive sexual, reproductive and maternal health services. And they have the right to adequate maternity protection in the workplace and to a friendly environment and appropriate conditions in public spaces for breastfeeding which are crucial to ensure successful breastfeeding practices.... Restriction of women’s autonomy in making decisions about their own lives leads to violation of women’s rights to health and, infringes women’s dignity and bodily integrity.”<sup>211</sup>

According to Rule 28 of the Mandela Rules, prisons shall ensure special accommodation for all necessary postnatal care and treatment,<sup>212</sup> and, under Rule 24,<sup>213</sup> breastfeeding women, as all individuals deprived of liberty, should enjoy the same standards of health care that are available in the community.<sup>214</sup> Under Rule 48 of the Bangkok Rules, “women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.”<sup>215</sup> According to Article 12 of CEDAW, States must ensure women receive appropriate services during the postnatal period, granting free services where necessary, including adequate nutrition during lactation.<sup>216</sup>

---

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Joint statement by the UN Special Rapporteurs on the Right to Food, Right to Health, the Working Group on Discrimination against Women in law and in practice, and the Committee on the Rights of the Child in support of increased efforts to promote, support and protect breast-feeding.  
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20871>.

<sup>211</sup> Ibid.

<sup>212</sup> *Mandela Rules*, Rule 28, A/RES/70/175.

<sup>213</sup> *Mandela Rules*, Rule 24, A/RES/70/175.

<sup>214</sup> Ibid.

<sup>215</sup> *Bangkok Rules*, Rule 48, A/RES/65/229.

<sup>216</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at:  
<https://www.refworld.org/docid/3ae6b3970.html>.

States are obligated to take measures appropriate to help parents with material assistance through support programs, especially with nutrition, clothing, and housing.<sup>217</sup> Similarly, the Bangkok Rules provide guidance on the importance of nutrition and health for children.<sup>218</sup> Rule 9 requires that these children undergo health screenings and that the prisons provide health care equivalent to what is provided in the community while Rule 51 requires prisons provide children “with ongoing health services and their development shall be monitored by specialists, in collaboration with community health services.”<sup>219</sup>

## 2. Comparative Examples of Standards and Best Practices

### a) Europe

The best interest standard has been reiterated by regional mechanisms. In the 2008 European Parliament Report on the Situation of Women in Prison, the Committee on Women’s Rights and Gender Equality listed recommendations on how to improve prison conditions for women and children.<sup>220</sup> This included how to help women maintain family ties and reintegrate into society.<sup>221</sup> In a subsequent resolution, the European Parliament recommended “that the imprisonment of pregnant women and mothers with young children should only be considered as a last resort.”<sup>222</sup> If detention with a parent is necessary, families are entitled to a spacious individual cell while particular attention should be given to their diet and hygiene.<sup>223</sup> The report urged States to create “separate cells, where possible, from the ordinary prison environment...”<sup>224</sup> It further suggests “suitable facilities and qualified staff to assist prisoners who are mothers with their parental responsibilities and the necessary care.”<sup>225</sup>

The 2000 Parliamentary Assembly Recommendation of the Council of Europe took note of “the adverse effects of imprisonment of mothers on babies” and made eight recommendations to counter them; one such recommendation that **member states only use custody for pregnant women and mothers of young children as a last resort.**<sup>226</sup> Additionally, Rule 36.1 of the

---

<sup>217</sup> Ibid.

<sup>218</sup> *Bangkok Rules*, A/RES/65/229.

<sup>219</sup> *Bangkok Rules*, Rule 9, 51, A/RES/65/229.

<sup>220</sup> *Report on the Situation of Women in Prison and the Impact of the Imprisonment of Parents on Social and Family Life*, at 9 (Feb. 5, 2008), <https://www.europarl.europa.eu/sides/getDoc.do?reference=A6-2008-0033&type=REPORT&language=EN&redirect>.

<sup>221</sup> Ibid.

<sup>222</sup> Resolution on the Particular Situation of Women in Prison and the Impact of the Imprisonment of Parents on Social and Family Life, **Eur. Parl. Doc.** P6 TA (2008).

<sup>223</sup> Ibid.

<sup>224</sup> *Report on the Situation of Women in Prison and the Impact of the Imprisonment of Parents on Social and Family Life*, at 9 (Feb. 5, 2008).

<sup>225</sup> Ibid.

<sup>226</sup> Council of Europe, Parliamentary Assembly, Recommendation 1469 (2000), Mothers and Babies in Prison (adopted on June 30, 2000), recommendation 5(i)–(viii), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1469.htm>



European Prison Rules states that “infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners.”<sup>227</sup>

The forcible separation of mothers and infants is undesirable, yet prisons do not provide an appropriate environment for babies and young children. In *Korneykova v. Ukraine*, the European Court of Human Rights highlighted the best interest of the child as a principle which is enshrined in the Court’s childcare case-law.<sup>228</sup> Namely, the Court cited the CPT Standard Provision that stipulated “a mother and child should be allowed to stay together for at least a certain period of time. If the mother and child are together in prison, they should be placed in conditions providing them with the equivalent of a creche and the support of staff specialised in postnatal care and nursery nursing....”<sup>229</sup>

Other examples worth mentioning are England, where women are able to stay with their babies in specialized separated units from the general population within women’s prisons.<sup>230</sup> Admission into the unit is decided by an admission board chaired by a social worker.<sup>231</sup> However, these units have very limited capacity, with only seventy-seven places across the nation, while around 120 women in custody give birth each year.<sup>232</sup> The decision to admit the mother and baby considers various factors such as whether it is in the best interest of the child, the necessity to maintain good order and discipline, and the health and safety of other babies and mothers within the unit.<sup>233</sup> In the majority of cases, the child leaves the unit by the age of eighteen months or earlier, depending on the best interests of the child.<sup>234</sup> Exceptionally, the child is allowed to stay longer.<sup>235</sup> The separation plan is agreed upon by a team as soon as the mother enters the unit.<sup>236</sup>

---

<sup>227</sup> Council of Europe, Comm. of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 36.1, (adopted Jan. 11, 2016) (revised and amended Jul. 1, 2020).

<sup>228</sup> See *Korneykova supra* note 200 at 8. *Korneykova v. Ukraine*, App. No. 39884/05 (2012).

<sup>229</sup> Council of Europe: The CPT standards, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010, # 66, <https://www.refworld.org/docid/4d7882092.html>.

<sup>230</sup> The Law Library of Congress, Global Legal Research Center, Laws on Children Residing with Parents in Prison (2014) <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf>.

<sup>231</sup> *Ibid.*

<sup>232</sup> Prison Service Order, Women Prisoners, 2008, PSO 4800, at 51, [https://www.justice.gov.uk/downloads/offenders/psipso/psipso/PSO\\_4800\\_women\\_prisoners.doc](https://www.justice.gov.uk/downloads/offenders/psipso/psipso/PSO_4800_women_prisoners.doc).

<sup>233</sup> Mother and Baby Units, 2011, PSI 16/2011, ¶ 1.4, <http://www.justice.gov.uk/downloads/offenders/psipso/psi2011/psi-54-2011.doc>.

<sup>234</sup> The Law Library of Congress, Global Legal Research Center, Laws on Children Residing with Parents in Prison (2014) <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf>.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

Similar to England and Wales, in France, the French Penal Code allows incarcerated mothers to keep their children until they reach eighteen months of age.<sup>237</sup> Children can stay beyond eighteen months upon a request of the mother and after a consultation with the special commission of pediatricians, psychologists, psychiatrist, and a probation officer.<sup>238</sup> A 2013 report by the Comptroller General in charge of the French prison system stated, out of 1,794 places for women, sixteen (four percent) were reserved for mothers with young children.<sup>239</sup>

The Swiss Penal Code provides for special forms of imprisonment for mothers and their small children as long as these forms are in the interest of the child.<sup>240</sup> Usually, a child stays with their mother until the age of three.<sup>241</sup> Switzerland considers three-year-old children in need of a broader social environment--beyond what prison can provide--for its development.<sup>242</sup> Swiss federal law entitles the cantons to provide for the necessary forms of imprisonment of mothers with small children.<sup>243</sup> Cantons have introduced special prison locations with adapted services—for example, staff with experience in childcare, suitable rooms, and external daycare facilities.<sup>244</sup>

#### *b) Africa*

The African Charter on the Rights and Welfare of Children calls for the development of alternative sentences for mothers with a focus on family and social rehabilitation.<sup>245</sup> Specifically, Article 30 states:

*“Children of Imprisoned Mothers*

*1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular: a. Ensure that a non-custodial sentence will always be first*

---

<sup>237</sup> Code de Procedure Penale (Code of Criminal Procedure) art. D401, [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2E1B6505838B6256B5CE6E1FD4ED4991.tpdjo17v\\_1?cidTexte=LEGITEXT000006071154&dateTexte=&categorieLien=cid](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2E1B6505838B6256B5CE6E1FD4ED4991.tpdjo17v_1?cidTexte=LEGITEXT000006071154&dateTexte=&categorieLien=cid).

<sup>238</sup> Ibid.

<sup>239</sup> The Law Library of Congress, Global Legal Research Center, Laws on Children Residing with Parents in Prison (2014) <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf>.

<sup>240</sup> Schweizerisches Strafgesetzbuch [Swiss Penal Code], Dec. 21, 1937, as amended through July 1, 2014, Systematische Sammlung Des Bundesrechts, art. 80(1)(b), <http://www.admin.ch/opc/de/classifiedcompilation/19370083/index.html>.

<sup>241</sup> Andrea Baechtold, *Kommentar zu Art. 80 Strafgesetzbuch* [Commentary on Art. 80 Swiss Penal Code], in 1 STRAFRECHT 1542, 1546 (Marcel A. Niggli & Hans Wiprächtiger eds., 2d ed. 2007).

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), <https://www.refworld.org/docid/3ae6b38c18.html> (last accessed 28 October 2020).



*considered when sentencing such mothers; b. Establish and promote measures alternative to institutional confinement for the treatment of such mothers; c. Establish special alternative institutions for holding such mothers; d. Ensure that a mother shall not be imprisoned with her child; e. The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.*"<sup>246</sup>

In its General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child states that:

*"36. Implementation of Article 30 requires that States parties review their sentencing procedure and reform it accordingly so that:*

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.*
- (b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.*
- (c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.*
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.*
- (e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.*

*37. Therefore, a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interest of the child into consideration.*"<sup>247</sup>

It is worth noting that the African Committee makes clear that in the case of primary caregivers, the pre-trial measures and sentencing must be decided not looking at the individual in isolation, but, on the contrary, the primary consideration must be the best interest of the children who depend on the primary caregiver facing the criminal justice system.

---

<sup>246</sup> Ibid. Emphasis added.

<sup>247</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), adopted by the Committee at its twenty-second Ordinary Session (04 - 08 November, 2013), 17-18.

## V. Recommendations

This request for the Court’s advisory opinion represents a unique opportunity to develop legal standards and provide definite protection to a group in a particular situation of vulnerability in the Americas. Pregnant, postpartum, and breastfeeding women deprived of liberty and children living with their mothers in detention face conditions that fall short of upholding the fundamental rights recognized by various international human rights instruments. In accordance with the principle of equality and non-discrimination, States should take appropriate measures to ensure that pregnant, postpartum, and breastfeeding women deprived of liberty and their children can enjoy their rights to equality, health and family. States must further interpret the best interest of the child in ways that are compatible with the exercise of these rights.

Based on the aforementioned analysis, we respectfully request the Court to include in its Opinion the following guidelines:

1. *In the case of pregnant, postpartum and breastfeeding women, States must prioritize non-custodial measures. In the case of primary caregivers, the best interest of the child must be sentencing’s primary consideration.*

Recognizing the special needs of women who are pregnant, postpartum, and breastfeeding, States should prioritize non-custodial measures to the most possible extent. The adoption of alternatives to detention is in line with international standards, including the ACHR and the CAT, and is reflected in the Mandela and Bangkok Rules. Research indicates that, globally, the majority of women prisoners are mothers. In order to best address the issue of mothers and their children residing in prison, the standards set out in the Convention of the Rights of the Child serve as the best guiding principles.<sup>248</sup> The most important of these is the best interest of the child standard.<sup>249</sup> As stated by both the Committee of the Rights in the Child in paragraph 39 of its general comment No. 14 (2013) and the Working Group on Arbitrary Detention, the best interest of the child standard “means the child’s interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.”<sup>250</sup> Likewise, the American Convention on Human Rights upholds the special protection of children under Article 9.<sup>251</sup>

Given the financial burden of enhancing prison standards, and the limited capacity to oversee new programs that meet the emotional and physical best interest of the child, the most effective way for States to follow the standards set by the ACHR would be to focus on alternative

---

<sup>248</sup> CRC, Art. 7., 7 March 1990, E/CN.4/RES/1990/74.; <https://www.penalreform.org/blog/children-of-prisoner-mothers/>

<sup>249</sup> Ibid.

<sup>250</sup> Working Group on Arbitrary Detention, *Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)*, A/HRC/WGAD/2019/2 at 13 (2019).

<sup>251</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, <https://www.refworld.org/docid/3ae6b36510.html> (last accessed 29 October 2020).

sentencing efforts. Alternative sentencing is most of the time in the best interest of the child as it allows mothers to be present in their child's lives. For example, States should focus on house arrests, halfway houses, electronic monitoring and community-based solutions and programs. These alternatives minimize the impact of custody on children.

The Working Group on Arbitrary Detention has encouraged States to reduce prison populations through "early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures as provided for in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)." The Working Group has gone so far to say "the Working Group has always held the view that the detention of children whose parents are detained cannot be justified on the basis of maintaining the family unit, and that alternatives to detention must be applied to the entire family instead."<sup>252</sup>

The use of alternative sentencing allows States to meet obligations in upholding the Convention on the Rights of the Child, ACHR, and the Belém do Pará Convention. By allowing eligible mothers a chance at alternative sentencing, States uphold the focus of reintegration and rehabilitation while being able to protect the family unit.

2. *States must prohibit the use of shackling or similar restraints and the use of solitary confinement on pregnant, postpartum and breastfeeding women*

When alternative sentencing is not an option, States have a duty to uphold the human rights and dignity of women. The shackling of women that are pregnant can amount to torture or ill-treatment, which is prohibited under Article 5 of the ACHR. To that end, States should prohibit the shackling or handcuffing of pregnant women, with due regard for its harmful consequences on the woman.

Restraints should only be used in exceptional circumstances as precaution against credible evidence of possible escape and the gravity of the offense imposes a danger of self-violence or violence towards others. The health of the mother and the life of the fetus must dictate the level and duration of restraints. Qualified medical officials should be involved in determining the use of restraints. Belly chains, leg irons, or handcuffs that limit mobility should be strictly prohibited. All correctional departments should develop standardized, comprehensive, clear, and pregnant-specific written policies and procedures to guide restraint practice. Correctional department policies should clearly prohibit restraint use on pregnant women in the third trimester, during labor or delivery or during recovery.

---

<sup>252</sup> Working Group on Arbitrary Detention, *Opinion No. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)*, A/HRC/WGAD/2019/2 at 13 (2019).

3. *States must ensure that pregnant, postpartum and breastfeeding women in custody have access to medical services and that her nutritional needs are duly covered*

Women's health needs, including the kind of postnatal or pregnancy related care that is most appropriate for them, cannot be ascertained until after the completion of a comprehensive assessment of their physical and mental wellbeing. States should therefore develop prison policies that provide comprehensive screening of women's health. This will enable facilities to respond to reproductive health complications that may arise. In the healthcare setting, and commensurate with the need for gender-sensitive approaches to healthcare, States should comply with women's request for a female healthcare professional whenever possible.

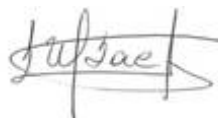
Women must have access to regular medical check-ups, access to prenatal care, medicines, vitamins and nutritional food and water necessary to ensure their health and that of their children. These include the conditions for healthy breastfeeding when women choose to do so.

4. *States must guarantee that children who live with their mothers in custody do so in an environment conducive to their healthy development.*

States should prioritize non-custodial measures for primary caregivers. If this is not possible, the decision to keep children with their mothers while in custody must be made on a case-by-case basis to ensure the child's best interest is upheld.

A child residing with their parent in detention is the responsibility of the State. The State is responsible for the wellbeing of that child with the understanding that these children are not prisoners. While living with their parents in prison, children should be provided health care, including regular vaccinations, educational services, and services to monitor their development. Children should be able to spend time with their mothers in custody and, when age appropriate, be able to attend school. Conditions that children reside in must be as close to their environment out of prison as possible. This requirement is aligned with the ACHR's rights of the child, right to life, and equal protection. An environment such as this would allow for the protection of the child's development. This must also include access to play and exercise.

Additionally, States should ensure that the prison staff are trained in providing support to mothers and children so that they can assist with parental care.



Professor Macarena Sáez  
Fellow in International Legal Studies  
Faculty Director, Center for Human Rights and Humanitarian Law