

INTER-AMERICAN COURT OF HUMAN RIGHTS

AMICUS CURIAE BRIEF

**RE: REQUEST FOR AN ADVISORY OPINION ON DIFFERENTIATED APPROACHES TO
PERSONS DEPRIVED OF LIBERTY UNDER ARTICLE 64(1) OF THE AMERICAN
CONVENTION ON HUMAN RIGHTS**

PRESENTED BY:



IN COORDINATION WITH:



EXECUTIVE SUMMARY

The absence of a differentiated approach for vulnerable populations deprived of liberty engenders serious concerns about protecting fundamental human rights in prisons and penal institutions. Globally, spaces of incarceration dilute the core human rights of incarcerated persons, leading to endemic impunity for rampant human rights violations in the carceral context. Human rights violations in prison are exponentially magnified in their scope for vulnerable and historically marginalized groups because they experience particularized discrimination and violence on account of their unique social identities. In this vein, a differentiated human rights framework for vulnerable groups deprived of liberty must be inclusive of pregnant, postpartum, and breastfeeding people in detention, lesbian, gay, bisexual, transgender, queer, intersex, and pansexual (LGBTQIAP+) people, and children incarcerated with their mothers because these groups suffer distinct harm due to their societal vulnerability. The adoption of enhanced human rights protections for these groups aligns with existing international, regional, and domestic jurisprudence and is urgently required to eliminate invidious identity-based discrimination, ill-treatment, and severe torture in prisons. The Inter-American Court of Human Rights (IACtHR) should adopt a comprehensive, differentiated human rights framework to ensure the well-being and dignity of people who are in a special situation of risk during the pendency of their incarceration.

Incarcerated people who are pregnant, postnatal, and breastfeeding warrant a pregnancy-specific human rights framework because of the heightened vulnerability that a person experiences during and after pregnancy. A differentiated human rights model for pregnant people is necessary to ameliorate the widespread deficiencies in pre-and post-natal care in prisons and to ensure the dignity and fundamental rights of people giving birth. Lesbian, gay, bisexual, queer, and pansexual (LGBQP) and transgender, gender non-conforming, and intersex (TGNCI+) people deprived of liberty suffer distinct prejudice-based harm on account of sexual orientation and non-conformity with binary gender norms. LGBTQIAP+ people in prison merit their own intersectional human rights approach because they experience transphobic and homophobic discrimination, violence, and ill-treatment that is magnified in the carceral context. Children and infants who are incarcerated with their mothers as they serve out their judicial sentences are extremely vulnerable to the human rights violations that occur within the penal system because of their social status as children and specific developmental needs. In preserving the sanctity of the mother-child relationship by allowing children to live with their incarcerated mothers, child-sensitive differentiated legal protections are essential to protect the child's right to development, promote the child's best interest in detention, and preserve the unique identities of children despite their upbringing in spaces of confinement.

The IACtHR should expand protective measures for incarcerated people throughout the region who are in a special situation of risk so that they may serve out their custodial sentences without fear of egregious bodily harm and discriminatory treatment. The IACtHR must adopt a differentiated human rights framework that encompasses the lived experiences of incarcerated pregnant, postpartum, and breastfeeding women, LGBTQIAP+ people, and children living in prison with their incarcerated mothers in order to categorically eliminate identity-based harm in prisons and uphold the inherent dignity and fundamental human rights of people who are in a special situation of risk during incarceration.

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I. Introduction

The absence of a differentiated approach for vulnerable populations deprived of liberty engenders serious concerns about protecting fundamental human rights in prisons and penal institutions. Globally, spaces of incarceration dilute the core human rights of incarcerated persons, leading to endemic impunity for rampant human rights violations in the carceral context. Human rights violations in prison are exponentially magnified in their scope for vulnerable and historically marginalized groups because they experience particularized discrimination and violence on account of their unique social identities. In this vein, a differentiated human rights framework for vulnerable groups deprived of liberty must be inclusive of pregnant, postpartum, and breastfeeding people in detention, lesbian, gay, bisexual, transgender, queer, intersex, and pansexual (LGBTQIAP+) people, and children incarcerated with their mothers because these groups suffer distinct harm due to their identities and societal vulnerability. The adoption of enhanced human rights protections for these groups aligns with existing international, regional, and domestic jurisprudence and is urgently required to eliminate invidious, identity-based discrimination, ill-treatment, and severe torture in prisons. The Inter-American Court of Human Rights (IACtHR) must adopt a comprehensive, differentiated human rights framework to ensure the well-being and dignity of people who are in a special situation of risk during the pendency of their incarceration.

This brief is divided into three sections and argues for the adoption of a differentiated human rights framework that addresses the specific needs of incarcerated pregnant people, LGBTQIAP+ persons, and children who are incarcerated with their mothers. The first section of this brief addresses the urgency of a differentiated human rights model for pregnant, postpartum, and breastfeeding people in prison. This section will argue that a pregnancy-specific human rights approach is necessary to remedy the widespread deficiencies in pre-and post-natal care in prisons

and to ensure the dignity and fundamental rights of all people who give birth and navigate the postpartum period in spaces of confinement. The second part of this brief calls for an intersectional human rights framework for incarcerated LGBTQIAP+ people to eliminate sexual orientation-based and gender identity-based harm in prisons and argues for the adoption of the Yogyakarta Principles. Finally, the third section of this brief advocates for child-sensitive differentiated legal protections to safeguard children and infants who are incarcerated with their mothers as they serve their custodial sentences. The IACtHR must adopt a differentiated human rights framework that is centered on the lived experiences of particularly vulnerable groups in prison, including incarcerated pregnant, postpartum, and breastfeeding people, LGBTQIAP+ people, and children incarcerated with their mothers in order to categorically eliminate identity-based harm in prisons and uphold the inherent dignity and fundamental human rights of these groups.

II. Pregnant, Postpartum, and Breastfeeding Individuals in Detention

This section will discuss the urgent need for the IACtHR to adopt a differentiated approach in regard to pregnant, postpartum and breastfeeding individuals¹ due to the vulnerabilities faced in detention. This group is an extremely vulnerable population, and the lack of a differentiated approach is a violation of the Inter-American Convention.

a. The Situation of Detained Pregnant, Postpartum, and Breastfeeding Individuals

Pregnant, postpartum, and breastfeeding individuals face a multitude of disproportionately egregious challenges in detention that require specialized attention and differentiated approaches. As the Inter-American Commission on Human Rights (IACHR) has already recognized in part, the main problem areas for detained pregnant, postpartum, and breastfeeding individuals are: (i) a

¹ To ensure inclusivity, this brief will refer to pregnant, postpartum, and breastfeeding “individuals”, rather than “women.” There are pregnant, postpartum and/or breastfeeding persons that may not identify as “women.”

lack of specialized medical care, (ii) a lack of adequate birth and labor protocols, (iii) inappropriate shackling, (iv) a lack of adequate clothing and nutrition, and (v) deprivation of contact between detained mothers and their children.²

1. Lack of Specialized Medical Care

Though it may seem obvious that pregnant, postpartum, and breastfeeding individuals require distinct medical care, prison systems do not provide health care that is specialized to their pre- and post-natal needs.³ Detained pregnant individuals do not receive sufficient pre-natal and post-natal medical checkups, if any at all.⁴ In a United States national government survey, twenty percent of pregnant individuals in prisons and fifty percent of pregnant individuals in jails reported receiving no prenatal care in any form.⁵ This becomes especially problematic considering that the already abysmal conditions of detention, often coupled with poor circumstances prior to detention, mean incarcerated individuals have a significantly higher probability of having high-risk pregnancies.⁶ Further exacerbating violation of these individuals' rights is the systemic lack of information given to them about their own health conditions, including the absence of informed consent for medical procedures.⁷

² Differentiated Approaches to Persons Deprived of Liberty, Request for an Advisory Opinion, Inter-Am. Ct. H.R. ¶ 22 (Nov. 2019).

³ ICRC, Pontificia Universidad Javeriana and CIDE, *Mujeres y prisión en Colombia: Desafíos para la política criminal desde un enfoque de género*, 2018, at 91; Republic of Panama and UNODC, *Diagnóstico de la Situación de las Mujeres Privadas de Libertad en Panamá desde un enfoque de género y derechos*, Panama, 2015, at 77, 82, 129.

⁴ National Women's Law Center and The Rebecca Project for Human Rights, *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*, 2010, at 6, 34; Roth, Rachel, "She Doesn't Deserve to Be Treated Like This": Prisons as Sites of Reproductive Injustice, Published in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, edited by Loretta J. Ross, Lynn Roberts, Erika Derkas, Whitney Peoples, and Pamela Bridgewater Toure (New York: The Feminist Press, 2017), at 8; The Prison Birth Project and Prisoners' Legal Services of Massachusetts, *Breaking Promises: Violations of the Massachusetts Pregnancy Standards & Anti-Shackling Law*, 2016, at 12; Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform*. New York: 2016, at 16.

⁵ Roth, *supra*, note 4, at 8.

⁶ American Public Health Association, *Pregnancy Outcomes in US Prisons, 2016-2017*, April 2019; Vera Institute of Justice, *supra* note 4, at 16.

⁷ CELS, Ministerio Público de La Defensa y Procuración Penitenciaria de la Nación, *Las mujeres en prisión. Los alcances del castigo*. Argentina, Siglo XXI editors, 2011, at 182; U.N. CEDAW, 47th Sess., Concluding Observations

Postpartum medical care for detained individuals is similarly abysmal.⁸ Postpartum individuals have reported going without six-week checkups and without the necessary care to heal from a cesarean delivery.⁹ Additionally, there are no measures in place to meet the specific psychological needs of postpartum individuals.¹⁰ The impact of this lack of psychological care is exacerbated by continued forced separation between mothers and their children, depriving both the mother and the child of adequate contact and leading to a heightened risk of traumatic long-term effects for both.¹¹

2. Lack of Adequate Birth and Labor Protocol

Harms relating to a lack of specialized medical care for pregnant individuals intensify when it comes time for labor and delivery. Not only is there a routine lack of attention given to detained pregnant individuals, there are often no written policies explaining when an individual in labor should be taken to the hospital.¹² Prison officials fail to attend to medical concerns in a timely manner and often disregard voiced concerns or calls for medical attention altogether, leading to substantial delays in care and loss of pregnancy.¹³ Prison staff refuse to take bleeding seriously, leading to miscarriages and stillbirth.¹⁴ Furthermore, their failure to recognize when individuals are in labor—be it from lack of monitoring, lack of medical training, or refusal to believe individuals when they say they are in labor—leads to pregnant individuals giving birth alone inside

at 9, U.N. Doc. CEDAW/C/CZE/CO/5 (October 22, 2010), <https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-CZE-CO-5.pdf>.

⁸ CELS, Ministerio Público de La Defensa y Procuración Penitenciaria de la Nación, *supra* note 7, at 182; ICRC, Pontificia Universidad Javeriana and CIDE, *supra*, note 3, at 91; Republic of Panama and UNODC, *supra* note 3, at 129; Roth, *supra* note 4, at 19.

⁹ Roth, *supra* note 4, at 11.

¹⁰ *Id.*

¹¹ UNODC, Handbook on Women and Imprisonment, Criminal Justice Handbook, 2nd Edition, 2014, at 17, 20.

¹² Roth, *supra* note 4, at 8, 10.

¹³ *Id.*; Manjoo, Rashida, Special Rapporteur on violence against women, its causes and consequences, Report “Pathways to, conditions and consequences of incarceration for women.” A/68/340, August 21, 2013, ¶¶ 44, 47.

¹⁴ National Women’s Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 28; Roth, *supra* note 4, at 8, 10; Manjoo, *supra* note 13, ¶¶ 44, 47.

their prison cells.¹⁵ Even for individuals who have experienced labor and delivery before, giving birth inside of a jail cell is extremely dangerous due to unhygienic conditions and a complete lack of medical assistance and knowledge.¹⁶ For individuals who have never given birth and have spent their entire pregnancy detained without access to adequate pre-natal care, it can be dire.¹⁷ Even when there is a response to a voiced concern, it is often severely inadequate given that there are often no minimum standards regarding health care for detained pregnant individuals.¹⁸ Necessary medical procedures, like stitching after delivery, are inappropriately delayed, and pregnant individuals may go through delivery alone without anesthesia.¹⁹ With regards to birth and labor protocol for detained pregnant individuals, the lack of a differentiated approach can be life-threatening.

3. Shackling of Pregnant, Laboring, and Postpartum Individuals

In addition to dangerously insufficient medical attention and complete lack of birth protocols, individuals are often shackled during labor and childbirth.²⁰ Some deliver their babies without ever leaving prison and/or remain shackled to a bed for the entirety of labor and delivery.²¹ One woman in a U.S. prison was forced to undergo labor and delivery in “full restraints, including

¹⁵ Olmeda, Rafael, South Florida Sun Sentinel, “Sherriff fires two jail administrators after inmate gave birth in cell,” Oct. 15, 2020, <https://www.sun-sentinel.com/local/broward/fl-ne-broward-inmate-birth-20201015-52kdeuirgrc53dpbbnwnkmywy-story.html>; Padilla, Mariel, New York Times, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, Sep. 1, 2019, <https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html#:~:text=Security%20footage%20showed%20Diana%20Sanchez,while%20she%20screamed%20for%20help.&text=Pacing%20in%20her%20jail%20cell,contractions%20for%20nearly%20five%20hours>; Ruggiero, Angela, The Mercury News, “Judge Says East Bay Jail Staff Acted With ‘Indifference’ When Woman Gave Birth Alone in Cell,” Jan. 29, 2020, <https://www.mercurynews.com/2020/01/29/judge-says-jail-staff-acted-with-indifference-when-woman-gave-birth-alone-in-cell/>; Roth, *supra*, note 4, at 8.

¹⁶ American Public Health Association, *supra* note 6.

¹⁷ *Id.*

¹⁸ National Women’s Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 11.

¹⁹ Olmeda, *supra* note 15; Padilla, *supra* note 15; Ruggiero, *supra* note 15; Roth, *supra* note 4, at 8.

²⁰ Manjoo, *supra* note 13, ¶ 57.

²¹ Roth, *supra* note 4, at 10; Manjoo, *supra* note 13, ¶ 57; The Prison Birth Project and Prisoners’ Legal Services of Massachusetts, *supra* note 4, at 2.

a metal chain around her full-term belly and handcuffs that bound her hands to the waist chain.”²² Officers even kept one of her ankles shackled to the bed, only removing it during her cesarean surgery.²³ While this level of shackling is not necessarily the norm, it is not unusual by any means.²⁴

In addition to the sheer cruelty of shackling a pregnant or laboring individual, the practice is dangerous for both the mother and fetus, and it makes labor and delivery more painful.²⁵ It elevates the risk of falls, high blood pressure, obstruction of circulation, and movement of the fetus.²⁶ Shackling also interferes with medical examinations and other necessary medical care, further endangering the lives of the mother and the fetus.²⁷

Pregnant, postpartum, and breastfeeding individuals are not only shackled during labor and delivery, they are also subjected to inappropriate handcuffing and physical restraints during medical examinations, check-ups, while waiting for medical attention related to their pregnancy, and during transfers.²⁸ A differentiated approach is crucial to ensure that pregnant, postpartum, and breastfeeding individuals who are deprived of freedom are not further endangered by seemingly routine uses of shackles.

²² Roth, *supra* note 4, at 10.

²³ *Id.*

²⁴ American Public Health Association, *supra* note 6; National Women’s Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 6-7.

²⁵ National Women’s Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 11; The Prison Birth Project and Prisoners’ Legal Services of Massachusetts, *supra* note 4, at 4.

²⁶ National Task Force on the Use of Restraints with Pregnant Women under Correctional Custody, *Best Practices in the Use of Restraints with Pregnant Women Under Correctional Custody* (Washington, DC: U.S. Department of Health and Human Services, 2012), 7-8; The Prison Birth Project and Prisoners’ Legal Services of Massachusetts, *supra* note 4, at 4.

²⁷ National Task Force on the Use of Restraints with Pregnant Women under Correctional Custody, *supra* note 26, at 7-8.

²⁸ *Duval v. France*, Eur. Ct. H.R. 2011, §§ 50-53; *Filiz Uyan v. Turkey*, Eur. Ct. H.R. 2009, §§ 32-35; *Korneykova and Korneykov v. Ukraine*, Eur. Ct. H.R. 2016, § 141; Manjoo, *supra* note 13, ¶ 57.

4. Lack of Adequate Nutrition and Clothing

Appallingly, there are no specialized nutritional standards for pregnant, postpartum, and breastfeeding detainees.²⁹ There is no consideration of the fact that they have different nutritional needs throughout the various pregnancy and postpartum stages, or even of serious health conditions that may arise during pregnancy.³⁰ Generally, pregnant, postpartum, and breastfeeding detainees are given the same sub-par sustenance as the rest of the detained population.³¹ The lack of adequate, specialized nutrition continues in the post-natal stage, affecting the pregnant individual's ability to breastfeed their newborn child.³² Because pregnant, postpartum, and breastfeeding individuals require an increased level of calories and well as increased levels of most nutrients, this failure to provide adequate nutrition endangers the individual's health as well as the health of the newborn.³³

The absence of a differentiated approach regarding clothing, is similarly alarming. Pregnant, postpartum, and breastfeeding individuals need clothing that can adapt with their rapidly changing bodies. Clothing provided without consideration of the different needs of pregnant, breastfeeding, and postpartum individuals creates various problems such as tripping hazards, hygiene concerns, unnecessary and unhealthy constriction, and impediments to breastfeeding.³⁴ One woman in a U.S. facility was given clothes "so small for her pregnant belly they gave her

²⁹ National Women's Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 8; Republic of Panama and UNODC, *supra* note 3, at 129; Manjoo, *supra* note 13, ¶ 52.

³⁰ *Korneykova and Korneykov v. Ukraine*, Eur. Ct. H.R. 2016, § 141; CELS, Ministerio Público de La Defensa y Procuración Penitenciaria de la Nación, *supra*, note 7, at 182; Republic of Panama and UNODC, *supra* note 3, at 129; Manjoo, *supra* note 13, ¶ 54.

³¹ Republic of Panama and UNODC, *supra* note 3, at 129.

³² Manjoo, *supra* note 13, ¶ 52.

³³ Foster, Jaime, Ohio State University, "Nutritional Needs During Pregnancy and Breastfeeding," Feb. 2015, <https://ohioline.osu.edu/factsheet/HYG-5573>; National Women's Law Center and The Rebecca Project for Human Rights, *supra* note 4, at 24; Manjoo, *supra* note 13, ¶ 52.

³⁴ Republic of Panama and UNODC, *supra* note 3, at 66, 129.

welts and ‘pain in [her] uterus.’³⁵ Pregnant, postpartum, and breastfeeding individuals must be provided with adequate nutrition and clothing.

5. Deprivation of Time and Contact with Newborns/Children

Finally, the struggles detained pregnant, postpartum, and breastfeeding individuals face due to the lack of a differentiated approach do not disappear after birth. If the individual was lucky enough to be taken to a hospital for delivery, they likely remain subject to physical restraints after childbirth.³⁶ Often, the mother is forcibly deprived of crucial time and physical contact with their newborn, including in the key hours immediately after giving birth.³⁷ This includes returning postpartum individuals to jail or prison less than 24 hours after giving birth, where they are subject to the jail’s visitation policies.³⁸

There are even instances of newborns being stolen from detained individuals after birth.³⁹ For example, in the case of *Gelman v. Uruguay*, a pregnant woman named María was arbitrarily detained.⁴⁰ After she gave birth to her daughter in custody, she was forcibly disappeared, and her newborn baby was taken from her and given to an Uruguayan family.⁴¹ Even where detained individuals are permitted time with their children, the remoteness of detention centers, various procedural difficulties, and inadequate spaces and conditions for child-friendly visits effectively

³⁵ Ema O’Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn’t Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018, 2:44 PM) (alteration in original), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-icedetention-trump>

³⁶ The Prison Birth Project and Prisoners’ Legal Services of Massachusetts, *supra* note 4, at 1.

³⁷ Roth, *supra* note 4, at 10-11; Vera Institute of Justice, *supra* note 4, at 10-11; American Public Health Association, *supra* note 6.

³⁸ Roth, *supra* note 4, at 11.

³⁹ *Gelman v. Uruguay*, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

⁴⁰ *Id.*

⁴¹ *Id.*

deprive them of any ability to see their own children.⁴² This forced separation causes long-term traumatic effects in both the mother and the child that are not easily remedied.⁴³

For these reasons, the lack of a differentiated approach to incarcerated pregnant, postpartum, and breastfeeding individuals is devastating. Pregnant, postpartum, and breastfeeding individuals are deprived of the ability to adequately nurture and clothe themselves and their child(ren). They are left to give birth alone in an unhygienic jail cell or are shackled to the bed for the entirety of labor and delivery. They are deprived of their right to see their children and their newborns are forcibly taken from them. The IACtHR must act to prevent these horrifying human rights abuses from continuing.

B. The Inter-American System

The IACtHR has indicated that pregnant, postpartum, and breastfeeding individuals are a vulnerable group of individuals.⁴⁴ However, the IACtHR must explicitly state the American Convention *requires* the adoption of a differentiated approach towards these persons deprived of liberty.⁴⁵ The Inter-American Human Rights System (“IAHRS”) member States’ failure to adopt a differentiated approach is a violation of the Inter-American Convention. From the IACtHR’s holdings in *Miguel Castro Castro Prison v. Peru* and *Gelman v. Uruguay*, the Inter-American System is moving in the right direction but needs to take further action to adopt a differentiated approach for pregnant, postpartum, and breastfeeding women.

C. Universal Human Rights Law

⁴² Republic of Panama and UNODC, *supra* note 3, at 61, 63; Vera Institute of Justice, *supra* note 4, at 17-18.

⁴³ ICRC, Pontificia Universidad Javeriana and CIDE, *supra* note 3, at 167; Vera Institute of Justice, *supra* note 4, at 17-18.

⁴⁴ Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, (Mar. 29, 2006).

⁴⁵ *Gelman v. Uruguay*, Admissibility Report, Report No. 30/07, Inter-Am. Comm’n H.R., Case No. 12.607, (Mar. 9, 2007); *Miguel Castro Castro Prison v. Peru*, Merits, Reparations, and Costs, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, 2010 (Nov. 25, 2006).

The international community has long recognized the vulnerable situation of pregnant, postpartum and nursing individuals in detention requires a differentiated approach and have adopted declarations, conventions, and measures to ensure protection of their rights.⁴⁶ International human rights law establishes that pregnancy is a special condition and that the absence of a differentiated approach that responds to the particular condition may place the individuals in a situation that violates their life and integrity and prevents them from enjoying their rights.⁴⁷ International human rights instruments and mechanisms provide extensive guidance for a differentiated approach which takes into consideration the particular vulnerabilities of incarcerated pregnant, postnatal and breastfeeding individuals. International human rights law protects pregnant prisoners by requiring “adequate delivery assistance,”⁴⁸ “safe motherhood”⁴⁹ and “special care and assistance.”⁵⁰ Because reliance on international human rights treaties provides greater human rights protections, the IACtHR should continue to refer to international human rights law and global consensus as a persuasive authority and as an indicator of how the American Convention should be interpreted.

⁴⁶Convention on the Elimination of All Forms of Discrimination Against Women, art. 12, G.A. Res. 34/180, U.N. Doc. A/Res/34/180 (December 18, 1979) [hereinafter CEDAW]; General recommendation No. 24: Article 12 of the Convention (women and health) ¶ 27 (1999), UN Doc. A/54/38/Rev.1); United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (December 9, 1988), UN Doc. A/43/49, Principle 5.2; UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: 1 The Prison System 27.

⁴⁷ General recommendation No. 24: Article 12 of the Convention (women and health) ¶ 27 (1999), UN Doc. A/54/38/Rev.1 [hereinafter General recommendation No. 24]; Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to the United States of America on the issue of violence against women in state and federal prisons (January 4, 1999), ¶ 206(f), UN Doc. E/CN.4/1999/68/Add.2; U.N. Committee Against Torture, Conclusion and Recommendations, United States of America ¶ 33 (July 25, 2006), UN Doc CAT/C/USA/CO/2; Human Rights Committee, General Comment 28 on the equality of rights between men and women, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

⁴⁸ Report of the International Conference on Population and Development, ¶ 8.22, U.N. Doc. A/CONF.171/13/Rev.1 (September 1994) (urging the broad expansion of maternity health care, including educational programs on safe motherhood and nutrition, prenatal care, delivery and referral services, post-natal care, and family planning services).

⁴⁹ General recommendation No. 24: Article 12 of the Convention (women and health) ¶ 27 (1999), UN Doc. A/54/38/Rev.

⁵⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc A/810 (December 10, 1948).

1. U.N. Treaty Body Jurisprudence

The IACtHR should consider other sources of international legal obligations for State parties that indicate an international consensus for adopting a differentiated approach. There is a wealth of international law supporting the adoption of a differentiated approach towards pregnant, postpartum, and breastfeeding individuals. For example, several United Nations treaty bodies have elaborated on the rights of pregnant, postpartum and breastfeeding persons—often with particular relevance to incarcerated people.⁵¹ The Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights all speak to the rights of pregnant, postpartum and breastfeeding women in detention. These widely ratified treaties require the adoption of a differentiated approach.

a. The Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has been nearly universally ratified⁵² and aims to protect women's' human rights.⁵³ CEDAW applies to all women, including women in detention, and provides a standard for the detention of pregnant, postpartum and breastfeeding women.⁵⁴

⁵¹ CEDAW, *supra* note 47.

⁵² CEDAW has been ratified or acceded to by 189 of the 193 U.N. member nations. Thus, the vast majority of states have voluntarily agreed to respect, protect, promote and fulfil the human rights of women under all circumstances. All of the American states, except the United States, have ratified CEDAW. The United States is the only country to have signed but not ratified the Convention. Other governments that have not ratified the treaty include Iran, Palau, Somalia, Sudan, and Tonga. United States Congressional Research Service, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate*, 12 November 2010, R40750.

⁵³ CEDAW, *supra* note 47, at art. 1.

⁵⁴ *Id.*; General recommendation No. 33: on women's access to justice ¶ 23—24 (2015), UN Doc. CEDAW/C/GC/33.

Access to specialized medical care and adequate nutrition for pregnant, postnatal and breastfeeding women in detention is a basic right under CEDAW.⁵⁵ CEDAW acknowledges that women who are pregnant in prison or jail, have particular health and nutrition needs and requires States to accommodate those needs.⁵⁶ Specifically, Article 12 of the Convention requires that States “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”⁵⁷ The pre- and post-natal care provided should be equivalent to that available outside prison.⁵⁸ Minimum standards with regard to health care should be codified including the presence of a qualified doctor on 24-hour call and easy access to gynecologists.⁵⁹ The CEDAW Committee declared that Article 12 places a “duty on State parties to ensure women’s right to safe motherhood and emergency obstetric services and they should allocate to these services the maximum extent of available resources.”⁶⁰

Furthermore, under CEDAW, pregnant women in detention are guaranteed the right to be informed about matters related to their pregnancy.⁶¹ The CEDAW Committee has stated that “adequate safeguards to ensure that medical procedures during childbirth are subject to objective assessments of need, and are conducted with respect for women’s autonomy and informed consent.”⁶² The CEDAW Committee has further stated that health care services must be

⁵⁵ CEDAW, *supra* note 47.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, Annex, princ. 1, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (December 18, 1982).

⁵⁹ Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to the United States of America on the issue of violence against women in state and federal prisons (January 4, 1999), ¶ 206(f), UN Doc. E/CN.4/1999/68/Add.2.

⁶⁰ General recommendation No. 24, *supra* note 48.

⁶¹ *Id.* ¶ 22.

⁶² Concluding Observations of the U.N. Committee on the Elimination of Discrimination against Women: Czech Republic ¶ 36 (October 22, 2010), UN Doc CEDAW/C/CZE/CO/5.

“delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives” in order to be in compliance with Article 12.⁶³

In addition to prenatal care, CEDAW requires State Parties to implement adequate birth and labor protocols for pregnant inmates, which provide timely and specialized birthing services.⁶⁴ Prison authorities and staff should foster a supportive environment for women prisoners’, provide timely access to medical services, and attend to pregnancy related complaints with urgency.⁶⁵ Without a differentiated approach, the delivery of babies may be carried out in prisons, in unhygienic conditions, by staff with inadequate medical expertise, resulting in health complications.

Also, shackling pregnant inmates is representative of the failure of the prison system to adapt protocols to unique situations faced by the female prison population in violation of CEDAW.⁶⁶ The practice of perinatal shackling has been reviewed by the U.N. Special Rapporteur on Violence against Women.⁶⁷ The report concluded that “the use of these instruments [of restraint] violates international standards and may be said to constitute cruel and unusual practices.”⁶⁸

b. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁶³ General recommendation No. 24, *supra* note 48, ¶ 22.

⁶⁴ U.N. Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report, Pathways to, conditions and consequences of incarceration for women (August 21, 2013), ¶ 47, UN Doc. A/68/340; Concluding Observations of the U.N. Committee on the Elimination of Discrimination against Women: Czech Republic ¶ 36 (October 22, 2010), UN Doc CEDAW/C/CZE/CO/5.

⁶⁵ U.N. Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Report, Pathways to, conditions and consequences of incarceration for women (August 21, 2013), ¶ 47, UN Doc. A/68/340.

⁶⁶ *Id.* ¶ 57.

⁶⁷ *Id.*

⁶⁸ *Id.*

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) aims to prevent and condemn torture and other acts of cruel, inhuman, or degrading treatment or punishment.⁶⁹ The Committee Against Torture, the enforcement body to CAT, considers forcing women to give birth in prisons in unhygienic conditions and without specialized assistance a violation of CAT's right to humane treatment.⁷⁰ A differentiated approach is required to address pregnant women's distinct needs and ensure their protection from cruel, inhuman or degrading treatment. The UN Special Rapporteur on Torture has found that women seeking maternal health care in prison face the high risk of ill-treatment, "particularly immediately before and after childbirth."⁷¹ The Rapporteur pointed out how pregnant women have specific health-care needs, "such as stitching after delivery,"⁷² that require immediate and appropriate health services be provided with the requisite expertise and specialization. The Rapporteur stated that extended delays in maternal health care exposes pregnant prisoners to significant health risks and "inflicts physical and psychological suffering that can amount to ill-treatment"⁷³ and recommended that states "account for women's gender-specific health-care needs and provide individualized primary and specialist care. . .in a holistic and humane manner."⁷⁴ The lack of timely and adequate specialized care to prevent or treat complications derived from pregnancy may have serious consequences that endanger the life of the mother and the well-being of the fetus, such as the risk of miscarriages, fetal death, and ectopic pregnancies. Lack of a differentiated

⁶⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (December 10, 1984).

⁷⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment (January 5, 2016), ¶ 47, UN Doc. A/HRC/31/57.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* ¶ 70(k).

approach is a significant problem for pregnant prisoners, who require specialized treatment for complications associated with pregnancy.

Additionally, use of instruments of restraint on women during labor, during childbirth and immediately after childbirth violates international standards and constitutes cruel and degrading treatment. The Committee Against Torture has noted its concerns with “incidents of shackling of women detainees during birth” and has made the recommendation that State party “adopt all appropriate measures to ensure that women in detention are treated in conformity with international standards.”⁷⁵

c. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR),⁷⁶ establishes in Article 10, that, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁷⁷ The assertion of an inalienable right to human dignity is a common element of many of the key human rights instruments and is surely relevant to any consideration of the treatment of incarcerated pregnant, postnatal and breastfeeding women. The UN Human Rights Committee (HRC)—a group of human rights experts which monitors implementation of the ICCPR—indicated that shackling of detained women during childbirth violates Article 10.⁷⁸ In response to the United States’ Second and Third Periodic Report submitted

⁷⁵ U.N. Committee Against Torture, Conclusion and Recommendations, United States of America ¶ 33 (July 25, 2006), UN Doc CAT/C/USA/CO/2.

⁷⁶ The ICCPR is the principal international treaty setting out fundamental civil and political rights for everybody and 173 nations have ratified the treaty, that is, have agreed to be legally bound by its provisions which include the obligation to protect the right of every person not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7).

⁷⁷ International Covenant on Civil and Political Rights, art. 10, 1, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (December 16, 1966).

⁷⁸ Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee ¶ 33, UN Human Rights Committee, (December 18, 2006), UN Doc CCPR/C/USA/CO/3/Rev.1 [hereinafter Concluding Observations].

to the HRC pursuant to the ICCPR in 2006,⁷⁹ the HRC raised concerns about the shackling of pregnant women deprived of their liberty in the United States.⁸⁰ The HRC also expressed concern about “the shackling of detained women during childbirth” in its Concluding Observations on United States’ Second and Third Periodic Report.⁸¹ The HRC issued a strong recommendation that the United States “prohibit the shackling of detained women during childbirth.”⁸² The HRC made it clear failure to do so would be a violation of the ICCPR.⁸³

Similarly, reiterating guarantees of humane and dignified treatment of prisoners required by Article 10, the HRC stated in its General Comment 28 that “pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children” and required states parties to report on facilities and medical and health care for imprisoned mothers and their babies.⁸⁴ In order to avoid violating the vast amount of international law that requires prisons to treat inmates in a humane and non-degrading manner, the IACtHR should adopt a differentiated approach for pregnant, postpartum and breastfeeding individuals in detention.

2.International Soft Law

In addition to the core human rights treaties, several other international human rights law instruments also provide comprehensive guidance on ensuring the rights of incarcerated pregnant, postnatal, and breastfeeding individuals.⁸⁵ It is a basic tenet of international human rights law that

⁷⁹ The HRC, set up to monitor the states adherence to the ICCPR, receive periodic reports from governments describing the steps undertaken domestically to conform to the commitments they have undertaken by ratifying the ICCPR.

⁸⁰ List of Issues to Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America ¶ 21, UN Human Rights Council, (April 26, 2006), UN Doc CCPR/C/USA/Q/3.

⁸¹ Concluding Observations, *supra* note 79.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Human Rights Committee, General Comment 28 on the equality of rights between men and women, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

⁸⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) E/CN.15/2015/L.6/Rev.1 (May 21, 2015) [hereinafter Nelson Mandela Rules]; United Nations Rules for the Treatment

no human being is beyond the reach of certain human rights protections. For example, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment urges States to adopt “measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children.”⁸⁶ Two prominent forms of soft law on detention establish that a differentiated approach for pregnant, postpartum and breastfeeding individuals in detention is the international standard: the U.N. Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)⁸⁷ and the U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).⁸⁸ Such guidelines are a main reference point for the design and evaluation of prison conditions worldwide. These instruments have moral force and provide a comprehensive set of safeguards for the protection of the rights of persons who are detained or imprisoned. The value of these instruments rests on their recognition and acceptance by a large number of States and even without binding legal effect, they are declaratory of principles that are broadly accepted by the international community.⁸⁹

a. The U.N. Minimum Rules for the Treatment of Prisoners

With the intention to establish a common legal framework for the protection of rights of those deprived of their liberty, a coalition of human rights experts created the U.N. Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).⁹⁰ This set of rules

of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), A/65/457 (March 16, 2011) [hereinafter Bangkok Rules].

⁸⁶ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (December 9, 1988), UN Doc. A/43/49, Principle 5.2.

⁸⁷ General Assembly resolution 70/175, annex, adopted on December 17, 2015.

⁸⁸ General Assembly resolution A/65/457, annex, adopted on December 21, 2010.

⁸⁹ Jenni Gainsborough, *Women in Prison: International Problems and Human Rights-Based Approaches to Reform*, 14 WM. & MARY J. WOMEN & L. 271, 295 (2008).

⁹⁰ General Assembly resolution 70/175, annex, adopted on 17 December 2015; The Standard Minimum Rules were adopted by the U.N. General Assembly in 1957 and in 2015 were revised and adopted as the Nelson Mandela Rules.

provide guidance to clarify States' human rights obligations to safeguard individuals in detention.⁹¹ Such standards provide invaluable guidance to prison staff for the performance of their professional duties through practices that are lawful, humane and disciplined. These rules are inspired by principles contained in various United Nations conventions and declarations and are therefore consistent with the provisions of existing international law. Although these rules are non-binding instruments, they constitute authoritative guides to the content of binding treaty standards and customary international law.⁹²

The Nelson Mandela Rules require “special accommodation for all necessary prenatal and post-natal care and treatment.”⁹³ They also state that, wherever possible, “children should be born in a hospital outside of the institute.”⁹⁴ By specifically highlighting the need for prenatal and post-natal care and treatment, the Nelson Mandela Rules point out how pregnant, postpartum and breastfeeding women have specific medical needs related to their unique condition. The need for a differentiated approach in managing pregnant, postpartum and breastfeeding individuals in prison underpins all of these rules.

The Nelson Mandela Rules also deal with the issue of postnatal arrangements for the baby.⁹⁵ They require that when “nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.”⁹⁶

⁹¹ The U.N. Standard Minimum Rules were passed by the U.N. General Assembly and are an international standard, but are not part of international law.

⁹² Penal Reform Int'l, *Making Standards Work: An International Handbook on Good Prison Practice* (2d ed. 2001); UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: 1 The Prison System 27.

⁹³ Nelson Mandela Rules, *supra* note 86, Rule 28.

⁹⁴ *Id.*

⁹⁵ *Id.*, Rule 29.

⁹⁶ *Id.*, Rule 29.1.

b. The U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders

The United Nations has also adopted the U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)⁹⁷ to fill the gaps in international standards by recognizing and addressing the gender-specific needs and circumstances of female prisoners.⁹⁸ The Bangkok Rules supplement the Nelson Mandela Rules⁹⁹ with much more detailed guidance on the type and nature of the support and services that should be provided to pregnant, postnatal and breastfeeding women, taking into account their different health care and nutritional needs.¹⁰⁰ The Bangkok Rules create the standard for a differentiated approach, and call for States to be “flexible enough to respond to the needs of pregnant women, nursing mothers and women with children”¹⁰¹ when enacting policies and “particular efforts shall be made to provide appropriate programs for pregnant women, nursing mothers and women with children in prison.”¹⁰² The IACtHR must uphold this international standard by requiring a differentiated approach for pregnant, postpartum and breastfeeding individuals in detention to ensure the modern global standards of decency that the Bangkok Rules set out are guaranteed under the ACHR.

Specifically, the Bangkok Rules acknowledge that pregnancy affects many areas of a person’s life, including health, diet and exercise requirements. The prison environment does not always take into account the specific needs of women, therefore the Bangkok Rules call for special

⁹⁷ General Assembly resolution A/65/457, annex, adopted on December 21, 2010.

⁹⁸ The Bangkok Rules, like the Nelson Mandela Rules, are what are termed “soft law.”

⁹⁹ The Bangkok Rules supplement but do not replace relevant provisions in the U.N. Standard Minimum Rules for the Treatment of Prisoners.

¹⁰⁰ Bangkok Rules, *supra* note 86, Rule 1. “Basic principle.”

¹⁰¹ *Id.*, Rule 42.2.

¹⁰² *Id.*, Rule 42.3.

programs to be developed to respond to the particular needs of pregnant, postpartum and nursing women in prison, such as health care and nutrition, among others.¹⁰³

Inadequate nutrition can have an extremely detrimental effect on the health of pregnant, breastfeeding and postpartum individuals. This is addressed by Rule 48 of the Bangkok Rules, which obliges prison administrations to provide pregnant or breastfeeding women with “advice on their health and diet under a program to be drawn up and monitored by a qualified health practitioner”¹⁰⁴ and “adequate and timely food, a healthy environment and regular exercise opportunities for pregnant women, babies, children, and breastfeeding mothers.”¹⁰⁵ Additionally, women who are in postpartum period and breastfeeding also face limited post-natal care and a poor diet characterized by inadequate quantities and little nutritional value, which also affects the ability to breastfeed, and may endanger a woman’s health. The Bangkok Rules recognize that, as during pregnancy, breastfeeding women have particular health and nutrition needs that are often unmet in prison, and, therefore, require that “the medical and nutritional needs of women who have recently given birth, but whose babies are not with them in prison, should be included in treatment programs.”¹⁰⁶

The Bangkok Rules also include rules which relate to the training of staff, including in relation to health-care issues of pregnant, postpartum and breastfeeding individuals. Rules 29—35, in particular, cover the training of staff working in women’s prisons on the basics of gender-specific health care and first aid, as well as basic health care in relation to children staying with their mothers in prison.¹⁰⁷ Rules 29—35 represent the Bangkok Rules’ holistic approach to prison

¹⁰³ *Id.*, Rule 48.

¹⁰⁴ *Id.*, Rule 48.1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, Rule 48.3.

¹⁰⁷ *Id.*, Rule 29—35.

management, including prison health care. The rules recognize that in all prison systems, regular staff, rather than health-care staff, will be the first to have to respond to women's health-care requirements, especially in emergencies like labor. In such cases, immediate and appropriate action is essential.

Security measures applied when taking pregnant women to hospital and during childbirth should be the minimum necessary. The Bangkok Rules explicitly prohibit the use of restraints during labor, birth and immediately following birth.¹⁰⁸ The commentary to Bangkok Rule 24 explains that “shackling during labor may cause complications during delivery such as hemorrhage or decreased fetal heart rate. If a caesarean section is needed, a delay of even five minutes may result in permanent brain damage to the baby.”¹⁰⁹ The Bangkok Rules are both a progressive step and a positive step for the basic rights of humanity, including pregnant, postpartum and breastfeeding individuals.

This set of international instruments represents an unavoidable guidance to clarify States' human rights obligations to safeguard pregnant, postpartum and breastfeeding individuals in detention. Adoption of a differential approach for the treatment of pregnant, postpartum and breastfeeding individuals in detention, as provided by the Nelson Mandela Rules and the Bangkok Rules, would be a positive and necessary step toward improving their care and ensuring human rights protections of this group.

3. Regional Human Rights

¹⁰⁸ *Id.*, Rule 24 (“Instruments of restraint shall *never* be used on women during labour, during birth and immediately after birth.”)(emphasis added).

¹⁰⁹ Commentary to the Draft United Nations Rules for the treatment of Women Prisoners and non-custodial Measures for Women offenders, DOC E/CN.15/2009/CRP.8, 2009, op. cit., 139, at 25.

The protection offered by international human rights norms and systems is complemented by regional human rights protection norms and systems. The wealth of universal international human rights law and soft law which require the adoption of a differentiated approach to pregnant, postpartum, and breastfeeding women addressed above is further strengthened through international law emerging from the European Human Rights System and the African Human Rights System. The European and African human rights systems have issued decisions and recommendations that recognize the critical importance of adopting a differentiated approach for pregnant, postpartum and breastfeeding women in detention.¹¹⁰ A comparison of the jurisprudence from regional human rights bodies shows that regional differences in socio-economic and political environments have not resulted in differing standards of acceptable approaches to pregnant, postpartum and breastfeeding women in detention.¹¹¹ Although these regional systems are not legally binding on the Inter-American system, they represent an international standard among societies all over the world regarding differentiated protections States owe pregnant, postpartum and breastfeeding women in detention on account of their enhanced vulnerability.

a. European Human Rights System

The European Human Rights System provides clear and persuasive authority regarding the necessity for the IACtHR to adopt a differentiated approach to pregnant, postpartum and breastfeeding individuals. Countries in the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) in 1950.¹¹² The

¹¹⁰ Case of *Alexandru Enache v. Romania*, (No. 16986/12), Eur.Ct.H.R., ¶ 74—79 (2017); Case of *Korneykova and Korneykov v. Ukraine*, (No. 56660/12), Eur.Ct.H.R., ¶ 110—148 (2016); European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 10th General Report [CPT/Inf (2000) 13], CPT Standards, ¶ 33 [hereinafter European Committee 10th General Report]; African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 28 July 2016, § 30 [hereinafter "Luanda Guidelines"].

¹¹¹ European Committee 10th General Report, *supra* note 111; Luanda Guidelines, *supra* note 111.

¹¹² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

supervisory organ of the European Convention is the European Court of Human Rights (ECtHR).¹¹³ The ECtHR is a key actor in the regulation of prison conditions at the European level¹¹⁴ and has positioned itself as a judicial tool for the effective protection of rights for vulnerable individuals in prison, including pregnant, postpartum and breastfeeding individuals in detention.¹¹⁵ Specifically, in 2017 the ECtHR recognized that pregnancy and motherhood in prison comes with certain extra challenges.¹¹⁶ In the case *Alexandru Enache v. Romania*, concerning a difference in treatment on the basis of legislation permitting deferral of prison sentence for mothers, but not fathers, the ECtHR found no violation of Article 14 (prohibition of discrimination) of the European Convention.¹¹⁷ The ECtHR held that differential treatment aimed at taking account of specific personal situations, such as pregnant, postpartum and breastfeeding women in detention, should not be considered as discriminatory.¹¹⁸ The ECtHR concluded that those considerations could provide a sufficient basis to justify the differential treatment of the applicant.¹¹⁹ The ECtHR stated that the difference in treatment was objectively and reasonably justified by the extra challenges that come with pregnancy and motherhood in prison.¹²⁰ Indeed, the ECtHR stressed that pregnancy and motherhood have “specific features which need to be taken into consideration, sometimes by means of protective measures.”¹²¹ The ECtHR also noted that

¹¹³ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby Art. 1, May 11, 1994, 2061 A-2889 U.N.T.S. 7 (the Convention system originally contained two part-time organs which were replaced by the current, full-time European Court of Human Rights with the entry into force of Protocol 11 to the European Convention).

¹¹⁴ The jurisprudence of the ECtHR has been often endorsed by the IACtHR as guidance on how to address some issues from a human rights perspective.

¹¹⁵ Council of Europe/European Court of Human Rights, 2020, *Guide on the case-law of the European Convention on Human Rights: Prisoners Rights*, August 31, 2020.

¹¹⁶ *Alexandru Enache v. Romania*, (No. 16986/12), Eur.Ct.H.R., ¶¶ 74—79 (2017).

¹¹⁷ *Id.* ¶¶ 78—79.

¹¹⁸ *Id.* ¶ 74.

¹¹⁹ *Id.*

¹²⁰ *Id.* at ¶ 76.

¹²¹ *Id.* at ¶ 77.

Article 4 § 2 of CEDAW,¹²² which imposes on States the obligation of protecting maternity, is “also valid where a woman is deprived of her liberty.”¹²³ Thus, “the impugned difference in treatment did not lead to a prohibited discrimination.”¹²⁴

Under the European Convention, States not only have the duty to refrain from inhumane and degrading treatment, but also ought to adopt differentiated approaches when necessary to ensure the full enjoyment of the person’s rights. Article 3 of the European Convention states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹²⁵ On the specific issue of detention conditions and the violation of Article 3 of the European Convention, a recent judgment addresses the vulnerabilities of pregnant, postpartum and breastfeeding prisoners.¹²⁶ The case of *Korneykova and Korneykov v. Ukraine* concerned the case of a pregnant mother who gave birth and breastfed her baby in prison.¹²⁷ The ECtHR found a breach of Article 3 of the European Convention in relation to the conduct of the authorities, specifically: shackling of the mother in the maternity hospital;¹²⁸ insufficient food corresponding to her needs as a breastfeeding mother in detention;¹²⁹ and inadequate sanitary and hygiene arrangements for her and her newborn son.¹³⁰ The ECtHR stressed that pregnancy was a differential element and that the absence of a differentiated approach amounted to inhuman and degrading treatment.¹³¹ With regards to shackling of the mother during labor and delivery, the ECtHR stated that “in the circumstances of the present case, where the impugned measure was applied to a woman suffering

¹²² Jurisprudence from regional human rights tribunals, like the ECtHR, are a useful reference point for interpretation of under United Nations human rights instruments.

¹²³ *Id.*

¹²⁴ *Id.* at ¶ 78.

¹²⁵ European Convention on Human Rights, *supra* note 113, art. 3.

¹²⁶ *Korneykova and Korneykov v. Ukraine*, (No. 56660/12), Eur.Ct.H.R., ¶¶ 110—148 (2016).

¹²⁷ *Id.*

¹²⁸ *Id.* ¶¶ 110—116.

¹²⁹ *Id.* ¶¶ 142—144.

¹³⁰ *Id.* ¶¶ 147—148.

¹³¹ *Id.* ¶ 147.

labour pains and immediately after the delivery, it amounted to inhuman and degrading treatment.”¹³² The ECtHR specifically noted “that handcuffing prisoners does not normally give rise to an issue under Article 3 of the Convention,”¹³³ but that a differentiated technique was necessary because applicant’s pregnancy was a special condition.¹³⁴ The ECtHR found that handcuffing a woman during childbirth and immediately after the delivery is disproportionate to the requirements of security considering “[a]ny risk of her behaving violently or attempting to escape would have been hardly imaginable given her condition. . . . Moreover, her unjustified shackling had continued after the birth, when she was particularly sensitive.”¹³⁵ Accordingly, the impugned measure had amounted to inhuman and degrading treatment.¹³⁶ The ECtHR also attached weight to the fact that the applicant was guarded by three guards at all times and found “[t]his measure appears to have been severe enough to respond to any potential risks.”¹³⁷ Therefore, even if there are genuine concerns about security and escape of a woman during childbirth and immediately after the delivery, an obvious and easy differentiated approach exists to protect these concerns.

In situations where food given to an applicant is clearly insufficient the ECtHR noted “the issue becomes crucial in the case of a breastfeeding mother.”¹³⁸ The ECtHR found that “the applicant did not receive sufficient and wholesome food corresponding to her needs as a breastfeeding mother in detention.”¹³⁹ And in addressing the inadequate sanitary and hygiene arrangements, the ECtHR stated, “In the present case the Court cannot but stress that adequate

¹³² *Id.* ¶ 111.

¹³³ *Id.* ¶ 115.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* ¶ 114.

¹³⁸ *Id.* ¶ 141.

¹³⁹ *Id.*

hygienic conditions are vital for a new-born baby and a nursing mother.”¹⁴⁰ The ECtHR stated the “in the circumstances of the present case the cumulative effect of malnutrition” and “inadequate sanitary and hygiene arrangements” was “of such an intensity as to induce in her physical suffering and mental anguish amounting to her inhuman and degrading treatment.”¹⁴¹ Therefore, the ECtHR acknowledges that being pregnant, postpartum or breastfeeding in prison is a unique circumstance that requires differentiated measures that respond to their particular conditions of vulnerability.

Referenced, but not discussed, in *Korneykova and Korneykov v. Ukraine*, are documents that have been adopted by the Council of Europe that are relevant to pregnant, postpartum and breastfeeding persons deprived of their liberty.¹⁴² Key documents relevant to pregnant, postpartum and breastfeeding persons deprived of their liberty that have been adopted include the European Prison Rules, as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its Protocols. The European Prison Rules establish minimum standards for the treatment of prisoners and for all aspects of prison administration and material conditions of detention.¹⁴³ With regards to adequate birth and labor protocols for pregnant inmates, Rule 34.4 states, “Arrangements shall always be made for prisoners to give birth outside prison. Where, nevertheless, a child is born in prison, the authorities shall provide all necessary support and facilities, including special accommodation.”¹⁴⁴ Furthermore, Rule 68.7 demands that, “Instruments of restraint shall never be used on women during labour, during childbirth or

¹⁴⁰ *Id.* ¶ 140.

¹⁴¹ *Id.* ¶ 147.

¹⁴² *Id.* ¶ 93.

¹⁴³ Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies) [Revised and amended by the Committee of Ministers on 1 July 2020 - see Rec(2006)2-rev].

¹⁴⁴ *Id.*, Rule 34.4.

immediately after childbirth.”¹⁴⁵ Notably, this is the only circumstance where restraint shall *never* be used, signaling that pregnancy is a differential element that requires different rules.

The European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment established the Committee for the Prevention of Torture (CPT) for the protection of human rights, placing a proactive non-judicial mechanism alongside the existing reactive judicial mechanism of the ECtHR.¹⁴⁶ The CPT is an important regional mechanism that addresses conditions of detention and treatment of persons deprived of their liberty in countries of the region, including pregnant, postpartum and breastfeeding persons deprived of their liberty.¹⁴⁷ The CPT considers the failure of States to provide such basic necessities, like prenatal care, to pregnant prisoners can amount to degrading treatment.¹⁴⁸ The CPT has expressed the view that shackling or otherwise restraining pregnant women to beds or other items of furniture during gynecological examinations and/or delivery, is “completely unacceptable, and could certainly be qualified as inhuman and degrading treatment.”¹⁴⁹

The CPT also advises that the full realization of pregnant individual’s right to humane treatment can be achieved only when States parties fulfil their obligation to respect, protect and promote pregnant individual’s fundamental human right to nutritional well-being, stating, “Every effort should be made to meet the specific dietary needs of pregnant women prisoners, who should be offered a high protein diet, rich in fresh fruit and vegetables.”¹⁵⁰ By specifying the specific dietary needs of pregnant women prisoners, the CPT is recognizing that the nutrition offered in

¹⁴⁵ *Id.*, Rule 68.7.

¹⁴⁶ Council of Europe: Committee for the Prevention of Torture, *The CPT Standards*, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010, at 4.

¹⁴⁷ *Id.*

¹⁴⁸ European Committee 10th General Report, *supra* note 111.

¹⁴⁹ *Id.* ¶ 27.

¹⁵⁰ *Id.* ¶ 33.

prisons often fails to meet pregnant women's needs. Lack of a differential approach is a significant problem for pregnant prisoners, who have increased nutritional needs.

European Human Rights jurisprudence makes clear that pregnant, postpartum and breastfeeding individuals in prison are extremely vulnerable to human rights abuses and require a differentiated approach that would respond to the special characteristics of this group. The IACtHR must follow the precedent set by the ECtHR and adopt a differentiated approach to pregnant, postpartum, and breastfeeding individuals in detention.

b. African Human Rights System

Similar to the European Human Rights System, the African Human Rights System also makes it clear that a differentiated approach towards pregnant, postpartum, and breastfeeding individuals in detention is required under regional human rights instruments.¹⁵¹ The IACtHR should take into account, that the other two regional human rights systems are unified on this issue. The founding treaty that promotes human rights in the African Region is the African Charter on Human and Peoples' Rights (African Charter).¹⁵² Although the African Charter does not directly address the special needs of pregnant, postpartum and breastfeeding individuals,¹⁵³ it contains provisions that are supportive of a differential approach to vulnerable individuals in prison, like pregnant, postpartum and breastfeeding individuals in detention. For example, similar to Article 3 of the European Convention, Article 5 of the African Charter on Human and Peoples Rights, states

¹⁵¹ The African Human Rights System is the youngest regional system coming after the European and Inter-American systems. Frans Viljoen, *The African Charter on Human and People's Rights / The Travaux Préparatoires in the Light of Subsequent Practice*, 25 HUM. RTS. L.J. 313, 314 (2004) (noting that the drafters of the African Charter relied largely on the American Convention on Human Rights).

¹⁵² African Charter on Human and People's Rights Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [hereinafter African Charter].

¹⁵³ The African Court on Human and Peoples' Rights, which has jurisdiction to interpret and apply the African Charter, is a newly established court that has yet to adjudicate on pregnant individual's rights, let alone the rights of pregnant individuals in detention.

in relevant part that “[e]very individual shall have the right to the respect of the dignity inherent in a human being[.] All forms of exploitation and degradation of man, particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”¹⁵⁴ Additionally, the African System enshrines a holistic protection of the right to health within its primary human rights instrument by requiring that states parties “take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”¹⁵⁵ This creates positive obligations that States must adopt approaches that address different health care needs of different groups, like pregnant, postpartum and breastfeeding individuals.

Additionally, Article 30 of the African Charter on the Rights and Welfare of the Child, which sets out rights of children of imprisoned mothers, states that States Parties “shall undertake to provide special treatment to expectant mothers and to mothers of infants. . . who have been accused or found guilty of infringing the penal law.”¹⁵⁶ Whilst Article 30 is focused on how children of imprisoned mothers should benefit from this special treatment, the use of the word “special” implies a much higher level of obligation for States Parties than that required in ordinary circumstances. This reflects the heightened vulnerability of pregnant individuals in detention.

In addition to the African Charter, African regional instruments contain specific protections for pregnant, postpartum and nursing individuals in detention. These include two key instruments: The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in

¹⁵⁴ African Charter, *supra* note 193, art. 5.

¹⁵⁵ *Id.*, art. 14(2).

¹⁵⁶ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), art. 30.

Africa¹⁵⁷ and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.¹⁵⁸

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) builds on the principles set forth in the African Charter on Human and Peoples Rights by further specifying values and principles relevant to women in Africa.¹⁵⁹ It also contains additional provisions that are directly relevant to pregnant or nursing individuals deprived of their liberty.¹⁶⁰ With regard to health and reproductive rights, the African Women's Protocol requires that "State Parties shall take all appropriate measures to . . . establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding."¹⁶¹ This puts an affirmative duty on its signatories to provide individuals with adequate care during pregnancy.¹⁶² Similarly, the African Women's Protocol mandates that "States Parties shall . . . enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all . . . harmful practices which endanger the health and general well-being of women,"¹⁶³ and that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards."¹⁶⁴ The African Women's Protocol also provides for the special protection of "women in distress" and stipulates that States have an obligation "to ensure the right of pregnant or nursing women or

¹⁵⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, O.A.U. CAB/LEG/66.6, Art. 14 (Sept. 13, 2000) [hereinafter African Women's Protocol].

¹⁵⁸ Luanda Guidelines, *supra* note 111.

¹⁵⁹ African Women's Protocol, *supra* note 158.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*, art. 14(2).

¹⁶² *Id.*, art. 14(1).

¹⁶³ *Id.*

¹⁶⁴ *Id.*, art. 2(1)(b) (qualifying any practice that harms the health of women as discriminatory and requiring that states should support continental policies that aim to eliminate those practices).

women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.”¹⁶⁵

In conclusion, the international community has recognized the extreme vulnerability of individuals who are pregnant, postpartum or breastfeeding in detention and imposes differentiated obligations on States to guarantee the rights of these individuals. The lack of a differentiated approach for pregnant, postpartum and breastfeeding individuals in detention is incompatible with international human rights standards and can also amount to inhumane treatment. To uphold its mandate to advance human rights in the Americas, the IACtHR must make an interpretation that requires differentiated approach for pregnant, postpartum and breastfeeding individuals in detention to respond to their specific needs.

D. Recommendations

It is important that the InterAmerican Court take the opportunity in this Advisory Opinion to recommend that States take actions regarding diet and clothing of this group in a vulnerable situation:

- Pregnant, postpartum, and breastfeeding individuals should receive specialized nutritional plans created by qualified medical personnel to meet their specific needs throughout all pregnancy and postpartum stages.
- Pregnant, postpartum, and breastfeeding individuals should receive clothing items tailored to meet specific needs relating to their changing condition, including those that minimize the risks of tripping and falling.

Regarding access to medical and psychological care:

¹⁶⁵ *Id.*, art. 24(b).

- Create and maintain standardized minimum requirements for pre- and post-natal medical care, including routine check-ups before and after birth and psychological care.
- Create and maintain standardized protocols for monitoring the status of pregnant individuals who may be in labor, including standardized protocols for ensuring laboring individuals are taken to a hospital as soon as possible upon discovering that the woman is in labor.
- Establish and enforce the right of pregnant, postpartum, and breastfeeding individuals to be fully informed about their own medical conditions and require informed consent before any medical examination or procedure.
- All prison staff should attend to pregnancy-related complaints and concerns with urgency.
- Pregnant, breastfeeding, and postpartum individuals should not be shackled during medical exams and procedures.

Regarding the conditions during labor and delivery:

- Labor and delivery should take place in a hospital outside of the detention facility.
- No pregnant individual should be shackled during labor and delivery or during transport to and from the hospital for labor and delivery purposes.

Regarding the transferring pregnant and postpartum individuals:

- Pregnant, postpartum, and breastfeeding individuals should not be shackled or otherwise subject to physical restraints during transfers.
- Any security measures taken when transferring pregnant, postpartum, and breastfeeding individuals should be the absolute minimum necessary.

Regarding contact between a detained mother and her child(ren):

- No mother should be deprived of physical contact with her newborn.
- Nursing infants should be allowed to remain in the facility with their mothers and provisions should be made for the proper care of the children by qualified persons when they are not in the care of their mothers.
- Mothers should not be placed in any facility that is more than two hours travel time away from their children.

In conclusion, the international community has recognized the extreme vulnerability of individuals who are pregnant, postpartum or breastfeeding in detention and imposes differentiated obligations on States to guarantee the rights of these individuals and respond to their particular conditions of vulnerability. The lack of a differentiated approach for pregnant, postpartum and breastfeeding individuals in detention is incompatible with international human rights standards and can also amount to inhumane treatment. To uphold its mandate to advance human rights in the Americas, the IACtHR must make an interpretation that requires differentiated approach for pregnant, postpartum and breastfeeding individuals in detention to respond to their specific needs.

III. LGBTQIAP+ People in Detention

Lesbian, gay, bisexual, transgender, queer, intersex, asexual, and pansexual (LGBTQIAP+) people in detention are at a higher risk of lethal and non-lethal violence, discrimination, and sexual abuse due to entrenched homophobia and transphobia that is magnified in the closed environment of the correctional setting.¹⁶⁶ Violence in correctional facilities against lesbian, gay, bisexual, transgender, queer, and intersex people is often enacted as a form of “punishment” for identifying outside the contours of heteronormativity, cisnormativity, and binary

¹⁶⁶ *Violence Against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas*, Report, Inter-Am. Comm’n H.R. (ser. L) No. 5, ¶ 102 (Nov. 12, 2015).

systems of sex and gender.¹⁶⁷ Notwithstanding, the experiences of these groups are diverse and each population merits additional protections as a result of unique and particularized harm.¹⁶⁸

A. The Situation of LGBTQIAP+ People in Detention

The LGBTQIAP+¹⁶⁹ acronym is an umbrella term that incorporates a wide range of concepts, including sexual orientation, gender identity and expression, and biological sex characteristics.¹⁷⁰ Sexual orientation can generally be understood as “capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”¹⁷¹ Gender identity is a blanket term that refers “to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body.”¹⁷² In this vein, the terms gay, lesbian, bisexual, queer, asexual and pansexual refer to “sexual orientation”¹⁷³ The terms transgender, genderqueer¹⁷⁴, gender non-conforming, and non-binary describe “people whose gender identity is different from the gender they were thought to be at birth” and the term “intersex” describes people “who naturally have biological traits which do not match what is typically identified as male or female.”¹⁷⁵ The terms transgender,

¹⁶⁷ *Id.* ¶¶ 8-10.

¹⁶⁸ *Id.* ¶¶ 104-106.

¹⁶⁹ The language used to address gender identity and sexual orientation is constantly evolving. The inclusion of the “+” sign is meant to indicate that the acronym is not exhaustive, and that non-heterosexual and non-cisgender identities exist that are not listed.

¹⁷⁰ Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, at 23 (2019).

¹⁷¹ The Yogyakarta Principles, n.1 (<http://yogyakartaprinciples.org/introduction/>).

¹⁷² *Id.* at n.2.

¹⁷³ Lesbian, Gay, Bisexual, and Transgender Resource Center, *General Definitions*, University of California San Francisco, (last accessed Oct. 18, 2020) available at: <https://lgbt.ucsf.edu/glossary-terms>.

¹⁷⁴ The term “queer” can be used to describe a person’s sexual orientation or gender identity and expression. For the purposes of this brief, the term “queer” will be used to describe sexual orientation while “genderqueer” will be used to describe gender identity.

¹⁷⁵ Outright Action International, *Acronyms Explained* (last accessed Oct. 18, 2020), available at: <https://outrightinternational.org/content/acronyms-explained>.

genderqueer, gender non-conforming, nonbinary, and intersex do not denote a sexual orientation.¹⁷⁶

While the populations encompassed by this acronym are subjected to torture and ill-treatment in detention at higher rates than non-LGBTQIAP+ people, the lived experiences of lesbian, gay, bisexual, queer, asexual, and pansexual people differ from the experiences of transgender, genderqueer, gender non-conforming, non-binary, and intersex people deprived of liberty. These different lived experiences occur because of the varied societal expectations and prejudices¹⁷⁷ surrounding gender and sexual orientation.¹⁷⁸ Moreover, LGBTQIAP+ people often face multiple and intersecting forms of discrimination that require the adoption of a differentiated approach to human rights.¹⁷⁹

For purposes of this brief, gender non-conforming, genderqueer, and nonbinary identities will be identified as “GNC.” As such, when referred to as a group, persons discriminated against based on gender identity and expression will be identified as “TGNCI+ persons” or “non-cisgender and intersex persons.” Persons discriminated against based on sexual orientation will be referred to as “LGBQAP+ persons” or “non-heterosexual persons.”

1. Lesbian, Gay, Bisexual, and Pansexual (LGBP+) People in Prison

¹⁷⁶ National Center for Transgender Equality, *Frequently Asked Questions about Transgender People* (last accessed Oct. 18, 2020), available at: <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

¹⁷⁷ Although outside of the scope of this brief, it is vital to recognize that many LGBTQIAP+ persons are deprived of their liberty because of their sexual orientation, gender identity, or gender expression. See e.g. Reuters, *LGBT individuals more likely to be incarcerated*, (Dec. 22, 2016), available at: <https://www.reuters.com/article/us-health-lgbt-incarceration-usa/lgbt-individuals-more-likely-to-be-incarcerated-idUSKBN14C1ZI>; Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People* at 13-15.

¹⁷⁸ Association for the Prevention of Torture, *supra* note 171, at 23.

¹⁷⁹ OHCHR, *Living Free and Equal: What States are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People*, at 95 (2016), available at: <https://www.ohchr.org/documents/publications/livingfreeandequal.pdf>.

The IACHR reports that lesbian, gay, bisexual, asexual, and pansexual (LGBQAP+) people in detention experience different human rights violations than the general prison population because of “*violence based on prejudice towards diverse sexual orientations.*”¹⁸⁰ LGBQAP+ people deprived of liberty are subjected to a broad range of ill-treatment and harm, including verbal, psychological, physical, and sexual violence owing to social stigma on account of their sexual orientation.¹⁸¹ For the aforementioned reasons, many LGBQAP+ persons deprived of liberty will hide non-heterosexual sexual orientations as a means of self-protection.¹⁸² The inability to live in accordance with and express one’s sexual orientation or gender identity can have profoundly detrimental impacts on mental, physical, and emotional wellbeing, as the dominant narrative purports that non-heterosexual and non-cisgender identities are deviant and require correctional or penological attention.¹⁸³

It is common for LGBQAP+ people in prison to suffer targeted harm from fellow detainees or prison staff on account of their sexual orientation, often in an attempt to visibly distinguish them from the general prison population and punish them for not conforming to societal expectations surrounding sexual and gender expression.¹⁸⁴ In the United States, the Bureau of Justice reports a staggering rate of violence against LGBTQIAP+ people in prison and found that LGBQAP+ prisoners were three times more likely to suffer violence than the general population; the rate of violence was ten times higher for transgender prisoners.¹⁸⁵

¹⁸⁰ Inter-Am. Comm’n H.R. (ser. L) No. 5, *supra* note 167, at 34, ¶ 25.

¹⁸¹ National Center for Transgender Equality, *Standing With LGBT Prisoners: An Advocate’s Guide To Ending Abuse And Combating Imprisonment*. (Apr. 10, 2014), available at: <https://transequality.org/issues/resources/standing-lgbt-prisoners-advocate-s-guide-ending-abuse-and-combating-imprisonment>.

¹⁸² Irish Penal Reform Trust, *Out on the Inside: The Rights, Experiences and Needs of LGBT Persons in Prison* (Feb. 2016) at 14-15.

¹⁸³ *Id.* at 23.

¹⁸⁴ Inter-Am. Comm’n H.R. (ser. L) No. 5, *supra* note 167, at 33-34, ¶¶ 25-26.

¹⁸⁵ Allen Beck, U.S. Department of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates (2014)* available at https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf; Allen Beck, Marcus Berzofsky, Rachel Caspar, and

In a study of LGBTQIAP+ people in prison, the United States Department of Justice found that LGBQAP+ people were more likely to be subjected to solitary confinement or segregation than heterosexual prisoners.¹⁸⁶ The Special Rapporteur on Torture noted that solitary confinement or segregation are often used as a form of “protective custody” for LGBQAP+ persons.¹⁸⁷ Nevertheless, relegation to segregation units often places limits on the ability for LGBQAP+ persons to access recreation, reading materials, legal counsel, or medical doctors.¹⁸⁸ The United Nations Office on Drugs and Crime has recommended that the principle for classification and allocation should be to house LGBT detainees “in whichever environment will best ensure their safety¹⁸⁹. Further, prolonged solitary confinement can “amount to cruel, inhuman or degrading treatment or punishment and even torture.”¹⁹⁰ The IACHR considers that the decision on where to house trans persons must be made on a case-by-case basis, and that OAS Member States must undertake the measures to ensure, whenever possible, that trans persons participate in the decision related to their allocation in detention center.¹⁹¹ The IACHR has found that prison staff and fellow inmates frequently target LGBTQIAP+ people with verbal abuse including mocking, verbal harassment, forced disclosure of sexual orientation, and openly distinguishing non-heterosexual and non-cisgender prisoners from the general population.¹⁹² Commonly, non-heterosexual prisoners who engage in romantic behavior or show affection to persons of the same sex are

Christopher Krebs., U.S. Department of Justice, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12 (2013) available at: <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

¹⁸⁶ Allen Beck, U.S. Department of Justice, Bureau of Justice Statistics, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 4 available at: <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>

¹⁸⁷ Association for the Prevention of Torture, LGBTI Persons Deprived of Their Liberty: A Framework for Preventative Monitoring, *supra* note 171, at 11.

¹⁸⁸ *Id.*

¹⁸⁹ U.N. Office on Drugs and Crime, *Handbook on Prisoners with Special Needs: Lesbian, Gay, Bisexual, and Transgender (LGBT) Prisoners*, 115 (2009).

¹⁹⁰ *Id.*

¹⁹¹ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 157.

¹⁹² Inter-Am. Comm’n H.R. (ser. L) No. 5, *Violence Against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas*, *supra* note 167, at 58.

punished by guards under the guise of prison security.¹⁹³ Additionally, many prisons have policies that only allow immediate family members to visit which is a significant obstacle for people whose same-sex unions are not recognized under the law.¹⁹⁴ These discriminatory practices are directly motivated by animus against sexual minorities and reflect a causal relationship between the targeted harm suffered and the victim's perceived sexual characteristic. Because perpetrators of homophobic harm are directly motivated by prejudice against non-heterosexual persons, differentiated protections are necessary to eliminate the unique violence and discrimination that affects LGBTQAP+ people deprived of liberty.

LGBTQAP+ individuals also experience a disproportionate amount of physical and sexual violence from both fellow inmates and prison guards, including rape and the threat of rape, forced prostitution, non-consensual touching, and being forced to undress in front of other prisoners.¹⁹⁵ For example, there is a global pattern of LGBTQAP+ prisoners being exposed to sexual harassment by prison staff, including abuse during humiliating and degrading body searches motivated by the desire to punish their sexuality.¹⁹⁶ In addition to being watched and improperly touched during body searches, guards also mirror this abuse in cells, bathrooms, and showers.¹⁹⁷ Furthermore, the UN Special Rapporteur on Violence Against Women also reports that non-heterosexual women, specifically lesbian women, are at a greater risk of gender-based violence, particularly when supervised by male guards.¹⁹⁸ Non-heterosexual women who refuse sexual advances by guards are

¹⁹³ *Id.* at 13.

¹⁹⁴ Association for the Prevention of Torture, *supra* note 216, at 89; Colombia Diversa, “Muchas veces me canso de ser fuerte”: ser lesbiana, gay, bisexual o trans en las cárceles de Colombia 26 (2015-2016).

¹⁹⁵ Inter-Am. Comm'n H.R. (ser. L) No. 5, *Violence Against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas*, *supra* note 171, at 58.

¹⁹⁶ *Id.* at 75.

¹⁹⁷ *Id.* at 57-58.

¹⁹⁸ *Id.* at 58.

placed in cells with men prisoners and are coerced into sex.¹⁹⁹ Additionally, non-heterosexual women, particularly lesbian women, are often tortured through “corrective rape” by fellow inmates with the objective of changing their sexual orientation.²⁰⁰ Similar problems persist with the persecution of non-heterosexual men, particularly gay men, in prison.²⁰¹ Prisoners frequently force gay men into indentured servitude and coerce them into having non-consensual sex; this conduct is often sanctioned and even encouraged by prison staff.²⁰² According to the United States Bureau of Justice statistics, 34% of bisexual men and 39% of gay men reported being sexually abused by another inmate, as compared to 3.5% of heterosexual men.²⁰³ While violence is a pervasive problem in many prisons, non-heterosexual persons deprived of liberty face a far greater and more deadly risk of violence than the general population in the form of physical assault, rape, and sexual torture motivated by anti-LGBQAP+ bias.²⁰⁴ A differentiated human rights approach is required precisely because LGBQAP+ people in prison experience violence based on their sexual orientation, which differs from the generalized violence that is incubated in prison contexts.

2. Incarcerated Transgender, Intersex, Non-binary, and Gender Non-Conforming (TIGNC+) People

Although transgender, gender-nonconforming, and intersex people experience much of the same violence and discrimination as non-heterosexual individuals in prison, they are also at risk for different kinds of harm as a result of discriminatory attitudes surrounding their gender identity and expression.²⁰⁵ Because TGNCI+ people present their gender outside traditional binaries, the

¹⁹⁹ UN, Human Rights Council, Pathways to, Conditions and Consequences of Incarceration of Women, A/68/340, August 21, 2013, paras. 58, 59 and 63, cited in OHCHR, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, May 4, 2015, ¶ 36.

²⁰⁰ Association for the Prevention of Torture, *supra* note 171, at 58.

²⁰¹ *Id.*

²⁰² Christopher Carrico, *Collateral Damage: The Social Impact of Laws Affecting LGBT Persons in Guyana*, Published by the Faculty of Law UWI Rights Advocacy Project, Faculty of Law, University of the West Indies, 16 (March 2012).

²⁰³ Association for the Prevention of Torture, *supra* note 171, at 10.

²⁰⁴ Inter-Am. Comm’n H.R., *supra* note 167, at 33.

²⁰⁵ Association for the Prevention of Torture, *supra* note 171, at 83.

violence that they experience is directly related to their non-normative gender expression.²⁰⁶ This group specifically experiences physical, sexual, and psychological harm on account of endemic transphobia.²⁰⁷ As TGNCI+ persons do not conform to socially constructed gender norms, violence against these persons is commonly motivated by a desire to punish non-normative gender expression and identity, which effectively criminalizes non-cisgender people and subjects them to torture for living authentically in their gender.²⁰⁸

There is a profound failure in detention facilities to protect TGNCI+ persons from sexual and physical abuse and harassment at the hands of prison personnel.²⁰⁹ In a study conducted by Lamda Legal on the experiences of transgender and gender-nonconforming persons incarcerated in the United States, 57% of those persons reported being verbally assaulted or harassed by jail or prison staff, 27% reported being sexually harassed by jail or prison staff, 12% reported being physically assaulted by jail or prison staff, and 7% reported being physically assaulted by jail or prison staff.²¹⁰ Additionally, the Association for the Prevention of Torture reports that TGNCI+ people are often subjected to invasive and punitive body searches driven by voyeurism, including body cavity searches by officers of the opposite gender of the prisoner.²¹¹ Violence against TGNCI+ persons is also perpetrated by other detainees.²¹² The Subcommittee for Prevention of Torture has received “reports of, among other things, beatings, sexual assault, confinement and targeted forms of violence, including...the intentional beatings of the breasts and cheekbones of transgender women to burst implants and release toxins.”²¹³

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 80.

²⁰⁸ Inter-Am. Comm’n H.R., *supra* note 167, at 33-34, ¶¶ 25-26.

²⁰⁹ Irish Penal Reform Trust, *supra* note 183, at 23-26.

²¹⁰ Lamda Legal, Transgender Incarcerated People in Crisis, https://www.lambdalegal.org/sites/default/files/transgender_booklet_-_incarcerated.pdf.

²¹¹ Association for the Prevention of Torture, *supra* note 171, at 75.

²¹² *Id.* at 10.

²¹³ *Id.*

Furthermore, when TGNCI+ persons deprived of liberty attempt to use different pronouns or to change their name to align with their gender identity, prison personnel or other detainees will use the wrong pronouns or use the name they were assigned at birth, a phenomenon commonly referred to as “deadnaming.”²¹⁴ Further, when TGNCI+ people deprived of liberty attempt to wear clothes or makeup consistent with their gender identity, they are attacked and punished by prisoners for not dressing with their assigned-at-birth sex.²¹⁵ One transgender woman, who was housed in a men’s prison, reported being pepper-sprayed because she “refused to hand over the ‘contraband’ bra and panties” she had bought from the canteen.²¹⁶ In other cases, due to the rigidity of patriarchal gender roles, transgender women or gender non-conforming persons who are perceived as too “masculine” in terms of their external appearance undergo “forced feminization” from guards.²¹⁷

In addition to violations pertaining to gender expression, TGNCI+ people deprived of liberty experience discrimination on the basis of their biological sex characteristics.²¹⁸ In practice, they are frequently placed in prison facilities based on genitalia or sex that is assigned at birth, rather than based on their actual gender identity.²¹⁹

In the United States, a state-wide survey of prisons in California found that transgender women erroneously placed in male prisons were 13 times more likely to be sexually assaulted than

²¹⁴ Enforced Dysphoria: A Letter from a Transgender Woman Denied Care In a Florida Men’s Prison (Aug. 15, 2016). <https://www.aclufi.org/en/news/enforced-dysphoria-letter-transgender-woman-denied-care-florida-mens-prison>.

²¹⁵ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 148.

²¹⁶ Enforced Dysphoria: A Letter from a Transgender Woman Denied Care In a Florida Men’s Prison. (Aug. 15, 2016). <https://www.aclufi.org/en/news/enforced-dysphoria-letter-transgender-woman-denied-care-florida-mens-prison>.

²¹⁷ United Nations Office on Drugs and Crime (UNODC), Handbook on Prisoners with special needs: Lesbian, Gay, Bisexual and Transgender (LGBT) Prisoners 105 (2009).

²¹⁸ Association for the Prevention of Torture, *supra* note 171, at 23.

²¹⁹ See e.g., American Civil Liberties Union, *A New York Jail Forced a Trans Woman Into a Men’s Facility*, (Sep. 3, 2019), <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/new-york-jail-forced-trans-woman-mens-facility>; Association for the Prevention of Torture, *supra* note 171, at 72.

male prisoners in the same facilities.²²⁰ In a lawsuit filed by an ACLU of Florida client, Reiyun Keohane, a transgender woman, spoke to her experiences of being placed in a men’s prison.²²¹ She stated, “I am a transgender woman--but to the classification officers there is no such thing. If they say you’re male, you go to the men’s prison, where you will be forced to ‘act like a man’ under threat of being locked up in solitary, beaten, and humiliated.”²²²

In some cases, there are policies in place that allow non-cisgender people to be housed in special protective units but the conditions in the segregated units are inferior and often resemble maximum security prisons.²²³ For example, the Curado Prison Complex in Pernambuco, Brazil, maintains a specialized housing unit for gay, bisexual, and transgender men.²²⁴ However, rather than having an equal facility that protects LGBTQIAP+ people from violence, the conditions in this unit are deplorable in comparison to the other units in the prison.²²⁵ Specifically, the special unit suffers from extreme overcrowding, as it was built to house fifty people but is currently housing 170, resulting in people sleeping on make-shift beds or concrete and sharing two toilets between 170 men.²²⁶

In addition to experiencing housing unit discrimination in prison, TGNCI+ people who are deprived of liberty experience profound barriers to accessing gender-related healthcare.²²⁷ For

²²⁰ National Center for Transgender Equality, *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* 13.

²²¹ Enforced Dysphoria: A Letter from a Transgender Woman Denied Care In a Florida Men’s Prison (Aug. 15, 2016). <https://www.aclufll.org/en/news/enforced-dysphoria-letter-transgender-woman-denied-care-florida-mens-prison>.

²²² *Id.*

²²³ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 148; see also, Matter of the Curado Prison Complex with regard to Brazil, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (October 7, 2015).

²²⁴ Human Rights Watch, *The State Let Evil Take Over: The Prison Crisis in the State of Pernambuco*, (Oct. 19, 2015) <https://www.hrw.org/report/2015/10/19/state-let-evil-take-over/prison-crisis-brazilian-state-pernambuco>.

²²⁵ Matter of the Curado Prison Complex with regard to Brazil, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. ¶ 151. (“[E]n la inspección efectuada por los representantes el 29 de mayo de 2018, fue la instalación de un alambrado, que torna el local más parecido a una perrera. Al menos 10 personas dormían en el suelo en colchones viejos, y el Estado no entregaría ropa de cama o uniformes para los internos.”)

²²⁶ Human Rights Watch, *supra* note 225.

²²⁷ Association for the Prevention of Torture, *supra* note 171, at 86.

example, those who require hormonal therapy as part of their healthcare regimens are at risk of being denied medication as a form of disciplinary sanction, risking solitary confinement.²²⁸ A study of transgender women in Latin America revealed that “in the majority of prison establishments in the region, health care does not include a gender perspective or contemplate this group’s particularities.”²²⁹ Furthermore, medical practices tend to be replete with homophobic and transphobic discourses. In this vein, TGNCI+ persons deprived of liberty experience distinct harm that is motivated by their actual or perceived nonconformity with traditional gender norms and thus, merit differentiated legal protections under Inter-American human rights law.

Because of the clear nexus between LGBQAP+ prisoners’ sexual orientation and the physical, psychological, and sexual harm they suffer, differentiated protections are required to eliminate prejudice-based violence in prisons and spaces of confinement. Moreover, the unique harm that TGNCI+ people suffer in prison on account of their non-normative gender identities warrants the adoption of differentiated human rights protections to eradicate gender-based harm in detention. This Court must take a step beyond generalized protections to adopt differentiated protections for LGBTQIAP+ people deprived of liberty in order to ensure the universal realization of human rights in the Inter-American system.

B. The Inter-American System

1. Failure to Protect LGBTQIAP+ Persons Deprived of Liberty from Violence Violates Inter-American Law

The existing codified law and jurisprudence of the Inter-American Human Rights System clearly expresses that discrimination and violence on the basis of sexual orientation and gender

²²⁸ *Id.* at 84.

²²⁹ Josefina Alfonsin et al., *Trans Women Deprived of Liberty: Invisible Stories Behind Bars*, Women, Drug Policy and Incarceration, Policy Briefing Series https://www.wola.org/wp-content/uploads/2020/04/Trans-Women-Deprived-of-Liberty.-Invisible-Stories-Behind-Bars_Final-3.pdf.

identity violates protected human rights under the American Convention on Human Rights, the Additional Protocol of San Salvador, the American Declaration of the Rights and Duties of Man, and the Inter-American Convention Against All Forms of Discrimination and Intolerance. Consequently, the failure to adopt differentiated approaches to protect LGBTQIAP+ persons deprived of liberty has resulted in significant violations of protected human rights and as such, is a violation of Inter-American law.

All rights and freedoms guaranteed under Inter-American law are subject to the right to nondiscrimination²³⁰ and as such, must be read to extend to LGBTQIAP+ persons deprived of liberty and require the adoption of differentiated approaches to protect these rights. In addressing the scope of the right to nondiscrimination, the IACHR has recognized that, although discrimination based on “gender identity” and “sexual orientation” is not expressly included, “[t]he language used in the clause does...indicate that it is an open provision, allowing the inclusion of additional categories under the wording “other social condition.” For example, Article 1(1) of The American Convention on Human Rights establishes that all persons are ensured the “free and full exercise” of the rights recognized “without any discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth *or any other social condition.*”²³¹ When considering those rights and freedoms protected by Inter-American human rights law, it is vital to recognize that they *apply unequivocally and without discrimination to LGBTQIAP+ persons.*

²³⁰ See Organization of American States, American Convention on Human Rights, art. 1 ¶ 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Protocol of San Salvador”), art 3, Nov. 17, 1988, O.A.S.T.S. No. 69; American Declaration of the Rights and Duties of Man, art. III; Organization of American States, Inter-American Convention Against All Forms of Discrimination and Intolerance, art. 1 ¶ 1, Jun. 6, 2013.

²³¹ American Convention on Human Rights, *supra* note 231, art. 1 ¶ 1; Inter-Am. Comm’n H.R., Compendium on Equality and Non-Discrimination: Inter-American Standards (Feb. 12, 2019).

LGBTQIAP+ persons deprived of liberty experience violence as a direct result of their perceived sexual orientation or gender expression.²³² This violence may occur at the hands of non-state actors, such as other detained persons, or from state actors, such as correctional officers and government officials.²³³ The IACHR has received several reports detailing violence against LGBTQIAP+ persons deprived of liberty, including but not limited to, “instances of violence, torture, and inhumane and degrading treatment against LGBT persons, or those perceived as such, in prisons, lock up facilities, police stations, immigration detention centers, and other places of detention”²³⁴ It is vital to recognize that this violence, which constitutes significant violations of protected human rights within the Inter-American Human Rights System, persists because of a failure to adopt differentiated protections for LGBTQIAP+ persons deprived of liberty.

The American Declaration on the Rights and Duties of Man (American Declaration) explicitly protects the right to *life*, liberty, and *personal security*²³⁵, the right to *protection of honor*, personal reputation, and *private and family life*²³⁶, and the *right to humane treatment while in custody*.²³⁷ The aforementioned violence perpetrated against LGBTQIAP+ persons deprived of liberty because of their sexual orientation or gender identity is a violation of these protected rights. This court must uphold its dedication to the rights granted under the American Declaration and adopt differentiated approaches to protect LGBTQIAP+ persons deprived of liberty.

The perpetration of violence against LGBTQIAP+ persons and failure to protect LGBTQIAP+ persons deprived of liberty from violence violates the rights granted by the

²³² Inter-Am. Comm’n H.R., *supra* note 167, ¶¶ 25-30.

²³³ Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the UN General Assembly, A/HRC/31/57 ¶ 15 (Jan. 5, 2016).

²³⁴ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 145.

²³⁵ American Declaration of the Rights and Duties of Man, *supra* note 231, art. I (emphasis added).

²³⁶ *Id.* at art. IV (emphasis added).

²³⁷ *Id.* at art. XXV. (emphasis added).

American Convention on Human Rights (American Convention), specifically Article 5 which grants the right to humane treatment²³⁸ and Article 7, which grants the right to personal liberty.²³⁹ Article 5(1) of the American Convention establishes the right to humane treatment, which includes a general guarantee that “every person has the right to have his physical, mental, and moral integrity protected.” Article 5(2) provides that no person should be subjected to “torture or to cruel, inhuman, or degrading punishment or treatment,” and that all persons deprived of their liberty “shall be treated with respect for the inherent dignity of the human person.”²⁴⁰ Article 7(1) of the American Convention establishes that “[e]very person has the right to personal liberty and security.”²⁴¹ The aforementioned violence experienced by LGBTQIAP+ persons in detention is a clear violation of the American Convention, and therefore, this Court must adopt differentiated protections to ensure that LGBTQIAP+ persons have the ability to exercise their fundamental rights.

The perpetration of violence against LGBTQIAP+ persons deprived of liberty violates the Inter-American Convention Against All Forms of Discrimination and Intolerance. Article 4 of the Convention provides that States must “undertake to prevent, eliminate, prohibit, and punish...all acts and manifestations of discrimination and intolerance...”²⁴² Article 4(iii) prohibits “violence motivated by any of the criteria set forth in Article 1.1.”²⁴³ Article 1(1) of the Convention establishes that “[d]iscrimination may be based on; sexual orientation; gender identity and expression.”²⁴⁴ Recognizing that the Inter-American Convention Against All Forms of

²³⁸ American Convention, *supra* note 231.

²³⁹ *Id.*

²⁴⁰ *Id.* art. 5 ¶¶ 1-2.

²⁴¹ *Id.* art. 7 ¶ 1.

²⁴² Inter-American Convention Against All Forms of Discrimination and Intolerance, *supra* note 231, art. 4.

²⁴³ *Id.*

²⁴⁴ *Id.* art. 1 ¶ 1.

Discrimination and Intolerance prohibits the discrimination-motivated violence currently experienced by LGBTQIAP+ persons deprived of liberty, this court must adopt differentiated protections designed to eradicate this insidious violence and protect the human rights of LGBTQIAP+ persons.

2. Failure to Respect Sexual Orientation and Gender Identity Violates Inter-American Law

LGBTQIAP+ persons often experience the corrosion of their mental, physical, and emotional health as a result of a failure to recognize or respect their sexual orientation or gender identity. This dehumanizing phenomenon is particularly endemic for LGBTQIAP+ persons deprived of liberty.²⁴⁵ The failure to adopt differentiated approaches designed to respect the sexual orientation and gender identity of LGBTQIAP+ persons deprived of liberty perpetuates this treatment.²⁴⁶

For TGNCI+ persons deprived of liberty, the failure to respect gender identity and expression is often manifested in the: (i) failure to acknowledge gender identity and expression²⁴⁷, (ii) disregard for a chosen name²⁴⁸, (iii) contempt for gender-affirming practices²⁴⁹, (iv) inaccurate placement and accommodation within prisons and detention centers²⁵⁰, and (v) perpetration of harassment and abuse²⁵¹. For LGBQAP+ people, the failure to respect sexual orientation is often manifested through the: (i) inability to participate in conjugal visits with partners in countries where their unions are not legally recognized²⁵², (ii) failure to respect intimate partnerships or

²⁴⁵ Association for the Prevention of Torture, *supra* note 171, at 7.

²⁴⁶ *Id.* at 1-2.

²⁴⁷ *Id.* at 76.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 83.

²⁵⁰ *Id.* at 68.

²⁵¹ Inter-Am. Comm'n H.R., *supra* note 167, ¶ 145.

²⁵² Association for the Prevention of Torture, *supra* note 171, at 79.

displays of affection²⁵³, (iii) perpetration of harassment and abuse.²⁵⁴ This Court must commit to the protection of the human rights of non-heterosexual and non-cisgender persons deprived of liberty by adopting differentiated approaches for LGBTQAP+ persons discriminated on the basis of their sexual orientation and TGNCI+ persons discriminated against based on their gender identity and expression. Through the adoption of differentiated approaches, this Court will demonstrate to the international community that it is dedicated to eradicating discrimination, violence, and ill-treatment perpetrated against LGBTQIAP+ persons deprived of liberty.

Articles I and V of the American Declaration guarantee the right to life, liberty and personal security and the right to protection of honor, personal reputation, and private and family life. Article I states that “[e]very human being has the right to life, liberty, and the security of his person.”²⁵⁵ Article V states that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”²⁵⁶ LGBTQIAP+ persons deprived of liberty are subject to dehumanizing violence and abuse at the hands of prison personnel and other detainees. This violence is an unequivocal violation of the rights protected by the American Declaration, and as such, a violation of Inter-American Human Rights Law.

The failure to adopt differentiated approaches designed to establish the responsibility to respect the sexual orientation and gender identity and expression of LGBTQIAP+ persons deprived of liberty violates Articles 5, 7, and 11 of the American Convention. Article 5(1) ensures the right to humane treatment, establishing that “no one shall be subjected to cruel, inhuman, or degrading punishment or treatment.”²⁵⁷ Article 7 ensures the right to personal liberty, which

²⁵³ *Id.* at 89.

²⁵⁴ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 145.

²⁵⁵ American Declaration of the Rights and Duties of Man, *supra* note 231, art. I.

²⁵⁶ *Id.* at art. V.

²⁵⁷ American Convention, *supra* note 231.

includes the right to personal security.²⁵⁸ Finally, Article 11 ensures the right to privacy, which guarantees that “[e]veryone has the right to have his honor respected and his dignity recognized,” and that “[n]o one may be the subject of arbitrary or abusive interference with his private life, his family...or of unlawful attacks on his honor...”²⁵⁹ This Court must recognize that the American Convention, as written, requires that LGBTQIAP+ persons deprived of liberty are owed respect for their sexual orientation and gender identity or expression. However, current detention conditions show that LGBTQIAP+ persons deprived of liberty are subjected to dehumanizing treatment on the basis of their sexual orientation and gender identity. As such, this Court must adopt differentiated approaches to protect LGBTQIAP+ persons deprived of liberty from being subjected to such treatment.

The failure to adopt differentiated approaches for LGBTQIAP+ persons deprived of liberty contributes to ill-treatment based on prejudice against non-heterosexual and non-cisgender persons. Further, this prejudice, which is often expressed through disrespect and contempt for the gender identity and sexual orientation of LGBTQIAP+ persons deprived of liberty, violates the plain language of Articles 1, 2, 3, and 4 of the Inter-American Convention Against All Forms of Discrimination and Intolerance. Article 1(1) defines discrimination as “any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one of more human rights and fundamental freedoms...” which can be based on “sexual orientation or gender identity.”²⁶⁰ Further, Article 1(5) defines “intolerance” as “an action or set of actions or expressions that denote disrespect, rejection, or contempt for the dignity, characteristics, convictions, or opinions of persons *for being*

²⁵⁸ *Id.* art. 7 ¶ 1.

²⁵⁹ *Id.* art. 11 ¶¶ 1, 2.

²⁶⁰ Inter-American Convention Against All Forms of Discrimination and Intolerance, *supra* note 231, art. 1 ¶ 1.

different or contrary”²⁶¹ This intolerance “may manifest itself as marginalization and exclusion of groups in conditions of vulnerability from participation in any sphere of public or private life or violence against them.”²⁶² This court must adopt differentiated approaches to protect the rights of LGBTQIAP+ person deprived of liberty. Without such differentiated approaches, LGBTQIAP+ persons deprived of liberty are vulnerable to discrimination and violence.

3. Failure to Guarantee Access to Adequate Health Care to Transgender, Gender Non-conforming, and Intersex Persons Violates Inter-American Law

It is well documented that the accessibility and quality of healthcare in detention facilities is inadequate.²⁶³ However, these challenges are particularly prevalent for transgender, gender non-conforming, and intersex persons deprived of liberty.²⁶⁴ There are reports of inadequate care related to mental health, sexually transmitted infections, such as HIV/AIDS and the “denial of basic care, discriminatory providers, denial of hormones and other transition-related treatments” for transgender, gender-nonconforming, and intersex persons deprived of liberty.²⁶⁵ Consequently, it is vital that differentiated protections are adopted to ensure that TGNCI+ persons deprived of liberty have access to adequate healthcare services.

TGNCI+ persons deprived of liberty face particular challenges if they attempt to receive or continue hormone therapy while detained.²⁶⁶ The IACHR has received reports of mistreatment, harassment, and violence perpetrated against transgender persons seeking medical care.²⁶⁷ The challenge of accessing quality healthcare is exacerbated when in detention facilities, as prison

²⁶¹ *Id.* art. 1 ¶ 5 (emphasis added).

²⁶² *Id.*

²⁶³ “It’s War in Here”: A Report on the Treatment of Transgender and Intersex People in New York State Men’s Prisons 24.

²⁶⁴ *Id.* at 25.

²⁶⁵ *Id.*

²⁶⁶ Association for the Prevention of Torture, *supra* note 171, at 13.

²⁶⁷ Inter-Am. Comm’n H.R., *supra* note 167, ¶ 196.

personnel and medical units are often unwilling to address the specific needs of TGNCI+ persons.²⁶⁸ For example, a transgender woman detained in a Florida men’s prison was denied hormone therapy and other medically necessary treatment for gender dysphoria.²⁶⁹ She repeatedly made clear that she needed to continue her treatment for her gender dysphoria, which included hormone therapy and the “ability to groom and dress consistent with her female gender identity.”²⁷⁰ However, “not only was she denied restoration of the hormone therapy...her hair was forcibly cut and she had her female clothing items confiscated.”²⁷¹ However, in detention facilities in which TGNCI+ persons are allowed access to hormone therapy, such care is often inconsistent and prison medical units often lack the materials, resources, and knowledge needed to provide adequate health care.²⁷² For example, in Colombia, although most transgender women deprived of liberty are not allowed access to hormone therapy, as a result of advocacy and demands from the population, “some institutions are now allowing hormones to be brought in.”²⁷³ However, these treatments are paid for by those taking them and the institutions “do not provide access to laboratory tests or the periodic checkups needed for safe treatment.”²⁷⁴

Further, TGNCI+ persons deprived of liberty report experiencing a lack of access to adequate mental health care.²⁷⁵ In a series of interviews with transgender women of color deprived of liberty in the United States, one woman recounted that “her experience of being harassed and dehumanized and being denied hormone therapy exacerbated her feelings of negative feelings

²⁶⁸ Association for the Prevention of Torture, *supra* note 171, at 89-92.

²⁶⁹ Gender dysphoria” is the medical diagnosis for the “incongruence between one’s gender identity and assigned sex and the clinical distress resulting from this incongruence.” American Civil Liberties Union, *Keohane v. Jones, et al.* Jan. 14, 2019. <https://www.aclu.org/cases/keohane-v-jones-et-al>.

²⁷⁰ American Civil Liberties Union, *Keohane v. Jones, et al.* <https://www.aclu.org/cases/keohane-v-jones-et-al>.

²⁷¹ *Id.*

²⁷² Association for the Prevention of Torture, *supra* note 171, at 89-92.

²⁷³ Alfonsin et al., *supra* note 230, at 14.

²⁷⁴ *Id.*

²⁷⁵ McCauley, et al. *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail* 3.1 Transgender Health 38 (2018).

of...self-worth.”²⁷⁶ However, as a result of the institutional harassment and institutional distrust, accessing care to address these particular feelings is difficult.²⁷⁷ Differentiated approaches for healthcare services for TGNCI+ persons deprived of liberty must include access to adequate mental health services, which are able to respond to the specific needs of this population.

The American Declaration recognizes the right to the preservation of health and to wellbeing in Article XI. The Declaration states that, “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”²⁷⁸ This Court must adopt differentiated approaches to remedy the inadequacies of healthcare offered to TGNCI+ persons deprived of liberty in accordance with Inter-American Human Rights Law.

The right to health is established in Article 10 of the “Protocol of San Salvador,” an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Article 10 states that all people “shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”²⁷⁹ Further, in ensuring this right is available, States must provide primary health care and extend the “benefits of health services to all individuals subject to the States’ jurisdiction.”²⁸⁰ In accordance with Article 3 of the Protocol of San Salvador, which ensures the right to nondiscrimination, the right to health must be guaranteed without discrimination of any kind.²⁸¹ In failing to provide access to adequate healthcare, particularly in failing to provide gender-affirming healthcare and non-discriminatory care, detention facilities are violating fundamental

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ American Declaration of the Rights and Duties of Man, *supra* note 231, art. XI.

²⁷⁹ Protocol of San Salvador, *supra* note 231.

²⁸⁰ *Id.*

²⁸¹ *Id.*

rights of TGNCI+ persons deprived of liberty. As such, this Court must adopt differentiated approaches aimed at remedying these violations.

4. The Inter-American Commission on Human Rights' Jurisprudence

The IACHR has emphasized that safeguarding protections for LGBTQIAP+ people is essential for the full realization of human rights in the Western hemisphere.²⁸² The universal implementation of human rights cannot be realized without the adoption of a differentiated human rights approach that recognizes the heightened vulnerability of LGBTQIAP+ people in spaces of confinement. In its 137th session report, the IACHR stated that:

The IACHR observes that inequality and discrimination are serious structural problems in the hemisphere that pose major obstacles to the respect for the human rights of all the region's inhabitants. Discrimination against . . . various groups based on sexual orientation, among others, is a serious problem in all countries of the region.²⁸³

The IACHR has long recognized that people deprived of liberty are entitled to respect for their inherent dignity and fundamental rights.²⁸⁴ These well-established norms are integral for LGBTQIAP+ people deprived of liberty because their fundamental rights are constantly violated on account of their sexual orientation, gender expression, and gender identities. In its Resolution on "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas," the IACHR recognized a non-derogable right to humane treatment in prison and protection from "any kind of threats and acts of torture, execution, forced disappearance, cruel, inhuman, or degrading treatment or punishment, sexual violence, corporal punishment, collective

²⁸² Annex to Press Release 78/09 on the 137th Regular Period of Sessions of the IACHR, available at <http://www.cidh.org/comunicados/english/2009/78-09engan.htm> (emphasis added).

²⁸³ *Id.*

²⁸⁴ Inter-Am. Comm'n H.R., *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Resolution No. 01/08 (Mar. 13, 2008), available at: http://www.cidh.oas.org/pdf%20files/RESOLUTION%201_08%20-%20PRINCIPLES%20PPL%20FINAL.pdf.

punishment, forced intervention or coercive treatment, from any method intended to obliterate their personality or to diminish their physical or mental capacities.”²⁸⁵ In the same Resolution, the IACHR recognized the need for measures to protect vulnerable groups deprived of liberty, including “particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and *minorities*.”²⁸⁶ Although LGBTQIAP+ people in detention are not explicitly listed, this demonstrates a clear trend toward enhanced legal protections for vulnerable minority groups. In this vein, the IACtHR should follow both emerging and well-established human rights norms to adopt differentiated legal protections for LGBTQIAP+ persons deprived of liberty to preserve their inherent dignity and fundamental rights.

In addition to affirming much-needed protections for all people deprived of liberty, the IACHR has more recently advocated for a more particularized human rights approach for LGBTQIAP+ people in detention.²⁸⁷ The IACHR has specifically pushed for stronger protections for LGBTQIAP+ people deprived of liberty by issuing precautionary measures,²⁸⁸ holding thematic hearings on relevant human rights issues,²⁸⁹ and admitting individual petitions.²⁹⁰ In particular, the IACHR admitted the petition of a lesbian woman who was denied a conjugal visit in prison.²⁹¹ In *Marta Lucía Álvarez Giraldo v. Colombia*, a female petitioner requested an intimate

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Inter-Am. Comm’n H.R., *supra* note 167.

²⁸⁸ Inter-Am. Comm’n H.R., Honduras: Human Rights and the Coup d’état. OEA/Ser.L/V/II., Doc. 55 (Dec. 30, 2009).

²⁸⁹ Inter-Am. Comm’n H.R., Thematic Hearings including: Situation of LGBTI Persons Deprived of Liberty in the Americas (2018), Situation of Human Rights of Trans Persons in Argentina (2018), “Situation of Older LGBTI Persons in the Americas (2018), Human Rights Situation of LGBTI People in El Salvador (2017), Human Rights Situation of LGBT Persons in Bolivia (2016), Reports of Criminalization of Same-Sex Relations in Grenada (2015), available at <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=32>

²⁹⁰ *Marta Lucía Álvarez Giraldo v. Colombia*, Case 11.656, Inter-Am. Comm’n HR., Report No. 71/99, ¶1.

²⁹¹ *Id.*

visit from her female life partner while incarcerated at Dosquebradas “La Badea” Women’s Prison in Pereira, Colombia.²⁹² The prison denied her request citing the desire to maintain “security, discipline, and morality” in the correctional setting.²⁹³ Colombia conceded that the policy was “based upon a deeply rooted intolerance in Latin American culture of homosexual practices.”²⁹⁴ This reflects a pattern of endemic prejudice against sexual and gender minorities that underpins discrimination and violence against LGBTQIAP+ people in prison.²⁹⁵ In its final ruling, the IACHR moved toward the adoption of differentiated protections by holding that the State’s denial of intimate visits for same-sex couples constituted impermissible discrimination on the basis of sexual orientation, inhumane treatment, and a denial of the right to privacy in violation of Articles 5(1), 11(2), 8(1), 24 and 25(1) of the American Convention.²⁹⁶ The IACHR implicitly recognized that a differentiated protection model is necessary to address systemic homophobia and transphobia in prison and ensure that States protect LGBTQIAP+ detainees from harm and discrimination during the pendency of their incarceration. IACtHR should follow suit and adopt a particularized human rights framework to compel States to uphold the rights of LGBTQIAP+ prisoners throughout the region.

5. The Inter-American Court’s Precedent

The IACtHR has aligned its jurisprudence with the findings of the IACHR by recognizing that sexual orientation and gender identity are protected classes against discrimination under the

²⁹² *Marta Lucía Álvarez Giraldo v. Colombia*, Case 11.656, Inter-Am. Comm’n HR., Report No. 71/99, ¶ 1 (May 4, 1999). http://www.cidh.org/annualrep/99eng/admissible/colombia11656.htm#_ftn1.

²⁹³ *Id.* at 11.

²⁹⁴ *Id.* at 12.

²⁹⁵ Association for the Prevention of Torture, *supra* note 171, at 75.

²⁹⁶ *Marta Lucía Álvarez Giraldo v. Colombia*, Case 11.656, Inter-Am. Comm’n HR., Report No.122/18, OEA/Ser.L/V/II.169, doc. 139 ¶227 (2018) <https://www.oas.org/en/iachr/decisions/2018/COPU11656EN.pdf>.

Article 1(1) of American Convention on Human Rights.²⁹⁷ The IACtHR has also recognized that LGBTQIAP+ individuals are subject to a heightened risk of harm in detention and face unique vulnerabilities due to their sexual orientation, gender identity, and gender expression.²⁹⁸ The human rights violations that affect this group occur as a result of prejudice against non-heteronormative or non-cisgender individuals, which is only magnified in the closed environment of prisons and detention facilities.²⁹⁹ This section outlines the IACtHR jurisprudence that supports the adoption of differentiated protections for LGBTQIAP+ individuals deprived of liberty.

The IACtHR has recently granted provisional measures in two cases involving LGBTQIAP+ people deprived of liberty, in which it highlighted the magnified vulnerability and special needs of sexual and gender minorities in detention.³⁰⁰ In *Matter of the Placido de Sa Carvalho Penal Institute with regard to Brazil*, the IACtHR granted provisional measures due to violations of LGBTQIAP+ prisoner's rights.³⁰¹ Specifically, the Placido de Sa Carvalho Penal Institute (IPPSC) did not have a separate unit to ensure the safety of LGBTQIAP+ people, which resulted in targeted violence and ill-treatment of these populations.³⁰² In *Matter of the Curado Prison Complex with regard to Brazil*, the IACtHR found that LGBTQIAP+ prisoners incarcerated

²⁹⁷ See *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12.502 (Feb. 24, 2012). *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 310 ¶ 110 (February 26, 2016). *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

²⁹⁸ *Matter of the Curado Prison Complex with regard to Brazil*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. ¶ 37 (October 7, 2015) (“Sobre la situación en particular de personas con discapacidad y personas LGBT, la Corte hace notar el deber de protección del Estado frente a situaciones conocidas de discriminación y riesgo de grupos en situación de vulnerabilidad.”) https://www.corteidh.or.cr/docs/medidas/curado_se_02.pdf.

²⁹⁹ Association for the Prevention of Torture, *supra* note 171, at 56.

³⁰⁰ See e.g., *Matter of the Curado Prison Complex with regard to Brazil*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (October 7, 2015); *Matter of the Placido de Sa Carvalho Penal Institute with regard to Brazil*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. (November 22, 2018).

³⁰¹ *Matter of the Placido de Sa Carvalho Penal Institute with regard to Brazil*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. (November 22, 2018).

³⁰² *Id.* ¶ 48.

at the Curado Prison Complex (CPC) were extremely susceptible to violence from fellow inmates and prison staff.³⁰³ The IACtHR recognized that States have an affirmative duty to protect LGBTQIAP+ inmates from discrimination and violence, “the State is obligated to take all available measures to protect and guarantee the enjoyment of the right to life and personal integrity of the people in its custody.”³⁰⁴ These cases demonstrate that without a differentiated rights model that has a broad mandate to protect LGBTQIAP+ people deprived of liberty, this group will continue to be subjected to discrimination, torture, and ill-treatment while incarcerated.

In its most recent review of the *Curado Prison Complex* in 2018, the IACtHR noted that Brazil had not implemented any of the IACtHR’s recommendations to address the extreme vulnerability of LGBTQIAP+ prisoners.³⁰⁵ The IACtHR maintained that the only State measure taken to protect LGBTQIAP+ rights was the creation of a special housing unit separate from the non-LGBTQIAP+ population.³⁰⁶ However, upon inspection the alleged unit comprised of a wire-type fence, described as having the appearance of a “kennel” where overcrowding persisted, and people slept on the floor without bedding or new clothing.³⁰⁷ Furthermore, transgender prisoners reported being blocked from accessing hormone treatments and self-identifying a gender different than one assigned to them at birth.³⁰⁸ The IACtHR held that the State must adopt necessary

³⁰³ *Id.* ¶ 32.

³⁰⁴ *Id.* (“El Estado tiene la obligación de tomar todas las medidas disponibles para proteger y garantizar el goce del derecho a la vida y a la integridad personal de las personas bajo su custodia”).

³⁰⁵ *Matter of the Curado Prison Complex with regard to Brazil, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R.* (November 28, 2018).

³⁰⁶ *Id.* ¶ 150.

³⁰⁷ *Id.* ¶ 151. (“[E]n la inspección efectuada por los representantes el 29 de mayo de 2018, fue la instalación de un alambrado, que torna el local más parecido a una perrera. Al menos 10 personas dormían en el suelo en colchones viejos, y el Estado no entregaría ropa de cama o uniformes para los internos.”)

³⁰⁸ *Id.* ¶153. (“Reiteraron que tampoco hay acceso por parte de ese grupo a ninguna de las especificidades que su encarcelamiento requiere, como hormonas, y a su identidad de género. A pesar de la orden específica hecha por la Corte no cuentan con ningún dato proporcionado por el Estado sobre presos y presas LGTBI, desde la cantidad de presos en ese grupo hasta su acceso a la salud, siendo imposible averiguar si existe discriminación en el acceso a servicios básicos.”)

measures to guarantee the effective protection of LGBTQIAP+ prisoners from, *inter alia*, physical violence, gang rape, discrimination, and restricted freedom of movement.³⁰⁹ The IACtHR should expand its strong precedents for protecting LGBTQIAP+ rights and adopt a differentiated human rights framework for incarcerated people suffering discrimination and violence on account of their sexual orientation or gender identities.

C. International Human Rights Law

1. Universal Human Rights Law

This section outlines the jurisprudence of key international human rights instruments and mechanisms that support a differentiated human rights approach for LGBTQIAP+ individuals deprived of liberty. The UN HRC³¹⁰ and the Office of the High Commissioner for Human Rights³¹¹ recognize that violence and discrimination motivated by a bias against LGBTQIAP+ people necessitate the creation of enhanced legal measures to combat sexual orientation- and gender identity-based (SOGI) harm. CEDAW, CAT, and the ICCPR are strong examples of international legal frameworks that already contain differentiated protection models for vulnerable groups, including LGBTQIAP+ people deprived of liberty.³¹² Given the prevalence of differentiated human rights frameworks among the core human rights treaties, differentiated or enhanced legal

³⁰⁹ *Id.* ¶ 160. (“En consideración de todo lo anterior y en particular la especial vulnerabilidad de personas LGBTI privadas de libertad de sufrir agresiones físicas y psicológicas en el Complejo Penitenciario de Curado (violación sexual colectiva, discriminación, restricción de la libertad de movimiento, entre otras) la Corte dispone que el Estado adopte en carácter de urgente, las medidas necesarias para garantizar la efectiva protección ese grupo y realice los cambios estructurales necesarios para tal efecto.”)

³¹⁰ Human Rights Committee, *Concluding Observations: Poland*, U.N. Doc. CCPR/C/POL/CO/6 ¶ 8 (2010).

³¹¹ Office of the United Nations High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 ¶78(a) (2015).

³¹² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51(1984), *entered into force* June 26, 1987. *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13, *entered into force* Sept. 3, 1981.

protections must be adopted because “laws can play an important role in facilitating the prosecution and punishment of perpetrators of hate-motivated violence and in establishing homophobia and transphobia as aggravating factors...”³¹³ The pervasive social stigma, violence, and discrimination against LGBTQIAP+ people in detention compel the adoption of enhanced legal protections to safeguard incarcerated non-heterosexual and non-cisgender people from prejudice-based harm in prison.³¹⁴

a. CAT, ICCPR, and the Prohibition on Torture

International law categorically prohibits the use of torture in all circumstances.³¹⁵ The Universal Declaration of Human Rights states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³¹⁶ Numerous other sources of international law codify the prohibition against torture and ill-treatment, namely, the ICCPR,³¹⁷ the CAT, the American Convention on Human Rights,³¹⁸ the European Convention for the Protection of Human Rights and Fundamental Freedoms,³¹⁹ and the African Charter on Human and Peoples’ Rights,³²⁰ which unequivocally prohibit the use of torture and impose an affirmative obligation on States to criminalize torture in all spheres. Within the UN system, the CAT and the ICCPR establish an

³¹³ Office of the United Nations High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 ¶ 39 (2015).

³¹⁴ Inter-Am. Comm’n H.R., *supra* note 167, at 33.

³¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984 I.L.M. 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984). International Covenant on Civil and Political Rights (hereinafter ICCPR), Dec. 16, 1966 I.L.M. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967). Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

³¹⁶ Universal Declaration of Human Rights, *supra* note 316, at 71.

³¹⁷ ICCPR, *supra* note 316; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

³¹⁸ American Convention on Human Rights, *supra* note 231, art. 5 ¶ 2.

³¹⁹ European Convention, *supra* note 113, art. 3.

³²⁰ African Charter, *supra* note 153, art. 5.

absolute and non-derogable prohibition on torture that encompasses LGBTQIAP+ people deprived of liberty.³²¹

As the power of the State is at its apex in sites of incarceration, deprivation of liberty has historically engendered obvious concerns about the use of torture and the dilution of rights in prison.³²² Because States often allow prison staff to use violence to achieve certain penological objectives, the CAT recognizes the high probability of unlawful torture in spaces of confinement and detention and provides that States have a duty to systematically review procedures involving the “custody and treatment of persons subjected to any form of arrest, detention or imprisonment.”³²³

The failure to address violence against LGBTQIAP+ individuals deprived of liberty constitutes torture and violates established principles of international law, the ICCPR, and CAT. Article 7 of the ICCPR reads that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”³²⁴ Under the CAT, specific instances of torture are proscribed, including both intentional acts and omissions,

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, *or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or *with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or

³²¹ CAT, *supra* note 316.

³²² See e.g., *Hudson v. Palmer*, 468 U.S. 517, 545 (1984)(prisoner has no reasonable expectation of privacy; “A detainee simply does not possess the full range of freedoms of a non-incarcerated individual.”); *Turner v. Safley* 482 U.S. 78, 89 (1987)(religious freedom and freedom of speech are subject to limitations relating to legitimate penological interests).

³²³ CAT, *supra* note 316; ICCPR, *supra* note 316.

³²⁴ *Id.*

suffering arising only from, inherent in or incidental to lawful sanctions.³²⁵

The UN Special Rapporteur on Torture has reported that LGBTQIAP+ persons are “disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations.”³²⁶ LGBTQIAP+ persons deprived of liberty experience torture in two unique ways, namely through (1) abuse at the hands of fellow prisoners and (2) illegitimate violence from correctional officers and government officials.³²⁷ Violence against LGBTQIAP+ people in detention that is motivated by homophobic or transphobic animus constitutes severe torture under CAT and the ICCPR.

The physical violence and psychological ill-treatment that incarcerated LGBTQIAP+ people experience does not stem from lawful sanctions or legitimate penological objectives. To the contrary, the vast array of suffering imposed on LGBTQIAP+ individuals deprived of liberty can only be described as severe torture under CAT and the ICCPR that falls outside the scope of incarceration. The Committee Against Torture and Human Rights Councils have expressed concerns over a global pattern of torture and ill-treatment in prisons and places of confinement.³²⁸ Specifically, they reported the torture of LGBQAP+ and TGNCI+ people in penitentiary facilities

³²⁵ CAT, *supra* note 316.

³²⁶ Human Rights Council, *Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the UN General Assembly*, U.N. Doc. A/56/156 ¶ 19 (2001).

³²⁷ Human Rights Council, *Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the UN General Assembly*, U.N. Doc. A/HRC/31/57 ¶ 15 (2016).

³²⁸ See Committee Against Torture, *Concluding Observations on the Seventh Period Report on Paraguay*, U.N. Doc. CAT/C/PRY/CO/7 (2017) (“The Committee reiterates its deep concern about consistent reports alleging that torture and ill-treatment are routinely practiced by police and prison officials.”) Committee Against Torture, *Concluding Observations on the Seventh Periodic Report of Ecuador*, U.N. Doc. CAT/C/ECU/CO/7 (2018) (“[T]he Committee is concerned at the introduction of restrictions on visits to prisoners and at the transfer of prisoners to prisons far from their family or social circle under the new model of prison administration...It is also concerned that, despite the transfer of responsibility to the Ministry of Health, there are still shortcomings in the health services and medical care provided in detention centres. Lastly, the Committee expresses its concern at complaints regarding the invasive and humiliating search procedures to which visitors, in particular women, are subjected (arts. 2, 11 and 16).”)

by public officials and fellow inmates, including excessive force,³²⁹ the involuntary placement of transgender women together with male detainees,³³⁰ and failure to prosecute and investigate violence against LGBTQIAP+ prisoners.³³¹ In its 2016 report, the Special Rapporteur on Torture noted that lesbian, gay, bisexual, transgender and intersex people in prison report higher rates of physical and psychological violence than the general prison population.³³² These groups are frequently placed in solitary confinement or administrative segregation under the pretext of protection which violates the prohibition against torture under international law.³³³ The evidence overwhelmingly demonstrates that physical and psychological torture against LGBTQIAP+ people in detention stems from prejudice relating to their sexual orientation and gender identity³³⁴ and thus, particularized legal protections are urgently required to address bias-motivated violence against this vulnerable group. Because prisoners and prison officials commit acts of torture against LGBTQIAP+ people at alarmingly higher rates than the general prison population, the IACtHR must be compelled to establish a model of differentiated human rights protections to eradicate torture against LGBTQIAP+ people in prison.

³²⁹ Human Rights Council, *Concluding Observations on the Second Periodic Report of Namibia*, CCPR/C/NAM/CO/2 (2016).

³³⁰ See Committee Against Torture, *Concluding Observations on the Fifth Periodic Review of Belarus*, U.N. Doc. CCPR/C/BLR/CO/5 ¶ 29. (2018) (“Violent clashes and humiliating and degrading treatment of homosexual prisoners by other inmates and their involuntary segregation from other inmates due to the criminal subculture and hierarchy in prison aggravate their conditions of detention. The Committee is also concerned at the reported involuntary placement of transgender women together with male detainees, which exposes them to a high risk of sexual assault (arts. 2, 11, 16)). U.N. Comm’n on Torture, *Concluding Observations on the Second Periodic Review of Namibia* (Feb. 1, 2017) (“Transgender women have been placed together with male detainees, exposing them to a high risk of sexual assault” and a recommendation to “take all necessary measures to protect [LGBTI] persons from threats and any form of violence, particularly in places of detention, including by separating transgender women from male detainees”). However, such a solution is quite controversial.”)

³³¹ Human Rights Council, *Concluding Observations on the Seventh Periodic Report of Colombia*, U.N. Doc. CCPR/C/COL/CO/7 (2016).

³³² Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. U.N. Doc. A/HRC/31/57 ¶ 34 (2016).

³³³ *Id.* ¶ 36.

³³⁴ *Id.* See also, *Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the UN General Assembly*, U.N. Doc. A/56/156 ¶ 19 (2001).

LGBTQIAP+ people deprived of liberty are also subjected to targeted sexual violence that is propelled by an insidious desire to “correct” their sexual and gender expression to align with hetero- and cis-normative conduct.³³⁵ This widespread, prejudice-based sexual violence violates the prohibition against torture enshrined in both the CAT and ICCPR and demonstrates the need for a differentiated legal approach to eliminate endemic levels of sexual and gender-based torture against LGBTQIAP+ people deprived of liberty.

The UN Special Rapporteur on Torture maintains that sexual and gender-based violence against LGBTQIAP+ people goes beyond mere ill-treatment and constitutes torture under international law.³³⁶ The Special Rapporteur on Torture calls for the application of the CAT in a “gender-inclusive manner” that recognizes the physical and mental torment that sexual and gender-based violence engenders.³³⁷ Furthermore, in the context of LGBTQIAP+ people deprived of liberty, rape and sexual violence that take on a form of “moral cleansing” violate the prohibition against torture.³³⁸ The Special Rapporteur on Torture also acknowledges that invasive body searches and non-consensual touching of the body may constitute torture under international law, particularly for transgender people deprived of liberty.³³⁹ The forced feminization of “masculine-presenting” cisgender lesbian women and transgender men, corrective rape of lesbian women, forced sexual servitude of gay men and transgender people, and punitive body searches violate the prohibition against torture under international law.³⁴⁰ Furthermore, the placement of transgender people in prison facilities based on their assigned-at-birth sex subjects them to an extreme risk of

³³⁵ Association for the Prevention of Torture, *supra* note 216, at 54.

³³⁶ Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. U.N. Doc. A/HRC/31/57 (2016).

³³⁷ *Id.* ¶ 7.

³³⁸ *Id.* ¶ 51.

³³⁹ *Id.* ¶ 36.

³⁴⁰ United Nations Office on Drugs and Crime, *Handbook on Prisoners with Special Needs: Lesbian, Gay, Bisexual and Transgender (LGBT) Prisoners*, 105 (2009).

retaliatory violence by fellow prisoners and prison staff and violates the prohibition against cruel and degrading treatment.³⁴¹

The Special Rapporteur on Torture emphasizes that “rape and other forms of sexual violence can amount to torture and ill-treatment when it is carried out by, at the instigation of, or with the consent or acquiescence of public officials.”³⁴² For example, the Special Rapporteur on Violence Against Women noted that El Salvadorian prison authorities tortured a transgender woman by detaining her in a cell with male gang members and was “raped more than 100 times, sometimes with the complicity of prison officials.”³⁴³ The Special Rapporteur on Torture also reported instances of transgender women in prison being intentionally beaten on their breasts and cheekbones in order to break down surgical implants and release the toxins into the body.³⁴⁴ These profound violations of transgender women’s bodily integrity violate the absolute right to be free from egregious ill-treatment and demonstrate the distinct particularity of gender-based torture in prison against transgender people. Incarcerated transgender men and women, nonbinary people, and gender-nonconforming people desperately require enhanced legal protections to shield them from torture motivated by transphobia during the pendency of their imprisonment.

The sexual, physical, and mental abuse that LGBTQIAP+ people are subjected to in detention rises to the level of torture under CAT and the ICCPR.³⁴⁵ LGBTQIAP+ people who are violated, sexually assaulted, and raped in prison are being subjected to torture under Article 7 of the ICCPR and under Article 1 of the CAT because prison officials acquiesce to the violence either

³⁴¹ Association for the Prevention of Torture, *supra* note 216, at 72.

³⁴² Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. U.N. Doc. A/HRC/31/57 ¶51 (2016).

³⁴³ Special Rapporteur on Violence Against Women, *Follow-up Mission to El Salvador*, U.N. Doc. A/HRC/17/26/Add.2, ¶¶ 28-29 (2011).

³⁴⁴ Special Rapporteur on Torture, *Question of Torture and Other Cruel, Inhuman or Degrading treatment or Punishment*, U.N. Doc. A/56/156 ¶ 23 (2001).

³⁴⁵ CAT, *supra* note 316; ICCPR, *supra* note 316.

through omission or direct participation.³⁴⁶ Both CAT and the ICCPR contemplate a differentiated human rights protection model for LGBTQIA+ people deprived of liberty through the recognition of a gender-sensitive and intersectional approach to eliminating torture in detention. This Court should adopt a gender-sensitive approach to defining torture with respect to differentiated legal protections for LGBTQIAP+ people in prison because it guards against “a tendency to regard violations against women, girls, and lesbian, gay, bisexual and transgender persons as ill-treatment even where they would more appropriately be identified as torture.”³⁴⁷

A differentiated human rights approach for non-heterosexual and non-cisgender people in prison ensures the well-being and dignity of all LGBTQIAP+ people deprived of liberty and seamlessly fits into existing international jurisprudence in this area.³⁴⁸ The Office of the High Commissioner for Human Rights has noted that a differentiated human rights approach does not require the creation of “new rights” but the rather involves the adoption of enhanced measures to ensure the universal application and enjoyment of human rights for LGBTQIAP+ people.³⁴⁹ In its Ninth Annual Report in 2016, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stressed the need to protect LGBTQIAP+ people in detention from torture through differentiated legislative, administrative, and judicial measures and include this group “in the design, implementation and evaluation of measures adopted to prevent torture and ill-treatment against them.”³⁵⁰ It is important to emphasize that LGBQAP+ people experience violence based on their sexual orientation whereas TGNCI+ people face

³⁴⁶ Inter-Am. Comm’n H.R., *supra* note 167, at 58.

³⁴⁷ Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57 ¶ 8 (2016).

³⁴⁸ United Nations High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41 (2011).

³⁴⁹ United Nations High Commissioner for Human Rights Navi Pillay, *Sixty-third Session of the General Assembly*, (2008).

³⁵⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Ninth Annual Report*, U.N. Doc. CAT/C/57/4, 15 ¶ 71 (2016).

differentiated harm based on their gender identity and expression.³⁵¹ The prohibition against torture under international law differs in its application to these two groups and differentiated protections for both groups are required. Although states have a heightened obligation to protect historically marginalized and vulnerable people from torture, particularly in custodial settings, LGBTQIAP+ people continue to be subjected to degrading treatment and torture while in custody.³⁵² This Court should immediately adopt differentiated protections for LGBTQIAP+ people in detention to ensure that State's combat prejudice-motivated torture in places where liberty is deprived.

b. CEDAW and LGBTQIA+ People in Detention

The application of the CEDAW to incarcerated lesbian, bisexual, pansexual, queer women, transgender women and transgender men,³⁵³ and gender-nonconforming people who society perceives

³⁵¹ Inter-Am. Comm'n H.R., *supra* note 167, at 33.

³⁵² *Ximenes Lopes v. Brazil, Merits, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 2, 112(3) (July 4, 2006).

³⁵³ CEDAW, *supra* note 47. CEDAW supports a trans-inclusive approach to anti-discrimination that enhances the rights of LGBTQIAP+ people. Ideally, the Yogyakarta Principles would be incorporated as an Optional Protocol to expand the scope of CEDAW to LGBTQIAP+ people who experience discrimination on account of sex and gender but in lieu of such a development, CEDAW notwithstanding applies to these populations through its central mandate. See Berta E. Hernández-Truyol, *Unsex CEDAW? No! Super-Sex it!*, University of Florida Law Scholarship Repository (2011). Traditionally, CEDAW stresses both the elimination of discrimination against women and the goal of equality between men and women, as well as the creation of State obligations to implement special measures that target the causes of women's oppression. However, CEDAW also encompasses gender inequality, which suggests that its framework extends beyond the traditional understanding of binary womanhood. While it generally does not apply to anti-discrimination against heterosexual and gay men (although these groups also suffer from gender stereotyping and can experience gender-based discrimination), CEDAW effectively applies to certain members of the LGBTQIAP+ community because of CEDAW's commitment to eradicate discrimination based on both sex and gender. Reading CEDAW as an asymmetrical, woman-only approach fails to provide a nuanced remedy to redress gender inequality by excluding "all kinds of sexes, including transgender, intersex, and other differently-sexed and gendered people." See Darren Rosenblum, *Unisex CEDAW, or What's Wrong with Women's Rights?*, Columbia J of Gender and L (2011). See also Rikki Holtmaat and Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?* Nordic Journal Of Human Rights (Jan. 25, 2016). While it is unequivocally undisputed that transgender men are men and should not be labeled as women, they are uniquely encompassed by CEDAW because in most countries they experience insidious discrimination on account of society refusing to accept their self-determined gender and treating them based on their assigned-at-birth female sex. The Vienna Convention on the Law of Treaties calls for the interpretation of treaties through the ordinary meaning of terms consistent with its "object and purpose." Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331. CEDAW's lack of specificity in defining "woman" also lends itself to a broad-based definition of womanhood that includes both biological sex and gender performance and identity. This trans-inclusive framework encompasses transgender women and can offer a degree of protection for transgender

as female is wholly consistent with the Convention’s core objective of eliminating discrimination on the basis of sex and gender.³⁵⁴ While the Convention originally only addressed sex discrimination and inequality between men and women within the binary system of gender, the CEDAW Committee has clarified that discrimination against women includes gender-based harm “which is directed against a woman because she is a woman or that affects women disproportionately.”³⁵⁵ Although the CEDAW Committee’s General Recommendations and Concluding Observations are nonbinding, the Committee’s interpretation of the Convention is considered to be authoritative and carries “considerable legal weight.”³⁵⁶ Thus, based on the Committee’s interpretations, it is clear CEDAW’s plain language patently applies to non-heterosexual women on the basis of their sex and gender. It also applies in equal force to non-cisgender women because they live and identify as women and experience gender-based discrimination that is often motivated by transphobic animus. Additionally, the scope of the Convention encompasses transgender men because although they live and identify as men, they often experience gender-based discrimination as punishment for identifying outside the scope of their assigned-at-birth female sex.³⁵⁷

people and gender non-conforming people who suffer harm and discrimination based on society misgendering them. See e.g., Robina Gallagher, *Rights: Incorporating Prohibitions Against The Discrimination Of Sexual Orientation And Gender Identity*, Southern California Interdisciplinary Law Journal (Jun. 30, 2020). Elise Meyer, *Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 CHI. J. INT’L L. 553 (2016). Sophie M. Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 FORDHAM INT’L L.J. 384, 390–94 (2012).

³⁵⁴ CEDAW, *supra* note 47. (Article I states that “the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”)

³⁵⁵ *Id.* ¶ 10.

³⁵⁶ Matthew Craven, *The Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 9 (1995).

³⁵⁷ Rikki Holtmaat and Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?* Nordic Journal of Human Rights, 321, 326-30 (2016) (discussing the gradual expansion of CEDAW’s anti-discrimination protection to both men and women, lesbian, transgender, transsexual and intersexual persons).

Discrimination against LBQAP+ and TGNCI+ people stems from gender-based stereotypes against women generally but also against specific subgroups of women and non-cis-gendered people, such as lesbian, bisexual, pansexual women and transgender people.³⁵⁸ In this vein, the Committee highlights that CEDAW's inherent function is to provide a differentiated human rights approach for women, vulnerable subgroups of women, and gender minorities, including LBQAP+ women and TGNCI+ people who fall within its scope.³⁵⁹ Because society singles out these groups for differentiated treatment and relegates them to positions of societal inferiority, a remedial approach must take into account the multiple identity factors that motivate anti-LBPQAP+ and anti-TGNCI+ discrimination in prisons. Given the proven efficacy of a gender-sensitive framework that recognizes discrimination on multiple grounds over a "single-axis" anti-discrimination model,³⁶⁰ the IACtHR should adopt CEDAW's differentiated anti-discrimination approach to eliminate invidious discrimination against LBQAP+ and TGNCI+ people deprived of liberty.

Because CEDAW applies to LBQAP women, transgender women, transgender men, intersex persons, and gender-nonconforming people, the Convention also compels States to take affirmative steps to protect LBQAP and TGNCI people deprived of liberty.³⁶¹ The Committee maintains that CEDAW establishes "a comprehensive obligation to eliminate discrimination in *all* its forms," including intersectional forms of discrimination.³⁶² An intersectional approach to anti-discrimination protections rejects the notion that identity markers such as race, gender, and sexual orientation are "mutually

³⁵⁸ International Gay and Lesbian Human Rights Commission, *Why Sexual Orientation and Gender Identity Must be Specifically Referenced in the Forthcoming CEDAW General Recommendation on Girls' and Women's Access to Education*, Office of the High Commissioner for Human Rights, 1, 5 (2014).

³⁵⁹ CEDAW Committee, *R.K.B. vs. Turkey*, UN Doc. CEDAW/C/51/D/28/2010, ¶ 8.8 (2012)(Highlighting that "full implementation of the Convention requires State parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also, to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women.")

³⁶⁰ Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, Equal Rights Trust, 73, 74-77 (2016).

³⁶¹ CEDAW, *supra* note 47, ¶ 18.

³⁶² *Id.* ¶ 10.

exclusive categories of experience and analysis.”³⁶³ An intersectional human rights approach contemplates that³⁶⁴ “intersectional oppression [that] arises out of the combination of various oppressions which, together, produces something unique and distinct from any one form of discrimination standing alone.”³⁶⁵ For example, a truly intersectional approach recognizes that the “discrimination that a gay woman experiences is different from that faced by other women and different from that suffered by other gay people.”³⁶⁵ While there is no explicit provision on intersectional discrimination in CEDAW or on incarcerated LBQAP+ and TGNCI+ people, the Committee takes the position that a differentiated, intersectional human rights approach is part and parcel of a transformative equality framework that addresses the lived experiences of all women and people of all sexual orientations and gender identities.³⁶⁶

The Committee has recognized the disproportionate sex- and gender-based discrimination born by women with intersecting identities:

Discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, color, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person.³⁶⁷

³⁶³ Kimberly Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies*, University of Chicago Legal Forum, 139, 1989.

³⁶⁴ Mary Eaton, *Patently Confused, Complex Inequality and Canada v. Mossop* 203, 229 (1994). See also Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, 2, 3-4 (2001).

³⁶⁵ Smith, *supra* note 361, at 76.

³⁶⁶ CEDAW, *supra* note 47, ¶ 18 (2013) (Recognizing marital status as an intersectional identity, “states parties are obligated to address the sex- and gender-based discriminatory aspects of all the various forms of family and family relationships.”).

³⁶⁷ CEDAW, *supra* note 47, ¶ 8.

For example, in its Inquiry Report addressing the disproportionately high number of disappearances and murder of indigenous women in Canada, the Committee stated that “the different forms of violence experienced by aboriginal women and girls constitute multiple forms of discrimination against them based on their sex, gender and aboriginal identity”³⁶⁸ and because “particular groups of women may be subject to specific forms of discrimination based on sex and other prohibited grounds of discrimination... States parties must address intersecting forms of discrimination.”³⁶⁹ Thus, the Committee recognizes that CEDAW implicitly contains a commitment to combat intersectional discrimination³⁷⁰ and affirms that discrimination qualitatively differs when multiple identity factors such as gender, age,³⁷¹ ethnicity and race,³⁷² poverty,³⁷³ and sexual orientation³⁷⁴ are present.

CEDAW’s recognition of intersectionality and discrimination based on multiple identity grounds also extends to a person’s incarceration status³⁷⁵ and affirms States’ obligations to eliminate discrimination against LBQAP+ and TGNCI+ persons deprived of liberty through a differentiated human rights approach.³⁷⁶ Discrimination against LBQAP+ and TGNCI+ people in prison is motivated by a number of cross-cutting identity factors, including gender, sexual orientation, gender expression, and incarceration status, among others.³⁷⁷ The Committee has stressed that a gender-sensitive

³⁶⁸ *Id.* ¶ 204.

³⁶⁹ *Id.* ¶ 200.

³⁷⁰ Meghan Campbell, *CEDAW and Women’s Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination*, *Revista Direito GV de Sao Paulo*, 479, 480 (2015).

³⁷¹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 27: Older Women And Protection Of Their Human Rights*, U.N. Doc. CEDAW/C/GC/27 (2010).

³⁷² Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women on Turkey*, U.N. Doc. CEDAW/C/TUR/6 (2010).

³⁷³ Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women on Kenya*, U.N. Doc. CEDAW/C/KEN/7 (2011).

³⁷⁴ Committee on the Elimination of Discrimination against Women, *The Core Obligations Of States Parties Under Article 2 Of The Convention On The Elimination Of All Forms Of Discrimination Against Women*, U.N. Doc. CEDAW/C/GC/28, ¶ 18 (2010).

³⁷⁵ Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women’s Access to Justice*, U.N. Doc. CEDAW/C/GC/33 (2015).

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 20.

monitoring approach is needed for lesbian, bisexual, and transgender women that “pays special attention to the situation of women prisoners.”³⁷⁸ Therefore, the IACtHR should adopt CEDAW’s differentiated, gender-sensitive human rights approach because it contemplates how multiple forms of discrimination based on gender, sexual orientation, and incarceration coalesce while providing a remedial framework for addressing targeted violence and discrimination against LGBTQIAP+ people in prison.

c. ICCPR and Anti-Discrimination

The ICCPR is founded on the inherent dignity of the human person and was developed to promote universal respect and observance of fundamental human rights and freedoms.³⁷⁹ Discrimination against LGBTQIAP+ persons on account of sexual orientation and gender identity is a violation of the fundamental rights and freedoms recognized in the ICCPR³⁸⁰. Articles 2,³⁸¹ 6,³⁸² 7,³⁸³ 10,³⁸⁴ 17,³⁸⁵ and 26³⁸⁶ provide particular guidance for protecting LGBTQIAP+ persons deprived of liberty.

Articles 2³⁸⁷ and 26³⁸⁸ unequivocally establish that the rights enshrined within the ICCPR are to be recognized without distinction or discrimination on any ground “such as race, colour (*sic*), sex, language, religion, political or other opinion, national or social origin, property, birth or other states.”³⁸⁹ Although not explicitly included, in accordance with other UN jurisprudence, this list is not to be

³⁷⁸ Committee on the Elimination of Discrimination against Women, *Abramova v. Belarus*, Communication No. 23/2009 (2011).

³⁷⁹ ICCPR, *supra* note 316.

³⁸⁰ *Id.* art. 2.

³⁸¹ *Id.*

³⁸² *Id.* art. 6.

³⁸³ *Id.* art. 7.

³⁸⁴ *Id.* art. 10.

³⁸⁵ *Id.* art. 17.

³⁸⁶ *Id.* art. 26.

³⁸⁷ *Id.* art. 2.

³⁸⁸ *Id.* art. 26.

³⁸⁹ *Id.* art. 2.

exhaustive and thus, discrimination and distinction on account of sexual orientation and gender identity must be prohibited under “other status.”³⁹⁰

Further, Articles 6, 7, 10, and 17, which are based on the fundamental dignity of the human person, enshrine the right to life³⁹¹, the freedom from cruel, inhuman, or degrading treatment³⁹², the right to be treated with humanity and respect while deprived of liberty³⁹³, and the freedom from arbitrary or unlawful interference with privacy³⁹⁴, respectively. However, as established, LGBTQIAP+ persons deprived of liberty often experience violations of these fundamental human rights through violence and harassment from prison personnel and other detainees. As such, the plain language of the ICCPR requires the adoption of differentiated approaches to protect these rights.

The HRC has provided guidance, through general comments and concluding observations, for those situations in which differentiated approaches are required to protect the rights of LGBTQIAP+ persons deprived of liberty.³⁹⁵ Article 6(1) of the ICCPR recognizes and protects the right to life for all persons.³⁹⁶ The HRC has established that the right to life must not be interpreted narrowly, but instead should be read to concern “the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”³⁹⁷ Further, Article 6(1) provides that the right to life “shall be protected by law.”³⁹⁸ This duty, the duty to protect life, “includes an obligation for States parties to adopt any appropriate laws or other

³⁹⁰ Committee on Economic, Social, and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights*, U.N. Doc. E/C.12/GC/20 (2009).

³⁹¹ ICCPR, *supra* note 316, art. 6.

³⁹² *Id.* art. 7.

³⁹³ *Id.* art. 10.

³⁹⁴ *Id.* art. 17.

³⁹⁵ See e.g. Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (2019); Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Liberty)* (1992).

³⁹⁶ ICCPR, *supra* note 316, art. 6.

³⁹⁷ Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (2019).

³⁹⁸ ICCPR, *supra* note 316, art. 6.

measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.”³⁹⁹ This obligation to develop positive measures designed to protect the right to life “requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or *pre-existing patterns of violence*.”⁴⁰⁰ Among these persons in vulnerable situations are LGBTQIAP+ persons.⁴⁰¹ As such, to demonstrate respect for the right to life, positive measures must be taken to protect LGBTQIAP+ persons. Further, the HRC has established through General Comment No. 21 that Article 10(1) of the ICCPR places a “positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty,”⁴⁰² Pursuant to Article 10(1) persons deprived of liberty must not be subject to any “hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.”⁴⁰³ States have a positive obligation to protect persons deprived of liberty and are required to prevent these persons from being subjected to “any hardship or constraint other than that resulting from the deprivation of liberty”.⁴⁰⁴ As such, states have an obligation to adopt measure which will protect LGBTQIAP+ persons deprived of liberty as they are at risk of additional violence in detention settings.

For example, In the Concluding Observations on the Fifth Periodic Report of Uzbekistan, the HRC voiced concern about pervasive discrimination on the grounds of sexual orientation and gender identity.⁴⁰⁵ The Committee noted continuing reports of “discrimination, harassment and violence,

³⁹⁹ Human Rights Committee, *General Comment No. 36 Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (2019).

⁴⁰⁰ *Id.* (emphasis added).

⁴⁰¹ *Id.*

⁴⁰² Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Liberty)* (1992).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ Human Rights Committee, *Concluding Observations on the Fifth Period Report of Uzbekistan*, U.N. Doc. CCPR/C/UZB/CO/5 (2020).

including extortion, arbitrary arrest, torture and sexual abuse, against lesbian, gay, bisexual and transgender persons by State officials and private individuals, including in places of deprivation of liberty, and about the mandatory disclosure of private medical information.”⁴⁰⁶ In response to these worrying reports, HRC recommended that the positive measures should be taken to “combat any form of violence against persons based on their sexual orientation or gender identity.”⁴⁰⁷ These measures are to include, but are not limited to “training for law enforcement personnel” and “conducting awareness raising campaigns promoting sensitivity and respect for diversity among the general public.”⁴⁰⁸ Additionally, in the Concluding Observations on the Fourth Periodic Report of Paraguay, the HRC expressed significant concern about the prison system in Paraguay, particularly about the “vulnerable situation” of women and LGBTQIAP+ persons deprived of liberty.⁴⁰⁹ In the recommendations, the HRC established that Paraguay should adopt positive measures, such as regular and ongoing training for the staff of all places of deprivation of liberty,⁴¹⁰ to “ensure that the rights of persons deprived of their liberty who are particularly vulnerable, such as women and lesbian, gay, bisexual, transgender and intersex persons, and especially transgender persons, are respected, in accordance with international standards and without discrimination of any kind.”⁴¹¹ This Court, in its efforts to uphold fundamental human rights, should adopt the HRC’s recommendations for differentiated approaches for LGBTQIAP+ persons deprived of liberty.

2. Regional Law

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ Human Rights Committee, *Concluding Observations on the Fourth Period Report of Paraguay*, U.N. Doc. CCPR/C/PRY/CO/4 (2019).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

The ECtHR has a growing body of jurisprudence that supports a differentiated human rights framework for LGBTQIAP+ people deprived of liberty, including cases that affirm the fundamental rights of lesbian, gay, and bisexual persons⁴¹² and transgender, intersex, and gender-nonconforming people⁴¹³. Additionally, in recent cases, the ECtHR has broadened protections for prisoners under the European Convention on Human Rights by establishing that conditions of confinement must be compatible with human dignity⁴¹⁴ and a State's failure to protect any prisoner from violence at the hands of other inmates and investigate such harm violates the Convention's prohibition on inhuman or degrading treatment.⁴¹⁵ The ECtHR extended these principles to a LGBTQIAP+ prisoner who experienced targeted harm on account of his sexual orientation.⁴¹⁶ While the extension of these protections in individual cases acknowledges the unique harms that lesbian, gay, bisexual, transgender, queer, and intersex people face in prison, the IACtHR must go further and codify differentiated protections for all LGBTQIAP+ people deprived of liberty to abolish bias-motivated violence and discrimination on account of sexual orientation, gender expression, and gender identity.

⁴¹² See e.g., *M.C. and C.A. v. Romania* (application no. 12060/12), Eur. Ct. H.R. (2016) (holding that police failure to protect LGBTQIA+ protestors from homophobic violence violated Article 3 (prohibition of inhuman or degrading treatment) read together with Article 14 (prohibition of discrimination) of the Convention). *Dudgeon v. United Kingdom*, Eur. Ct. H.R. (1981) (holding that Irish laws criminalizing homosexual relationships violated Article 8 (right to respect for private life) of the European Convention on Human Rights).

⁴¹³ See e.g., *S.V. v. Italy* (no. 55216/08), Eur. Ct. H.R. (1992) (holding that Italy violated Article 8 (right to respect for private and family life) of the European Convention by failing to allow a transgender woman to change her male birth name before undergoing gender reassignment surgery). *B. v. France* (application no. 13343/87), Eur. Ct. H.R. (1992) (Court concluded for the first time that there had been a violation of Article 8 of the Convention in a case concerning the recognition of transgender identity), *Christine Goodwin v. the United Kingdom*, Eur. Ct. H.R. (2002) (holding that there was a violation of Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family) of the Convention based on the applicant's lack of legal recognition of her changed gender).

⁴¹⁴ See e.g., *Mouïsel v. France* (no. 67263/01), Eur. Ct. H.R. (2002); *Renolde v. France* (no. 5608/05), Eur. Ct. H.R. (2008).

⁴¹⁵ See e.g., *Premininy v. Russia*, No. 44973/04, Eur. Ct. H.R. ¶¶ 82-88 (2011); *Gjini v. Serbia*, No. 1128/16, Eur. Ct. H.R. ¶¶ 78-80 (2019).

⁴¹⁶ *X v. Turkey*, (application no. 12060/12), Eur. Ct. H.R. (2016).

The ECtHR recognizes that LGBTQIAP+ people deprived of liberty experience heightened vulnerability in prisons.⁴¹⁷ In *X v. Turkey*, the Eskişehir Prison in Turkey placed Mr. X, a Turkish applicant who identified as a gay cisgender man, in prolonged solitary confinement after he filed a complaint that other prisoners targeted him based on his sexual orientation.⁴¹⁸ The ECtHR held that Turkey violated the prohibition on cruel and degrading treatment or punishment because the applicant was unable to go outdoors and the cell was filthy, rat-infested, dimly lit, and extremely cramped.⁴¹⁹ The ECtHR also recognized that the applicant’s total isolation in solitary confinement amounted to invidious discrimination⁴²⁰ because solitary confinement in Turkey is reserved for prisoners serving whole-life imprisonment, and thus, the difference in treatment was discriminatory because it was based solely on the applicant’s sexual orientation.⁴²¹

The ECtHR’s central holding in *X* that incarcerated people who experience discrimination and torture on account of their sexual orientation are entitled to unique protection under the law further supports the adoption of a differentiated human rights model for LGBTQIAP+ persons deprived of liberty. While this precedent is critical for giving legitimacy to individualized human rights complaints, the ECtHR’s decision did not offer broad protections for LGBTQIAP+ people in prison through a differentiated framework. In the absence of enhanced protections, violence and discrimination against these groups on account of sexual orientation and gender identity will not be abated. The IACtHR must create comprehensive legal protections for these populations through

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, Europe.T.S. No. 5; 213 U.N.T.S. 221, art. 3. (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”)

⁴²⁰ *Id.* art. 14. (“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”)

⁴²¹ *X v. Turkey*, (application no. 12060/12), Eur. Ct. H.R. ¶ 37 (2016).

the implementation of a differentiated human rights approach for incarcerated LGBTQIAP+ people.

3. National Jurisprudence

a. OAS Member States

In general, differentiated approaches for LGBTQIAP+ people are a well-established principle throughout the IAHRS and Member States have drawn from other enhanced protection models for vulnerable groups in society to combat homophobic and transphobic violence and discrimination.⁴²² One such differentiated approach is the creation of hate crime legislation that distinguishes violence on account of sexual orientation and gender identity. Several OAS member states have adopted laws that contemplate hate crimes based on sexual orientation and gender-identity, including Argentina,⁴²³ Bolivia,⁴²⁴ Chile,⁴²⁵ Canada,⁴²⁶ Colombia,⁴²⁷ Ecuador,⁴²⁸ the United States,⁴²⁹ El Salvador,⁴³⁰ Honduras,⁴³¹ Mexico,⁴³² Nicaragua,⁴³³ and Uruguay,⁴³⁴ While hate crime legislation is instrumental in eliminating marginalization, prejudice-based violence, and discrimination throughout the OAS system generally, it does not extend to address the unique

⁴²² OHCHR, *supra* note 200, at 112.

⁴²³ Argentine Criminal Code, § 80(4), as amended by Law 26.791, §1. Published in Official Gazette December 14, 2012 (incorporating sexual orientation as a hate crime motive for homicide).

⁴²⁴ Bolivian Criminal Code, art. 40.

⁴²⁵ Chilean Criminal Code, art. 12(21).

⁴²⁶ Canadian Criminal Code (R.S.C., 1985, c. C-46), art. 718.2(a)(i).

⁴²⁷ Article 58 of the Colombian Criminal Code (Ley 599 of 2000), published on July 24, 2000.

⁴²⁸ Código Orgánico Integral Penal (COIP), art. 177 (2014)(The Ecuadorean Criminal Code includes hate crime provisions for incitement or perpetration of any kind of physical or moral violence based on sexual orientation or gender identity).

⁴²⁹ 18 U.S.C. § 249 (Hate Crime Acts).

⁴³⁰ The Washington Blade, *El Salvador Lawmakers Approve enhanced Hate Crime Penalties*, September 9, 2015.

⁴³¹ *Honduran Criminal Code, Article 27; Response to the IACHR Questionnaire on Violence against LGBTI Persons in the Americas submitted by the State of Honduras*, Note DC-179/2013, received by IACHR Executive Secretariat (2013).

⁴³² *Federal Criminal Code of Mexico (as amended by Decree published in Official Gazette June 14, 2012)*, art. 149; Response to the IACHR Questionnaire on Violence against LGBTI Persons in the Americas submitted by Mexico, received by IACHR Executive Secretariat (2013).

⁴³³ *Nicaraguan Criminal Code, Article 36(5); Response to the IACHR Questionnaire on Violence against LGBTI Persons in the Americas submitted by the State of Nicaragua*.

⁴³⁴ Uruguayan Criminal Code, Article 149bis (as amended by Law 17.677 of 2003).

situation of LGBTQIAP+ people deprived of liberty who experience a mixture of violence from both state actors and fellow prisoners in detention. Effective differentiated protection models for LGBTQIAP+ people already exist in the form of hate crime legislation and other guidelines; however, the IACtHR must extend such measures to encompass all non-heterosexual and non-cisgender populations specifically in the prison context.

The vast majority of OAS member states have failed to enact uniform legislation, administrative measures, or guidelines that ensure enhanced legal protections for LGBTQIAP+ persons deprived of liberty.⁴³⁵ A minority of OAS Member States have adopted differentiated human rights protections for LGBTQIAP+ people in prison in the form of judicial protocols,⁴³⁶ informal prison agency guidelines,⁴³⁷ and protective judicial decisions⁴³⁸ relating to the treatment of LGBTQIAP+ people in prison. The IACtHR must expand on these piecemeal protections and require all State parties to the American Convention to adopt differentiated approaches for LGBTQIAP+ persons.

One example of progressive domestic approach is the Argentine model. Argentine courts have upheld the specific rights of incarcerated LGBTQIAP+ people by recognizing equal protection for this group.⁴³⁹ For example, after same-sex civil unions were legalized, a judge

⁴³⁵ Alfonsín, *supra* note 230, at 4 (“In Latin American countries, there is an alarming absence of standards and public policies to assist and care for LGBTI+ people deprived of liberty—in particular with regard to protection measures against discrimination and abuse”).

⁴³⁶ OHCHR, *supra* note 200.

⁴³⁷ United States Department of Justice National Corrections Institute, *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings*, available at: <https://info.nicic.gov/lgbti/>.

⁴³⁸ See e.g., Pagina 12, *Un Juez Autoriza Visitas Íntimas Para Dos Detenidos Homosexuales*, (Nov. 29, 2005), available at: <https://www.pagina12.com.ar/diario/sociedad/3-59808-2005-11-29.html>. Clarin, *Los Gays Que Estén Presos En Córdoba Podrán Tener “Visitas Íntimas”* (Nov. 28, 2005), available at: https://www.clarin.com/ediciones-antteriores/gays-presos-cordoba-podran-tener-visitas-intimas_0_HJglbhLk0Yx.html

⁴³⁹ See e.g., Pagina 12, *Un Juez Autoriza Visitas Íntimas Para Dos Detenidos Homosexuales*, (Nov. 29, 2005), available at: <https://www.pagina12.com.ar/diario/sociedad/3-59808-2005-11-29.html>. Clarin, *Los Gays Que Estén Presos En Córdoba Podrán Tener “Visitas Íntimas”* (Nov. 28, 2005), available at: https://www.clarin.com/ediciones-antteriores/gays-presos-cordoba-podran-tener-visitas-intimas_0_HJglbhLk0Yx.html

ordered the prison officials at the Complejo Carcelario N° 1 Reverendo Padre Luchesse in the Córdoba Province to allow conjugal visits between gay, lesbian, and bisexual prisoners and their partners.⁴⁴⁰ This precedent reflects a move on the part of the judiciary to distinguish discrimination against LGBTQIAP+ prisoners that is motivated by homophobic and transphobic attitudes. The IACtHR ought to adopt a differentiated human rights approach to further solidify existing national structures that enshrine the fundamental human rights of sexual and gender minorities.

Mexico has taken the unique step of enhancing legal protections for LGBTQIAP+ people through a non-binding, differentiated legal approach that has judicial applications for incarcerated members of these populations. In 2014, the Supreme Court of Mexico issued the “Protocol For Judicial Actors On Sexual Orientation And Gender Identity,” an internal document that contains judicial guidelines instructing judges on best practices in adjudicating cases involving sexual orientation, gender identity, and bodily diversity, including how to manage “harmful stereotypes and misconceptions, which may hinder access to justice in various sectors, including gender identity recognition, family life and relationships, employment, the criminal system, health, education, *deprivation of liberty*, and freedom of expression and association.”⁴⁴¹ In doing so, the highest level of the Mexican judiciary affirmed that LGBTQIAP+ people deprived of liberty are uniquely vulnerable entitled to enhanced and particularized protections on account of that vulnerability. The IACtHR should build from the Judicial Protocol to extend enhanced protections for LGBTQIAP+ people in detention facilities throughout the Inter-American system.

⁴⁴⁰ See e.g., Pagina 12, *Un Juez Autoriza Visitas Íntimas Para Dos Detenidos Homosexuales*, (Nov. 29, 2005), available at: <https://www.pagina12.com.ar/diario/sociedad/3-59808-2005-11-29.html>. Clarin, *Los Gays Que Estén Presos En Córdoba Podrán Tener “Visitas Íntimas”* (Nov. 28, 2005), available at: https://www.clarin.com/ediciones-antiores/gays-presos-cordoba-podran-tener-visitas-intimas_0_HJglbhLk0Yx.html.

⁴⁴¹ OHCHR, *supra* note 200, at 112.

In the United States, human rights protections for LGBTQIAP+ prisoners are theoretically differentiated but remain underenforced in praxis as prisons often assess LGBTQIAP+ issues through the same legal standards afforded to general prison populations.⁴⁴² The National Institute of Corrections (NIC) has specifically released guidelines for prison officials to combat abuse against LGBTQIAP+ people in custody, including uniform standards for non-discrimination, mental health and medical care, housing, risk assessment, body searches, and gender expression.⁴⁴³ For example, the NIC recommended that prison agencies, “develop, adopt, and enforce policies that explicitly prohibit discrimination and mistreatment of inmates or residents on the basis of sex, age, race, national origin, disability, and *actual or perceived sexual orientation and gender identity*.”⁴⁴⁴ Despite these recommendations, prison officials and other prisoners continue to target these groups on account of their sexual orientation and gender identity.⁴⁴⁵ Delaying the adoption of a regional differentiated human rights approach for this group will result in further violence, discrimination, and ill-treatment of all LGBTQIAP+ people in Inter-American prisons.

For States that openly criminalize and persecute LGBTQIAP+ people and acquiesce to torture and discrimination against this group in prison, differentiated approaches are critical to compel States to respect the fundamental rights of LGBTQIAP+ deprived of liberty. Similarly, States that are already amenable to adopting protections for this group, a differentiated legal approach has the additional benefit of contemplating a broad human rights mandate that ensures comprehensive coverage for all incarcerated LGBTQIAP+ people. This Court should adopt

⁴⁴² United States Department of Justice National Corrections Institute, *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings* 37-41 available at: <https://info.nicic.gov/lgbti/>.

⁴⁴³ *Id.* at 43.

⁴⁴⁴ *Id.* at 44 (emphasis added).

⁴⁴⁵ Beck, *supra* note 231; National Center for Transgender Equality, *supra* note 264.

enhanced protections for these groups because gender-based discrimination and violence against LGBTQIAP+ people in prison will continue in the absence of a coherent, regionalized standard.

b. Council of Europe Member States

The majority of Council of Europe Member States have failed to create special rules, guidelines, or measures for the treatment of LGBTQIAP+ people in prison and tend to resort to ad hoc solutions usually aimed at isolating non-heterosexual and non-cisgender people from the general prison population.⁴⁴⁶ However, a handful of individual States have adopted differentiated human rights protections in the form of thematic legislation and formal guidelines relating to the treatment of LGBTQIAP+ people in prison, including Finland, Malta, Romania, and the United Kingdom.⁴⁴⁷ These differentiated protections have been critical in reducing harm on account of sexual orientation and gender identity in prison.⁴⁴⁸ The IACtHR should formulate similar enhanced legal protections for incarcerated LGBTQIAP+ people because of the proven efficacy of a differentiated human rights approach for incarcerated sexual and gender minorities in Council of Europe countries.

4. Soft Law

The Yogyakarta Principles are nonbinding guidelines which clarify the human rights obligations of States toward LGBTQIAP+ people under international law.⁴⁴⁹ Despite global patterns of abuse, discrimination, and violence on the basis of actual or perceived sexual orientation and gender identity, there is no singular, comprehensive source of international law on

⁴⁴⁶ Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights, *Democracy and Human Rights in the OSCE* (2019).

⁴⁴⁷ European Union Agency for Fundamental Rights, *Criminal Detention Conditions in the European Union: Rules and Reality* 42 (2019).

⁴⁴⁸ *Id.*

⁴⁴⁹ International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007).

the rights of LGBTQIAP+ individuals deprived of liberty.⁴⁵⁰ While the UN Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), emphasize the need for “prison administrations [to] take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings,”⁴⁵¹ the Nelson Mandela Rules do not explicitly refer to LGBTQIAP+ prisoners or offer differentiated protections for this group.

Recognizing this gap in international jurisprudence, leading human rights law experts drafted the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) at the request of the United Nations High Commissioner for Human Rights.⁴⁵² The Yogyakarta Principles propose a framework for applying human rights mechanisms to violations affecting these populations.⁴⁵³ In 2017, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (YP+10) were created in response to the changing landscape of international law with respect to sexual orientation and gender identity.⁴⁵⁴ Although the Yogyakarta Principles are derived from key UN Conventions, the document is not merely a restatement of existing international law because it proposes holistic human rights protections specifically for LGBTQIA+ people.⁴⁵⁵ The Yogyakarta Principles and YP+10 have been cited by national courts in cases involving discrimination on the basis of sexual orientation and gender identity,⁴⁵⁶ have been incorporated into UN Special Rapporteur and UN agency

⁴⁵⁰ *Id.*

⁴⁵¹ The Nelson Mandela Rules, *supra* note 86, Rule 2 ¶ 2.

⁴⁵² Yogyakarta Principles, *supra* note 172.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, Mich. J. of Int’l Law, 822, 823 (2010).

⁴⁵⁶ See *National Legal Services Authority (NALSA) v. Union of India*, 2014 SC 1863 (India)(citing the Yogyakarta Principles in holding that the Indian Constitution protects trans people and contains the right to self-identify gender).

writings,⁴⁵⁷ and have been used in LGBTQIAP+ domestic policy and human rights campaigns.⁴⁵⁸

The IACtHR has also relied on the Yogyakarta Principles in its own precedent and case law.⁴⁵⁹

The Yogyakarta Principles recognize that “everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.”⁴⁶⁰ Specifically, the Principles recognize the right to legal recognition of one’s self-defined gender identity,⁴⁶¹ protection against state-sanctioned or private violence or bodily harm,⁴⁶² the right to privacy and body autonomy,⁴⁶³ and specifically addresses the rights of LGBTQIAP+ people in detention.⁴⁶⁴ This includes the right to

See also Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001, (2009)(India)(citing the Yogyakarta Principles). *See also Sunil Babu Pant and Others v. Nepal Government and Others*, Supreme Court of Nepal (2008)(Nepal) (The Yogyakarta Principles allowed the lawyers to make the case for gender identity as a separate ground of nondiscrimination).

⁴⁵⁷ International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System* (4th ed. 2010) (covering the period between January 2007 through March 2010).

⁴⁵⁸ OutRight International, *An Activist’s Guide to The Yogyakarta Principles* 1, 95 (2010) (the Dutch government announced that it would use the Yogyakarta Principles as guidance for its international LGBT policy).

⁴⁵⁹ *See Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 310 ¶ 110 (February 26, 2016)(Using the Yogyakarta Principles to hold that failure to grant same-sex couples equal access to public benefits following the death of their partner constitutes discrimination). *See also State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

⁴⁶⁰ Yogyakarta Principles, *supra* note 172, at Principle 9. (The Right to Treatment with Humanity while in Detention).

⁴⁶¹ *Id.* at Principle 3 (The Right to Recognition Before the Law: “Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.”)

⁴⁶² *Id.* at Principle 5 (The Right to Security of the Person, “Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.”)

⁴⁶³ *Id.* at Principle 6 (The Right to Privacy, “Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”)

⁴⁶⁴ *Id.* at Principle 9.

placement in an appropriate facility based on self-determined gender identity and sexual orientation.⁴⁶⁵ As TGNCI+ people face unique challenges in accessing proper healthcare in incarceration, the Principles are integral in recognizing the right to the highest attainable standard of health, “without discrimination on the basis of sexual orientation or gender identity.”⁴⁶⁶ Finally, the YP+10 develop protections for LGBTQIAP+ people deprived of liberty who are targeted and persecuted because of their immutable characteristics by codifying the right to be free from criminalization “arising directly or indirectly from [a] person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.”⁴⁶⁷ At their core, these Principles call for a highly tailored legal approach that seeks to eliminate the particularized harm that LGBTQIAP+ people in detention experience on account of their unique sexual orientation and gender identities.

Since their inception, the Yogyakarta Principles have presciently articulated the clear need for a differentiated approach under international law to guarantee substantive protections for all LGBTQIAP+ people deprived of liberty.⁴⁶⁸ This Court must adopt a differentiated approach for LGBTQIAP+ people deprived of liberty that compels States to eradicate violence against this group and ensures the universal and full enjoyment of human rights in the Inter-American System.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at Principle 17 (“Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”)

⁴⁶⁷ *Id.* at Principle 33: The Right to Freedom from Criminalization and Sanction on the Basis of Sexual Orientation, Gender Identity (“Everyone has the right to be free from criminalization and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.”)

⁴⁶⁸ Yogyakarta Principles, *supra* note 172.

D. Recommendations

Lesbian, gay, bisexual, queer, and pansexual (LGBQP) and transgender, gender non-conforming, nonbinary, and intersex (TGNCI+) people deprived of liberty suffer distinct prejudice-based harm on account of non-heterosexual sexual orientation and non-cis-gendered gender identities. LGBTQIAP+ people in prison merit an intersectional human rights framework because they experience uniquely transphobic and homophobic discrimination, violence, and torture that is magnified in the carceral context. In this vein, a differentiated human rights approach is urgently required to categorically eliminate identity-based discrimination and harm in detention centers and prisons. Such an approach is supported by existing international and regional human rights instruments, including the American Convention and Protocol of San Salvador, CAT, CEDAW, ICCPR, and the jurisprudence of the ECtHR and IACtHR, in addition to broad normative shifts at the national and international level with respect to protections for LGBTQIA+ people. In particular, the Yogyakarta Principles and YP+10 offer a comprehensive roadmap for the adoption of a differentiated approach for incarcerated LGBTQIAP+ people by focusing on the lived experiences of these groups in prison. The IACtHR must incorporate the following measures into its differentiated human rights framework:

- Adopt an intersectional and gender-sensitive human rights framework to address violence and discrimination against LGBTQIAP+ people in prison using the Yogyakarta Principles and YP+10
- Create a framework that addresses specific human rights violations against incarcerated LGBTQIAP+ people, including but not limited to:
 - Safeguard access to gender-affirming healthcare

- Protect the chosen gender expression of incarcerated transgender, non-binary, and gender non-conforming people, including the right to grooming and dress
 - Use self-affirmed gender identity rather than assigned-at-birth sex in determining prison placement
 - Ensure conjugal and family visits for same-sex and non-heterosexual couples
 - Implement procedures to eliminate physical, sexual, and psychological torture in prison, including prohibiting the use of “protective” solitary confinement to segregate LGBTQIAP+ prisoners, mandating the creation of non-penal LGBTQIAP+ “pavilions” or sections, prohibiting invasive body searches by creating proper procedures, and hire female prison guards for women’s prisons to reduce gender-based violence perpetrated by male guards.⁴⁶⁹
- Mandate training of law enforcement and corrections system officers on best practices for LGBTQIAP+ protections
 - Create an independent monitoring system focused on LGBTQIAP+ people for prisons and detention facilities with an annual audit system for compliance
 - Ensure an independent and functioning complaint system for human rights violations occurring in the carceral context
 - Provide for the investigation and prosecution of guards and public officials engaging in torture and ill-treatment of incarcerated LGBTQIA people

This Court must guarantee the adoption of differentiated protections for LGBTQIAP+ persons deprived of liberty to ensure safety and well-being for this population. Particular care is required when developing enhanced substantive protections to address and eliminate the harms

⁴⁶⁹ Inter-Am. Comm’n H.R., *supra* note 167, at 58.

that LGBTQIAP+ people deprived of liberty face on account of their gender identity and sexual orientation.

IV. Children in Detention with their Mothers

Children living in detention with their mothers represent a particularly vulnerable group and as a result, the IACtHR must require a differentiated approach to the care of this population. Children incarcerated with their mothers generally do not receive specialized attention or protection from the State parties to the ACHR. Most State parties permit children to live in prison with their mothers, but there is no acknowledged “best practice” for protecting children living in prison.⁴⁷⁰ Minor children are either forcibly removed from their mother’s care and thrust into society alone without adequate state protection, or they follow their mothers to prison and become ghosts in the jail cells never meant for children.⁴⁷¹

This section of the brief will provide guidance on how to best protect children living in detention with their mothers with the best interests of the child as the primary consideration. This section is designed to illustrate some of the issues children face in prison while incarcerated with their mothers, and present recommendations intended to alleviate those issues.

A. The Situation of Children Living in Detention with their Mothers

Children living in detention with their mothers are not prisoners. They are imprisoned by circumstance; these children are either born into prison or they follow their mother upon her custodial sentencing.⁴⁷² During their stay, children incarcerated with their mothers are often exposed to the common deplorable conditions of prisons that strip children of their rights.⁴⁷³

⁴⁷⁰ Oliver Robertson, *Children Imprisoned by Circumstance*, Quaker United Nations Office (2008).

⁴⁷¹ Pro Zahrah Latif, *The Ghost Children of Latin America’s Prisons*, Havana Times (May 3, 2020) <https://havanatimes.org/features/the-ghost-children-of-latin-americas-prisons/>.

⁴⁷² Robertson, *supra* note 471.

⁴⁷³ Latif, *supra*, note 472.

Children living in detention with their mothers do not receive basic health necessities, are placed in overcrowded prisons, and can suffer severe developmental issues.⁴⁷⁴ It is not within the scope of this brief to debate whether minor children should accompany their primary caregiver to prison; but rather, what protections can be implemented for children living in detention with their mothers.⁴⁷⁵ In addition to the harms reported below, the “institutional invisibility” of children living in detention with their mothers is a critical problem.⁴⁷⁶ There is no universal record-keeping or follow-up information of innocent children incarcerated with their mothers.⁴⁷⁷ For that reason, children living in detention with their mothers are virtually impossible to track and their best interests are often forgotten. These children are suffering directly as a result.

1. Lack of Basic Health Necessities

The IACtHR must adopt a differentiated approach to children living in detention with their caretakers, to ensure these children receive the most basic of health necessities which are required for proper emotional, mental and physical development. Children living in detention with their mothers do not receive adequate nutrition or proper medical care necessary for development; there

⁴⁷⁴ Nicole Mazoue, *Children Incarcerated with their Mothers: A Critique of the Current Age-Based Approach to the Separation of Children from their Mothers*, U. KwaZulu-Natal (2012), http://researchspace.ukzn.ac.za/bitstream/handle/10413/9982/Mazoue_Nicole_2012.pdf?sequence=1&isAllowed=y.

⁴⁷⁵ This brief is limited to evaluating the situation of children living in detention with their mothers. Some state parties permit children to live in detention with their fathers, but this is a rare occurrence. However, the limited scope of this brief does not minimize the importance of protecting all children living in detention with their caregiver. Oliver Robertson, *The Impact of Parental Imprisonment on Children*, Quaker United Nations Office, 30 (April 2007).

⁴⁷⁶ Tarja Poso et al., *Children Residing in Prison with Their Parents: An Example of Institutional Invisibility*, 90(4) *The Prison Journal* 516, 517 (2010). This empirical study from Finland sought to evaluate children residing in prison with their mothers from the perspective of the child. Gathering this data proved difficult because no universal records are kept about the children in prison, unofficial in-house records are inconsistent, and the studies that exist are small in scope and context. The authors claim the key issue for children is their institutional invisibility and that parent imprisonment has rarely been considered from the viewpoint of the child. Making children institutionally visible would help in considering their needs and rights and evaluating their best interests on a case-by-case basis.

⁴⁷⁷ *Id.*

are reports from multiple countries describing this inadequate supply of basic necessities.⁴⁷⁸ The limited quality of prison diets can make it difficult for prisoners to breastfeed or produce enough milk for their babies; this can result in high rates of malnutrition in children.⁴⁷⁹ In Argentina, for example, Unit 31 is the only unit of the Federal Penitentiary Service that has a nursery school, where 62% of the mothers reported that their children did not receive adequate nutrition.⁴⁸⁰ Similarly, in Uruguay, it has been confirmed that inmates have restricted access to water and insufficient access to food.⁴⁸¹ Water and food are basic necessities that detention centers do not always provide mothers and children. At the Buen Pastor prison in Paraguay, children can live with their mothers until they are two years old, but the mothers are responsible for providing nutrition and necessities for their children even if there is no work due to overcrowding.⁴⁸² Children directly suffer from this lack of food. In an extreme case, in March 1999, the Comision Especial de Politicas Carcelarias del Parlamento Latinoamericano (Special Commission on Incarceration Policies in Latin America Parliament) reported an alarming case where children never consumed milk.⁴⁸³ Generally, children require breastmilk until six months of age, at which point a child's needs for energy and nutrients exceeds the nutrients provided in breastmilk and they require supplemental food diets in order to properly grow.⁴⁸⁴ Without supplemental food diets and specified nutrition regimes, children cannot get the energy and nutrients they require for proper growth and can suffer severe malnutrition.⁴⁸⁵

⁴⁷⁸ Center for Justice and International Law (CEJIL), *Women in Prison: Regional Report: Argentina, Bolivia, Chile, Paraguay, Uruguay* (2006). This publication corresponds with the report presented to the Inter-American Commission on Human Rights during its 126th session in October of 2006 under the title, *Mujeres Privadas de Libertad*.

⁴⁷⁹ Robertson, *supra* note 471, at 15-16.

⁴⁸⁰ CEJIL, *supra* note 479, at 41.

⁴⁸¹ *Id.* at 34.

⁴⁸² *Id.* at 42.

⁴⁸³ *Id.*

⁴⁸⁴ World Health Organization, *Infant and Young Child Feeding* (August 24, 2020), available at: <https://www.who.int/news-room/fact-sheets/detail/infant-and-young-child-feeding>.

⁴⁸⁵ *Id.*

Detention centers lack the adequate medical care that is critical for the healthy development of children living in detention with their caretakers.⁴⁸⁶ Specifically, reports have shown that doctors are rarely available, and when they are available, they lack the appropriate medical instruments to care for patients. This lack of adequate medical care is acutely experienced during the first days of the lives of infants born in prison. Infants desperately need medical care during the first few days of life to ensure their survival.⁴⁸⁷ Most infant deaths occur in the first six weeks of life.⁴⁸⁸ Infants not receiving pediatric care in those first critical days of life is a direct consequence of the State's failure to provide adequate postnatal care to the mother. In Bolivia, attention to health is deficient as doctors are only available a few hours a week and are not specialized in postpartum care.⁴⁸⁹ In addition to the failure to provide basic medical care, the unhygienic nature of most prisons in the Americas, exacerbates existing medical conditions and creates a whole host of new medical concerns for inmates, including the contraction of life-threatening diseases. Specifically, in many prisons, diapers and sanitary napkins are not distributed regularly.⁴⁹⁰ By failing to adopt a differentiated approach, children living in detention with their mothers are susceptible to the undernutrition, malnourishment, and diseases from a lack of basic supplies in prisons.

2. Direct Consequences of Overcrowding

⁴⁸⁶ Jean Friedman-Rudovsky, *In Bolivia, Keeping Kids and Moms Together – In Prison*, TIME (Apr. 22, 2019), <http://content.time.com/time/world/article/0,8599,1890642,00.html>.

⁴⁸⁷ World Health Organization, *Raising the Importance of Postnatal Care*, available at: <https://www.who.int/activities/raising-the-importance-of-postnatal-care>.

⁴⁸⁸ *Id.* According to the World Health Organization, postnatal care remains the most neglected phase of quality maternal and newborn care. “Basic care for all newborns should include promoting and supporting early and exclusive breastfeeding if possible, keeping the baby warm, increasing hand washing and providing hygienic umbilic cord and skin care.”

⁴⁸⁹ CEJIL, *supra* note 479, at 34.

⁴⁹⁰ *Id.*

The lack of basic resources explained above are unacceptable and are due in large part, to overcrowding in prisons.⁴⁹¹ Overcrowding of prisons negatively affects children living in detention with their caretakers and results in inadequate space for development and insufficient resources.⁴⁹² As incarceration rates have drastically increased in the region, over the years, most States' prison infrastructure is not suited to accommodate the ever-increasing population.⁴⁹³ Failing prison infrastructure endangers children's wellbeing because children do not have adequate space to develop and play, and they can suffer mistreatment from guards.⁴⁹⁴

Standardized prison cells are not equipped to accommodate both a mother and her child and therefore, a differentiated approach which requires a larger cell for mother and child could alleviate some of these harms. The failure to provide space beyond the standardized cell to children and their mothers, coupled with the common problem of overcrowding had led to horrific abuses of children's rights. For example, in Argentina, two dozen women and children were living in a trailer similar to those used to transport cattle.⁴⁹⁵ Similarly, some prisons are reportedly operating at double capacity which requires children to sleep on the floor.⁴⁹⁶ These types of living conditions are unacceptable for children and often create tension between other mothers and their children; children can be punished for normal behavior like waking up in the middle of the night.⁴⁹⁷ Even worse, children can be subject to indirect and direct effects of punishment against their mothers within prison.⁴⁹⁸ More specifically, children living in detention with their mothers can be used as

⁴⁹¹ Latif, *supra* note 472.

⁴⁹² CEJIL, *supra* note 479.

⁴⁹³ Latif, *supra* note 472. Latin American prisons are particularly notorious for being overcrowded and dangerous as a result the U.S. driven "War on Drugs" and extortion of pre-trial detention. "The vast majority of women in Latin American prisons serve time for non-violent drug-related crimes, and 87% of these incarcerated women are mothers." This is evident that the War on Drugs disproportionately affects the most vulnerable populations.

⁴⁹⁴ CEJIL, *supra* note 479; Mazoue, *supra* note 475.

⁴⁹⁵ CEJIL, *supra* note 479, at 18.

⁴⁹⁶ *Id.*

⁴⁹⁷ Friedman-Rudovsky, *supra* note 487.

⁴⁹⁸ CEJIL, *supra* note 479, at 42.

pawns for punishment against mothers; situations of abuse have been verified where children are placed in solitary confinement with or without their mothers⁴⁹⁹ This is a critical problem and it is crucial to emphasize these solitary confinement units are uninhabitable.⁵⁰⁰ The units are not well-maintained; the dimensions are often minimal with a rotten smell from the broken toilet and rotten mattress.⁵⁰¹ These conditions are unacceptable for children and can have a considerable negative impact on a child's emotional, mental, and physical development.⁵⁰²

3. Irreparable Developmental Harm

In addition to suffered harms stemming from the from lack of appropriate space and healthcare, children living in detention with their mothers, may suffer serious developmental harm from exposure to stressful environments. Children's young brains are particularly sensitive to environmental influences; children incarcerated with their mothers are in danger of suffering a toxic stress response that permanently impairs normal brain functioning.⁵⁰³ Children living in detention with their mothers can experience toxic stress response and consequently, suffer irreparable developmental harm as a result of attachment interference, curtailed connection with their community, and a lack of proper education in prison.⁵⁰⁴

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 44.

⁵⁰¹ *Id.*

⁵⁰² Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 108 J. Criminal L. and Criminology 539, 562 (2018).

⁵⁰³ Jacob P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, American Academy of Pediatrics 232-235 (2012). Toxic stress response is a "most-dangerous" phenomenon characterized by the disruption of brain circuitry and metabolic systems during crucial stages of development. Prolonged activation of a body's stress response disrupts brain activity during crucial developmental periods of a child's brain and can result in toxic stress response. Impairment of brain development can create a weak foundation for later learning, behavior, and health; specifically, it can have potential effects on functions such as regulating stress physiology, learning new skills, and the ability to adapt to future adversity. Toxic stress response is especially disruptive for children because the plasticity of young brains makes them particularly sensitive to environmental influences and damage is difficult to reverse.

⁵⁰⁴ *Id.*

Attachment bonds between mother and child are imperative for a child's optimal development and this attachment bond continues to build throughout early childhood.⁵⁰⁵ Children who fail to securely attach to their mothers are likely to suffer developmental issues, are unable to connect with others, and have a greater chance of being convicted of a crime.⁵⁰⁶ Alternatively, children who securely attach to their mothers become more self-reliant and are better able to cope with stressors later in life.⁵⁰⁷ Breastfeeding, physical closeness, and emotional bonding all contribute to successful attachment.⁵⁰⁸ Breastfeeding alone provides unmatched health benefits for babies, reduces risk for diseases, and creates a sense of trust and security in the baby in order to develop secure attachment.⁵⁰⁹ Attachment and development can be impaired by a mother's inability to breastfeed, absent child-care facilities in prisons in addition to restrictions on contact in prisons.⁵¹⁰ Alternatively, prison environments that successfully nurture this mother-child relationship can buffer the stressful conditions that children face in prison and encourage healthy developmental for children living in detention with their mothers.⁵¹¹ Children who spent one to eighteen months in a prison nursery program were less likely to be anxious, depressed, or withdrawn when compared to children of the same age, who were separated from mothers at birth.⁵¹²

⁵⁰⁵ Mazoue, *supra* note 475; J. Bowlby, *An Ethological Approach to Personality Development*, 46 *American Psychologist* 333-341 (1991). Bowlby's Attachment Theory suggests the mother-child bond is the primary force in a child's successful development and a child's close attachment to the mother remains crucially important to development through early childhood.

⁵⁰⁶ Anne Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Program*, 87 *Indiana L. J.* 1825, 1826 (2012). Negative emotional development in young children can result in a psychopathic personality later in life. These children can suffer from disruptive or delinquent behavior because their normal reactions for guilt and inappropriate behavior are lacking.

⁵⁰⁷ *Id.* at 1827.

⁵⁰⁸ Mazoue, *supra* note 475, at 23.

⁵⁰⁹ Aarti Rajaratnam, *Attachment Parenting and Breastfeeding*, Parent Circle, <https://www.parentcircle.com/article/attachment-parenting-and-breastfeeding/>.

⁵¹⁰ Halter, *supra* note 503, at 561.

⁵¹¹ Matthew Clarke, *Benefits of Allowing Prisoners to Raise Babies Born in Prison*, Prison Legal News (June 3, 2016) <https://www.prisonlegalnews.org/news/2016/jun/3/benefits-allowing-prisoners-raise-babies-born-prison/>.

⁵¹² *Id.*

Most State parties allow children to reside with their incarcerated mothers until a certain age.⁵¹³ When a child reaches that state's age limit, the child may be automatically removed from prison and forcibly taken from their mother's care.⁵¹⁴ Children are then faced with the trauma of being separated from their mother and forced to face the outside world.⁵¹⁵ While prisons are not the ideal environment for children, being deprived of a mother's nurture and care may result in far greater deprivation with longer lasting consequences.⁵¹⁶ Children separated from their mothers, as a result of detention, were found to exhibit heightened rates of anxious behavior, distress, and symptoms of post-traumatic stress disorder.⁵¹⁷ Children should not leave prison without their mothers, unless it is the best interests of the child because leaving prison separately can create new issues for the child including trauma from separation, proper care for the child, and reintegrating into society with stigma of a prisoner.⁵¹⁸

In addition to the importance of the mother-child relationship, children also need to maintain relationships with family members outside of prison to promote healthy development and secure a child's right to family.⁵¹⁹ A child's relationship with non-incarcerated family members can diminish greatly as a result of restricted prison visits and curtailed community contact.⁵²⁰ For example, some prisons restrict familial visits by requiring a specific language to be spoken at all

⁵¹³ Library of Congress: Law, *Laws on Children Residing with Parents in Prison* (July 24, 2020) available at: https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php#_ftn3.

⁵¹⁴ Robertson, *supra* note 471.

⁵¹⁵ Latif, *supra* note 472.

⁵¹⁶ Mazoue, *supra* note 475, at 24.

⁵¹⁷ Mia Stange and Brett Stark, *The Ethical and Public Health Implications of Family Separation*, 47 J. L. Med. & Ethics 91, 21 (2019).

⁵¹⁸ Robertson, *supra* note 471, at 22.

⁵¹⁹ Oliver Robertson, *Collateral Convicts: Children of Incarcerated Parents*, Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Quaker United Nations Office, (2012)

https://quano.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20good%20practice.pdf; Mazoue, *supra* note 475.

⁵²⁰ Robertson, *supra* note 476, at 32.

times, even if it is not the family's native language.⁵²¹ Children living in prisons with their mothers should not be restricted from communicating with other family members in their native language because it impairs the child's familial relationship and threatens successful reintegration.⁵²² It is crucial for children to create and maintain these relationships, particularly if the child will live with family members following their incarceration with their mother.⁵²³ Furthermore, children who accompany their mothers to prison are deprived of exposure to male figures and father figures.⁵²⁴ Denying children relationships with non-incarcerated family members can create issues later in life.⁵²⁵ For example, there are reports of children initially being afraid of men after leaving prison because their only image of a male authority figure was that of prisons guards.⁵²⁶ A differentiated approach requires detention centers to allow family members unrestricted access to children living in detention with their mothers to maintain a relationship with non-incarcerated people and their communities.

Education is imperative for a child's development and the IACHR noted that most detention centers where children reside do not have adequate educational structure.⁵²⁷ Children require differentiated education and guidance at various childhood stages, such as developing cognitive skills in infancy and providing pre-school and primary education in early childhood.⁵²⁸ Generally, prisons do not provide adequate education which means children do not receive incentives for overall development and often have lower levels of education than children their

⁵²¹ *Mozer v. the Republic of Moldova and Russia* ECHR no. 11138/10 (2016).

⁵²² *Id.*

⁵²³ Robertson, *supra* note 520.

⁵²⁴ Mazoue, *supra* note 475, at 25.

⁵²⁵ *Id.* at 26; Robertson, *supra* note 471, at 30.

⁵²⁶ Robertson, *supra* note 476, at 33; Robertson, *supra* note 471, at 30.

⁵²⁷ Request for an Advisory Opinion, *supra* note 2, ¶ 51.

⁵²⁸ Robertson, *supra* note 520, at 25; Katie Philbrick et al., *Children of Imprisoned Parents: European Perspective on Good Practice*: Second Edition 114 (2014). Fostering the normal development of cognitive skills in children include walking, talking, adequate play, toilet training, and socialization.

age.⁵²⁹ In an extreme case, a prison worker reported that young children could not draw pictures of animals because they had never seen any animals.⁵³⁰ In Argentina, for example, access to academic courses is highly deficient with limited scheduling and lack of motivation from authorities.⁵³¹ A lack of proper education further alienates children from society and children departing prison have difficulty interacting with other children their age.⁵³² Absent access to proper education and play activities, children living in prison can suffer irreparable developmental harms.⁵³³ These issues are exacerbated for children without a prison system that supports a child's emotional and physical needs.⁵³⁴ As the female prison population continues to grow, there are not enough facilities that offer programs to foster a child's educational development. A differentiated approach, which requires proper educational structure and opportunities for adequate play and socialization, would significantly decrease these harms.

B. The Inter-American System

Inter-American Human Rights Law not only allows for but *requires* the adoption of a differentiated approach to children living in detention with their mothers. Specifically, both the American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights require this approach to protect the rights of children living in detention with their mothers.

1. The American Convention on Human Rights

⁵²⁹ Request for an Advisory Opinion, *supra* note 2, ¶ 57.

⁵³⁰ Robertson, *supra* note 471, at 29-30.

⁵³¹ CEJIL, *supra* note 479, at 36.

⁵³² Robertson, *supra* note 471, at 30.

⁵³³ Mazoue, *supra* note 475, at 25.

⁵³⁴ *Id.* at 24.

There is no explicit mention of children living in detention with their mothers in the American Convention on Human Rights.⁵³⁵ However, the American Convention allows for adoption of a differentiated approach to protect children living in detention with their mothers if read with the best interests of the child in mind.⁵³⁶ The Convention explicitly requires State parties to protect minor children.⁵³⁷ State parties must ensure children living in detention with their mothers receive basic health necessities, sufficient living conditions, and unrestricted familial contact to uphold legal obligations under the Convention. This section will argue the American Convention not merely allows for the adoption of a differentiated approach but *requires* it.

a. Failure to Provide Sufficient Living Conditions Violates Child’s Right to Humane Treatment

Article 5 of the American Convention recognizes every person’s right to humane treatment and state parties are obligated to satisfy this right for children.⁵³⁸ Within the right to humane treatment are several protections ensured by the American Convention.⁵³⁹ Taken together, it is evident that children living in detention with their mothers require special resources from their respective states in order to satisfy their right to humane treatment. It is a violation of the American Convention for children living in detention with their mothers to experience insufficient living conditions inside prison as a result of overcrowding and arbitrary punishment.

⁵³⁵ American Convention, *supra* note 231.

⁵³⁶ *Id.*

⁵³⁷ Article 19 of the American Convention on Human Rights dictates: every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

⁵³⁸ Article 5 in the American Convention on Human Rights dictates in part: (1) Every person has the right to have his physical, mental, and moral integrity respected; (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person; (3) Punishment shall not be extended to any person other than the criminal; (4) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons; (5) Minors while subject to criminal proceedings shall be separated from adults... and (6) punishments consisting of deprivation of liberty shall have as an essential aim the reform and readaptation of the prisoners.

⁵³⁹ *Id.*

Children living in detention with their mothers are subjected to failing prison infrastructure; state parties violate a child's right to humane treatment absent proper space for development and resources for children in prison.⁵⁴⁰ For instance, restricted access to food and water and permitting children who live in detention with their mothers to sleep on the floor or reside in cattle-like trailers is a horrific encroachment on a child's right to humane treatment.⁵⁴¹ State parties are responsible for providing appropriate living accommodations in prisons. Accommodations should be thought about from the viewpoint of protecting the minor child in accordance with the American Convention.⁵⁴²

Article 5 of the American Convention declares that punishment must not be extended to any person other than the criminal and punishments consisting of deprivation of liberty must have an essential aim to reform prisoners.⁵⁴³ State parties are violating the American Convention when children living in detention centers are subjected to indirect and direct effects of punishment against their mothers within prison.⁵⁴⁴ For example, it is a violation to place children living in detention with their mothers in solitary confinement for any reason.⁵⁴⁵ The minimal dimensions and overuse of isolation as punishment is unacceptable for a child. Children incarcerated with their mothers are already receiving punishment for their mother's crimes so special protection must be afforded to ensure children are not further deprived of liberty. States are violating a child's right to humane treatment by allowing punishment inside prisons to extend to children living in

⁵⁴⁰ CEJIL, *supra* note 479, at 18.

⁵⁴¹ *Id.*

⁵⁴² American Convention, *supra* note 231, art. 19.

⁵⁴³ American Convention, *supra* note 231, art. 5 ¶¶ 3-6. Children living in detention with their mothers are an anomaly in this sense because they are innocent inmates. This is indicative of the necessity to implement a differentiated approach designed to protect children living in detention with their mothers.

⁵⁴⁴ CEJIL, *supra* note 479, at 42.

⁵⁴⁵ *Id.* at 41.

detention with their mothers. By failing to adopt a differentiated approach, these children remain unprotected.

b. Forceful Separation of Child and Mother Violates Child’s Right to Family

The American Convention on Human Rights labels the family as the “fundamental group unit of society” and ensures its protection in Article 17.⁵⁴⁶ Additionally, Article 19 of the American Convention affirms the state party obligation protect the family from the viewpoint of the child.⁵⁴⁷ State parties violate a child’s right to family by placing age limits on children living in detention with their mothers; children should not be automatically removed from their incarcerated mother’s care when they reach a certain age.⁵⁴⁸ Rather, a child should only be removed from a mother’s care if it is in the best interests of that child. Children suffer extreme trauma when they are forcibly removed from their mother’s care and can face negative developmental hurdles in the future.⁵⁴⁹ By failing to adopt a differentiated approach that is based on a child’s case-by-case basis and proceeding to remove children from their incarcerated mother’s care at a certain age, state parties violate a child’s right to family.

Children living in detention with their mothers are entitled to protection by the state, and a state’s failure to nurture the familial relationship violates a child’s right to family.⁵⁵⁰ For example, children living in detention with their mothers must not be restricted from breastfeeding to establish a secure attachment and promote healthy development.⁵⁵¹ A differentiated approach requires increasing the number of child-care facilities within detention centers to help nurture

⁵⁴⁶ American Convention, *supra* note 231, art. 17.

⁵⁴⁷ *Id.* art. 19.

⁵⁴⁸ Library of Congress, *supra* note 514; Robertson, *supra* note 520.

⁵⁴⁹ Latif, *supra* note 472.

⁵⁵⁰ American Convention, *supra* note 231, art. 17 ¶ 1.

⁵⁵¹ Halter, *supra* note 503, at 562.

healthy relationships and buffer the toxic stress experienced by children living in detention with their mothers.⁵⁵² Children form attachment bonds in the first few years of life and state parties violate a child's right to family by interfering with this crucial developmental period.⁵⁵³ By failing to adopt a differentiated method for nurturing the familial relationship, state parties are violating Article 17 of the American Convention.

2. The Protocol of San Salvador

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) does not explicitly offer protection for children living in detention with their mothers.⁵⁵⁴ However, the Protocol reaffirms the intention of the American Convention to protect vulnerable individuals such as children living in detention with their mothers.⁵⁵⁵ This is expressed through Article 10, Article 11, Article 12, Article 13, Article 15, and Article 16.⁵⁵⁶ Collectively, these relevant articles require State parties to offer specialized and differentiated protection for children living in detention with their mothers.⁵⁵⁷ The Protocol declares in order for State parties to fully realize the dignity of the children living in detention with their mothers, children require permanent protection and promotion.⁵⁵⁸

a. Failure to Provide Proper Nutrition Violates Child's Right to Food

⁵⁵² Shonkoff, *supra* note 504.

⁵⁵³ Halter, *supra* note 503.

⁵⁵⁴ Protocol of San Salvador, *supra* note 231. As of 2006, half of the state parties to the American Convention have ratified the Protocol of San Salvador.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

Article 12 of the Protocol of San Salvador recognizes every child's right to food and adequate nutrition.⁵⁵⁹ Children in particular need high levels of energy, nutrients, and supplement food diets in order to properly grow.⁵⁶⁰ Taken together, a differentiated approach to food distribution for children living in detention with their mothers is required to satisfy a child's right to food. State parties violate the Protocol of San Salvador by failing to accommodate a child's growing nutrition needs. Infant and children proper feeding is key to promote healthy growth and development; children should be breastfed until six months of age and then introduce to a nutrient-heavy diet.⁵⁶¹ The standardized diet offered in prisons is horrifically insufficient to satisfy a child's needs and does not provide the nutritional value specific to their stage of development.⁵⁶²

Further, it is a violation the Protocol of San Salvador to restrict a child's access to food or require the child's mother to provide food in prison.⁵⁶³ Restricting access to food in this manner increases a child's risk for undernutrition. Mothers with children should not rely on outside visitors or work inside prison to feed her child. States are required to provide differentiated nutrition regimes based on age and nutritional value for children living in detention with their mothers. Failing to provide children living in detention with their mothers nutritionally adequate and specific diets violates the Protocol of San Salvador.

b. Failure to Guarantee Medical Assistance Violates a Child's Right to Health

⁵⁵⁹ Article 12 in the Protocol of San Salvador dictates: (1) everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional, and intellectual development; and (2) in order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

⁵⁶⁰ World Health Organization, *supra*, note 485.

⁵⁶¹ *Id.*

⁵⁶² Request for an Advisory Opinion, *supra* note 2, ¶ 50.

⁵⁶³ CEJIL, *supra* note 479, at 42.

Article 10 of the Protocol of San Salvador protects a child's right to health.⁵⁶⁴ Article 11 affirms a child's right to health by requiring State parties to provide a healthy environment.⁵⁶⁵ By failing to provide proper medical care and hygienic facilities specific to children's needs, State parties are actively violating the Protocol to San Salvador.⁵⁶⁶ Children are particularly susceptible to contracting diseases, and the horrific conditions inside prisons exacerbate this preexisting susceptibility.⁵⁶⁷ This is why it is critical for detention centers to offer round-the-clock care at facilities where children reside.⁵⁶⁸ Prisons should be equipped with pediatric doctors, necessary medical instruments, and proper medical assistance to provide to children living in detention with their mothers.⁵⁶⁹ Additionally, mothers in detention with children should have an adequate supply of diapers and sanitary napkins; these are basic health necessities.⁵⁷⁰ By failing to provide these materials and care, state parties violate the Protocol of San Salvador. Therefore, the IACtHR must explicitly adopt a differentiated approach to children living in detention with their mothers to clarify existing legal obligations under the American Convention and the Protocol of San Salvador.

c. Failure to Provide Proper Educational Structure Violates Child's Right to Education

Article 13 of the Protocol of San Salvador guarantees the right to education.⁵⁷¹ In order to achieve the full exercise of the right to education, primary education should be required and freely

⁵⁶⁴ Article 10 of the Protocol of San Salvador dictates in part: (1) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social well-being; (2) In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) primary health care or essential health care made available to all individuals and families.

⁵⁶⁵ Article 11 of the Protocol of San Salvador dictates in part: (1) everyone shall have the right to access basic public services; and (2) state parties shall promote, protect, preserve, and improve the environment.

⁵⁶⁶ Protocol of San Salvador, *supra* note 231.

⁵⁶⁷ CEJIL, *supra* note 479, at 35.

⁵⁶⁸ Friedman-Rudovsky, *supra* note 487.

⁵⁶⁹ CEJIL, *supra* note 479, at 31.

⁵⁷⁰ *Id.* at 35.

⁵⁷¹ Protocol of San Salvador, *supra* note 231, art. 13.

accessible to everyone.⁵⁷² Additionally, Article 13 explicitly states in pertinent part that “parents should have the right to select the type of education to be given to their children.”⁵⁷³ State parties are actively violating Article 13 of the Protocol of San Salvador by failing to provide an educational structure for children living in detention with their mothers. State parties must foster the development of young children and further provide free primary education for children incarcerated with their mothers.

Children living in prison should have adequate access to basic primary education and the opportunity to develop crucial cognitive motor skills such as walking, talking, and socialization.⁵⁷⁴ Absent this educational structure, children living in prison with their mothers receive lower levels of education compared to non-incarcerated children and may have increased difficulty reintegrating into society.⁵⁷⁵ State parties should not only encourage crucial educational instruction but *require* in-prison services that foster a child’s development, such as mother-child units or community-centered detention programs.⁵⁷⁶ State parties are actively violating the Protocol of San Salvador by failing to provide an educational structure that provides basic education and promotes development through socialization.

C. International Human Rights Law

Although there is no international human rights law treaty which explicitly states children detained with their parents need differentiated protections, ingrained within both the Universal Declaration of Human Rights (UDHR)⁵⁷⁷ and the Convention on the Rights of the Child (CRC)

⁵⁷² *Id.* ¶ (3)(a).

⁵⁷³ *Id.* ¶ (4).

⁵⁷⁴ Robertson, *supra* note 520, at 25; Philbrick et al., *supra* note 529.

⁵⁷⁵ Robertson, *supra* note 471, at 30.

⁵⁷⁶ Halter, *supra* note 503.

⁵⁷⁷ Universal Declaration of Human Rights, *supra* note 316. The Universal Declaration of Human Rights laid the foundation for all people’s fundamental rights. State parties to the Declaration are obligated to promote the universal respect for all peoples and to observe fundamental freedoms. There are overlapping similarities between the Declaration and the CRC. Notably, the Declaration protects people from arbitrary imprisonment or interference with

is a child's right to play, to grow, and to live without fear of arbitrary imprisonment or detention.⁵⁷⁸ These rights enshrined in the UDHR and the CRC, support the need for the IAHRs to require state parties to adopt differentiated protections for children imprisoned with their parents. The IAHRs would not be the first to adopt differentiated protections for children detained with their parents. Rather, it would follow both the African Human Rights System and the European Human Rights System who have used the UDHR and the CRC as guidelines to develop differentiated protections for children detained with their parents.⁵⁷⁹ The IAHRs should follow the precedent set by their regional counterparts and afford children imprisoned with their parents differentiated protections.

1. The Convention on the Rights of the Child

The IACHR has recognized that to determine the obligations member-states owe to minor children, it is important to refer to other international instruments, including the CRC. The CRC contains specific provisions to protect minors.⁵⁸⁰ The CRC is the most widely ratified treaty in the world, and it serves as an incredibly powerful treaty obligating all State parties to protect *all* children – including those detained with their parent.

To ensure all children receive their guaranteed protections and rights, State parties must adopt differentiated protections for children imprisoned with their parent. Without adopting a set of protections specially crafted for these children, State parties to the CRC will fail to uphold their treaty obligations and fail to consider the child's best interest. To comply with the CRC, State

the family, guarantees a standard of living adequate to uphold his health, obligates state parties to give all children and mothers special care, and uphold a person's right to education.

⁵⁷⁸ United Nations Convention on the Rights of the Child, March 7, 1990, E/CN.4/RES/1990/74.

⁵⁷⁹ See, *infra* note 581.

⁵⁸⁰ *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. Ct.H.R., Report No. 41/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999) available at:

http://www.worldcourts.com/iacmhr/eng/decisions/1999.03.10_Minors_in_detention_v_Honduras.pdf.

parties must enact legislation to protect a child's right to live in an appropriate environment, to develop without fear or discrimination, and to have adequate access to basic health care.⁵⁸¹

a. Child's Right for their Best Interest to be a Primary Consideration

To properly protect children detained with their parent, it is imperative for State parties to take affirmative measures to ensure the prisons make the child's best interest a primary consideration. The Committee on the Rights of the Child (CRC Committee) is a body of experts who are responsible for monitoring the implementation of the CRC.⁵⁸² These experts have indicated that a child detained with their primary caregiver must be afforded differentiated protection crafted with the child's best interest in mind.⁵⁸³ Within the CRC, it is evident that a State party is obligated to consider the best interest of the child. This affirmative obligation to consider a child's best interest is repeated throughout the CRC in Article 3, Article 9, Article 18, Article 20, Article 21, Article 37 and Article 40.⁵⁸⁴ Read collectively, these obligations strongly support the adoption of differentiated protections and laws guaranteeing these protections for children living in detention with their parent.

Article 3 of the CRC plainly requires a State party to consider a child's best interest in all actions concerning the child when living in a public or private social welfare institution.⁵⁸⁵ When

⁵⁸¹ Convention on the Rights of the Child, *supra* note 579.

⁵⁸² Committee on the Rights of the Child, United Nations Human Rights. Available at: <https://www.ohchr.org/en/hrbodies/crc/pages/crcintro.aspx>.

⁵⁸³ *See generally*: Recommendation CM/Rec(2018)5 of the Committee of Ministers.

⁵⁸⁴ Convention on the Rights of the Child, *supra* note 579, art. 3, 9, 18, 20, 21, 37, 40.

⁵⁸⁵ Article 3 in the Convention on the Rights of the Child dictates: (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures; (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

living in detention, a child cannot be seen as another prisoner because this child is not a prisoner.⁵⁸⁶ This child is detained *with* their primary caregiver. To treat an innocent child like other prisoners while he or she is living in detention would deprive a child their right to due process. Eliminating a child's right to due process violates both the UDHR and the CRC.⁵⁸⁷ State parties to the CRC must avoid violating a child's right to due process by implementing laws and administrative guidance to prison institutions requiring the institution to take a child's best interest into consideration while they are detained with their primary caregiver.

Article 9 of the CRC ensures that a child shall not be separated from his or her parent against their will unless such separation is necessary for the child's best interest.⁵⁸⁸ If a child is to remain with their imprisoned parent, the child needs to be guaranteed a prison environment suited for both the primary caregiver and the child.⁵⁸⁹ Creating a prison environment well suited for both the child and the mother will ensure the child's right to maintain a relationship with his or her parent.⁵⁹⁰ A strong child-parent relationship is universally understood to be in the best interest of the child,⁵⁹¹ and State parties to the CRC must require prison institutions to provide an environment to support the best interest of these children detained with their caregiver.

⁵⁸⁶ CEJIL, *supra* note 479, at 42.

⁵⁸⁷ See Article 9 in the Convention on the Rights of the Child, *infra* note 589mini.

⁵⁸⁸ Article 9 in the Convention on the Rights of the Child dictates: (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child; (2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known; (3) States Parties shall 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; (4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

⁵⁸⁹ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 14.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.* at 23.

Along with a child's right to a family relationship, Article 18 requires state parties to allow both parents to participate in the upbringing and development of their child.⁵⁹² Having both parents involved in the child's life and upbringing is in the best interest of the child.⁵⁹³ To guarantee this relationship, a state party must ensure a child the right to have daily or weekly visitation with family members in the outside world. With this guarantee, the child can continue developing a relationship with both parents and further Article 9's goal, as well.

Article 20 of the CRC requires States parties to enact national laws or to take administrative action to ensure a child is cared for if a child is deprived of their family environment.⁵⁹⁴ This affirmative obligation laid out in Article 20 applies to all children, even those living in detention with their primary caregiver. Unfortunately, all children detained with their parent are deprived of a traditional family environment that will support their development because prison institutions are not, and have never been, considered a family environment. Because children detained with their mothers are living in an environment unsuitable for proper development and care, state parties must provide these children differentiated legal protections.⁵⁹⁵ To comply with Article 20 of the CRC, a State must take affirmative legal action to ensure a child's best interests are met through enacting legislation. Therefore, Article 20 of the CRC supports the need for the IAHRs to require State Parties to take legal action and to create a set of differentiated protections for children living

⁵⁹² Article 18 in the Convention on the Rights of the Child dictates in part: (1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern; (2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

⁵⁹³ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 627, at 23.

⁵⁹⁴ Article 20 in the Convention on the Rights of the Child dictates: (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State; (2) States Parties shall in accordance with their national laws ensure alternative care for such a child.

⁵⁹⁵ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 627, at 24.

in detention. Without such action, children detained with their mothers lose their guaranteed right to a familial and traditional upbringing.

Article 37 of the CRC ensures no child shall be subject to cruel, inhuman or degrading punishment nor shall a child be arbitrarily deprived of his or her liberty.⁵⁹⁶ State parties that do not provide differentiated protections for children detained with their parent effectively deprive children of their liberty, subject them to degrading punishment, and fail to uphold their obligation to the CRC. The IACHR should find that children detained with their caregiver need differentiated protections to avoid inhuman treatment. Innocent children are not prisoners, and Article 37 requires that state parties do not treat them as prisoners solely because they are living in detention with their primary caregiver.

Lastly, Article 40 of the CRC recognizes the right of every child to be treated in a manner consistent with the child's sense of dignity and worth.⁵⁹⁷ By treating children like any prisoner and subjecting them to poor conditions, a state party effectively deprives children of their dignity.⁵⁹⁸ By not affording these children any differentiated protections, a state party to the CRC is violating their obligation to take into consideration a child's best interest and guarantee a child's right to feel dignified.

b. Child's Right to be Protected Against Discrimination and Punishment on the Basis of their Parents' Actions

⁵⁹⁶ Article 37 in the Convention on the Rights of the Child dictates in part: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

⁵⁹⁷ Article 40 in the Convention on the Rights of the Child dictates in part: States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

⁵⁹⁸ *American Convention on Human Rights*, *supra* note 276, at art. 5, ¶ 3.

When a State party fails to adopt a differentiated approach to children living in detention the State party fails to consider the best interest of a child and thereby violates the child's right to be protected against discrimination and arbitrary punishment. The CRC requires State parties to protect these children by guaranteeing their right to be free from discrimination.⁵⁹⁹ One of the ways the CRC protects children and their right to be free from discrimination is to shield them from any punishment stemming from their parent's status or actions.⁶⁰⁰ A parent's criminal activity should not subject a child to any form of mistreatment or discrimination. Therefore, by not affording children detained with their primary caregiver special protections, a state party is effectively discriminating against the child, punishing the child for his or her parent's actions, and violating their obligation to the CRC. Specifically, a State party that does not protect the child violates Article 2, 16, and 37 of the CRC.⁶⁰¹

Article 2 of the CRC requires State parties to ensure children will not be discriminated against, irrespective of the child's parents' activities or status.⁶⁰² A child cannot be arbitrarily discriminated against due to the illegal actions of their parents or because their parent is in prison.⁶⁰³ Children imprisoned with their parents are already susceptible to stigma and discrimination due to the culture's perception of the parent and their criminal activity.⁶⁰⁴ To ensure a child is not discriminated against, a state party must afford children protection while detained

⁵⁹⁹ Convention on the Rights of the Child, *supra* note 622, art. 2.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* art. 2, 16, and 37.

⁶⁰² Article 2 in the Convention on the Rights of the Child dictates: (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

⁶⁰³ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 12, 31.

⁶⁰⁴ *Id.* at 31.

with their parent and also help these children overcome such prejudices once they are reintegrated into society.

Article 16 of the CRC protects children from arbitrary interference with their privacy.⁶⁰⁵ Furthermore, Article 16 requires state parties to take affirmative action by passing laws to protect children from any arbitrary interference with their privacy. A prison is an invasive environment. Constantly subjected to prison staff, guards, and rules, children and prisoners alike have little to no privacy. The CRC creates an affirmative obligation in state parties to enact legislation to uphold a child's right to privacy. This obligation should apply to *all* children, especially those detained with their parents. By not affording these children the necessary legal protections, a state party fails to uphold the mission of the CRC and their duty to all children.

State parties are required by Article 37 to ensure a child is not deprived of his or her liberty arbitrarily by ensuring their right to due process.⁶⁰⁶ As noted previously, children detained with their parent are often treated like the prisoners themselves. To uphold a child's right against cruel and arbitrary punishment, a state party must protect children detained with their parent by affording them differentiated protections.

c. Child's Right to Develop in Child-Friendly Atmosphere with the Highest Attainable Standard of Health

When children are detained, they are often in the same prison conditions as their parent.⁶⁰⁷ As noted previously, prisons are not a traditional family environment. Additionally, these prisons are not child-friendly nor do prisons have child-friendly designated areas to promote the child's guaranteed right to play and to grow. Moreover, prisons are missing essential resources to provide

⁶⁰⁵ Article 16 in the Convention on the Rights of the Child dictates: (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; (2) The child has the right to the protection of the law against such interference or attacks.

⁶⁰⁶ Convention on the Rights of the Child, *supra* note 579.

⁶⁰⁷ CEJIL, *supra* note 479, at 42.

children with basic necessities to ensure their physical development. State parties with prison systems that cannot ensure the child's right to develop physically in a child friendly atmosphere with quality healthcare standards violates Article 3, Article 24, and Article 31 of the CRC.

To comply with Article 3 of the CRC, State parties must take appropriate legislative and administrative measures to ensure a child's necessary care while detained with their parent.⁶⁰⁸ Article 3, as previously discussed, requires all state parties to ensure institutions, services and facilities providing for children conform with the standards established by the CRC. To do so, state parties often must take affirmative measures, such as legal action, to guarantee the child is cared for.⁶⁰⁹ This obligation should extend to prison systems and institutions hosting children who are detained with their primary caregiver.

Additionally, prison systems must be able to provide children with necessary care while also upholding a child's right to enjoyment of the highest attainable standard of health.⁶¹⁰ Article 24 of the CRC requires State parties to provide all children with adequate health care services and to take appropriate measures to (1) diminish infant mortality, (2) ensure necessary medical assistance during a child's primary development, (3) combat malnutrition by providing adequate nutritious foods, clean drinking water, and (4) provide necessary prenatal and postnatal care for

⁶⁰⁸ Convention on the Rights of the Child, *supra* note 579, art. 3.

⁶⁰⁹ *Id.*

⁶¹⁰ Article 24 in the Convention on the Rights of the Child dictates in part: (1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services; (2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services; and (3) States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

mothers.⁶¹¹ State parties to the CRC must afford children living in detention these guarantees by taking affirmative legislative action and monitoring prison systems.⁶¹²

Not only is a child guaranteed the right to the highest attainable standard of health, but a child also has the right to rest and to leisure. Article 31 requires state parties to recognize a child's right to play and to engage in recreational activities.⁶¹³ A child cannot play in a dangerous prison environment nor can they properly develop.⁶¹⁴ Without affording children differentiated protections while detained with their primary caregiver, a state fails to recognize the child's right to rest and leisure.

2. Regional Law

The following sections will analyze how the regional courts have used universal human rights law to further protect children detained with their primary caregiver. Although these regional systems are not binding on the IACtHR, the IACtHR should follow its regional counterparts to ensure the rights of children detained with their parent.

a. The African Human Rights System and the European Human Rights System

The African Court on Human and Peoples' Rights (ACtHPR) and ECtHR have used these specific regional bodies of law and universal human rights law to promote the adoption of differentiated rights and protections for children detained with their parents. Together, the two systems have interpreted regional and universal law to maintain that State parties must continue to

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ Article 31 in the Convention on the Rights of the Child dictates: (1) States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts; (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

⁶¹⁴ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 14, 16, 39.

ensure a child's best interest while detained with their primary caregiver which has led to the adoption of differentiated protections for these children.⁶¹⁵ As the IACtHR's two regional counterparts require State parties to implement higher standards of care for children detained with their caretaker, the IACtHR is falling behind and failing to ensure *all* children are protected. The IACtHR should follow the standard adopted by the other regional human rights systems, require State parties to adopt special protections for children imprisoned with their parents, and ensure State Parties uphold their obligations to all children. Because the two human rights systems have handled this issue in similar ways, the two systems and their evolution will be discussed in tandem.

i. African Charter on the Rights and Welfare of the Child

Notably, the African Charter on the Rights and Welfare of the Child (ACRWC) explicitly addresses the rights of the child detained with their mother.⁶¹⁶ The ACRWC affords African children special safeguards to ensure their full development and implies a duty in everyone to protect the rights of the child.⁶¹⁷ Modeled after the CRC, the ACRWC takes it a step further by protecting children imprisoned with their mothers and children of imprisoned mothers.⁶¹⁸

Article 30 explains the State parties' responsibility to children of imprisoned mothers.⁶¹⁹ State parties must provide special treatment for expecting mothers and to mothers of young children "who have been accused or found guilty of infringing the law."⁶²⁰ Additionally, Article

⁶¹⁵ *See, infra* note 131.

⁶¹⁶ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child (ACRWC), 11 July 1990, CAB/LEG/24.9/49 (1990).

⁶¹⁷ *Id.*

⁶¹⁸ *Id.* art. 30.

⁶¹⁹ Article 30 dictates: State 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 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) ensure that a death sentence shall not be imposed on such mothers; (f) the essential aim of the penitentiary system will be the reformation, integration of the mother to the family and social rehabilitation.

⁶²⁰ *Id.*

30 specifically requires State Parties to establish alternative measures or special alternative institutions for confinement for these mothers imprisoned with their prisons.⁶²¹ The ACRWC recognizes a child detained with their mother needs differentiated protections, and attempts to uphold a child's right by requiring States to establish a prison environment suitable for both the mother and child.⁶²² The IACtHR should follow the ACRWC's affirmative obligation and should require State parties to take legislative action to establish child-friendly environments within prison institutions. By not taking legal action, the IACtHR is failing all children detained with their primary caregiver and is violating the CRC.

b. Regional Jurisprudence Upholding the Rights of the Child

In addition to the extended protections enshrined in the ACRWC, there has been a growing trend in both the ACtHPR and the ECtHR to afford children detained with their primary caregiver specific protections.⁶²³ Starting with a landmark case from the South African Constitutional Court, the two regional systems have continued to endorse that when a primary caregiver is given a custodial sentence, State parties must ensure the needs of the child are met during the caregiver's incarceration.⁶²⁴ Children imprisoned with their parent cannot be forgotten nor treated like ghost

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ See: *R v Modhwadia* [2017] EWCA; *R v. Bishop* [2011] WL; *ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department* [2011]; *R v Petherick* [2012] EWCA; *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC; *S v M (CCT53/06)* [2007]; *R (on the application of P and Q) v Secretary of State for the Home Department* EWCA (2001).

⁶²⁴ *South Africa: Constitutional Court S v M (CCT53/06) [2007] ZACC 18 (26 September 2007), paragraph 36*: In 2007, *S v. M*, a landmark case from the South African Constitutional Court, laid out a general recommendation on how to thoroughly consider the best interests of the child and the need to uphold the law. The High Court created the "5-point method" to evaluate future decisions concerning a primary caregiver's custodial sentencing and a state parties' obligations to the caregiver's child. Notably, the 5-point method states that when a court gives an appropriate custodial sentence to the primary caregiver, then the court must also determine if it is necessary to ensure the primary caregiver's child and his or her needs are cared for during the caregiver's incarceration. The High Court obligated the state to take necessary measures to uphold a children's rights while in detention with their primary caregiver. Although the High Court acknowledged that no perfect formula existed when balancing varied societal interests, it hoped these five considerations would ease the lower court's burden in deciding a primary caregiver's custodial sentence and result in consistent decision-making. The 5-point method dictates: (1) A sentencing court should find out if the convicted person is a primary caregiver; (2) The sentencing court should ascertain the effect a custodial sentence will

children drifting in and out of the prison system.⁶²⁵ Both regional systems have made an effort to ensure that State parties' take affirmative measures to uphold the child's best interest, the child's right to necessary health care and development, and the child's right to family relationships while detained with their caregiver.⁶²⁶

i. Child's Best Interest Must Be Considered While Detained with Caregiver

The ACtHPR and ECtHR have continued to hold State parties to the CRC responsible for affording children imprisoned with their parent specific protections.⁶²⁷ The result has led to a set of differentiated protections for children imprisoned with their parent supported by both international law and regional jurisprudence.⁶²⁸ These set of differentiated protections are laid out explicitly in the Council of Europe Recommendations CM/Rec(2018)552.⁶²⁹ Here, these Recommendations require State parties to make the child's best interest a primary consideration during their detention with their parent.⁶³⁰ A child detained with their primary caregiver is entitled to all the same rights as other children.⁶³¹ The next section will discuss important decisions coming out of the regional human rights systems requiring state parties to continue guaranteeing the rights of all children while imprisoned with their parents. The IACtHR should follow its regional

have on children; (3) If the court gives an appropriate custodial sentence to the primary caregiver, then the court must determine if it is necessary to take active step to ensure the children are cared for during the caregiver's incarceration; (4) If the court gives a non-custodial sentence, the court must make sure it is appropriate bearing in mind the interest of the child; (5) If the primary caregiver could equally receive a custodial or non-custodial sentence, the court must make the interest of the child a paramount principle in guiding their decision.

⁶²⁵ *Latif*, *supra* note 472.

⁶²⁶ *See, supra* note 624 for a list of cases protecting children imprisoned with their parents and requiring State parties to adopt differentiated protections to uphold the child's right.

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 31.

⁶³⁰ *Id.* at 29.

⁶³¹ *Id.* at 11. *See Korneykova and Korneykov v. Ukraine*, (No. 56660/12), Eur.Ct.H.R., (2016).

counterparts and find that children imprisoned with their caregivers require a set of differentiated protections to ensure their codified rights.

ii. Child’s Right to Basic Necessities and Adequate Health Care

In *Korneykova and Korneykova v. Ukraine*, the ECtHR held that a State party’s failure to provide prenatal and postnatal care to expecting mothers surmounted to cruel and inhuman treatment.⁶³² Additionally, failing to provide expecting mothers with proper healthcare or adequate nutrition harms both the mother and the newborn.⁶³³ By failing to provide pregnant women with necessary care, a State party effectively violates the newborn’s right to health and to development *before* he or she is born.⁶³⁴ Therefore, any State party shackling pregnant women in prisons violate their obligations to the CRC.⁶³⁵

iii. Child’s Right to Family Life

The ECtHR continued to extend differentiated protections to children imprisoned with their parent by upholding their right to family life and to develop a family relationship in *Mozer v. the Republic of Moldova and Russia*.⁶³⁶ In 2016, the ECtHR held that the prison’s restrictions on family visits violated the CRC.⁶³⁷ The restrictions required a prison guard to closely monitor the visit with no real reason, and the visitors were forced to speak in the prison guard’s native language.⁶³⁸ The restrictions were a clear violation of a person’s right to family life and the child’s right to develop family relationships.⁶³⁹

⁶³² *Korneykova and Korneykov v. Ukraine*, (No. 56660/12), Eur.Ct.H.R., (2016) ¶ 116.

⁶³³ *Id.*

⁶³⁴ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 31.

⁶³⁵ *Id.*

⁶³⁶ *Mozer v. the Republic of Moldova and Russia*, no. 11138/10.

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ *Id.*

The prisoner's right to family visitation and to freely communicate with their family in their native language continued to be upheld by the ECtHR in *Mehmet Nuri Özen and Others v. Turkey*.⁶⁴⁰ Here, the ECtHR held that prison authorities' refusal to allow prisoners to send letters to their families drafted in their native language violated their Article 8 rights.⁶⁴¹ Unless there was a sufficient legal basis, disallowing family correspondence in their own language violated a person's right to family and family development.⁶⁴²

The IACtHR should follow the trend set by the protect ECtHR and the by guaranteeing a child's right to family relationships by requiring state parties to guarantee daily family visitation and contact with family outside the prison.⁶⁴³ Any restrictions or policies on family visitation should not be unduly burdensome on either the child, parent, or visitor.⁶⁴⁴ In fact, state parties should facilitate a child's right to family by taking administrative measures to make family visitation easier and to allow visitors to speak in their native language.⁶⁴⁵ Adopting these differentiated protections will uphold a child's right to family while he or she is imprisoned with their primary caregiver. Furthermore, a state party should adopt these differentiated protections to comply with their commitment to the CRC and UDHR.

D. Recommendations

Children and infants detained with their parent are not prisoners. It is imperative that this Court adopt a differentiated approach to children living in detention with their caregivers. Adopting such an approach would align the IAHSR with the legal standards adopted and developed by the European Human Rights System and the African Human Rights System. The

⁶⁴⁰ *Mehmet Nuri Özen and Others v. Turkey*, ECHR 115 (2014).

⁶⁴¹ *Id.*

⁶⁴² *Id.* ¶ 22.

⁶⁴³ Recommendation CM/Rec(2018)5 of the Committee of Ministers, *supra* note 584, at 13.

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.* at 37.

adoption of a differentiated approach to children living in detention with their caregivers would guarantee adequate legal protections to children detained with their primary caregivers.

Specifically, this brief recommends the following:

- State parties must guarantee overseeing judicial authorities and municipalities must take into consideration the child's best interest when sentencing a primary caregiver and during detention.
- If it is necessary to separate the child from their primary caregiver, any separation should be done on an individual assessment and only if it is in the best interest of the child.
- If a child is detained in prison with their primary caregiver, national authorities and municipalities should provide resources to state agencies and organizations to support children with imprisoned parents.
- If a child is detained in prison with their primary caregiver, State Parties must require prison officials and authorities to provide child-friendly environments within the prison to ensure a child's right to play and to rest.
- If a child is detained in prison with their primary caregiver, State Parties are obligated to provide resources to ensure a child's basic health care needs.
- If a child is detained in prison with their primary caregiver, State Parties must allow frequent family visitations to respect the child's right to family and to protect their right to emotionally bond with their family.
- If a child is detained in prison with their primary caregiver, State parties must provide access to primary education and facilities that promote development to ensure a child's right to education is satisfied.

- If a child is detained in prison with their primary caregiver, State parties must provide nutritional regimes tailored to the nutritional needs of children.
- If an expecting mother is detained, State Parties are required to provide prenatal and postnatal health care to guarantee the child's right to health.
- If an expecting mother is detained, State Parties are prohibited from using any instrument of restraint, such as shackling, on a pregnant mother whenever.

Children living in detention with their mothers require immediate attention from the Inter-American Court of Human Rights. The best interests of the child should be the governing principle when considering a custodial sentence for a primary caregiver. The IACtHR's absence of guidance subjects children to deplorable conditions in overcrowded prisons and arbitrarily deprives them of their guaranteed rights. To improve the lives of children living in detention with their mothers, it is imperative for states to take into consideration the best interest of the child. Specialized resources, including meal plans, medical assistance, and designated child-friendly areas, can help nurture a child's development and ensure their basic rights are fulfilled. Inter-American human rights law and the persuasive international authority presented above not only allow for but *require* the adoption of a differentiated approach to children living in detention with their mothers. Anything less would render children detained with their mothers helpless and violate international law.

V. Conclusion

The Inter-American Court of Human Rights must codify a comprehensive human rights framework that addresses the lived experiences of incarcerated pregnant and postpartum people, LGBTQIAP+ people, and children incarcerated with their mothers throughout the region so that they may serve out their custodial sentences without fear of discrimination, ill-treatment, and

torture. Incarcerated people who are pregnant, postnatal, and breastfeeding warrant a pregnancy-specific human rights framework because of the heightened vulnerability that a person experiences during and after pregnancy. A differentiated human rights model for pregnant people is necessary to ameliorate the widespread deficiencies in pre-and post-natal care in prisons and to ensure the dignity and fundamental rights of all people who give birth while incarcerated. Lesbian, gay, bisexual, queer, and pansexual (LGBQP) and transgender, gender non-conforming, nonbinary, and intersex (TGNCI+) people deprived of liberty suffer distinct prejudice-based harm on account of non-heterosexual sexual orientation and non-conformity with traditional binary gender norms. LGBTQIAP+ people in prison merit an intersectional human rights framework because they experience uniquely transphobic and homophobic discrimination, violence, and ill-treatment that is magnified in the carceral context. Children and infants who are incarcerated with their mothers as they serve out their judicial sentences are extremely vulnerable to the human rights violations that occur within the penal system because of their status as children and specific developmental needs. In preserving the sanctity of the mother-child relationship by allowing children to live with their incarcerated mothers, child-sensitive differentiated legal protections are essential to protect the child's right to development, promote the child's best interest in detention, and preserve the unique identities of children despite their upbringing in the penal system.

The IACtHR must adopt a differentiated human rights framework that is centered on the lived experiences of incarcerated pregnant, postpartum, and breastfeeding people, LGBTQIAP+ people, and children living in prison with their incarcerated mothers in order to categorically eliminate identity-based harm in prisons and uphold the inherent dignity and fundamental human rights of people who are in a special situation of risk during incarceration.