

INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Presented by

The Inter-American Commission on Human Rights

with regard to

'Differentiated Approaches to Persons Deprived of Liberty'

WRITTEN OBSERVATIONS OF LAW

Submitted by the

University College London

Public International Law Pro Bono Project

Pursuant to Article 73(3) of the

Rules and Procedure of the Inter-American Court of Human Rights

Submitted on behalf of the UCL PIL Pro Bono Project on 15 January 2021 by:

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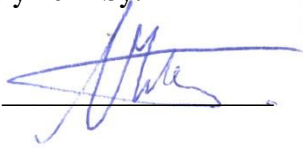
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1. Introduction

The UCL PIL Pro Bono Project (‘the PILPBP’) respectfully submits these written observations of law in response to the Request for an Advisory Opinion on ‘Differentiated Approaches to Persons Deprived of Liberty’ (‘the Request’) submitted by the Commission on 25 November 2019, and in accordance with conventional and procedural rules governing third party interventions before the Inter-American Court of Human Rights in the exercise of its advisory function.

Information about the PILPBP is set out in **Annex 1**.

The details of the individuals who contributed to the preparation of these written observations are set out in **Annex 2**.

This submission begins with a note on the nature, scope and purpose of these written observations (section 2), and a brief consideration of the questions of jurisdiction and admissibility (section 3). It then examines the general approach to non-discrimination and differential treatment under the United Nations and European human rights systems (section 4), and the particular approach to differential treatment of persons in detention under each of these systems (section 5). It concludes (section 6) with an examination of particular examples of differential treatment adopted in relation to the specific categories of persons mentioned in the Request. As discussed in section 2, this submission does not seek to make a particular argument in response to the Request, but it may be noted that the analysis in these observations provides strong support for the general conclusion that differential treatment of specific categories of persons in detention is not only permitted but required as a matter of human rights law, with sensitivity to the different characteristics and circumstances of particular detainees.

The following abbreviations are used in these observations:

ACHR	American Convention on Human Rights (adopted 22 November 1969, entry into force 18 July 1978) 1144 UNTS 123
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13
CERD	Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entry into force 4 January 1969) 660 UNTS 195
CRC	Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3

CRPD	Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entry into force 3 May 2008) 2515 UNTS 3
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (adopted 4 November 1950, entry into force 3 September 1953) 213 UNTS 221
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
Commission	Inter-American Commission on Human Rights
Court or IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171
ICESCR	International Covenant on Economic, Social and Cultural Rights (16 December 1966, entry into force 3 January 1976) 993 UNTS 3
Rules of Procedure	Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its XLIX Ordinary Period of Sessions, held from November 6 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009
UDHR	Universal Declaration of Human Rights (10 December 1948) 217 A (III)
UN Charter	Charter of the United Nations (26 June 1945, entry into force 24 October 1945) 1 UNTS XVI
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331

2. The Nature, Scope and Purpose of these Written Observations

The purpose of these written observations is to assist the Court by providing information about the practices of other human rights bodies faced with similar questions under their respective legal instruments. The observations provide information on the practices of the United Nations treaty bodies and the ECtHR with regard to differential treatment in general, in situations of detention, and in respect of the specific categories of persons mentioned in the Request.

It is our submission that this material may be relevant to the Request as both a *formal* and *informal* source, as explained immediately below. The PILPBP invites the Court to make use of the information contained in these observations in the manner it considers to be most appropriate.

2.1 Relevance as a Formal Source

United Nations human rights treaties have been held to fall within the category of ‘other treaties concerning the protection of human rights in the American states’ in Article 64(1) ACHR,¹ and thus within the scope of the Court’s interpretive power in the exercise of its advisory jurisdiction. The practice of UN human rights bodies is directly relevant to the interpretation of these treaties.

The Court also has the ability to take into account the practices of other bodies in its interpretation of provisions of the ACHR and other Inter-American human rights treaties. There are various *formal* ways in which this may occur. Under general international law, the principle of systemic integration, enshrined in Article 31(3)(c) VCLT, allows the Court to take account of other ‘relevant rules of international law applicable in the relations between the parties’ in its interpretation of the Convention.²

There are, moreover, specific provisions of treaties within the Inter-American system that refer to or incorporate international conventions and legal norms—in particular, those of the United Nations system—into the Inter-American system. The most significant such provision is to be found in Article 29 ACHR, which, under paragraphs b. and d. in particular, require the interpretation of ACHR rights to be not more restrictive than under international human rights law in general.³

¹ “*Other Treaties*” *Subject to the Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 September 1982, Ser A No 1; *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, of 1 October 1999 Ser A No 16.

² ILC, ‘Report on Fragmentation of International Law’ (13 April 2006) A/CN.4/L.682, paras 410-480, esp paras 415, 462-472. See also, C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279.

³ See *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17 of 24 November 2017 Ser A No 24, para 58.

The Inter-American Convention Against All Forms of Discrimination and Intolerance ('IACAD')⁴ has an interpretation clause, Article 16(2), that is of similar effect to Article 29 ACHR. Moreover, there are numerous other references to international human rights standards within IACAD. In particular, the definition of discrimination under Article 1 IACAD, includes references to 'international instruments' and 'international human rights law'. Furthermore, the obligation of non-discrimination under Article 4 IACAD, includes within prohibited discrimination (with emphasis added):

viii. Any discriminatory restriction on the enjoyment of the *human rights enshrined in applicable international and regional instruments* and in the *jurisprudence of international and regional human rights courts*, particularly those applicable to minorities or groups that are in vulnerable situations and subject to discrimination;

The Inter-American Commission's 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' adopt a similar approach.⁵ The Preamble to the principles makes specific mention of the UN human rights treaties. In a similar manner to the instruments mentioned above, many substantive provisions, including the prohibition on discrimination, refer to international human rights standards.

2.2 Relevance as an Informal Source

The Court may also take account of the practices of other bodies in an *informal* way, where those bodies provide persuasive authority as to the content of international or regional human rights standards on similar questions. The practice of other human rights bodies may be examined by the Court for the purposes of identifying cogent and convincing reasoning and analysis, in much the same way as national courts may rely on non-binding foreign judgments as informal authorities.

It is, however, our submission that the practice of international or regional human rights bodies is of stronger relevance to the issues facing the Court in this Request than foreign judgments are to the work of domestic courts. This is because the principle of equality and non-discrimination, although contained within international and regional conventions, also forms part of general international law, as indeed this Court has stated.⁶ Moreover, the principle has been held by this Court to derive directly from human nature.⁷

Decisions of other bodies, even though not binding on the Court, may inform the Court as to the content of the general standard, either because they evidence a customary standard or as persuasive

⁴ Adopted 7 June 1999, AG/RES. 1608 (XXIX-O/99).

⁵ Approved by the Commission during its 131st regular period of sessions, 3-14 March 2008, OEA/Ser/L/V/II.131 doc 26.

⁶ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, para 173.

⁷ *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, (n 3) para 61.

authority of a general principle. This point has been recognised by the Court itself, and it has made use of UN and ECtHR authority in its previous judgments and advisory opinions⁸ – a practice which we submit would be beneficial in relation to this Request.

⁸ See e.g. *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 3).

3. Jurisdiction and Admissibility

Before the Court can engage with the substantive issues involved in a request for an advisory opinion, it must satisfy itself that it has jurisdiction to do so and that engaging with the questions posed to the tribunal does not constitute an improper exercise of its jurisdiction (admissibility). It is our submission that these requirements are satisfied in relation to the present Request.

3.1 Jurisdiction

There are two points which must be satisfied for the Court to have advisory jurisdiction—the subject matter must fall within its jurisdictional authority (referred to below as jurisdiction *ratione materiae*), and the request must come from an entity with the standing to make such a request (jurisdiction *ratione personae*). It is uncontroversial that the Commission has standing to submit the Request.

The Court has advisory jurisdiction *ratione materiae* over (a) the ACHR and (b) other treaties concerned with human rights in the American States. The Request asks the Court to interpret various articles of the ACHR; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; the Inter-American Convention on Protecting the Human Rights of Older Persons; and ‘other applicable inter-American instruments’.⁹ The named conventions, as conventions of the Inter-American system, clearly fall within the Court’s competence under its advisory jurisdiction.

3.2 Admissibility

Article 70 of the Rules of Procedure requires that:

1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought.
2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates.

It is our submission that, although in relation to some instruments (such as the Inter-American Convention on Protecting the Human Rights of Older Persons) the Request does not identify specific provisions to be interpreted, it nevertheless identifies the matters to be addressed by the Court with sufficient focus and precision to satisfy the requirements for the Request to be admissible.

⁹ Request, para 78.

4. The General Approach to Non-Discrimination under Other Human Rights Systems

This section provides observations on the general approaches taken in the UN and European human rights systems, respectively, to non-discrimination and differential treatment. It examines, first, the general principles of equality and non-discrimination as applied within those systems. Second, it examines the respective approaches to differential treatment.

4.1 Equality and Non-Discrimination

The principles of equality and—its corollary—non-discrimination are central and fundamental to the protection of human rights. They are the only human rights expressly provided for in the United Nations Charter,¹⁰ and lie at the heart of international human rights protection.¹¹ As stated in Article 1 of the Universal Declaration of Human Rights: 'All men are born free and equal in dignity and rights'; and in Article 2: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'. The prohibition on discrimination is found in all international and regional human rights treaties,¹² with the exceptions of the UN Convention Against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. Furthermore, it constitutes, at a minimum, customary international law.¹³

¹⁰ UN Charter, Articles 1(3), 13(3), Article 55(c), Article 62(2).

¹¹ See, 'Declaration of the Rights of Man' adopted by the Institut de Droit International, 1929, printed in (1930) 24 AJIL 560, which gives primacy to non-discrimination; H Lauterpacht, *An International Bill of the Rights of Man* (repr with Introduction by P Sands, OUP 2013) 69, 71: 'Preamble' and 'art 7', see also commentary at p.115: 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most constitutions. It is the starting point of all other liberties'. Note also commentary, at p.116: "equal treatment in all respects," as provided in the draft, does not imply identical treatment. It implies an equality relative to the situation. A purely mechanical absence of differentiation may result in inequality and injustice.... The individualization of punishment or the special protection afforded by law to certain classes of persons, like women and children, are not contrary to the principle of equality.'

¹² In addition to those cited below, it is found in the International Convention on the Protection of All Migrant Workers and Members of Their Families; African Charter on Human and Peoples' Rights; Arab Charter on Human Rights; ASEAN Human Rights Declaration; Charter of Fundamental Rights of the European Union.

¹³ See M Shaw, *International Law* (7th edn, CUP 2014) 208-9. It is clear that the prohibition on racial discrimination amounts to *jus cogens*: *South-West Africa Cases (Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 293 and 299–300 (Judge Tanaka, dissenting); *Barcelona Traction Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32, 34. In addition, it is the long held view of the Inter-American Court that the prohibition of discrimination in all its forms is *jus cogens*: *Juridical Condition and Rights of Undocumented Migrants* (n 6) para 101.

4.1.1 United Nations System

The 'United Nations system' refers to the treaties and norms adopted within the framework of the United Nations, along with the various bodies, general and special, established within the framework for the protection of human rights. Although the treaties cover different aspects of human rights protection, they form an integrated system based on common principles, principal among which are the principles of equality and non-discrimination. Together they 'constitute a basic and general principle relating to the protection of human rights'.¹⁴

The principles of equality and non-discrimination are found in three provisions of the ICCPR.

Article 2, paragraph 1 states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 states:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

And Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Various other provisions include equality and non-discrimination as an explicit condition of the duty to ensure particular substantive rights.¹⁵ The list of protected characteristics includes but is not limited to those listed in the ICCPR – it extends to the categories of persons identified in the Request, as discussed further in section 6 below.

The substantive provisions of the ICCPR reflect and establish two different legal norms of equality.¹⁶ The first, embodied in Articles 2 and 3, is equality in the protection of human rights,

¹⁴ HRC, 'General Comment No 18: Non-discrimination' (1989) UN Doc HRI/GEN/1/Rev.9 (Vol. I) ('HRC GC 18') para 1.

¹⁵ Notably, ICCPR, Articles 14, 23(4), 24, 25. It is, moreover, implicit in the universalism of other rights.

¹⁶ As does the UDHR, Articles 2, 7.

namely that human rights norms extend equally to everyone (known as a 'subordinate' norm).¹⁷ This norm follows from the universality of human rights. The second, embodied in Article 26, is equal treatment and non-discrimination *in general* (known as an 'autonomous' or 'free-standing' norm).¹⁸

The ICCPR does not expressly define what constitutes discrimination. Explicit definition is to be found in CERD and CEDAW. Article 1, paragraph 1 of CERD defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 1 CEDAW defines 'discrimination against women' as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This standard is held by the HRC to be that applicable under the ICCPR.¹⁹

The idea of equality has two aspects.²⁰ Formal equality, or equality in or under the law, requires people in similar situations to be treated similarly. Substantive equality, or effective equal protection and equal benefit of the law, is concerned to achieve effective equality by addressing structural and indirect discrimination, in order that people, including those in different situations, are treated with equal dignity, or granted equal opportunities.

The two aspects of equality—formal and substantive—entail two different forms of prohibited discrimination: (1) direct discrimination and (2) indirect discrimination. Direct discrimination occurs when one person or group is treated less favourably than someone else in comparable circumstances.²¹ Indirect discrimination occurs when a practice, rule or requirement is outwardly

¹⁷ This is a provision common to nearly all human rights treaties, see e.g. Article 2(2) ICESCR, in addition to those cited below.

¹⁸ See also CERD Article 5; CEDAW, Articles 15, 16.

¹⁹ HRC GC 18 (n 14) para 7. It is also the standard applicable under the CRPD, Article 2 (definition of 'discrimination'). The Committee on the Rights of the Child has indicated that the CRC ought to be read in line with HRC GC 18 – CRC, 'General Comment No 5' (2003) CRC/GC/2003/5, 4.

²⁰ *Advisory Opinion regarding Minority Schools in Albania* (1935) PCIJ Rep Series A/B, No 64; CRPD General Comment No 6 (2018) on equality and non-discrimination (CRPD/C/GC/6) ('CRPD GC 6') para 10. See generally T Khaitan, *A Theory of Discrimination Law* (OUP 2015).

²¹ CRPD GC 6 (n 20) paras 10, 18(a).

neutral yet has a disproportionate impact on a particular group by reference to one of the prohibited grounds of discrimination.²²

4.1.2 *European Convention on Human Rights*

The ECHR provides for two grounds of non-discrimination. The first pertains to discrimination in the protection of ECHR rights in Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is subordinate (or 'ancillary') in nature; it complements other substantive provisions of the Convention, and does not have an independent existence. To find a breach of Article 14, the facts must fall within the ambit of another substantive Convention right, although the ECtHR has interpreted this broadly to require non-discrimination even if a state goes beyond the requirements of the ECHR.²³

Article 14 does not prohibit all forms of differential treatment, only treatment based on an identifiable objective or personal characteristic. The list of protected characteristics includes but is not limited to those listed in the Convention—the Court has extended it to other grounds not expressly mentioned in Article 14,²⁴ including the categories mentioned in the Request, as discussed further in section 6 below.

The ECHR also has a general norm of non-discrimination in Article 1 of Protocol 12, which states:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

²² CRPD GC 6 (n 20) paras 10, 18(b). See also, HRC, Communication No 208/1986, *Singh Binder v Canada*, UN Doc CCPR/C/37/D/208/1986 (1989), para 6.1; HRC, Communication No 998/2001, *Althammer v Austria*, UN Doc CCPR/C/78/D/998/2001 (2003), para 10.2.

²³ ECtHR, *A.H. and Others v Russia*, App No 6033/13 and 15 other applications, Judgment of 17 January 2017, paras 380ff; ECtHR, *Pichkur v Ukraine*, App No 10441/06, Judgment of 7 November 2013.

²⁴ ECtHR, *Novruk and Others v Russia*, App No 31039/11 and others, Judgment of 15 March 2016, para 90.

This provision is a general prohibition,²⁵ since it extends the scope of non-discrimination protection to 'any right set forth by law' or acts by a public authority. It thereby constitutes a 'free-standing' right not to be discriminated against.

The concept of discrimination in Article 1 of Protocol 12 is understood and interpreted by the ECtHR in the same manner as under Article 14. As set out in the Explanatory Report to Protocol 12,²⁶ the scope of Article 1 covers discrimination in relation to: (i) any right specifically granted to an individual under national law; (ii) the performance of an obligation under national law by a public authority; (iii) the exercise of discretionary power by a public authority; and (iv) any other act of omission of a public authority.

The ECtHR applies Article 14 to cover both *direct* and *indirect* discrimination. *Direct discrimination* has been defined by the ECtHR as a 'difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic, or "status"'.²⁷ *Indirect discrimination* involves 'difference in treatment' arising out of the 'disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.²⁸ The question is one of effect, and not necessarily of intent.²⁹ Indirect discrimination may be the result of a neutral *rule*, and may also arise from a *de facto* situation—i.e. where an *application* of a rule results in discrimination, even though the rule could have been applied in a non-discriminatory manner.³⁰

The ECtHR generally grants states a margin of appreciation under Article 14. However, the margin is considered inapplicable or narrowed where the discrimination pertains to certain protected grounds. Thus, discrimination based exclusively or decisively on a person's racial or ethnic origin is not capable of being objectively justified.³¹ The justification of unequal treatment on the basis of gender or sexual orientation requires 'particularly convincing and weighty reasons' to be advanced.³²

²⁵ ECtHR, *Sejdić and Finci v Bosnia and Herzegovina*, App Nos 27996/06 and 34836/06, Judgment of 22 December 2009.

²⁶ Explanatory Report to the Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para 22 <<https://rm.coe.int/09000016800cce48>> accessed 15 January 2021.

²⁷ ECtHR, *Biao v Denmark*, App No 38590/10, Judgment of 24 May 2016, para 89; ECtHR, *Carson and Others v the United Kingdom*, App No 42184/05, Judgment of 16 March 2010, para 61; ECtHR, *DH and Others v the Czech Republic*, App No 57325/00, Judgment of 13 November 2007, para 175; ECtHR, *Burden v the United Kingdom*, App No 13378/05, Judgment of 29 April 2008, para 60.

²⁸ *DH v Czech Republic* (n 27) para 184; *Biao v Denmark* (n 27) para 103.

²⁹ *ibid.*

³⁰ ECtHR, *Zarb Adami v Malta*, App No 17209/02, Judgment of 20 June 2006.

³¹ *DH v Czech Republic* (n 27) para 176.

³² ECtHR, *Schalk and Kopf v Austria*, App No 30141/04, Judgment of 24 June 2010, para 97.

4.2 Differential Treatment and Special Measures

Differential treatment does not necessarily amount to discrimination. It may be *permitted* where it is justified under human rights law. It may also be *required* pursuant to the prohibition of indirect discrimination in human rights law. Differential treatment may involve the adoption of measures—known as ‘special measures’, ‘affirmative action’, or ‘positive action’—for the specific purpose of achieving *de facto* equality.³³

4.2.1 United Nations System

The HRC has noted that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.³⁴ This has been understood by the HRC to entail that:

In order to determine the discriminatory or non-discriminatory character of the criteria in dispute... the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.³⁵

The HRC has also noted that ‘The enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance.’³⁶ Indeed, many human rights instruments expressly or implicitly require states to adopt differential treatment, in order to protect certain protected groups. For instance, Article 6(5) ICCPR expressly prohibits the imposition of the death penalty on children under 18 and pregnant women. Article 10(3) ICCPR requires the segregation of juveniles from adults in detention. Under Article 5(3) CRPD, states are required to take ‘all appropriate steps to ensure that reasonable accommodation is provided’, and are under various other positive obligations to ensure differential treatment to achieve equality for disabled persons. Similarly, many obligations under the CRC are directed towards differential treatment for children. Article 2 CEDAW requires states parties to ‘pursue by all appropriate means and without delay a policy of eliminating discrimination against women’, which entails obligations to take positive measures aimed specifically at eliminating discrimination towards women. Under Article 3 CEDAW, states are required to take ‘all appropriate measures...to ensure the full development and

³³ See further, UNCHR, ‘Report of the Sub-Commission on the Promotion and Protection of Human Rights on the Prevention of Discrimination: The concept and practice of affirmative action’ (17 June 2002) UN Doc E/CN.4/Sub.2/2002/21.

³⁴ HRC GC 18 (n 14) para 13.

³⁵ e.g. HRC, *Gillot v France*, Communication 932/2000, A/57/40 Vol II at 270 (15 July 2002) para 13.2. See also, CERD, Concluding Observations: Australia, CERD/C/AUS/CO/14 (14 April 2005) 24; CESCR, General Comment 20, E/C.12/GC/20, 13; HRC, Communication No 1314/2004, *O’Neill and Quinn v Ireland*, UN Doc CCPR/C/87/D/1314/2004 (2006) para 8.3.

³⁶ HRC GC 18 (n 14) para 8.

advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’.

Laws, policies and practices adopted and implemented to fulfil obligations under human rights treaties may require supplementing, when circumstances warrant, with special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.³⁷ The permissibility of a state taking special measures where it considers them to be appropriate to the fulfilment of their human rights obligations is expressly recognised in Article 1(4) CERD and Article 4(1) CEDAW, and implicit in other human rights treaties.

A state may also be required to take such measures as proactive steps to address the circumstances which lead to indirect discrimination.³⁸ As the HRC has noted:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.³⁹

The measures required under CEDAW are also understood to require the adoption of special measures where necessary.⁴⁰ In particular, the requirement to take special measures follows from the duty to achieve substantive equality.⁴¹ Similarly under Article 2 paragraph 2 CERD, states parties are required where ‘the circumstances so warrant, take...*special and concrete measures* to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and

³⁷ HRC, ‘General Comment No 31, The nature of the general legal obligation imposed on States Parties to this Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add.13 (‘HRC GC 31’) para 7; CERD, General Recommendation No 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, 24 September 2009, CERD/C/GC/32 (‘CERD General Recommendation 32’), para 11.

³⁸ HRC, General Comment 4, HRI/GEN/1/Rev. 9 (Vol I) 175, para 2; HRC GC 18 (n 14) paras 5 and 10; CRPD GC 6 (n 20) para 10.

³⁹ HRC GC 18 (n 14) para 10.

⁴⁰ CEDAW, ‘General Recommendation No 28 on the core obligations of State parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28) (‘CEDAW General Recommendation 28’) paras 9, 37(d).

⁴¹ CEDAW, ‘General Recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures’ (2004) UN Doc HRI/GEN/1/Rev.7 at 282 (‘CEDAW, General Recommendation 25’), paras 8-10.

fundamental freedoms' (emphasis added).⁴² An important distinction is drawn between special measures, which are adopted to address socio-economic inequalities and justified by the continued existence of those inequalities, and the general obligation to adopt differential treatment where necessary to avoid indirect discrimination, which is justified by the fact that formally equal treatment may have discriminatory outcomes.

Because of their distinctive justifications, special measures are subject to particular restrictions. For instance, under Article 1(4) CERD, special measures must, in summary, be (a) a coherent packet of measures, (b) of a temporary character, (c) aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, and (d) adopted in order to achieve effective equality.⁴³ This applies both to measures taken voluntarily and to measures required under Article 2(2).⁴⁴ Moreover, a special measure is only legitimate in so far as it does 'not lead in purpose or in practice, to the segregation of communities.'⁴⁵

The HRC also highlights the need for special measures to be temporary, but it is clear that the temporariness is not determined by any arbitrary time period, and instead by the existence of a continuing need for the measures.⁴⁶ Furthermore, under the approach taken by the HRC, the measures must be necessary,⁴⁷ and a State's measures cannot amount to preference to protect one minority group without providing similar preferences to another minority group.⁴⁸

Similarly, the Committee on the Elimination of Discrimination Against Women has recognised that special measures are only justified to the extent that the facts creating the need for them persist. In addressing the temporariness of the measures, the Committee distinguishes between 'women's biologically determined needs' and 'other needs that may be the result of past and present discrimination against women', including 'discrimination in social and cultural structures and institutions'.⁴⁹ The temporary nature of special measures is particularly directed at the latter category, and not to the former.

⁴² See further, CERD General Recommendation 32 (n 37) paras 28-35.

⁴³ UN Economic and Social Committee (ECOSOC), Sub-Commission on the Promotion & Protection of Human Rights, Comprehensive Examination of Thematic Issues Relating to Racial Discrimination: Prevention of Discrimination: The concept and practice of affirmative action, 42, UN Doc E/CN.4/Sub.2/2002/21, 17 June 2002, para 7.

⁴⁴ CERD General Recommendation 32 (n 37) para 35.

⁴⁵ CERD, Concluding observations on the Czech Republic, CERD/C/CZE/CO/7, para 17.

⁴⁶ HRC GC 18 (n 14) para 10, quoted above.

⁴⁷ HRC, Communication No 385/1989, *Bannatyne and Others v Canada*, UN Doc CCPR/C/47/D/385/1989 (2002), para 10.

⁴⁸ HRC, Communication No 694/1996, *Waldman v Canada*, UN Doc CCPR/C/67/D/694/1996, para 5.

⁴⁹ CEDAW General Recommendation 25 (n 41) para 11.

4.2.2 *European Convention on Human Rights*

The ECtHR applies a test of 'reasonable and objective justification' to determine whether any differentiation amounts to discrimination. As originally stated in the *Belgian Linguistics* case:⁵⁰

the Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In order to identify discrimination, the ECtHR requires the treatment of the applicant to be measured against a relevant comparator. This does not require the two groups to be identical, but instead the difference in treatment must be between 'persons in an analogous or relevantly similar situation'.⁵¹ This is a contextual question that must be determined in light of the nature of the claim.⁵²

Differential treatment, moreover, may be required as a corollary of indirect discrimination. Where a general policy or measure results in discrimination in fact, a state may be required to adopt differential policies.⁵³ Indeed, the ECtHR has held that, although ordinarily discrimination occurs 'when States treat differently persons in analogous situations without providing an objective and reasonable justification', 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'⁵⁴ In such cases, where formal equality of treatment fails to respect significant differences, differential treatment is not only justified, it is required.

The ECHR contains no specific provisions on special measures adopted to address socio-economic inequality, which within the ECtHR are referred to as 'positive action' or 'positive measures'. The ECtHR has, however, found that Article 14 does not prohibit a State 'from treating groups

⁵⁰ ECtHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case) (No 2)*, App No 1474/62 and others, Judgment of 23 July 1968, para 10.

⁵¹ ECtHR, *Molla Sali v Greece*, App No 20452/14, Judgment of 19 December 2018, para 133.

⁵² ECtHR, *Fábián v Hungary*, App No 78117/13, Judgment of 5 September 2017, para 113.

⁵³ See e.g. ECtHR, *Taddeucci and McCall v Italy*, App No 51362/09, Judgment of 30 June 2016, para 81.

⁵⁴ ECtHR, *Thlimmenos v Greece*, App No 34369/97, Judgment of 6 April 2000, para 44; ECtHR, *Pretty v UK*, App No 2346/02, Judgment of 29 April 2002, para 88.

differently in order to correct 'factual inequalities'.⁵⁵ The ECtHR has thus held that there is an obligation to take positive action in certain circumstances, because 'a failure to attempt to correct inequality through different treatment may in itself give rise to a breach' of the ECHR.⁵⁶ In particular, positive measures may be required in order to correct 'structural deficiencies' arising from 'past discrimination...with continuing effects'.⁵⁷ This obligation is 'particularly stringent where there is an actual history of direct discrimination'.⁵⁸ Whilst the ECtHR is clear in condoning the use of special measures, it only does so as an 'exceptional means of challenging prejudices'⁵⁹ experienced by individuals with protected characteristics.

⁵⁵ ECtHR, *Stec v United Kingdom*, App No 65731/01, Judgment of 12 April 2006, para 51.

⁵⁶ *Stec v United Kingdom* (n 55) para 51. See also ECtHR, *Çam v Turkey*, App No 51500/08, Judgment of 23 February 2016; ECtHR, *Horvath and Kiss v Hungary*, App No 11146/11, Judgment of 29 January 2013; ECtHR, *Kuric and Others v Slovenia*, App No 26828/06, Judgment of 26 June 2012.

⁵⁷ *Horvath and Kiss v Hungary* (n 56) para 104.

⁵⁸ *ibid.*

⁵⁹ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (2018) p.71.

5. Differential Treatment in Detention

This section considers the general approaches of the UN and European human rights systems to differential treatment in detention.

5.1 United Nations System

As the UN High Commissioner for Human Rights has recognised, 'equality and non-discrimination are even more important in circumstances where persons with increased vulnerability are deprived of their liberty, as they are even less able to challenge their detention and take action against discriminatory situations'.⁶⁰

5.1.1 Treaty provisions

Under the ICCPR, the general prohibition of discrimination in the exercise of ICCPR rights under Article 2 encompasses non-discrimination in situations of detention. Article 9 provides for the prohibition of arbitrary deprivation of liberty. Article 10 provides for specific standards of treatment of individuals deprived of liberty, notably that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. It applies to all persons deprived of their liberty, not only prisoners.⁶¹ Article 7 provides for the prohibition of torture or cruel, inhuman or degrading treatment. These are absolute standards applicable to all detainees; conditions beyond these standards are required to be provided in a non-discriminatory manner in line with the general prohibition in Article 2.⁶² Moreover, the obligations in Articles 7 and 10 are non-derogable,⁶³ and apply irrespective of a state's level of development.⁶⁴

State parties under the ICCPR are generally responsible for the lives and well-being of their detainees and must treat them according to common minimum standards, which are discussed further below. The standard of treatment nevertheless requires taking into consideration particular

⁶⁰ Human Rights Council, 'Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding: Report of the United Nations High Commissioner for Human Rights' (21 August 2017) A/HRC/36/28, para 8.

⁶¹ HRC, General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty) (Forty-Fourth Session, 1992) UN Doc HRI/GEN/1/Rev.1 at 33 ('HRC GC 21'), para 2.

⁶² HRC, General Comment No 9: Humane Treatment of Persons Deprived of Liberty (Sixteenth session, 1982) UN Doc HRI/GEN/1/Rev.1 at 9 ('HRC GC 9'), para 1.

⁶³ HRC, General Comment No 29: States of Emergency (article 4) (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 13(a).

⁶⁴ HRC, *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994), para 9.3.

characteristics of the detainee which might affect their vulnerability.⁶⁵ The ICCPR explicitly provides for differential treatment in three cases. Under Article 10(2)(a), accused persons are required to be segregated from convicted persons and subject to separate treatment appropriate to their status. Under Article 10(2)(b), accused juveniles are to be separated from adults, and are required to be brought to trial 'as speedily as possible'. Under Article 10(3), juveniles are to be segregated from adults and 'accorded treatment appropriate to their age and legal status'. Although the age threshold for a juvenile is not defined in the ICCPR, it is understood to be any person under the age of 18.⁶⁶ These more specific protections are understood by the HRC to follow from the general requirement to treat prisoners in accordance with human dignity.⁶⁷ In addition, the HRC has recognised that the general requirement under Article 10 also implies positive obligations in respect of other categories of vulnerable persons.⁶⁸

Beyond the ICCPR, it is clear that the other UN human rights treaties apply in situations of detention. CEDAW has outlined that states owe protective duties to women in detention. The Committee has called on States to ensure that, for example, young female offenders are not held in adult prisons, that adequate healthcare services are provided, and that rehabilitative programmes are available to women in prison.⁶⁹ CEDAW requires states to analyse the situation of women in target areas such as detention and imprisonment,⁷⁰ initiating institutional change to overcome past or present discrimination⁷¹. The CEDAW Committee has urged states to introduce special measures in the form of comprehensive gender-sensitive policies, strategies and programmes.⁷²

Under CERD, states must guarantee the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation: the

⁶⁵ HRC, *Brough v Australia*, Communication No 1184/2003 (2006) CCPR/C/86/D/1184/2003.

⁶⁶ HRC GC 21 (n 61) para 13.

⁶⁷ HRC GC 9 (n 62) para 4.

⁶⁸ HRC, General Comment 28: Equality of rights between men and women (article 3) (2000) UN Doc CCPR/C/21/Rev.1/Add.10 ('HRC GC 28'), para 15 (pregnant and post-natal prisoners); Concluding Observations on Cambodia, (1999) UN Doc CCPR/C/79/Add.108 (women prisoners). See further Section 6, below.

⁶⁹ CEDAW, Concluding observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/6, para 20.

⁷⁰ CEDAW General Recommendation 25 (n 41) para 27.

⁷¹ CEDAW General Recommendation 25 (n 41) para 33.

⁷² CEDAW General Recommendation 25 (n 41) para 20. See also United Nations Office on Drugs and Crime (UNODC) Handbook on Women and Imprisonment: 2nd Edition with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) (2014) page 2.

right to respect for their religious and cultural practices,⁷³ the right to respect for their customs as regards food, and the right to access to an interpreter.⁷⁴ In addition, the medical, psychological or social services offered to prisoners should take their cultural background into account.⁷⁵ It has also been held that in the context of detention, special measures (positive action) taken for the sole purpose of securing adequate advancement for certain racial or ethnic groups, ensuring equal exercise of rights and fundamental freedoms, are not discriminatory.⁷⁶

Under Article 14(2) CRPD:

if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation

In *Mr X v Argentina*, the CRPD Committee clarified that ‘reasonable accommodation’ within the context of detention requires states to ‘take all relevant measures, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of detention’.⁷⁷ Moreover, the Committee held that ‘states parties have a special responsibility to uphold human rights when prison authorities exercise significant control or power over persons with disabilities who have been deprived of their liberty by a court of law’.⁷⁸

5.1.2 Soft law instruments

In addition to the standards set forth by human rights treaties and treaty bodies, there are various other instruments addressing standards for the treatment of prisoners. Most notable among these is ‘The United Nations Standard Minimum Rules for the Treatment of Prisoners’ (‘the Mandela Rules’).⁷⁹ The Rules do not set out to be mandatory but are ‘generally accepted as being good

⁷³ CERD, General Recommendation No 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, CERD/C/GC/31 (‘CERD General Recommendation 31’) para 38(a). See also Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by the General Assembly in its resolution 45/111 of 14 December 1990, principle 3.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Communication No 8/2012, CRPD/C/11/D/8/2012 (11 April 2014) para 8.5.

⁷⁸ *ibid.* para 8.9. See also, HRC, *Noble v Australia*, Communication No 7/2012, CRPD/C/16/D/7/2012 (2 September 2016), paras 8.7-8.9.

⁷⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted 17 December 1955 UNGA Res 70/175); replacing earlier rules adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

principles and practice in the treatment of prisoners⁸⁰ that 'represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations'.⁸¹ They are considered to provide a frame of reference for the standard of treatment under Article 10 ICCPR.⁸² The Mandela Rules integrate, within the minimum standards, rights to dignity of treatment under the ICCPR and economic, social and cultural rights under the ICSECR, such as healthcare rights. The positive obligations under Article 10 ICCPR to respect human dignity have also been held by the HRC, on the basis of the Mandela Rules, to include protections of economic, social and cultural rights in situations of detention.⁸³

Under the Mandela Rules, Rule 1, 'All prisoners shall be treated with the respect due to their inherent dignity and value as human beings'. Under Rule 2:

1. The present rules shall be applied impartially. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The religious beliefs and moral precepts of prisoners shall be respected.

2. In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.

As apparent from Rule 2 paragraph 2 above, differential treatment and special measures for the protection of 'vulnerable categories' is permissible and at least in some circumstances required.

Similarly, under Principle 5, paragraph 2 of the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment',⁸⁴ adopted by the General Assembly in 1988, special measures in situations of detention are not deemed discriminatory:

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory.

⁸⁰ *ibid*, preliminary observation 1.

⁸¹ *ibid*, preliminary observation 2.

⁸² HRC, *Mukong v Cameroon* (n 64); HRC, *Potter v New Zealand*, UN Doc CCPR/C/60/D/632 (1995), para 6.3; Concluding Observations on the United States, UN Doc CCPR/C/79/Add.50, para 34 ('Conditions of detention in prisons, in particular in maximum security prisons, should be scrutinised with a view to ... implementing the Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein); see also Concluding Observations on the Ukraine, UN Doc CCPR/C/79/Add.52 (1996), para 24; Morocco, UN Doc CCPR/C/79/Add.44 (1995), para 21; Gabon, UN Doc CCPR/CO/70/GAB (2000), para 14.

⁸³ *Mukong v Cameroon* (n 64) para 9.3.

⁸⁴ Adopted by General Assembly resolution 43/173 of 9 December 1988, A/RES/43/173.

The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

The Bangkok Rules⁸⁵ supplement the Mandela Rules with specific standards for the treatment of women prisoners. Under Rule 1 of the Bangkok Rules:

In order for the principle of non-discrimination embodied in rule 6⁸⁶ of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

The remainder of the Bangkok Rules set out particular standards required to achieve substantive equality in the treatment of women prisoners. The United Nations Minimum Standards for the Administration of Juvenile Justice, also known as the Beijing Rules,⁸⁷ similarly provide for specific standards for the treatment of juveniles within the justice system, including detention. The Rules reinforce the application of the Standard Minimum Rules to juveniles.⁸⁸

The requirement that special provision be made for prisoners in particularly vulnerable categories is further reinforced by the United Nations Office for Drugs and Crime, which has provided specific guidance on vulnerable groups in detention. The focus of its guidance includes: women prisoners, prisoners with disabilities, ethnic and racial minorities and indigenous peoples, LGBT persons, and older prisoners.⁸⁹

5.2 European Convention on Human Rights

Under the ECHR, member states are under an obligation to treat all persons deprived of liberty with respect for their human dignity and fundamental rights.⁹⁰ The ECHR rights most applicable to persons deprived of liberty are the right to life (Article 2), the prohibition of inhuman or degrading treatment (Article 3), and the right to liberty and security of the person (Article 5).⁹¹ These provisions must be read together with the principle of non-discrimination enshrined in Article 14. In determining the standards of treatment for persons deprived of liberty, the ECtHR

⁸⁵ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (adopted 21 December 2010 UNGA Res 65/229) ('The Bangkok Rules').

⁸⁶ This is now Rule 2 of the Mandela Rules, referred to above.

⁸⁷ United Nations Minimum Standards for the Administration of Juvenile Justice, adopted 29 November 1985, UNGA Res 40/33.

⁸⁸ *ibid*, rule 27.

⁸⁹ UNODC, *Handbook on Prisoners with Special Needs* (United Nations 2009).

⁹⁰ ECtHR, *Bonyid v Belgium* (GC), App No 23380/09, Judgment of 28 September 2015, para 90.

⁹¹ Other rights may also be relevant, depending on the particular circumstances.

is guided by the need to avoid subjecting prisoners to suffering of an intensity exceeding the unavoidable level of hardship inherent in detention.⁹² At the same time, however, the ECtHR grants states a wide margin of appreciation regarding questions of prisoners and penal policy.⁹³

States have a positive duty to protect the physical well-being of persons who, by virtue of being under the control of a public authority, find themselves in a particularly vulnerable situation.⁹⁴ Instead of considering prisoners as an abstract category, the ECtHR has consistently analysed the impact of general policies and concrete practices on the particular individuals at issue.⁹⁵ The obligation to safeguard human dignity has been found to cover not just the conservation of physical health⁹⁶ but to entail positive obligations to protect privacy⁹⁷ and to facilitate a certain degree of self-sufficiency.⁹⁸ What this requires in any particular case, however, is determined by the factual context. For example, the ECtHR has held that in some cases the separate detention of categories of prisoners may be justifiable, for example to ensure the adequacy of their healthcare provision,⁹⁹ while in other cases the separate detention of categories of prisoners may itself be a violation of their rights.¹⁰⁰

It is important to observe that the ECtHR sometimes considers differential treatment under the rubric of particular substantive rights, without addressing the differential treatment in non-discrimination terms. Standards of treatment of vulnerable persons may engage prohibitions on inhuman or degrading treatment in the absence of a violation of Article 14. For example, where a pregnant woman was shackled while giving birth and where a baby was not examined by a paediatrician following their birth for almost three months, the Court considered these to be a violation of Article 3.¹⁰¹

⁹² ECtHR, *Kudła v Poland* (GC), App No 30210/96, Judgment of 26 October 2000, paras 92-94.

⁹³ ECtHR, *Alexandru Enache v Romania*, App No 16986/12, Judgment of 3 October 2017, para 78.

⁹⁴ ECtHR, *Premiñiny v Russia*, App No 44973/04, Judgment of 10 February 2011, para 73.

⁹⁵ See ECtHR, *Serifis v Greece*, App No 27695/03, Judgment of 2 November 2006, paras 34-36; ECtHR, *ZH v Hungary* App No 28973/11, Judgment of 8 November 2012, para 29; *Alexandru Enache v Romania* (n 93) paras 70-79.

⁹⁶ ECtHR, *Ananyev and Others v Russia*, App Nos 42525/07 and 60800/08, Judgment of 10 January 2012, para 156; ECtHR, *Dudchenko v Russia*, App No 37717/05, Judgment of 7 November 2017, para 130.

⁹⁷ ECtHR, *Szafrański v Poland*, App No 17249/12, Judgment of 15 December 2015, para 37-41.

⁹⁸ ECtHR, *Vincent v France*, App No 6253/03, Judgment of 24 October 2006, para 103.

⁹⁹ ECtHR, *Dikaion and Others v Greece*, App No 77457/13, Judgment of 16 July 2020.

¹⁰⁰ ECtHR, *Martzaklis and Others v Greece*, App No 20378/13, Judgment of 9 July 2015.

¹⁰¹ ECtHR, *Korneykova and Korneykov v Ukraine*, App No 56660/12, Judgment of 24 March 2016, paras 129-131.

In addition to the provisions of the ECHR, the Council of Europe has adopted recommended standards for prisoners.¹⁰² These rules are supplemented by commentaries that further define their scope.¹⁰³ The European Rules are based on the UN Standard Minimum Rules, and the revisions to the rules were for the purpose of bringing European standards in line with the Mandela Rules. Although the European Rules are soft-law, the ECtHR has frequently referred to them, alongside applicable UN instruments, to inform itself as to what constitute proper conditions of detention under the ECHR.¹⁰⁴

¹⁰² 'Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules' (adopted the Committee of Ministers on 11 January 2006 at the 952nd Meeting of the Ministers' Deputies, and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Ministers' Deputies) ('European Prison Rules 2006, as revised (2020)') <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581> accessed 15 January 2021.

¹⁰³ European Committee on Crime Problems, 'Draft Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules: Commentary' (20 February 2020) CM(2020)17-add2 <<https://cdn.penalreform.org/wp-content/uploads/2020/07/EPR-Commentary.pdf>> accessed 15 January 2021.

¹⁰⁴ See e.g. ECtHR, *Dickson v United Kingdom* (GC), App No 44361/04, Judgment of 4 December 2007, paras 31-36, 75; ECtHR, *Boulois v Luxembourg* (GC), App No 37575/04, Judgment of 3 April 2012, paras 61, 83 (and references therein).

6. Approaches of Other Human Rights Systems to the Specific Categories of Persons Mentioned in the Request

This section sets out some relevant principles and practice which have been adopted in the United Nations System and under the European Convention on Human Rights in relation to each of the specific categories of persons mentioned in the Request.

Although this section deals with each such category separately, it should be noted that many human rights bodies adopt approaches which underline the importance of recognizing intersections between different categories rather than viewing them as distinct. For example, equality under CEDAW encompasses *intersectionality* as a basic concept for understanding the scope of the general obligations of States parties. Rather than viewing different groups such as race, gender and class as separate categories of differentiation, intersectionality suggests that they 'intersect and confirm each other'.¹⁰⁵ Similarly, under the CRPD, the rights of persons with disabilities are understood under the concept of '*inclusive equality*'.¹⁰⁶ This is a substantive model, which embraces intersectional equality, and incorporates a 'fair redistributive dimension to address socio-economic disadvantages', focuses on combating stigma and violence, and highlights a 'participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society'.¹⁰⁷ CERD also recognises the intersectionality of race with other characteristics which can make individuals and groups more vulnerable within the justice system, such as gender and age. Where this is the case, states should pay special attention to ensuring that such persons benefit from the 'special regime' to which they are entitled in prison.¹⁰⁸ CEDAW and CERD have, for example, recognized the particular vulnerability of indigenous women.¹⁰⁹

¹⁰⁵ See CEDAW General Recommendation 28 (n 40) paras 18 and 26. See discussion in Pok Yin S Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 Human Rights Law Review 453.

¹⁰⁶ CRPD GC 6 (n 20) para 11.

¹⁰⁷ See CRPD Communication No 3/2011, *HM v Sweden*, CRPD/C/7/D/3/2011; CRPD Communication No 21/2014, *F v Austria*, CRPD/C/14/D/21/2014; CRPD, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No 7/2012; *Noble v Australia* (n 78); and CRPD Communication No 22/2014, *X v Tanzania*, CRPD/C/18/D/22/2014.

¹⁰⁸ CERD, General Recommendation 31 (n 73), para 41.

¹⁰⁹ CEDAW, *Kell v Canada*, Communication No 19/2008 (2012), CEDAW/C/51/D/19/2008, para 10.2; Concluding Observations, Paraguay, UN Doc CERD/C/PRY/CO/1-3 (2011): 'the situation of indigenous women is of particular concern to the Committee, as they are subject to multiple, intersectional forms of discrimination because of their ethnic origin, gender, occupational status and poverty'.

6.1 Women Deprived of Liberty who are Pregnant, in Postpartum Period and Breastfeeding

6.1.1 United Nations system

There is an increasing body of UN principles and guidance advocating for the special needs of women in prison in situations of maternity. As already noted, special measures for the specific needs of women prisoners are endorsed by the Bangkok Rules.

The need for states to adopt additional measures to address the specific needs of women in maternity is recognised under Article 10(2) ICESCR:

Special protection should be accorded to mothers during a reasonable period before and after childbirth.

In connection with healthcare, under Article 12(2) CEDAW, states are also required to:

ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Moreover, under Article 4(2), special measures aimed at protecting maternity are not discriminatory.¹¹⁰ The Committee on the Elimination of All Forms of Discrimination Against Women affirms that access to healthcare for all women is a basic right.¹¹¹

In the specific context of imprisonment, the HRC has clarified that there are positive duties under Article 10 ICCPR, for pregnant and post-natal prisoners.¹¹² The Mandela Rules similarly state that 'in women's institutions there shall be special accommodation for all necessary prenatal and postnatal care and treatment'.¹¹³ Moreover, under the Bangkok Rules, prison regimes should be sensitive to the situation of maternity, being 'flexible enough to respond to the needs of pregnant women, nursing mothers and women with children'.¹¹⁴ States are obliged to take particular efforts to provide appropriate programmes for pregnant women, nursing mothers and women with children in prison.¹¹⁵

The Bangkok Rules provide for standards of healthcare for women in maternity. Prison health services are required to provide or facilitate specialized treatment programmes designed for the special needs of pregnant women and women with children, as well as their diverse cultural

¹¹⁰ See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 5(2).

¹¹¹ CEDAW General Recommendation No 24, Article 12 of the Convention, A/54/38/Rev.1(1999) ('CEDAW General Recommendation 24'), para 1.

¹¹² HRC, GC 28 (n 68) para 15.

¹¹³ Mandela Rules, rule 28(1).

¹¹⁴ Bangkok Rules, rule 42(2).

¹¹⁵ Bangkok Rules, rules 39(2)-(3).

backgrounds.¹¹⁶ Pregnant or breastfeeding women prisoners shall receive: (i) advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner, (ii) food adequate for their particular needs, and (iii) a healthy environment and regular exercise opportunities for them and their children. The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, are required to be included in treatment programmes.¹¹⁷ The Bangkok Rules also provide, under rule 50, that women whose infants are in prison with them should be given maximum opportunity to spend time with them.

Pregnant juvenile prisoners are to receive equivalent medical care to pregnant adult prisoners, with their health monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.¹¹⁸ Special adjustments are also required to be made to prison accommodations to meet women's specific hygiene needs, including a regular supply of water to be made available for the personal care of children and women, in particular women who are pregnant or breastfeeding.¹¹⁹ There are also specific measures under the Bangkok Rules to ensure the safe and humane treatment of pregnant prisoners, during pregnancy, labour and after the birth. For example, instruments of restraint are not to be used on women during labour, birth and immediately after birth,¹²⁰ and punishment by close confinement or disciplinary segregation is not to be applied to pregnant women, women with infants and breastfeeding mothers in prison.¹²¹

In addition to these special protections, pregnant, postpartum and breast-feeding women are also entitled to the standards of treatment of women generally required under the Bangkok Rules. The application of these general standards for the treatment of women prisoners must be appropriately modified, in accordance with the principles outlined above, to take account of the special circumstances of maternity and breast-feeding.

6.1.2 *European Convention on Human Rights*

The ECtHR has taken the position that 'providing for the distinctive needs of women prisoners, particularly in relation to maternity, in order to accomplish substantial gender equality should not

¹¹⁶ Bangkok Rules, rule 15.

¹¹⁷ Bangkok Rules, rule 48(1)-(3).

¹¹⁸ Bangkok Rules, rule 39.

¹¹⁹ Bangkok Rules, rule 5.

¹²⁰ Bangkok Rules, rule 24.

¹²¹ Bangkok Rules, rule 22.

be regarded as discriminatory', and different treatment of men and women prisoners is 'acceptable and may even be necessary in order for substantive gender equality to be ensured'.¹²²

In making its assessment of the standards of treatment of women in maternity for the purposes of the prohibition of inhuman or degrading treatment, the ECtHR has taken account of the Bangkok Rules and also relevant WHO recommendations.¹²³ In cases involving breastfeeding infants, the ECtHR has also been guided by the principle of the best interests of the child.¹²⁴

The ECtHR has held that the shackling of a woman during and after childbirth is contrary to Article 3 ECHR, due to the particular circumstances of childbirth.¹²⁵ It should be noted that the Court did not state that shackling or similar restraint would never be permissible, but this appears to have been implicit in its judgment, or the decision implies that very weighty reasons would be required to justify such action.

The ECtHR has also found that the general obligation to provide sufficient food to prisoners 'becomes crucial in the case of a breastfeeding mother',¹²⁶ and the standard of food required is that of 'sufficient and wholesome food corresponding to [the mother's] needs as a breastfeeding mother in detention'.¹²⁷ Mothers of new-born infants also require adequate hygiene commensurate with their situation as this is considered 'vital for a new-born baby and a nursing mother'.¹²⁸ The particular circumstances of a mother with a new-born child also justify additional exercise time for the benefit of both mother and child.¹²⁹

¹²² ECtHR, *Ēcis v Latvia*, App No 12879/09, Judgment of 10 January 2019, para 86; ECtHR, *Alexandru Enache v Romania* (n 93) paras 70-79.

¹²³ *Korneykova and Korneykov v Ukraine* (n 101) paras 89-94.

¹²⁴ *ibid*, para 130.

¹²⁵ *ibid*, para 115.

¹²⁶ *ibid*, para 141.

¹²⁷ *ibid*, para 144.

¹²⁸ *ibid*, para 140.

¹²⁹ *ibid*, para 145.

6.2 LGBT Persons

6.2.1 *United Nations system*

LGBT¹³⁰ persons are disproportionately subject to cruel, inhuman or degrading treatment¹³¹ and violence in situations of deprivation of liberty.¹³² States are obliged to ensure that ‘all cases of arbitrary detention, violence towards and ill-treatment of persons because of their foreign origin, sexual orientation or gender identity are investigated, with a view to prosecuting and punishing the perpetrators of such acts and suspending the officials involved’ – in addition, differential treatment is required through ‘the adoption of policies and programmes specifically aimed at the integration and protection of persons detained on the basis of their sexual orientation or gender identity’.¹³³ States are also required to ensure the personal safety of transgender persons in all spheres, including in places of detention.¹³⁴

States must ensure that apparently protective measures do not operate to the detriment of LGBT individuals. For example, it has been suggested that prolonged periods of protective custody are extremely taxing on the person and restrict access to education, work and programme opportunities that affect time off for good behaviour and parole. LGBT persons who serve their sentences in isolation are therefore also more likely to serve longer time.¹³⁵

Many of the human rights issues faced by LGBT persons in general are also faced by them in the context of detention. For example, LGBT persons are frequently denied medical treatment.¹³⁶ Their access to necessary resources and services, such as physical and mental care, should stem from

¹³⁰ In these observations we use the term ‘LGBT’ because it is the terminology used in the Request, although we understand and acknowledge that other terms such as LGBTI, LGBT+ and LGBTQ are also widely used and may be considered more inclusive.

¹³¹ UN General Assembly, Question of torture and other cruel, inhuman and degrading treatment or punishment: Note by the Secretary General, A/56/156, para 19; CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/C/57/4, para 63; CAT, General Comment No 2: Implementation of Article 2 by States Parties (24 January 2008), CAT/C/GC/2, para 22.

¹³² CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/C/57/4, para 60; CAT, Decision adopted by the Committee under article 22 of the Convention, concerning Communication No 573/2013, CAT/C/60/D/573/2013, para 5.3; Human Rights Committee (HRC), Communication No 2054/2011 (2015).

¹³³ CAT, Concluding Observations, Argentina (24 May 2017), CAT/C/ARG/CO/6, paras 36(b)-(c).

¹³⁴ CAT, Concluding Observations, Panama (28 August 2017), CAT/C/PAN/CO/4, paras. 44-45; CAT, Concluding Observations, Honduras (26 August 2016), CAT/C/HND/CO/2, paras. 49-50.

¹³⁵ CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/C/57/4, para 64.

¹³⁶ HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (5 January 2016), A/HRC/31/57, para 48.

understanding of their specific needs.¹³⁷ The lack of information and services for persons undergoing a gender transition is particularly harmful and there can be grave health consequences.¹³⁸ LGBT persons may also be subject to improper medical procedures which may lead to severe pain and suffering and can amount to torture and ill-treatment.¹³⁹

Legal protection of LGBT persons in detention may require special measures to address these issues, although obligations to protect against particular abuses also derive from the general prohibitions of torture and inhuman and degrading treatment, and general standards for the treatment of prisoners, under Articles 7 and 10 ICCPR, or CAT, as set out above. Soft-law instruments at the UN level do not generally provide for specific measures required for LGBT persons. An exception to this, however, is to be found in Rule 7, Mandela Rules, which requires in the case of transgender persons:

No person shall be received in a prison without a valid commitment order. The following information shall be entered in the prisoner file management system upon admission of every prisoner:

(a) Precise information enabling determination of his or her unique identity, *respecting his or her self-perceived gender*

6.2.2 European Convention on Human Rights

Within the European human rights system, the Commentary to the European Prison Rules makes clear that 'prisoners who self-identify with a gender different from their biological sex and transgender prisoners may not fit the binary male and female accommodation categories and therefore require different arrangements'.¹⁴⁰

The ECtHR has made clear that gender identity and sexual orientation constitute two 'distinctive and intimate characteristics', both protected by the ECHR, and has held that they ought not to be confused.¹⁴¹ In the case of sexual orientation, the ECtHR has held that discrimination based on sexual orientation is as serious as discrimination based on race.¹⁴²

¹³⁷ CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/C/57/4, para 60.

¹³⁸ CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/C/57/4, para 65.

¹³⁹ Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (1 February 2013), A/HRC/22/53.

¹⁴⁰ Revised Commentary to the European Prison Rules 2006 (2020) (n 103) p. 11.

¹⁴¹ ECtHR, *Sousa Goucha v Portugal*, App No 70434/12, Judgment of 22 March 2016, para 27.

¹⁴² ECtHR, *Vejdeland and Others v Sweden*, App No 1813/07, Judgment of 9 February 2012, para 55.

The ECtHR has found breaches of human rights in relation to situations of discrimination of LGBT persons in detention. One issue in particular that has arisen within the European human rights system concerns the separation and isolation of LGBT prisoners, which is a common solution to the risk of violence faced by LGBT prisoners.¹⁴³ In *Stasi v France*, the ECtHR accepted that separation of a prisoner at risk of abuse on account of their sexual orientation was a justified measure.¹⁴⁴ The ECtHR has clarified, however, that segregation of prisoners requires justification on the basis of the risk posed to the individual's safety,¹⁴⁵ weighed against the mental and physical stress which may be caused by isolation.¹⁴⁶

The ECtHR has assessed the necessity of segregation in particular cases. For instance, in *X v Turkey* the ECtHR found that the conditions of the prisoner's detention amounted to inhuman treatment violating Article 3, and that these conditions were a result of discrimination on the basis of his sexual orientation.¹⁴⁷ The prisoner in this case had been separated from the rest of the prison population, in squalid conditions, allegedly for protection from a risk of abuse. The ECtHR considered that, on the evidence before it, including the absence of a risk assessment, the measure of solitary confinement was not shown to be necessary. In its view, 'the authorities have an obligation, which was incumbent on them under Article 14 of the Convention taken in conjunction with Article 3, to take all possible measures to determine whether or not a discriminatory attitude had played a role in adopting the measure totally excluding the applicant from prison life'.¹⁴⁸ The court highlighted that the applicant was placed in conditions stricter than the usual prison conditions used for a person serving the applicant's sentence,¹⁴⁹ and found that the main reason for the applicant's treatment was his sexuality, and thus a violation of Article 3 and Article 14.¹⁵⁰

¹⁴³ EU Agency For Fundamental Rights, *Criminal Detention Conditions in the EU: Rules and Reality* (2019), p 40 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf> accessed 15 January 2021.

¹⁴⁴ ECtHR, *Stasi v France*, App No 25001/07, Judgment of 20 October 2011.

¹⁴⁵ ECtHR, *X v Turkey*, App No 24626/09, Judgment of 9 October 2012, para 56.

¹⁴⁶ ECtHR, *Jeanty v Belgium*, App No 82284/17, Judgment of 31 March 2020, para 117.

¹⁴⁷ *X v Turkey* (n 145) para 57. See further, Paul Johnson and Silvia Falcetta, 'Sexual Orientation Discrimination and Article 3 of the ECHR: Developing the Protection of Sexual Minorities' (2018) 43 *European Law Review* 167, 175-6.

¹⁴⁸ *X v Turkey* (n 145) para 55.

¹⁴⁹ *ibid*, para 37.

¹⁵⁰ *ibid*, para 57.

6.3 Indigenous People

6.3.1 United Nations System

The protections and obligations under CERD apply equally to indigenous peoples.¹⁵¹ Special measures under CERD, as outlined in section 4 above, may therefore be necessary in order to protect indigenous persons in situations of factual inequality. In addition to temporary special measures, states must respect the permanent rights of indigenous peoples, such as the rights to enjoy their own culture, profess and practise their own religion and use their own language.¹⁵² This requires the application of the general standards of treatment of prisoners with appropriate modifications for the particular circumstances of indigenous persons.

In *Brough v Australia*, the HRC held that the state had breached its obligations under Article 10 ICCPR because its treatment of the complainant was 'not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal'.¹⁵³ In particular, the HRC appeared to accept the submission that prison conditions need to attend to the fact that 'segregation, isolation and restriction of movement within prisons have more deleterious effects on Aboriginal than on other inmates, given the importance they attach to a high degree of mobility and to access to their family and community'.¹⁵⁴

The practices of states when taking into account the special needs of indigenous people in detention ought to be in conformity with the rights of indigenous peoples, as recognised by the UN General Assembly. This requires, among other things, measures to ensure respect for language and culture;¹⁵⁵ spiritual and cultural practices;¹⁵⁶ rights to belong to a community,¹⁵⁷ including the right not to be forced to assimilate,¹⁵⁸ and rights to traditional health practices.¹⁵⁹ More generally, states are required to engage and consult in good faith with indigenous peoples in matters affecting them or their rights.¹⁶⁰

¹⁵¹ CEDAW General Recommendation 24 (n 111) para 1.

¹⁵² CERD General Recommendation 32 (n 37) para 15; CERD, Reply to the request for further information on the recommendations contained in paragraphs 14, 19, 20 and 23 of the fifteenth to seventeenth periodic reports of New Zealand (2007), CERD/C/NZL/CO/17, para 15, CEDAW General Recommendation 25 (n 41) para 12.

¹⁵³ *Brough v Australia* (n 65) para 9.4.

¹⁵⁴ *ibid*, para 3.4.

¹⁵⁵ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (adopted 2 October 2007) ('Indigenous Rights Declaration') A/RES/61/295, Articles 13-16.

¹⁵⁶ *ibid*, Articles 11-12.

¹⁵⁷ *ibid*, Article 9.

¹⁵⁸ *ibid* Article 8.

¹⁵⁹ *ibid*, Article 24.

¹⁶⁰ *ibid*, Articles 18-19.

The Bangkok Rules make specific provision for special measures to address the special vulnerability of indigenous women,¹⁶¹ as follows:

Rule 54

Prison authorities shall recognize that women prisoners from different religious and cultural backgrounds have distinctive needs and may face multiple forms of discrimination in their access to gender- and culture-relevant programmes and services. Accordingly, prison authorities shall provide comprehensive programmes and services that address these needs, in consultation with women prisoners themselves and the relevant groups.

Rule 55

Pre- and post-release services shall be reviewed to ensure that they are appropriate and accessible to indigenous women prisoners and to women prisoners from ethnic and racial groups, in consultation with the relevant groups.

6.3.2 *European Convention on Human Rights*

Within the European human rights system, there is greater focus on the rights of minorities than indigenous peoples, although the challenges faced by both have similarities. The principles embodied in the European Prisoner Rules pertaining to national minorities are in principle equally applicable to indigenous peoples. In particular:¹⁶²

Ethnic or linguistic minorities

38.1 Special arrangements shall be made to meet the needs of prisoners who belong to ethnic or linguistic minorities.

38.2 As far as practicable the cultural practices of different groups shall be allowed to continue in prison.

38.3 Linguistic needs shall be met by using competent interpreters and by providing written material in the range of languages used in a particular prison.

The ECtHR has made clear, in general, that minorities can require differential treatment and special measures to address factual inequalities.¹⁶³ In making a determination that differential treatment is required, the ECtHR is particularly sensitive to the position of the minority group, finding, for instance, in *DH v Czech Republic* that Roma children were subject to structural inequality and that 'as a result of their turbulent history and constant uprooting the Roma have become a specific type

¹⁶¹ See also Indigenous Rights Declaration (n 155) Article 22.

¹⁶² European Prison Rules 2006, as revised (2020).

¹⁶³ *DH v Czech Republic* (n 27).

of disadvantaged and vulnerable minority [that] ... require special protection'.¹⁶⁴ Moreover, states ought to protect minorities from racial discrimination, and, in particular ought to ensure that, if violence occurs in prison, any racial motive should be investigated.¹⁶⁵

The ECtHR requires states to provide reasonable accommodation to minorities in order to achieve the effective realisation of their rights while in detention. In particular, the general requirement, under Article 8 ECHR, that prisoners are allowed to maintain contact with their families while in prison may require reasonable adjustments to be effective. In *Nusret Kaya and Others v Turkey*, the ECtHR found a violation of Article 8 where the prisoner, a Kurd, was prevented from communicating in Kurdish with his family, which effectively prevented him from communicating with them since they only spoke Kurdish.¹⁶⁶ Although the ECtHR has held that security reasons might justify restricting prisoners from communicating in a language of their choosing, given the inability to communicate in another language, the ECtHR considered that an appropriate system of translation ought to have been considered to enable effective communication.¹⁶⁷

In addition, the ECtHR has taken the view that access to culture, and cultural rights, are important in the context of detention.¹⁶⁸ The ECtHR's caselaw on this is not specific to indigenous peoples or national minorities, but the principle extends to such cases.

6.4 Older Persons

6.4.1 *United Nations System*

The rights of older persons—both in general and in the context of detention—are not directly addressed by international conventions, but they have received increasing attention in recent years, beginning with the non-binding UN Guiding Principles for Older Persons.¹⁶⁹ There is now general recognition of the serious need for the introduction of special measures of protection to ensure the dignity of older persons. Moreover, the situation of older persons often intersects with the rights of persons with disabilities, since, as noted in a report by the Special Rapporteur on the rights

¹⁶⁴ *ibid*, para 182.

¹⁶⁵ ECtHR, *Bekos and Koutropoulos v Greece*, App No 15250/02, Judgment of 13 December 2005.

¹⁶⁶ App Nos 43750/06, 32054/06, 37753/08, 37753/08 and 60915/08, Judgment of 22 April 2014, paras 59-61.

¹⁶⁷ *ibid*.

¹⁶⁸ ECtHR, *Laduma v Slovakia*, App No 31827/02, Judgment of 13 December 2011.

¹⁶⁹ United Nations Principles for Older Persons, UNGA Res 46/91 (16 December 1991). Further attention has occurred within the Committee on Economic, Social and Cultural Rights: CESCR, General Comment No 6, The economic, social and cultural rights of older persons (1995) E/1996/22. See also International Plan of Action on Ageing, UNGA, A/66/173 (22 July 2011).

of persons with disabilities, 46 percent of older persons worldwide have a disability and 'older persons represent the majority of the overall population of persons with disabilities'.¹⁷⁰

Under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, special measures applied to protect the rights of elderly individuals in prison are permitted.¹⁷¹ To the extent that additional provision is necessary to achieve equal dignity of older persons, or constitute necessary reasonable adjustments for elderly disabled persons, such additional measures are required under international human rights law. Failure to provide a standard of treatment commensurate with these requirements would violate Article 10 ICCPR, and, for disabled persons, Article 15 CRPD.

In particular, the Mandela Rules require prisons to provide healthcare that is 'organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care'.¹⁷² Thus treatment of older persons should be delivered in the same way it is to the general population, in accordance with general human rights standards. Prisons are also required, in the provision of health services, to pay 'particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation'.¹⁷³ This is particularly necessary for the elderly and, in particular, older persons with disabilities.¹⁷⁴

6.4.2 *European Convention on Human Rights*

The European Prison Rules¹⁷⁵ provide for particular arrangements for certain categories of prisoners:

18.8 In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain:

...

c. young adult prisoners separately from older prisoners.

...

¹⁷⁰ Report of the Special Rapporteur on the rights of persons with disabilities, 'Report on the rights of older persons with disabilities' (17 July 2019) A/74/186, para 4.

¹⁷¹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 5(2).

¹⁷² Mandela Rules, rule 24(2).

¹⁷³ *ibid*, rule 25(1).

¹⁷⁴ See also Article 25, CRPD.

¹⁷⁵ European Prison Rules 2006, as revised (2020).

18.10 Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

Although neither of these rules is explicitly directed towards older persons—rule 18.8(c) is principally concerned with the distinction between juvenile and non-juvenile prisoners—the latest commentaries to the rules make clear that these provisions imply special accommodation for older persons deprived of liberty. The European Committee on Crime Problems has stated, in connection with rule 18.8(c) that: ‘As the composition of the prison population changes, attention needs to be paid to the accommodation needs of other categories of prisoners too. In particular, older prisoners may require modifications to the standard prison accommodation and possibly being grouped together away from younger prisoners’.¹⁷⁶ And, in connection with 18.10, it has stated that: ‘particular attention should be paid to providing appropriate accommodation for older prisoners and physically disabled prisoners who, on the one hand, may have special needs but, on the other hand, may not pose security risks’.¹⁷⁷

The ECtHR has considered how healthcare must be administered in prisons, and how conditions and length of detention may affect the rights of older persons. The ECtHR has noted that there is no prohibition in the Convention against the detention of elderly persons.¹⁷⁸ However, the Court has stated that age, in conjunction with a person’s state of health, has to be considered when a sentence is passed or while it is being served.¹⁷⁹ Citing criteria used in a case where a prisoner had a serious mental health illness,¹⁸⁰ the Court has addressed what States’ obligations are in regard to an elderly person in detention. The ECtHR stated that ‘where persons deprived of liberty are concerned, Article 3 compels the State to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance’.¹⁸¹

¹⁷⁶ Revised Commentary to the European Prison Rules 2006 (2020) (n 103) p. 11.

¹⁷⁷ *ibid.*

¹⁷⁸ ECtHR, *Sawoniuk v the United Kingdom*, App No 63716/00, Judgment of 29 May 2001.

¹⁷⁹ ECtHR, *Papon v France (No 1)*, App No 64666/01, Judgment of 7 June 2001.

¹⁸⁰ ECtHR, *Kudła v Poland (GC)*, App No 30210/96, Judgment of 26 October 2000, para 94.

¹⁸¹ ECtHR, *Papon v France (No 1)*, App No 64666/01, Judgment of 7 June 2001.

6.5 Children Living in Detention Centres with their Mothers

6.5.1 United Nations System

The CRC, under Article 37(c), requires that every child in detention be treated with 'humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.

The Mandela Rules make special provision for children born, or otherwise living with their mother, in prison. Under rule 29,¹⁸²

1. A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned. Where children are allowed to remain in prison with a parent, provision shall be made for:
 - (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent;
 - (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists.
2. Children in prison with a parent shall never be treated as prisoners.

More specific provision is made in the Bangkok Rules:

Rule 51

1. Children 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.
2. The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.

Rule 52

1. Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws.
2. The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.
3. After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible

¹⁸² See also Bangkok Rules, rule 49.

opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.

The Committee on the Rights of the Child has addressed the issue of 'Children of Incarcerated Parents' as a part of a Day of General Discussion.¹⁸³ In the discussion, the Committee emphasised that children of incarcerated parents have the same rights as other children. They recommend that measures be taken ensuring that children in such situations are protected from stigmatisation as these children have themselves not come into conflict with the law.¹⁸⁴ The Committee recommended that decisions on whether the best interests of the child are better respected by having the child live with the incarcerated parent or outside the detention facility should always be made on an individual case by case basis.¹⁸⁵ The Committee also recommended that State parties ensure the provision of sufficient social services at an adequate quality, including, health and educational facilities, to children living with incarcerated parent(s).¹⁸⁶

6.5.2 European Convention on Human Rights

The Council of Europe's 'European Prison Rules' make special provision for the rights of children detained with their mothers:¹⁸⁷

Infants

36.1 Infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners.

36.2 Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present.

36.3 Special accommodation shall be set aside to protect the welfare of such infants.

The ECtHR has acknowledged that there exists a fundamental tension between the recognition that prisons are generally inappropriate environments for young minors to grow up in, and the

¹⁸³ Held in Geneva on Friday 31st September 2011.

¹⁸⁴ CRC, 'Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"' (30 September 2011) <<https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>> accessed 15 January 2021, p.6

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ European Prison Rules 2006, as revised (2020).

clearly negative impact on children of forcibly separating them from their mothers.¹⁸⁸ In deciding on such situations, authorities are to be guided by the best interests of the child.¹⁸⁹

The obligation established under Article 8 ECHR is primarily negative in nature: States must not interfere with a child's right to family life.¹⁹⁰ The separation of children from their families is permitted only where there are weighty reasons for it and only on a temporary basis with a view to eventual reunification.¹⁹¹ The younger a child is, the more exceptional are decisions to permit separation.¹⁹² The right of parental access has been consistently held to extend to both parents.¹⁹³

Where a decision is made for the child to remain in detention with its mother, there necessarily arises a duty to provide adequate conditions for mother and child.¹⁹⁴ Failure to provide adequate medical attention, including specialist care by a paediatrician to the child, as well as inadequate hygiene and insufficient opportunities for outdoor activities may be considered not just individually, but cumulatively as constituting violations of Article 3.¹⁹⁵

¹⁸⁸ *Korneykova and Korneykov v Ukraine* (n 101) para 93.

¹⁸⁹ *ibid.*

¹⁹⁰ ECtHR, *RMS v Spain*, App No 28775/12, Judgment of 18 June 2013, para 69.

¹⁹¹ ECtHR, *Scorzari and Giunta v Italy*, App No 28775/12, Judgment of 13 July 2000, para 148.

¹⁹² ECtHR, *K and T v Finland*, App No 25702/94, Judgment of 12 July 2001, para 168.

¹⁹³ ECtHR, *Schneider v Germany*, App No 17080/07, Judgment of 15 September 2011.

¹⁹⁴ *Korneykova and Korneykov v Ukraine* (n 101); see section 6.1 above.

¹⁹⁵ *ibid.*, paras 140-148.

Annex 1 – About the UCL Public International Law Pro Bono Project

The UCL Public International Law Pro Bono Project ('PILPBP') is a community of collaborative learning and practice based at the UCL Faculty of Laws, which operates in service of human rights protection – supporting members of civil society and international organisations in their important protective missions, while enhancing the educational experience of our students.

The PILPBP is comprised of three 'generations' of law scholar: Two Co-Directors, who are Professors in the UCL Faculty of Laws; several Coordinators, who are also PhD students in the UCL Faculty of Laws or PILPBP alumni; and LLM Researchers – in 2020-21 we have eighteen LLM student participants. The PILPBP is not a formal part of the curriculum, relying entirely on volunteer participation. We partner with leading international non-governmental and inter-governmental organisations, providing legal research, analysis and advice to help address some of the world's most pressing and difficult human rights challenges. We also contribute to the work of international courts and tribunals, such as the Inter-American Court of Human Rights, through the submission of *amicus curiae* briefs. Students work together in teams, based on a particular project, with a PhD Coordinator and Co-Director directing their research and managing each project and the relationship with our partner organisations.

The PILPBP began as a PhD and LLM student initiative, inspired by public-spiritedness in an era of serial global crises. With Faculty support, it has become an innovative collaborative educational enterprise, connecting our LLM and PhD students with UCL Laws academic staff, enhancing the skills development of our students and putting them at the centre of research-based learning. But it remains, perhaps most importantly, an outward-facing project – driven by the highest traditions of public service in academia in striving to make a positive contribution to the world.

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