

**OBSERVATIONS ON THE REQUEST FOR ADVISORY OPINION  
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

***DIFFERENTIATED APPROACHES TO PERSONS DEPRIVED OF LIBERTY***

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## I. INTRODUCTION

1. On November 25, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") a request for an Advisory Opinion, pursuant to the provisions of articles 64(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and 70 of the Rules of Procedure of the Court.

2. In that request, the Commission asked the Inter-American Court to answer a series of questions on the differentiated obligations that the principle of equal protection and nondiscrimination establishes for States in the context of deprivation of liberty in order to address the real situation of inequality of groups that are particularly at risk. This specifically includes pregnant, postpartum, and nursing women; LGBT persons; indigenous persons; older persons; and children who live with their mothers in prison.

3. As indicated with the submission of the request, the purpose of this request and definition of the groups or populations it covers take into account the aspects necessary for the admissibility of the request, pursuant to the jurisprudence and caselaw of the Inter-American Court. However, there has been no interpretation of the obligations derived from the American Convention and addressed under the competence of the Court that would enable "States members and bodies of the OAS to fully and effectively comply with their international obligations on the subject and define and develop public policies on human rights."<sup>1</sup> The Commission observes that this request is therefore admissible given its practical implications for States, as the Court has emphasized that "the task of interpretation that it performs in the exercise of its advisory function not only seeks to clarify the reason for, meaning and purpose of international human rights norms, but also, and above all, to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations aim to help strengthen the system for the protection of human rights."<sup>2</sup>

4. In addition, the Commission has verified that the Court's opinion would not represent a ruling in disguise on a specific contentious case. In this regard, the purpose of this request, and the sections on the groups and populations to which it refers, are preceded by a broad review of the jurisprudence of the Inter-American Court, the cases before it, the portfolio of cases decided on by the Commission pursuant to Article 50 of the American Convention that have not yet been referred to the Court, and other pronouncements of the IACHR. The Commission also notes that, according to the Court, "the mere fact of the existence of contentious cases related to the issue under consultation, or petitions before the Inter-American Commission, [...] is not enough for this Court to

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<sup>1</sup> Inter-American Court. Gender identity and equal protection, and nondiscrimination for same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 22; Inter-American Court. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights, in conjunction with articles 1(1) and 2). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 24.

<sup>2</sup> Inter-American Court. Gender identity and equal protection, and nondiscrimination for same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 22.

declined to answer the questions brought for consultation, in view of its nature as an autonomous judicial institution.”<sup>3</sup>

5. Therefore, the request for advisory opinion submitted by the IACHR is admissible, and its purpose is to develop the jurisprudence of the Inter-American system regarding individuals or groups experiencing deprivation of liberty, so as to help States fully comply with their obligations under the Convention by providing a clear definition of their scope, thus contributing to preventing human rights violations.

6. The President of the Inter-American Court set a deadline of November 5, 2020, for the presentation of written observations. Therefore, the IACHR submits its comments hereinafter on the questions brought before the Honorable Inter-American Court. The Commission has appointed XXX and XXXX as its delegates. Likewise, XX, Marisol Blanchard Vera, Assistant Executive Secretary for Petitions and Cases, and Sofía Galván Puente, Jorge Humberto Meza Flores, and Analía Banfi Vique, lawyers of the Executive Secretariat, shall act as legal advisors.

## II. OBSERVATIONS OF THE IACHR

7. In its capacity as the requesting party of this Advisory Opinion, the Commission in this document issues its observations highlighting the relevance and pertinence of the questions, along with a number of elements it views as important for this Honorable Court to take into account when answering them. The information included hereinafter is not intended to be exhaustive, and it is the Commission’s understanding that it will be supplemented by the contributions of OAS Member States and other intervening parties.

### A. General

1. *As regards the protection of the rights of persons who face particular vulnerability, such as pregnant, postpartum, and nursing women, LGBT persons, indigenous persons, older persons, and children living in detention centers with their mothers, is it possible to justify, based on articles 24 and 1(1) of the Convention, the need to adopt differentiated measures or approaches to ensure that their specific circumstances do not affect their equality with the other individuals deprived of liberty, as regards both to their detention conditions and the remedies available for protecting their rights in the context of deprivation of liberty? If so, what are the specific implications of the content of the rights set forth in those articles for the scope of States’ corresponding obligations on the subject?*

8. The Inter-American Court has stated that the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual, and that principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority; it is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. The Court’s caselaw has indicated that at the current moment of the development of international law, the fundamental principle of equal protection and nondiscrimination has taken on the status of *ius cogens*. On it rests

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<sup>3</sup> Inter-American Court. The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 50.

the entire legal framework of the national and international public order, and it permeates all legal systems.<sup>4</sup>

9. As regards the scope of the provisions of articles 1(1) and 24 of the American Convention, the Court has drawn distinctions between autonomous and subordinate provisions, establishing that, while the general obligation set forth in Article 1(1) addresses the State's duty to respect and guarantee, "without discrimination," the rights set forth in the American Convention, Article 24 protects the right to "equal protection of the law."<sup>5</sup> In the words of the Court, this means that, based on Article 24 of the American Convention, *de jure* and *de facto* discrimination is prohibited "not only as regards the rights enshrined in the treaty but also with respect to all laws enacted by the State and their application."<sup>6</sup> In view of this, the Court concludes that "if a State discriminates in respecting or guaranteeing a right set forth in the Convention, it fails to comply with the obligation set forth in Article 1(1) and the substantive right in question. On the other hand, if the discrimination involves unequal protection under a domestic law or its application, the facts should be reviewed pursuant to Article 24 of the American Convention."<sup>7</sup>

10. The principle of equal protection and nondiscrimination should be understood in the sense of incorporating two concepts: "(...) a negative concept related to the prohibition of arbitrary differentiation of treatment, and an affirmative concept related to the obligation of States Party to create real equal conditions toward groups who have been historically excluded or who are exposed to a greater risk of being discriminated."<sup>8</sup> Regarding the first concept, the Inter-American Court has indicated that not all differentiated treatment is discriminatory, and it must be established whether the treatment has an objective and reasonable justification.<sup>9</sup> This analysis is especially strict when treatment is different based on one of the categories prohibited under Article 1(1) of the Convention.

11. As far as the second concept, there are groups that are subjected to historic discrimination and exclusion for a variety of reasons—including age, sex, gender, ethnicity, sexual orientation, and gender identity and expression—which prevents them from exercising their rights on the same footing as others. Historic discrimination against and exclusion of one specific group means that the group could be the victim of harmful differentiated impacts of laws or practices that, although they may appear neutral and not be intentionally discriminatory, are in fact discriminatory based on their effects. The Inter-American Court has employed the concept of indirect discrimination and differentiated impact as follows:

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<sup>4</sup> Inter-American Court. *Case of Flor Freire v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315. Para. 109.

<sup>5</sup> Inter-American Court. *Case of Atala Riffo and girls v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 82, Cfr. Advisory Opinion OC-4/84, *supra* footnote 83, paras. 53 and 54; and *Case of Barbani Duarte et al. v. Uruguay*. Merits, Reparations, and Costs. Judgment of October 13, 2011. Series C No. 234, para. 174

<sup>6</sup> Inter-American Court. *Case of Atala Riffo and girls v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 82.

<sup>7</sup> Inter-American Court. *Case of Atala Riffo and girls v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 82; Cfr. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114 and *Case of the "Mapiripán Massacre" v. Colombia*. Merits, Reparations, and Costs. Judgment of September 15, 2005. Series C No. 134, para. 106. In the European Court, see ECHR, *Tyrer v. The United Kingdom*, (No. 5856/72), judgment of April 25, 1978, para. 31.

<sup>8</sup> Inter-American Court. *Case of Furlan and relatives v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246. Para. 267.

<sup>9</sup> Inter-American Court. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4. Paras. 55 and 56.

(...) the principle of the essential right to equal and effective protection of the law and non-discrimination means that the States must abstain from producing discriminatory regulations or those with discriminatory effects on the different groups of the population when exercising their rights.<sup>10</sup> The Human Rights Committee,<sup>11</sup> the Committee on the Elimination of Racial Discrimination,<sup>12</sup> the Committee on the Elimination of Discrimination against Women,<sup>13</sup> and the Committee on Economic, Social and Cultural Rights<sup>14</sup> have recognized the concept of indirect discrimination. The concept means that a law or practice that appears to be neutral can have particularly negative repercussions on an individual or group with certain characteristics.<sup>15</sup>

(...)

For its part, the European Court of Human Rights has also developed the concept of indirect discrimination establishing that, when a general policy or measure has an effect that is disproportionately prejudicial toward a particular group, this may be considered discriminatory even if it was not specifically addressed at that group.<sup>16</sup>

12. Regarding deprivation of liberty, the IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and other United Nations instruments prohibit discrimination against persons deprived of liberty for a variety of reasons, including based on sex,

<sup>10</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. *Case of Yean and Bosico Children v. Dominican Republic*, para 141, and Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, para. 88.

<sup>11</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. Cfr. Human Rights Committee, Communication 993/2001, Althammer v. Austria, August 8, 2003, para. 10.2 (“that a violation of [equal protection] can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate”), and Human Rights Committee, General Comment 18, Non-discrimination.

<sup>12</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. Cfr. United Nations Committee on the Elimination of Racial Discrimination No. 31/2003, L.R. et al. v. Slovakia, March 7, 2005, para. 10.4.

<sup>13</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. Cfr. Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 on temporary special measures (2004), endnote 1 (“Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women”).

<sup>14</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. Cfr. Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009.

<sup>15</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations, and Costs. Judgment of October 24, 2012, Series C No. 251, para. 234.

<sup>16</sup> Inter-American Court. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257. Para. 286. Citing. ECHR, *Case of Hoogendijk v. Netherlands*, No. 58641/00, First Section, 2005; ECHR, Grand Chamber *D.H. et al. v. Czech Republic*, No. 57325/00, November 13, 2007, para. 175, and ECHR, *Case of Hugh Jordan v. United Kingdom*, No. 24746/94, May 4, 2001, para. 154.

gender, ethnic origin, age, and sexual orientation.<sup>17</sup> In particular, with regard to the negative concept of the principle of equal protection and nondiscrimination, the instruments establish that measures aimed at protecting the rights of persons deprived of liberty who belong to particularly at-risk groups cannot be considered discriminatory.<sup>18</sup>

13. Independent of the situation of risk faced by persons deprived of liberty—derived not only from the context of subordination to the State<sup>19</sup> but also the deplorable detention conditions that characterize the region’s prisons—persons belonging to particularly at-risk groups and groups that face discrimination outside prisons are much more susceptible to becoming the target of indirect discrimination as a result of the disproportionate risks and differentiated impacts they experience while in prison. In this regard, in its reports on pretrial detention from 2012 and 2017, the Commission indicated that the cumulative effects of imprisonment have a much more intense impact on persons belonging to vulnerable groups, and that this impact is even more serious when those persons belong to groups facing particular economic risk, as they are victims of other forms of social exclusion.<sup>20</sup>

14. Persons deprived of liberty who belong to particularly at-risk groups are disproportionately harmed due both to the existence of special needs deriving from their particular status that intensify in prison, and as a consequence of the lack of differentiated protection. Additionally, these persons may often belong to more than one especially at-risk group, translating into multiple special needs and greater vulnerability. Therefore, the laws and practices that fail to recognize this differentiated impact lead to penitentiary systems that reproduce and enhance the patterns of discrimination and violence that exist outside prison.

15. In this context, and based on the general obligation derived from Article 1(1) of the ACHR and the right to equal protection of the law, enshrined in Article 24, States have the inescapable obligation to guarantee the principle of equal protection and nondiscrimination. Consequently, they must adopt measures that use a differentiated approach that enables it to ensure that particular situations of vulnerability—like gender, ethnicity, age, sexual orientation, and gender identity and expression—do not affect the enjoyment of rights on an equal footing with the other persons deprived of liberty.

16. In particular, the specific implications of the adoption of measures—legislative, administrative, and judicial—that use differentiated approaches are founded on: i) the particular conditions of

<sup>17</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle II, “Equality and non-discrimination;” UN, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 2.1; UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Resolution 43/173, of December 9, 1988, Principal 5.2, and UN, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Resolution A/RES/65/229, March 16, 2011, Rule 1. “Basic principle.”

<sup>18</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle II, “Equality and non-discrimination;” UN, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 2.2; UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Resolution 43/173, of December 9, 1988, Principal 5.2, and UN, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Resolution A/RES/65/229, March 16, 2011, Rule 1. “Basic principle.”

<sup>19</sup> IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II. Doc. 64. December 31, 2011, para. 49.

<sup>20</sup> IACHR, Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 215, and IACHR, Report on the Use of Pretrial Detention in the Americas, para. 128.

vulnerability of persons belonging to at-risk groups; and ii) the factors that can increase the risk of acts of violence and discrimination in prison contexts. Likewise, actions aimed at including differentiated approaches must take into account the frequent intersectionality of the above factors that result in discrimination, which can accentuate the situation of risk facing imprisoned persons<sup>21</sup> and make them more susceptible to experiencing multiple forms of discrimination.

17. Hereinafter, the IACHR will expand on the concrete implications of the content of the rights of pregnant, postpartum, and nursing women; LGBT persons; indigenous persons; and older persons deprived of liberty, as well as children who live with their mothers in prison. This will make it possible to address the specific characteristics of these groups and ensure that, through a differentiated approach regarding the scope of the State obligations involved, they have equal access while they are deprived of liberty to all the rights and services to which all other persons have access.

## **B. Regarding pregnant, postpartum, and nursing women**

*Based on articles 1(1), 4(1), 5, 11(2), 13, 17(1), and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the other applicable Inter-American instruments:*

1. *What are States' specific obligations as far as guaranteeing that pregnant, postpartum, and nursing women who are deprived of liberty have detention conditions that are adequate in view of their particular circumstances? Specifically:*

18. In the context of deprivation of liberty, in order to ensure that pregnant, nursing, and postpartum women do not face discrimination and violence in their exercise of their rights to life, humane treatment, information, and family, States must adopt specific measures to account for these special conditions. In this regard, with respect to the treatment that women deprived of liberty should receive, in its judgment in the case of *Miguel Castro Castro Prison v. Peru*, the Inter-American Court cited the finding of the United Nations High Commissioner of Human Rights that nursing and pregnant women deprived of liberty must be provided with special conditions while under detention.<sup>22</sup> Likewise, in the provisional measures for the Andean Region Penitentiary, regarding Venezuela, the Court emphasized "States' obligation to take into account the special care they must provide to pregnant and nursing women deprived of liberty while they are held."<sup>23</sup>

19. Also, pursuant to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), the penitentiary regime must react with flexibility in response to the needs of pregnant and nursing women and women with children.<sup>24</sup> Regarding this, the European Parliament indicates that pregnant women must be able to receive the basic conditions necessary for the proper development of their pregnancies and

<sup>21</sup> In this regard, see IACHR, [Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas](#), OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 215.

<sup>22</sup> Inter-American Court, *Case of Miguel Castro Castro Prison v. Peru*, para. 303.

<sup>23</sup> Inter-American Court. Matter of the Andean Region Penitentiary regarding Venezuela Request for provisional measures. Order of the Inter-American Court of Human Rights of September 6, 2012, para. 14.

<sup>24</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 42.2.

maternities.<sup>25</sup> In this context, the Bangkok Rules indicate that States must establish appropriate programs for these women,<sup>26</sup> which, according to the UNODC, must cover nutrition, medical care, and parenting.<sup>27</sup>

20. Hereinafter, the IACHR will develop the specific obligations that States have with regard to guaranteeing the rights of pregnant, nursing, and post-partum women deprived of liberty.

2. *What specific obligations do States have in terms of food, clothing, and access to medical and psychological care?*

21. Regarding nutrition for pregnant, nursing, and postpartum women, according to international precedents on deprivation of liberty, State obligations include the preparation and supervision of diets, nutritional advisory support, and food storage. Additionally, pursuant to international precedents on deprivation of liberty, States have duties as regards form, quantity, and type of nutrition. When these obligations are not fulfilled, these women suffer differentiated impact due to their unique conditions, which could violate their rights to life, humane treatment, and health.

22. For its part, Resolution 2007/2116(INI) of the European Parliament stipulates that, with regard to pregnant women, States have an obligation to provide specialized nutritional support.<sup>28</sup> Additionally, the Bangkok Rules indicate that the diet of pregnant and nursing women should be devised and supervised in the framework of a program administered by health personnel.<sup>29</sup> Also, the Bangkok Rules and the UNODC stipulate that these women must receive advisory support on nutrition from a properly-qualified prison physician.<sup>30</sup> Additionally, the Bangkok Rules establish that food provided to pregnant and nursing women must be provided free of charge,<sup>31</sup> must be sufficient, and must be provided promptly and in a clean space that offers the possibility of doing regular physical exercise.<sup>32</sup> With regard to the type of food to provide, the European Parliament resolution indicates that the nutrition must be balanced;<sup>33</sup> and in this regard, the UNODC indicates that the food must include milk, high-protein products, and adequate quantities of fresh fruits and vegetables.<sup>34</sup> Therefore, prison facilities must make arrangements to properly store these goods.<sup>35</sup>

23. Additionally, in order to guarantee that nursing women are able to properly nourish their children, the Bangkok Rules indicate that States must guarantee the opportunity to nurse unless

<sup>25</sup> European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008.

<sup>26</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 42.3.

<sup>27</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

<sup>28</sup> European Parliament, [Resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), para. 14. March 13, 2008.

<sup>29</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>30</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>31</sup> Provision of food free of charge has also been indicated by the UNODC. See UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

<sup>32</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>33</sup> European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008.

<sup>34</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>35</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

there are specific sanitary reasons for preventing it.<sup>36</sup> Additionally, the UNODC indicates that the environment provided to nursing women for feeding their children must be comfortable and flexible.<sup>37</sup>

24. As regards health, women deprived of liberty—in this case, pregnant, nursing, or postpartum women—have specific sanitary needs, and therefore the right to receive adequate pre-and postnatal care. Otherwise, as the IACHR has found previously, the lack of timely and adequate specialized care for preventing and treating complications arising from a pregnancy can have grave consequences that endanger the life, health, and integrity of the mother and put fetal health in jeopardy. Consequences may include the risk of miscarriage, fetal death, and ectopic pregnancies.<sup>38</sup>

25. In this context, in fulfilling their specific obligations, States should focus on providing medical care that adequately addresses the needs of these women that arise from their status as pregnant, nursing, or postpartum, comparable to the care they would have received outside prison. With regard to medical care in penitentiaries in general, in the case of *Chinchilla Sandoval et al. v. Guatemala*, the Court ruled with regard to the so-called principle of equivalence. At that time, the Court found that health services must maintain a level of quality that is equivalent to the services received by persons who are not deprived of liberty.<sup>39</sup> Thus, under the principle of equivalence, and in line with decisions of the European Court of Human Rights, health services in detention facilities should be able to provide, among other things, medical care and nursing with conditions that are comparable to those enjoyed by patients in the outside community.<sup>40</sup> In view of this, and as the UNODC has indicated, the pre- and postnatal care provided should be equivalent to what is available outside the prison.<sup>41</sup> These women should therefore receive adequate medical attention in their place of detention from properly qualified medical staff; failing this, the State should provide access to healthcare centers in the community.

26. Likewise, with regard to obligations that adequately meet the needs of pregnant, nursing, and postpartum women, States must provide specialized programs and facilities that address their conditions. In this regard, the Principles and Best Practices, the Mandela Rules, and the resolution on the issue from the European Parliament indicate that women must be provided with gynecological and pediatric medical care, as well as appropriate resources and specialized facilities before, during, and after giving birth.<sup>42</sup> According to the Committee of Ministers of the Council of Europe, this will guarantee that children can enjoy their right to the highest attainable standard of health.<sup>43</sup> For its part, the Bangkok Rules require that penitentiaries provide appropriate programs

<sup>36</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>37</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

<sup>38</sup> Request, para. 24.

<sup>39</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 177.

<sup>40</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 189.

<sup>41</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

<sup>42</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008. Principles X Health, and XII Accommodation, hygiene, and clothing; UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 28; and European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008.

<sup>43</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018.

specifically for pregnant and nursing women.<sup>44</sup> In addition, the IACHR notes that regulations in the state of Massachusetts, United States, establish that postpartum women must be evaluated for depression and, where it is diagnosed, provided with care by mental health personnel.<sup>45</sup>

27. Lastly, it is the IACHR's view that a lack of proper clothing for pregnant women deprived of liberty may constitute a violation of their rights contained in articles 4 and 5 of the American Convention. Failing to provide pregnant women with access to appropriate clothing places them at greater risk of falling and tripping, which could hurt them or the fetus.<sup>46</sup> In this context, the State has an enhanced obligation to provide these pregnant women with clothing that is adequate to their condition. In this regard, the IACHR notes that Section 118 of the regulations governing penitentiaries in the state of Massachusetts includes a rule in this sense.<sup>47</sup>

### 3. *What minimum conditions must the State guarantee during labor and childbirth?*

28. In view of the multiple difficulties facing women who go into labor and that pose a risk to their lives and safety, as well as to that of their newborn children,<sup>48</sup> the minimum conditions—according to standards on deprivation of liberty—that the State must guarantee during labor and childbirth cover medical care, labor, and registering the newborns. The State also must prohibit the use of measures of physical restraint during labor, childbirth, and immediately afterward

29. With regard to treatment during childbirth, the UN Human Rights Committee has indicated that States have an enhanced duty to ensure that pregnant women deprived of liberty are treated humanely and in a way that respects their inherent dignity.<sup>49</sup> Specifically, with regard to medical care, the IACHR and the UNODC have indicated that women should receive gynecological and pediatric treatment before, during, and after giving birth.<sup>50</sup> With regard to the location where they must give birth, a number of international instruments state that pregnant women deprived of liberty should not be required to give birth within detention centers but rather in hospitals or civilian establishments intended for such purposes.<sup>51</sup> However, if this is not possible, the UNODC indicates that the delivery can be handled by a medical specialist in facilities that are adequate for

<sup>44</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 42.

<sup>45</sup> [Massachusetts General Laws chapter 127 § 118: Pregnant and postpartum inmates: standards of care: use of restraints.](#) Effective: May 15, 2014.c

<sup>46</sup> Request for Advisory Opinion, para. 22. In this regard, see The Prison Birth Project and Prisoners' Legal Services of Massachusetts, [Breaking Promises: Violations Of The Massachusetts Pregnancy Standards & Anti-Shackling Law](#), 2016, pg. 2.

<sup>47</sup> [Massachusetts General Laws chapter 127 § 118: Pregnant and postpartum inmates: standards of care: use of restraints.](#) Effective: May 15, 2014.

<sup>48</sup> In particular, the IACHR highlighted the following impacts: i) a failure by penitentiary medical staff to recognize when they begin labor; ii) giving birth in prisons under unhygienic conditions and without specialized assistance; and iii) use of shackles. The IACHR indicated that, in general, prison staff fail to identify when a woman goes into labor because they lack applicable training. Request for Advisory Opinion, para. 26.

<sup>49</sup> Human Rights Committee, General Comment 28 on the equality of rights between men and women, para. 15, U.N. Doc. HRI/GEN/1/Rev.7 in 153 (2004).

<sup>50</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle X Health.

<sup>51</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle X Health. UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 28; and Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018. Also see UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

childbirth.<sup>52</sup> Additionally, States must not record on the birth certificate that the birth took place inside a detention center.<sup>53</sup> Lastly, pursuant to the Mandela Rules and the Bangkok Rules, and in keeping with Resolution 2018/5 of the Council of Europe, States must refrain from using physical measures of restraint while women are in labor, during childbirth, and during the period immediately following.<sup>54</sup>

4. *What security measures can the State take when transporting pregnant women that are compatible with their special needs?*

30. The IACHR has found that pregnant women are handcuffed when being transferred for medical treatment, posing a special risk both to them and to the fetus.<sup>55</sup> Therefore, in order to guarantee the rights to humane treatment and health of pregnant women during their visit to hospitals—including during childbirth and the recovery period—the State must adopt security measures that meet their special needs. In this regard, the UNODC has indicated that the security measures should be the "minimum necessary" and means of restraint should never be used.<sup>56</sup>

31. Additionally, the general laws of Massachusetts go into more detail, indicating that during the second and third trimesters of the pregnancy or during the postpartum recovery and related medical treatment, women must be transported in vehicles with seatbelts and shackled only by the wrists.<sup>57</sup> Likewise, the law—in contrast to what the UNODC has indicated—establishes that other types of restraints can be used in "extraordinary circumstances," and that they must be the least restrictive available and the most reasonable depending on the particular case. Also, the reasons for using them must be documented.<sup>58</sup> The circumstances considered extraordinary include immediate and serious threat to themselves or others or in when inmates present an immediate and credible risk of escape that cannot be curtailed by other reasonable means.<sup>59</sup>

5. *What is the scope of the right to access to information—in the context of deprivation of liberty—of pregnant, postpartum, and nursing women regarding information on their special condition?*

32. In the context of deprivation of liberty, it is the IACHR's view that the scope of the right to information as it relates to the special condition of pregnant, postpartum, and nursing women includes advisory support on health, diet, and access to medical care subsequent to their release.

<sup>52</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

<sup>53</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle X Health. UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 28; and UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

<sup>54</sup> UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 48.2; and UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 24; and Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018.

<sup>55</sup> OC para. 26. In this regard, see The Prison Birth Project and Prisoners' Legal Services of Massachusetts, [Breaking Promises: Violations Of The Massachusetts Pregnancy Standards & Anti-Shackling Law](#), 2016, pg. 4.

<sup>56</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 84.

<sup>57</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014

<sup>58</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014.

<sup>59</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014.

33. In this regard, both the Council of Europe and the European Parliament indicate that for a healthy pregnancy and maternity, and in order to guarantee the right to health of children, pregnant women must receive information on their condition.<sup>60</sup> Specifically, the Bangkok Rules stipulate that pregnant or nursing women must receive support with their health and diet in the framework of a program designed and supervised by medical staff.<sup>61</sup> Also, the penitentiary rules of the state of Massachusetts indicate that pregnant women must receive this information in writing and in an accessible format so they can have a clear understanding of penitentiary policies and practices on care during pregnancy and labor.<sup>62</sup> Additionally, when women are received at penitentiary centers, they must be informed of the performance of initial medical evaluations that may touch on whether they are pregnant.<sup>63</sup> The law also stipulates that prior to the release of pregnant women, the penitentiary medical staff must provide them with support to ensure the continuity of prenatal medical care.<sup>64</sup>

34. In view of the standards set forth in this section, the IACHR asked the Honorable Court to determine the content and scope of States' specific obligations to guarantee proper nutrition, clothing, access to medical and psychological care, and transfer, as well as adequate information, for pregnant, nursing, and postpartum women. The Commission also asks the Court to establish the minimum conditions that States must guarantee during labor and childbirth. All of this is based on articles 1(1), 4(1), 5, 11(2), 13, 17(1), and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the other applicable Inter-American instruments.

6. *In the cases of women deprived of liberty with young children living outside the detention facility, what specific measures should States adopt to ensure that mothers and their children maintain a close bond in accordance with their special needs?*

35. Under the specific mandate on the rights of the family set forth in Article 17 of the Convention, and pursuant to the best interest of the child, States should adopt concrete measures to ensure that women deprived of liberty have ample opportunity to maintain contact with their children, especially when they are very young. These measures become particularly important considering that in most cases, the women are the heads of single-parent households.<sup>65</sup> Additionally, maintaining family connections is a basic tool for social reintegration,<sup>66</sup> and therefore an important element for accomplishing the goals of deprivation of liberty.

<sup>60</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, and European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008.

<sup>61</sup>UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 48.

<sup>62</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014.

<sup>63</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014.

<sup>64</sup> Massachusetts General Laws chapter 127 § 118 Pregnant and postpartum inmates; standards of care; use of restraints Effective: May 15, 2014.

<sup>65</sup> IACHR, [Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas](#), OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, para. 201.

<sup>66</sup> In this regard, European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#). March 13, 2008, J & K.

36. In view of the differentiated consequences facing women deprived of liberty, the advantages of applying alternative measures, and the impacts that their imprisonment has on their children,<sup>67</sup> the IACHR has indicated that States should adopt the measures necessary to encourage the application of alternatives to deprivation of liberty.<sup>68</sup> In this regard—and also to facilitate the transition from prison to freedom—the Committee of Ministers of the Council of Europe has established that, in order to improve the relationships between imprisoned mothers and their children, penitentiary authorities should adopt measures including: granting home confinement, placing women in transition centers, using electronic monitoring devices, and participation in community programs and services.<sup>69</sup> Additionally, in view of this, decisions on whether to grant women parole should take into account the responsibilities of mothers and their specific needs for familial reintegration.<sup>70</sup>

37. If it is not possible to use alternative measures for imprisoned mothers, in order to ensure that these women can have contact with their children, States are required to facilitate visits and guarantee appropriate conditions for them. Likewise, as established in the Bangkok Rules, States should refrain from imposing disciplinary sanctions that prevent contact with children.<sup>71</sup>

38. Regarding States' obligation to guarantee that children visit their mothers in prison, in the judgment handed down in the case of *Miguel Castro Castro Prison v. Peru*, the Court emphasized that in view of the special attention women should receive for being mothers, the State should "ensur[e] that appropriate visits be permitted between mother and child."<sup>72</sup> Therefore, under the Bangkok Rules, States are required to: i) guarantee an appropriate environment, including as regards staff behavior; ii) allow free contact between the mother and their children; and iii) encourage more lengthy visits. For its part, the Committee of Ministers of the Council of Europe establishes that States should guarantee adequate facilities for children to meet with their mothers.<sup>73</sup> With regard to the ease of allowing personal relationships and direct contact between mothers and children, the Committee of Ministers has indicated that States must make it as easy as possible, unless it runs against the best interest of the child.<sup>74</sup> For its part, the European Parliament establishes that it should be easy in terms of its frequency, duration, and scheduling.<sup>75</sup>

39. In this context, and taking into consideration the care responsibilities of mothers deprived of liberty, the Bangkok Rules establish that States must ensure that women are sent to prisons close

<sup>67</sup> IACHR, [Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas](#), OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, paras. 201 and 202.

<sup>68</sup> IACHR, [Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas](#), OEA/Ser.L/V/II.163. Doc. 105, July 3, 2017, paras. 201 and 202. In this regard, see also UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 26.

<sup>69</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 42. It should be noted that the Committee of Ministers is addressing both parents, not only mothers.

<sup>70</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 43.

<sup>71</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 23.

<sup>72</sup> Inter-American Court. *Case of Penal Miguel Castro Castro v. Peru*. Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C No. 160, para. 330.

<sup>73</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 40.

<sup>74</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 40.

<sup>75</sup> In this regard, see European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), March 13, 2008, para. 23.

by their homes.<sup>76</sup> Likewise, the Robben Island Guidelines adopted by the African Commission on Human and Peoples' Rights stipulate that "when a decision is taken to imprison a parent or other primary caregiver then the relevant authorities should first establish where the child is living in order to have the parent or caregiver sent to a facility within suitable travelling distance of the child's home."<sup>77</sup> If it is not possible for the place where the mother is deprived of liberty to be nearby her home, the Bangkok Rules establish that States must take special measures to reduce the problems arising from depriving mothers of liberty in facilities far from their homes.<sup>78</sup>

### C. Regarding LGBT persons

*Based on articles 1(1), 4(1), 5, 11(2), 13, 17(1), and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the other applicable Inter-American instruments:*

*What are States' specific obligations as far as guaranteeing that LGBT persons have detention conditions that are adequate in view of their particular circumstances?*

40. It is currently established in the Inter-American system that sexual orientation, gender identity, and gender expression are categories protected under the American Convention and, therefore, enjoy the protections set forth under Article 1(1) of the Convention from any discriminatory law, action, or practice based on these criteria.<sup>79</sup> Likewise, the IACHR has identified a number of circumstances in which the vulnerability of LGBT persons has a differentiated impact in regard to their right to live lives free from violence, due solely to the fact of belonging to that group<sup>80</sup> or, intersectionally, due to their race<sup>81</sup> or because they live in the context of an armed conflict,<sup>82</sup> among other situations.

41. The IACHR has also indicated that a lack of social recognition of LGBT persons is not a sufficient argument for failing to recognize their rights or to justify violations of them. In this regard, States have an obligation to design and implement projects aimed at cultural change with the objective of guaranteeing respect for and acceptance of LGBT persons, as "failure to recognize the existence of LGBTI persons and to provide them with the protection everyone else enjoys leaves them in a situation of absolute vulnerability to the various forms of inequality, discrimination, violence, and exclusion."<sup>83</sup>

<sup>76</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 4.

<sup>77</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 on Article 30 of the ACRWC: *Children of Incarcerated and Imprisoned Parents and Primary Caregivers*, 8 November 2013, para. 3.1.6.

<sup>78</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 26.

<sup>79</sup> IACHR, Application submitted before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paras. 90-95; Inter-American Court. Gender identity and equal protection, and nondiscrimination for same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24 [hereinafter, Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24], para. 67.

<sup>80</sup> IACHR, [Report on the situation of human rights situation in Guatemala](#), OEA/Ser.L/V/II.Doc. 43/15, December 31, 2015, para.

<sup>81</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, paras. 94 and 367.

<sup>82</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 123

<sup>83</sup> IACHR, [Progress on and challenges to recognizing the rights of LGBTI persons in the Americas](#), para. 40.

42. Thus, the determination of inter-American standards on the differentiated situations experienced by LGBT persons deprived of liberty is derived from the obligation to recognize their rights, with emphasis on the situations they may experience in a differentiated fashion due to their particular situation of vulnerability, including when they are deprived of liberty. Therefore, with regard to the questions brought before the Court in this request for an advisory opinion, the IACHR submits the following observations, answering questions 2 and 5 together:

1. *How must States take into account the gender identity of an individual when determining the unit in which they will be placed?*

43. States' international obligations regarding their policies on segregation by sex of persons whose liberty is or will be restricted based on respect for and guarantee of the right to gender identity protected by the American Convention—in conjunction with the obligation to prevent cruel, inhuman, and degrading treatment and punishment of transgender persons—consist of: i) preparing and managing records based on self-identification; ii) housing inmates in accordance with their self-perceived gender identities; iii) ensuring that LGBT persons participate in decisions on detention locations appropriate to their sexual orientations and gender identities; and iv) prevention of mistreatment.

44. The problem of a lack of guidance on where transgender persons deprived of liberty are to be housed is a reflection of the constant social and juridical questioning of their sexual-gender identities. In this regard, the Court has found that this questioning forces them to “bear a different identity that does not represent their individuality,” thus affecting their enjoyment and exercise of their human rights.<sup>84</sup> Additionally, the Commission has indicated that binary sex and gender systems are the dominant social models in western culture and view gender and sex as breaking down into only two rigid categories—that is, the binary masculine/man and feminine/woman, thus excluding persons who do not identify themselves therein.<sup>85</sup> This has been reflection in national and international law on separating detention units by sex.

45. For its part, the Court has found that the American Convention protects every person's right to define their own sexual and gender identities autonomously, and for information in public records and identification documents to match or correspond to how individuals define themselves. According to its Advisory Opinion on the matter, the Court has determined that this protection derives from articles 3, 7, 11(2), and 18, which enshrine the rights to recognition of juridical personality, development of personal liberty, privacy, and name.<sup>86</sup>

46. Thus, the Inter-American Court has established that the recognition of gender identity requires that States respect and guarantee the “change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents so that they correspond to the self-perceived gender identity.”<sup>87</sup> In this regard, the Organization of American States has indicated that allowing trans persons access to recognition of their self-perceived gender identities can facilitate their placement in prisons of their choice.<sup>88</sup>

<sup>84</sup> Inter-American Court. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 115.

<sup>85</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 34.

<sup>86</sup> Inter-American Court. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 115.

<sup>87</sup> Inter-American Court. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 116.

<sup>88</sup> OAS, [Panorama del reconocimiento legal de la identidad de género en las Américas](#), OEA/Ser.D/XXVII.5, May 2020, pgs. 73-74.

47. Therefore, the Commission finds that the protections derived by this Court of the rights protecting gender identity and its correlating effects in terms of the registry or public documents are not limited solely to a procedural gesture. Rather, they require the adoption of measures that broadly guarantee all facets of sexual and gender identity.

48. Thus, with regard to the documentary aspects of the intake of a transgender person into a detention center and subsequent assignation to a certain unit based on sex, under Principle IX.2.a of the Principles and Best Practices—regarding admission and registration of persons deprived of liberty—the “sex” is information that must be recorded by penitentiary authorities.<sup>89</sup> In this regard, it is the IACHR's view that, by virtue of the recognition of gender identity as a right protected by the Convention, “sex” should correspond to the self-identification of the inmate, regardless of the information contained in their identification documents.

49. Along the same lines, the Mandela Rules also establish in Rule 11 that inmates should be separated by sex in penitentiary centers.<sup>90</sup> This rule should be interpreted in conjunction with Rule 7 of the same instrument, which categorically establishes that, at the moment of admission, information shall be entered in the prisoner file management system including “Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender.”<sup>91</sup>

50. Additionally, Principle 9 of the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (“The Yogyakarta Principles”) establishes in subparagraph C that States must “ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity.”<sup>92</sup>

51. Therefore, the IACHR observes that, consistent with current international human rights law, the sex of persons whose liberty is or will be restricted must be recorded based on their self-perceived gender identities. Likewise, for current inmates, States must establish mechanisms to update and correct this information through a quick and simple procedure. In cases of non-binary transgender persons, the records must be sufficiently flexible or allow for annotations indicating their gender identities.

52. Additionally, as regards persons detained along with persons of a different gender identity, States must provide a quick and simple procedure so that inmates can change detention centers if they wish. Likewise, this procedure must cover the situation of persons deprived of liberty who

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<sup>89</sup> Principle IX.2: “The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information: Personal information including, at least, the following: name, age, sex, nationality, address and name of parents, family members, legal representatives or defense counsel if applicable, or other relevant data of the persons deprived of liberty.”

<sup>90</sup> The Rules stipulate that: “The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus: (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate...,” UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 11.

<sup>91</sup> UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 7.a.

<sup>92</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), March 2007.

were admitted to a detention center that, at the time, corresponded to their gender identities, but who began gender transition processes while inmates. Along the same lines, the IACHR notes to this Court that individuals who are inmates should have the opportunity to access procedures for changing their names and sex to match their gender identities on other documents and registries that must be updated, and their deprivation of liberty must not pose an obstacle to this.

53. Additionally, with regard to States' duty to prevent mistreatment, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the CAT") has indicated that, with regard to transgender persons, "The absence of appropriate means of identification, registration and detention leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel."<sup>93</sup> Along the same lines, and pursuant to States' duty to prevent abuse, the CAT has recommended to States that decisions on the internment of transgender persons must be made in consideration of their particular individual situations ("case-by-case"), "considering seriously their views as to their safety" and with their informed consent and the participation of experts and activists on the subject.<sup>94</sup> In the European system, the IACHR also notes that the Committee of Ministers' recommendation to member states of the Council of Europe has recommended the adoption of measures to properly protect and respect the gender identities of trans persons deprived of liberty.<sup>95</sup>

54. Therefore, the Commission observes that, in cases where it applies, and with the objective of protecting the personal integrity of transgender and gender non-binary persons deprived of liberty, States must be able to evaluate individual situations when assigning a place of internment, with the participation of specialists and fundamentally taking into consideration the opinion of the person whose liberty is being restricted.

2. *What are States' specific obligations to prevent all acts of violence against LGBT persons deprived of liberty, aside from segregating them from the rest of the population? And 5. What particular obligations do States have in terms of keeping records of the different types of violence against LGBT persons deprived of liberty?*

55. The general level of risk to life and integrity faced by LGBT persons deprived of liberty activates the duty to prevent human rights violations and gives rise to an obligation for States to adopt measures of protection other than isolation. With regard to LGBT persons deprived of liberty, the IACHR observes that, as part of their duty to prevent, States have an obligation to: i) adopt measures to prevent violations to the rights to life and integrity; ii) investigate and eliminate sources of risk, both specific and structural; and iii) produce and compile information on this issue so as to enable States to adopt adequate measures of protection.

56. The IACHR has indicated that prejudicial violence against LGBT persons is widespread throughout the countries of the American continent.<sup>96</sup> In the context of deprivation of liberty, the IACHR has indicated that LGBT persons face greater risk of sexual violence—including a higher risk of multiple sexual aggressions—and other acts of violence and discrimination at the hands of other

<sup>93</sup> CAT, Eighth Annual Report, CAT/C/54/2, March 26, 2015, para. 68.

<sup>94</sup> CAT, Ninth Annual Report, CAT/C/57/4, March 22, 2016, para. 76.

<sup>95</sup> Committee of Ministers Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies, point I.A.4.

<sup>96</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 102.

persons deprived of liberty or of security personnel,<sup>97</sup> and that this Court has found it necessary to take into account the vulnerability of LGBT persons deprived of liberty to physical and psychological aggression.<sup>98</sup>

57. It is the Commission's view that this generalized level of risk to which LGBT persons deprived of liberty are exposed activates the international duty to prevent violations to the rights to life and integrity. In the Inter-American System, the activation of this duty has been characterized as a function of whether the State was or should have been aware of a situation of risk; if that risk was real or immediate; and if it generated an obligation for States to adopt measures reasonably expected to prevent that risk from becoming realized.<sup>99</sup> For its part, the European Court has emphasized States' obligation to exercise oversight and control mechanisms to prevent and alert to acts of violence in the penitentiary population,<sup>100</sup> especially when the State is aware or should be aware when an individual deprived of liberty is at risk or has been subjected to violence by the actions of other inmates,<sup>101</sup> especially when the State has already adopted measures with regard to a certain situation.<sup>102</sup>

58. Likewise, with regard to the investigation of threats, the Commission has indicated that the duty to prevent is not limited to providing material measures of protection but also entails an obligation to address the structural causes that impact the safety of the threatened individuals. To comply with this obligation, the State must investigate "immediately, exhaustively, seriously, and impartially where the threats come from, and punish[...] those responsible, with the aim of preventing the threats from being carried out."<sup>103</sup> Essentially, States are "responsible for observance of the right to life of all persons under its custody as guarantor of the rights enshrined in the American Convention."<sup>104</sup>

59. Once the duty to prevent is activated with regard to LGBT persons deprived of liberty, the IACHR observes that obligations arise to protect them from aggressions from other persons deprived of liberty and from State agents.<sup>105</sup> Regarding the measures adopted by States, the Special Rapporteur on Torture has pointed to the need for "increasing the number of personnel sufficiently trained in using non-violent means of resolving conflicts; promptly and efficiently investigating all reports of inter-prisoner violence and prosecuting and punishing those responsible; and offering

<sup>97</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 102.

<sup>98</sup> Inter-American Court, Provisional Measures regarding Brazil, Matter of the Curado Penitentiary Complex, November 15, 2017, para. 102.

<sup>99</sup> The case law of the European Court on the elements of the duty to prevent has been cited by the Inter-American Court in several of its judgments. In this sense, see: Inter-American Court. *Case of the "Pueblo Bello Massacre" v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 124; Inter-American Court. *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 284; Inter-American Court. *Case of Luna López v. Honduras*. Merits, Reparations, and Costs. Judgment of October 10, 2013. Series C No. 269, para. 124.

<sup>100</sup> ECtHR, *Premininy v. Russia*, No. 44973/04, 10 February 2011, paras. 82-88; ECtHR, *Gjini v. Serbia*, No. 1128/16, 15 January 2019, paras. 78-80.

<sup>101</sup> ECtHR, *Premininy v. Russia*, No. 44973/04, 10 February 2011, para. 83; ECtHR, *Gjini v. Serbia*, No. 1128/16, 15 January 2019, paras. 78, 85-87.

<sup>102</sup> ECtHR, *Premininy v. Russia*, No. 44973/04, 10 February 2011, para. 84.

<sup>103</sup> IACHR. Report on the Situation of Human Rights Defenders in the Americas, para. 45

<sup>104</sup> Inter-American Court. *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para.

<sup>105</sup> IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, 2011, para. 73, citing IACHR, Merits Report 41/99, Detained Minors, Honduras, March 10, 1999, paras. 136 and 140.

protective custody to vulnerable individuals without marginalizing them from the prison population more than is required for their protection.”<sup>106</sup>

60. In this regard, in response to the threat of acts of violence against LGBT persons deprived of liberty, the State should order penitentiary authorities to launch a serious and impartial ex officio investigation aimed at determining whether the threat is based on violence due to prejudice with regard to the sexual orientation, gender identity, or gender expression of the victim and implement specific measures of protection. Additionally, if it is found that the threats involve State agents due to action, omission, or acquiescence, the State shall adopt the corresponding administrative and disciplinary measures.

61. Also, the IACHR finds that the obligation to prevent violence against LGBT persons deprived of liberty includes a State obligation to establish mechanisms for conflict resolution and violence prevention among persons deprived of liberty, including a measures for early detection of violence due to threats against the inmate LGBT population. This mechanism should include training for staff and, where necessary, the hiring of new personnel specializing in the rights of LGBT persons.

62. In the framework of the duty to prevent, the measures of protection that States adopt must be based on the collection of information and statistics. The Commission found that, consistent with what other human rights protection bodies have indicated,<sup>107</sup> procedures to collect statistics are needed to uniformly and accurately measure the prevalence, trends, and other aspects of violence in a given State or region, and for the standardization and dissemination of this information to raise awareness on violence against LGBT persons.<sup>108</sup> Along these lines, the CAT has also indicated that in order to prevent torture and other cruel, inhuman, or degrading treatment or punishment against LGBT persons deprived of liberty, it is "essential to ensure that context is assessed, taking into account the ethical principle of 'do no harm,' since isolated, decontextualized or intuitive actions may increase the risk of violence against lesbian, gay, bisexual, transgender and intersex persons.”<sup>109</sup>

63. Therefore, the IACHR observes that, from the framework of the duty to prevent emerges the obligation to create standardized and public record-keeping systems on the threats and acts of violence against LGBT persons deprived of liberty, using the indices generally accepted for measuring violence, with the addition of criteria for sexual orientation, gender identity, and gender expression.

64. Additionally, regarding the use of isolation of LGBT persons deprived of liberty as a means of protecting them from violence, the IACHR notes that this Court has found that it "produces moral and psychological suffering in any person, places him in a particularly vulnerable position,”<sup>110</sup> and that both prolonged isolation and keeping someone incommunicado by force were, in and off

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<sup>106</sup> Interim report of the HRC Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, August 9, 2013, para. 49

<sup>107</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, paras. 392 and 393.

<sup>108</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 102; IACHR, [Progress on and challenges to recognizing the rights of LGBTI persons in the Americas](#), para. 42 and following.

<sup>109</sup> CAT, Ninth Annual Report, CAT/C/57/4, March 22, 2016, para. 76.

<sup>110</sup> Inter-American Court. Case of *Suárez Rosero v. Ecuador*. Interpretation of Judgment on Reparations. Judgment of May 29, 1999. Series C No. 51. Para. 90.

themselves, cruel and inhuman.<sup>111</sup> However, the measures used to protect LGBT persons often place them in separate cells or in units with inferior living conditions, increasing the stigma and segregation.<sup>112</sup>

65. The IACHR also notes that isolation is essentially disciplinary and exceptional, as has been recognized by international instruments on the subject. Thus, the Principles and Best Practices establish that isolation can only be permitted as a last resort and “when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”<sup>113</sup> Likewise, according to Principle XXIII, in order to prevent violence amongst persons deprived of liberty, or between persons deprived of liberty and prison personnel, States can “separate the different categories of persons,”<sup>114</sup> ensure appropriate instruction and training for the personnel,<sup>115</sup> and set up early-warning mechanisms to prevent crises.<sup>116</sup> Likewise, the IACHR notes that the Mandela Rules<sup>117</sup> and the Yogyakarta Principles<sup>118</sup> emphasize conflict prevention and the exceptional nature and limits on measures to separate LGBT persons as a means of protecting them.

66. The Commission notes that this Court has found that the gravity of isolating an individual deprived of liberty can constitute abuse. Therefore, in general terms, it is the IACHR’s view that the isolation of LGBT persons cannot be understood as a measure of protection from threats or acts of violence against them. Without prejudice to this, and on an exceptional basis, measures of protection that involves separating LGBT persons from the rest of the prison population must not worsen their living conditions or lead to prolonged isolation or solitary confinement. The reincorporation of individuals who have been separated out back into the general penitentiary population must be supervised to prevent stigmatization and revictimization of the protected individual.

3. *What special obligations do States have regarding the special medical needs of trans persons deprived of liberty and, specifically, where applicable, regarding those who wish to begin or continue with their transition process?*

67. Under the principle of equivalency, the enjoyment of the highest level of health entails an obligation to provide access to healthcare services for trans persons deprived of liberty so they can undergo transition processes that are accessible, depathologized, without discrimination, and free of violence.

<sup>111</sup> Inter-American Court. *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4. Para. 156.

<sup>112</sup> IACHR, [Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas](#), OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, para. 156.

<sup>113</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII.3 Disciplinary Regime.

<sup>114</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXIII.a.

<sup>115</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXIII.b.

<sup>116</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXIII.e.

<sup>117</sup> UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 38.

<sup>118</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), March 2007, Principle 9.D.

68. The Commission observes that in the World Health Organization’s International Statistical Classification of Diseases and Related Health Problems (hereinafter the “ICD-11”), the mentions made in earlier editions to transsexuality in the chapter on mental and behavioral disorders were eliminated. According to the analysis of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (hereinafter the “Independent Expert SOGI”), trans persons are mentioned in a new chapter on sexual health, and they are not described in binary terms or based on gender stereotypes. The expert notes that the transitions are made so trans persons can live and be accepted as “a person of the experienced gender, through hormonal treatment, surgery or other health-care services to make the individual’s body align, as much as desired and to the extent possible, with the experienced gender.”<sup>119</sup>

69. With regard to rights to health and gender identity of LGBT persons, the Independent Expert SOGI has called on States to, in the framework of their public policies, adopt measures to improve the health and well-being of trans persons and guarantee them access to good quality healthcare services and information on health, including by considering the possibility of establishing the provision of gender-affirming care as a State obligation that does not require a diagnosis.<sup>120</sup>

70. Along these lines, the Yogyakarta Principles establish that States must:

C. Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality;

(...)

G. Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support;

71. Regarding this, the Commission observes that the case law of the European Court has progressively and steadily removed administrative and legal obstacles to the right to identity and the transition processes of trans persons. Indeed, the European Court has recognized human rights violations—regarding the rights to privacy and integrity—when the State has required trans persons to undergo sex reassignment surgery<sup>121</sup> that would cause sterility<sup>122</sup> in order to change their name and sex. The Court has also affirmed that States have an obligation to foster the conditions enabling trans person to enjoy the legal and juridical recognition needed to exercise their gender identities in accordance with their post-transition social realities.<sup>123</sup> In this regard, the Commission observes that in the European human rights system, the notion of transition is not a reference to a surgical procedure as the ultimate objective but to the idea that persons can select the elements in their personal and legal lives that they wish to change based on the exercise of their right to gender identity.

<sup>119</sup> Independent Expert SOGI, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, July 12, 2018, para. 12.

<sup>120</sup> Independent Expert SOGI, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, July 12, 2018, para. 77.a)

<sup>121</sup> ECtHR, Judgment S.V. v. Italy, Application No. 55216/08, 11 October 2018.

<sup>122</sup> ECtHR, Judgement, A.P., Garçon and Nicot v. France, Application nos. 79885/12, 52471/13 and 52596/13, 6 April 2017.

<sup>123</sup> ECtHR, Judgement, Christine Goodwin v. the United Kingdom, Application no. 28957/95, 11 July 2002.

72. Likewise, the Inter-American Court has affirmed the connection between physical and psychological integrity and personal autonomy and liberty when making decisions about one's own body and health expressed as a two-dimensional State obligation: i) to guarantee and respect the decisions and choices made freely and responsibly, and ii) to guarantee access to relevant information so persons are able to make informed decisions regarding the course of action related to their bodies and health, in accordance with their own life plans.<sup>124</sup>

73. Therefore, it is the Commission's view that, in the framework of their international obligations on the right to health of the penitentiary population, States must consider the particular needs of the transgender population as they relate to any transition processes they may wish to begin by removing unnecessary administrative obstacles or pathologizing requirements that involve unwanted body modifications. The IACHR likewise notes that the Court could specify the scope of the State's duty to guarantee access without discrimination to healthcare services for transgender persons deprived of liberty who wish to begin, recommence, continue, or further their transition processes.

4. *What special measures must States take to ensure the rights of LGBT persons to conjugal visits?*

74. As regards conjugal visits for LGBT persons under the same conditions as other inmates, it is the Commission's view that States must: i) identify persistent practices that make these visits difficult; ii) adjust regulations to guarantee this right; iii) ensure proper privacy; and iv) train and sensitize penitentiary personnel on this subject.

75. The Commission has indicated that one of the ways in which persons deprived of liberty exercise the right to privacy and family is through regular visits, pursuant to the requirements set by the authorities in the framework of their authorities to ensure that the essential aims of the deprivation of liberty are met.<sup>125</sup> Along these lines, the Commission has specified that the State has an obligation to provide conditions that ensure persons under their custody can maintain their interpersonal relationships, associated with their private life and privacy, which correspond absolutely to each individual and a realm that shall not be infringed up.<sup>126</sup>

76. Generally, with regard to conjugal visits, the Commission has indicated that States must ensure they can be conducted with dignity, with minimum hygiene and security standards and respect on the part of officials. This means that spaces must be set up for them, and the practice of inmates receiving their partners in their own cells should be avoided. Also, States must properly supervise

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<sup>124</sup> Inter-American Court. Case of *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 30, 2016. Series C No. 329, para. 155.

<sup>125</sup> IACHR Report No. 122/18, Case No. 11.656. Merits (publication) Marta Lucía Álvarez Giraldo. *Colombia*. October 5, 2018, para. 193; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the IACHR through Resolution 1/08 in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle XVIII.

<sup>126</sup> IACHR Report No. 122/18, Case No. 11.656. Merits (publication) Marta Lucía Álvarez Giraldo. *Colombia*. October 5, 2018, para. 192; IACHR, Merits Report 38/96; Case 10.506, X and Y (Argentina), October 15, 1996, para. 91. The IACHR has established that these realms of privacy include "the capacity to develop one's own personality and aspirations, and to determine one's own identity." IACHR, Merits Report 4/01, Case 11.626, María Eugenia Morales de Sierra (Guatemala), January 19, 2001, para. 46. Cited in: IACHR, Complaint submitted before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, para. 110, footnote 94.

and strictly monitor how these types of visits are carried out to prevent any type of irregularity, both in the granting of permission for conjugal visits and in how they are carried out.<sup>127</sup>

77. In particular, with regard to conjugal visits for LGBT persons, in the framework of a provisional measure on the matter for the Curado Penitentiary Complex (Brazil), this Court was made aware of a grave situation of insecurity and rights restrictions to the detriment of the LGBT population deprived of liberty and ordered that the necessary measures be adopted to guarantee conjugal visits for the LGBT population as part of the structural changes necessary to ensure their safety in the penitentiary.<sup>128</sup>

78. The Commission observes that conjugal visits are recognized by the international instruments that establish the standards and good practices for guaranteeing the rights of the penitentiary population.<sup>129</sup> Specifically with regard to LGBT persons deprived of liberty and conjugal visits, Principle 9 of the Yogyakarta Principles establishes in part E that States must "Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner."<sup>130</sup> In this regard, the IACHR also recalls that provisions sanctioning a certain group of persons for participating in a consensual act or practice with another person of the same sex are not admissible, as they run directly contrary to the prohibition on discrimination for reasons of sexual orientation.<sup>131</sup>

79. In this regard, conjugal visits are protected by the American Convention, by the rights to private life and privacy, in conjunction with the requirement under the Convention that the essential purpose of punishment be social reintegration, thus permitting contact between the inmate and the outside world in a realm as private as their sex life. In the case of conjugal visits for LGBT persons deprived of liberty, in view of the situation of discrimination and violence they experience and that has been described in these observations, it is the Commission's view that States—which are in a special position of guarantor—must identify guidelines or persistent practices that prohibit, obstruct, or dis-incentivize conjugal visits for LGBT persons deprived of liberty in order to adjust regulations or remove them and provide adequate privacy for conjugal visits for LGBT persons, so as to avoid exposing them to prejudicial violence.

80. It is also the IACHR's view that States should work to eradicate discrimination against LGBT persons and their sex lives in detention centers by training personnel to eliminate ridicule, humiliation, or punishment (physical and psychological) of LGBT persons for attending conjugal visits and exercising their sex lives, either by other inmates or the penitentiary authorities themselves.

81. Based on the observations set forth in this section, the Commission asks the Honorable Court to determine the content and scope of States' specific obligations to ensure the rights to life, integrity,

<sup>127</sup> IACHR Report No. 122/18, Case No. 11.656. Merits (publication) Marta Lucía Álvarez Giraldo. Colombia. October 5, 2018, para. 196; IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas. OEA/SER.L/V/II. Doc. 64, December 31, 2011, para. 586

<sup>128</sup> Inter-American Court, Provisional Measures regarding Brazil, Matter of the Curado Penitentiary Complex, November 23, 2016, para. 58.

<sup>129</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle XVIII; and UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rules 58.1 and 2.

<sup>130</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), March 2007, Principle 9.E.

<sup>131</sup> IACHR Report No. 81/13, Case 12,743. Merits. Homero Flor Freire. *Ecuador*. November 4, 2013, para. 114.

gender identity, and health pursuant to the obligations to respect, guarantee, and not discriminate based on sexual orientation, gender identity, and gender expression, all based on articles 1(1), 3, 4(1), 5(1), 5(2), 7, 11(2), and 18 of the American Convention on Human Rights and the other applicable Inter-American instruments.

#### **D. Regarding Indigenous persons**

*Based on articles 1(1), 4(1), 5, 12, 13, and 24 of the American Convention on Human Rights and the other applicable Inter-American instruments:*

*What are States' specific obligations as far as guaranteeing that Indigenous persons have detention conditions that are adequate in view of their particular circumstances? Specifically:*

82. Because indigenous persons deprived of liberty belong to culturally distinct peoples, States should adopt specific measures to address their particular situations. The aim is to guarantee respect for their rights to cultural identity and health, as well as protection against violence and discrimination. Likewise, States should address the cultural and linguistic particularities of indigenous persons deprived of liberty so they can participate without discrimination in activities or programs that take place within prisons, including disciplinary hearings.

83. The individual and collective rights of indigenous peoples and their members are a subject of particular concern for both universal instruments and jurisprudence and that of the inter-American human rights system. When applying measures benefiting indigenous persons deprived of liberty, States must take into account the universal and Inter-American standards on their cultural rights, rights to health, and others. Thus, as established in the American Declaration on the Rights of Indigenous Peoples, States must take measures to guarantee that members of indigenous peoples can maintain, express, and freely develop their cultural identities in all respects, free from any external attempt at assimilation.<sup>132</sup> Likewise, the United Nations Declaration on the Rights of Indigenous Peoples provides that States shall establish effective mechanisms for “any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.”<sup>133</sup> Regarding spiritual practices, indigenous peoples “have the right freely to exercise their own spirituality and beliefs [and to] carry them out in public and in private, whether individually or collectively.”<sup>134</sup>

84. The customs, norms, and legal systems specific to indigenous peoples are also cultural elements that must be taken into account by States when members of indigenous peoples enter national justice systems. According to International Labour Organization Convention 169 on Indigenous and Tribal Peoples (hereinafter “Convention 169”), when State authorities and courts rule on criminal matters involving persons who are members of indigenous peoples, they must take into account the customs of those persons. Likewise, when criminal sanctions are imposed by national legislation, they must take into account the economic, social, and cultural characteristics of persons belonging to indigenous peoples, and “preference shall be given to methods of punishment other than confinement in prison.”<sup>135</sup> It is the IACHR's view that this latter point is particularly important when

<sup>132</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article X.

<sup>133</sup> United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 adopted by the United Nations General Assembly (September 31, 2007), Article 8.

<sup>134</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XVI.

<sup>135</sup> ILO Convention 169 on Indigenous and Tribal Peoples, adopted on June 27, 1989, articles 9 and 10.

defining State obligations with regard to the commission of certain crimes or infractions when the legal systems of indigenous peoples establish sanctions and punishments other than imprisonment. This must also be taken into account with regard to indigenous peoples who are already being held in national penitentiaries.

85. Additionally, when enacting legislation and public policies on penitentiaries, States must take into account the differentiated impacts of deprivation of liberty on the cultures of indigenous persons deprived of liberty, which are generally based on the close ties to their families, communities, and ancestral territories. In the case of *Norín Catrimán et al. v. Chile*, the Inter-American Court took into account, among other aspects, the cultural characteristics of the members of the indigenous peoples in concluding that prolonged pretrial detention of traditional Mapuche authorities had negative impacts on the values, uses, and customs of their communities.<sup>136</sup> This decision made clear the importance for indigenous persons of being able to continue with their cultural practices, customs, rituals, food, and traditional health systems in prison, along with being able to speak their native languages.

1. *What specific obligations do States have to ensure that indigenous persons deprived of liberty can preserve their cultural identities, particularly their customs, rituals, and food?*

86. In order to guarantee the right to cultural identity of indigenous persons deprived of liberty, States must adopt specific measures that enable them to preserve their customs, rituals, and food traditions. In this regard, the Court has established that, pursuant to the principle of nondiscrimination enshrined in Article 1(1) of the American Convention, recognition of the right to cultural identity is a crosscutting interpretive element when it comes to understanding, respecting, and guaranteeing the enjoyment and exercise of the rights of indigenous peoples. In this regard, the Court has found that the right to cultural identity is a fundamental and collective right of indigenous peoples.<sup>137</sup> As the Court has recognized, an important element of cultural identity of the members of indigenous peoples is their intrinsic connection to their traditional territories, the protection of which is necessary to guarantee that their cultural identities, social structure, customs, beliefs, and traditions will be respected, guaranteed, and protected by States.<sup>138</sup>

87. In this context, the measures adopted by States must take into account the special relationship that indigenous people deprived of liberty—as members of their respective peoples—maintain with their ancestral lands and communities of origin, elements that are fundamental for their cultural identities, cultural practices, and spirituality. It is therefore the IACHR's view that, in the case of indigenous persons deprived of liberty, these factors are also important for the exercise of the right to freedom of conscience and religion, pursuant to Article 12 of the American Convention.

88. Therefore, State obligations in this regard are centered on: i) the adoption of measures to recognize and respect the right of indigenous persons deprived of liberty to engage in their cultural and religious practices, including cultural aspects of the way they dress; and ii) ensuring that the detention centers where they are held are located close to their families and communities.

<sup>136</sup> Inter-American Court, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations, and Costs. Judgment of May 29, 2014. Series C No. 279, para. 357.

<sup>137</sup> In this sense, see the Inter-American Court: Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment June 27, 2012. Series C No. 245, paras. 213, 217.

<sup>138</sup> Inter-American Court. Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment June 27, 2012. Series C No. 245, para. 146

89. As regards the recognition of and respect for indigenous cultural and religious practices, international standards point to the need for adopting national strategies and regulatory changes aimed at preventing discrimination against indigenous persons deprived of liberty in the exercise of those rights. Regarding this, the Committee on the Elimination of Racial Discrimination has established that States must prevent any type of discrimination in the exercise of human rights by indigenous persons, including the right to respect for their religious and cultural practices, culinary traditions, and relationships with their families.<sup>139</sup> In line with this, the Committee has recommended implementing national strategies to prevent discrimination against persons deprived of liberty who belong to certain racial or ethnic groups—including indigenous peoples—as well as making changes to penitentiary rules to ensure their cultural and religious practices are respected.<sup>140</sup> It is the IACHR's view that these measures are necessary to ensure that persons deprived of liberty are able to preserve their cultural identities, customs, rituals, and culinary traditions.

90. Another essential element of indigenous cultural identity is forms of dress. In this regard, the Principles and Best Practices establish that the clothing that persons deprived of liberty are required to wear must take their cultural and religious identities into account.<sup>141</sup> For these purposes, States must implement measures to ensure that dress codes are not degrading or humiliating for indigenous persons deprived of liberty due to their cultural conceptions.<sup>142</sup> In the Commission's view, this should also take into account other prison rules—on haircuts, etc.—that may prevent indigenous persons deprived of liberty from expressing their culture identities.

91. Additionally, regarding housing indigenous persons deprived of liberty in a location that is nearby their communities, the Inter-American Court has stressed that placing them in penitentiaries close to their families and communities is especially important in view of the connection they have to their places of origin and communities.<sup>143</sup> These family and community connections are essential for the preservation of the cultural identities of indigenous persons deprived of liberty. Therefore, in order for them to be able to maintain their cultural identities, States must develop penitentiary policies and other measures to ensure that the detention centers or prisons where indigenous persons deprived of liberty are held are located close to their families, communities, and ancestral lands.

2. *What are a State's duties with regard to medical care for indigenous persons deprived of liberty, particularly with regard to traditional medical and medicinal practices?*

92. Under the principle of equivalency, States must guarantee—under conditions comparable to those in the community—the right of indigenous persons deprived of liberty to enjoy the highest attainable standard of physical, mental, social, and spiritual health. In this regard, both the United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Persons enshrine the right of members of indigenous communities to use, without any discrimination, the facilities, health services, and medical care available to the general

<sup>139</sup> ICERD, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 65th period of sessions (2005), para. 38.a.

<sup>140</sup> ICERD, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 65th period of sessions (2005), para. 5.f.

<sup>141</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle XII.

<sup>142</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle XII.

<sup>143</sup> Inter-American Court, *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*. Merits, Reparations, and Costs. Judgment of May 29, 2014. Series C No. 279, para. 408.

population.<sup>144</sup> These instruments also establish that States must incorporate an intercultural approach to their own health systems and practices, including by using plants and other traditional medicines.<sup>145</sup> In this context, States' obligations with regard to indigenous persons deprived of liberty consist of guaranteeing access to health services with an intercultural approach and under the same conditions that they would be able to enjoy in the community. Additionally, measures for such purposes must be designed and implemented in consultation and coordination with the beneficiary indigenous persons.

93. With regard to including an intercultural approach in medical care services, the American Declaration on the Rights of Indigenous Peoples enshrines the right of indigenous persons to have health and medical care services that incorporate intercultural systems or practices.<sup>146</sup> In this regard, the United Nations Committee on Economic, Social and Cultural Rights recognizes the right of indigenous peoples to have culturally appropriate health services that take traditional indigenous preventative care, healing practices, and medicines into account.<sup>147</sup> Along these lines, it is the IACHR's view that the right in question translates to a State obligation to guarantee access for indigenous persons deprived of liberty to their traditional medicines and healing practices, as well as to practitioners of traditional indigenous medicine. Likewise, States should respect the different Cosmo visions and cultural conceptions regarding health, as well as associated ceremonial and ritual practices.

94. With regard to the direct involvement of indigenous persons in the provision of these services, and regarding the intercultural approach to health, the American Declaration on the Rights of Indigenous Peoples establishes that States must promote intercultural systems or practices in medical and health services in consultation and coordination with the indigenous peoples.<sup>148</sup> It is the Commission's view that these processes of consultation and coordination between State authorities and representatives of indigenous peoples should also be followed with regard to persons deprived of liberty. In this regard, the IACHR has taken note of some positive practices that incorporate the intercultural perspective in the context of indigenous persons deprived of liberty. Such is the case with the agreement between the Governments of Chile and the Machi—or Mapuche spiritual leader—Celestino Córdova, signed in the context of a hunger strike carried out by he and other detained Mapuche persons. The agreement requires certain concerns associated with the issues of health and prison conditions be addressed. The agreement included commitments by the State to begin intercultural dialogue with the aim of changing penitentiary rules in order to incorporate cultural significance into the workforce and education reintegration, healthcare, and spiritual support programs.<sup>149</sup>

<sup>144</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XVIII, and United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 adopted by the United Nations General Assembly (September 31, 2007), Article 24.

<sup>145</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XVIII, and United Nations Declaration on the Rights of Indigenous Peoples, Article 24.

<sup>146</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XVIII.4

<sup>147</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to enjoy the highest attainable standard of health (Article 12 of International Covenant on Economic, Social and Cultural Rights), UN. Doc. E/C.12/2000/4, para. 27.

OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XVIII.4.

<sup>149</sup> IACHR, [@CIDH] (August 19, 2020). Tweet: "*La CIDH Saluda el acuerdo firmado entre el Gobierno chileno y el machi Celestino Córdova*" ["The IACHR welcomes the agreement signed between the Chilean government and Machi Celestino Córdova"]. Twitter: <https://twitter.com/cidh/status/129617947656557730?lang=en>.

3. *What special measures would States be required to take with regard to activities or programs that take place within prisons, as well as disciplinary hearings, to address the cultural and linguistic particularities of indigenous persons?*

95. In order for indigenous persons deprived of liberty to be able to participate effectively, under the same conditions as any other person, in activities or programs that take place within prisons—including disciplinary hearings—States must adopt measures in attendance to their cultural and linguistic particularities. In this regard, the special obligations that States have include: i) ensuring indigenous persons deprived of liberty are able to use their native languages so they can understand and communicate amongst each other; ii) ensuring that indigenous persons and their communities are able to participate in the design and implementation of prison programs; and iii) incorporating an intersectional approach in addressing the different forms of discrimination that may limit these persons' participation in this type of program or in the defense of their rights in disciplinary or other similar processes.

96. Regarding the right to use their native languages—particularly in the framework of administrative, judicial, or other proceedings that could impact their rights—the American Declaration on the Rights of Indigenous Peoples establishes that persons who are members of indigenous peoples have the right to use their native languages and to understand and be understood in their own languages during any type of process through the use of interpreters or other effective measures.<sup>150</sup> For their part, under Convention 169 on Indigenous and Tribal Peoples, States must guarantee that indigenous peoples are protected from violations of their rights by launching legal procedures to ensure they are respected. In this context, indigenous persons must have the means to ensure that they can understand and make themselves understood during those proceedings via—if necessary—interpreters or other effective measures.<sup>151</sup>

97. In particular, in the context of deprivation of liberty, the Mandela Rules establish that anyone deprived of liberty must receive, at the time of admission, information on: i) penitentiary legislation; ii) applicable penitentiary regulations; iii) their rights, including the right to legal counsel; iv) obligations; and v) disciplinary sanctions. These rules stress that if a person deprived of liberty does not understand the commonly-used languages, the information should be provided using interpretation services.<sup>152</sup> With regard to complaints and disciplinary measures, the Mandela Rules also establish that every detained person must be informed, without delay and in a language that they understand, of the nature of the infractions of which they are accused. Likewise, they must be able to defend themselves alone or with legal assistance, and with an interpreter provided free of charge, if necessary.<sup>153</sup>

98. For its part, this Court has recognized the right of indigenous persons deprived of liberty to speak their native languages, along with the consequences of any restriction to it. In the case of *López Álvarez vs. Honduras*, the Court established that the restriction imposed by penitentiary authorities on the use of the native language by the Garífuna population in the penitentiary where Mr. López Álvarez was being held caused harm to his identity as Garífuna and the restriction was not a response to security conditions or treatment needs. Therefore, it violated his right to freedom

<sup>150</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XIV.4.

<sup>151</sup> ILO Convention 169 on Indigenous and Tribal Peoples, adopted on June 27, 1989, article 12.

<sup>152</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rules 54 and 55.

<sup>153</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 41.

of thought and expression.<sup>154</sup> In this case, the Court found that States must take into account the particular characteristics that differentiate members of indigenous peoples from the general population—in particular, language as an essential part of expressing, disseminating, and transmitting their culture.<sup>155</sup>

99. In view of this, States should guarantee the use of native languages by indigenous persons deprived of liberty so they can understand and be understood through them. In particular, pursuant to the terms of the Mandela Rules, they must receive all the necessary information at the moment of admission and related to disciplinary processes. Where necessary, indigenous persons deprived of liberty have the right to interpreters or translators in their native languages. In this context, it is also the IACHR's view that rules, regulations, disciplinary sanctions, and other relevant materials should be translated into indigenous languages—in writing or in other culturally-appropriate formats—so that indigenous persons deprived of liberty can understand their rights and obligations in detention centers.

100. Also, regarding special prison programs that are culturally pertinent to indigenous persons and ethnic minorities, the United Nations Office on Drugs and Crime (hereinafter “UNODC”) has recommended that their communities participate in designing and implementing them.<sup>156</sup> According to the UNODC, the development of special culturally relevant programs is an important mechanism for indigenous persons deprived of liberty belonging to these groups to participate in penitentiary programs that, pursuant to the law in some jurisdictions, may be a requirement or a condition for requesting prison benefits, such as parole.<sup>157</sup> In this regard, it is the IACHR's view that the design and implementation of prison programs that specifically address the cultural and linguistic particularities of indigenous persons deprived of liberty should involve their participation and that of their communities.

101. In addition to the linguistic and cultural particularities of indigenous persons deprived of liberty, States must adopt measures with an intersectional approach to address the different forms of discrimination that may limit their participation in programs and activities developed within prisons, as well as in the defense of their rights and interests in disciplinary or other similar processes.

102. In this regard, in the case of women deprived of liberty, the Bangkok Rules establish that penitentiary authorities must provide for ample programs and services addressing the different needs of women deprived of liberty belonging to indigenous peoples and minority groups. They should do so in order to address the multiple forms of discrimination preventing them from accessing programs and services that are culturally appropriate and offer a gender perspective.<sup>158</sup> Such measures should be carried out in consultation with the women deprived of liberty and the corresponding groups.<sup>159</sup> Likewise, the rules require that pre-and post-release services should be

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<sup>154</sup> Inter-American Court, Case of *López Álvarez v. Honduras*. Merits, Reparations, and Costs. Judgment of February 1, 2006. Series C No. 141, para. 166.

<sup>155</sup> Inter-American Court, Case of *López Álvarez v. Honduras*. Merits, Reparations, and Costs. Judgment of February 1, 2006. Series C No. 141, para. 171.

<sup>156</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 74, 78.

<sup>157</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 74.

<sup>158</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 54.

<sup>159</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 54.

reviewed to ensure they are appropriate for and accessible to inmates belonging to indigenous peoples and minority groups.<sup>160</sup> Along these lines, the UNODC has emphasized the need for penitentiary authorities to work together with indigenous groups or organizations that work with women in order to develop programs that meet their needs.<sup>161</sup>

4. *What particular obligations do States have to prevent all acts of violence against indigenous persons deprived of liberty?*

103. As presented in the request to this Court for an Advisory Opinion, indigenous persons are more likely to be the victims of physical and verbal abuse by penitentiary personnel and other persons deprived of liberty<sup>162</sup> due to their ethnic-racial origins, cultures, spiritual beliefs, languages, and other factors. In view of this, States must take special measures to prevent and punish acts of racism, discrimination, and intolerance that indigenous persons deprived of liberty may experience. These measures should include: i) guaranteeing the security and protection of indigenous persons while taking into account their particular needs that may place them in a situation of special risk; ii) investigating cases of violence, with a special focus on potential motives that are based on racial discrimination, xenophobia, and other related forms of intolerance; and iii) guaranteeing the right of indigenous persons deprived of liberty to file for remedies and submit other complaints in response to acts of violence and other violations of their human rights.

104. Due to the situation of vulnerability facing indigenous peoples for a variety of historical and other reasons, the American Declaration on the Rights of Indigenous Peoples establishes that States must adopt preventative and corrective measures to fully and effectively protect the right of indigenous peoples to not be subjected to racism, racial discrimination, xenophobia, or other related forms of intolerance.<sup>163</sup> In the context of deprivation of liberty, the Mandela Rules require States to adopt measures to guarantee that persons deprived of liberty are secure and protected from torture and other abuse based on the principle of nondiscrimination and taking into account the particular needs of vulnerable inmates.<sup>164</sup>

105. In particular, with regard to persons deprived of liberty who belong to ethnic minorities and indigenous peoples, the UNODC has recommended that they be placed in penitentiaries that offer minimum restrictive security provisions, similar to for other detained persons, and that the personnel supervise common areas regularly to prevent any abuse by other inmates.<sup>165</sup> Likewise, the UNODC establishes that in order to protect members of these groups from race-based abuse and violence, States should, among other measures, conduct risk evaluations and, where necessary, refrain from placing inmates with racist tendencies or who have been accused of violent race-based crimes together with indigenous persons or persons belonging to ethnic minorities.<sup>166</sup>

<sup>160</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 54.

<sup>161</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 74.

<sup>162</sup> Brief requesting Advisory Opinion, para. 38.

<sup>163</sup> OAS, [American Declaration on the Rights of Indigenous Peoples](#), AG/RES. 2888 (XLVI-O/16). Approved in the second plenary session held on June 14, 2016, article XII

<sup>164</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rules 1 and 2.

<sup>165</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 78.

<sup>166</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 71.

106. For its part, pursuant to the Basic Principles and Best Practices, States should adopt appropriate and effective measures to prevent violence amongst persons deprived of liberty, or between persons deprived of liberty and the penitentiary personnel. Among other measures, the IACHR emphasizes i) ongoing and appropriate training for personnel; and ii) investigation and punishment of all incidents of violence.<sup>167</sup> With regard to training that takes a differentiated approach, the Committee on the UN Elimination of Racial Discrimination has established that States must promote proper training for public security forces—which includes prison personnel—on human rights, tolerance, and interracial and interethnic understanding, along with sensitivity training on intercultural relations.<sup>168</sup>

107. With regard to the investigation and punishment of acts of violence, the Principles and Best Practices establish that States have an obligation to conduct serious, exhaustive, impartial, and rapid investigations into all acts of violence in detention facilities in order to establish their causes and identify and punish the person responsible.<sup>169</sup> In particular, with regard to indigenous persons, the Committee on the Elimination of Racial Discrimination has established that States must prevent and severely punish acts of violence, torture, and cruel, inhuman, or degrading treatment and all human rights violations against persons belonging to racial and ethnic groups—including indigenous persons—committed by State agents, and specifically by the police and penitentiary institution personnel.<sup>170</sup> In view of this, investigations into acts of violence committed against indigenous persons inside detention facilities must consider the possibility of motives related to racial discrimination, xenophobia, and other related forms of intolerance against them. In this regard, the UNODC has recommended that penitentiary authorities investigate complaints of racial and ethnic discrimination, harassment, and abuse by prison personnel and other inmates.<sup>171</sup> States must also adopt appropriate disciplinary measures.<sup>172</sup>

108. With regard to the right to report incidents of violence while imprisoned, the Principles and Best Practices establish that States must adopt the measures necessary to guarantee the right of all persons deprived of liberty to file a simple, quick, and effective remedy before the relevant authorities against acts or omissions that violate or threaten to violate their rights. This would include complaints or reports of acts of prison violence, torture, or cruel, inhuman, or degrading treatment.<sup>173</sup> In the case of indigenous persons deprived of liberty, the remedies and complaint mechanisms—along with other legal mechanisms to report cases of discrimination, harassment, abuse, violence, and other human rights violations—must be available to these persons; likewise, the mechanisms must take into account the linguistic and cultural particularities of persons deprived of liberty, pursuant to the above-developed terms with regard to the right to use their native languages and to understand and be understood in their own languages during any type of proceeding.

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<sup>167</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle XXIII.1.

<sup>168</sup> ICERD, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 65th period of sessions (2005), para. 5.b.

<sup>169</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle XXIII.3.

<sup>170</sup> ICERD, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 65th period of sessions (2005), para. 21.

<sup>171</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 71.

<sup>172</sup> UNODC, [Handbook on Prisoners with special needs. Criminal justice handbook series. United Nations Office on Drugs and Crime](#), 2009, p. 71.

<sup>173</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission in its 131st Ordinary Period of Sessions, held on March 3-14, 2008, Principle V.

109. Based on the contents developed in this section, the Commission asks this Court to establish the content and scope of States' specific obligations such that they guarantee the preservation of cultural identity, health, social reintegration activities, and participation in disciplinary hearings of indigenous persons deprived of liberty, as well as prevent all acts of violence against them, all based on articles 1(1), 4(1), 5, 12, 13, and 24 of the American Convention on Human Rights and the other applicable Inter-American instruments.

### **E. Regarding older persons**

*Based on articles 1(1), 4(1), 5, 17(1), and 24 of the American Convention on Human Rights, the provisions of the Inter-American Convention on Protecting the Human Rights of Older Persons, and the other applicable Inter-American instruments:*

*What are States' specific obligations as far as guaranteeing that older persons have detention conditions that are adequate in view of their particular circumstances?*

110. According to the UNODC, prison terms have a disproportionate effect on older persons given that many of their critical health needs are not met, even as their health is in rapid decline.<sup>174</sup> In this context, in order for older persons deprived of liberty to exercise their rights on an equal footing with other persons, States must develop differentiated policies and strategies to meet the special needs of this population group. These needs are related mainly to their old age and consequent declining health, to the point of including the potential for disability.

111. In this regard, in order to establish a specific framework for guaranteeing the rights of older persons, and in consideration of their special needs for protection, the Inter-American Convention on Protecting the Human Rights of Older Persons establishes that States must adopt "affirmative measures and reasonable adjustments that are necessary to expedite or attain de facto equality for older persons, or to ensure their full social [...] engagement."<sup>175</sup>

112. The IACHR also emphasizes that this Convention explicitly prohibits age-based discrimination and directs States to, "In their policies, plans, and legislation on ageing and old age, [...] develop specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination, including [...] people deprived of their liberty."<sup>176</sup> Along these lines, as indicated by the IACHR in its Principles and Best Practices, affirmative measures aimed exclusively at protecting older persons will not be considered discriminatory.<sup>177</sup>

113. At the same time, based on the general principles set forth in the Inter-American Convention on Protecting the Human Rights of Older Persons—especially on equality and nondiscrimination, independence and autonomy, inclusion, well-being and care, and preferential care—it is the IACHR's view that States have an enhanced obligation to provide specialized services to this population pursuant to its particular condition. In the context of deprivation of liberty, the IACHR will hereinafter delve into the particular obligations with regard to health, physical

<sup>174</sup> UNODC, Handbook on Prisoners with special needs. Criminal justice handbook series, 2009, p. 130.

<sup>175</sup> OAS, Inter-American Convention on Protecting the Human Rights of Older Persons, adopted in Washington, DC, United States, on June 15, 2015, entered into force on January 11, 2017, Article 4(b).

<sup>176</sup> OAS, Inter-American Convention on Protecting the Human Rights of Older Persons, adopted in Washington, DC, United States, on June 15, 2015, entered into force on January 11, 2017.

<sup>177</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 131st Period of Sessions, March 14, 2008, Principle II.

accessibility of penitentiary facilities, family coexistence, and mechanisms of social reintegration. The aim is to give content to the aforementioned rights with an approach based mainly on the advanced age of this population group to prevent these persons from being subjected to a twofold situation of abandonment, neglect, and exclusion, as a result not only of age but of their status as deprived of liberty.

114. Lastly, while the States must pay special attention to the specific needs of older persons, they must also introduce specific approaches in the treatment of older persons who find themselves in complex discrimination situations, such as the case of older women.<sup>178</sup> In this regard, in consideration of multiple discrimination and the additional barriers to which older women may be subject due to their gender, the IACHR observes that the *Inter-American Convention on Protecting the Human Rights of Older Persons* establishes one of its general principles as that of equity and gender equality.<sup>179</sup> **In particular, in order to eliminate any form of discrimination, said Convention indicates** that States must incorporate a gendered lens in all their policies, programs, and legislation aimed at establishing the rights of this population through an effective approach.<sup>180</sup>

1. *What specific obligations do States have to ensure the right to accessibility and personal mobility in detention centers for older persons deprived of liberty?*

115. In order to guarantee that older persons can live with the greatest possible independence and in the same conditions as other persons deprived of liberty, States must guarantee accessibility—and, consequently, personal mobility—for older persons in penitentiary facilities. Failing to do so places older persons in a situation of discrimination and in detention conditions that are not compatible with their right to have their physical and mental integrity respected under the same conditions as other persons, resulting in violations of articles 5(1) and 1(1) of the American Convention.

116. In particular, and pursuant to international precedent on this subject, in order to ensure the right to accessibility in contexts of detention, States should identify barriers to access, requiring and implementing reasonable changes pursuant to the particular situation of detained persons—in this case, older persons. In the IACHR's view, this will: i) enable access to services under the same conditions as other persons and allow older persons to act independently; and ii) avoid isolating them from the rest of the prison population.

117. Regarding making adjustments for older persons in prison facilities, the Committee of Ministers of the Council of Europe establishes that such adjustments must be made to allow older persons to live the most normal life possible and avoid separating them from the rest of the prison population.<sup>181</sup> Regarding this, the World Health Organization has indicated that enabling older persons to live with the general prison population is important to prevent their isolation, and thus States should take the measures necessary to guarantee them access to all the programs and

<sup>178</sup> In this regard, see OAS, *Inter-American Convention on the Protection of the Human Rights of Older Persons*. Adopted on June 15, 2015, Article 5.

<sup>179</sup> OAS, *Inter-American Convention on the Protection of the Human Rights of Older Persons*. Adopted on June 15, 2015, Article 3.

<sup>180</sup> OAS, *Inter-American Convention on the Protection of the Human Rights of Older Persons*, adopted in Washington D.C., United States on June 15, 2015, entered into effect on January 11, 2017, preamble and articles 3 and 5.

<sup>181</sup> Committee of Ministers of the Council of Europe, *Recommendation No. (98)7 Concerning the Ethical and Organizational Aspects of Health Care in Prison*, 627th meeting of Ministers' Deputies, April 8, 1998, para. 50.

activities offered in prison.<sup>182</sup> Additionally, the WHO has stipulated that determination of whether an adjustment is adequate should be based on a careful evaluation of the person's individual needs.<sup>183</sup>

118. The WHO also underscores that because of their advanced age, an increasing number of older persons with physical disabilities are deprived of liberty.<sup>184</sup> Thus, in view of the physical deficiencies that older persons may develop with age—which fit within the framework of the concept of disability<sup>185</sup>—the IACHR will next set forth the standards on the subject based on international law on the rights of persons with disabilities, standards that also give content to the rights of older persons.

119. In this context, as the Court stipulated in *Chinchilla Sandoval et al. v. Guatemala*—a case involving a woman with a physical disability deprived of liberty—States have an obligation to protect the right to accessibility<sup>186</sup> in order to guarantee the principle of nondiscrimination and balance related to the protection of health—availability, accessibility, acceptability, and quality—including by making any reasonable adjustments necessary.<sup>187</sup>

120. Based on this right, the Court established that States have the obligation to change the environment so that a person with any limitation is able to function and enjoy the greatest independence possible, such that they can fully participate in all aspects of life under the same conditions as other persons deprived of liberty.<sup>188</sup> Based on this, and with regard to persons who have difficulties with physical mobility, the Court determined that the content of the right to accessibility means, on one hand, identifying obstacles and barriers to access, and on the other, eliminating or fixing them.<sup>189</sup> With regard to this latter obligation, it is the IACHR's view that this entails making reasonable adjustments, defined by the CRPD as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights [...]”<sup>190</sup>

121. For their part, the Mandela Rules, the CRPD, and the UN Committee on the Rights of Persons with Disabilities establish that States have an obligation to guarantee accessibility in penitentiaries.<sup>191</sup> In this regard, the CRPD Committee has recommended that States establish legal

<sup>182</sup> World Health Organization – Regional European Office, Prisoners and Health: Prisoners with Special Needs, 2014, pg. 157.

<sup>183</sup> World Health Organization – Regional European Office, Prisoners and Health: Prisoners with Special Needs, 2014, pg. 157.

<sup>184</sup> World Health Organization – Regional European Office, Prisoners and Health: Prisoners with Special Needs, 2014, p. 153

<sup>185</sup> In this regard, the Convention on the Rights of Persons with Disabilities establishes that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” CRPD, Article 1.2.

<sup>186</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 214.

<sup>187</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 214.

<sup>188</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 214.

<sup>189</sup> Inter-American Court. Case of *Chinchilla Sandoval et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Para. 214.

<sup>190</sup> UN, Convention on the Rights of Persons with Disabilities, Article 2.

<sup>191</sup> UN, United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Resolution A/Res/70/175, December 17, 2015, Rule 5(2); Convention on the Rights of Persons with Disabilities, Article 14.2; UN

frameworks aimed at making reasonable adjustments that preserve the dignity of persons with disabilities and guarantee their rights in penitentiaries.<sup>192</sup> In general, in order to guarantee the right to accessibility and dignified detention conditions, States must guarantee persons with disabilities access—under the same conditions as everyone else—to the different common areas and services, including bathrooms, yards, libraries, study areas, workshops, and medical services.<sup>193</sup> According to the CRPD, this will ensure that persons with disabilities deprived of liberty can live independently and participate fully in all aspects of daily life in their place of detention.<sup>194</sup>

2. *What are States' obligations with regard to medical and psychological care for older persons deprived of liberty? Specifically, what duties does the State have with regard to palliative care that these individuals may need?*

122. In the context of deprivation of liberty—as referenced previously—based on the principle of equivalency, States' specific duties consist of ensuring that medical attention within penitentiaries is comparable to what is provided in the community.<sup>195</sup> In view of this, and pursuant to the provisions of the Inter-American Convention on Protecting the Human Rights of Older Persons, in order to guarantee comprehensive care—including palliative care—States must adopt measures to ensure that public institutions guarantee access to it without discrimination, appropriately manage problems related to fear of death and pain; and avoid isolation, unnecessary suffering, and futile and unhelpful procedures.<sup>196</sup> Additionally, according to that Convention and to the United Nations Principles for Older Persons, States have an obligation to establish a process whereby older persons can explicitly state their wishes and instructions with regard to their care and quality of life.<sup>197</sup> In this case, the will may be expressed, amended, or expanded at any time only by the older persons through legally binding instruments, pursuant to national law.<sup>198</sup>

123. In particular, with regard to older persons deprived of liberty, States should provide medical care—including psychological, dental,<sup>199</sup> and palliative care—based on the special needs and health requirements of these individuals. Also, pursuant to standards on older persons, States are required to take special measures with regard to: i) assessment upon intake; ii) proper medical checkups; and iii) conducting regular reviews.

124. With regard to the need to address the special circumstances of older persons when providing medical care, the Mandela Rules impose an enhanced duty for States to guarantee the

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Committee on the Rights of Persons with Disabilities, [Communication 8/2012, Case of X v. Argentina](#). Adopted by the Committee during its 11th period of sessions. CRPD/C/11/D/8/2012, June 18, 2014, para. 8.5.

<sup>192</sup> Committee on the Rights of Persons with Disabilities, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities “The right to liberty and security of persons with disabilities.” Adopted during the Committee’s 14<sup>th</sup> session, held in September 2015.

<sup>193</sup> UN Committee on the Rights of Persons with Disabilities, [Communication 8/2012, Case of X v. Argentina](#). Adopted by the Committee during its 11th period of sessions. CRPD/C/11/D/8/2012, June 18, 2014.

<sup>194</sup> UN Committee on the Rights of Persons with Disabilities, [Communication 8/2012, Case of X v. Argentina](#). Adopted by the Committee during its 11th period of sessions. CRPD/C/11/D/8/2012, June 18, 2014.

<sup>195</sup> *Cite paragraph from this brief.*

<sup>196</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 6.

<sup>197</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 11; and UN, [Principles for Older Persons](#), Resolution 46/91 of 16 December 1991, Principle 14.

<sup>198</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 11.

<sup>199</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25.2. Also see European Court of Human Rights, [Case of Iacov Stanciu v. Romania](#), (Application no. 35972/05), Judgement of July 24, 2012, para. 184.

right to health for persons with "special needs or health problems"—such as older persons.<sup>200</sup> In this regard, they require penitentiary facilities to provide a healthcare service in charge of evaluating, encouraging, protecting, and improving the physical and mental health of inmates.<sup>201</sup> For its part, the Principles and Best Practices establish that in order to guarantee the right to health of persons belonging to vulnerable or high risk groups—including older persons—States have an obligation to adopt special measures to meet their particular health needs.<sup>202</sup>

125. Pursuant to international precedent on deprivation of liberty, medical care services must be based on scientific principles and best practices,<sup>203</sup> and they must be provided by a team that is interdisciplinary, adequate, qualified, and independent.<sup>204</sup> In particular, with regard to psychological care, the Principles and Best Practices and the Mandela Rules explicitly stipulate that States have an obligation to provide this type of care for older persons;<sup>205</sup> they also stipulate that penitentiary medical personnel must have "sufficient expertise in psychology and psychiatry."<sup>206</sup>

126. As regards the special measures that must be adopted for the assessment of older persons that must be carried out during intake to penitentiaries, the UNODC indicates that it must include their physical and mental health, their family contacts, and their relations to their community. This will enable determination of the personalized program to be applied to them.<sup>207</sup> The assessment will also ensure that the different needs of older persons deprived of liberty can be met. In this regard, "Early detection and treatment of health conditions particularly are important both from an ethical point of view and in terms of minimizing costs of medical treatment."<sup>208</sup>

127. Regarding regular health checks for older persons deprived of liberty, in the case of *Iacov Stanciu v. Romania*, the European Court of Human Rights emphasized the importance of keeping proper records on these persons' health. In this regard, it established that, in order to guarantee Article 3 of the European Convention on Human Rights (regarding protection from inhuman and degrading treatment), comprehensive records should be kept on their health, treatment, and corresponding medical checkups. According to the European Court, in the absence of such records, it is not possible to regularly and systematically conduct health checkups on imprisoned older persons, and neither is it possible to implement a comprehensive medical strategy for treating their illnesses or preventing them from getting worse.<sup>209</sup> Along the same lines, the UNODC has indicated

<sup>200</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25 (1 and 2).

<sup>201</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25 (1 and 2).

<sup>202</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), 131st Period of Sessions, March 14, 2008, Principle X.

<sup>203</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), 131st Period of Sessions, March 14, 2008, Principle X.

<sup>204</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25.2.

<sup>205</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), 131st Period of Sessions, March 14, 2008, Principle X; and UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25(1).

<sup>206</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 25(2).

<sup>207</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 51.

<sup>208</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 51.

<sup>209</sup> European Court of Human Rights, [Case of Iacov Stanciu v. Romania](#), (Application no. 35972/05), Judgement of July 24, 2012, paras. 180-186.

that, due to rapid changes in the health of older persons, medical checkups should be done regularly to adjust activity programming to meet their special needs.<sup>210</sup>

128. Particularly, in relation to the additional challenges and hurdles to the health of older women brought about by incarceration, States have a special duty to ensure the health of this prison population from a gender perspective. According to UNODC, the health of older women deprived of their liberty tends to deteriorate, as the large majority of prison systems do not offer medical care that takes into account their specific needs given their gender.<sup>211</sup> Scientific evidence also shows that older women deprived of their liberty have additional medical care needs that are directly related to their gender.<sup>212</sup> An example of this is menopause, which may require ongoing hormone treatments, along with medications, and adaptations to prison living conditions to reduce symptoms.<sup>213</sup> The treatment of older women also requires early diagnosis and prevention of the diseases that affect them the most, such as breast and cervical cancer.<sup>214</sup> UNODC also states that women have higher levels of mental health care needs than men on entry to prison, as well as higher rates of self-harm attempts.<sup>215</sup>

129. In this context, the IACHR notes that, pursuant to the Inter-American Convention on Protecting the Human Rights of Older Persons, States have a duty to provide a comprehensive system of care for older persons that takes into account a gender perspective.<sup>216</sup> This means that States must consider the particular situation of older women as part of the obligation to provide medical care in contexts of incarceration, which entails promoting their health, preventing and treating illness, and addressing other specific needs they have.

130. Based on numerous international instruments, States must fulfill the following obligations to ensure the health of older women in detention: i) perform general checkups on older women when they enter correctional facilities, in order to identify their specific health care needs and the appropriate treatments for them;<sup>217</sup> ii) ensure that older women deprived of their freedom are included in the State's preventive care plans and measures for diseases typical of their age group and gender, such as Papanicolaou tests and screenings for breast cancer and other types of cancer that affect them the most;<sup>218</sup> and iii) develop gender-specific policies and strategies to address the mental health care needs of older women while they are incarcerated.<sup>219</sup>

<sup>210</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 51.

<sup>211</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal Justice Handbook Series, 2009, p. 64.

<sup>212</sup> British Society of Criminology (Dr. Azrini Wahidin). *'We are a significant minority: Old Women in English Prisons'*; Aday, R., Farney, L. *Malign Neglect: Assessing Older Women's Health Care Experiences in Prison*. Bioethical Inquiry 11, 359–372 (2014).

<sup>213</sup> See WHO/UNODC [Declaration on women's health in prison \(Kyiv Declaration\)](#), 2009, pars. 15 and 16; Public Health England. [Gender Specific Standards for Women in Prison to Improve Health and Wellbeing](#), Standard 7.14, pp. 147 and 148.

<sup>214</sup> British Society of Criminology (Dr. Azrini Wahidin). *'We are a significant minority: Old Women in English Prisons'*; Public Health England. [Gender Specific Standards for Women in Prison to Improve Health and Wellbeing](#).

<sup>215</sup> UNODC, [Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders](#). Rule 6 (2), p. 27.

<sup>216</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#), Adopted on June 15, 2015, Article 12.

<sup>217</sup> See United Nations [Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(Bangkok Rules\)](#), Resolution A/RES/65/229, March 16, 2011, Rule 6; and UNODC [Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders](#), Rule 6, p. 26.

<sup>218</sup> United Nations, [Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(Bangkok Rules\)](#), Resolution A/RES/65/229, March 16, 2011, Rule 18.

<sup>219</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal Justice Handbook Series, 2009, p. 40.

131. Additionally, regarding end-of-life palliative care for older persons, based on the principle of equivalency, States have an obligation during this stage to focus on ensuring that the care is comparable to what citizens would receive outside in the community. In this regard, and based on the definition of palliative care set forth in the Inter-American Convention on the Human Rights of Older Persons, States have an obligation to provide integrated and interdisciplinary care to older persons in order to improve their quality of life until their final days. This essentially means controlling older persons' pain and other symptoms, and addressing their social, psychological, and spiritual issues.<sup>220</sup>

132. Likewise, pursuant to the aforementioned Convention, States must take the measures necessary to ensure that palliative care services are available and accessible to older persons, and to provide support to their families.<sup>221</sup> With regard to availability, States have an obligation to guarantee access to medications recognized by the World Health Organization as "necessary for palliative care."<sup>222</sup> Also, the care in question should cover the patient, the patient's environment, and the patient's family.<sup>223</sup> Additionally, as with medical care, older persons must have the necessary mechanisms available to them to express their will with regard to the provision of palliative care.<sup>224</sup>

133. In the event that the palliative care provided in penitentiaries is inadequate—and as long as qualified medical personnel have determined that a patient is terminal in the short term and a risk analysis has been conducted—States should adopt the measures necessary to guarantee medical care outside the prison, either within their families or in institutions with the capacity to provide the care they need. For persons convicted of grave human rights violations and crimes against humanity, in view of the legal interests affected, the gravity of the facts, and States' obligation to punish those responsible for such violations, the risk evaluations' analysis and requirements must be more stringent, hewing to the principle of proportionality and applicable inter-American standards.<sup>225</sup>

134. The Committee of Ministers of the Council of Europe stipulates that only under certain medical criteria should decisions be made to transfer persons expected to die in the short-term from prison. For its part, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter the European Committee for the Prevention of Torture) indicates that prison medical staff are responsible for drafting a report for the competent authority for implementing adequate alternative options.<sup>226</sup> For transfers, the Committee of Ministers of the Council of Europe states that while they are pending, these persons must receive optimal care during the terminal phase of their illness, including temporary periods of hospitalization outside the prison.<sup>227</sup> For its part, the Office of the Correctional Investigator of

<sup>220</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 2.

<sup>221</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 12(l).

<sup>222</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 12(m).

<sup>223</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, articles 2 and 12.

<sup>224</sup> OAS, [Inter-American Convention on Protecting the Human Rights of Older Persons](#). Adopted on June 15, 2015, article 11.

<sup>225</sup> IACHR. Resolution 1/2020, Pandemic and Human Rights in the Americas, para. 46.

<sup>226</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Healthcare services in prisons](#), Extract from the 3rd General Report, 1993, para. 70.

<sup>227</sup> Committee of Ministers of the Council of Europe, [Recommendation No. \(98\)7 Concerning the Ethical and Organizational Aspects of Health Care in Prison](#), 627th meeting of Ministers' Deputies, April 8, 1998, para. 51.

Canada determined in a recent investigation that prisons are not adequate places for a person to receive palliative or end-of-life care, and therefore, no type of assisted death can take place in such facilities.<sup>228</sup>

3. *What measures must States adopt to ensure that older persons deprived of liberty have outside contact with their families?*

135. In order to guarantee the rights protected under articles 11(2) and 17(1)—which the Court has understood to provide direct and complementary protection to family life<sup>229</sup>—as well as Article 5 of the American Convention, States have an enhanced duty to ensure that older persons deprived of liberty have outside contact with their families. According to the UNODC, these obligations consist of: i) placing older persons in penitentiaries that are as close as possible to their homes; ii) granting regular outside visits to them; and iii) encouraging civil society organizations that work with this population group to include penitentiary visits and projects in penitentiaries in their programs of activities.<sup>230</sup> The adoption of these measures is especially relevant for the enjoyment of rights by these persons considering the particular positive effect of maintaining family bonds "to alleviate the weight of incarceration," as well as help them with social reintegration,<sup>231</sup> as due to their long time in prison, their dependence on the institutional framework increases considerably as they lose contact with their families and community.<sup>232</sup>

136. With regard to the importance of the rights of the family as a natural and fundamental element of society, the Inter-American Court has found that the State has an obligation to support the development and strengthening of the nuclear family.<sup>233</sup> In the context of deprivation of liberty, in the case of *Trosin v. Ukraine*, the European Court has indicated that an essential element of the content of this right is that penitentiary authorities ensure that older persons can maintain contact with their families.<sup>234</sup> Likewise, the Mandela Rules indicate that States must place particular emphasis on maintaining and improving these relationships in "the best interests of both."<sup>235</sup>

137. In particular, the right of persons deprived of liberty to have outside contact with their family is set forth in a number of international instruments.<sup>236</sup> The context can be established in the

<sup>228</sup> Office of the Correctional Investigator of Canada, [Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody](#), February 28, 2019.

<sup>229</sup> Along these lines, the Court has indicated that arbitrary interference in family life as prohibited by Article 11(2) can have a negative impact on the nuclear family and run contrary to the guarantee of Article 17(1). Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 96. Cf. *Case of Atala Riffo and girls v. Chile*, para. 175, and *Case of Ramírez Escobar et al. v. Guatemala*, para. 162.

<sup>230</sup> In this regard, see UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 143.

<sup>231</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, pgs. 130 and 138.

<sup>232</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 130.

<sup>233</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 98 Cf. *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 325, and *Case of Carvajal Carvajal et al. v. Colombia*. Merits, Reparations and Costs. Judgment of March 13, 2018. Series C No. 352, para. 191.

<sup>234</sup> European Court of Human Rights, Case of [Trosin Vs. Ukraine](#) Application no. 39758/05, 23 February 2012, para. 39.

<sup>235</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 106.

<sup>236</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), 131st Period of Sessions, March 14, 2008. Principle XVIII, Contact with the outside world; UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), Resolution A/Res/70/175, December 17, 2015, Rule 58(1); UN, Resolution 43/173, [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#). Adopted 9 December 1988, principle 19; Council of Europe, Committee of Ministers, [Recommendation Rec\(2006\)2 to](#)

form of visits—including conjugal visits—or other channels of communication, including written correspondence, phone calls, or electronic and digital media.<sup>237</sup> In this regard, the Committee of Ministers of the Council of Europe establishes that, in order to guarantee adequate contact between detained persons and the outside world, penitentiary authorities must provide the necessary social assistance.<sup>238</sup> Along these lines, the European Committee for the Prevention of Torture indicates that the health assistance service must, in collaboration with relevant social services, guarantee contact with persons deprived of liberty by providing properly equipped areas for visits; family or conjugal visits with adequate conditions; and permits for family, occupational, educational, and sociocultural contexts.<sup>239</sup>

138. Regarding visits to persons deprived of liberty, both the Commission and the Court have established that they are fundamental to the right to family of these persons and their relatives.<sup>240</sup> As the Court found, this is "not only because they represent an opportunity for contact with the outside world but because the support of family members for persons deprived of liberty while they serve their sentences is crucial in many respects."<sup>241</sup> Therefore, to protect the rights of persons in their custody, States are required to adopt the most appropriate measures to facilitate and enable the exercise of contact between persons deprived of liberty and their relatives.<sup>242</sup> In this regard, the Committee of Ministers of the Council of Europe has established that the modalities in which the visits are made should enable detained persons to participate in their family relationships in the most normal manner possible.<sup>243</sup>

139. To facilitate visits to older persons, thereby fostering family contacts, their place of detention must be close to their homes. In this regard, States must facilitate, as much as possible, the placement of detained persons in the prisons closest to where their relatives live;<sup>244</sup> they also must ensure that the place of detention does not violate the right of relatives, visitors, legal

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[member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24; and Council of Europe, Committee of Ministers, [Recommendation Rec\(2006\)2 to member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24.7

<sup>237</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), 131st Period of Sessions, March 14, 2008. Principle XVIII, Contact with the outside world; UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), Resolution A/Res/70/175, December 17, 2015, Rule 58(1); UN, Resolution 43/173, [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#). Adopted 9 December 1988, principle 19; Council of Europe, Committee of Ministers, [Recommendation Rec\(2006\)2 to member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24;

<sup>238</sup> Committee of Ministers of the Council of Europe, [Recommendation Rec\(2006\)2 to member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24(5).

<sup>239</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Healthcare services in prisons](#), Extract from the 3rd General Report, 1993, para. 63.

<sup>240</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 101; and IACHR. Merits. Case 12.865. [Djamel Ameziane v. United States](#) September 30, 2015, para. 140.

<sup>241</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 101.

<sup>242</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 101 *Cfr. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 407.

<sup>243</sup> Committee of Ministers of the Council of Europe, [Recommendation Rec\(2006\)2 to member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24(4).

<sup>244</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 102.

representatives, and medical staff to access them.<sup>245</sup> Along these lines, the Mandela Rules establish that where possible, persons deprived of liberty must be held in penitentiaries that are close to their homes or places of social reintegration.<sup>246</sup> With regard to older persons deprived of liberty, the UNODC indicates that States must place them "as close as possible to home [...] to help maintain contacts with family members."<sup>247</sup> Where this is not possible, the European Committee for the Prevention of Torture has indicated that more flexibility is necessary with regard to how visits are conducted and to establishing contact over the phone.<sup>248</sup>

140. Additionally, in view of the enhanced duty that States have to guarantee that older persons maintain contact with the outside, they must adopt measures aimed at granting regular leave from prisons. In this regard, the UNODC indicates that in order for older persons to stay in touch with their families and "reduce the sense of isolation," States must "grant regular prison leave as an integral element of prison regime."<sup>249</sup> For its part, the Committee of Ministers of the Council of Europe indicates that where circumstances allow—either under escort or alone—prison authorities can grant detained persons leave from prison "in order to visit a sick relative (...) or for other humanitarian reasons"<sup>250</sup>

141. Lastly, the Commission highlights the UNODC standard that outside contact with family is essential for reintegration, especially for older persons.<sup>251</sup> Along these lines, the Mandela Rules stipulate that to foster the social reintegration of detained persons and in the best interest of their families, States must encourage and help maintain or establish relationships with external individuals or organizations from the very start of a prison sentence.<sup>252</sup>

4. *What are States' specific duties to guarantee that these individuals fully reintegrate with society?*

142. States have an enhanced duty to ensure that, for the social reintegration of older persons, they maintain their independence, autonomy, social participation, and family and community ties. This obligation is based on the disproportionate impact of imprisonment on this population, as it could have greater difficulty reintegrating and adapting upon return to community life. This is due to factors such as accelerated aging,<sup>253</sup> psychological problems, mobility difficulties, poor health, lack of a support network within prison,<sup>254</sup> and separation from nuclear family and community. Likewise, older persons—particularly those who are serving long sentences—tend to suffer severe

<sup>245</sup> *Cfr.* Matter of María Lourdes Afiuni regarding Venezuela. Provisional measures. Order of the President of the Inter-American Court of Human Rights of December 10, 2010, Considering 12 and Operative Paragraph 2; and Order of the Inter-American Court of Human Rights of March 20, 2011, Considering 6.

<sup>246</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 59.

<sup>247</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009.

<sup>248</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Imprisonment](#), Extract from the 2nd General Report, 1992, para. 51.

<sup>249</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 143.

<sup>250</sup> Committee of Ministers of the Council of Europe, [Recommendation Rec\(2006\)2 to member states on the European Prison Rules](#). 952nd meeting of the Ministers' Deputies. Adopted on January 11, 2006, article 24.7

<sup>251</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 130.

<sup>252</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 107.

<sup>253</sup> UNODC, [Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders](#). Criminal justice handbook series, 2013, p. 145.

<sup>254</sup> *Internet Journal of Criminology*, "The reintegration of elderly prisoners: an exploration of services provided in England and Wales," 2011.

impacts from "institutionalization," meaning that they may lack basic and essential skills for proper social reintegration.<sup>255</sup>

143. In general terms, under the American Convention and other international instruments on the subject, the purpose of deprivation of liberty is the social reintegration of the person.<sup>256</sup> In this regard, the Mandela Rules hold that social reintegration can be accomplished in two ways: "[i] by a pre-release regime organized in the same prison or in another appropriate institution, or [ii] by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid."<sup>257</sup>

144. With regard to the social reintegration of older persons deprived of liberty, the Inter-American Convention on Protecting the Rights of Older Persons stipulates that they must be guaranteed through access to special programs and comprehensive care, as well as through rehabilitation mechanisms.<sup>258</sup> In particular, pursuant to standards on deprivation of liberty, State obligations to guarantee reintegration of older persons while they are deprived of liberty—in both pretrial detention and while serving sentences—consist of the following: i) strengthening exterior contact with their relatives; ii) initial assessment and ongoing review of their health in order to adopt the corresponding programs; and iii) offering programs and opportunities that are adapted for this population. States must also offer support to older persons following their release from prison.

145. Regarding the initial evaluation and ongoing review of the health of older persons, it is the IACHR's view that this obligation is essential for having reintegration programs that are adapted to their particular needs, which change constantly due to their old age. First, the UNODC indicates that, in order to determine personalized activities and programs for older persons, assessment upon intake to the penitentiary system should cover: i) the physical and mental health of older persons; ii) their support network outside prison, including family contacts and community ties; and iii) identification of their specific needs.<sup>259</sup> Along the same lines, according to the Committee of Ministers of the Council of Europe, penitentiary authorities must analyze the problems and factors that may impede the social reintegration of persons following their release.<sup>260</sup> To do so, pursuant to the Standard Minimum Rules for the Treatment of Prisoners, prison medical services must identify and address the deficiencies or illnesses that may pose an obstacle to proper reintegration.<sup>261</sup> Also, with regard to ongoing review of the health of this population group, the UNODC indicates that regular checkups—and along with them, the corresponding and necessary adjustments to their

<sup>255</sup> Kerbs, J. (2000) "The older prisoner: Social, psychological and medical considerations" in M. B., Rothman, P., Entzel, and B. D., Dunlop, (eds.) *Elders, Crime and the Criminal Justice System: Myth, Perceptions, and Reality in the 21st Century*, New York: Springer. Cited in *Internet Journal of Criminology*, "The reintegration of elderly prisoners: an exploration of services provided in England and Wales," 2011.

<sup>256</sup> American Convention, Article 5(6); UN, International Covenant on Civil and Political Rights, Resolution of the General Assembly 2200 A (XXI), December 16, 1966, article 10(3) (3); Committee of Ministers of the Council of Europe Recommendation Rec(2006)2 to member states on the European Prison Rules, January 11, 2006, Part I/Principles 6 and 72.3.

<sup>257</sup> UN, United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules). Resolution A/Res/70/175, December 17, 2015, Rule 87.

<sup>258</sup> OAS, Inter-American Convention on Protecting the Human Rights of Older Persons (A-70), adopted by the General Assembly in its 45th Regular Period of Sessions on June 15, 2015, article 13.

<sup>259</sup> UNODC, Handbook on Prisoners with special needs. Criminal justice handbook series, 2009, p. 51.

<sup>260</sup> Committee of Ministers of the Council of Europe Recommendation Rec(2006)2 to member states on the European Prison Rules, January 11, 2006, Part III/Principle 42.3.

<sup>261</sup> UN, Standard Minimum Rules for the Treatment of Prisoners, Resolution 663 C (XXIV) of 31 July 1957 and Resolution 2076 (LXII) of 13 May 1977.

activities and programs—are needed due to the rapid changes in health these persons experience.<sup>262</sup>

146. Additionally, and as previously indicated, for older persons, maintaining contact with family on the outside is essential for reintegration. In this regard, according to UNODC, ties to family members are extremely important for reducing the negative impact of imprisonment on older persons and for supporting their process of social reintegration after they are released from the penitentiary system.<sup>263</sup> With regard to family contact and social reintegration, in the case of *López et al. v. Argentina*, the Inter-American Court found that based on article 5.6 of the American Convention—which establishes social reintegration as the purpose of punishments of deprivation of liberty—the State must guarantee “as much contact as possible between the person deprived of liberty and their families, their representatives, and the outside world.”<sup>264</sup> Likewise, the Mandela Rules establish that facilitation that enables establishing and maintaining these types of relationships can support the social reintegration of detained persons and the best interest of their families.<sup>265</sup>

147. In particular, in terms of family involvement in the social reintegration of older persons, States have two types of obligations: i) to strengthen family relationships through visits or other measures,<sup>266</sup> and ii) to include the family in the process of progressively returning to life in society. Regarding this latter measure, in the judgment in the case of *López Soto et al. v. Argentina*, the Inter-American Court underscored the need for persons deprived of liberty to have family support during the rehabilitation and social readaptation process.<sup>267</sup>

148. Likewise, with the objective of guaranteeing the social reintegration of persons deprived of liberty, States have an obligation to offer programs and activities within prisons.<sup>268</sup> In this regard, the Mandela Rules establish that penitentiary authorities must implement job programs, education programs, and other relevant activities that build the moral, spiritual, and social character of detained individuals.<sup>269</sup> For their part, the Principles and Best Practices establish that these persons have the right to participate in cultural activities, sports, and social activities that are healthy and constructive for their well-being.<sup>270</sup> Considering that older persons face particular challenges when it comes to social integration, associated with their age and physical condition, the UNODC indicates that States must take these factors into account when developing social reintegration programs.<sup>271</sup>

<sup>262</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 51.

<sup>263</sup> UNODC, [Handbook on Prisoners with special needs](#). Criminal justice handbook series, 2009, p. 138, para 4.2.7.

<sup>264</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 118.

<sup>265</sup> UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 107.

<sup>266</sup> See paras.

<sup>267</sup> Inter-American Court. *Case of López Soto et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 25, 2019. Series C No. 396, para. 106.

<sup>268</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle XVIII, “Education and cultural activities;” European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Imprisonment](#), Extract from the 2nd General Report, 1992.

<sup>269</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rules 4.1 and 4.2.

<sup>270</sup> IACHR, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle XVIII, “Education and cultural activities.”

<sup>271</sup> UNODC, [Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders](#). Criminal justice handbook series, 2013, p. 146.

149. Regarding work programs in contexts of deprivation of liberty, pursuant to international precedents on deprivation of liberty, States have the following principal obligations: i) to facilitate working conditions such that detained individuals are able to reenter the labor market<sup>272</sup> and ii) to provide adequate and equitable compensation for the work done.<sup>273</sup> The adoption of measures that make it possible to provide the tools and resources necessary for older persons to have their own income is particularly relevant in terms of guaranteeing social reintegration. This is in view of the lack of economic support they receive upon release, reflected in: i) post-release support provided only by nongovernmental organizations in most cases; and: ii) a lack of adequate housing due to a shortage of geriatric institutions in many communities.<sup>274</sup>

150. Lastly, support following release is especially important in view of the greater difficulties that older persons have with social reintegration. In this regard, pursuant to international precedents on the subject, State obligations are centered around: i) providing support services and activities to enable the social reintegration of older persons;<sup>275</sup> ii) continuation of medical treatment—including mental health services—after release;<sup>276</sup> and iii) tailored post release plans.

151. With regard to the provision of services to ensure the social reintegration of older persons, the UNODC indicates that States must collaborate with conditional release services or other civil agencies and social organizations to provide the support.<sup>277</sup> Likewise, with regard to tailoring post release plans, the Standard Minimum Rules for the Treatment of Prisoners indicate a need to personalize how individuals are treated during detention in order to guarantee a progressive returned to life in society.<sup>278</sup> Along these lines, the UNODC notes that preparing persons for release includes developing a personalized plan that specifically takes into consideration the needs of people who have grown old during their detention and lost family support, in order to ensure they are capable of reestablishing ties with their communities.<sup>279</sup>

152. Based on the analysis provided in this section, the IACHR asks this Court to determine the content and scope of States' specific obligations to guarantee the right to physical accessibility, health, palliative care, outside contacts, and social reintegration of older persons deprived of liberty, based on articles 1(1), 4(1), 5, 17(1), and 24 of the American Convention on Human Rights, the provisions of the Inter-American Convention on Protecting the Human Rights of Older Persons, and the other applicable Inter-American instruments.

<sup>272</sup> In this regard, UN, Basic Principles for the Treatment of Prisoners, Resolution 45/11, December 14, 1990, Principle 8, and Committee of Ministers of the Council of Europe Recommendation Rec(2006)2 to member states on the European Prison Rules, January 11, 2006, Part II/Principle 7.

<sup>273</sup> IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131, document adopted by the Commission during its 131st regular period of sessions, held on March 3-14, 2008, Principle XIV "Work." In this sense, also see Committee of Ministers of the Council of Europe, Resolution (76) 2 on the treatment of long-term prisoners, February 17, 1976.

<sup>274</sup> UNODC, Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders, Criminal justice handbook series, 2013, p. 146.

<sup>275</sup> UN, United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Resolution A/Res/70/175, December 17, 2015, Rules 90 and 108.1.

<sup>276</sup> Committee of Ministers of the Council of Europe Recommendation Rec(2006)2 to member states on the European Prison Rules, January 11, 2006, Part III/Principle 42.3.

<sup>277</sup> UNODC, Handbook on Prisoners with special needs, Criminal justice handbook series, 2009, p. 144.

<sup>278</sup> UN, Standard Minimum Rules for the Treatment of Prisoners, Resolution 663 C (XXIV) of 31 July 1957 and Resolution 2076 (LXII) of 13 May 1977, Rules 59 and 60.

<sup>279</sup> UNODC, Handbook on Prisoners with special needs, Criminal justice handbook series, 2009, p. 144.

## F. Regarding children who live in detention centers with their mothers

*Based on articles 1(1), 4(1), 5, 17(1), 19, and 24 of the American Convention on Human Rights and the other applicable Inter-American instruments, as well as on the best interest of the child:*

1. *What are States' specific obligations to guarantee the rights of children who live with their mothers in prison, based on their particular circumstances? Specifically:*

153. In cases in which the law allows some parents to live with their children in prison until a certain age, the State, as the guarantor of the rights of persons under its custody, has an enhanced duty to take concrete measures to guarantee life, integrity, and health, as well as the right to family and the best interest of the child. In this regard, the IACHR has indicated that States must adopt “comprehensive, ongoing measures of general application to ensure that when children are lodged in detention centers together with their father or mother deprived of liberty [...] have access to the special protection, food, health and educational services necessary for their proper development.”

154. Likewise, it is the IACHR's view that decisions on whether children should stay with their mothers in prison must take into account the living conditions and quality of care they may receive in the prison, as well as possible alternatives for the children outside prison. According to the UNODC, this means that the decisions must be made on a case-by-case basis, according to the specific circumstances of the child and the family. In this regard, it is the IACHR's understanding that there should not be rigid rules that apply to all cases. Rather, the measures that should be adopted must always be the ones that are in the best interest of the child.

155. Also, as will be explored later on, States must seek as much as possible to ensure that these children have opportunities equivalent to those living in the community, especially in view of the fact that they have not engaged in any conduct that violates the law, and consequently, they cannot be subjected to punitive State actions. Therefore, when mothers deprived of liberty are allowed to keep their children inside prisons, States must adopt appropriate measures according to the ages and particular conditions of the children so as to guarantee their rights and pursue their best interests.

2. *What specific obligations do States have to guarantee a child's right to family life, including respecting contact with the other parent?*

156. With regard to the right to family, international human rights law recognizes the family as the nucleus of the protection of childhood. In the United Nations system, the Committee on the Rights of the Child indicates that the word “family” describes a variety of structures that may be involved in care and development of children, including the nuclear family, the extended family, and other traditional and modern community-based modalities, as long as they respect the rights and best interests of children.<sup>280</sup> For its part, the IACHR has indicated that based on the rights of children to live with their families and to be cared for and raised by their parents in those families,

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<sup>280</sup> Committee on the Rights of the Child, General Comment No. 7, [Implementing child rights in early childhood, CRC/C/GC/7/Rev.1](#), September 20, 2006, para. 15 and 19.

primary responsibility for the well-being of children and the exercise of their rights falls to their parents and to the members of their family of origin, independent of its composition.<sup>281</sup>

157. Regarding situations in which families are limited in practice with regard to their capacity or ability to fulfill their care and protection responsibilities, the IACHR has established that the State has a duty to adopt special measures to support the family in overcoming these circumstances.<sup>282</sup> Thus, when children live in prison with their mother, States' special obligations to protect the right to family have two main components: the first is centered on obligations with regard to the relationship in the prison between mother and child;<sup>283</sup> and the second entails the actions the State must take to ensure contact between the child and the parent living outside the prison.<sup>284</sup>

158. With regard to the first type of obligations, according to the Committee of Ministers of the Council of Europe, States must adopt measures to: i) promote the kind of attachment that allows imprisoned parents to exercise adequate parental responsibility for their children; and ii) provide the maximum opportunities possible for them to spend time with their children within the prison.<sup>285</sup> In particular, States have an obligation to adopt measures aimed at facilitating the development of the parenting skills of imprisoned parents and their ability to care for their children. In this regard, penitentiary authorities must ensure that they are provided with an opportunity to cook for their children, prepare them for daycare, and play with them—both inside the prison and in the open air.<sup>286</sup>

159. Second, if the children are separated from one or both parents, the Convention on the Rights of the Child stipulates that States must respect the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.<sup>287</sup> In particular, the obligations that the State must fulfill to guarantee that children have contact with the parent who is not deprived of liberty consist mainly of encouraging ties of affection and facilitating the aforementioned context. It is the IACHR's view that the adoption of special measures in this regard is essential for the relationship between parents who live outside the prison and their children to develop as normally as possible. In this regard, the Committee on the Rights of the Child indicates that States must facilitate the interaction between the children and the parent who is not deprived of liberty.<sup>288</sup> Likewise, pursuant to what the Committee on the Rights of the Child and the European Parliament have established on this, the Commission highlights that the State must also

<sup>281</sup> IACHR, Report, "[The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas](#), OEA/Ser.L/V/II. Doc. 54/13, October 17, 2013, para. 54.

<sup>282</sup> IACHR, Report, "[The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas](#), OEA/Ser.L/V/II. Doc. 54/13, October 17, 2013, para. 65.

<sup>283</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"](#), 30 of September 2011, para. 33, and Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>284</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 36.

<sup>285</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>286</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>287</sup> UN, [Convention on the Rights of the Child](#), November 20, 1989, article 9.3.

<sup>288</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"](#), 30 of September 2011, para. 33

ensure these children can have relationships with other members of their family, such as siblings and grandparents.<sup>289</sup>

3. *What obligations does the State have as far as access to the right to health and food for children who live in detention centers with their mothers?*

160. When mothers deprived of liberty are allowed to keep their minor children with them inside prisons in order to guarantee their right to health and the best interest of the child, States must provide medical care and adequate food to meet the special needs of that age. In particular, State obligations on health consist of: providing qualified personnel and adequate services, supervising child development, and collaborating with community health clinics. Additionally, in keeping with a number of international instruments on this subject, the respective medical services must be good-quality and permanent, and they must be free of charge for the children and their families.<sup>290</sup>

161. Regarding health care for children who stay with their mothers deprived of liberty, the Mandela Rules establish that States must provide them with special health care, including initial medical checkups during intake and regular monitoring of their development.<sup>291</sup> Likewise, the Committee on the Rights of the Child calls on States to provide educational facilities;<sup>292</sup> and the Principles and Best Practices stipulate that the daycares inside prisons should have pediatric services.<sup>293</sup>

162. With regard to training for penitentiary personnel on health, the Bangkok Rules indicate that States must sensitize and train personnel on basic health care for children so they can react properly where needed and in emergencies.<sup>294</sup> Likewise, according to those Rules, the UNODC, and the Committee of Ministers of the Council of Europe, the development of children who live with their mothers shall be supervised by child development specialists, in collaboration with the medical services available in the community.<sup>295</sup> Additionally, the UNODC establishes that prison authorities must collaborate with health clinics on administering vaccines.<sup>296</sup>

163. Additionally, with regard to food, the Principles and Best Practices and Resolution 2007/2116 of the European Parliament establish that States should adopt the measures necessary

<sup>289</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on “Children of Incarcerated Parents”](#), 30 of September 2011, para. 33; European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008, Clause K.

<sup>290</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 51; UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85; and Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>291</sup> UN, [United Nations Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#). Resolution A/Res/70/175, December 17, 2015, Rule 29(1b).

<sup>292</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on “Children of Incarcerated Parents”](#), 30 of September 2011, para. 34.

<sup>293</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle X Health.

<sup>294</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 33.

<sup>295</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 51; UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85; and Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>296</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

to provide appropriate special nutritional services for children living with their mothers in prison.<sup>297</sup> In particular, the UN Committee on the Rights of the Child has repeatedly urged states to take immediate measures to ensure that the nutrition is adequate for the physical, mental, and social development of these children.<sup>298</sup> Similarly, the International Committee of the Red Cross establishes that prison authorities should ensure that the food received by children is adequate for their ages and general condition.<sup>299</sup>

4. *What are the State's duties to ensure adequate development of the children who live in a detention center with their mothers, including as regards community integration, socialization, education, and recreation?*

164. In order to guarantee the proper development of children who live in prison with their mothers, as well as their best interest, States must adopt the measures necessary to ensure they are not treated like imprisoned persons.<sup>300</sup> In this regard, they must have opportunities to exercise the same rights as those who live in the community. In view of this, States have specific obligations to guarantee these children's upbringing is as close as possible to that of children who do not live in prisons,<sup>301</sup> and they must ensure adequate access to education and recreation.

165. In this context, and considering that these are not children who have broken the law, the Committee on the Rights of the Child indicates that they have the same rights as other children and recommends that States adopt measures to guarantee they are protected from stigmatization.<sup>302</sup> Likewise, in order for the conditions experienced by children living with their mothers in prison to be as distinct as possible from the penitentiary environment, the Mandela Rules and Resolution 2007/2116 of the European Parliament stipulate that States must use a flexible outings regimen to integrate them into community daycares or schools.<sup>303</sup> When access to community child care is not available, a number of international instruments on the subject establish that childcare in prisons must be adequate and staffed by qualified personnel to meet the needs of the children.<sup>304</sup>

<sup>297</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle X, and European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008, clause 14.

<sup>298</sup> Committee on the Rights of the Child, Concluding observations: Cambodia, [Consideration of reports submitted by States parties under article 44 of the Convention](#), CRC/C/KHM/CO/2, May 30 to June 17, 2011, para. 64; Committee on the Rights of the Child, [Concluding observations: Concluding observations on the fourth periodic report of Eritrea](#), CRC/C/ERI/CO/4, July 2, 2017, para. 52; Committee on the Rights of the Child, [Concluding observations on the combined fourth and fifth periodic reports of Mexico](#), CRC/C/MEX/CO/4-5, July 3, 2015, para. 44; Committee on the Rights of the Child, Concluding observations: Myanmar, [Consideration of reports submitted by States parties under article 44 of the Convention](#), CRC/C/MMR/CO/3-4, March 14, 2012, para. 72.

<sup>299</sup> International Committee of the Red Cross, [ICRC action on behalf of prisoners](#), 1998.

<sup>300</sup> In this regard, the IACHR notes the general prohibition set forth in a number of international instruments to the effect that children must not be treated like incarcerated persons. See UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 29.2; UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 86; Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 36.

<sup>301</sup> UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 51.2; Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 36.

<sup>302</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"](#), 30 of September 2011, para. 33.

<sup>303</sup> European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), Clause D, March 13, 2008, para. 25.

<sup>304</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle X Health; UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#),

166. Likewise, and regardless of the type of childcare or educational facility children attend, States have an obligation to provide educational services. In this regard, and to protect the best interest of the child, the right to education of children living in prisons with their mothers is set forth in the Principles and Best Practices,<sup>305</sup> and also recognized by the Committee on the Rights of the Child<sup>306</sup> and the European Parliament.<sup>307</sup>

167. With regard to the right recognized by the Committee on the Rights of the Child to have a social environment that is appropriate for the development of the children living in prison with their mothers,<sup>308</sup> it is the IACHR's view that States should adopt measures to ensure that children are able to participate in activities on the outside. In this regard, a number of international precedents on the subject indicate that the conditions they should provided toward this include the following: i) permission from parents; ii) carried out in compliance with security considerations;<sup>309</sup> and iii) proper supervision.<sup>310</sup>

168. In particular, the enjoyment of recreational activities has been recognized by the UNODC, the European Parliament,<sup>311</sup> and the Committee of Ministers of the Council of Europe.<sup>312</sup> Likewise, the UNODC specifically indicates that prisons should have adequate facilities for children to play and exercise.<sup>313</sup>

169. Additionally, it is the IACHR's view that access to child care services or arrangements is important for ensuring that mothers are also able to participate in prison activities and programs under the same conditions as the other women deprived of liberty.<sup>314</sup>

170. Based on the observations set forth in this section, the Commission asks the Honorable Court to determine the content and scope of States' specific obligations to ensure the right to a family, as well as the rights to health, food, development, community integration, socialization, and recreation of children who live in prison with their mothers, based on articles 1(1), 4(1), 5, 17(1),

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E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 29.1; UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

<sup>305</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle X Health.

<sup>306</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"](#), 30 of September 2011, para. 34.

<sup>307</sup> European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), March 13, 2008, Clause L.

<sup>308</sup> Committee on the Rights of the Child, [Report and Recommendations of the day of General Discussion on "Children of Incarcerated Parents"](#), 30 of September 2011, para. 33.

<sup>309</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 86. In this regard, UN, [Standard Minimum Rules for the Treatment of Prisoners \(Mandela Rules\)](#), E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 29.1.

<sup>310</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 36.

<sup>311</sup> European Parliament, [Resolution on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life](#), 2007/2116(INI), March 13, 2008, Clause L.

<sup>312</sup> Committee of Ministers of the Council of Europe, [Recommendation CM/Rec\(2018\)5 concerning children with imprisoned parents](#), April 4, 2018, para. 37.

<sup>313</sup> UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, p. 85.

<sup>314</sup> In this regard, see UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) Resolution A/RES/65/229, March 16, 2011, Rule 42, and UNODC, [Handbook on Women and Imprisonment](#). Criminal justice handbook series, 2nd edition, 2014, pg. 84 and 85.

19, and 24 of the American Convention on Human Rights and the other applicable Inter-American instruments, as well as on the best interest of the child.

### III. CONCLUSIONS

171. Through its judgments and provisional measures, this Honorable Court has addressed some specific aspects of this request for an Advisory Opinion. However, as the IACHR indicated in submitting this request, a more comprehensive interpretation of the obligations derived from the American Convention and addressed under the competence of the Court is still lacking, an interpretation that would enable effective State compliance with international obligations on differentiated approaches to the groups of persons described in this request, pursuant to the principle of equal protection and nondiscrimination.

172. In these observations, the IACHR has provided a summary of the standards and pronouncements of the most important specialized bodies for the Honorable Court to review as it answers the questions raised in the request for an Advisory Opinion. In particular, the Commission views it as fundamental for this Court to go into depth on the scope of the differentiated or special obligations that States have regarding the persons deprived of liberty described in this request for an Advisory Opinion and the relationship between these obligations and the principle of equal protection and nondiscrimination. This is in view of the fact that these groups face disproportionately harmful impacts from their special situation of risk and lack of differentiated protection. The laws and practices that fail to recognize this differentiated impact lead to penitentiary systems that reproduce and enhance the patterns of discrimination and violence that exist outside prison.

173. As regards the differentiated approach to women deprived of liberty who are pregnant, postpartum, and nursing, the Commission pointed to pronouncements of international bodies and courts on States specific obligations regarding nutrition, medical care, clothing, and security measures during transport. Regarding LGBT persons, the Commission highlighted the greater risk of sexual and other acts of violence and discrimination experienced by this population in the context of deprivation of liberty. Likewise, it addressed several international standards on prison intake registration that respects the gender with which an individual identifies, as well as the exceptional nature of and limits on measures to separate out LGBT persons as a form of protection. Additionally, the Commission summarized aspects related to access to medical services for persons undergoing gender transition and States' obligation to respect the right to conjugal visits under equal conditions for all persons in detention, regardless of the sex or gender of the partner.

174. Regarding indigenous persons deprived of liberty, these observations point to several specific measures that States could take in addressing the particular situation of this group based on their membership in culturally distinct peoples. The aim of the measures is to guarantee respect for their rights to cultural identity and health, as well as protection from violence and discrimination against indigenous persons deprived of liberty. As regards differentiated approaches to older persons deprived of liberty, the Commission reviewed several standards on the affirmative measures and reasonable adjustments that States must make in order to ensure the equality of this group to other persons deprived of liberty, particularly with regard to specific and differentiated obligations on health, physical accessibility of penitentiary facilities, family coexistence, and mechanisms of social reintegration.

175. Lastly, regarding children who live in detention centers with their mothers, the Commission pointed to the need to make the decision on whether children were to stay with their mothers in

prison based on the specific circumstances, taking into account the living conditions and quality of care they may receive within the facility and possible alternatives on the outside. The existing standards established that, should it be decided that children are to stay with their mothers, the authorities must guarantee that their upbringing is as close as possible to that of children who do not live in prisons, and they must ensure adequate access to food, education, and recreation.

176. In conclusion, the IACHR reiterates that it is crucial for the Court to make an interpretation that enables the development and deepening of States' more specific obligations on the subject based on inter-American law with the objective of helping States effectively and more comprehensively move to protect these individuals on an equal footing with the rest of the prison population. This, while taking into account the differentiated approach that must be taken due to the special situation of risk that these groups deprived of liberty must face and the State's duty to guarantee with regard to individuals under their jurisdiction. By doing so, this Honorable Court will enable States to effectively comply with their international obligations and to define and develop human rights public policies on the subject.

Washington, D.C., November 5, 2020