

Inter-American Court of Human Rights

**Written observations regarding
Request for an Advisory Opinion by the Inter-American Commission on
Human Rights with respect to “Differentiated Approaches to Persons
Deprived of Liberty”**

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I. Introduction

1. Interest in submitting these written observations

The International Human Rights Practicum (the “Practicum”) at Boston College Law School (“B.C. Law”) appreciates the open invitation of the Inter-American Court of Human Rights (the “Court” or “IACtHR”) to submit written observations on the advisory opinion requested by the Inter-American Commission on Human Rights (the “Commission” or “IACHR”) on **“Differentiated Approaches to Persons Deprived of Liberty”** (the “Request”). The Commission submitted the Request to this Court pursuant to Article 64.1 of the American Convention on Human Rights (the “American Convention” or “ACHR”) and Article 70 of the Rules of Procedure of the Inter-American Court of Human Rights (the “Rules of Procedure”). We now submit this brief pursuant Article 73.3 of the Rules of Procedure.

The Practicum is a clinical course at B.C. Law that provides second- and third-year *Juris Doctor* students and *Master of Laws* students from various international backgrounds with the opportunity to submit appellate briefs to regional and international courts that address questions of human rights. The Practicum operates under the supervision of human rights legal academics and experts. It is devoted to legal education through experiential learning with respect to defense and advocacy for the international protection of human rights and puts special emphasis on the study of the Inter-American System on Human Rights, its legal framework, mechanisms, rights protected, the States’ obligations, and relevant principal entities. The Practicum appreciates the globalization of human rights and the fundamental importance of human rights as a pillar of constitutional democracy and the rule of law. Thus, the Practicum is committed to teaching advocacy and protection of human rights and collaborating with the Court in the exercise of its jurisdictional functions.

The Commission requests an advisory opinion “concerning the differentiated obligations that the principle of equality and non-discrimination imposes on the States in the context of deprivation of liberty” to address the inequality that vulnerable groups face when placed in long-term detention (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para 2). The Commission limits its request to the inequalities experienced by five specific vulnerable groups while incarcerated. The groups consist of “women

who are pregnant, or postpartum and breastfeeding; LGBT persons; indigenous people; older persons; and children living in prison with their mothers” (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para 2). We focus our brief on the first three groups and the last group. We do not discuss the group defined as older persons. The absence of any analysis relating to that group should not be interpreted as an indication that we believe the group does not require differentiated protection. Rather, we express no opinion as to that group.

The Practicum carried out multidisciplinary research in answer to this opportunity. We analyzed from a human rights perspective the Inter-American legal framework for the protection of vulnerable groups as well as the international principles, standards, and minimum conditions that these vulnerable groups must have when in long-term detention. From a social work perspective, we also studied the biological, psychological, and social consequences of the lack of application of these standards and the recommended conditions for vulnerable imprisoned peoples. For that purpose, the Practicum team incorporated students of the Boston College School of Social Work. The Boston College School of Social Work team used their clinical expertise, along with relevant social sciences research, to establish and propose recommendations that would benefit the unique bio-psycho-social needs of these vulnerable populations.

In addition, this brief acknowledges the importance of this work in light of the Covid-19 pandemic which has exacerbated the vulnerability of marginalized populations. Prisons are close-contact environments where a spread of the virus can be deadly. In the United States, the Centers for Disease Control (“CDC”) has provided guidance for managing the pandemic in prisons. We make recommendations in this brief with the understanding that the CDC guidance would benefit vulnerable populations both during and after the pandemic. We acknowledge the urgent need for the protection of vulnerable populations during this pandemic.

Accordingly, we respectfully submit these written observations before the honorable Court to advocate for the protection of human rights, as the recognition of rights for specific groups aids in protecting the human rights of all. Additionally, the development of guidelines for structural, procedural, and regulatory protections for vulnerable groups in long-term detention will streamline each State’s ability to protect its vulnerable populations.

The ideas expressed in this brief are our own. They do not represent the opinions of any institution, group, or individuals, including Boston College, its staff, faculty, or students. We have

not received any money or direction from any groups or organizations to write the opinions expressed within this brief, and we have no economic interest in the advisory opinion that the Court will provide.

2. Summary of the Advisory Opinion Requested

The Commission submitted the Request on November 25, 2019 to interpret several Inter-American provisions regarding the obligations of the States under the ACHR to adopt differentiated approaches on long term detention conditions to guarantee the right of equal protection and non-discrimination of vulnerable persons deprived of liberty. The scope of the Request is limited in two ways. First, the scope is limited in regards to specific categories of populations. The Commission seeks guidance only regarding five vulnerable groups, specifically: women who are pregnant or breastfeeding, LGBT individuals, indigenous individuals, older individuals, and children living in prison with their mothers. Second, the scope is limited situationally. It only involves the aforementioned groups when they are in long-term detention (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para. 5).

The content of the Request is divided into five sections. Section I explains the purpose, scope, and content of the Request. Section II provides a general overview of the human rights that must be protected for the five groups while in long-term detention. It also argues why the five groups are vulnerable and why their protection is necessary. Section III describes the many ways that the members of the five groups are at risk when deprived of liberty. It outlines specific disadvantages and instances of discrimination each group faces while in long-term detention. Section IV details studies and judicial responses to particular infringements of human rights that individuals in each group have previously faced. Section V lists a general question to determine the justification, under the Inter-American legal framework, of the referred differentiated approach and particular questions regarding each group for which the Commission seeks answers and insight (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, sections I-V).

The Commission reports that prisons in the region are subject to substandard conditions, such as overcrowding, deficient infrastructure, lack of hygiene and medical care, inadequate food

choices and access to water, and an absence of social rehabilitation programs (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para 3). These conditions disproportionately impact at-risk populations. Due to these interlocking systems of oppression —the combination of imprisonment and vulnerable status pre-imprisonment—, there is a need to work toward structural changes to promote social justice and equity. Therefore, the Commission requests that the Court provide standards for member States to create differentiated approaches to better accommodate these vulnerable individuals.

The Request's scope includes individuals in the region who are deprived of their liberty by means of detention, imprisonment, institutionalization, or custody of a person in a public or private institution in which that person is not permitted to leave at will. For instance, this includes individuals in psychiatric hospitals and centers for migrants and refugees; however, the central concern of the Commission is those in the prison system for long periods, excluding the juvenile justice system. Although juveniles in long-term detention facilities likely face many, if not more, of the same difficulties discussed here, such a discussion is outside the limited scope of the Request. The Commission asserts that the discrimination faced by these vulnerable groups arises directly from the conditions of detention and not simply from their situation of vulnerability. These disadvantages are replicated and often magnified inside prison, which, in turn, increases the threats to their already tenuous sense of safety and well-being.

The general conceptualization of the Request is based on the main principles of equality and non-discrimination which require member States to utilize differentiated approaches for at-risk groups residing in their detention facilities. The principles of equality and non-discrimination involve both a negative aspect, including prohibition on arbitrary differences in treatment for different groups, and a positive aspect. The member States are obligated to create conditions of equality among groups that have been historically marginalized. Proportional equality —the recognition that some groups require additional support to achieve the same level of equality of less-disadvantaged groups— is more precise and detailed and contains fundamental insights. Even if a norm or practice is on its face neutral and without intent to discriminate, it may indirectly discriminate through its application to these at-risk groups.

The Commission concludes that it is, therefore, the Court's task to interpret international legal frameworks that determines the obligations of member States to create differentiated approaches to respond to particular conditions of vulnerabilities, protect against discrimination,

and guarantee basic human rights (IACHR, Advisory Opinion Request on "Differentiated approaches to persons deprived of liberty", 2019).

II. Amici considerations

1. Answer to the Request general question: the need to adopt differentiated approaches of long-term detention conditions of persons deprived of liberty finds justification under the American Convention of Human Rights.

In Section V, the Request asks a general question applicable to all vulnerable groups:

“Regarding the protection of the rights of persons in a special situation of vulnerability such as women who are pregnant, postpartum and breastfeeding; LGBT persons; indigenous people; older persons, and children living in detention centers with their mothers: is it possible to justify, based on Articles 24 and 1 (1) of the Convention, the need to adopt differentiated approaches or measures to guarantee that their specific circumstances do not affect the equality of their condition with other persons deprived of liberty, as regards both their detention conditions, and the remedies filed to protect their rights in the context of the deprivation of liberty? If so, what are the specific implications of the content of the rights established in these articles on the scope of the correlative obligations of the states in this matter?” (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, section V(A)).

In sum, the Request asks if it is possible to justify the need to adopt differentiated approaches or measures to protect the vulnerable groups' rights when in prison based on Articles 24 and 1(1) of the American Convention of Human Rights (the “ACHR”). The Commission then asks, if the answer to that question is yes, whether there are specific standards and obligations of the States under the ACHR in this matter (IACHR, Advisory Opinion Request on "Differentiated approaches to persons deprived of liberty", 2019, section V(A)). This question must be answered before determining what special measures should be applied to members of the vulnerable groups in order to analyze if special measures are warranted at all.

As defined in the Request, the right to equal protection under the ACHR has two prongs, a negative prong that prohibits behavior and a positive prong that obligates affirmative actions. In the negative, equality prohibits arbitrary differences in treatment of individuals due to certain traits or characteristics (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para. 13). In the positive, the States have obligations to create true

equality in terms of human rights protection for persons or groups who have historically or contextually faced discrimination and exclusion (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para. 14). Some groups of people face barriers to enjoying the same level of equality and fair treatment as the general population in the absence of affirmative, specialized protections. The States have an obligation to ensure that such protections are implemented. On the other hand, some facially neutral provisions may create situations of inequality due to the different needs of different groups. These situations create indirect discrimination. States have an obligation to make sure they do not actively promote policies that result in indirect discrimination, even when discrimination was not the intent of the policy.

Article 1.1 of the ACHR establishes the States’ obligations to “undertake and respect the rights and freedoms” included in the treaty “without any discrimination for the reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition” (ACHR, Article 1.1). While many of the enumerated characteristics fit aspects of the specific vulnerable groups who are the subject of the Request, the inclusion of “or any other social condition” indicates that the list is not exhaustive.¹ Furthermore, Article 24 of the ACHR establishes the right of equal protection and non-discrimination before the law. It further states that all are entitled to protection “without discrimination” (ACHR, Article 24). Individuals in similar circumstances must be treated equally under the law. Some of the enumerated groups faces discrimination while in situations of long-term detention. The groups do not enjoy equal protection while being subject to discrimination. Assuming members of the vulnerable groups are in long-term detention as a result of a criminal conviction, the conditions of detention make their punishment unequally severe. Furthermore, the law does not protect them if it does not provide remedies for their abuse and discrimination.

¹ In the Advisory Opinion OC-24/16 of November 24, 2017, this Court notes that “the most favorable alternative for the safeguard of the rights protected by this treaty” must be used in the interpretation of the phrase “any other social condition.” This Court further notes, “*the prohibited categories of discrimination listed under Article 1(1) of the American Convention are neither exhaustive nor restrictive, but merely indicative. Therefore, the wording of this article, with the inclusion of the words “any other social condition”, leaves the categories open to the incorporation of other grounds of discrimination that were not explicitly indicated. Consequently, the phrase “any other social condition” of Article 1(1) of the Convention must be interpreted by the Court in the most favorable perspective for the individual and for the evolution of fundamental rights in contemporary international law.*” (IACtHR Advisory Opinion OC-24/16 of November 24, 2017, para. 70).

Many of the enumerated characteristics apply to the vulnerable groups who are subjects of the Request. Each one is based on different reasons or circumstances that make them vulnerable in particular situations and needs. Women who are pregnant, postpartum or breastfeeding experience discrimination in prisons because they need specialized health, nutritional, and psychological needs that require specialized care. If they do not receive such care, they are prevented from fully enjoying the same rights to health, family, and human dignity to which incarcerated women who are not pregnant or postpartum have access. Indigenous individuals experience discrimination in prison due to their unique cultural identity and needs. Systems that do not account for, and protect, this unique identity permit and facilitate unequal treatment. Indigenous peoples have special needs in regard to their religious practices, dietary habits and languages, which often leaves them to suffer discriminatory practices. This can lead to violence, cultural assimilation and a gross disregard for their individual and collective rights. Children living in prison with their mothers face discrimination because they are deprived of liberty even though they have not committed any crime which would result in their detention. They have special nutritional, medical, social and educational needs that require a particular treatment while in prison. LGBT individuals experience discrimination for social conditions of gender expression and sexual orientation. They face discrimination due to lack of acceptance for their self-expression. The essence of their identities is not always respected and can be subject to intentional discrimination. Furthermore, transgender individuals have specialized medical needs. Typical medicine offered in prisons may indirectly discriminate against transgender individuals because it may not meet their unique medical needs. Section II of this brief contains detailed discussions of the discrimination that each group faces in long-term detention.

Each group's particular circumstances result in a greater vulnerability to the risks of incarceration and therefore require additional attention from the States. The deplorable situation of the prisons in the region already creates a high-risk situation for any person deprived of liberty, which the Covid pandemic further exacerbates. These conditions, and the risks and legal weaknesses suffered by vulnerable groups converge and compound. This justifies particular attention by the States.

Furthermore, this honorable Court has been protecting in an extensive way the rights guaranteed in the ACHR, including the right to life and the right to liberty, since the first cases to come before the Court. This Court applied Article 1.1 in the Case of Velásquez Rodríguez v.

Honduras, the earliest contentious IACtHR case.² In that case, the Court interpreted the Convention rules regarding States obligations to both respect and guarantee the rights recognized within the ACHR.³ This Court affirmed the obligations set forth in Article 1.1 by invoking Article 2. This Court stated:

“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁴

There is no doubt, therefore, that the ACHR imposes duties on the States to respect and guarantee human rights. These duties can have different scope and means depending on the rights and individual needs. This Court has also recognized in the case of *Ximenes Lopes v. Brazil* that vulnerable groups need special protection that the States are obligated to provide.⁵ This Court has recognized the duty of the States to take affirmative steps to protect members of vulnerable groups. This Court explicitly mentioned the States’ negative and positive obligations as discussed in this brief, stating:

“The Inter-American Court considers that any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights. The Court reaffirms that not only should the States refrain from violating such rights, but also adopt positive measures, to be determined according to the specific needs of protection of the legal person, either because of his personal condition or the specific situation he is in, such as his disabilities.”⁶

Although the case was about an individual whose vulnerability stemmed from mental health concerns, a group that is not a direct subject of the advisory request, the same standards should apply to the vulnerable groups at issue. Additionally, individuals may belong to multiple vulnerable groups concurrently. Because an individual belongs to one specific group does not

² IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, C No. 4.

³ *Id* at para. 164-167.

⁴ *Id* at para. 174.

⁵ IACtHR, *Case of Ximenes Lopes v. Brazil*, Merits, Reparations and Costs. Judgment of July 4, 2006, C No. 200; IACtHR, *Case of Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312

⁶ *Id* at para. 103.

preclude that same individual's membership in another group. Thus, it is essential to bring all vulnerable groups within the scope and protections of this case.

In a recent landmark decision, this honorable Court has emphasized that under Article 1.1 and Article 24 of the ACHR, the States should adopt measures to guarantee that equality is real and effective for those groups who have been historically or contextually marginalized so that the groups may effectively enjoy their rights. The Court states "...in short, offering people concrete possibilities to see material equality realized, in their own cases."⁷ The Court explains how the right to equal protection under Article 24 has a double dimension: a formal one, which establishes equality before the law, and a material or substantial one that orders the adoption of positive promotional measures in favor of historically discriminated or marginalized groups:

“On the other hand, the Court finds that Article 24 of the Convention gives rise to a mandate to guarantee material equality, which was not the case in the instant case. In this sense, the right to equality guaranteed by conventional article 24 has two dimensions, the first a formal dimension, which establishes equality before the law. The second, a material or substantial dimension, orders the adoption of positive promotional measures in favor of historically discriminated or marginalized groups due to the factors referred to in Article 1.1 of the American Convention. This means that the right to equality implies the obligation to adopt measures to guarantee that equality is real and effective, that is, correct existing inequalities, promote the inclusion and participation of historically marginalized groups, guarantee people or disadvantaged groups the effective enjoyment of their rights, in short, offering people concrete possibilities to see material equality realized, in their own cases, for this, the States must actively confront situations of exclusion and marginalization.”⁸

The rights of the people and groups in special situations of vulnerability are also protected by other Inter-American legal instruments. The Inter-American Convention Against All Forms of Discrimination and Intolerance protects the human rights of vulnerable groups and places obligations on the States to respect and uphold those rights. Its definition of discrimination includes any distinctions, exclusions, restrictions, or preferences on the basis of factors such as age, sex, sexual orientation, gender identity and expression, language, religion, cultural identity, and more (Inter-American Convention Against All Forms of Discrimination and Intolerance, Article 1.1).

⁷ IACtHR, Case of employees from the fábrica de fuegos in San Antônio De Jesus v. Brazil, Preliminary Objection, Merits, reparations and Costs. Judgement of July, 15, 2020, C No. 407 para. 199 (translation is ours).

⁸ IACtHR, Case of employees from the fábrica de fuegos in San Antônio De Jesus v. Brazil, cit., para 199 (translation and underline is ours).

As previously discussed, discrimination can also be indirect, arising not from purposeful and targeted actions, but rather from a seemingly neutral provision that targets the population generally, yet incidentally disadvantages a particular group (Inter-American Convention Against All Forms of Discrimination and Intolerance, Article 1.2). Furthermore, special or affirmative actions that target one or more specific groups in order to allow them to enjoy the full extent of their human rights is not discriminatory (Inter-American Convention Against All Forms of Discrimination and Intolerance, Article 1.4). Per Article 2, every human being has a right to be free of any form of discrimination and intolerance in both public and private life (Inter-American Convention Against All Forms of Discrimination and Intolerance, Article 2). Additionally, the States have multiple duties to prevent such discrimination and intolerance, such as by avoiding indirect discrimination, stopping targeted discrimination, and creating additional policies and actions to affirm the full enjoyment of the human rights of vulnerable groups (Inter-American Convention Against All Forms of Discrimination and Intolerance, Chapter II).

Thus, vulnerable groups are protected under Articles 24 and 1.1 of the ACHR. They are further protected under Articles of the Inter-American Convention against All Forms of Discrimination and Intolerance as well as other legal instruments and principles of the Inter-American System of Human Rights devoted to specific groups' rights. The adoption of differentiated approaches is justified by the guarantee of equal protection. This applies to persons in special situations of vulnerability while incarcerated. In these situations, differentiated treatment is an obligation of the States.

As previously noted, the Commission limits its request to the conditions of members of five vulnerable groups in the context of long-term incarceration. It bases its argument on the finding of a “differentiated impact faced by these persons during their imprisonment.” (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 6). As a result, the Commission explains, “it [is] necessary for the Court to analyze and develop . . . relevant standards.” (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 6). In particular, the Commission notes that those who belong to vulnerable groups and are subsequently deprived of their liberty in a long-term detention setting are likely to experience prejudice because their needs are different from those of the general prison population. (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 17). To guarantee rights to members of these group—in particular,

their rights to equality and non-discrimination— States must therefore, “adopt measures that respond to a differentiated approach which takes into consideration the particular vulnerabilities and factors that may increase the risk of acts of violence and discrimination in contexts of incarceration . . . [which] also take into account the frequent intersectionality of these factors.” (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 18).

2. Considerations regarding pregnant, postpartum, and breastfeeding women who are deprived of liberty in long-term detention settings.

With regard to pregnant, postpartum, and breastfeeding women, the Commission points out that these women--who may already belong to multiple vulnerable groups--experience a heightened risk of rights deprivations because of the unique physical and psychological needs of their condition. (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 21). These women need specialized treatment to enjoy the same protections of their rights to equality, non-discrimination, and human dignity as other incarcerated women. This need stems from the fact that pregnant, postpartum, and breastfeeding women experience four main deprivations in prison: (i) they receive insufficient prenatal medical care; (ii) they do not receive the nutritious diet pregnancy, and breastfeeding require; (iii) they do not have proper clothing, which increases their risk of injury and the risk of injury to the fetus; (iv) and they are frequently shackled during transfers. (IACHR, Advisory Opinion Request, “differentiated approaches to persons deprived of liberty,” 2019, para 22).

This honorable Court has emphasized the vulnerability of pregnant women. In the IACtHR *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, the Court noted that in its case law since 1997, it considers that the State of Paraguay had full knowledge about the vulnerability of pregnant women in particular. (IACtHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para 159) Furthermore, in the resolution of the provisional measure in the *Matter of Penitentiary Centre of the Andina Region regarding Venezuela* (2012), this Court also provides that “the Court considers it appropriate to emphasize the obligation of the States to take into account the special attention that pregnant and lactating women deprived of liberty must receive during their detention. Likewise, it is the duty of the State to protect women against all forms of

discrimination and violence, even more so when they are in State custody, which is why they must be separated from men and supervised by female personnel.” (IACtHR, Resolution of the Provisional Measure in the *Matter of Penitentiary Centre of the Andina Region regarding Venezuela* 2012, para 14).

Also, the Inter-American Commission has explicitly stated that “on th[e] subject, Article 9 of the Convention of Belém do Pará establishes that the States shall take special account of women’s vulnerability when pregnant.” (IACHR Report on the Access to Maternal Health Services from a Human Rights Perspective 2006, p. 20). The emphasis on the protection of vulnerable populations has been ingrained in the Inter-American System for some time now. Focusing on the particular vulnerabilities of pregnant, breastfeeding and postpartum women is extremely important to realize how to standardize safety measures.

2.1. Vulnerability of incarcerated pregnant, postpartum, and breastfeeding women

A. Pregnant, postpartum, and breastfeeding women are a vulnerable population

The Organization of American States (OAS) has long recognized women as a vulnerable population and gender equality as one of its central mandates. This recognition is evident from the OAS’s establishment of the Inter-American Commission of Women in 1928, an organization tasked with “protect[ing] women’s rights in the Hemisphere so that women and men may participate in all spheres of society on an equal footing.” (OAS, Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality, p. 1).

Furthermore, in 1994 the OAS adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (known as the Belém do Pará Convention), the goal of which was to establish “that the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.” (Belém do Pará Convention 1994, p. 1). Adopting this convention further underscores the assertion that the OAS considers women to be a vulnerable group. The Inter-American System of Human Rights seeks to protect all vulnerable groups, as is evident from the Inter-American Convention Against All Forms of Discrimination and Intolerance, which “reaffirm[s] the resolute commitment of the member States of the Organization of American States

to the complete and unconditional eradication of all forms of discrimination and intolerance.” (Inter-American Convention Against All Forms of Discrimination and Intolerance, 2013, p. 1)

Pregnant, postpartum, and breastfeeding women are a particularly vulnerable subset of this population due largely to the physical, mental, financial, and social risks of pregnancy, birth, and infancy. For example, the World Health Organization (WHO) estimates that “every day in 2017, approximately 810 women died from preventable causes related to pregnancy and childbirth.” (World Health Organization, Maternal Mortality, 2019). Furthermore, most of the women died due to complications that could have been prevented had they had access to appropriate resources and medical care. (World Health Organization, Maternal Mortality, 2019). In the lowest-income countries, “[a] woman’s lifetime risk of maternal death is . . . 1 in 45.” (World Health Organization, Maternal Mortality, 2019). Moreover, postpartum depression, if left untreated, can significantly affect the health of the mother, the mother-child bond, and the long-term health of the child. (Canadian Pediatric Society, 2004). Mothers and their children are also vulnerable to the risk that stress, poor sleep, and inadequate nutrition pose to the mother’s ability to produce milk and breastfeed her child. (Dozier et al., 2012). This is especially troubling when considering that breastfeeding has been endorsed by the World Health Organization as a good thing for babies, providing important nutrition for growth. (World Health Organization, Maternal Mortality, 2019). The risk of death and other complications associated with pregnancy thus positions pregnant, postpartum, and breastfeeding women as an inherently vulnerable population who must receive special medical and psychological treatment in order to protect their right to life. However, these risks can be controlled with proper medical and social attention.

B. Incarcerated women are a vulnerable population

Incarcerated women, whether pregnant or not, are an inherently vulnerable population. Women face unique challenges in prison that affect their right to personal liberty while incarcerated. For example, sexual abuse and violence against women in prison, the inability to access a lawyer to help with their case, and a lack of access to health-care services to treat both mental and physical health issues all represent challenges to personal liberty. (United Nations Office on Drugs and Crime, Handbook on Women and Imprisonment, 2014, p. 4, 10). Part of their vulnerability, as compared to their male counterparts, stems from the fact that “[m]ost women who

are in prison [in Latin America and the Caribbean] have experienced discrimination or violence before being incarcerated.” (Organization for American States, Women, Drug Policies, and Incarceration, 2015 p. 5).

Women have become an increasingly vulnerable population as the number of women incarcerated in Latin American countries has been increasing in recent years. (Clontz 2020). Scholars have linked this increase to “the feminization of poverty, the social liberation of women, economic marginalization, and the War on Drugs.” (Clontz 2020). In particular, many women are imprisoned due to drug convictions, and “in Ecuador, Venezuela, Nicaragua, Panama, and Argentina, close to 80 percent of incarcerated women are incarcerated for drug-related offenses.” (Clontz 2020).

Additionally, prisons in Latin America and the Caribbean are severely overcrowded and are plagued by “shortages of food and water, limited numbers of beds, poor sanitation and hygiene, inmate-on-inmate and staff-inmate violence, and institutional mismanagement.” (Limoncelli, Mellow & Na, 2020 p. 1). These conditions contribute to problems including “the spread of lethal infectious diseases . . . violence, riots, escapes, and recidivism.” (Limoncelli, Mellow & Na, 2020, p. 1).

C. The intersectionality of incarcerated pregnant, postpartum, and breastfeeding women requires heightened protection to guarantee their rights of equal protection, nondiscrimination, and human treatment

Incarcerated women who are pregnant, postpartum, and breastfeeding belong to more than just one vulnerable group. To understand the full extent of the vulnerability of women in these situations, their experience must be viewed through the lens of intersectionality, which “characterize[s] the convergence of multiple stigmatized identities within a person or group . . . to address their effects.” (Turan et al., 2019, p. 1).⁹ Scholars have noted that “[a]n intersectional perspective is vital to understanding the experiences and consequences of living with multiple stigmatized identities.” (Turan et al., 2019, p. 2).

⁹ Furthermore, women who have experienced racism and discrimination prior to pregnancy and incarceration are at an even higher risk of pregnancy complications due to “toxic stress.” (PBS, 2018).

Intersectionality is an essential component of the vulnerable populations' protection in the Inter-American System of Human Rights, particularly regarding incarcerated women's' human rights protection. Article 3 of the IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (OAS, 2008) establishes that States should adopt "measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers" when fulfilling the States' obligations to ensure equality and non-discrimination for all incarcerated persons. (OAS, 2008) Article 12 explains that States "shall take into account the special needs of . . . pregnant women or breastfeeding mothers," when providing sleeping, clothing, and hygiene accommodations to those deprived of their liberty. (OAS, 2008).

There is growing research in the area of the intersectionality of "systems of oppression and the need to work toward structural changes to promote social justice and equity." (Gueta, 2020, p. 1). Exploring the plight of incarcerated pregnant, postpartum, and breastfeeding women through an intersectional lens brings to light the specific needs of this vulnerable and invisible subgroup of women. (Gueta, 2020, p. 2). Race and class frequently interact with gender to render incarcerated women particularly vulnerable. (Gueta, 2020, p. 3). The IASHR, by employing the lens of intersectionality, can adapt its general standards to address these and other structural inequalities that make women vulnerable, and indeed, lead to their incarceration. (Gueta, 2020). To fully protect this subgroup of women's rights, States thus must understand that they are vulnerable in multiple ways.

Cases of the IACtHR highlights the importance of intersectionality in the Inter-American analysis. In *Miguel Castro Prison v. Peru*. (IACtHR, Case of Miguel Castro Prison v. Peru 2006, "in totum"), officials at the Miguel Castro Prison in Peru abused and beat prisoners, some of whom were pregnant women. There, the Court emphasized the intersectionality of issues faced by pregnant women, stating that "the pregnant women who lived through the attack experienced an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings on anguish, despair, and fear for the lives of their children." (IACtHR, Case of Miguel Castro Prison v. Peru 2006, para 260, 292).

Furthermore, in *Cuscul Pivaral v. Guatemala*, the Court noted that "intersectional discrimination is the result of the confluence of different factors of vulnerability or sources of discrimination associated with certain conditions of an individual." (IACtHR, Case of Cuscul Pivaral v. Guatemala, 2018, para. 138). Because of this, "discrimination against women based on

sex and gender is indivisibly combined with other factors that affect women, and this type of discrimination may affect women from some groups to a different degree or in a different way than it affects men.” (IACtHR, Case of Cuscul Pivaral v. Guatemala, 2018, para. 138). As a result, the Court found that, “in their legal instruments, States should recognize and prohibit these intersecting forms of discrimination and their combined negative impact on the women concerned, as well as adopt and implement policies and programs to eliminate such situations.” (IACtHR, Case of Cuscul Pivaral v. Guatemala, 2018, para. 138).

In sum, women who are incarcerated face multiple, interconnected issues. Therefore, applying an intersectional analysis is necessary to guarantee equal protection and non-discrimination for this particularly vulnerable group of women.

2.2. International standards and amicus proposals

This amicus brief roots its proposals in the Inter-American legal framework, the international minimum standards for treatment of incarcerated pregnant women, based on the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)¹⁰, and the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)¹¹. Regarding the Inter-American legal framework, this amicus refers to the ACHR, the Belém do Pará Convention, the Inter-American Convention Against All Forms of Discrimination, and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

¹⁰ The UN Standard Minimum Rules (Mandela Rules) have served during the last decades and even more after its review in 2015, as the most widely accepted and respected international rules of detention centers. Even though the Rules are not an international treaty and are not immediately binding, they guide public officials including prison and judicial authorities in interpreting applicable law and standards (Cavallaro, Vargas, Sandoval and Duhaime 2019, p. 487). This honorable IACtHR has held that the UN Standard Minimum Rules constitute standards to be observed in detention centers in the Americas (Cavallaro 2019, p. 487), particularly in the case of *Urso Branco Prison v. Brazil* (IACtHR., Matter of *Urso Branco Prison* regarding Brazil. Provisional Measures. August 29, 2002, para 10) and the case of *Boyce et. al. v. Barbados* (IACtHR, Case of *Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, para 88).

¹¹ The General Assembly approved the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) on December 21, 2010 (R/RES/65/229). This honorable Inter-American Court has invoked the Bangkok Rules as fundamental international standards for protecting incarcerated women rights. Among others, IACtHR, Case of *J. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para 328.

It also turns to the guidance of international bodies such as the World Health Organization and professional medical associations such as the American College of Obstetricians and Gynecologists (ACOG). The ACOG is one of the leading professional associations of obstetricians and gynecologists and consists of over 60,000 members across North and South America. Because the International Human Rights Practicum operates out of Boston College Law School in Massachusetts, this brief also turns to U.S. and Massachusetts law as persuasive resources. It also turns to the U.S. National Library of Medicine National Institutes of Health, operated by the United States federal government and is the world's most extensive medical library. Through articles, the library provides valuable statistics and information pertaining to women's health.

NGOs are also helpful resources, providing information on the on-going standards about women's health. The ACLU is a nonprofit organization in the United States focused on defending and preserving individual rights and liberties guaranteed by the U.S. Constitution. The organization provides valuable research and statistics on the protection of women in prisons.

A. General and Basic Standards for the Treatment and Protection of Incarcerated Pregnant Women

Numerous universal standards protect the rights of incarcerated pregnant and postpartum women. Article 25 of the Universal Declaration of Human Rights states that "motherhood and childhood are entitled to special care and assistance." Article 10 of the International Convention on Economic, Social, and Cultural Rights (ICESCR) provides that "Special protection should be accorded to mothers during a reasonable period before and after childbirth." (UDHR, 1948; ICESCR, 1966). Furthermore, Rule 42 of the Bangkok Rules mandates that prisons "shall be flexible enough to respond to the needs of pregnant women [and] nursing mothers," and that "particular efforts shall be made to provide appropriate programs for pregnant women, [and] nursing mothers." (Bangkok Rules, 2010). Moreover, Rule 64 of the Bangkok Rules prefers non-custodial sentences for pregnant women where possible and appropriate. (Bangkok Rules, 2010). Finally, Rules 24–34 of the Mandela Rules mandate that prisoners have access to comprehensive health care and qualified physicians. Rule 28 applies specifically to prisons with female inhabitants, directing prisons to provide "special accommodation for all necessary prenatal and

postnatal care and treatment," and further stating that "arrangements shall be made wherever practicable for children to be born in a hospital outside the prison." (Mandela Rules, 2016).

In consequence, international standards require that conditions of incarcerated pregnant women be based on the following principles: (i) Principle of flexible prison regimen, to respond to the pregnant women's needs and provide appropriate services for women prisoners. (ii) Non-custodial sentences for pregnant women shall be preferred where possible and appropriate. (ii) Separate pavilions with special accommodations for pregnant, postpartum, and breastfeeding women should be provided in any prison guaranteeing special health care treatment.

B. States are obligated to ensure that pregnant women in long-term detention facilities are guaranteed access to full, professional prenatal medical care.

For States to fulfill the mandate of personal dignity embodied in these descriptions of rights, all women, including those in long-term detention facilities, must be entitled to appropriate medical care during pregnancy. Article 10 of the IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas specifically obligates States to provide women deprived of their liberty with "specialized medical care . . . [that] adequately meets their reproductive health needs . . . [including] access to gynecological and pediatric care, before, during, and after giving birth." (IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 2008, p. 161). Article 10 is consistent with ACHR Articles 1, 4, and 5, which recognize that every person has the rights "to personal liberty and security," "to have his physical, mental, and moral integrity respected," and "to have his life respected."¹² Moreover, the Convention of Belém do Pará states that "[e]very woman has the right to recognition, enjoyment, exercise and protection of all human rights and freedoms," including the right to life, the rights to "physical, mental, and moral integrity," and "[t]he right to have the inherent dignity of her person respected and her family protected."¹³ The Convention of Belém do Pará clearly expresses that "every woman" has these rights, including incarcerated pregnant women. Thus, international standards, as well as the AHCR, require states to provide women in long-term incarceration appropriate medical care during pregnancy.

¹² American Convention on Human Rights, Articles 1, 4 and 5.

¹³ Convention of Belém do Pará, Article 4.

According to the World Health Organization (WHO), thousands of women and millions of babies die each year due to the lack of appropriate prenatal medical care.¹⁴ (World Health Organization, *Pregnant Women Must be Able to Access the Right Care at the Right Time, Says WHO*, 2016). Prenatal care includes medical care as well as appropriate nutrition. WHO recommends that pregnant women have at least eight visits with a health care provider during pregnancy, because this ensures they obtain medical care and education about nutrition, diseases, and family planning (WHO, *Pregnant Women Must be Able to Access the Right Care at the Right Time, Says WHO*, 2016). Moreover, States should ensure that women have access to a doctor or dietitian who can assess whether they are consuming enough vitamins and who can determine whether the food they have access to is of the quality they need or not. (Alirezai & Roudsari, 2020).

Furthermore, pregnant incarcerated women should have unlimited access to water and snacks between meals so that they do not become dehydrated or hungry. (Alirezai & Roudsari, 2020). Because all of these measures are instrumental in protecting the rights -- and the lives -- of mothers and their children, they are an essential obligation of States who have incarcerated women in their custody.¹⁵

Many women in long term detention have faced extreme adversity before their incarceration, and therefore experience chronic illnesses at higher numbers than other women, are more likely to suffer from substance abuse, and are also at higher risk of having other medical problems undiagnosed and unattended. (American College of Obstetricians and Gynecologists, *Reproductive Health Care for Incarcerated Women and Adolescent Females*, 2012). The American College of Obstetricians and Gynecologists (ACOG) explains that [i]n general, care for incarcerated women . . . should be provided using the same guidelines as those for women . . . who are not incarcerated, with attention to the increased risk of infectious diseases and mental health

¹⁴ The World Health Organization estimates that in 2015, “303,000 women died from pregnancy related causes, 2.7 million babies died during the first 28 days of life and 2.6 million babies were stillborn.” (World Health Organization, *Pregnant Women Must be Able to Access the Right Care at the Right Time, Says WHO*, 2016).

¹⁵ These standards are also included in Rule 48 of the Bangkok Rules and Rule 28 of the Mandela Rules. Rule 28 of the Mandela Rules provides that, “In women’s prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment.” (Mandela Rules, 2015). Rule 48 of the Bangkok Rules provides that “Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a program to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.” (Bangkok Rules, 2010).

problems common to incarcerated populations." (ACOG, Reproductive Health Care for Incarcerated Women and Adolescent Females, 2012). The ACOG further notes that more research is needed into pregnant incarcerated women's special needs, including the types of services and health care providers that are best positioned to meet these needs. (ACOG, Reproductive Health Care for Incarcerated Women and Adolescent Females, 2012).¹⁶ By highlighting that incarcerated pregnant women may have special needs, even above and beyond those of other women, the ACOG is touching on the undisputable importance of adequate healthcare for pregnant women in correctional settings.

Currently, access to comprehensive and professional prenatal care in prisons is disproportionate, in the sense that basic medical care for pregnant women requires more than it does for nonpregnant women, and inconsistent. The National Commission on Correctional Health Care in the United States adopted a position statement in 1994, recommending the need to view incarcerated women as a particular population and provide appropriate treatment. (Hoteling 2008). There are some model pregnancy and birth programs in the U.S., such as the Doula Birth-Support Program and the Schroeder and the Camp Share Program. (Hoteling 2008). Both aim to provide women in prison with information, skills, and training about prenatal care and to ensure that their experiences align more closely with the pregnancies of women who are not incarcerated. These programs can help frame the way that prenatal care and access to resources and information should be handled in the Inter-American System.

Furthermore, the Bangkok Rules outline some other measures and recommendations on what international standards should be. Rule 6 states that women's health screening is necessary and that it must be comprehensive to determine primary health-care needs. Rule 25.2 of the Rules states that there needs to be special attention given to pregnant women prisoners subjected to sexual abuse, especially to those who have become pregnant as a result. By providing more accurate training to prison personnel about the unique issues that pregnant women face, prisons can begin to ensure that they provide adequate care to incarcerated pregnant women.

¹⁶ The ACOG recommends increased "support funding for research on the health needs of incarcerated women . . . the services they require, the qualifications of the health care provider, the location of the service, and the outcomes of these services." (American College of Obstetricians and Gynecologists, *Reproductive Health Care for Incarcerated Women and Adolescent Females*, 2012).

C. What are the minimum conditions that the State should guarantee during labor and while giving birth?

Subjecting an incarcerated woman to inhumane treatment while she is pregnant or in labor constitutes a violation of the ACHR, which provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment and treatment,” and that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the person.”¹⁷ For incarcerated women, the prohibition of cruel treatment and torture might easily be violated if they are subjected to inhumane treatment while they are pregnant and while they are giving birth.¹⁸

In addition to the ACHR, other international instruments stress the importance of proper medical care for pregnant women in the global human rights framework. The Mandela Rules state that in women’s prisons, “there shall be special accommodation for all necessary prenatal and postnatal care and treatment.” (Rule 28). Rule 24 of the Bangkok Rules states that “prisoners should enjoy the same standards of healthcare that are available in the community.” Both the Bangkok and Mandela Rules find a right to give birth in a proper place, preferably in a hospital with proper medical attention. Also, under Bangkok Rule 5, pregnant incarcerated women have a right to hygiene supplies postpartum and this is on the State to provide these materials.

The practice of shackling women during labor and delivery violates international standards. Shackling impedes the mothers’ ability to give birth, choose her birthing position, and receive appropriate healthcare, and thus in most instances, violates Article 5 of the ACHR prohibition on torture and cruel punishment. The trend against pregnant women being shackled during pregnancy and labor is increasing in the OAS States. In the United States, “the Federal Bureau of Prisons, the U.S. Marshals Service, the American Correctional Association, the American College of Obstetricians and Gynecologists (ACOG), the American Civil Liberties Union (ACLU) and the American Public Health Association all opposed shackling women during labor, delivery, and postpartum recovery because it is unnecessary and dangerous to a women’s health and well-

¹⁷ American Convention on Human Rights, Article 5.2.

¹⁸ See United Nations Office of the High Commissioner, *Reproductive Rights Are Human Rights: A Handbook For National Human Rights Institutions*, (2014), <https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf> (explaining a similar provision in the UN Convention Against Torture in light of pregnant incarcerated women).

being.”¹⁹ (Federal Bureau of Prisons, 2008). Thus, women should never be shackled while giving birth because this practice violates international standards against cruel treatment and torture.

D. What safety measures should States take when transferring pregnant women that are compatible with their special needs?

As mentioned, the ACHR provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment and treatment.”²⁰ The shackling of pregnant inmates during transfer risks the health of both the woman and her baby. This can be classified as highly inhuman and cruel under the standards of the American Convention. Furthermore, Amnesty International recommends that “policies on the use of restraints should prohibit their use on pregnant women when they are being transported and when they are in hospital awaiting delivery; on women who have just given birth; and on seriously sick inmates when they are being transported to, and when they are in, hospital.” (Amnesty International, United States of America: Rights for All).

The ACLU notes that shackling pregnant women poses special harms like throwing them off-balance, preventing them from catching themselves if they fall, potentially harming themselves and the fetus, and can cause dangerous blood clots. (Kuhlik, 2019). There has been a consistent trend in the United States, in many States, against pregnant women's shackling during transfers. There is on-going consensus that shackling pregnant women is dangerous and puts the baby at risk. (Cohen 2018). In 2018, the United States enacted the First Step Act, taking the first step, towards increased protections for pregnant women in prison. (Samant 2018). The Act moved towards a total federal ban on pregnant women's shackling during pregnancy and for a period thereafter. (Samant 2018). When being transferred to hospitals to give birth, the special needs of women are closely linked with their right to adequate medical care.

The National Commission on Correctional Healthcare (NCCHC), a non-profit in the United States dedicated to improving the standard of care in the field of correctional health care, outlined the safest way for prisons to transport pregnant inmates to hospitals. Their position is that "restraints during transport to the hospital or during labor and delivery should not be used, except

¹⁹ See American Civil Liberties Union, *Bureau of Prisons Revises Policy on Shackling of Pregnant Inmates*, (2008) (describing shackling as “just one of the many dangerous and inhumane practices that pregnant women face in prison).

²⁰ American Convention on Human Rights, Article 5.2.

where necessary." (Restraint of Pregnant Women 2015). When restraint is necessary, the NCCHC recommends that "it should be done by the least restrictive means necessary and in a way that mitigates adverse clinical consequences." (Restraint of Pregnant Women 2015).

Other recommendations by the NCCHC include no abdominal restraints that directly constrict the area of pregnancy; if used, wrist restraints should be applied in such a way that the pregnant inmate can protect herself and the fetus in the event of a forward fall, pregnant inmates should never be placed in a facedown position or in four-point restraint, leg and ankle restraints should not be used because they increase the risk of forwarding fall, and pregnant inmates should never be chained to other inmates. (Restraint of Pregnant Women 2015).

In 2014, the U.S. Department of Justice outlined a similar set of guidelines on pregnant inmates' shackling during transfer. (Bureau of Justice Assistance 2014). Furthermore, in the U.S. House Bill, H.R. 6805, the United States Congress explicitly stated that the "use of restraints can cause injuries to mothers and their babies including physical trauma due to falls, increased pain during labor from bone separation and muscle tears, blocked circulation, and miscarriage." (Pregnant Women in Custody Act 2018). For this reason, the shackling of pregnant women during their transfer to hospitals should be avoided at all costs and, if necessary, should be done with regard to their health and safety as described by the standards outlined by the NCCHC and the U.S. Department of Justice. Also, training prison personnel on the standards that they must follow is vital to ensure that they are enforced.

E. In the context of deprivation of liberty, what is the scope of the right of access to information for women who are pregnant, postpartum and breastfeeding, as regards information on their special condition?

States are obligated to ensure that pregnant women are fully informed about matters relating to their health and pregnancy.

Article 5 of the ACHR recognizes the right to humane treatment, including the right to have "physical, mental and moral integrity respected."²¹ Furthermore, the Convention recognizes

²¹ American Convention on Human Rights, Article 5.

a right to privacy where “everyone has the right to have his honor respected and his dignity recognized.”²² In addition, the Belém do Pará Convention recognizes the “right to have the inherent dignity of her person respected” and the “right to have her life respected.”²³ Access to information regarding a woman’s health and pregnancy helps ensure that women maintain their rights to personal dignity and respect for life as required by both Conventions.

Under the Mandela Rules (Rules 24-35), it is required of prisons to have and provide adequate health services and information to prisoners. Notably, the Rules require special treatment and attention to patients with particular specialized needs. In addition, the persuasive authority of the European Court of Human Rights also recognizes that “no one should be subjected to torture or to inhumane or degrading treatment or punishment” under Article 3 of the European Convention on Human Rights.²⁴

The ACOG explains that the personal autonomy of the patient is the primary goal underscoring the informed consent requirement in obstetrics and gynecology. (ACOG, *Ethical Decision Making in Gynecology and Obstetrics*, 2007). The ACOG further provides that “one of the most important elements of informed consent is the patient’s capacity to understand the nature of her condition and the benefits and risks of the treatment that is recommended as well as those of the alternative treatments.” (ACOG, *Ethical Decision Making in Gynecology and Obstetrics*, 2007). She must then be free to make voluntary choices about the various alternative treatments she has discussed with her doctor, and this “voluntariness” requires that she “be free from coercion, pressure, or undue influence.” (*Id.*) For an incarcerated woman who is pregnant, postpartum, or breastfeeding, her right to personality liberty in medical care is thus only protected if she is given full, expert information about her medical condition, and if she is then permitted to make choices based on that information.

In America, “federal acts and regulations, as well as professional guidelines, state that every pregnant woman has the right to base her maternity care decisions on accurate, up-to-date, comprehensible information.” (Goldberg, 2009). This right must continue to be protected when a pregnant woman is in prison in order to ensure that the woman's life and dignity is respected and

²² American Convention on Human Rights, Article 11.

²³ Convention of Belém do Pará, Article 4

²⁴ European Convention on Human Rights, Article 3.

guaranteed as required by the Inter-American legal framework. Providing women with information in their preferred language on a consistent basis is necessary to ensure proper care.

Ultimately, incarcerated pregnant women have a right to be informed about their medical condition, about nutrition, and about the postpartum and breastfeeding process just as non-incarcerated women do. Ensuring continued discourse between prison personnel, appropriate medical personnel, and these women about their health is essential to ensure they receive the necessary care. Just because a woman is in prison, it does not make her any less human and responsive to the process of being pregnant. Today, however, the rights and liberties that all humans enjoy are being infringed upon in regards to incarcerated pregnant women.

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

Women should not be separated from their children immediately after birth. Postpartum and breastfeeding women should be permitted to spend time with, nurse, and bond with their children.

The ACHR provides that every person must “have his physical, mental, and moral integrity respected,” and “have his life respected.”²⁵ In Article 17, the Convention also acknowledges the importance of a family unit and states that this unit is “entitled to protection by society and the State.” In addition, The Convention of Belém do Pará recognizes that women have “the right to simple and prompt recourse to a competent court for protection against acts that violate her rights” and “the rights to have the inherent dignity of her person respected and her family protected.”²⁶ These rights can only be realized if women are not separated from their children immediately after birth and are permitted to spend time with, nurse, and bond with their infants. The rights protected under both the American Convention on Human Rights and the Convention of Belem do Para do not expire or cease to exist just because a woman is in prison. Besides, the persuasive authority of

²⁵ American Convention on Human Rights, Articles 4 and 5.

²⁶ Convention of Belém do Pará, Article 4.

the European Convention on Human Rights recognizes in Article 8 that “everyone has a right to respect for his private and family life, his home and his correspondence.”²⁷

The United Nations Rules for the Treatment of Women Prisoners (Bangkok Rules) states that decisions on whether to allow children to stay with their mothers in prisons shall be based on the children’s best interests.²⁸ The European Court of Human Rights has adopted this approach when balancing what is best for the child upon birth in its cases.²⁹ Furthermore, when analyzing this exact issue in 2020, the European Court of Human Rights cited a case, *Korneykova and Korneykov v. Ukraine*, where it determined that “in a situation in which the mother is detained and where the new-born child remains with her under the full control of the authorities, an obligation arises for the authorities to secure adequately the child’s health and well-being.”³⁰ The Inter-American Court of Human Rights should find a similar obligation on authorities in the Inter-American system, especially because the reasoning behind the European’s system adoption of this standard was formulated in discourse with the international organizations driving these protections.

Experts advise that “mothers and babies have a physiological need to be together at the moment of birth and during the hours and days that follow.” (Crenshaw, 2014). The World Health Organization and the United Nations Children’s Fund “recommend that all healthy mothers and babies, regardless of feeding preference and method of birth, have uninterrupted skin-to-skin care beginning immediately after birth for at least an hour, and until after the first feeding, for breastfeeding women.” (World Health Organization & UNICEF, 2009). From a medical standpoint, when children are immediately taken away from their mothers after birth, they lack the necessary skin-to-skin care which forms their development. This violates the right to have the woman’s family protected as required by the Convention of Belem do Para and the right of family protection under the American Convention on Human Rights. Furthermore, it has been shown that “disrupting or delaying skin-to-skin care may suppress a newborn’s innate protective behaviors, lead to behavioral disorganization, and make self-attachment and breastfeeding more difficult.”

²⁷ European Convention on Human Rights, Article 8.

²⁸ Bangkok Rules, United Nations.

²⁹ Guide on the Case Law, European Court of Human Rights, Prisoners’ Rights, 2020, p. 51, https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf.

³⁰ Guide on the Case Law, European Court of Human Rights, Prisoners’ Rights, 2020, p. 51 https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf.

(Crenshaw 2014). Therefore, it is of paramount importance that women are able to bond with their children through skin-to-skin care after birth and that children are not taken away from their mothers after birth. Furthermore, it is important that these women have the necessary hygienic supplies, and the proper information about breastfeeding and childcare, as is required by the Bangkok and Mandela Rules.

The benefits of restricting the separation of mothers and their children continue after the children are infants. The emotional connection between a mother and her children continues throughout life and is critically important as they develop into adults. There has been a steady increase in prison nursery programs in the United States, providing mothers with parenting classes, support groups, substance abuse counseling, and complementary day-care services to attend these classes. (Johnson). The benefits of these programs can strengthen the relationships between mothers and their children. The positive effects often continue after women re-enter society.

2.3 Conclusion and recommendations on long-term detention conditions of pregnant, postpartum and breastfeeding women

The unique circumstances of pregnant, postpartum, and breastfeeding women in prison require special attention in order to ensure that their human rights to dignity, health, personal liberty, and life are respected in equal condition to those of other incarcerated women and non-incarcerated pregnant women. The State should provide this special attention according to Article 1 and Article 24 of the ACHR as a guarantee of the equal protection and non-discrimination right of these vulnerable populations. The challenges that pregnant women face when not in prison, from learning about what pregnancy entails to adjusting to a new lifestyle, are only exacerbated in prison's stressful circumstances. As the Inter-American Commission Advisory Opinion Request cites, women face a "differentiated impact" and require increased protection of their rights while pregnant in prison and breastfeeding (IACHR, Advisory Opinion Request "Differentiated approaches to persons deprived of liberty," 2019, para 26). The rights that women are afforded outside of prisons should also be guaranteed when incarcerated. Therefore, protections safeguarding these rights need to be increased in order to ensure universal guarantees of these human rights.

The principal international standards pertaining to the special approach of incarcerated pregnant, breastfeeding, and postpartum women are the following:

1. In general, care for incarcerated pregnant, breastfeeding, and postpartum women should be provided using the same guidelines as those for women who are not incarcerated, with attention to the increased risk of infectious diseases and mental health problems common to incarcerated populations.
2. The conditions of incarcerated pregnant, breastfeeding, and postpartum women should always be based on the following principles: (i) Principle of flexible prison regimen, to respond to the pregnant women's needs and provide appropriate services for women prisoners. (ii) Non-custodial sentences for pregnant women shall be preferred where possible and appropriate. (ii) Separate pavilions with special accommodations for pregnant, postpartum, and breastfeeding women should be provided in any prison guaranteeing special health care treatment.
3. Pregnant, breastfeeding and postpartum women should have access to prenatal care and medical supplies while in prison, especially in long-term detention facilities.
4. Pregnant, breastfeeding and postpartum women should have access to all medical information regarding their health and be allowed to make choices about their health condition after receiving this information.
5. Pregnant, breastfeeding, and postpartum women should not be shackled unless absolutely necessary, but not shackled at the leg and ankles or around the abdomen, and never while giving birth because they need unhindered body movement to choose what position they give birth in to ensure a safe delivery.
6. When transferring pregnant women prisoners, guidelines must be followed about shackling the women to ensure that their health is protected, specifically that they be able to walk in a manner that allows them to remain balanced and avoid tripping and falling, and that wrist restraints are applied in such a way that the pregnant inmate can protect herself and the fetus in the event of a downward fall. If possible, shackling during transfer should be avoided.
7. No abdominal restraints that directly constrict the area of pregnancy should ever be used.
8. Breastfeeding and postpartum women should not be separated from their children immediately upon giving birth. They need time to bond and to feed their children to

ensure proper development. Skin-to-skin contact after birth is necessary for appropriate development.

9. Women must be free to make voluntary choices about alternative treatments they discuss with their doctor. This "voluntariness" requires that they "be free from coercion, pressure, or undue influence."
10. In line with the World Health Organization recommendations, pregnant women must have at least eight visits with a health care provider during pregnancy.
11. States should ensure that women have access to a doctor or dietitian who can assess whether they are consuming enough vitamins and who can determine whether the food they have access to is sufficiently nutritious.
12. Pregnant, breastfeeding, and postpartum incarcerated women should have unlimited access to water and snacks between meals so that they do not become dehydrated or hungry.
13. All possible accommodations should be made to have a child's birth occur at a hospital outside of the prison, with proper maternal conditions.
14. Providing women with information in their preferred language on a consistent basis is necessary to ensure proper care.

3. Considerations regarding LGBT individuals who are deprived of liberty in long-term detention settings

The LGBT community experiences a disproportionate amount of existing prejudice. Due to this bias, the group faces targeted discrimination while in long-term detention. This includes exposure to violence, harassment, humiliation and degradation, rejection of gender identity, and sexual assault. Therefore, targeted anti-discrimination policies are beneficial. (IACHR, Advisory Opinion Request on "Differentiated approaches to persons deprived of liberty", 2019, paras. 29-30).

The LGBT community requires certain special provisions to enjoy the same benefits as the general prison population due to existing provisions that promote indirect discrimination. For example, transgender individuals require specialized medical attention that is not generally

available in prisons. Similarly, many prison systems will place individuals in wings or complexes based on birth sex and not gender identity, which causes hardships for those individuals. These types of issues would benefit from targeted special provisions (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, paras. 32, 34).

While some relevant judicial opinions tackle specific aspects of the hardships that these groups face in long-term detention, no opinion has set broad standards for their protection. In the Matter of the Curado Prison Complex with regard to Brazil, this honorable Court gave provisional measures to protect the rights of LGBT individuals. The IACtHR recognized that LGBT individuals are particularly vulnerable in long-term detention and require affirmative measures of protection, including not placing LGBT individuals with other inmates who posed a risk to their safety, ensuring they receive adequate medical care and allowing conjugal visits with romantic partners (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, paras. 61-63).

Generally, the Advisory Opinion Request seeks a comprehensive interpretation of State obligations based on the ACHR, treaties, and other instruments over which the IACtHR has jurisdiction about the protection of human rights of the five referred groups in long-term detention (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, para. 72). Regarding LGBT individuals, the Advisory Opinion Request asks specifically: 1) how States should take into account gender identity when determining the unit where an LGBT individual will be placed; 2) what specific obligations States may have to prevent violence against LGBT individuals that do not involve segregation; 3) what specific obligations States may have regarding the needs of transgender individuals, including those who have begun or wish to begin the transition process; 4) special measures States should adopt to ensure LGBT individuals may have intimate visits; and 5) any particular obligations the States have regarding recording different types of violence that LGBT individuals suffer while deprived of liberty (IACHR, Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty”, 2019, section V subsection C).

3.1. Vulnerability of LGBT persons

A. Existing prejudice against LGBT persons

In many countries across the world, LGBT people face societal prejudice based on their identities. These prejudices manifest in several ways, including social stigmatization, criminalization of sexual identity, and targeted violence based on sexual orientation and gender identity. In many western societies, including Latin America, the culture is biased towards heteronormativity and cisnormativity. Thus, there is a rigid gender binary where the only widely accepted genders are male and female. Further, the only widely accepted sexual orientation is heterosexual. These terms describe a society that views being homosexual, bisexual, transgender, and intersex as abnormal, and may even be seen as deviant. As such, LGBT individuals face serious social stigmatization (IACHR, *Violence against Lesbians, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OAS/Ser.L/V/II.rev.1 Doc. 36, 2019, pp. 36-41). This stigmatization leads to discrimination and violence in their communities. For example, in a 15-month period between January 2013 and March 2014, the IACHR recorded over 594 killings based on the victims' gender orientation. Many of the killings showed an intense level of cruelty exceeding that of other hate crimes. Many victims suffer "multiple forms of extreme humiliation, debasement, torture and rape," and these issues are only exacerbated while incarcerated (IACHR, *Violence against Lesbians, Gay, Bisexual, Trans and Intersex Persons in the Americas*. 2019, pp. 76-79).

According to data from the United States, transgender individuals, in particular, are more likely to end up in jail than the general population (Johnson 2019, p. 332; National Center for Transgender Equality 2018, p. 6). Additionally, a study into the transgender prison populations in Latin America uncovered that transgender individuals may have a more challenging time finding work than the general population and therefore turn towards illegal measures to survive (Johnson 2019, p. 336). Being transgender also may attract negative societal attention, including more police attention (Johnson 2019, p. 332). Thus, transgender individuals are jailed at higher rates than the general population (National Center for Transgender Equality 2018, p. 6).

This Court has heard cases of discrimination against LGBT individuals. One example is in the Matter of the Curado Prison Complex, a previously cited case from Brazil. Gay inmates were the targets of poor detention conditions and physical violence, including a gang rape likely carried out to condemn the LGBT individual's identity. This Court affirmed the importance of protecting

the LGBT population while deprived of liberty. Another such case is the Case of Azul Rojas Marín et al. v Peru, in which a woman was sexually assaulted and subjected to acts of physical and mental violence by the police, who targeted her because she was LGBT.³¹ Consequently, the IACtHR implemented various reparations in recognition of the systemic discrimination faced by LGBT individuals in Peru. Further, the IACtHR has recognized that sexual orientation and gender identity are protected by the ACHR in an advisory opinion that it has issued.³²

B. Issues are exacerbated in prison

The issues faced by LGBT individuals are exacerbated by poor prison conditions, including a lack of segregation in prison and inadequate medical care. LGBT individuals are unlikely to be placed in cells or cell blocks that correspond to their gender identity. It is worse for transgender individuals, who are generally placed in cells according to their gender identity at birth. This situation opens up many LGBT people to violence in prison by members of the prison population that view LGBT negatively and opens up transgender individuals to more targeted harassment. Indeed, this population is disproportionately likely to experience assault and harassment (Johnson 2019, p. 333).

A lack of medical care in prisons tends to affect LGBT individuals disproportionately as well. Prisons across Latin America struggle with a lack of resources in general, which extends to the area of medical treatment. For example, according to Human Rights Watch in 2015, in the Brazilian state of Pernambuco, there are only 161 employed medical professionals to care for over 30,000 prisoners (Human Rights Watch 2015, p. 10). While abhorrent for all prisoners, these conditions disproportionately affect LGBT individuals, as they are in more need of medical services. This situation especially affects trans individuals who need greater medical care due to higher rates of substance abuse, sexually transmitted diseases, and mental health issues (Johnson 2019, p. 333). This lack of care also prevents trans individuals from having their unique needs met, such as access to hormone therapy.

³¹ IACtHR, Case of Azul Rojas Marín et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of March 12, 2020, paras. 244 and 248.

³² IACtHR Advisory Opinion OC-24/17 of November 24, 2017, cit., para. 68.

In addition to being victims of physical violence in prison, LGBT inmates are often victims of psychological trauma. Once in prison, LGBT individuals face high levels of discrimination and victimization (IACHR, *Violence against Lesbians, Gay, Bisexual, Trans, and Intersex Persons in the Americas*. 2019, pp. 76-79). Inmates are often put in situations where they must choose between sexual assault and being subjected to other forms of physical violence (Johnson 2019, p. 338). Such targeted abuse can lead to psychological trauma, such as anxiety, post-traumatic stress disorder, rape trauma syndrome, and depression (Chivers-Wilson 2006, p.112-113; Boxer 2009, p. 795-796). These symptoms will stay with the inmates post-release (Boxer 2009, p. 802).³³

3.2 International standards and amicus proposals

We address the policy recommendations by responding to the specific questions posed in Section V of the Request (IACHR, *Advisory Opinion Request on “Differentiated approaches to persons deprived of liberty,”* 2019, section V).

A. How should States take into account the gender identity with which a person identifies himself or herself when determining the unit where they should be placed?

Per the Yogyakarta Principles³⁴, the States must ensure placement avoids further marginalization for LGBT individuals (Yogyakarta Principles on the Application of the International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006. Principle 9). Inmates should participate in the decision about where they will ultimately be placed, and their placement be consistent with their identity expression and should reflect their needs. The Nelson Mandela Rule 7.a mandates that authorities must take into account the inmate’s unique identity and self-perceived gender (Mandela Rules, Rule 7.a). For example, if an inmate identifies

³³ The Court has also recognized the negative psychological effects that discrimination on the basis of LGBT status has on individuals. The discrimination that LGBT individuals face can rise to the level of a violation of Article 5(1) of the ACHR (IACtHR Advisory Opinion OC-24/17 of November 24, 2017, para. 48).

³⁴ The Court has previously recognized the importance of the Yogyakarta Principles in framing issues of policy and rights for LGBT individuals and has applied the principles in other situations, such as the Advisory Opinion of November 24, 2017 (IACtHR Advisory Opinion OC-24/16 of November 24, 2017).

as male and prefers to be placed at a male prison, then all effort should be made to accommodate that inmate in the male prison, regardless of sex at birth.

Authorities must also consider that the most suitable placement for an individual may change over the course of detention. Thus, the Association for the Prevention of Torture recommends consultations with inmates throughout their detention regarding their most suitable placement (Association for the Prevention of Torture 2018, pp. 68-69). If authorities cannot ensure the safety of LGBT individuals if placed in their preferred units, authorities should consider alternate housing options. However, alternate housing should not be wings or units where the sole purpose is housing LGBT inmates. This form of segregation leads to further stigmatization and discrimination (Association for the Prevention of Torture 2018, p. 65).

The 2016 United Kingdom prison instructions regarding The Care and Management of Transgender prisoners recommends specific actions that would significantly improve the treatment of trans inmates (Beard 2018, Pp. 10-11). It suggests that arrangements be made to determine the inmates' self-identified gender upon entering prison and before their ultimate unit placement. Additionally, it recommends that transgender inmates be asked with which gender they feel the most comfortable being housed. It also asks prisons to use transgender care boards to review cases where transgender inmates are asking to be housed according to their expressed, rather than legal, gender identity. These care boards are then used on a case-by-case basis to allow prisoners to prove that they live based on their preferred rather than legal identity (Beard 2018, pp. 10-11). These guidelines allow prison staff to accurately place transgender inmates in the jail wing that best fits their gender identity.

B. What specific obligations do States have to prevent any act of violence against LGBT persons deprived of liberty that do not involve segregation from the rest of the prison population?

States have an obligation to protect LGBT individuals, and to ensure that such protection does not involve a restriction greater than that experienced by the general prison population. States also must challenge, discourage, and prevent any discriminatory behavior from other inmates and guards to LGBT individuals (Association for the Prevention of Torture 2018, pp. 57-58). Any individuals, including other inmates and prison staff, who harm, intimidate, or abuse inmates

because of sexual orientation or gender expression must be held accountable (Yogyakarta Principles on the Application of the International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006. Principle 33).

This is affirmed by the Prison Rape Elimination Act (“PREA”) enacted in the United States in 2003. The Act provides data on incidents of sexual violence in prisons (34 U.S.C. § 303). It also provides periodic training and educational programs for prison staff and local authorities to aid in the prevention, investigation, and punishment of sexual violence in prisons (34 U.S.C. § 303). The sources and occurrences of sexual violence may vary by geographic regions large and small. There may even be a variation between local prison complexes. As variation may be prevalent, a one-size-fits-all approach may not be the most effective method for combatting sexual violence. Full-time monitoring and reporting coupled with yearly studies and periodic training will allow authorities to tackle the specific root of sexual violence wherever it is found.

The IACtHR has previously enforced reparations to aid in the betterment of LGBT individuals in the Case of Azul Rojas Marin et al. v. Peru. In that case, the IACtHR laid out the key points of a training program to raise awareness of the discrimination LGBT individuals face and teach government officials how to handle issues of LGBT discrimination best.³⁵ The States may consider the precedent set here in determining programs to aid the LGBT populations of their own countries. For example, a targeted training program along with protocol that government agents must follow will help prison officials identify issues of discrimination within the detention facilities and deal with the issues accordingly, whether perpetrated by other inmates or prison staff.

C. What are the special obligations that States have with regard to the particular medical needs of transgender persons deprived of liberty and, in particular, if applicable, with regard to those who wish to begin or continue their transition process?

Prisons should provide inmates with adequate access to medical, including access to hormonal therapy and gender-reassignment treatments when desired by a transgender-identifying inmate (Yogyakarta Principles on the Application of the International Human Rights Law in

³⁵ I/A Court of H.R., Case of Azul Rojas Marin et al. v. Peru, cit., para. 244 and 248.

Relation to Sexual Orientation and Gender Identity, 2006. Principle 9). Prison staff, especially medical staff, should also receive specific training on transgender individuals' needs to dispel stereotypes and misconceptions and provide adequate medical care. Transgender individuals who have begun hormone therapy before detention or before transfer to a new facility must be given access to continued hormone therapy throughout detention. Any support and treatment that would be available to inmates outside of detention should also be available inside detention, including continuous hormone therapy, medical care for past surgeries, and access to the resources necessary to begin transitioning (Association for the Prevention of Torture 2018, p. 90).

If prison does not have medical staff specially trained in transgender medicine, or the interim period before such medical staff begin work at the prison, authorities should assist transgender inmates in receiving appropriate medical attention outside of the prison. Outside treatment should not pose any extra cost or difficulty to the inmate. This includes transportation to a doctor educated in transgender medicine and covering all related expenses that would be covered for the inmate had the treatment been given within the prison. If there is no doctor within travelling distance educated in transgender medicine, authorities should consider periodically bringing such a doctor into the prison and facilitating private, confidential, virtual appointments between transgender individuals and appropriate healthcare professionals.

D. What special measures should States adopt to ensure the right to intimate visits of LGBT persons?

The Yogyakarta Principles recommend that conjugal visits, where permitted, are granted on an equal basis to all prisoners (Yogyakarta Principles on the Application of the International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006. Principle 9). Conjugal visits should not be limited to heterosexual couples. The standard given to the general prison population should be given to all without any differentiation of sex or gender identity of either the inmate or the visitor.

E. What particular obligations have States with regard to recording different types of violence against LGBT persons deprived of liberty?

Authorities should implement monitoring bodies to better control the occurrence of violence and discrimination in prisons (Association for the Prevention of Torture 2018, pp. 59-60). One primary function of the monitoring body is to record all incidences of violence and discrimination and investigate accordingly. Targeted reporting will help authorities uncover the sources of violence and discrimination. Thus, authorities can develop and implement effective corrective measures. It will allow officers to provide targeted training and resources to combat systematic abuses of LGBT individuals in long-term detention. As discussed previously in section B above (in the discussion of PREA), a reporting system is integral to correcting the violence that LGBT individuals face in long-term detention. PREA provides an annual statistical review and analysis to identify areas of abuse and create regulations and training to combat those areas (34 U.S.C. § 303).

Other standards towards which States may turn are those laid out in the IACtHR case of *Azul Rojas et al v. Peru*. In that case, the IACtHR ordered guidelines for the implementation of a protocol to address LGBT discrimination.³⁶ States may follow this precedent in writing their own protocol to address LGBT discrimination in detention facilities.

3.3. Conclusion and recommendations on long-term detention conditions of LGBT individuals

The LGBT community is a vulnerable population. It faces high levels of violence and discrimination in everyday life. Thus, LGBT individuals need special, targeted regulations and laws to enjoy the same level of protection and human rights as the general population to combat widespread discrimination. In order to protect this vulnerable group rights while in prison, States must consider the following recommendations:

1. Take an inmate's expressed and desired gender identity into account when determining the unit of a transgender inmate and involve the individual's preferences in the unit placement decision.
2. Prevent violence against LGBT individuals through rigorous and dedicated reporting of incidents of violence and designing periodic anti-violence training for authority and prison staff.

³⁶ I/A Court of H.R., Case of *Azul Rojas Marin et al. v. Peru*, cit., para. 243.

3. Ensure each prison has medical staff trained specifically in transgender care and provide medical services for transgender inmates wishing to begin or continue their transition. Until such medical staff and services are available within the prison, authorities must provide access to such services outside of the prison.
4. Allow LGBT inmates conjugal visits by the same standards as allowed to the general prison population.
5. Record and investigate all allegations of violence against LGBT individuals in prison. Such protections will make progress towards a more equal world where human rights are both ensured to and enjoyed by all.

4. Considerations regarding indigenous people who are deprived of liberty in long-term detention settings

4.1. Vulnerability of indigenous people

The Commission has requested an advisory opinion on the differentiated effects of imprisonment on indigenous people deprived of liberty for a considerable time. The particular vulnerability of indigenous people is best understood as being linked to discrimination against indigenous peoples, the destruction of their culture and dispossession of their lands, as well as the repercussions of incarceration and isolation on indigenous people and their community. These issues inform the particular vulnerability of indigenous populations and the unequal burden that incarceration forces upon them.

According to the obligations set forth by the ACHR, the State must respect and protect the right to life, the right to humane treatment, the right to culture, the right to health, the right to freedom of conscience and religion, freedom of thought and expression, and the right to equal protection. Furthermore, the State has a responsibility to ensure that persons deprived of liberty have conditions necessary to live with dignity and enjoy the rights whose restriction is not a necessary consequence of their liberty deprivation.³⁷

³⁷ IACtHR, Case of “Juvenile Reeducation Institute” v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 2, 2004, para. 153.

International and domestic legal instruments recognize the vulnerability of indigenous peoples and the need to provide them differentiated protection.³⁸ Indigenous people are unable to enjoy their fundamental rights to the same degree as the rest of the population within their states, and their laws, values, customs, and perspectives are substantially eroded.³⁹ The Court has held that States “must take into consideration the inherent characteristics that differentiate the members of indigenous peoples from the general population and that constitute their cultural identity.”⁴⁰ Centuries of discrimination and genocide have created the need for States to consider indigenous people's vulnerable circumstances carefully.

When indigenous peoples are incarcerated in State facilities, this need is heightened. States have recognized that within institutions where the government exerts a degree of control more significant than that which is found in civilian life, such as prisons, the government has an even greater responsibility to protect religious and cultural freedoms⁴¹. States that do not account for indigenous people's unique customs and character will not provide adequate protection for their human rights. Incarceration institutions that are tailored only for the general population will fail to provide for indigenous people adequately.

Failures of the State to provide for indigenous people, impact detained indigenous people, as well as their communities. This adverse community impact conflicts with Article 4 of the American Declaration on the Rights of Indigenous Peoples, which states, “*indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples... States shall promote, with the full and effective participation of indigenous peoples, the harmonious coexistence of the rights and systems of different population groups and cultures.*”⁴² The imprisonment of indigenous peoples has a destructive effect on their cultural identity and connection to community. Not only are they imprisoned, but their absence disrupts their sense of community and their communities’ functioning. The disruption in ability to express one’s culture and feel connected to a cultural community, can heighten the risk of assimilation, by which an individual feels compelled by force or by circumstances to abandon their

³⁸ OAS, Inter-American Convention Against All Forms of Discrimination and Intolerance. It is a principle also recognized in most of the OAS member States constitutions, as for example Brazilian Constitution of 1988, Article 231.

³⁹ International Labor Organization, C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).

⁴⁰ IACtHR, Case of Norín Catrimán v. Chile, Merits, Reparations and Costs, Judgment of May 29, 2014, para. 357.

⁴¹ The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. 106–274, codified as 42 U.S.C.

⁴² OAS, American Declaration on the Rights of Indigenous Peoples, Reg. UN 02/26/1997, Article 4, page 9.

own cultural expressions and assume the values, behaviors, and beliefs of a dominant culture. Meanwhile, when an indigenous person or a group of indigenous people are taken from their community, the community itself loses the ability to cleave to its membership to withstand larger scale assimilation. Such loss of personhood and community can have irreversible effects.

The vulnerability of indigenous communities and cultures is acute. Many indigenous cultures have been driven to extinction in recent decades. Hundreds of languages have disappeared, and their cultures are often lost too. The Director of UNESCO Mexico, Frédéric Vacheron, recently said, “it is not only words that disappear, it is a perspective, a wealth of cultural practices, a worldview.”⁴³

Accordingly, the imprisonment of indigenous people should incorporate restorative justice principles to meet human rights protection. This will allow the imprisonment of indigenous people with a commitment to rehabilitation and reintegration into social and cultural environments. Restorative justice requires considering several factors when sentencing or condemning the indigenous person in the first instance and fashioning particular conditions of confinement. In Canada’s landmark case on indigenous sentencing procedures, the Supreme Court held that “judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique and different from those of non-aboriginal offenders.”⁴⁴ Canada and other States administer judicial and incarceration procedures in a distinct manner that appreciates the uniquely vulnerable circumstance of indigenous peoples.⁴⁵

States should also consider the historical and modern circumstances that are a substantial factor in the imprisonment of indigenous peoples. The industrial expansion of the Americas - for timber, farming, and husbandry - came at a large price for indigenous people.⁴⁶ Evidence indicates that many indigenous people are forcibly displaced from their native land, and when they resist -

⁴³ Oré, Diego, and Díaz, Lizbeth. 2019. “In the 21st century, threats from all sides’ for Latin America’s original languages”. *Reuters* (July).

<https://www.reuters.com/article/us-latam-indigenous-language/in-21st-century-threats-from-all-sides-for-latin-america-original-languages-idUSKCN1UN04W> (Last visited on 10/22/2020)

⁴⁴ Case of R. v. Gladue, [1999] 1 S.C.R. 688 (Canada).

⁴⁵ Basic Guide for the Defense of Accused Indigenous Peoples. October 2018. Defensoría, Chile. <http://www.dpp.cl/resources/upload/f16fc19ab31dc6c65178a3d651408dd7.pdf>

⁴⁶ Lumsden, Stephanie. *From Wilderness to Raw Material: How the Dispossession of Native Land Enables the Prison Industrial Complex*, UCLA Center for the Study of Women Blog (March 3, 2017) <https://csw.ucla.edu/2017/03/03/wilderness-raw-material-dispossession-native-land-enables-prison-industrial-complex/> (last visit on Oct. 8, 2020)

they are imprisoned.⁴⁷ The UN Special Rapporteur on the Rights of Indigenous Peoples recently said, “it is urgent that governments around the world take immediate action to protect indigenous rights activists peacefully protesting for legal rights to their own lands and territories.”⁴⁸ As it has been for centuries, these land-takings and forced displacements are a clear violation of their inalienable human rights protected by International Law. The UN Committee on the Elimination of Racial Discrimination noted, “[i]n many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and... have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.”⁴⁹

4.2. International standards and amicus proposals

To provide indigenous people special protection while they are deprived of liberty, the Advisory Opinion request raises four questions to be answered.

A. General and Basic Standards for the Treatment and Protection of Incarcerated Indigenous People

In responding to these issues, States should consider the discrimination and unequal status surrounding the history and present circumstances of indigenous people in the Americas. Given this landscape and inadequate resources, this opinion expounds on flexible proposals based on fundamental principles. These principles offer recourse to reduce the potential violations of human rights of imprisoned indigenous people and good practices in accordance with international standards and international conventions.

According to Article 1 and Article 24 of the ACHR, there is an obligation of the States to provide differentiated and particularized protections to guarantee the right to life, right to human

⁴⁷ IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations, Judgment of June 27, 2012, para. 153.

⁴⁸ Oxfam International. *Unearthed: Land Power and Inequality in Latin America*. 2016.

⁴⁹ Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, on indigenous peoples, adopted at the 1235th meeting, 18 August 1997, CERD/C51/Misc. 13/Rev. 4 (1997), para. 3

treatment, personal integrity, right to equal protection, and non-discrimination of the indigenous while they are deprived of liberty. Otherwise, punishment will be more burdensome for them than for the rest of the inmates, with eventual irreparable damages.⁵⁰

In *Yakye Axa v. Paraguay*, the Court ruled that the States are obligated to ensure, on an equal basis, the opportunity for the enjoyment of rights and their full exercise. When applying the laws to indigenous people it must “*take into account the specific characteristics that differentiate the members of the indigenous people from the general population and that constitute their cultural identity.*”⁵¹ In Canada’s landmark case on indigenous sentencing procedures, for example, the Supreme Court held that “*judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders.*”⁵² Canada and other States, therefore, administer judicial and incarceration procedures in a distinct manner that appreciates the uniquely vulnerable circumstance of indigenous peoples.⁵³

Recognition that the forced displacement of these communities results in great incarceration, hastening the destruction of the indigenous community is, in itself, important. One way to solve this problem is to foster a legal environment that embraces restorative justice for indigenous peoples. The restorative justice framework incorporates a commitment to reintegration into social and cultural environments. Restorative justice principles can be used when deciding whether to condemn the indigenous person in the first instance, their sentence in the second instance, and their conditions of confinement in the final instance. State institutions should be cognizant of the unique burdens that imprisonment has on indigenous peoples. In Canada, Criminal Code Section 718.2(e) and landmark case *R. v. Gladue* mandate that judicial processes account for the indigenous status of an offender.⁵⁴ Canadian courts weigh the adverse impact factors that affect indigenous peoples generally, as well as those that affect the particular indigenous offender. It also evaluates the offender’s ties to their community, land and family. This process accounts for the

⁵⁰ OAS, American Convention on Human Rights, cit., Articles 1, 4, 5, 12, 13, 24.

⁵¹ IACtHR, Case of *Yakye Axa v. Paraguay*, Merits, Reparations and Costs, cit., para. 51.

⁵² Case of *R. v. Gladue*, [1999] 1 S.C.R. 688 (Can.).

⁵³ Basic Guide for the Defense of Accused Indigenous Peoples. October 2018. Defensoría. <http://www.dpp.cl/resources/upload/f16fc19ab31dc6c65178a3d651408dd7.pdf>

⁵⁴ Case of *R. v. Gladue*, cit.

uniquely vulnerable position of indigenous peoples, and the understanding that their incarceration creates disproportionate harm.

In addition, processes that incorporate restorative justice better reflect the indigenous justice systems, which focus more on healing and rehabilitation than punishment and retribution.⁵⁵ A differentiated approach, based in restorative principles, ameliorates adverse cultural effects on indigenous peoples by providing alternative rehabilitation methods and reduced sentences. This preference for restorative justice techniques is reflected in other instruments, such as Brazil's Constitution.⁵⁶

Should restorative justice practices not result in diversion from incarceration in the first instance, the standards, principles and best practices for the treatment of imprisoned people recognized in a multitude of treaties and documents can provide a path to greater humanity in the confinement of indigenous people.⁵⁷ The UN Mandela Rules, emblematic of these documents, begins by stating that prisoners should be treated “with the respect due to their inherent dignity and value as human beings.”⁵⁸ It continues to require prison administrations to “take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.”

States and prison administrators should also be cognizant of the differences among indigenous communities. While there are many overlapping qualities, particularly within indigenous communities in the same country or region, material differences do exist. These differences should be considered in sentencing, as well in prescribing and augmenting prison conditions.

Due to the effects of liberty deprivation on indigenous peoples and practical limitations on resources, solutions to these issues must cure multiple needs. Fortunately, this is possible. The compounding elements of harm faced by imprisoned indigenous people create an opportunity to deploy remedies that similarly compound beneficial effects.

Special penitentiaries for indigenous peoples, or separate pavilions in the regular ones, can cater to indigenous particularities and better protect their rights and cultures. This concept has been

⁵⁵ Justice Education Society. “Gladue and Aboriginal Sentencing” <https://www.justiceeducation.ca/about-us/research/gladue-and-aboriginal-sentencing> (last visited on 10/22/2020).

⁵⁶ Constituição Federal [C.F.] [Constitution] art. 56 and 57 (Braz.).

⁵⁷ Regarding indigenous people, it is particularly important to consider the International Labor Organization, C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).

⁵⁸ Nelson Mandela Rules, 2015.

successfully implemented and is proliferating in several States⁵⁹. The special penitentiaries are built in locations that allow indigenous prisoners better access to their families and traditional lands, food, and medicines. In addition to the benefits of this proximity, the concentration of indigenous peoples allows prison administrators to efficiently provide the services, foods and medicine that are particular to indigenous peoples. Furthermore, the separate facilities prevent prison inmates and staff from discriminating against the indigenous prisoners.

Other practices also ameliorate the harm on indigenous people and communities. Even if an indigenous prisoner is placed in a non-indigenous prison, if this prison is close to the person's community, it will be easier to maintain ties to family and obtain traditional foods, costumes and medicines. Additionally, prisons can be outfitted with resources and services that can adequately meet indigenous prisoners' differentiated needs.

B. What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their customs, traditions and diet?

Indigenous people face tremendous difficulty in preserving their cultural identity while deprived of liberty. This has profound effects on an incarcerated individual, as well as their community. Article X of The American Declaration on the Rights of Indigenous Peoples states: “*Indigenous peoples have the right to maintain, express, and freely develop their cultural identity in all respects, free from any external attempt at assimilation.*”⁶⁰. Inability to exercise these rights causes a diminishing sense of cultural identity and acculturation, and results in the continued extinction of indigenous cultures.

Incarceration establishments must provide places and resources to allow indigenous peoples to practice their traditions, costume, and languages. Failure to do so is violative of several

⁵⁹ Rodríguez, Michel Cruz. 2020. “Indígenas en prisión, forzados a cambiar su cultura”. *Un Periódico Digital*. <http://unperiodico.unal.edu.co/pages/detail/indigenas-en-prision-forzados-a-cambiar-su-cultura/> (last visited on 10/22/2020); Jara, Alejandra. 2020. “Diputados UDI proponen al gobierno la creación de penales ‘especiales y específicos’ para presos de pueblos originarios”. *La tercera*. (August) <https://www.latercera.com/politica/noticia/diputados-udi-proponen-al-gobierno-creacion-de-penales-especiales-y-especificos-para-presos-de-pueblos-originarios/WAYP75JUOVAQJAYJHW2LSSKMHQ/>. (last visited on 10/22/2020).

⁶⁰ OAS, American Declaration on the Rights of Indigenous Peoples, cit., Article X.

treaties and international principles which give preferential treatment to indigenous lives and culture⁶¹. States that seek to meet these obligations, must keep in mind that the necessary measures depend on each specific indigenous community, in each nation State. Not all communities have the same needs and cultural characteristics, so special measures must take this into consideration before being implemented.

Placing indigenous prisoners in facilities closer to their community is critical for preserving their culture, and this placement often does not unduly burden States. When detained far away from the community, the duration and cost of visiting are often a far too great financial burden to these families, who often come from low-income backgrounds. This leaves the prisoner isolated, causes a lack of connectivity or closeness to their family, village, or territory, and is a violation of the right to family as protected by Article 16, § 3, in the Universal Declaration of Human Rights⁶².

This isolation further causes a violation of the right to religion, to the extent that placement occurs far away from one's community and sacred lands. This isolation can seriously impair the cultural identity of an indigenous prisoner, and harm their communities. This isolation also likely violates the right to correspondence, established by Article 12 of the Declaration, since mail is less likely to arrive from more distant communities. Mail may contain traditional medicines and artifacts necessary to preserve a prisoner's indigenous identity. Furthermore, correspondence may be the only way for a prisoner to practice their indigenous language.

The Court has previously ruled that the State violated the right to family by placing a prisoner 250km from his family and community. The Court established that in "the case of indigenous people deprived of liberty, the adoption of this measure [ability by the State to keep those deprived of liberty closest to their family] is especially important in light of the significance of their connection with their place of origin and their communities"⁶³.

Furthermore, States and treaties have recognized the unique connection that indigenous people have with their families, and how essential this connection is to the preservation of cultural identities. For example, the Indian Child Welfare Act, in the United States, provided additional

⁶¹ American Convention on Human Rights; the Inter-American Convention Against All Forms of Discrimination and Intolerance; the American Declaration on the Rights of Indigenous Peoples; the UN International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights.

⁶² U.N., The Universal Declaration of Human Rights, cit.

⁶³ IACtHR, Case of Norín Catrimán v. Chile, para. 408

protections to help maintain the connectedness of indigenous families⁶⁴. Accordingly, States should consider granting greater conjugal visitation rights to indigenous peoples to meet their human rights obligations. Many States allow and facilitate conjugal visits⁶⁵. States have provided differentiated services to allow for sexual relations between married individuals, unmarried individuals, as well as for gay and lesbian inmates. Family visits are also a common practice. During these visits, families often provide the bedding, clothing and medicinal items that inmates require⁶⁶. One jurisdiction in the United States allows families to visit inmates in a private trailer for 30-40 hours at a time⁶⁷.

Considering the importance of family to indigenous peoples, and the importance of this connection to fostering and preserving indigenous cultures, conjugal visits and family visits should be made especially available to indigenous inmates. This will allow families to remain more intact during a family member's incarceration. This improved contact allows indigenous prisoners to better practice their cultures and maintain their position in their communities. It will also allow families to provide traditional medicines, foods and costumes to incarcerated family members. Increasing the availability of conjugal visits to indigenous peoples would create a slight burden on the State, but it would have great benefits for indigenous peoples and communities.

Commensurate with this expanded visitation rights, States should account for the unequal burden of imprisonment by placing indigenous offenders in prisons closer to their community. The Court has previously taken into consideration "that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands"⁶⁸. Placing indigenous people in prisons with closer proximity to secure indigenous communities would allow imprisoned indigenous peoples to more easily maintain ties to their community, to better practice traditions, and make translative services more accessible.

In addition, creating separate prisons and pavilions in the incarceration establishment where indigenous people are detained would be an effective step to preserve cultural traditions and

⁶⁴ National Indian Child Welfare Association (NICWA), <https://www.nicwa.org/about-icwa/> (last visited on 10/22/2020).

⁶⁵ World Heritage Encyclopedia. *Conjugal Visits*. Article ID WHEBN0002217667. http://self.gutenberg.org/articles/conjugal_visits#cite_note-12 (last visited on 10/22/2020).

⁶⁶ Human Rights Watch. "*Behind Bars in Brazil, IX: Prisoner's Contacts with the Outside World*". <https://www.hrw.org/legacy/reports98/brazil/Brazil-10.htm> (last visited on 10/22/2020).

⁶⁷ Prison Law Office. *Family Visiting Information*. 2019. <https://prisonlaw.com/wp-content/uploads/2019/02/Family-Visiting-Feb2019.pdf> (last visited on 10/22/2020).

⁶⁸ IACtHR. Case of *Yakye Axa v. Paraguay*, cit., para. 154

identity. This measure would encourage their sense of belonging and strengthen their ties to their community by providing them with a secure place to practice their religious rituals, speak their languages, consume traditional foods and preserve their overall culture.

Finally, disproportionate harm may be mitigated by providing prison personnel with proper training and resources to meet indigenous special needs. The burden to provide, mandate, and encourage the implementation of said training falls on the prison establishment, and the State by association. Without differentiated services or separate structures for indigenous peoples, their cultures will continue to diminish and be permanently lost.

C. What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their customs, traditions and diet?

Indigenous people face tremendous difficulty in preserving their cultural identity while deprived of liberty. This has profound effects on an incarcerated individual, as well as their community. Article X of The American Declaration on the Rights of Indigenous Peoples states: *“Indigenous peoples have the right to maintain, express, and freely develop their cultural identity in all respects, free from any external attempt at assimilation”*.⁶⁹ Inability to exercise these rights causes a diminishing sense of cultural identity and acculturation, and results in the continued extinction of indigenous cultures.

Incarceration establishments must provide places and resources to allow indigenous peoples to practice their traditions, costume, and languages. Failure to do so violates several treaties and international principles that give preferential treatment to indigenous lives and culture⁷⁰. States that seek to meet these obligations must keep in mind that the necessary measures depend on each specific indigenous community in each nation State. Not all communities have the same needs and cultural characteristics, so special measures must consider this before being implemented.

⁶⁹ OAS, American Declaration on the Rights of Indigenous Peoples, cit., Article 10.

⁷⁰ American Convention on Human Rights; the Inter-American Convention Against All Forms of Discrimination and Intolerance; the American Declaration on the Rights of Indigenous Peoples; the UN International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights.

Placing indigenous prisoners in facilities closer to their community is critical for preserving their culture, and this placement often does not unduly burden States. When detained far away from their community, the duration and cost of visiting are often a far too great financial burden to these families, who often come from low-income backgrounds. This leaves the prisoner isolated, causes a lack of connectivity or closeness to their family, village, or territory, and is a violation of the right to family as protected by Article 16, § 3, in the Universal Declaration of Human Rights⁷¹.

This isolation further causes a violation of the right to religion, to the extent that placement occurs far away from one's community and sacred lands. This isolation can seriously impair the cultural identity of an indigenous prisoner and harm their communities. This isolation also likely violates the right to correspondence, established by Article 12 of the Declaration⁷², since mail is less likely to arrive from more distant communities. Mail may contain traditional medicines and artifacts necessary to preserve a prisoner's indigenous identity. Furthermore, correspondence may be the only way for a prisoner to practice their indigenous language.

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⁷¹ U.N., The Universal Declaration of Human Rights.

⁷² *Id.*, Article 12.

⁷³ IACtHR, Case of Norín Catrimán v. Chile, cit. para. 408.

⁷⁴ National Indian Child Welfare Association (NICWA), <https://www.nicwa.org/about-icwa/> (last visited on 10/22/2020).

⁷⁵ World Heritage Encyclopedia. *Conjugal Visits*. Article ID WHEBN0002217667. http://self.gutenberg.org/articles/conjugal_visits#cite_note-12 (last visited on 10/22/2020).

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In addition, creating separate prisons and pavilions in the incarceration establishment where indigenous people are detained would be an effective step to preserve cultural traditions and identity. This measure would encourage their sense of belonging and strengthen their ties to their community by providing them with a secure place to practice their religious rituals, speak their languages, consume traditional foods and preserve their overall culture.

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⁷⁶ Human Rights Watch. “*Behind Bars in Brazil, IX: Prisoner’s Contacts with the Outside World*”. <https://www.hrw.org/legacy/reports98/brazil/Brazil-10.htm> (last visited on 10/22/2020).

⁷⁷ Prison Law Office. *Family Visiting Information*. 2019. <https://prisonlaw.com/wp-content/uploads/2019/02/Family-Visiting-Feb2019.pdf> (last visited on 10/22/2020).

⁷⁸ IACtHR. *Case of Yakye Axa v. Paraguay*, cit., para. 154.

D. What are the duties of the State in relation to medical care for indigenous people deprived of liberty, in particular with regard to their medicinal practices and traditional medicines?

According to the American Declaration on the Rights of Indigenous Peoples, indigenous people should have adequate access to traditional medical care, in line with their own cultural practices.⁷⁹ This is a fundamental right that is often overlooked by incarceration facilities.

In the case of *Sawhoiyamaya Indigenous Community v. Paraguay*, Leonardo González, one of the parties, testified to the Court that “*Many times we want to resort to our traditional medical knowledge, but we cannot get to gather medicinal herbs because they are to be found inside the wire-fenced lands and we must contemplate disease and death with resignation.*”⁸⁰

For this reason, it is the duty of the State not only to provide space and adequate facilities to allow for this treatment to happen but to provide medical personnel trained in indigenous medicinal practices that can treat the indigenous population while they are incarcerated. This situation presents a powerful opportunity for the State to employ indigenous people to oversee this process and ensure medicinal rights are respected.

In Australia, an indigenous controlled healthcare organization provides medical resources for imprisoned aboriginal peoples.⁸¹ This organization is composed of elected indigenous leaders from various tribes. The organization engages with policymakers and funding organizations and advises culturally appropriate medicinal operations for prisoners. This system has had great success in providing adequate medical resources to imprisoned indigenous peoples while respecting and preserving cultural identities.

Canada has devised a similar system for medicinal care. An elder-driven healing initiative provides culturally-appropriate medical options for imprisoned indigenous peoples.⁸² Indigenous leaders are a part of the prison administration process, and are often present in the incarceration

⁷⁹ OAS, American Declaration on the Rights of Indigenous Peoples, cit., Article 18.

⁸⁰ Cf. testimony by affidavit of Leonardo González of Jan. 17, 2006, *supra note* 145.

⁸¹ Australian and New Zealand Journal of Public Health. *Holistic Primary Health Care for Aboriginal and Torres Strait Islander Prisoners*. Petit (2019).

⁸² The Continuing Legal Education Society of British Columbia. *Indigenous Healing in Federal Corrections*. 2019. <https://www.cle.bc.ca/indigenous-healing-in-federal-corrections/> (last visited on 10/22/2020).

facilities themselves. The system also provides access to ceremonial services, such as healing lodges. This approach reinforces traditional ways of life and allows increased access to the differentiated services that maintain indigenous identities. American States should create a mechanism to allow Indigenous peoples to take a similar role in the incarceration administration.

E. What special measures must States adopt in relation to the activities or programs implemented within prisons, as well as in disciplinary hearings, in light of the cultural and linguistic particularities of indigenous people?

Incarceration facilities that do not account for the special treatment required by indigenous people violate their cultural and social rights. This is particularly acute when linguistic and cultural differences are ignored. International legal instruments mandate that imprisoned people have adequate access to legal resources, counsel and fair hearings.⁸³ Similarly, Indigenous people should have adequate access to vocational, religious, and social programming, including linguistic accommodations.⁸⁴ Without adequate translation services, especially regarding legal services, a State violates critical human rights.

In López Álvarez v. Honduras, the detention conditions, lack of due process, and prohibition of the Garifuna population from speaking their own language in the detention center, were measures not justified by the State. The Court specifically assigned damages to account for the substantial sums a family spent to visit their imprisoned relative. The Court further established that the matter “*harmed the individuality of the detainee and did not respond to safety conditions or necessary treatment*”.⁸⁵ The Court also ruled that the State cannot restrict people's liberty to express themselves in their own language without justification. In this case, it harmed his personal dignity since language is one of the most important elements of a people's identity. Accordingly, in order for the incarcerated individual to have full access to the practice of his rights, the State

⁸³ U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. (Dec., 1988); Also in: IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, cit.

⁸⁴ U.N., International Covenant on Economic Social and Cultural Rights. Article 6.

⁸⁵ IACtHR, Case of López Álvarez v. Honduras, Merits, Reparations and Costs, Judgment of February 1, 2006, para. 166.

must provide activities or programs that are either held in the native language of the individual or offer the possibility of translation services to those in need.

The same should be provided in relation to prison rule books and guidelines, as well as any administrative announcements and information regarding the indigenous individual's judicial process. Currently, many indigenous people do not have adequate interpretation assistance in disciplinary hearings, during prison activities and rehabilitation programs. In Mexico, over 8,000 indigenous people are currently imprisoned, simply due to a lack of translative services and accessible legal resources.⁸⁶ Furthermore, in order to allow indigenous peoples to exercise their cultural rights, the State should also provide leisure reading material in these languages in order to promote the broadening of cultural ties.

To effectuate this, States should hire and maintain sufficient translators and interpreters from native indigenous tribes. This hiring should be in accordance with the needs and composition of the indigenous peoples incarcerated in each region. If this is not feasible, translative resources and training should be given to existing prison staff so that they may better assist indigenous inmates.

Indigenous peoples and communities should be incorporated into this process. International conventions recognize the right of indigenous people to participate in decision processes that affect their own communities.⁸⁷ Therefore, indigenous peoples should help oversee the cultural and linguistic resources offered to incarcerated persons. States that employ indigenous people to oversee the mitigation of linguistic and cultural barriers in prison will prevent violations of cultural and linguistic rights, and fulfil the requirement that indigenous people are involved in their own governance.

A prison specifically for indigenous peoples, or a special pavilion in the incarceration establishment, would also have linguistic benefits. Language is essential to cultural identity. Special prisons or prison pavilions would create a safe space for indigenous inmates to speak in their own language freely.

⁸⁶ *Mexico: Over 8,000 indigenous people in prison for lack of interpreters and lawyers.* The Mazatlan Post. (April 2, 2019) <https://themazatlanpost.com/2019/04/02/mexico-over-8000-indigenous-people-in-prison-for-lack-of-interpreters-and-lawyers/> (last accessed on Oct. 8, 2020)

⁸⁷ OAS, *Inter-American Convention Against All Forms of Discrimination and Intolerance*; Also in: U.N. *International Covenant on Civil and Political Rights*. Preamble. Article 9.

F. What special obligations do States have to prevent any act of violence with regard to indigenous people deprived of liberty?

The IACtHR has held that there is an “inseparable connection” between the obligation to respect and guarantee human rights, as stated in Article 1.1 of the ACHR, and the principles of equality and nondiscrimination also established in Article 24 *eiusdem*. That said, discrimination, especially against indigenous peoples, is expressly denounced in many international agreements, such as the ACHR, the Inter-American Convention Against All Forms of Discrimination and Intolerance, the American Declaration on the Rights of Indigenous Peoples, the UN International Covenant on Economic, Social and Cultural Rights, and even the Universal Declaration of Human Rights. Discrimination can not only physically, mentally and emotionally harm the indigenous victim, but it can also quiet their vigor to practice and preserve their cultural traditions. Preventing discrimination is a worthy end-in-itself, but it will also lighten the conformist pressures on indigenous peoples within the prison.

According to statistics provided by the United States Department of Justice, indigenous people are incarcerated in the USA at a rate 38% higher than the national average⁸⁸. Reports show that in many countries, such as Canada, indigenous women are held in disproportionately high numbers in federal prison, and are also often singled out for segregation, suffering higher rates of inmate abuse. The same can be said for Mexico, where reports highlight how indigenous women are more susceptible to becoming involved in drug and prostitution schemes.

As noted, this discrimination can manifest itself in many ways and are often difficult to verify, or its documentation disregarded by authorities or not considered to be related to the victim’s ethnicity. Consequently, these acts suffered by indigenous peoples may lead to the creation of barriers to access to basic health, food, and resocialization services. In order to prevent this harm, prison administrators should more closely monitor potential acts of discrimination against indigenous peoples. Those who discriminate, especially through violence, should be punished.

Exclusively indigenous prisons, or sections or prisons housing only indigenous peoples would have ameliorative effects on the discrimination and violence against indigenous peoples.

⁸⁸ *Bureau of Justice Statistics*. US Department of Justice.

Evidence shows that putting greater numbers of indigenous peoples in a single prison - including one prison in Mexico exclusively for indigenous prisoners - has many beneficial effects⁸⁹. Traditions and culture are easier to maintain in prison when indigenous people are in greater numbers. Discrimination and violence decrease as the number of indigenous peoples increase, and accordingly, traditions and religion are more openly and better preserved. Prison administrators would not be catering to a small group of prisoners, or a singular prisoner, with unique indigenous requirements, but would rather utilize economies of scale to more effectively provide the food, medicine, and translators that indigenous peoples require.

4.3. Conclusion and recommendations on long-term detention conditions of indigenous people

To guarantee the human rights of long-term imprisoned indigenous people, States must provide differentiated treatment to these, particularly vulnerable individuals. That differentiated approach is an obligation under Articles 1 and 24 of the ACHR and the Inter-American Convention against all forms of discrimination and some international instruments as the Indigenous and Tribal Peoples Convention and the Mandela Rules. To this end, embracing restorative justice techniques is essential. These techniques have successfully protected indigenous rights in many countries and reflect traditional indigenous correctional processes' values. Furthermore, not all communities have the same needs and cultural characteristics, so special measures must consider this before being implemented. In order to protect this vulnerable group, should be considered the following international standards:

1. The embracing of restorative justice approaches and practices in the sentencing and confinement of indigenous people. Restorative justice better comports with traditional indigenous value, and will better preserve indigenous human rights and communities.
2. The creation of prisons, or prison sections, that are exclusively for indigenous people. This allows for improved preservation of indigenous cultures, traditions and languages, and will help avoid incidents of violence and discrimination against them.

⁸⁹ Pardo, Jose Luis. 2016. "Mexico's only indigenous prison is free from drugs, rape and corruption" *Vice*. (July 2016). <https://www.vice.com/en/article/59een8/mexicos-only-indigenous-prison-is-free-from-drugs-rape-and-corruption>

3. The placement of indigenous peoples in prisons that are closest to their communities and lands. Such placement assists indigenous inmates in maintaining ties to their families, communities and traditional lands.
4. The provision of sufficient translation services and resources, especially in regards to legal services. Absent translative services, indigenous peoples are greatly disadvantaged and unlikely to enjoy their rights.
5. The provision of, or access to, traditional and culturally-sensitive foods, medicines and costumes. Otherwise, indigenous inmates will not practice their traditions and religions, and the substantial deterioration of indigenous culture, in the individual and collective, will continue.
6. The creation of an advisory organization, composed of indigenous leaders, to advise the policies and provision of resources that are needed to practice and preserve indigenous cultures. Such an advisory organization facilitates more informed decisions, and better allocation of resources, relating to the protection of indigenous rights.
7. The hiring of indigenous peoples into the political and administrative systems that govern incarceration. The right to self-governance is protected, and the hiring of indigenous peoples into political and administrative roles would ensure greater attention is paid to indigenous rights.
8. The provision of prison personnel with proper training and resources to meet indigenous special needs.
9. The increase in access to conjugal and familial visits for indigenous peoples. Indigenous peoples have critical ties to their communities and lands. Facilitating more and stronger opportunities for indigenous inmates to connect with their communities and families helps protect the rights of an individual inmate and assists in the preservation of collective indigenous cultures.
10. In order to prevent this harm, prison administrators should closely monitor potential acts of discrimination against indigenous peoples.

5. Considerations regarding children living in prison with their mothers

5.1. Vulnerable situation of children living in prison with their mothers

A. Children are a vulnerable population

The ACHR obliges member States to respect the rights and freedoms recognized in its provisions and "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or another opinion, national or social origin, economic status, birth, or any other social condition." (OAS, American Convention on Human Rights, 1969, Article 1). The term "person" used in the ACHR means "every human being," and embraces all children. The ACHR stipulates provisions for the protection of children "solely on the basis of their own best interests" and Article 19 of the ACHR guarantees the rights of the child, stating that "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." (OAS, American Convention on Human Rights, 1969).

The Court concluded in the Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, that the scope of the "measures of protection" referred to in Article 19 of the Convention incorporate "the rights to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living, and the social rehabilitation of all children who are abandoned or exploited." The Court also advanced the fundamental concept of "corpus juris" which refers to the "double discrimination affecting children living in the streets, the situation of children in conflict with the law or juvenile delinquents, the scope of protective measures applicable to children's rights, and the concept of a decent life, among others." In cases pertaining to children and adolescents, the Court established that the ACHR and the Convention of the Rights of the Child (CRC) should be applied in tandem as part of the concept of international corpus juris for protection of the rights of children. (IACtHR, Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, 1999, para. 194). Furthermore, this "duty of special protection is based on recognition of the special condition of children who, because of their progressive development at all levels—physical, cognitive, emotional, psychological, and social—depend on adults for effective access to and enjoyment of all their rights." (IACHR, The Right of Girls and Boys to a Family, 2013, p. 13).

In the case *Mendoza et al. v. Argentina*, the Court held that children have the same rights as all human beings, and also have "special rights derived from their condition that are accompanied by specific obligations of the family, society, and the State" as a vulnerable part of the population. In this decision, the Court reflects the fundamental notion that children are bearers of all the rights established in the ACHR, in addition to the special measures of protection provided for in Article 19 of the ACHR, which must be defined according to the particular circumstances of each specific case. The adoption of special measures for the child's protection corresponds to the State, the family, the community, and the society to which the child belongs. Furthermore, all State, social, or family decisions involving any limitation to the exercise of any right of a child must take into account the child's best interests and rigorously respect the provisions that govern this matter. Regarding the best interests of the child, the Court reiterates that this principle is based on the dignity of the human being, the inherent characteristics of the child and the need to promote their development to maximize their potential, as well as on the nature and scope of the Convention on the Rights of the Child. (IACtHR, *Mendoza et al. v. Argentina*, 2013, para. 53).

On an international scale, it has been affirmed through a large volume of resolutions and other legal instruments that children and adolescents deserve special protection in order to guarantee their human rights. (IACHR 2013, p. 10). The Universal Declaration of Human Rights (UHDR), for instance, contains an article that refers explicitly to all children, which includes children living in prison with incarcerated parents. Article 25(2) states: "[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." [emphasis added] (Universal Declaration of Human Rights, 1948). Finally, Article 10.2 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) states that "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth." (U.N. General Assembly, 1966).

B. Children living in prison with their mothers are even more vulnerable

Article 24 of the ACHR dictates that all persons are entitled, without discrimination, to equal protection of the Law. (OAS, American Convention on Human Rights, 1969). Children living in prisons with their mothers are inherently deprived of rightful liberty. However, States are still obligated to guarantee their right to life, humane treatment, right to family, right to health,

education, and other fundamental human rights. Due to the added obstacle of deprivation of liberty, the Inter-American System of Human Rights must institute standards that afford special protections to ensure that children living in prisons with their mothers have equal access to the rights they would otherwise enjoy.

In *Bulacio v. Argentina*, the Court concluded that States are obligated to provide prison detainees with “the right to live in conditions that are compatible with their personal dignity and the State must guarantee the right to life and to humane treatment.” It furthermore noted that the particular vulnerability of minor detainees “gives the State the obligation to exercise its function as guarantor taking all care required by the weakness, the lack of knowledge, and the defenselessness that minors naturally have under those circumstances.” It concluded that detention centers must have adequately trained staff to attend to and protect the children. (IACtHR, *Case of Bulacio v. Argentina*, 2003, para. 126).

The Court also found in *Miguel Castro Castro Prison v. Peru* that “the deprivation of contact and relationships with [childrens’] inmate mothers,’ as a consequence of the measures of solitary confinement applied by the State, violated the right to humane treatment of said children” under Article 5 of the ACHR. (IACtHR, *Case of Miguel Castro Castro Prison v. Peru*, 2008, para. 65). Finally, the Court found in the *Case of The “Street Children”* that “the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.” Since children living in prison with their mothers are inherently deprived of liberty, the States are obligated to adopt positive duties in order to ensure the full exercise of human rights for children. (IACtHR, *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala*, 1999, para. 144).

Children living with their mothers in long-term prison faced a double vulnerable situation: they are vulnerable because they are children and vulnerable because they are deprived of liberty. Consequently, the intersectionality of this population's vulnerability requires superior protection to guarantee their human right of equal protection, non-discrimination, childrens' special rights, and the right of humane treatment. The Commission has concluded that the conditions of detention that characterize the region's prisons cause an inadequate environment for children's development. Specifically, the children face the following problems due to a lack of differentiated approach based on their age: (i) obstacles to enjoying family life with their mother; (ii) barriers to community

integration and establishing links with the exterior; (iii) inadequate health care, education and nutrition services, and (iv) subjection to entry and permanence procedures that are contrary to their interests. (IACHR, Advisory Opinion Request "Differentiated approaches to persons deprived of liberty," 2019, paras. 48-52).

Furthermore, the IACHR reports that "[c]hildren incarcerated in adult prisons and jails in the U.S. are not afforded sufficient levels of contact with their families and communities, and in many cases are restricted or discouraged from such contact or are purposefully separated from their families." The report also indicates that "children's contact with family and community is essential to their social reintegration." This lack of contact with their families and communities, combined with a lack of age-appropriate programming to accommodate youths' physical, mental health, and educational needs, restricts their development. (IACHR, "The Situation of Children in the Adult Criminal Justice System in the United States," March 1, 2018, pp. 115-117). A child's family life is also negatively impacted due to loss of contact with the other parent, resulting from prisons being located in remote or inaccessible areas, making visits difficult. Furthermore, community integration and socialization skills are impaired since children generally grow up without contact with the exterior world or other children.

Children in detention centers also lack sufficient hygiene, are more likely to contract diseases, and lack pediatric monitoring of their development. Their diet is also inadequate as it is not specified to their specific age, nor does it provide sufficient nutritional value. The prison system does not provide for adequate pre-school or primary education, slowing their overall educational development compared with children outside of prison, and evidence suggests that children with incarcerated parents struggle more academically. Finally, the procedures for admission and permanence of children in prison with their mothers do not consider each child's specific needs, nor do they consider the child's best interest. (IACHR, Advisory Opinion Request "Differentiated approaches to persons deprived of liberty," 2019, paras. 48-52).

The IACHR adopted the "Principles and Best Practices on the Protection of the Persons Deprived of Liberty in the Americas" in 2008, which observed with concern "the critical situation of violence, overcrowding, and inhumane living conditions in several places of deprivation of liberty in the Americas," including the vulnerable situation of children and women. As a basic principle of personal liberty, the Commission concluded that the "[d]eprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and

shall be limited to strictly exceptional cases.” Finally, the Commission incorporated the principles of equality and non-discrimination for persons deprived of liberty, stating that they are entitled to equal protection of the law and that measures designed exclusively to protect the rights of children shall not be discriminatory. (IACHR, “Principles and Best Practices on the Protection of the Persons Deprived of Liberty in the Americas,” 2008, p. 156).

5.2. International standards and amicus proposals

A. What specific measures should States take to ensure the right to family life of the child, including contact with the other parent?

The Commission found that “[a]ccording to international human rights law, States are obliged to favor, in the broadest possible way, the development and strengthening of the family as a measure of protection of the child. This includes the development of policies, programs and services to support and strengthen families.” Further, “the Court has held that States are obligated to favor, in the broadest manner possible, development and strengthening of the family nucleus as a means of protecting the child, thereby establishing an intrinsic connection between Article 17(1) and Article 19 of the Convention.” (IACHR, “The Right of Girls and Boys to a Family,” 2013, pp. 1, 29).

This honorable Court has brought special attention to the right to family life of children in particularly vulnerable circumstances. In the case of *Contreras et. al. v. El Salvador*, the Court found that children separated from their parents or next of kin are especially vulnerable, and the State should prioritize measures to promote family reunification. (IACtHR, *Case of Contreras et. al. v. El Salvador*, 2011, para. 86). Similarly, in the *Case of Rocha Hernández et. al. v. El Salvador*, the Court found that “[w]ithin the array of measures included in treaties of international humanitarian law are those aimed at preserving the family unit and facilitating the search, identification, and reunification of families.” (IACtHR, *Case of Rocha Hernández et. al. v. El Salvador*, 2014, para. 110).

The international standards of prison conditions include measures to guarantee the right to a family life. Rule 26 of The United Nations’ Bangkok Rules states that “[w]omen prisoners’ contact with their families, including their children, and their children’s guardians and legal

representatives shall be encouraged and facilitated by all reasonable means” and Rule 50 states that “[w]omen prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.” (Bangkok Rules, 2010).

In addition, Rule 28 of the Bangkok Rules states that “[v]isits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.” (Bangkok Rules, 2010). Thus, States should ensure that a child’s other parent, who is not incarcerated, lives near to the prison, such that the prison is accessible, so that they are able to visit and meet with their child often. (U.N. Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents,” 2011, para. 4).

This situation may entail transferring both the mother and her child to a different location in order to be geographically closer to the other parent. Prison visits are costly, and funds must be allocated to cover transportation, usually to geographically remote locations, meals and vending machine snacks during visits, and, sometimes, overnight lodging. (Hairston 2001, p. 4). Also, the other parent or family members should be given the opportunity to take their child out of prison temporarily for specific outings or on weekends (in accordance with their custody agreements) to help the child establish a life outside of the prison. This is especially important for transition planning if the child plans to leave the detention center and move in with a family member. (Byrne et al. 2010).

When decisions regarding visitation of children are being made, a lawyer or advocate should be present to ensure that decisions are made based on the well-being of the child. Finally, since it is proven that visitation rights are vital to a child’s right to family, prisons should not threaten the revocation of family visits as a tool to punish or induce behavior from the incarcerated parent, such as to compel cooperation in an investigation. (U.N. Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents,” 2011, para. 26).

States should also ensure that the child has access to the same experiences as children outside of prison. This requires ample quality time with their mother, such as by facilitating recreational, education, or artistic activities that they can perform together (U.N. Committee on the Rights of the Child 2011; Bangkok Rules 48-52). One way to achieve this would be to provide

co-residing nurseries where the mother and child live together, which is particularly important for mothers with young infants given the importance of the first year of life developmentally. Therefore, the mother should be allowed to primarily focus on the development and care of her baby during the first year without having to take on additional responsibilities within the prison, such as various work assignments.

One example of a country whose laws require prisons to maintain nurseries is Brazil, where prisons for women must have a nursery where convicted women can care for their children, including nursing them until they reach at least six months of age. Brazilian law requires that a women's penitentiary have a section for pregnant women and women in labor, and a childcare facility to house children older than six months and younger than seven years. (Global Research Directorate, Brazil, 2014). Prison nurseries should not only support the mother-child relationship but should also arrange for continued services after release. For instance, Brazil's National Council of Criminal and Prison Policy issued Resolution No. 4 in 2009, which details the steps to be taken for the gradual separation of the convicted mother from her child, once the child reaches the age of one year six months. (Global Research Directorate, Brazil, 2014). Additionally, European countries are moving toward establishing child-centered facilities within prisons to maintain contact between children and parents. (Tompkin 2007, p. 35). For example, in Korneykova and Korneykov v. Ukraine, it was determined that in a situation in which the mother is detained and where the new-born child remains with her under the full control of the authorities, an obligation arises for the authorities to adequately secure the child's health and well-being. (ECHR, Korneykova and Korneykov v. Ukraine, 2016, paras. 128-132).

B. What obligations does the State have with regard to access to the right to health and food of children living in detention centers with their mothers?

The Commission asserts that States shall be obliged to ensure the right to health for persons deprived of liberty, by providing "adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk

groups, such as...children....” (IACHR, “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas 2008, p. 161). Additionally, according to domestic law in several Latin American countries, the Commission recommends that children born in a place of deprivation of liberty shall not have this fact mentioned in their birth certificates. Finally, the Commission concluded that, “where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child.” (IACHR, “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 2008, p. 161).

In *Mendoza, et al. v. Argentina*, this honorable Court found that inadequate access to medical care for children in prison, which in that case included a lack of proper optical treatment, constituted a violation of the right to personal integrity under Articles 5(1) and 5(2) of the Convention. (IACtHR, *Mendoza v. Argentina*, 2013, para. 184).

States are obligated to ensure the highest attainable standard of physical and mental health for children living in detention centers with their mothers, including access to medical services when ill, use of hygienic facilities, and prevention of disease spread. (U.N. General Assembly, ICESCR, Article 12, 1996). Furthermore, States must ensure the provision of adequate nutritious foods, clean drinking water, and preventative healthcare. (U.N. General Assembly, Convention on the Rights of the Child, Article 24, 1989). States are also obligated to provide sufficient access to mental health services in order to prevent otherwise avoidable emotional and behavioral problems. (U.N. Committee on the Rights of the Child 2011). Rule 9 of the Bangkok Rules states that “[i]f the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.” (Bangkok Rules, 2010). Similarly, Rule 29 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) calls for “[c]hild-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists.” (Nelson Mandela Rules, 2015).

Finally, States are obligated to provide mothers sufficient access to health services that are conducive to nursing their newborn babies in prison. The U.N. Committee on the Rights of the

Child suggests that breastfeeding a baby is integral to the right to life, survival and development - all rights enshrined in the Convention on the Rights of the Child. (U.N. CRC, 2004, para. 8).

C. What are the State obligations to ensure the adequate development of children living in detention centers with their mothers, including the obligation relating to community integration, socialization, education and recreation?

Children of incarcerated parents have the same rights as other children, and measures should be taken to ensure children are protected from stigmatization and arbitrary conflict with the law. States are obligated to ensure access to sufficient social services, including but not limited to, health and educational facilities. (U.N. Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents,” 2011, para. 34). Rule 51 of the Bangkok Rules states that “[c]hildren living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services” and “[t]he environment provided for such children’s upbringing shall be as close as possible to that of a child outside prison.” (Bangkok Rules, 2010). One example of this can be seen in Colombia, where the Colombian Institute of Family Welfare, in coordination with penitentiary authorities, provides special care to minor children residing in prison with their mothers, including educational and recreational programs for them. (Global Research Directorate, Colombia, 2014).

Furthermore, the Commission affirms the obligation of the States to provide primary or basic education for free to all persons deprived of liberty, particularly children. (IACHR, “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,” 2008, p. 163)⁹⁰.

If children are given the opportunity to work or perform labor of any kind in prison, States must “apply all protective national and international standards applicable to child labor,

⁹⁰ An example of how to implement these standards, from a comparative perspective, is Turkey, where the Ministry of Education signed the “Protocol of Cooperation in Supporting the Development of Children Remaining with Their Mothers in Prisons and Correctional Facilities”. This protocol provides that children of prisoners and detainees who are three to five years old should be placed in kindergartens and nurseries as a priority without a queue or a fee. The Ministry of Education provides for the children’s round-trip travel to and from the facilities so that children incarcerated with their mothers may have equal access to education as their peers. (Global Research Directorate, Turkey, 2014).

particularly in order to prevent exploitative labor practices and to ensure the best interest of the child.” (IACHR, “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,” 2008, p. 163). States are also obligated to facilitate contact between children and their community because it is essential to their social integration. They must provide age-appropriate programming to accommodate physical wellbeing, mental health, and educational needs of youths. States are obligated to provide children the right to grow up in a social environment conducive to their development. Decisions in relation to a child’s development should always be made on an individual basis and with due consideration to the best interests of the child affected. (IACHR, *The Situation of Children in the Adult Criminal Justice System in the United States*, child’s March 1, 2018, para. 301). Furthermore, States are “forbidden to impose solitary confinement to...children deprived of liberty.” (IACHR, “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,” 2008, p. 166). Finally, Rule 69 of the Mandela Rules suggests that efforts be made to evaluate the “effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatization and negative impact of those women’s confrontation with the criminal justice system on them.” (Mandela Rules, 2015).

D. Proposed standards and policy recommendations

The following proposed standards and policy recommendations for the treatment and protection of children living in prison with their mothers are based on general considerations taken from the above referenced international and regional legal frameworks and reports, as well as decisions of the IACtHR. Some of these legal frameworks include the ACHR, the U.N. Convention on the Rights of the Child, Mandela Rules, Bangkok Rules and the IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. The human rights relied upon in these frameworks in order to create these proposals include equality, non-discrimination, personal liberty, humane treatment, and right to a family. The proposals also rely heavily on perspectives from prominent social work sources.

Some basic principles that are essential to determine the standards and to guide the protection and treatment of children living in prison with their mothers include:

- Principle of the best interest of the child when deciding anything during his or her incarceration. (U.N. Guidelines; Bangkok Rules 49; Mandela Rules 29)
- Principle of flexible prison regime in order to respond to the needs of children in prison with their mothers and provide appropriate services for them. (Bangkok Rules 42)
- Non-custodial sentences for women with children shall be preferred where possible and appropriate (Bangkok Rules 29) and even house arrest if possible. (Cornell Law School, Avon Global Center for Women and Justice and International Human Rights Clinic, 2013, p. 5).
- Separate pavilions with special accommodations for children in prison with their mothers should be provided in any prison guaranteeing special healthcare treatment. (Mandela Rules 24-35, especially 27 and 28)

These extra protections are guaranteed under various frameworks discussed previously, such as the UDHR Article 25.2, which states that both motherhood and childhood are entitled to special care and assistance, as well as the ICESCR, which guarantees special protection for mothers before and after childbirth. The following list of proposals contains more specific policy recommendations based on these foundational principles.

(i) Custodial Decisions and Best Interests of the Child

Governments and lawmakers should recognize children of incarcerated mothers as a vulnerable group in need of particular support and assistance. States should ensure that the rights of children with a parent in prison, and their best interests, are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process at all its stages. In sentencing parents and primary caregivers, non-custodial sentences should be made wherever possible, such as house arrest, placement into community homes, or other alternatives to incarceration. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child. (U.N. Committee on the Rights of the Child 2011, p. 6; Bangkok Rules 49; Mandela Rules 29; IACHR Principles and Best Practices, 2008).

States should incorporate laws similar to those in Argentina, which allow for the house arrest of women prisoners who are pregnant, have children of less than five years of age living

with them, or are caring for a disabled child. (Cornell Law School, Avon Global Center for Women and Justice and International Human Rights Clinic, 2013, p. 5). The U.N. Guidelines for the Alternative Care of Children recommends that: “States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent, best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community.” (U.N. General Assembly, 2010).

The Bangkok Rules also support this in Rule 49, which states that “[d]ecisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.” (Bangkok Rules 49, 2010). The Mandela Rules expand on this further in Rule 29, stating that “[w]here children are allowed to remain in prison with a parent, provision shall be made for...[i]nternal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent.” Finally, Rule 68 of the Mandela Rule states that “efforts shall be made to organize and promote research on the number of children affected by their mothers’ confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and program development, taking into account the best interests of the children.” (Mandela Rules 29, 2015). These rules emphasize that the child's best interests should always be considered and that children living with their mothers in detention should be treated as free individuals and given community access regularly, along with adequate care and protection while in detention.

(ii) Health

Children should receive yearly checkups with a pediatrician in the community (separate from the doctor used by adults in prison), have a pediatrician on call for emergencies, and have access to pediatric dental care. Also, in terms of developing a nutrition plan for children, a dietician or nutritionist and the mother should be consulted to ensure that the child is getting more than the basic food provided to adult prisoners. Mothers with children in prison should have access to nursery rooms for breastfeeding, particular sections of the prison designated for only pregnant women, and day-care centers. Children of female prisoners require access to adequate and age-

appropriate health and medical facilities, including childhood immunizations. (U.N. Office on Drugs and Crime, 2020, p. 25)

(iii) Mental Health

Mental health services for both the child and their mothers are extremely important. Studies suggest that children who have parents in incarceration are more likely to experience behavioral and educational difficulties, along with poorer health outcomes in general. There is also a lot of stigma surrounding having a parent in incarceration. (Turney & Goodsell, 2018). This is why children need to receive counseling in the early stages of life. Providing counseling and interventions to mothers has also produced good outcomes for developing secure attachments with their child, developing communication skills with the child, and improving the mother's emotional well-being. (Turney & Goodsell, 2018; Byrne et al., 2010). Specifically, relationship-focused group interventions for mothers may be effective and help to mitigate some of the detriments of children living in prisons. This is particularly important during the first year of a child's life, as this is a critical developmental stage. (Sleed et al., 2013). Finally, children of incarcerated parents should have psychosocial counseling and regular mental health check-ins.

(iv) Education

Children living in prison with their incarcerated mothers should have access to educational services that are of the same quality as those living outside of prison. These services should account for various age-appropriate levels of education, including pre-school. (U.N. Office on Drugs and Crime, 2020, p. 25). For school-aged children attending school outside of prison, transportation to and from school needs to be supplied by the prison (especially if the prison is in a remote location). Nurseries should be equipped with a library of children's books and developmentally appropriate toys that promote learning and healthy development.

(v) Development

A child's development should be reassessed every couple of months to ensure that the child receives the best care and support possible and that it is in their best interest to remain in prison with their mothers. Prison management can support incarcerated mothers and their children by inviting experts in parenting and early childhood care to provide workshops and provide mothers of young children with child-friendly spaces that include age-appropriate games and toys. (U.N. Office on Drugs and Crime, 2020, p. 24). Children should be socialized with other children living in prisons. Children should be integrated into their communities with regular field trips into the community facilitated by civilian staff, family members, or in some cases, the mothers themselves. States should ensure adequate outdoor space for children living in prison, equipped with play structures and toys, and children should be allowed to spend at least two hours outside every day.

Many children who have parents in incarceration have experienced trauma regarding the legal process, from being separated from their families, and other events. (Turney & Goodsell, 2018). Therefore, it is essential to protect children from future traumatization that may occur in the prison system. Child outcomes are often associated with their nursery's quality along with the maternal interventions provided. (Goshin et al., 2014). It is recommended that prison nurseries be segregated from other prison facilities, renovated specifically to house children, staffed both by correction officers and civilians who have experience with counseling and child development and include an emphasis on developing relationships with mothers and children, promoting healthy development, and providing parenting life skills education. (Goshin et al., 2014). These types of nurseries can also be helpful in promoting camaraderie among mothers. (Byrne et al., 2010).

(vi) Family Life

As discussed in the answer to the first question in the request above, children should be able to see their other parent, participate in outings outside of the prison, have inviolable visitation rights, spend quality and uninterrupted time with their mother, and have access to nurseries which accommodate both the mother and child during the first year.

5.3. Conclusion and recommendations on long-term detention conditions of children living in prison with their mothers

In sum, we highlight the following standards for the protection of children living in prisons with their mothers:

1. The best interests of the children should be taken into account at every stage and in all decisions made in regard to children living with their incarcerated mothers.
2. Non-custodial sentences should be made whenever possible, and when alternatives to detention are not available, best efforts should be made to ensure that children remaining in custody with their mother benefit from adequate care and protection while guaranteeing their own status as free individuals.
3. Children living in prison with their mother should have access to healthcare, which is equal in quality to children living outside of prison, including age-appropriate physical and mental health services. Children should receive yearly checkups with a pediatrician in the community (separate from the doctor used by adults in prison), have a pediatrician on call for emergencies, have access to pediatric dental care, have a nutrition plan developed by a dietician or nutritionist, and receive childhood immunizations. Children of incarcerated parents should also have psychosocial counseling and regular mental health check-ins.
4. Children living in prison with their mothers should have ample contact with their family, including quality time with their mother in an appropriate space within the prison and visitation with their other parent and family members outside of the prison. Children should have inviolable visitation rights and have access to nurseries that accommodate both the mother and child during their first year of life.
5. Children living in prison with their mothers should have access to education equal in quality to children living outside of prison, including programs that are free and cater to all levels and styles of learning. Transportation to and from school should be supplied by the prison. On-site nurseries should be equipped with a library of children's books and developmentally appropriate toys that promote learning and healthy development.
6. The development of children living in prison with their mothers should be assessed periodically and promoted with programs that socialize children as much as feasibly possible and encourage community integration. Specifically, children should be socialized

with other children living in prisons and integrated into non-prison communities with regular field trips. Children should be provided adequate outdoor space equipped with play structures, and children should be allowed to spend at least two hours outside every day.

7. Prison nurseries should be segregated from other prison facilities, specifically renovated to house children, staffed both by correction officers and civilians who have experience with counseling and child development, and emphasize developing relationships with mothers and children.

III. General conclusion and final remarks

In order to enjoy the same level of equality and non-discrimination as the general prison population, the five groups cited in the IACHR request need specific care and specialized anti-discrimination provisions. There are two main circumstances in which individuals in the mentioned groups need targeted conditions. First, in some cases, actions are taken to avoid discriminatory treatment and guarantee individuals the same level of rights and protections as the general inmate population. These situations require targeted anti-discrimination policies. Second, in other circumstances, individuals do not receive adequate care when receiving the same treatment as the general inmate population because the individuals have specialized needs. These situations require additional affirmative policies. There are some areas where affirmative action is necessary for all groups and some areas where anti-discrimination policies are required.

It is possible to justify adopting differentiated approaches and measures to guarantee the specific rights and needs of people from certain vulnerable populations when they are deprived of liberty. In many cases, this adoption is necessary. States should provide such enhanced protections, as established by Article 1.1 and Article 24 of the ACHR and Articles 1, 5 and 8 of the Inter-American Convention Against All Forms of Discrimination and Intolerance, among other specific Inter-American Conventions previously detailed, concerning the respect and protection of human rights without discrimination and the right to equal protection before the law. Material equality requires differentiated treatment that allows equitable conditions for marginalized groups.

Standardized treatment, that does not account for the particularities of vulnerable populations while they are in prison, implies discriminatory treatment. In their diminished situation, the detention conditions pose a high risk to the human rights of vulnerable populations,

creating unequal punishments, and in some circumstances, forming an environment of further discrimination and violence. The intersectionality of various vulnerable groups should also be considered. Many individuals belong to several vulnerable groups, which compounds the unequal and discriminatory conditions for those deprived of liberty.

The international standards of prison conditions for each of the vulnerable groups studied are included in each chapter of these written observations, taking into account the leading international and Inter-American instruments on the matter and the jurisprudence of this honorable Court and other regional human rights courts. The UN Mandela Rules, UN Bangkok Rules, Yogyakarta Rules and the ILO Indigenous and Tribal People Convention have particular relevance, forming the foundation of international standards, that give rise to concrete conditions that States must implement within their obligations to respect and protect human rights under the ACHR and the rest of the Inter-American Corpus Iuris.

Nevertheless, these standards are not enough. The guarantee of inmates' human rights also requires public policies and institutional reforms on the state level that improve the serious prison situation in the region, especially aggravated by the Covid-19 pandemic, and promote restorative justice and crime prevention. Likewise, it is necessary to analyze the special conditions of other vulnerable groups deprived of liberty, such as people with physical and mental disabilities, to guarantee material equality in the protection of their human rights too.

References

1. Bibliographic References

American College of Obstetricians and Gynecologists, Ethical Decision Making in Obstetrics and Gynecology, Committee Opinion No. 390, (2007),

<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2007/12/ethical-decision-making-in-obstetrics-and-gynecology>

American College of Obstetricians and Gynecologists, Reproductive Health Care for Incarcerated Women and Adolescent Females, (2012),

<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/08/reproductive-health-care-for-incarcerated-women-and-adolescent-females>

Boxer, P., Middlemass, K., and Delorenzo, T., “Exposure to violent crime during incarceration: Effects on psychological adjustment following release.” *Criminal Justice and Behavior*, 36(7), 793-807, (2009).

Bureau of Justice Assistance U.S. Department of Justice, “Best Practices in the Use of Restraints with Pregnant Women and Girls under Correctional Custody.”, (2014),

http://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant%282%29.pdf

Byrne, M.W, Goshin, L.S, & Joestl, S.S., “Intergenerational transmission of attachment for infants raised in a prison nursery. *Attachment & Human Development*”, 12(4), 375-393, (2010),

<https://doi.org/10.1080/14616730903417011>

Canadian Pediatric Society, “Depression in Pregnant Women and Mothers: How Children are Affected.” *Pediatric. Child Health*, (2004),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2724170/>.

Cavallaro, James, Claret Vargas, Clara Sandoval and Bernard Duhaime, *Doctrine, Practice and advocacy in the Inter-American Human Rights System*. Oxford University Press: New York, (2019).

Chivers-Wilson, K. A., “Sexual assault and posttraumatic stress disorder: a review of the biological, psychological and sociological factors and treatments.” *McGill Journal of Medicine : MJM : An International Forum for the Advancement of Medical Sciences by Students*, 9(2), 111–118, (2006),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2323517/>

Cornell Law School, Avon Global Center for Women and Justice, Defensoría General de la Nación (Argentina) and University of Chicago Law School International Human Rights Clinic, “Women in Prison in Argentina: Causes, Conditions, and Consequences”, (2013),

https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1003&context=avon_clarke

Crenshaw, Jeannette T., “Keep Mother and Baby Together--It’s Best for Mother, Baby, and Breastfeeding.”, *J. Perinat. Educ.*, (2014),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4235060/>

Dozier, Ann M., et al., “The Relationship Between Life Stress and Breastfeeding Outcomes Among Low-Income Mothers.” *Adv. Prev. Med.* (2012),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3546433/>.

Federal Bureau of Prisons, *Escorted Trips*, 13, (2008),

https://www.aclu.org/files/pdfs/prison/bop_policy_escorted_trips_p5538_05.pdf

Global Legal Research Directorate Staff, “Laws on Children Residing with Parents in Prison.” Library of Congress, (2014),

<https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php>

Goldberg, Holly, “Informed Decision Making in Maternity Care.”, *Journal of Perinatal Education*, (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2667301/>

Goshin, Lorie S, Byrne, Mary W, & Blanchard-Lewis, Barbara, “Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery.” *The Prison Journal*, 94(2), 139-158, (2014),

<https://doi.org/10.1177/0032885514524692>

Gueta, Keren, “Exploring the Promise of Intersectionality for Promoting Justice-Involved Women’s Health Research and Policy.”, *Health and Justice*, Vol. 8, (2020),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7382787/>

Hairston, Creasie F, “Prisoners and Families: Parenting Issues During Incarceration.” *U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation*, (2001),

<https://aspe.hhs.gov/basic-report/prisoners-and-families-parenting-issues-during-incarceration>

Hoteling, Barbara A., “Perinatal Needs of Pregnant, Incarcerated Women.” *Journal of Perinatal Education* (2008),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2409166/>

Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality,

[http://www.oea.org/en/CIM/docs/PIA\[EN\].pdf](http://www.oea.org/en/CIM/docs/PIA[EN].pdf)

Johnson, Richard G., Sean McCandless, Hugo Renderos. “An Exploratory Study of Transgender Inmate Populations in Latin America.” *Public Integrity* 22, (2019).

Katherine E. Limoncelli, Jeff Mellow, Chongmin Na, “Determinants of Intercountry Prison Incarceration Rates and Overcrowding in Latin America and the Caribbean”, *International Criminal Justice Review*, (2019),

<https://journals.sagepub.com/doi/abs/10.1177/1057567719830530>

Owen, B., Wells, J. and Pollock, “*In Search of Safety: Confronting Inequality in Women's Imprisonment*”, Oakland, California: University of California Press, (2017).

Oxfam International, “*Unearthed: Land Power and Inequality in Latin America.*”, (2016).

Sleed, Michelle, Baradon, Tessa, & Fonagy, Peter, "New Beginnings for mothers and babies in prison: A cluster randomized controlled trial.", *Attachment & Human Development*, 15(4), 349–367, (2013),

<https://doi.org/10.1080/14616734.2013.782651>

Somayeh Alirezaei & Rohab Latifnejad Roudsari, “*Promoting Health Care for Pregnant Women in Prison: A Review of International Guidelines*”, *Iranian Journal Nursery and Midwifery Research*, (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7055189/>.

Tompkin, Jean, “Orphans of Justice.”, Quaker United Nations Office, (2009),

http://www.quno.org/sites/default/files/resources/ENGLISH_Orphans%20of%20Justice.pdf.

Turan et al., *Challenges and opportunities in Examining and Addressing Intersectional Stigma and Health*, BMC Med., (2019),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6376691/>

Turney, Kristin, & Goodsell, Rebecca, “Parental Incarceration and Children’s Wellbeing”. *The Future of Children*, 28(1), 147-164, (2018),

<https://doi.org/10.1354/foc.2018.0007>

World Heritage Encyclopedia, *Conjugal Visits*,

http://self.gutenberg.org/articles/conjugal_visits#cite_note-12

2. International Legal Instruments

Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, on indigenous peoples, adopted at the 1235th meeting, 18 August 1997, CERD/C51/Misc. 13/Rev. 4 (1997).

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, (September 1953).

IACHR, Inter-American Commission on Human Rights, *Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (March 2008).

International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, (5 September 1991).

OAS, Organization of American States, *American Convention on Human Rights*, OAS N°36, Reg. UN 08/27/1979, N° 17955, San Jose, Costa Rica, (1969).

OAS, Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES.2888 (XLVI-O/16), (June 2016).

OAS, Organization of American States, *Inter-American Convention Against All Forms of Discrimination and Intolerance*, (2013).

OAS, Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 (June 1994).

UN General Assembly, *Convention on the Rights of the Child*, U.N. Treaty Series, vol. 1577, p. 3, (20 November 1989).

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, U. N. Treaty Series, vol. 993, p. 3, (16 December 1966).

UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules")*.A/RES/70/175, (17 December 2015).

UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules")*, A/RES/65/229, (21 December 2010).

UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), U.N. Doc. A/810 at 71, (10 December 1948).

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, (2006),

<https://yogyakartaprinciples.org>.

3. International Human Rights reports

Amnesty International, *United States of America: Rights for All*, AI Index: AMR 51/01/99, (March 1999),

<https://www.amnesty.org/download/Documents/144000/amr510191999en.pdf>

Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: a monitoring guide*. 5-136. France: Imprimerie Villi, (2018).

IACHR, Inter-American Commission on Human Rights, Advisory Opinion Request brief on "Differentiated approaches to persons deprived of liberty", submitted before the Inter-American Court of Human Rights, (November 25, 2019).

IACHR, Inter-American Commission on Human Rights, *Commission Report on the Access to Maternal Health Services From A Human Rights Perspective*, (2006).

IACHR, Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II.Doc 56/09, (2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>

IACHR, Inter-American Commission on Human Rights, *The Right of Girls and Boys to a Family*, OEA/Ser.L/V/II. Doc.54/13, (2013), <http://www.oas.org/en/iachr/children/docs/pdf/report-right-to-family.pdf>

IACHR, Inter-American Commission on Human Rights, *The Situation of Children in the Adult Criminal Justice System in the United States*, OEA/Ser.L/V/II.167 Doc.34, (2018), <https://www.oas.org/en/iachr/reports/pdfs/Children-USA.docx>

IACHR, Inter-American Commission on Human Rights, *Violence against Lesbians, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OAS/Ser.L/V/II.rev.1 Doc. 36, (2019).

OAS, Organization of American States, Inter-American Commission of Women, *Women's Human Rights and Violence Against Women*, (1998), <http://www.oas.org/en/CIM/rights.asp>

OAS, Organization of American States, Women, Drug Policies, and Incarceration, (2015), <https://www.oas.org/en/cim/docs/WomenDrugsIncarceration-EN.pdf>

UN Committee on the Rights of the Child, *Day of Discussion on Implementing Child Rights in Early Childhood*, (2004), <http://www2.ohchr.org/english/bodies/crc/docs/discussion/earlychildhood.pdf>

UN Committee on the Rights of the Child, *Report and Recommendations of the Day of General Discussion on Children of Incarcerated Parents*. ,(2011), <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>

UN General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, (24 February 2010),
<https://digitallibrary.un.org/record/673583?ln=en>

UN Office of the High Commissioner for Human Rights (OHCHR), *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions Published jointly with UNFPA and the Danish Institute for Human Rights*, HR/PUB/14/6, (2014),
<https://www.ohchr.org/documents/publications/nhrihandbook.pdf>

UN Office on Drugs and Crime, “*Handbook on Women and Imprisonment*”, (2014),
https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf

UN Office on Drugs and Crime, *Tools And Strategies For Service Providers Working With Female Prisoners*, (2020),
https://www.unodc.org/documents/pakistan/Briefs_and_strategies_for_NGOs_working_with_Female_Prisoners_B_opt.pdf

WHO, World Health Organization, *Maternal Mortality*, (2019),
<https://www.who.int/news-room/fact-sheets/detail/maternal-mortality>

WHO, World Health Organization, *Pregnant Women Must be Able to Access the Right Care at the Right Time*, (2016),
<https://www.who.int/news/item/07-11-2016-pregnant-women-must-be-able-to-access-the-right-care-at-the-right-time-says-who>

WHO, World Health Organization,& UNICEF, *Baby-Friendly Hospital Initiative*, (2009),
https://apps.who.int/iris/bitstream/handle/10665/43593/9789241594967_eng.pdf;jsessionid=B725F0C3E013CEECC2F690C40EEE934C?sequence=1.

4. Jurisprudence of International Courts

Eur. Court H.R., *Dowsett v. the United Kingdom*. Judgment of 24 June 2003, Reports of Judgments and Decisions 2003, para. 43.2.

Eur. Court H.R., *Korneykova and Korneykov v. Ukraine*. Judgment of 24 March 2016, Reports of Judgments and Decisions 2016.

I/A Court of H.R., *Advisory Opinion OC-24/16* of November 24, 2017.

I/A Court of H.R., *Case of Azul Rojas Marin et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs. Judgment of March 12, 2020. Serie C No. 402.

I/A Court H.R., Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100.

I/A Court H.R., Case of Contreras et. al. v. El Salvador. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232.

I/A Court H.R., Case of Cuscul Pivaral et. al. v. Guatemala. Preliminary Objection, Merits, reparations and Costs. Judgement of August 23, 2018. Series C No. 359.

I/A Court H.R., Case of “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs, Judgement of September 2, 2004.

I/A Court H.R., Case of López Álvarez v. Honduras, Merits, Reparations and Costs. Judgement of February 1, 2006.

I/A Court H.R., Case Mendoza et al. v. Argentina. Judgment of May 14, 2013. Series C No. 260.

I/A Court H.R., Case of Miguel Castro Castro Prison v. Peru. Interpretation of the Judgment on Merits, Reparations, and Costs. Judgment of August 2, 2008. Series C No. 160.

I/A Court H.R., Case of Rocha Hernandez et. al. v. El Salvador. Merits, Reparations, and Costs. Judgment of October 14, 2014. Series C No. 285.

I/A Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations, and Costs Judgement of March 26, 2006. Series C. No. 146. Para 159.

I/A Court H.R., Case of the “Street Children” Villagran-Morales et al. v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63.

I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Merits Judgment of July 29, 1988, Series C No. 4.

I/A Court H.R., Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006, Series C No. 200.

I/A Court H.R., Case of Yakye Axa v. Paraguay. Merits, Reparations and Costs. Judgement of June 17, 2005, Series C No. 125.

I/A Court H.R., Matter of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169.

I/A Court H.R., Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312.

I/A Court H.R., Matter of Penitentiary Centre of the Andina Region regarding Venezuela. Request for Provisional Measures. September 6, 2012.

I/A Court H.R., Matter of Urso Branco Prison regarding Brazil. Provisional Measures. August 29, 2002.

I/A Court H.R., Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275.

I/A Court H.R., Case of employees from the fábrica de fuegos in San Antônio De Jesus v. Brazil, Preliminary Objection, Merits, reparations and Costs. Judgement of July, 15, 2020, C No. 407.

5. Domestic Law Instruments

Constituição Federal, art. 56 and 57 (Brazil),

https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf

Bureau of Justice Statistics. US Department of Justice.

H.R. 6805, Pregnant Women in Custody Act, U.S. House Committee on the Judiciary (2017-2018).

Prison Rape Elimination Act, 34 U.S.C. § 303 (2003), <https://bja.ojp.gov/program/prison-rape-elimination-act-prea/overview>

6. Hemerographic references

American College of Obstetricians and Gynecologists,

<https://www.acog.org/about>.

Beard, Jacqueline, “Transgender Prisoners”. *House of Commons Library*. 07420 (2018),

Boston University, <https://www.bu.edu/writingprogram/journal/past-issues/issue-9/johnson/>

Clontz, Carley. The Rise of Female Incarceration Rates in Latin America, *Panoramas*, (2020),

<https://www.panoramas.pitt.edu/news-and-politics/rise-female-incarceration-rates-latin-america#:~:text=Women%20only%20make%20up%206,for%20non%2Dviolent%20drug%20offenses>.

Cohen, Rachel D. Federal Legislation Seeks Ban On Shackling Of Pregnant Inmates, *NPR* (2018),

<https://www.npr.org/sections/health-shots/2018/12/05/673757680/federal-legislation-seeks-ban-on-shackling-of-pregnant-inmates>

The Continuing Legal Education Society of British Columbia. *Indigenous Healing in Federal Corrections*, (2019),

<https://www.cle.bc.ca/indigenous-healing-in-federal-corrections/>

Doula International, Doulas are Making a Difference for Families Worldwide,

<https://www.dona.org>

Human Rights Watch. “Behind Bars in Brazil, IX: Prisoner’s Contacts with the Outside World”.

<https://www.hrw.org/legacy/reports98/brazil/Brazil-10.htm>

Human Rights Watch. “The Prison Crisis in the Brazilian State of Pernambuco”. <https://www.hrw.org/report/2015/10/19/state-let-evil-take-over/prison-crisis-brazilian-state-pernambuco>

Jara, Alejandra, “Diputados UDI proponen al gobierno la creación de penales ‘especiales y específicos’ para presos de pueblos originarios”. *La tercera*. (2020) <https://www.latercera.com/politica/noticia/diputados-udi-proponen-al-gobierno-creacion-de-penales-especiales-y-especificos-para-presos-de-pueblos-originarios/WAYP75JUOVAQJAYJHW2LSSKMHQ/>

Johnson, Analisa, “*The Benefits of Prison Nursery Programs: Spreading Awareness to Correctional Administrators Through Informative Conferences and Nursery Program*”.

Justice Education Society, “Gladue and Aboriginal Sentencing”, <https://www.justiceeducation.ca/about-us/research/gladue-and-aboriginal-sentencing>.

Kuhlik, Lauren. “Congress Just Took a Big Step Toward Ending the Shackling of Pregnant Prisoners”, ACLE, (2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/congress-just-took-big-step-toward-ending-shackling-pregnant>.

Mexico: Over 8,000 indigenous people in prison for lack of interpreters and lawyers. The Mazatlan Post. (2019), <https://themazatlanpost.com/2019/04/02/mexico-over-8000-indigenous-people-in-prison-for-lack-of-interpreters-and-lawyers/>

National Center for Transgender Equality. <https://transequality.org/sites/default/files/docs/resources/EndingAbuseofTransgenderPrisoners.pdf>

National Commission on Correctional Healthcare, Restraint of Pregnant Inmates, <https://www.ncchc.org/restraint-of-pregnant-inmates>

National Indian Child Welfare Association (NICWA), <https://www.nicwa.org/about-icwa/>

Pardo, Jose Luis, “Mexico’s only indigenous prison is free from drugs, rape and corruption” *Vice*. (2016), <https://www.vice.com/en/article/59een8/mexicos-only-indigenous-prison-is-free-from-drugs-rape-and-corruption>

PBS, “*Why Are Black Mothers and Infants Far More Likely to Die in U.S. From Pregnancy-Related Causes?*”, (2018), <https://www.pbs.org/newshour/show/why-are-black-mothers-and-infants-far-more-likely-to-die-in-u-s-from-pregnancy-related-causes>.

Prison Law Office. *Family Visiting Information*, (2019)

<https://prisonlaw.com/wp-content/uploads/2019/02/Family-Visiting-Feb2019.pdf>

Prison Population Rates in Latin America and the Caribbean as of 2019, (2020),

<https://www.statista.com/statistics/809197/prison-population-rates-latin-america-caribbean-country/>

Rodríguez, Michel Cruz, “Indígenas en prisión, forzados a cambiar su cultura”. Un Periódico Digital,(2020)

<http://unperiodico.unal.edu.co/pages/detail/indigenas-en-prision-forzados-a-cambiar-su-cultura/>

Samant, Anjana. The First Step Act Is A Small Step for Incarcerated Women (2018),

<https://www.aclu.org/blog/prisoners-rights/women-prison/first-step-act-small-step-incarcerated-women>

Notifications

Following the indications of the IACtHR in the open invitation to submit written observations to this request for an advisory opinion, we indicate the following address for any notification by physical or electronic means that may arise:

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