INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-29/22

OF MAY 30, 2022

REQUESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DIFFERENTIATED APPROACHES WITH RESPECT TO CERTAIN GROUPS OF PERSONS DEPRIVED OF LIBERTY

(Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:[*]

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Humberto Antonio Sierra Porto
Eduardo Ferrer Mac-Gregor Poisot
Eugenio Raúl Zaffaroni
Ricardo C. Pérez Manrique

also present,

Pablo Saavedra Alessandri, Registrar and
Romina I. Sijniensky, Deputy Registrar,

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and to Articles 70 to 75 of its Rules of Procedure (hereinafter "the Rules"), issues the following Advisory Opinion, which is structured as follows:

[*] This advisory opinion was delivered at the 64th Special Session of the Court. Pursuant to Articles 54(3) of the Convention, 5(3) of the Statute and 17(1) of the Rules of the Court, the judges whose mandates have expired shall continue to hear the cases that they have begun to hear and that are still pending. Therefore, by order of the Plenary Court, the composition of the Court, including its officers, that participated in the deliberation and signing of this advisory opinion is that which heard it Judge Eduardo Vio Grossi, for reasons of force majeure accepted by the Plenary Court, did not participate in the deliberation and signing of this advisory opinion.

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I
PRESENTATION OF THE REQUEST

1. On November 25, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission"), on the basis of Article 64(1) and 64(2) of the American Convention and in accordance with Article 70(1) and 70(2) of its Rules of Procedure, presented a request for an advisory opinion on "Differentiated Approaches to Persons Deprived of Liberty (hereinafter "the request").[1]

2. The Commission stated the considerations that gave rise to the request and pointed out that:

> [I]n a context of the extreme vulnerability of individuals who belong to groups in special situations of risk -derived not only from the deplorable conditions of detention that characterize prisons in this region, but also from the disproportionate impact of the lack of differentiated protection- it is pertinent and timely for the Inter-American Court to rule of these issues and provide guidelines for the States to comply adequately with their obligations in this area. In particular, in this request, the [Commission] will analyze the main difficulties faced by individuals who belong to the groups that are the subject of this request; difficulties derived from the fact that the treatment they received is, generally, the same as that provided to the rest of the prison population. Thus, added to the general deficiencies and difficulties in which those deprived of liberty are subjected, -owing to their age, sex, gender, race, sexual orientation, and gender identity or expression- and to the consequent absence of a differentiated approach. This results in problems that have a disproportionate impact on their imprisonment and that, in addition to preventing their enjoyment of human rights, may place those individuals who are the subject of this request in a situation that jeopardizes their life and personal integrity.
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> In this context, the identification of the rights involved and the respective development of standards to guarantee the principle of equality and non-discrimination for the individuals who are the subject of this request has great relevance for their protection. This would respond to the special characteristics of the respective groups and ensure that, through a differentiated approach as regards the scope of the relevant State obligations, they would have the same access to all the services and rights as everyone else while deprived of their liberty.
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> In order to find the scope of this request […] [it] focusses mainly on the deprivation of liberty that takes place in the prison system, under prison authorities, and that is characterized by a prolonged stay in prison. Therefore, this request for an Advisory Opinion does not refer to situations of deprivations of liberty that take place in police detention centers, in the custody of administrative authorities, that are generally of a transitory nature. In particular, the groups in a special situation of risk for whom the Commission is asking the Court to make a ruling in relation to this request for an advisory opinion are: (i) woman who are pregnant, or postpartum and breastfeeding; (ii) LGBT persons; (iii) indigenous people; (iv) older persons, and (v) children living in prison with their mothers. […] In addition, frequently, these individuals belong to more than one group in a special situation of risk, which results in numerous special needs and in greater vulnerability. Consequently, norms and practices that disregard this differentiated impact result in prison systems reproducing and reinforcing the patterns of discrimination and violence present in their life when they were free. In this context, for States to comply with their international obligation to protect those who are in their custody and, in particular, to guarantee the principle of equality and non-discrimination, the Commission understands that States have an unavoidable obligation to adopt measures that respond to a differentiated approach which takes into consideration the particular vulnerabilities and factors that may increase the risk of acts of violence and discrimination in the contexts of incarceration, such as gender, ethnicity, age, sexual orientation and gender identity and expression. Such measures should also take into account the frequent intersectionality of these factors, which may heighten the situation of risk of those in prison.
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> Consequently, based on the diagnosis of the situation made previously under its monitoring functions, the Commission considers that it is essential to have an interpretation by the Court that examines further and develops, in light of the inter-American provisions, the more specific obligations that the States have in this matter in order to help to provide a more effective and comprehensive response to protect those persons, in equal conditions to the rest of the prison population. And this, taking into account the differentiated approach that should exist for the special situation of risk that these persons face in a context of deprivation of liberty and the State's duty as guarantor of all those in its custody.

3. Based on the above, the Commission presented the following specific questions to the Court:

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[1] The full text of the request may be found at the following link of the website of the Court: http://www.corteidh.or.cr/docs/opiniones/soc_05_19_es.pdf

A. General:

Regarding the protection of the rights of persons in a special situation of vulnerability such as women who are pregnant, in postpartum and breastfeeding; LGTB persons; indigenous people; older persons, and children living in detention centers with their mothers is it possible to justify, based on articles 24 and 1(1) of the Convention, the need to adopt differentiated approaches or measures to guarantee that their specific circumstances to not affect the equality of their conditions with the other persons deprived from liberty, as regards both their detention conditions, and the remedies filed to protect their rights in the context of the deprivation of liberty? If so, what are the specific implications of the content of the rights established in these articles on the scope of the correlative obligations of the States in this matter?

B. Regarding women deprived of liberty who are pregnant, in postpartum and breastfeeding:

In light of Articles 1(1), 4(1), 5, 11(2), 13, 17(1) and 24 of the American Convention on Human Rights, Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and other applicable inter-American instruments:

What specific obligations do the States have to guarantee that women deprived of liberty who are pregnant, postpartum and breastfeeding have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific obligations do the States have as regards to diet, clothing and access to medical and psychological care?

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

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

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

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

C. Regarding LGBT persons

In light of Articles 1(1), 4(1), 5, 11(2), 13, 17(1) and 24 of the American Convention on Human Rights, Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and other applicable inter-American instruments:

What specific obligations do the States have to guarantee that LGBT persons have adequate detention conditions in light of their particular circumstances? In particular:

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

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

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

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

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

D. Regarding indigenous people

In light of Articles 1(1), 4(1), 5, 12, 13 and 24 of the American Convention on Human Rights, and other applicable inter-American instruments:

What specific obligations do the States have to guarantee that [indigenous][2] people have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their customs, traditions and diet?
2. What are the duties of the State in relation to medical care for indigenous people deprived of liberty in particular with respect to their medicinal practices and traditional medicines?
3. What special measures must States adopt in relation to the activities or programs implemented within prisons, as well as in disciplinary hearings, in light of the cultural and linguistic particularities of indigenous people?
4. What special obligations do States have to prevent any act of violence with respect to indigenous people deprived of liberty?

E. Regarding older persons

In light of 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 other applicable inter-American instruments:

What specific obligations do States have to guarantee that indigenous people have adequate detention conditions in light of their particular circumstances? In particular:

1. What specific measures should States take to ensure the right to accessibility and personal mobility in detention centers for older persons deprived of liberty?
2. What are the State obligations with respect to medical and psychological care for older persons deprived of liberty. In particular, what are the duties of the State in relation to any palliative care that such persons may require?
3. What measures should the States adopt to ensure that older persons deprived of liberty have contact with their family outside the prison?
4. What are the States' specific duties to guarantee full social reinsertion to older persons?

F. Regarding children living in detention centers with their mothers

In light of Articles 1(1), 4(1), 5, 17(1), 19 and 24 of the American Convention on Human Rights and other applicable inter-American instruments, and the best interest of the child:

What are the specific obligations of the States to guarantee the rights of children living in prison with their mothers in light of their particular circumstances? In particular:

1. What specific measures should States take to ensure the right to family life of the child, including contact with the other parent?
2. What obligations does the State have with respect to access to the right to health and food of children living in detention centers with their mothers?
3. What are the State obligations to ensure the adequate development of children living in detention centers with their mothers, including the obligation relating to community integration, socialization, education and recreation.

4. The Commission named Commissioners Joel Hernández García and Edgar Stuardo Ralón Orellana, as delegates for this request. Marisol Blanchard Vera, then Deputy Executive Secretary for Petitions and Cases, and Sofía Galván Puente, Jorge Humberto Meza Flores and Analía Banfi Vique, staff lawyers of the Secretariat, acted as legal advisors.

II
PROCEDURE BEFORE THE COURT

[2] The Court has changed the term "LGBT" in the original text to "indigenous," in the understanding that it was an error.

5. In notes dated August 6, 2020, the Secretariat of the Court (hereinafter "the Secretariat"), pursuant to Article 73(1) of the Rules,[3] forwarded the request to the Member States of the Organization of American States (hereinafter "the OAS"), the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, the Inter-American Commission of Women, the Inter-American Children's Institute and the Inter-American Commission on Human Rights. The Secretariat, in these notes, informed that the President of the Court, in consultation with the other judges, had set November 5, 2020 as the time limit to present written observations on the request. Following the instructions of the President, and as established in Article 73(3) of the Rules,[4] the Secretariat, by note of August 7, 2020, also invited different civil society and international organizations, as well as academic institutions of the region, to submit, within the aforementioned time frame, a written opinion on the questions presented to the Court. Moreover, an open invitation was issued on the Court's website to all those interested in presenting a written opinion on the questions. The original deadline was extended until January 15, 2021, thus offering those interested around five months to forward their submissions.

6. As of the expiration of the established period, the Secretariat had received the following written observations:[5]

> *a. Written observations presented by OAS Member States:* 1) Argentina; 2) Bolivia; 3) Brazil; 4) Chile; 5) Costa Rica; 6) El Salvador; 7) Mexico; 8) Nicaragua; 9) Panama and 10) Suriname.
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> *b. Written observations presented by OAS organs:* Inter-American Commission on Human Rights and Inter-American Commission of Women.
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> *c. Written observations presented by international bodies:* (1) Special Representative of the UN Secretary General on violence against children; (2) UN Independent Expert on the enjoyment of all human rights by older persons; (3) President of the UN Working Group on Arbitrary Detention; (4) UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter also " the SPT"), and (5) UN Latin American Institute for the Prevention of Crime and the Treatment of the Offender (hereinafter "ILANUD").
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> *d. Written observations presented by international associations and State bodies:* (1) Inter-American Association of Public Defenders (AIDEF); (2) Public Ministry of Defense of Argentina; (3) Federal Public Defenders Office of Brazil; (4) Public Defenders Office of Costa Rica; (5) Public Criminal Defenders Office of Chile; (6) Public Criminal Defenders Institute of Guatemala; (7) Federal Institute of Public Defenders of Mexico; (8) Public Defenders Office of the State of Oaxaca, Mexico, with the support of the International Institute of Social Responsibility and Human Rights (IIRESODH); (9) Association for the Prevention of Torture (APT) and National and Local Mechanisms of Prevention established by virtue of the Optional Protocol of the Convention against Torture; (10) Working Group of the Ibero-American Federation of Ombudsman on National Mechanisms for the Prevention of Torture; (11)

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[3] Article 73(1) of the Rules establishes that: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

[4] Article 73(3) of the Rules reads as follows: The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent."

[5] The request for this advisory opinion presented by the Inter-American Commission, the written and oral observations of the participating States, the Inter-American Commission of Women and the academic institutions, non-governmental organizations and individuals of civil society are available on the Court's website at the following link: http://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2224

National Committee for the Prevention of Torture of Argentina, and (12) Prison Ombudsman of Argentina.

e. Written observations presented by non-governmental organizations, national associations, academic institutions and individuals of civil society: (1) Mexican Academy of Criminal Sciences; (2) Human Rights Legal Assistance (ASILEGAL); (3) Asociación Argentina de la Justicia de Ejecución Penal (AAJEP); (4) Asociación Derechos en Acción, Capacitación y Derechos Ciudadanos (CDC), Colectivo de Derechos Humanos Empoderate, Construir Foundation, Esperanza Foundation, Development and Dignity, Foundation for Due Process, Fundación Tribuna Constitucional, ONG Realidades, Plataforma Ciudadana por el Acceso a la Justicia y los Derechos Humanos and three independent experts; (5) Center for Reproductive Rights; (6) Centro de Investigación Científica Aplicada y Consultoría Integral, Sociedad Civil (CICACI); (7) Center for Research and Promotion of Human Rights (CIPRODEH); (8) Citizens of the World for Human Rights; (9) Colectivo Cohesión por Dignidad y Conciencia; (10) Colombia Diversa, Synergia Iniciativas por los Derechos Humanos, en representación de la Red de Litigantes LGBT de las Américas y la Coalición LGBTTI y de Trabajadoras Sexuales con trabajo en Estados miembros de la OEA; (11) Comisión Episcopal de Acción Social (CEAS) de la Conferencia Episcopal Peruana; (12) Consejo Latinoamericano de Estudiosos de Derecho Internacional y Comparado (COLADIC), capítulo República Dominicana; (13) Consorcio Internacional de Políticas de Drogas (IDPC), Elementa DDHH, A.C., Plataforma NNAPES, Washington Office on Latin America (WOLA), EQUIS Justicia para las Mujeres, Centro de estudios de Derecho, Justicia y Sociedad (Dejusticia) y Centro de Estudios Legales y Sociales (CELS); (14) Cyrus R. Vance Center for International Justice, como organización vocera de la Red de Mujeres en Prisión; (15) Defiende Venezuela; (16) International Law without Frontiers; (17) Documenta, Análisis y Acción para la Justicia Social, A.C.; (18) Elementa DDHH, Consultoría en Derechos A.C.; (19) EQUIS Justicia para las Mujeres, A.C., Intersecta Organización para la Igualdad, A.C., y Centro de Estudios y Acción por la Justicia Social, A.C.; (20) Fundación Dignidad; (21) Iniciativa Americana por la Justicia; (22) Instituto Alana (Programa Prioridade Absoluta), Instituto de Defesa do Direito de Defesa (IDDD) e Instituto Terra, Trabalho e Cidadania (ITTC); (23) Instituto Autónomo de Occidente; (24) Instituto Internacional de Responsabilidad Social y Derechos Humanos (IIRESODH); (25) Observatorio Venezolano de Prisiones; (26) Plataforma Regional por la defensa de los derechos de niñas y niños y adolescentes con referentes adultos privados de libertad (NNAPES); (27) Red Internacional para el Trabajo de Personas Privadas de Libertad LGBTI+ "Corpora en Libertad"; (28) Red Lésbica Cattrachas; (29) Anti-Torture Initiative, American University Washington College of Law; (30) Cátedra Derechos Humanos y Garantías de la Universidad de Congreso de Mendoza; (31) Centro de Derechos Humanos del Caribe y del área de Derecho Internacional de la Universidad del Norte en Barranquilla; (32) Center of Studies on Human Rights of the Law School of the National University of the Center of the Province of Buenos Aires; (33) Antônio Eufrásio de Toledo University Center of Presidente Prudente; (34) Human Rights Clinic of the Federal University of Bahia; (35) Human Rights Clinic of the Brazilian Institute of Ensino, Desenvolvimento and Research (IDP) and Prios Institute of Public Policy and Human Rights; (36) Human Rights and Environmental Law Clinic of the University of the State of Amazonas, Human Rights Clinic of the Amazon of the Federal University of Pará and the Public Defenders Office of the State of Pará; (37) Legal clinic on the international law of human rights of the Law School of the University of Aix-Marseille; (38) Departament of Law of the Universidad Iberoamericana; (39) Escuela Libre de Derecho de México; (40) Facultad de Ciencias Jurídicas y Sociales de la Universidad Rafael Landívar de Guatemala; (41) Law School of the Autonomous University of Mexico; (42) Law School of the University of Costa Rica; (43) Group of Prisons and Action Program for Equality and Social Inclusion (PAIIS) of the Law School of the University of the Andes; (44) Impact Litigation Project of the Center for Human Rights and Humanitarian Law, American University Washington College of Law; (45) Instituto de Estudios Jurídicos de Ejecución Penal (INEJEP) de la Universidad de Palermo (UP);

(46) International Human Rights Law Institute, DePaul University College of Law in coordination with the International Institute of Social Responsibility and Human Rights (IIRESODH); (47) International Human Rights Practicum, Boston College Law School; (48) Master's Program in Human Rights and Constitutional Justice of the University of Vera Cruz; (49) Netherlands Institute of Human Rights, Utrecht University; (50) Center of Studies in Human Rights Systems and Clinic on Access to Justice and Education in Prisons of the Federal University of Paraná; (51) Inter-American Center of Human Rights of the National School of Law of the Federal University of Rio de Janeiro; (52) Program of International Studies for Justice and Human Rights of the Law and Political Sciences School of the National University of Trujillo; (53) Semillero de Litigio ante Sistemas Internacionales de Protección de Derechos Humanos, Semillero de Derecho Penitenciario y el Semillero de Discusiones Constitucionales de la Facultad de Derecho y Ciencias Políticas de la Universidad de Antioquia en asocio con la Corporación Everyday House y el Colectivo Feminista Bolívar en Falda; (54) Semillero en Derecho Penitenciario de la Pontificia Universidad Javeriana (55) Universidad Externado of Colombia; (56) University College London, Public International Law Pro Bono Project; (57) Ángel Albornoz; (58) Carlos Uriel Ramírez Carrillo and Gabriel Alejandro Virgen Torres; (59) Diego Alejandro Sanchez Sanchez, Paola Alessandra García Rubio and María del Carmen Rangel Medina; (60) Fernando Delgado Rivera; (61) Luis Peraza Parga; (62) María Guadalupe Yenira Arriaga Reséndiz y Laura Karen Cedillo Torres; (63) Mauren Roxana Solís Madrigal; (64) Rafael Andree Salgado Mejía, Enrique Flores Rodríguez, Sindy Osorto Velásquez and José Roberto Izaguirre; (65) Rolando E. Gialdino and Mariano R. Gialdino; (66) Rosalva Rafaela Chao Gámez and Jesús Guillermo Belman Leal; (67) Sebastián Desiata and Paula Monsalve; (68) Sonia Esmeralda Padilla Nava, Juan Francisco Cortes Guerrero and Alejandra Isabel Plascencia López; (69) Vinícius Alexandre Fortes de Barros, and (70) Xochithl Guadalupe Rangel Romero.

7. Following the conclusion of the written procedure and pursuant to Article 73(4) of the Rules,[6] the President of the Court issued an order,[7] dated March 8, 2021, that called to a public hearing all those who had submitted written observations so that they could present their oral comments on the request.

8. The public hearing was held April 19-22, 2021, during the 141st regular session of the Court, by means of a video conference.

9. The following persons appeared before the Court:

1) For the Inter-American Commission on Human Rights: Antonia Urrejola Noguera, then Chairwoman, Commissioner Edgar Stuardo Ralón Orellana, and Marisol Blanchard, then Deputy Executive Secretary;

2) For Argentina: Javier Salgado, Director of the International Human Rights Litigation Office of the Ministry of Foreign Affairs, Elizabeth Victoria Gómez Alcorta, Minister for Women, Gender and Diversity, and María Laura Garrigós, Under-Secretary for Prisons of the Ministry of Justice and Human Rights;

3) For Bolivia: Jhanneth del Rosario Bustillos, Director General for the Defense of Human Rights and the Environment, and Mabel Martínez Pabón, Head of the Unit on Cases at the Merits Stage and member of the Human Rights Committee;

4) For Brazil, as auditor: Ana Lívia Fontes da Silva, Head of the Division of Treatment of Women and Specific Groups of the National Prison Department (DEPEN);

5) For Chile: Macarena Cortés Camus, Head of the Division of Social Reintegration, Ministry of Justice and Human Rights, and Marcela Corvalán, Head of the Department of Social Reintegration of Adults, Ministry of Justice and Human Rights;

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[6] Article 73(4) of the Rules establishes that: "At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

[7] *Cf*. Request for the Advisory Opinion OC-29. Call to a hearing. Order of the President of the Court of March 8, 2021. Available, in Spanish, at: http://www.corteidh.or.cr/docs/asuntos/solicitud_08_03_2021_spa.pdf

6) For Costa Rica: Fiorella Salazar Rojas, Minister of Justice and Peace, and Natalia Córdoba Ulate, Juridical Director of the Ministry of Foreign Affairs and Worship;

7) For Mexico: Rosalinda Salinas Durán, Director of Cases of the Secretariat of Foreign Affairs, and Clary Elizabeth Tejeda Mendoza, Responsible for the area of Cases I of the Secretariat of Foreign Affairs;

8) For Peru: Laura Ruiz Pimentel and Catherine Vega Paucar;

9) For Suriname: Joyce Pane-Alfaisi, Director of Prisons of the Ministry of Justice and Police;

10) For the OAS Permanent Mission of Venezuela: Humberto Prado, Presidential Commissioner for Human Rights and Treatment of Victims, and Jonathan Klindt, Litigation Aide;

11) For the Inter-American Commission of Women: Alejandra Mora and Hilary Anderson;

12) For the Special Representative of the UN Secretary General on violence against children, Annette Lyth and Cecilia Anicama;

13) For the UN Independent Expert on the enjoyment of all human rights by older persons: Claudia Mahler;

14) For the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT): Marco Feoli Villalobos;

15) For the Latin American Institute for the Prevention of Crime and the Treatment of the Offender (ILANUD): Douglas Durán Chavarría and Ana Selene Pineda Neisa;

16) For the Inter-American Association of Public Defenders (AIDEF): Rivana Barreto Ricarte de Oliveira;

17) For the Public Ministry of Defense of Argentina: Stella Maris Martínez and Mariano Fernández Valle;

18) For the Federal Public Defenders Office of Brazil: Walber Rondon Filho;

19) For the Public Defenders Office of Costa Rica: Maricel Gómez Murillo and Laura Marcela Arias Guillén;

20) For the Public Criminal Defenders Office of Chile: Marco Montero Cid;

21) For the Federal Institute of Public Defenders of Mexico: Netzaí Sandoval Ballesteros;

22) For the Public Defenders Office of the State of Oaxaca, Mexico (DPU): Jesús Gerardo Herrera Pérez and Eduardo Ezequiel Martínez Gutiérrez;

23) For the Association for the Prevention of Torture (APT) and National and Local Mechanisms of Prevention established by virtue of the Optional Protocol of the Convention against Torture: Veronica Filippeschi and Bárbara Suelen Coloniese;

24) For the Working Group of the Ibero-American Federation of Ombudsman on National Mechanisms for the Prevention of Torture: Jordán Rodas Andrade and María Gabriela Mundo Rodríguez;

25) For National Committee for the Prevention of Torture of Argentina (CNPT): María Laura Leguizamón and Gonzalo Martín Evangelista;

26) For the Prison Ombudsman of Argentina: Ariel Cejas Meliare and Mariana Lauro;

27) For the Mexican Academy of Criminal Sciences (AMCP): Mercedes Peláez;

28) For the Asociación Argentina de la Justicia de Ejecución Penal (AAJEP) María Jimena Monsalve and Marcela Pérez Bogado;

29) For the Asociación Derechos en Acción, Capacitación y Derechos Ciudadanos (CDC), Colectivo de Derechos Humanos Empoderate, Fundación Construir, Fundación Esperanza, Desarrollo y Dignidad, Fundación para el Debido Proceso, Fundación Tribuna Constitucional, ONG Realidades, Plataforma Ciudadana por el Acceso a la Justicia y los Derechos Humanos and three independent experts: Soraya Santiago Salame and Susana Saavedra Badani;

30) For the Center of Reproductive Rights: Carmen Martínez;

31) For the Centro de Investigación Científica Aplicada y Consultoría Integral, Sociedad Civil (CICACI): Jorge Alberto Pérez;

32) For the Center for Human Rights Research and Promotion (CIPRODEH): Alejandra María Duarte Iraheta and María José Paz Castillo;

33) For Global Citizenship for Human Rights: Gloria Ríos Rendon and Gloria Perico de Galindo;

34) For the Colectivo Cohesión por Dignidad y Conciencia: Mitzi Jade Lima Pulido;

35) For Colombia Diversa, Synergia Iniciativas por los Derechos Humanos, representing the LGBTI Litigants Network of the Americas and the Coalition of LGBTITTI of Sex Workers: Juan Felipe Rivera and Mirta Moragas Mereles;

36) For the Episcopal Commission of Social Action (CEAS) of the Episcopal Conference of Peru: Monsignor Jorge Enrique Izaguirre Rafael and Silvia Alayo Dávila;

37) For the Latin American Council of Studies in International and Comparative Law (COLADIC), Dominican Republic chapter: Anderson Javiel Dirocie De León;

38) For the International Drug Policy (IDPC), Element Human Rights, Central America, Plataform NNAPES; Washington Office on Latin America (WOLA); EQUIS Justicia para las Mujeres; Dejusticia: Center for Studies in Law, Justice and Society and Center for Legal and Social Studies (CELS): Luciana Pol and Corina Giacomello;

39) For the Cyrus R. Vance Center for International Justice: Marie-Claude Jean-Baptiste and Claudia Alejandra

Cardona;

40) For Defiende Venezuela: Simón Gómez Guaimara and Alfredo Félix;

41) For Direito Internacional sem Fronteiras: Matheus Presotto e Silva and Raquel Castilho da Silva;

42) For Documenta. Analysis and Action towards Social Justice, Central America: Sofia González Talamantes and Diana Sheinbaum Lerner;

43) For EQUIS Justicia para las Mujeres, Central America; Intersecta Organización for Equality Central America and Center for Studies and Action for Social Justice, Central America: Kenya Cytlaly Cuevas Fuente and Adriana E. Ortega;

44) For the Foundation for Dignity: Daniel Vásconez Silva;

45) For Iniciativa Americana por la Justicia: Federico Ariel Vaschetto and María Alejandra Arango Posada;

46) For the Alana Institute (Absolute Priority Program), Institute for the Defense of the Right to Defense (IDDD) and Land, Work and Citizenship Institute (ITTC): Ana Claudia Cifali and Caroline Dias Hilgert;

47) For the Autonomous Institute of the Occident (IAO): José Benjamín González Mauricio;

48) For the International Institute of Social Responsibility and Human Rights (IIRESODH): Víctor Rodríguez Rescia and Roxanne Cabrera Baptista;

49) For the Venezuelan Observatory of Prisons: Beatriz Carolina Girón:

50) For the Regional Platform for the defense of the rights of children and adolescents with adult references deprived of liberty (NNAPES): José Manuel Fleitas Olivera, Federico Acuña and David Francisco Flores Valle;

51) For the Red Internacional para el Trabajo de Personas Privadas de Libertad LGBTI+ "Corpora en Libertad": Ari Vera Morales and Amilton Gustavo da Silva Passos;

52) For the Cattrachas Lesbian Network:Nadia Stefanía Mejía Amaya and Astrid Lideny Ramos Campos;

53) For the Cátedra Derechos Humanos y Garantías de la Universidad de Congreso de Mendoza: Marcelo Pesce Méndez and Ana María Blanco;

54) For the Center of Human Rights of the Caribbean and the Area of International Law of the Universidad del Norte of Barranquilla: Laetitia Ruiz;

55) For the Antônio Eufrásio de Toledo University Center of Presidente Prudente: Amanda Yamaguchi da Silva and Lorena Novaes Meira;

56) For the Human Rights and Environmental Law of the University of the State of Amazonas, Human Rights Clinic of Amazônia of the Federal University of Pará, and Public Defenders Office of the State of Pará: Ana Paula Simonete Castelo Branco Bremgartner and Anna Izabel e Silva Santos;

57) For the Legal Clinic on the international law of human rights of the Law School of the University of Aix-Marseille: Andreina Chaguan and Lavinia Francesconi;

58) For the Department of Law of the Universidad Iberoamericana: Michelle Guerra Sastré and Giovanni A. Figueroa Mejía;

59) For the Escuela Libre de Derecho of Mexico: Patricia Aurora Almada Beltrán and Samuel Ibarra Vargas;

60) For the Law School of the Autonomous University of Mexico: Perla Gómez Gallardo;

61) For the Law School of the University of Costa Rica: Alfredo Chirino Sánchez;

62) For the Instituto de Estudios Jurídicos de Ejecución Penal (INEJEP) of the University of Palermo (UP): Rubén Alderete Lobo and Gustavo Plat;

63) For the International Human Rights Law Institute, DePaul University College of Law: Michelle Redondo and Morgan Drake;

64) For the International Human Rights Practicum, Boston College Law School: Daniela Urosa;

65) For the Master's Program in Human Rights and Constitutional Justice of the University of VeraCruz: Lorna Briseida Herrera García and Juan Francisco Toscano Godines;

66) For the Center of Studies in Human Rights and Access to Justice and Education in Prisons Clinic of the Federal University of Paraná: Melina Girard Fachin and André Riberido Giamberardino;

67) For the International Studies Program for Justice and Human Rights of the School of Law and Political Science of the National University of Trujillo: Ena Rocio Carnero Arroyo and Winnie Pauca Castillo;

68) For the Semillero de Litigio ante Sistemas Internacionales de Protección de Derechos Humanos, Semillero de Derecho Penitenciario and the Semillero de Discusiones Constitucionales de la Facultad de Derecho y Ciencias Políticas de la Universidad de Antioquia in association with the Corporación Everyday House and the Colectivo Feminista Bolívar en Falda: Alejandro Gómez Restrepo and Alejandra Zapata López;

69) For the Semillero en Derecho Penitenciario de la Pontificia Universidad Javeriana: Gabriela del Pilar Thiriat Pedraza and Daniel Antonio Niño Carreño;

70) For the Universidad Externado of Colombia: Camilo Eduardo Umaña Hernández;

71) For the University College London, Public International Law Pro Bono Project: Alex Mills and Lucía Saborío

Pérez;

72) For the Netherlands Institute of Human Rights, Utrecht University: Lorena Sosa;
73) Ángel Albornoz;
74) Carlos Uriel Ramírez Carrillo and Gabriel Alejandro Virgen Torres;
75) Paola Alessandra García Rubio;
76) Fernando Delgado Rivera;
77) Luis Peraza Parga;
78) María Guadalupe Yenira Arriaga Reséndiz and Laura Karen Cedillo Torres;
79) Mauren Roxana Solís Madrigal;
80) Rafael Andrés Salgado Mejía and Sindy Osorto Velásquez;
81) Rolando E. Gialdino and Mariano R. Gialdino;
82) Jesús Guillermo Belman Leal;
83) Sebastián Desiata and Paula Monsalve;
84) Juan Francisco Cortes Guerrero and Alejandra Isabel Plascencia López;
85) Vinícius Alexandre Fortes de Barros, and
86) Xochithl Guadalupe Rangel Romero.

10. After the public hearing and as part of the cooperation between the Inter-American Court and the different national high courts, the Court received information from the following: (1) Superior Court of Justice of Brazil; (2) Supreme Court of Canada; (3) Constitutional Court of Colombia; (4) Constitutional Chamber of the Supreme Court of Justice of Costa Rica; (5) Supreme Court of Justice of Chile; (6) Supreme Court of Justice of the Dominican Republic; (7) National Court of Justice of Ecuador; (8) Constitutional Court of Ecuador; (9) Supreme Court of Justice of Mexico, (10) Supreme Court of Justice of Panama; and (11) Supreme Court of Justice of Uruguay.

11. In responding to this request for an advisory opinion, the Court examined, considered and analyzed 91 written observations and jurisprudence presented by 11 domestic courts, as well as those of 86 participants and the interventions in the public hearing by Member States, the Inter-American Commission on Human Rights, the Inter-American Commission of Women, international organizations, international bodies, international associations, State institutions, non-governmental organizations, national organizations, academic institutions and individuals from civil society (*supra* paras. 6, 9 and 10). The Court expresses its appreciation for these valuable contributions that provided the Court with insight on the different issues raised by this request.

12. The Court began to deliberate on the request April 27-29, 2022 and adopted this advisory opinion on May 30, 2022, by means of virtual meetings.[8]

III
JURISDICTION AND ADMISSIBILITY

13. Article 64(1) of the Convention provides one of the guidelines of the consultative function of the Court, by establishing that:

> The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

[8] Due to the exceptional circumstances caused by the COVID-19 pandemic, this advisory opinion was deliberated and adopted during its 63rd and 64th Special Sessions, which were conducted virtually using technological means in accordance with its Rules.

14. This request is submitted to the Court by the Inter-American Commission, pursuant to Article 64(1) of the Convention. The Commission is a principal and autonomous organ of the OAS, the mandate of which is set forth in the OAS Charter and in the American Convention and, therefore, it is conventionally empowered to seek an advisory opinion. Moreover, a principal function of the Commission is to "promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters;"[9] thus, the Commission undoubtedly has a legitimate institutional interest regarding its request since it concerns an interpretation of the scope of various human rights provisions in the inter-American system of the protection of human rights set out in the American Convention, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "the Convention of Belém do Pará") and the Inter-American Convention on Protecting the Human Rights of Older Persons (hereinafter also "the IACPHROP").

15. Articles 70[10] and 71[11] of the Rules govern the formal requisites that must be met for a request to be considered by the Court. The Rules place the following requirements on the requesting State or body: (i) state the questions precisely; (ii) identify the provisions to be interpreted; (iii) indicate the considerations giving rise to it, and (iv) provide the name and address of the agent or delegate. As previously stated, requirements (iii) and (iv) were properly met (*supra* paras. 2 and 4). During the proceedings of this request, no questions were raised on the Court's competence to issue this advisory opinion, neither with respect to its admissibility nor to the admissibility of the Commission's questions, although some observations suggested broadening the object of the request. The Court deems it pertinent to offer some general considerations on its competence, admissibility and propriety to respond to the Commission's questions, which it will do in the following order: (a) the formal requirement to specify the provisions to be interpreted and its competence regarding the pertinent regional instruments and other sources of international law and (b) the admissibility of the request.

A. The formal requirement to specify the provisions to be interpreted and its competence regarding the pertinent regional instruments and other sources of international law

16. The Court considers that the questions are clear and specific. With respect to requirement (ii), the Court notes that the questions are precise and include the juridical provisions to be interpreted; they are, Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19 and 24 of the Convention, Article 7 of the Convention of Belém do Pará and the IACPHROP.

17. With respect to its competence *ratione materiae*, the Court has already established that its advisory function permits it to interpret any norm of the American Convention, without excluding any aspect from its scope of interpretation. In this regard, the Court, as the "ultimate interpreter of the American Convention," has competence to interpret, with full authority, all the provisions of the Convention, including those of a procedural nature.[12]

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9 Charter of the Organization of American States, Article 106.

10 Article 70(1) and 70(2) of the Rules reads as follows: "Interpretation of the Convention: 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. […]

11 Article 71(1) of the Rules reads as follows: "Interpretation of Other Treaties: 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request" […].

12 *Cf. Article 55 of the American Convention on Human Rights. Advisory Opinion OC-20/09 of September 29, 2009.* Series

18. The Court has also held that Article 64(1) of the Convention, in referring to its authority to issue an opinion on "other treaties concerning the protection of human rights in the American States," is broad and unrestricted. Thus, the Court's advisory competence may be exercised, in general, with respect to any provision concerning the protection of human rights of any international treaty applicable to the American States, regardless of whether it is bilateral or multilateral, or of its principal object or that States outside the inter-American system are or can be parties.[13] Consequently, the Court has competence to issue interpretations on the Convention of Belém do Pará and the IACPHROP. Although no provisions of the latter treaty were cited, the Court notes that allusion was made to that instrument, in general terms and since its purpose is to "promote, protect and ensure the recognition and full enjoyment and exercise, in conditions of equality, of all human rights and fundamental freedoms of older persons, so as to contribute to their full inclusion, integration and participation in society." In any case, the Court will refer to the pertinent provisions in interpreting an inter-American instrument that delves deeply into old age and ageing from a human rights perspective.

19. The Court also notes that the Commission's specific questions referred to the interpretation of "other applicable inter-American instruments," although the Commission did not indicate in each question the "applicable inter-American instruments." Nevertheless, it can be discerned from the text of the request that it refers to the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (hereinafter "the Principles and Best Practices"), adopted by the Commission during its 131st regular session, held March 3-14, 2008. That document refers to other international human rights instruments regarding persons deprived of liberty that are applicable in the Americas. Therefore, the Court will take into account the Principles and Best Practices, as well as other auxiliary sources, in interpreting the content of the provisions of the American Convention and the other inter-American treaties indicated in the request. These sources include a body of norms of a general nature or soft law that offer broader precision on the content fixed conventionally.[14]

A No. 20, para. 18 and *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights* (interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, Article 3(d) of the OAS Charter and the Inter-American Democratic Charter). Advisory Opinion OC-28/21 of June 7, 2021. Series A No. 28, para. 26.

[13] *Cf. "Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American. Convention on Human Rights). Advisory* Opinion OC-1/82 of September 24, 1982. Series A No. 1, Point 1 and *Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective* (interpretation and scope of Articles 13, 15, 16, 24, 25 and 26, in relation to Articles 1(1) and 2 of the American Convention on Human Rights; Articles 3, 6, 7 and 8 of the Protocol of San Salvador; Articles 2, 3, 4, 5 and 6 of the Convention of Belém do Pará; Article 34, 44 and 45 of the OAS Charter and Articles II, IV, XIV, XXI and XXII of the American Declaration of the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 24.

[14] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 60, and *Gender identity, and equality and non-discrimination with respect to 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. 60. The Court will take into account, *inter alia*, the UN Standard Minimum Rules for the Treatment of Prisoners (hereinafter "Mandela Rules"), adopted by the UN General Assembly in Resolution A/RES/70/175, approved on December 17, 2015; UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (hereinafter "Bangkok Rules"), adopted by the UN General Assembly by means of Resolution A/RES/65/229 of March 16, 2011; the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly by means of Resolution 34/169 of December 17, 1979; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly by means of Resolution 37/194, of December 18, 1982; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly by means of Resolution 43/173 of December 9, 1988; the UN Standard Minimum Rules for Non-custodial Measures (hereinafter "Tokyo Rules"), adopted by the UN General Assembly by means of Resolution 45/110 of December 14, 1990 and the UN Principles on older persons, adopted by the UN General Assembly by means of Resolution 46/91 of December 16, 1991. Moreover, the Court will recur, to the relevant extent, to the comparative law and jurisprudence of the high courts of the region. (*supra*, para. 10).

20. Therefore, the Court holds that the request meets the formal requirements established in the Rules and, therefore, is admissible.

B. The admissibility of the request

21. The Court has developed the following jurisprudential standards regarding the admissibility of a request for an advisory opinion: (1) it cannot be used to conceal a contentious case nor prematurely obtain a ruling on a matter that could eventually be submitted to the Court as a contentious case; (2) it cannot be used as a mechanism to obtain an indirect domestic ruling on a matter being litigated or is subject to a controversy; (3) it cannot be used as an instrument of a domestic political debate; (4) it cannot exclusively concern matters on which the Court has already ruled in its jurisprudence and, (5) it cannot be used to resolve questions of fact, but only to untangle the sense, purpose and meaning of international norms on human rights and, above all, (6) it is to assist the OAS Member States and organs to fully and effectively comply with their international obligations.[15]

22. The questions posed in this request are mainly directed to the interpretation of the principle of equality and non-discrimination in relation to the rights established in the American Convention and in applicable inter-American treaties in order that States comply with their special duty of protecting persons under their custody in prisons with a differentiated approach that takes into account their particular vulnerability and factors such as sex and gender, ethnic origin, age, sexual orientation and gender identity and expression, that may heighten the risk of certain acts of violence and discrimination during imprisonment.

23. With respect to whether the questions have already been answered in the Court's jurisprudence, it is noted that the Commission presented a recapitulation of the principal aspects of the Court's decisions -both in the development of its case law and in the area of provisional measures- for each group, that demonstrated that the questions posed are new and different with respect to the jurisprudence that has been developed by the Court. Moreover, a conceptualization of the differentiated approach that the State must make with respect to older persons deprived of liberty, as well as children living in prison with their mothers or main caretakers, has not yet been considered by the Court.

24. Finally, it should be noted that the intent of this request is not to resolve questions of fact, but rather is related to the States' obligations to create conditions of true equality for groups that have historically been excluded or that are in a situation of greater vulnerability due to their imprisonment, and that it is of the highest importance to define the international obligations of the OAS Member States.

25. With respect to the foregoing, it is necessary to clarify that the Commission limited the scope of its request to:

a) imprisonment ordered by a judicial authority as a result of involvement or presumed involvement in the perpetration of offenses or violations of the law," particularly "the deprivation of liberty that takes place in the prison system, under prison authorities, and that is characterized by a prolonged stay in prison" and, therefore, does not include deprivations of liberty in police detention centers.
b) the following groups in a special situation of risk: women who are pregnant, postpartum or breastfeeding, LGBT persons, indigenous persons, older persons and children living with their

[15] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of Legal Due Process.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 47 and Advisory Opinion OC-28/21, *supra,* para. 24.

mothers in prison.

26. Although the Court recognizes that there may be other groups that require a differentiated approach and that there are other forms of deprivation of liberty[16] that could be applied to the considerations found in this opinion, the Court will center its interpretation on those groups specified by the Commission and that are subjected to deprivation of liberty in prison; in other words, within the scope of the obligations imposed by the Convention regarding a treatment with dignity for persons serving their sentences in a prison.

27. The Court also stresses that there is an excessive and abusive use of pretrial detention in the region (*infra* para. 100), in that there exists a large proportion of persons deprived of liberty in prisons who have not been sentenced. The Court considers that this advisory opinion should be taken into account, where appropriate and adjusted to the differentiated approach, with respect to those persons, in light of the provisions of Article 5(4) of the Convention, which states that "accused persons […] shall be segregated from convicted persons" and "shall be subjected to separate treatment appropriate to their status as unconvicted persons."[17] This should not, however, be deemed an authorization to perpetuate the practice of anticipating a sentence, which would be contrary to the principle of exceptionality and *ultima ratio* and ignore the presumption of innocence.[18]

28. Therefore, the response to the request will not only be valuable to the countries of the region since it will clarify the content and scope of State obligations, but also for the development of standards to guarantee the principle of equality and non-discrimination with respect to the special particularities and needs of the groups, identified by the Commission, during the stage of supervision of deprivation of liberty, which will be largely important for the protection of those persons and for a strengthened compliance of the human rights standards in a matter of great juridical significance in the region, as demonstrated by the many participants in this process.

29. In conclusion, the Court holds that it is competent to issue an opinion regarding all the international human rights instruments in the American States brought to its attention by the Commission since they fall within the competence of the Court. Therefore, the Court will proceed to answer the request in order to assist and orient the OAS Member States and organs to comply with their mission within the inter-American system.[19]

30. The Court deems it necessary to reiterate that, under international law, when a State is a party to an international treaty, such as the American Convention, that treaty obligates all State

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[16] As found in both the Optional Protocol to the UN Convention Against Torture and the Principles and Best Practices, adopted by the Inter-American Commission, and as they have been understood by the Court. *Cf. Rights and guarantees of children in the context of migration and/or the need for international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 145.

[17] On this point, the Court has noted that the guarantee established in Article 5(4) of the Convention can be understood as a "corollary of the right of a person who is being prosecuted to the presumption of innocence until his or her guilt is established legally, which is recognized in Article 8 of the Convention," since placing a person being prosecuted together with convicted persons implies treating the former the same as those whose criminal responsibility has been duly determined. *Cf. Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013. Series C No. 275, para. 380 and *Case of González et al. v. Venezuela. Merits and Reparations*. Judgment of September 20, 2021. Series C No. 436, para. 144.

[18] In this regard, it should be repeated that deprivation of liberty is a precautionary nature and not one of punishment, which should be applied exceptionally. Therefore, the rule should be that a person being prosecuted be in liberty while his or her criminal responsibility is being determined. *Cf. Case of López Álvarez v. Honduras. Merits, Reparations and Costs.* Judgment of February 1, 2006. Series C No. 141, para. 67; *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 103 and *Case of Villarroel Merino et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 24, 2021. Series C No. 430, para. 83.

[19] *Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 25.

institutions, including the judicial and legislative branches to the extent that a violation by a part of any of those bodies creates international responsibility for that State. Thus, the various State institutions must carry out the corresponding control of conventionality for the protection of all human rights, also on the basis of the considerations of the Court in the exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the purpose of the inter-American system of human rights, which is "the protection of the fundamental rights of the human being."[20]

31. The Court recalls that one of its inherent powers is that of structuring its rulings in a way that it deems most appropriate in the interests of law and in the effects of an advisory opinion. Bearing this in mind and in order to properly respond to the questions posed *supra*, the Court will structure this opinion as follows: first, develop some general considerations on the need to adopt differentiated measures or approaches with respect to certain groups of persons deprived of liberty; subsequently, give its interpretation on each of the groups deprived of liberty mentioned in the request, which it will be do in the following order: differentiated approaches applicable to women who are pregnant, postpartum or breastfeeding, or primary caretakers; to children living in prison with their mothers or primary caretakers; to LGBTI persons; to persons belonging to indigenous peoples, and to older persons.

IV
GENERAL CONSIDERATIONS ON THE NEED TO ADOPT DIFFERENTIATED MEASURES OR APPROACHES WITH RESPECT TO CERTAIN GROUPS OF PERSONS DEPRIVED OF LIBERTY

32. The competence of the Court consists essentially in interpretating and applying the American Convention[21] and other treaties over which it has competence[22] to then determine, in accordance with international standards, both conventional and customary, the international responsibility of a State under international law.[23] The Court recalls, as it has done on other occasions,[24] that its interpretation in the exercise of its advisory function differs from that of its contentious function in that there are no "parties" in the advisory process and no litigation to resolve and that the purpose of the advisory function is to obtain a judicial interpretation on one or more of the provisions of the Convention or of other human rights treaties in the American States.[25]

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[20] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 31 and Advisory Opinion OC-28/21, *supra*, para. 41.

[21] Article 62 of the Convention states that:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> […]
>
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by special agreement.

[22] *Cf. Case of González et al. ("Campo Algodonero") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205, paras. 45 to 58 and 77.

[23] Article 27 of the Vienna Convention on the Law of Treaties (Internal law and the observance of treaties) states that:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article46.

See also, Resolution of the UN Assembly, *Responsibility of States for internationally wrongful acts*, UN Doc. A/RES/56/83 published January 28, 2002, Article 3 (Characterization of an act of a State as internationally wrongful): "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

[24] *Cf. Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights). Advisory* Opinion OC-15/97 of November 14, 1997. Series A No. 15, paras. 25 and 26 and Advisory Opinion OC-28/21, *supra,* para. 10.

[25] *Cf.* Advisory Opinion OC-3/83, *supra*, para. 22 Advisory Opinion OC-28/21, *supra,* para. 24.

33. The American Convention expressly recognizes the right to personal, physical and mental integrity, the violation of which "has different connotations of degree and […] the physical and psychological aftereffects of which vary in intensity based on factors that are endogenous and exogenous […] that must be analyzed in each specific situation."[26] The Court has also indicated that, pursuant to Article 5(1) and 5(2) of the Convention, every person deprived of liberty has the right to live in conditions of detention that are compatible with personal dignity. Being responsible for detention installations, the State has a special role as guarantor of the rights of every person under its custody.[27] Thus, the State's duty to safeguard the well-being of those detained and to ensure that the manner and method of detention do not exceed the level of suffering inherent in detention. In addition, since prison authorities exercise complete control or domination over the prisoners under their custody, due to the very nature of detention it is impossible for detained persons to satisfy on their own certain basic rights or needs that are essential for a life with dignity. Consequently, the State is obligated to guarantee all the rights of persons under its custody, especially the rights to life and to personal integrity, as well as access to the basic services indispensable for a life with dignity.

34. With respect to the general questions formulated by the Commission on whether (1) it is possible to justify, by means of 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 the equality of conditions with the other persons deprived of liberty, both in referring to the conditions of detention and to the resources that are provided to protect their rights in the context of deprivation of liberty and (2) what are the specific implications of the content of the rights involved in those articles with respect to the scope of the correlative obligations that States have in the matter? The Court will develop some general considerations to respond to these basic questions, which will transversally guide the Court's subsequent considerations and interpretations with respect to each specific group mentioned in the request and with respect to the different rights that may be involved in connection with the questions submitted to the Court.

35. The Court will offer those considerations in the following order: (A) respect for human dignity as a general principle of the proper treatment of persons deprived of liberty and conditions of deprivation of liberty; (B) prohibition and prevention of torture and other cruel, inhuman or degrading treatment [or punishment]; (C) purpose of the oversight of sentences in the Convention; (D) judicial control in the oversight of sentences; (E) right to equality and non-discrimination, differentiated approach and intersectionality; (F) access to basic services for a life with dignity in prison; (G) generalized overpopulation and overcrowding; (H) prison management and, (I) context caused by the COVID-19 pandemic and the particular harm to certain groups in the prison system.

A. Respect for human dignity as a general principle of the proper treatment of persons deprived of liberty and conditions of deprivation of liberty

36. Article 5(2) of the Convention establishes a general principle on the proper treatment of

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[26] *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 57 and *Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs*. Judgment of August 26, 2021. Series C No. 431, para. 100.

[27] *Cf., inter alia, Case of Neira Alegría et al v. Peru*. *Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60; *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 98; *Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C No. 99, para. 111; *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 2, 2004. Series C No. 112, para. 154; *Case of López Álvarez v. Honduras, supra*, para. 105; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Merits, Reparations and Costs*. Judgment of July 5, 2006. Series C No. 150, paras. 85 and 87 and *Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2010. Series C No. 218, para. 198.

persons deprived of liberty based on the dignity of the individual,[28] and on the understanding that the State, being responsible for places of detention, is the guarantor of the rights of persons deprived of liberty.[29] The other clauses of Article 5 set out a series of rules that give content to the principle of proper treatment and that comply with the purpose of oversight of sentences, in accordance with the Convention (*infra* paras. 48 to 52).

37. The specific universal and inter-American instruments on the treatment of persons deprived of liberty stress the central role of dignity as one of the most fundamental values of the individual in the development of every prison policy. Similarly, the Nelson Mandela Rules (hereinafter "the Mandela Rules") establish that "[a]ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings."[30]

38. The Court recalls that the interdependence of democracy, rule of law and protection of human rights is the basis of the system of which the Convention forms part[31] and that a principal objective of a democracy must be respect for the rights of minorities.[32] This implies that the State's punitive power must be exercised with respect for the human rights established in the Convention and that it must respect and ensure the rights of persons deprived of liberty in the context of being treated with dignity so that when a State has a high degree of democracy, criminal and prison policies are centered on respect for human rights; criminal law is used only as *ultima ratio* and the rights of those deprived of liberty are ensured.

39. Therefore, one of the obligations that the State must ineluctably assume in its role as guarantor, since prison authorities exercise almost complete control or domination over persons who are subject to their custody, is that of providing those persons with the minimum conditions that befit their dignity while they are in prison in order to protect and ensure their rights to life and to personal integrity, as the Court has already indicated.[33] Thus, the State's obligations are directed not only towards the actions of public officials, but also towards the actions of the other persons who are deprived of liberty. States cannot invoke economic hardship to justify conditions of detention that do not comply with the minimum international standards in this area and that do not respect the dignity of the individual.[34] This imposes positive obligations on the State[35] whenever the nature of prison impedes persons deprived of liberty from satisfying, on their own, certain basic rights or needs that are essential to a life with dignity.

40. To comply with the right of every person deprived of liberty to be held in detention conditions compatible with personal dignity, the Court has analyzed the conditions of population density (so

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28 The Court has held that: "the American Convention protects one of the most fundamental of values of the individual, understood as a rational being, which is the recognition of the individual's dignity." *Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 30, 2016. Series C No. 329, para. 149.

29 *Cf. Case of Neira Alegría et al. v. Peru. Merits, supra*, para. 60 and *Case of Mota Abarullo et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of November 18, 2020. Series C No. 417, paras. 88 and 89.

30 Mandela Rules, *supra*, Rule 1.

31 *Cf.* Advisory Opinion OC-28/21, *supra*, para. 46.

32 *Cf*. Advisory Opinion OC-28/21, *supra*, para. 45.

33 *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay, supra*, para. 159.

34 *Cf. Case of Fleury et al. v. Haiti. Merits and Reparations.* Judgment of November 23, 2011. Series C No. 236, para. 83; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 85 and *Case of Vélez Loor v. Panama, supra*, para. 198. The Human Rights Committee, in its General Comment 21, held that: "[t]reating all persons deprived of liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule norm, as a minimum, cannot be dependent on the material resources available in the State Party. This norm must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Human Rights Committee, General Comment 21, 44th Session, U.N. Doc. HRI/GEN/1/Rev.7 at 176, 1992, para. 4.

35 *Cf.* Human Rights Committee, General Comment 21, *supra*, para. 3.

that there not be overcrowding),[36] the separation of detainees according to different categories,[37] infrastructure, cubic meters of air, as well as access to basic rights and services, such as medical care,[38] ventilation and natural light,[39] a bed, adequate conditions of hygiene and health care,[40] food,[41] access to water,[42] access to education, work and recreation for the rehabilitation and social readaptation of the detainees,[43] a schedule of visits,[44] solitary confinement and incommunicado,[45] among others. The Court has incorporated into its case law the principal standards on prison conditions and on the duty of prevention that the State must ensure with respect to persons deprived of liberty,[46] by interpreting and establishing the content and scope of Article 5(2) in light of the inter-American and international *corpus iuris* in the area and, where applicable, in connection with other rights set forth in Convention. The Court reiterates, as it has done on several occasions, that it will refer to diverse interpretative sources in order to give content and scope to Article 5(2).[47]

41. The Court notes that Articles 1(1) and 24 of the Convention, mentioned in the request, include the principle of non-discrimination and equality before the law, which is useful for the interpretation since the request asks for an approach that stems from the notion of "differentiated approaches," as will be addressed later (*infra* paras. 57 to 71). The Court, in answering the specific questions submitted, will provide content to the principle of a treatment with dignity for persons deprived of liberty and will specify the pertinent State obligations, bearing in mind the special needs of the diverse groups and the differentiated approach. Although it might be applicable to a variety of vulnerable groups in prison, the Court will limit the approach to those that were specifically indicated by the Commission.

42. As to the provisions of the Convention mentioned in the request (Articles 1(1), 4(1), 5, 11(2),

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[36] *Cf. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 150; *Case of Fleury et al. v. Haiti*, *supra*, para. 85; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 20 and *Case of Vélez Loor v. Panama, supra*, para. 204.

[37] A separation of categories should be made between the prosecuted and the convicted and between minors and adults, with the objective that persons deprived of liberty receive appropriate treatment for their condition. *Cf.* Article 5(4) of the Convention and *Case of Tibi v. Ecuador, supra*, para. 158.

[38] *Cf. Case of Tibi v. Ecuador, supra*, para. 156 and *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C No. 160, para. 301.

[39] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 146 and *Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 315.

[40] *Cf. Case of López Álvarez v. Honduras, supra*, para. 209 and *Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 319.

[41] *Cf. Case of López Álvarez v. Honduras, supra*, para. 209.

[42] *Cf. Case of Vélez Loor v. Panama, supra*, para. 216.

[43] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 146 and *Case of Vélez Loor v. Panama, supra*, para. 204.

[44] Visitations must be guaranteed in places of detention. Imprisonment under a regimen of restricted visitations may violate the right to personal integrity, depending on the circumstances. *Cf. Case of Loayza Tamayo v. Peru. Merits, supra*, para. 58 and *Case of López et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2019. Series C No. 396, para. 93.

[45] Imprisonment of prolonged solitary confinement, as well as any other measure that might place the physical or mental health of the prisoner in grave danger is strictly prohibited. *Cf. Case of the Children and Adolescents Deprived of Liberty in the "Complex of Tatuapé" of FEBEM. Provisional Measures with regard to Brazil.* Order of the Inter-American Court Rights of November 30, 2005, Considering paragraph 13 and *Matter of the Unit of Socio-educative Internment. Provisional Measures with regard to Brazil.* Order of the Inter-American Court of September 1, 2011, Considering Paragraph 21.

[46] *Cf. Case of Pacheco Teruel et al. v. Honduras. Merits, Reparations and Costs.* Judgment of April 27, 2012. Series C No. 241, para. 67.

[47] In this regard, it should be specified that the *corpus iuris* of the international law of human rights consists of a body of rules expressly set forth in international treaties or found in international customary law as evidence of a practice generally accepted as law, as well as the general principles of law and a series of rules of a general nature or soft law, the latter serving as a guide for the interpretation of the former because they give greater precision to the minimum content set out in the treaties. *Cf.* Advisory Opinion OC-14/94, *supra*, para. 60 and Advisory Opinion OC-24/17, *supra*, para. 61.

12, 13, 17(1), 19 and 24), the Court will also take into account the standards developed under its jurisdictional function; in other words, judgments in contentious cases, orders of provisional measures and advisory opinions for the appropriate interpretation. As already specified, the Court deems it pertinent to include an interpretation of Article 26 of the Convention, although it was not expressly requested by the Commission (*infra* para. 76).

B. The prohibition and prevention of torture and other cruel, inhuman or degrading treatment

43. Article 5 recognizes, in addition to the principle developed in the previous paragraph, one of the most fundamental values in a democratic society -the right to personal integrity, according to which "[e]very person has the right to have his physical, mental and moral integrity respected"- and expressly prohibits torture and other cruel, inhuman or degrading treatment or punishment. Pursuant to Article 27(2) of the Convention, this right is one of the non-derogable rights that cannot be suspended in cases of war, public danger or other threats to the independence and security of the States Parties. Many other international instruments contain the same prohibition.

44. It is important to recall that there is an international juridical regime that absolutely prohibits all forms of torture, both physical and psychological, which is now part of *ius cogens.*[48] The Inter-American Convention to Prevent and Sanction Torture and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibit torture and impose specific obligations on States to adopt all effective measures for its prevention, autonomous criminal classification, research and sanction with punishments depending on the gravity of the offense.

45. Furthermore, the UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment emphasizes a preventive approach by setting up a system of periodic international, national and local visits and by publishing reports and recommendations based on the context, circumstances and facts observed during the visits.[49] The Court emphasizes that the monitoring, inspection and follow-up with autonomous and independent mechanisms to ensure that the conditions of detention centers and prisons meet international standards[50] enables ensuring respect for the rights of persons deprived of liberty and obligates the authorities to account for their actions.

46. The Court also points out that certain groups and persons are more exposed to torture and to sexual violence in prisons. The SPT has recognized that "although all of those in detention form a vulnerable group, some groups suffer a particular vulnerability, such as women, juveniles, members of minority groups, foreign nationals, persons with disabilities, and persons with acute medical or

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48 *Cf. Caso of the Gómez Paquiyauri Brothers v. Peru, supra*, para. 112 and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs.* Judgment of November 21, 2018. Series C No. 368, para. 192. The Mandela Rules also establish this principle in Rule 1, stating that "[n]o prisoner shall be subjected to, and all prisoners shall be protected from, torture or other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification." In addition, Principle 6 of the Body of Principles indicates that "[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." It also contains provisions to ensure the right of persons deprived of liberty to present petitions or complaints of possible acts of torture to the administrative authorities of the place of detention, as well as to guarantee the independence of physicians to document possible situations of torture. *Cf*. Body of Principles, *supra*, Principle 24.

49 The SPT finds that the Protocol establishes that "such an approach requires that there not only be compliance with relevant international obligations and standards in both form and substance, but that attention must also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be content specific." SPT, Approach of the concept of the prevention of torture and other cruel, inhuman or degrading treatment or punishment, CAT/OP/12/6, December 30, 2010, para. 3.

50 *Cf.* CAT, General Comment 2, Application of Article 2 by the States Parties, CAT/C/GC/2, January 24, 2008, Recommendation 13.

psychological dependencies or conditions."[51] Thus, there is a specific appeal to combat all forms of torture and ill-treatment with respect to certain minority or marginated individuals and populations within the prison system.[52] As to the obligation to prevent and sanction torture derived from the American Convention and the Inter-American Convention to Prevent and Sanction Torture,[53] the Court considers that States should pay special attention to the situation of these vulnerable groups that are deprived of liberty and to their specific risk of torture and other ill-treatment so that they strengthen the control mechanisms of prevention and sanction with respect to both prison staff and third persons.

47. The guidelines on a differentiated approach developed in this opinion on the conditions of detention also have, as stated by the SPT,[54] "a critical function in the prevention" of torture and cruel, inhuman or degrading treatment or punishment. The Court points out that interpretations made under its advisory function are a source that, given its nature, contributes, especially in the area of prevention, to achieving an effective respect and guarantee of human rights;[55] in this case, that of persons deprived of liberty.

C. The purpose of oversight of sentences in the American Convention

48. Pursuant to Article 5(6) of the Convention, "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." In *Mota Abarullo v. Venezuela*, the Court stated that "[c]ompliance with the objective established in this provision presumes that the deprivation of liberty is carried out in satisfactory conditions that do not harm the rights of the inmates […]."[56] Applying it to specific cases, the Court has manifested the importance of ensuring that persons in detention participate in productive activities[57] and have as much contact as possible with family members, representatives and the outside world,[58] which are among the issues related to effective compliance. Therefore, due to the intrinsic relationship between the conditions of deprivation of liberty and the attainment of the purpose of oversight of sentences, the Court will now offer some additional considerations on the matter.

49. The Court notes that Article 5(6) of the Convention corresponds to Article 10(3) of the International Covenant on Civil and Political Rights, which states: "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Although both texts are essentially the same, the Covenant is more explicit and precise in that it clarifies that it concerns the "penitentiary syste*m";* in other words, not the deprivation of liberty in itself, but rather the purpose that its oversight should pursue.[59]

50. According to the Court, the term "reform" in Article 5(6) is not to be understood literally,

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[51] SPT, Approach to the concept of the prevention of torture and other cruel, inhuman or degrading treatment or punishment, CAT/OP/12/6, *supra*, para. 5(j).

[52] *Cf.* CAT, General Comment 2, *supra*, para. 21.

[53] Particularly, Articles 1(1), 5(1) and 5(2) of the American Convention. The general obligation to respect and ensure rights is strengthened by the provisions of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Sanction Torture, which obligate the State to "take effective measures to prevent and sanction torture within its jurisdiction," and also to prevent and sanction […] other cruel, inhuman or degrading treatment or punishment."

[54] SPT, Approach to the concept of the prevention of torture and other cruel, inhuman or degrading treatment or punishment, CAT/OP/12/6, *supra*, para. 5(d).

[55] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 31 and Advisory Opinion OC-26/20, *supra*, para. 92.

[56] *Cf. Case of Mota Abarullo et al. v. Venezuela, supra*, para. 104.

[57] *Cf. Case of Pacheco Teruel et al. v. Honduras, supra*, paras. 60 and 69.

[58] *Cf. Case of López et al. v. Argentina, supra*, para. 118.

[59] In this regard, it is necessary to clarify that the "purpose of the sanction" leads to a long discussion on absolute and relative theories, the latter subdivided into general and special preventions and each one, in turn, subdivided into positive and negative.

because that would imply that the State could intervene in a person's body, personality and intimacy, which would negatively affect other rights ensured by the Convention. It must, therefore, be interpreted in accordance with the object and purpose of the treaty and from a systematic interpretation in the sense that "reform" in that context signifies bringing about, with proper respect for the dignity of the prisoner, appropriate social comportments that do not negatively affect the rights of other persons in the terms of Article 32 of the Convention,[60] so that they can reinsert or reintegrate themselves into society.

51. Therefore, the Court, in interpreting Article 5(6), read in conjunction with Article 10(3), holds that oversight of deprivation of liberty must ensure that the convicted person is able to reintegrate into life on the outside and to coexist with the rest of society without harming anyone; in other words, to be able to cope with life according to the principles of pacific coexistence and respect for the law.[61] This implies, above all, that time spent in the prison system should not cause a person's deterioration other than the inevitable effect of all institutionalization (in this case, "prisonization"), but that the system must minimize or naturalize it to the greatest extent possible, which means that the prison stay must be designed and directed towards attaining this objective. Thus, education, professional training, work and recreation are essential functions of detention centers[62] and should be offered to all persons deprived of liberty. Moreover, judicial or administrative authorities should bear in mind these circumstances when applying and/or evaluating sentences and the different stages of the treatment of inmates when overseeing sentences, all the while applying the differentiated approach with respect to the distinct populations deprived of liberty, attending to their particular needs as will be developed *infra*.

52. Therefore, the Court considers that the State is obligated to adopt certain positive, specific measures aimed at ensuring not only the enjoyment and exercise of those rights, the limitation of which is not the unavoidable consequence of deprivation of liberty, but also to ensuring compliance of the purpose of oversight of deprivation of liberty, in the terms expressed above. Taken together, such measures should be framed in public policies that develop specific programs and mechanisms that would result in the satisfactory reintegration of convicted persons into society, as well as in mitigating the barriers and obstacles that confront the formerly confined due to the adverse effects produced by the conditions of deprivation of liberty and the stigmatization and deterioration caused by imprisonment that may lead to ostracism by the family and the community.[63]

D. Judicial control of oversight of sentences

53. Judicial protection regarding acts that violate human rights is one of the basic pillars not only of the American Convention, but also of the rule of law itself in a democratic society.[64] The relationship of the special subjection between detainees and the State, as well as the special situation

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60 Article 32. Relationship between Duties and Rights

1. Every person has responsibilities to his family, his community, and mankind.

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

61 *Cf. Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 28, 2018, Considering paragraph 88. Similarly, Rule 91 of the Mandela Rules state: "The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as to encourage their self-respect and develop their sense of responsibility."

62 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, *supra*, para. 146 and *Case of Vélez Loor v. Panama*, *supra*, para. 204. See also, Mandela Rules, *supra*, Rule 4.

63 *Cf.* UNODC, Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders, 2013.

64 *Cf. Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 82 and *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, para. 174

of vulnerability of the prison population (*supra* para. 33), justifies a more rigorous judicial control to ensure their rights. Principle VI of the Principles and Best Practices establishes that:

> Competent, independent and impartial judges and tribunals shall be in charge of the periodic control of legality of the public administration that affect, or could affect the rights, guarantees or benefits to which persons deprived of liberty are entitled. The Member States of the Organization of American States shall ensure the necessary resources to permit the establishment and effectiveness of judicial bodies of control and supervision of punishments, and shall provide the necessary resources for them to function adequately.[65]

54. In this regard, the Court has emphasized that judicial authorities should implement, *de officio* or at the request of the interested party, judicial control to verify the guarantee of the rights of persons deprived of liberty.[66] The State's role of guarantor of the rights of persons deprived of liberty is the responsibility of all public powers within the area of their competence, which includes judicial control of oversight of the sentence of deprivation of liberty.[67] The Court welcomes the good practices of many countries of the region in establishing figures that comply with that responsibility, such as judges in charge of oversight of sentences.[68] On this point, the Court considers it imperative that States establish adequate procedural and substantive rules for those specialized jurisdictions that: (i) provide them with the necessary resources to carry out their work with full independence and impartiality; (ii) guarantee the legal defense, free of charge, of persons during oversight of their sentence,[69] and (iii) foster coordination of justice operators with the prison administration.

55. The judicial protection of the human rights of persons deprived of liberty does not end with a judgment, but rather it is especially important at the moment of oversight. Therefore, one of the essential components of this system, which integrates procedural and substantive rules, is the role of the technical defense of persons deprived of liberty. The right to defense continues to be a central aspect that obligates the State to treat the individual at all times as a true subject of the process in the broadest sense of this concept and not simply as an object thereof. The right to defense must be exercised from the moment that the person is considered the possible perpetrator or accessory of a punishable act and only ends when the process is terminated, including, where applicable, the stage of oversight of the sentence.[70] The Court stresses the important role played by the institution of the public defender as a means by which the State ensures the inalienable right of any accused person to be aided by such a defender, equipped with sufficient guarantees to act effectively and on equal terms with the prosecutor. To comply with this commitment, the State must adopt all adequate measures, including having appropriate and trained defenders who are able to act with functional autonomy.[71]

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65 IACHR, Principles and Best Practices, *supra,* Principle VI. Similarly, the Body of Principles states that "Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority." Body of Principles, *supra*, Principle 4.

66 *Cf. Mutatis mutandis*, *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of February 29, 2016. Series C No. 312, para. 188.

67 *Cf.* IACHR. Report on the human rights of persons deprived of liberty in the Americas of December 31, 2011, OEA/Ser.L/V/II, para. 58.

68 *Cf., inter alia*, Argentina, Law of the Oversight of the Sentence of Deprivation of Liberty of July 8, 1996, Articles 3 and 4; Chile, Organic Code of the Tribunals of July 9, 1943, Articles 14 and 113(2); Colombia, Code of Criminal Procedure of 2004, Articles 31(7) and 38; Costa Rica, Code of 1996, Article 482; Mexico, National law on the Oversight of the Sentence of 2016, Article 25; Ecuador, Integral Organic Criminal Code of 2014, Article 666 and Uruguay, Code of Criminal Procedure of 2017, Article 26.

69 The Court has established that the right to defense must necessarily be exercised from the moment that a person is accused as the perpetrator or accessory of a punishable offense and ends when the process is concluded, including, where applicable, the stage of oversight. *Cf. Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs.* Judgment of November 17, 2009. Series C No. 206, para. 29 and *Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 303, para. 153.

70 *Cf. Case of Ruano Torres v. El Salvador, supra*, para. 153.

71 *Cf. Case of Ruano Torres v. El Salvador, supra,* para. 153.

56. The Court considers that these jurisdictional authorities should, *de officio*, monitor to ensure that the oversight of sentences respects human dignity and that a differentiated approach is applied in the treatment of persons deprived of liberty by exercising an adequate control of conventionality[72] under the parameters derived from Article 5(6) of the Convention and identified in this opinion (*supra* paras. 36 to 52). The Court also considers it appropriate that those who comprise the jurisdiction that oversees respect for the human rights of persons deprived of liberty during the stage of oversight of sentences have specialized knowledge on prison norms and on international standards on the prevention of torture.

E. The right to equality and non-discrimination, a differentiated approach and intersectionality

57. The Court has affirmed that "[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual."[73] The principle of equality and non-discrimination is fundamental to safeguarding human rights. Therefore, non-discrimination together with equality before the law and equal protection under law for all are the constitutive components of a general and basic principle related to the protection of human rights and is now a matter of *ius cogens,*[74] which is the basis of the legal structure of national and international public order that permeates the entire legal system.

58. When interpreting Article 1(1) of the Convention, the Court has stated that it is a norm that is general in scope and "applies to all the provisions of the treaty, and imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination.'"[75] The Court has held that a difference in treatment is discriminatory when it does not have an objective or reasonable justification; that is, when it does not pursue a legitimate goal and there no reasonable relationship of proportionality between the means used and the end pursued.[76]

59. The Court has held that the right to equality and non-discrimination includes two concepts: a negative concept related to the prohibition of arbitrary differences in treatment and a positive concept related to the States' obligation to create conditions of true equality for groups that have traditionally been excluded or who are at a greater risk of being discriminated against.[77] States are obligated to adopt positive measures to reverse or change existing discriminatory situations in their societies that prejudice a certain group of persons, which implies a special duty of protection that the State must exercise with respect to the acts and practices of third parties who, through tolerance or

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[72] The Court has consistently held that the different State authorities are obligated to exercise, *ex officio,* a control of conventionality between the domestic norms and practices and the American Convention within the framework of their respective competences and the corresponding procedural rules. In doing so, the domestic authorities must take into account not only the treaty, but also its interpretation by the Court, which is the final interpreter of the Convention. *Cf*. *Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 124 and *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2020. Series C No. 419, para. 139.

[73] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4. para. 55 and Advisory Opinion OC-27/21, *supra*, para. 152.

[74] *Juridical condition and rights of undocumented migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 83 and 101 and Advisory Opinion OC-27/21, *supra*, para. 152.

[75] *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of August 24, 2010. Series C No. 214, para. 268.

[76] *Cf. Case of Norín Catrimánet 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. 200.

[77] *Cf. Case of Furlan and family members v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 267.

acquiescence, create, maintain or favor discriminatory situations.[78]

60. In cases of unfavorable different treatment, when the differentiated standard is one protected by Article 1(1) and alludes to (i) permanent traits of persons that they cannot eliminate without losing their identity; (ii) groups that are traditionally marginated, excluded or subordinated, and (iii) standards that are irrelevant for an equitable distribution of social benefits, rights or charges, the Court has found evidence that the State acted arbitrarily. The Court has also established that the specific standards that prohibit discrimination, under Article 1(1), do not form an exhaustive or restricted list but are merely declaratory. The Court believes that the wording of that article by including the term "any other social condition" allows other categories that were not explicitly indicated, but are similar, to be incorporated.[79] When interpreting that term, the most favorable hermeneutic alternative for the protection of the right of the individual must be chosen in application of the principle *pro persona*.[80]

61. The Court stresses the vulnerability and defenselessness caused by the installations housing those deprived of liberty, the interiors of which are, in principle, beyond public scrutiny. The Human Rights Committee, in its General Comment 21, refers to the vulnerability of these populations for the mere fact of being detained and emphasized that these persons cannot be subjected "[…] to any hardship or constraint other than that resulting from the deprivation of liberty."[81] For its part, the Committee on Economic, Social and Cultural Rights (hereinafter "the ESCR Committee") in referring to the scope of the term "other social condition," in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, pointed out that the vulnerability that affects certain groups, among them those in detention, is a prohibited grounds of discrimination.[82] For its part, the "100 Brasilia Regulations regarding access to justice for vulnerable people," adopted at the XVI Ibero-American Judicial Summit held in Brasilia in March 2008, expressly recognizes detention as among the categories that expose persons to different situations of vulnerability.[83]

62. In examining the implications of a differentiated treatment that some norms may provide, it is important to refer to the Court's holding that "not every difference of treatment can be considered offensive, per se, to human dignity." Distinctions may be made, based on *de facto* inequalities, which are an instrument to protect those who must be protected, in view of the situation of greater or lesser disadvantage in which they find themselves.[84]

63. The foregoing demonstrates that, in the first place, respect for the dignity of persons deprived of liberty must be ensured under the same conditions that are applicable to the rest of the people who make up society, without any type of discrimination[85] other than inevitable limitations.[86]

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78 Advisory Opinion OC-24/17, *supra*, para. 65.

79 *Cf. Case of I.V. v. Bolivia*, *supra*, para. 240.

80 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 66.

81 *Cf.* Human Rights Committee, General Comment 21, *supra*, para. 3.

82 *Cf.* ESCR Committee, General Comment 20*,* E/C.12/GC/20, July 2, 2009, para. 27.

83 *Cf.* Brasilia Regulations, *supra*, Rule 2(10).

84 For example, the European Court of Human Rights held in a case in which there was an allegation of a difference in treatment established in the legislation since it permitted the possibility obtaining a suspension in the execution of a prison sentence only for convicted mothers with children under one year of age that there was no violation of the Convention. In particular, it held that differentiated treatment that takes into account specific personal situations, such as women who are pregnant, postpartum or breastfeeding, should not be considered discriminatory. ECHR*, Case of Alexandru Enache v. Romania*, No. 16986/12. Judgment of October 3, 2017, para. 77.

85 As an example, see Rule 24(1) of the Mandela Rules: "The provision of health care services is a State responsibility. The prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status."

86 *Cf.* Human Rights Committee, General Comment 21, *supra*, para. 3. Similarly, the Mandela Rules state that:

64. In the second place, domestically and as a negative obligation, the principle of non-discrimination prohibits unjustified or arbitrary differentiated treatments based on motives protected by Article 1(1).[87] It should be remembered that the Court has held that, as a result of the term "any other social condition" contained in that provision, categories such as age,[88] disability,[89] sexual orientation,[90] gender identity and expression[91] are protected by the American Convention.

65. Thirdly, it must be recognized that, in the context of deprivation of liberty, systems of social domination based on the privilege of some and the oppression of others, such as patriarchy, homophobia, transphobia and racism, are reproduced and exacerbated. Thus, certain groups of persons deprived of liberty due to their condition, identity traits or current situation related to sex and gender, sexual orientation, gender identity and expression and ethnic background, among others, suffer a greater degree of vulnerability or risk to their security, protection or well-being, as a result of their deprivation of liberty and their belonging to historically discriminated against groups, which obligates States to adopt additional and specialized measures that meet their specific needs in prison and that avoid their ill-treatment, torture or other acts against their dignity. In the case of children or older persons, age is a factor to be taken into account in the intersectional approach that requires special measures of protection due to their life cycle, their condition as persons who are developing or for factors of risk associated with aging.[92] The Court recalls that it is not sufficient for States to abstain from violating human rights, but rather it is imperative that they adopt positive measures, determined in function of the particular needs of protection of the individual, whether due to his or her personal condition or due to the specific situation in which he or she finds himself or herself.[93] The adoption of these particular measures shall not be considered, under any concept, as discriminatory.

66. The Mandela Rules clarify this notion of the principle of non-discrimination by stating that "[i]n order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be considered discriminatory."[94] For its part, the Bangkok Rules point out that,

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"[i]mprisonment and other measures that include cutting off a person from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation." Mandela Rules, *supra*, Rule 3.

87 In this same regard, it should be recalled that the Mandela Rules specifically state that "There shall be no discrimination on the grounds of race, colour, sex, language, political or other opinion, national or social origin, property, birth or any other status." Mandela Rules, *supra*, Rule 2(1).

88 See, *inter alia,* Advisory Opinion OC-18/03, *supra*, para. 101 (with respect to minors) and *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 349, para. 122 (with respect to adults).

89 *Cf. Case of Guachalá Chimbo et el. v. Ecuador. Merits, Reparations and Costs*. Judgment of March 26, 2021. Series C No. 423, para. 79 and *Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 1, 2021. Series C No. 439, para. 101.

90 *Cf. Case of Atala Riffo and children v. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239*,* para. 93 and Advisory Opinion OC-24/17, *supra*, para. 78.

91 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 78 and *Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs.* Judgment of March 26, 2021. Series C No. 422, para 67.

92 For example, the Brasilia Regulations establish that: "Ageing can also constitute a cause of vulnerability if an elderly adult person finds it especially difficult to exercise their rights before the justice system with full respect for their dignity, on the basis of their functional abilities and/or barriers as a result of the economic and social conditions." Brasilia Regulations, *supra*, Section 2(6).

93 *Cf. Case of the Pueblo Bello Massacre v. Colombia*, *Merits, Reparations and Costs.* Judgment of January 31, 2006. Series C No. 140*,* para. 111 and *Case of Manuela and others v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 2, 2021. Series C No. 441, para. 257.

94 Mandela Rules, *supra*, Rule 2(2).

in order to put into practice the principle of non-discrimination, "account shall be taken of the distinctive needs of female prisoners."[95] For its part, Principle 5(2) of the Body of Principles for the Protection of All Persons Subjected to Any Form of Detention or Prison (hereinafter "the Body of Principles") states that special measures to address the special needs of detained women and other categories shall not be considered discriminatory.[96]

67. Summarizing the above, Principle II of Principles and Best Practices states that measures that are exclusively designed to protect the rights of women who are pregnant or breastfeeding; of children; of the elderly; of persons with a physical, mental or sensory disability; as well as indigenous peoples; Afro-descendants and minorities, among others, shall not be considered discriminatory. It adds that "[t]hese measures shall be applied in accordance with the law and international human rights law and shall always be subject to review by a judge or other competent, independent, and impartial authority."[97]

68. Taking into account all those sources and in response to the questions posed by the Commission, the Court considers that the application of a differentiated approach to prison policies enables identifying how the characteristics of the group and the prison environment would affect the guarantee of the rights of certain groups of persons deprived of liberty that are minorities and marginalized in prison and determining the specific risks of the infringement of rights, according to their particular characteristics and needs, in order to define and implement a set of specific measures directed to overcome the discrimination (structural and intersectional) that affects them. In not doing so, States would be in violation of Article 5(2) of the Convention and of other treaties and would result in treatment that was contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

69. It should be repeated that, in this advisory opinion, the Court will specifically cover the differentiated approaches applicable to women, who are pregnant, giving birth, postpartum or breastfeeding or primary caretakers deprived of liberty (Chapter V); children living in detention centers with their mothers or primary caretakers (Chapter VI); LGBTI persons deprived of liberty (Chapter VII); persons belonging to indigenous peoples deprived of liberty (Chapter VIII) and older persons deprived of liberty (Chapter IX), since they are all included in the Commission's request. This, of course, does not preclude the State's obligation to develop other differentiated approaches in their prison policies in accordance with the particularities of the prison population and the context of the country. In addition, as has been stated by the Court in other cases, States should pay special attention to those cases in which there is an intersection of multiple factors of vulnerability and risk of discrimination associated with a series of particular conditions and identity traits.[98]

70. The Court also points out that, in order to reach the objective of considering the diverse groups that are in a greater situation of vulnerability, it is necessary, in designing prison policy, to have reliable data that would allow visibilization of their needs and to develop specific actions. The Court notes that the observations that it received have broadly emphasized the dearth of disaggregated data with respect to the groups under consideration, which should be reversed as soon as possible. The Court stresses that, in the development of any policy or State act that is undertaken to comply with the obligations indicated in this opinion, it is desirable to have the involvement and participation of the affected population as well as organizations of civil society that

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95 Rules of Bangkok, *supra*, Rule 1.

96 *Cf.* Body of Principles, *supra*, Principle 5.

97 *Cf.* IACHR, Principles and Best Practices, *supra,* Principle II.

98 Regarding this concept of intersectionality, see, among others, *Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298 and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 15, 2020. Series C No. 407.

work for the respect of their rights.[99]

71. Finally, the Court considers that, in order to meet the specific needs of the distinct groups of persons deprived of liberty and to ensure a differentiated treatment in accordance with what has been developed in this opinion, States must provide the competent institutions and personnel involved in the treatment of persons deprived of liberty with adequate budgetary resources and specialized training. It is also necessary to define clearly within their institutional design the appropriate assignment of functions within the competences of each State body, as well as the pertinent measures to attain an effective inter-institutional coordination, where applicable.

F. Access to basic services for a life with dignity in prison

72. The Court recalls that, with respect to persons who have been deprived of liberty, the State has a special role as guarantor since the prison authorities exercise an almost complete control or domination over those who are subject to their custody. This control is characterized by the particular degree by which the State can regulate those persons' rights and obligations and is due to the circumstances of being confined, where the deprivation of liberty impedes them from satisfying on their own a series of basic needs essential for the development of a life with dignity (*supra* para. 33) It is for this reason that access to basic services, such as adequate food, potable water, medical care, among others, is primordial.

73. Furthermore, the selectivity of the penal system must be acknowledged in that those are who subjected to deprivation of liberty are, in the great majority, young men, whose socio-economic conditions are precarious and who have a low level of schooling.[100] In the case of women, studies show that many of them have a history of prior victimization and are heads of family so that, before being detained, they were economically responsible for their family and solely responsible for the daily tasks of the home.[101] The lack of a guarantee of certain minimum conditions of detention places the persons deprived of liberty in a situation of vulnerability since they cannot provide for themselves on their own and, in the case of persons who live in poverty, they cannot be provided for by their relatives, which aggravates the conditions of the deprivation of liberty.

74. The Court reiterates that the State cannot allege economic difficulties to justify conditions of detention that do not comply with established international minimum standards in the area and that do not respect the dignity inherent in the human being.[102] In this regard, the Court stresses that, in the case of persons deprived of liberty, the very circumstances of confinement means that there is a minimum amount of access and effective enjoyment of the right to access to basic services for a life with dignity in prison that cannot depend on the available resources and that must satisfy the treatment with dignity set forth in Article 5(2) of the Convention and the right to equality and non-discrimination set forth in Articles 24 and 1(1) thereof.

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[99] Similarly, the SPT has stated on various occasions that "the adage 'nothing about us without us' should be considered a guiding principle in this sense." Written observations of the SPT (file of observations, f. 553).

[100] According to a study of the Inter-American Development Bank (hereinafter (IADB), 92% of the persons deprived of liberty are young men who have not completed high school and are, for the most part, deprived of liberty for offenses of robbery and homicide. On the other hand, "[i]n the last decade, the imprisoned feminine population increased 52%, more than double of the increase of the total imprisoned population." The sub-regions where a greater increase has been observed are the Caribbean (85%) and the Southern Cone (63%). *Cf*. IADB *Inside the prisons of Latin America and the Caribbean: A look from the other side of the bars*, USA, 2019, p. 13.

[101] Pontificia Universidad Javeriana, International Committee of the Red Cross (ICRC) in Colombia and Center for Research and Teaching of Economics (CIDE), *Mujeres y prisión en Colombia. Desafíos para la política criminal desde un enfoque de género*, Bogotá, Colombia, December 2018, p. 45.

[102] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 85 and *Case of López et al. v. Argentina, supra*, para. 90.

75. Thus, the UN Human Rights Committee has stated that "[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[103] The Committee has also expressed that:[104]

> As to conditions of detention in general […] certain minimum standards must be observed regardless of a State party's level of development:
> a) minimum floor space and cubic content of air for each prisoner,
> b) adequate sanitary facilities,
> c) clothing that should be in no manner degrading or humiliating,
> d) provision of a separate bed, and
> e) provision of food of nutritional value adequate for health and strength.

76. The Court will now review some general standards in its case law on the rights to health, nutritious food and potable water since they are rights that deal with various of the questions posed by the Commission. The Court stresses that the obligation to maintain the health and general well-being of persons deprived of liberty is intimately related to the requirement of providing adequate food and sufficient potable water. Bearing in mind its recent holding in *Hernández v. Argentina,*[105] the Court deems it pertinent to include in its considerations the interpretation of Article 26 of the Convention in relation to the direct justiciability by the Court of economic, social, cultural and environmental rights, even though it has not been expressly requested by the Commission. In later sections, the Court will offer those considerations in the application of a differentiated focus and refer to other rights that involve certain specific groups, such as cultural identity in the case of members of indigenous and tribal communities.

F.1) Right to health

77. The Court has pointed out that the rights to life and personal integrity are directly and immediately linked to medical care,[106] which involves, among others, the State's obligation to ensure the physical and mental health of persons deprived of liberty, specifically through regular medical examinations and, where applicable, medical treatment that is adequate, timely and, when required, specialized to meet the special care that detainees require.[107]

78. In this regard, Rule 24(1) of the Mandela Rules establishes that "[t]he provision of medical care for prisoners is a responsibility of the State."[108] Moreover, Article 25(1) points out that all prisons must have "a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of the prisoners, paying particular attention to prisoners with special health-care needs or health issues that hamper their rehabilitation."[109]

79. In this context, the Court recalls that "under the American Convention, the suffering and harm to personal integrity caused by the lack of adequate medical care for a person deprived of liberty -

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103 Human Rights Committee. General Comment 21, *supra*, para. 4.

104 Human Rights Committee. *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9(3).

105 *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 22, 2019. Series C No. 395, para. 54.

106 *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of November 22, 2007. Series C No. 171, para. 117 and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 171.

107 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra,* para. 171 and *Case of Manuela et al. v. El Salvador, supra,* para. 230.

108 Mandela Rules, *supra*, Rule 24(1).

109 Mandela Rules, *supra*, Rule 25(1).

and the consequent harm to his health- may, in themselves, constitute cruel, inhuman or degrading treatment."[110]

80. The Court has recognized on various occasions that Articles 34(i), 34(l)[111] and 45(h)[112] of the OAS Charter serve as the basis for the right to health to be protected by Article 26 of the Convention.[113] Moreover, the consolidation of this right enjoys a broad regional consensus as it is explicitly recognized in various constitutions and domestic laws of the States of the region.[114]

81. This jurisprudential interpretation of Article 26, applied to persons deprived of liberty,[115] has emphasized the fundamental nature of the right to health, the respect of which is essential for the exercise of the other human rights. The Court has reiterated that "everyone has the right to enjoy the highest attainable standard health that allows them to live in dignity," understanding health not only as the absence of disease or infirmity, but also "as a state of complete physical, mental and social well-being." The Court has also indicated that the general obligation to protect health can be found in "the State's duty to ensure access to persons to the essential services of health, ensuring effective and quality medical services," among others.[116]

82. More specifically, the Court has already noted that various OAS Member States have incorporated into their legislation specific standards to protect the health of persons deprived of liberty; measures or procedures for their regular or emergency treatment, and alternative or substitute measures to imprisonment, as well as the administrative and judicial control of those persons.[117]

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110 *Case of Hernández v. Argentina, supra*, para. 59. The European Committee for the Prevention of Torture and of Inhuman or Degrading Treatment or Punishment has affirmed that "[a]n inadequate level of health care can lead rapidly to situations falling within the scope of the term "inhuman and degrading treatment." *Cf*. European Committee for the Prevention of Torture and of Inhuman or Degrading Treatment or Punishment (CPT), Health care services in prisons, Extract from the 3rd General Report, 1993, para. 30.

111 Article 34(i) and (l) of the OAS Charter establish that: "[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] (i) Protection of man's potential through the extension and application of modern medical science, […] (l) Urban conditions that offer the opportunity for a healthful, productive and full life."

112 Article 45(h) of the OAS Charter establishes that "[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] h) Development of an efficient social security policy."

113 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, paras. 106 and 110; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359, paras. 98 to 102; *Case of Hernández v. Argentina*, *supra*, paras. 69 to 76; *Case of Guachalá Chimbo et al. v. Ecuador, supra*, paras. 97 to 101; *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432, para. 80; *Case of Vera Rojas et al. v. Chile, supra*, paras. 95 to 100 and *Case of Manuela et al. v. El Salvador, supra*, paras. 180 to 186.

114 See the constitutional norms of Argentina (Art. 42); Bolivia (Art. 35); Brazil (Art. 6); Chile (Art. 19.9) Colombia (Art. 49); Costa Rica (Art. 46); Dominican Republic (Art. 61); Ecuador (Art. 32); El Salvador (Art. 65); Guatemala (Art. 95); Haiti (Art. 19); Honduras (Art. 145); Mexico (Art. 4); Nicaragua (Art. 59); Panama (Art. 109); Paraguay (Art. 68); Peru (Art. 7); Suriname (Art. 36); Uruguay (Art. 44) and Venezuela (Art. 83). *Cf.* Constitutional Chamber, Supreme Court of Justice of Costa Rica, Resolution No. 13505 – 2006, of September 12, 2006, Considerations Paragraph III; Constitutional Court of Colombia, Judgment C-177 of 1998; Supreme Court of Justice of Mexico, Thesis of jurisprudence 8/2019 (10ª.). Right to the Protection of Health. Individual and social dimension and Constitutional Court of Ecuador, Judgment 0012-09-SIS-CC, of October 8, 2009.

115 *Cf*. *Case of Hernández v. Argentina, supra*, para. 76 and *Case of Manuela et al. v. El Salvador, supra*, paras. 180 to 186.

116 *Cf*. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 122 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, paras. 100 and 101.

117 The specific obligations of the administrative and judicial authorities are governed by that normative, for example: (a) the obligation to treat those deprived of liberty with respect for the inherent dignity of every person; (b) the right to timely

83. Although the jurisprudence varies substantially in each State of the region, several domestic courts have referred to the protection of the health and medical procedures for persons deprived of liberty; for example, Argentina,[118] Bolivia,[119] Brazil,[120] Canada,[121] Colombia,[122] Costa Rica,[123] Ecuador,[124] Mexico,[125] Panama[126] and Peru.[127]

84. Health is a "fundamental human right indispensable for the exercise of other human rights" and "every human being is entitled to enjoy the highest attainable level of enjoyment of health conducive to living a life with dignity, understanding health not merely the absence of disease and infirmity, but also as a complete state of physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balanced life."[128] Thus, the right to health refers to the right of every person to enjoy the highest attainable level of physical, mental and social life.[129] In the case of persons deprived of liberty, the guarantee of the right to health is the exclusive responsibility of the State.

85. The Court considers that States must conduct a complete medical examination of persons

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and free of charge medical care; (c) the duty of the prison authorities to carry out a medical, psychological and social screening of the prisoner upon entrance, with a criminological diagnosis and prognosis to determine the physical and mental state and, where applicable, adopt the pertinent measures, which must be placed in the clinical history of the prisoner; (d) the pretrial detention centers and prisons must provide permanent services of general medicine, odontology, psychology and psychiatry, with the relevant team; (e) in serious cases or when the prisoners so request, they have the right to be assisted by private doctors or receive care in public and/or private institutions at their cost, with the favorable opinion of the forensic doctor and other authorities; (f) every punishment shall be conducted under the strict control of the oversight judge, who shall implement the decisions of the sentence, as well as the adequate compliance of the prison regime; g) control of the general conditions of the centers of deprivation of liberty shall be under the responsibility of the administrative authorities, supervised by the competent judge; h) the transfer of the prisoners from one center to another or to a medical center can only be authorized by the competent judge in serious cases that require urgent care and specialized medical care that are not offered in the medical unit of the prison, and i) in emergencies, the prison authorities may order the relevant transfers *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 180.

118 Supreme Court of Justice of Argentina, *Badín, Rubén et al. v. Province of Buenos Aires, on damages*, Judgment of October 19, 1995 and *Gothelf, Clara Marta v. Province of Santa Fe on damages*, Judgment of April 10, 2003.

119 Plurinational Constitutional Tribunal, Plurinational Constitutional Judgment 0561/2015-S3 of May 14, 2015 and Plurinational Judgment 0017/2015-S1 of February 2, 2015.

120 Supreme Federal Tribunal, Special Remedy 592.581, Judgment of August 13, 2015.

121 Supreme Court of British Columbia, Canada, *British Columbia (Attorney General) v. Astaforoff, 1983 510 (BC SC)*, of July 14, 1983.

122 Constitutional Court of Colombia, Judgment T-1326/05 of December 15, 2005 and Judgment T-714/96 of December 16, 1996.

123 Constitutional Chamber of the Supreme Court of Justice of Costa Rica. Judgment 13266, Record: 03-010418-0007-CO of November 18, 2003 and Judgment 03480, Record: 05-002087-0007-CO of March 30, 2005.

124 Constitutional Court of Ecuador, Judgment 0012-09-SIS-CC, of October 8, 2009.

125 First Collegiate Tribunal of Circuit of the Auxiliary Center of the Eighth Region, Direct Writ of Amparo 798/2011, of November 30, 2011, Registry 2000769.

126 Supreme Court of Justice of Panama: Habeas Corpus 194-10, March 30, 2010 and Second Criminal Chamber, Special Request for Medical Evaluation, Record 768-G, January 14, 2011.

127 Constitutional Tribunal of Peru, file 1429-2002-HC/TC, November 19, 2002.

128 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118 and *Case of Guachalá Chimbo et al. v. Ecuador, supra*, para. 100.

129 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118 and *Case of Guachalá Chimbo et al. v. Ecuador, supra*, para. 100. See, *inter alia,* Preamble of the Constitution of the World Health Organization (WHO). Adopted by the International Health Conference, held in New York from June 19 to July 22, 1946, signed on July 22, 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org.; and entered into force on April 7, 1948. The reforms adopted by the 26th, 29th, 39th and 51st World Health Assemblies (Resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) that entered into force on February 3, 1977, January 20, 1984, July 11, 1994 and September 15, 2005, respectively, have been successively incorporated into its text. ESCR Committee, General Comment 14: The right to the highest attainable standard of health, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 12.

deprived of liberty, performed by medical personnel who do not have ties to prison officials, as soon as possible after they are admitted to detention centers.[130] Under the Mandela Rules (Rules 24 to 35), States must provide quality medical attention, including psychiatric, to persons deprived of liberty in emergency situations and under regular care, either in the place of detention or the prison or, if not available in those places, in hospitals of medical centers where the service is provided. The health care services must "maintain accurate, up-to-date and confidential individual medical files on all persons deprived of liberty," which must be accessible to them when they so request. The medical services must be organized and coordinated with the general administration of health services, which implies establishing appropriate and prompt procedures for the diagnosis and treatment of the sick, as well as for their transfer when the state of their health requires special treatment in specialized prison installations or in civil hospitals. To make these duties effective, it is necessary to have protocols of health care and agile and effective mechanisms to transfer prisoners, particularly in emergency situations or serious illnesses.[131]

86. The provision of medical services is undoubtedly a primary responsibility of the State and access to the necessary services must be provided without charge and without discrimination due to a person's legal situation. The Court reiterates that the health services must be maintained at a level of quality equal to those who are not deprived of liberty.[132] Health should be understood as a fundamental and indispensable guarantee for the exercise of the rights to life and personal integrity, which implies a State's obligation to adopt provisions of domestic law, including appropriate measures for overseeing equal access to health services with respect to persons deprived of liberty, as well as for the availability, accessibility, acceptability and quality of those services.[133]

F.2) Right to adequate food

87. The Court has already indicated that Article 34(j) of the OAS Charter,[134] interpreted in the light of the American Declaration[135] and taking into account other inter-American [136] and universal[137]

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130 To that end, the Mandela Rules indicate, *inter alia,* that a physician must examine each prisoner as soon as possible upon entrance and then as often as necessary, especially to determine the existence of a physical or mental illness and, if appropriate, take the necessary measures." Mandela Rules, *supra*. It is also pertinent to recall that "[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." Body of Principles, *supra*, Principle 24. The Principles and Best Practices indicate that "[a]ll persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture or to determine the need for care and treatment." IACHR, Principles and Best Practices, *supra,* Principle IX.3.

131 Mandela Rules, *supra*, Rules 22, 25, 26 and 27.

132 The principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment state that "Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained." Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment, *supra*, Principle 1.

133 *Cf. Case of Manuela et al. v. El Salvador, supra*, para. 236.

134 This article states that: "The Member States agree […} to devote their utmost efforts to accomplishing […] proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food."

135 Article XI of the American Declaration of the Rights and Duties of Man states that "[e]very person has the right to the preservation of his health through sanitary and social measures relating to food," among others.

136 Article 12(1) of the Protocol of San Salvador expresses that "has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development."

137 The Universal Declaration of Human Rights, in its Article 25(1) states that "Everyone has the right to a standard of

instruments, provides the basic components of the right to adequate food protected by Article 26 of the Convention. The Court has held that this right protects access to food that provides adequate and appropriate nutrition for the preservation of health.[138] Additionally, it is noted that several countries have recognized the right to food in their domestic norms.[139]

88. In its General Comment 12, the ESCR Committee indicated that the "core content" of the right to food implies "the *availability* of food in a quantity and quality sufficient to meet the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" and "the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."[140]

89. On the right to food of persons deprived of liberty, the Court has affirmed that the food offered in prisons must be of good quality and sufficient nutritional value.[141] Rule 22(1) of the Mandela Rules states that "every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served."[142] For its part, Principle XI on food and drinking water of the Principles and Best Practices establishes that:

> Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law.

90. Therefore, according to existing sources, States must ensure that (i) food is provided at regular intervals that are appropriate from a nutritional, cultural and religious point of view;[143] (ii) the food is prepared and/or transported in hygienic conditions,[144] and (iii) whenever possible, persons

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living adequate for the health and well-being of himself and of his family, including food," as well as other goods indicated in the article. Similarly, the International Covenant on Economic, Social and Cultural Rights expresses, in its Article 11(1), that, "[t]he States Parties […] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food," among other factors. Other relevant instruments are the Convention on the elimination of all Forms of Discrimination against Women, Article 12; the Convention on the Rights of the Child, Articles 24 and 27, and the Convention on the Rights of Disabled Persons, Articles 25 and 28.

138 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs*. Judgment of February 6, 2020. Series C No. 400, para. 216.

139 PSS Working Group. Progress Indicators for Measuring Rights under the Protocol of San Salvador. November 5, 2013. Doc. OEA/Ser.L/XXV.2.1 GT/PSS/doc.9/13. Second Group of Rights, para. 18. The footnote on page 87, corresponding to this paragraph, indicated that "Bolivia (Art. 16), Brazil (Art. 10), Ecuador (Art. 13), Guatemala (Art. 99), Guyana (Art. 40), Haiti (Art. 22) and Nicaragua (Art. 63) recognize the right to food for all in their constituencies; Colombia (Art. 44), Cuba (Art. 9), Honduras (Arts. 142-146) recognize the right of children to food, Suriname (Art. 24) recognizes the right to food in the context of the right to work. Argentina, El Salvador and Costa Rica implicitly recognize the right to food in their constitutions by granting constitutional or supraconstitutional status to the International Covenant on Economic, Social and Cultural Rights." *Cf. Case of the Members of the Indigenous Communities Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 215.

140 ESCR Committee, General Comment 12. Right to adequate food (Article 11). 20th Session (1999). Doc. E/C.12/1995/5, para. 8.

141 *Cf. Case of López Álvarez v. Honduras, supra*, para. 209 and *Case of Pacheco Teruel et al. v. Honduras, supra*, para. 67.

142 Mandela Rules*, supra,* Rule 22(1).

143 *Cf*. IACHR, Principles and Best Practices, *supra,* Principle XI(1); Office of the UN High Commissioner for Human Rights. *Human rights and prisons: Manual on human rights training for prison officials*, 2004, p. 60. See also, European Prison Rules, Rules 22(1) and 22(3); ECHR, *Case of Chkhartishvili v. Greece*, No. 22910/10. Judgment of May 2, 2013, para. 61; *Case of de los Santos and de la Cruz v. Greece*, No. 2134 /12 and 2161/12. Judgment of June 26, 2014, para. 44 and *Case of Ebedin Abi v. Turkey*, No. 10839/09. Judgment of June 13, 2018, para. 30.

144 *Cf*. SPT, Report on the visit to Costa Rica of March 3-14, 2019: recommendations and observations addressed to the State Party, CAT/OP/CRI/ROSP/1, of January 5, 2021, para. 55; IACHR, Principles and Best Practices, *supra,* Principle XI(1), and UNOPS. Technical and practical considerations based on the Minimum Rules for the Treatment of Prisoners (Mandela Rules) of 2016, p. 163.

deprived of liberty are able to cultivate and prepare their own food or receive it from outside sources.[145] In sum, States must provide adequate food to persons deprived of liberty so as to maintain their health and strength, taking into account the particular needs due to age or according to their habits and customs, as will be developed.

F(3) Right to potable water

91. The Court has affirmed that the right to water is protected by Article 26 of the Convention,[146] which has incorporated the norms of the OAS Charter, one of which is the right to water.[147]

92. The Universal Declaration of Human Rights contemplates, in its Article 25, the right to an adequate "standard of living," as does the International Covenant on Economic, Social and Cultural Rights in its Article 11. This right must be considered to include the right to water, as indicated by the ESCR Committee, which has also considered its relationship to other rights. Therefore, there is a universal right to water, despite the lack of an express recognition.[148]

93. The ESCR Committee has stated that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the fundamental conditions for survival."[149] The Committee has also indicated that "the right to water contains both freedoms and entitlements." The former implies being able "to maintain access to existing water supplies" that are "free of interference," such as "contamination of water supplies." The rights, for their part, involve "a right to a system of water supplies and management that provides equality of opportunity for people to enjoy the right." It also stressed that "water should also be treated as a social and cultural good and not primarily as an economic good" and that "the following factors apply in all circumstances:"

> *a) Availability.* The water supply for each person must be continuous and sufficient for personal and domestic uses […].
> *b) Quality.* The water necessary for each personal or domestic use must be safe […]. Furthermore, the water should be of an acceptable colour, odour and taste […].
> *c) Accessibility.* Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party.[150]

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145 *Cf*. UNOPS. Technical and practical considerations based on the Minimum Rules for the Treatment of Prisoners (Mandela Rules) of 2016, p. 163 and *Human rights and prisons: Handbook on human rights training for prison officials supra*, p. 70. See also, ECHR, *Case of Chkhartishvili v. Greece*, *supra*, para. 61.

146 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, *supra*, para. 222.

147 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, *supra*, para. 222. In this regard, Articles 30, 31, 33 and 34 of the OAS Charter establish an obligation on the States to achieve the "integral development" of its peoples. "Integral development" has been defined by the Executive Secretariat for Integral Development of the OAS as "the general name given to a series of policies that work together to promote sustainable development." As has been mentioned, one of the dimensions of sustainable development is precisely environmental. *Cf. 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 personal integrity– interpretation and scope of Articles 4(1) and 5(1), Articles 1(1) and 2 of the American Convention on Human Rights).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, paras. 52, 53 and 57. Another factor to be pointed out, as part of sustainable development, is Goal 6 "Ensure availability and sustainable management of water and sanitation for all" of the Sustainable Development Goals adopted by the UN. *Cf.* UN General Assembly, Resolution 70/1, entitled "*Transforming our World: the 2023 Agenda for Sustainable Development,"* September 25, 2015, Doc. ONU A/RES/70/1, Goal 6.

148 *Cf.* ESCR Committee. General Comment 15. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), paras. 3 and 4.

149 C*f.* ESCR Committee*.* General Comment 15*, supra*, paras. 3, 4 and 6.

150 *Cf*. ESCR Committee. General Comment 15, *supra*, para. 10, 11 and 12. As to "accessibility," the Committee, in the last paragraph, explained that it "has four overlapping dimensions: i) *Physical accessibility*. Water, and adequate water facilities and services must be within safe physical reach for all sectors of the population. […] ii) *Economic accessibility*. Water,

94. The Special Rapporteur for the Human Rights to Safe Drinking Water and Sanitation has stated that the element of "accessibility" to the right to water includes providing, without charge, potable water in prisons.[151]

95. The Court has indicated that "access to water" implies "obligations to be realized progressively," […] "however, States have immediate obligations, such as ensuring [that access] without discrimination and taking measures to achieve [its] full realization."[152] The Court has specified that everyone deprived of liberty must have access to potable water for personal consumption and to water for personal hygiene; the lack of drinking water constitutes grave negligence by the State with respect to its obligations of guarantee to those under its custody.[153]

96. Along the same line and specifically with respect to persons deprived of liberty, Rule 22(2) of the Mandela Rules indicates that "[d]rinking water shall be available to every prisoner whenever he or she needs it."[154] For its part, Principle XI(2) of the Principles and Best Practices states that "[e]very person deprived of liberty shall have access at all times to sufficient drinking water suitable for consumption. Its suspension or restriction as a disciplinary measure shall be prohibited by law."[155]

97. The Court, therefore, reiterates that States must provide sufficient potable water to prisoners to cover their personal consumption, as well as for their personal hygiene. This requires the State to (i) ensure access to a minimum of 15 liters of potable water for the consumption of each person to drink, to cook and for personal hygiene;[156] (ii) collect data on the availability of water in places of detention,[157] and (iii) ensure the potability of water for personal consumption, for example by the installation of systems to treat rainwater.[158]

98. The right to water is intimately related to sanitation. Thus, limited access to water may contribute to high rates of transmittal of infectious diseases in prisons.[159] In this regard, in the places where communal or shared latrines are used, the States must ensure privacy, safety and hygiene, affordability and sustainability.[160]

99. Finally, it is necessary to emphasize that the failure to supply sufficient potable water, as well as food that meets the needs of the inmates, may constitute a form of torture or cruel, inhuman or

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and water facilities and services, must be affordable for all. The direct and indirect costs associated with securing water must be affordable and must not compromise or threaten the realization of other Covenant rights; iii) *Non-discrimination*. Water, and water facilities and services, must be accessible to all, including the most vulnerable and marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds, and iv) *Access to information*. Accessibility includes the right to seek, receive and impart information concerning water issues."

151 *Cf.* Report of the Special Rapporteur on the human rights to safe drinking water and sanitation. Léo Heller, A/70/203, of July 27, 2015, paras. 16 and 18.

152 *Cf*. Advisory Opinion OC-23/17, *supra*, para. 111.

153 *Cf. Case of Vélez Loor v. Panama, supra*, para. 216 and *Case of Pacheco Teruel et al. v. Honduras, supra*, para. 67.

154 *Cf*. Mandela Rules, *supra*, Rule 22(2).

155 *Cf*. IACHR, Principles and Best Practices, *supra,* Principle XI(2).

156 *Cf*. International Committee of the Red Cross (ICRC). *Handbook on water, sanitation, hygiene and habitat in prisons*, 2013, p. 38.

157 *Cf*. Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, A/67/270, of August 8, 2012, para. 72.

158 *Cf*. UNOPS. Technical and practical considerations based on the Minimum Rules for the Treatment of Prisoners (Mandela Rules), para. 213.

159 *Cf*. See, *mutatis mutandis*, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, A/67/270, *supra*, para. 27.

160 *Cf.* Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller, A/70/203, *supra*, para. 55.

degrading treatment.[161] For this reason, different international instruments prohibit its restriction as a disciplinary measure.[162]

G. Generalized overpopulation and overcrowding

100. The Court notes that, in the States Parties to the Convention, the generalized conditions of overpopulation[163] and overcrowding[164] greatly increase vulnerability and insufficient access to basic services. In the words of ILANUD "in the majority of countries [of the region] overpopulation is the norm, and of these countries, in almost all there are critical rates of overpopulation" with an "exaggerated increase in overcrowding, with rates of over 120 per cent."[165] ILANUD, in its written observations, reported that the average density in prisons in the region reaches 184%,[166] which is in addition to the excessive use of pretrial detention[167] that in 2018 was estimated to reach 36.3% of the total prison population.[168]

101. The Court is of the opinion that overcrowding constitutes, per se, a violation to personal integrity and is contrary to the prohibition of cruel, inhuman or degrading treatment or punishment.[169] Overpopulation and overcrowding increase the risks in emergencies or fires, provoke tensions and violence among the prisoners and lead to negative repercussions or impacts on the access to services, which impedes the routine performance of the essential functions of a detention center[170] and adequate control by the prison staff (*infra* para. 109). As the Court has indicated, the State, in its role as guarantor and through all its pertinent institutions and bodies, must design and implement a prison policy for the prevention of emergency situations that may endanger the fundamental rights of the inmates.[171] In *Boyce et al. v. Barbados*, the Court held that "overcrowded conditions at a detention center may cause detrimental effects on the whole prison population, including prisoners who, as in the case at hand, are held in single cells,"[172] since it may result in a reduction of activities held outside the cells, overextend the health services and cause problems of hygiene and reduced accessibility to the lavatories and sanitary facilities, among others. Obviously, overpopulation and overcrowding are also contrary to the efficacy of the oversight of sentences and have an exacerbated impact on certain groups, such as women and children living in prison with their mothers or primary caretakers.

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161 *Cf., inter alia*, ECHR, *Case of Ebedin Abi v. Turkey*, *supra*, para. 30.

162 See, for example, Mandela Rules, *supra*, Rule 43(d). Similarly, SPT, Report on the visit to Costa Rica of March 3-14, 2019: recommendations and observations addressed to the State party.

163 When the prison density is greater than 100%.

164 When the prison density is greater than 120% of the official capacity, the Court agrees with ILANUD that the levels of overpopulation have reached a critical stage, which is called overcrowding. *Cf. Case of Vélez Loor v. Panama, supra,* para. 203 and *Case of Mota Barullo et al. v. Venezuela, supra,* para. 95

165 Written observations of ILANUD (file of observations, f. 577).

166 There are different degrees depending on the specific situation in each State. Thus, for example, in 2018, the prison density of Uruguay was around 85%, when in Guatemala it reached 342%. Written observations of ILANUD (file of observations, f. 577).

167 *Cf.* IACHR. Report on the Use of Preventive Detention in the Americas. Approved by the Inter-American Commission of December 30, 2013, OEA/Ser.L/V/I, p. 2.

168 According to the Inter-American Commission, this number is much higher in several States of the region and since 2014, this tendency has been increasing in the Americas. *Cf.* IACHR. Report on the measures to reduce the use of preventive detention in the Americas. Approved on July 3, 2017, OEA/Ser.L/V/II.163, paras. 22 and 23.

169 *Cf. Caso of Tibi v. Ecuador, supra*, para. 150 and *Case of Mota Abarullo et al. v. Venezuela*, *supra*, para. 94.

170 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 20 and *Case of Vélez Loor v. Panamá, supra*, para. 204.

171 *Cf. Case of Pacheco Teruel et al. v. Honduras, supra*, para. 68.

172 *Cf. Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C No. 169, para. 93.

102. The Court has already stated that such a situation would violate Article 5(2) of the Convention and cannot be resolved solely by building new installations, modifying existing spaces or by contracting prison officials and staff in sufficient numbers, while deaths, acts of violence and humiliating and degrading situations continue to occur with alarming frequency. Therefore, in addition to other measures that may be applicable in specific cases under the provisions of the domestic laws of the OAS Member States,[173] the Court considers it a priority that the States set limits to the housing capacities of prison installations and adopt effective measures against overcrowding.[174] On this matter, Principle XVII of the Principles and Best Practices deals with "measures against overcrowding," as follows:

> The competent authority shall determine the maximum capacity of each place of deprivation of liberty according to international standards related to living conditions. Such information, as well as the actual ratio of occupation of each institution or center shall be public, accessible and regularly updated. The law shall establish the procedures through which persons deprived of liberty, their legal representatives or non-governmental organizations can individually or collectively dispute the data regarding the maximum capacity or the occupation ratio. In these procedures, the participation of independent experts shall be permitted.
>
> The occupation of an institution over its maximum capacity shall be prohibited by law. In cases where such overcrowding results in human rights violations, it shall be considered cruel, inhuman or degrading treatment or punishment. The law shall establish remedies intended to immediately address any situation of overcrowding. The competent judicial authorities shall adopt adequate measures in the absence of an effective legal regulation.
> Once overcrowding is observed, States shall investigate the reasons for such situation and determine the corresponding individual responsibilities of the authorities who authorized that situation. Moreover, States shall adopt measures to prevent the repetition of such situations. In both cases, the law shall establish the procedures through which persons deprived of liberty, their legal representatives or non-governmental organizations can participate in those procedures.[175]

103. The Court notes that, in addition to measures to achieve a more rational use of pretrial detention,[176] in some countries the judiciary has issued rulings or other types of measures have been adopted, such as legislative initiatives,[177] that promote or establish quotas or limits to the number of persons who can be housed in a detention center, taking into account parameters promoted by international bodies with respect to the minimum space required for a life with dignity in prison.[178]

104. The Constitutional Court of Colombia declared that the state of the prisons and penitentiaries was unconstitutional. Although the Court initially was mainly concerned with the issue of quotas in those places, it subsequently defined a constitutional minimum with reference to the conditions of habitability.[179] Costa Rice proposed complementing the data on the capacity of an installation by

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173 See, *Matter of the Penitentiary Complex of Curado with regard to Brazil*. *Provisional Measures*. Order of the Inter-American Court of November 28, 2018, paras. 93 to 133.

174 UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2014, p. 195 to 202.

175 IACHR, Principles and Best Practices, *supra,* Principle XVII.

176 See, *Matter of the Penitentiary Complex of Curado with regard to Brazil*. *Provisional Measures.* Order of the Inter-American Court of November 28, 2018, paras. 93 to 133 and IACHR. Report on the measures to reduce the use of preventive detention in the Americas, *supra*.

177 In this regard, the Penitentiary Ombudsman of Argentina (PPN) informed that it presented a proposal to the legislature to regulate the functional capacity and placing of prisoners of centers of detention in order to deal with overcrowding. The proposal includes. Mechanisms of prior accreditation, with broad participation of involved actors, mechanisms of warning and control and the implementation of a system to prevent or remedy human rights violations. PPN, The Situation of Human Rights in the Federal Jails of Argentina. Annual Report 2019, p. 49. Resolution 2892/2008 of the Ministry of Justice and Human Rights in relation to the Basic Conditions of Habitability in Installations of the Federal Penitentiary Service.

178 ICRC (3.4 meters in collective dormitories and 5.4 meters in individual cells) and European Committee on the Prevention of Torture (4 meters in collective dormitories and 6 meters in individual cells). See, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 90.

179 The Constitutional Court of Colombia, by means of Judgment T-153 of 1998, for the first time declared the state of unconstitutionality "in view of the penitentiary crisis that already was linked to high rates of overcrowding. The creation of jail

defining the minimum space to house a prisoner without it implying permission to increase those quotas unlawfully[180] In the Province of Buenos Aires, Argentina, the provincial Supreme Court urged judges to reduce overpopulation through the use of a rational manner of pretrial detention in accordance with the parameters developed by the Federal Supreme Court regarding the use of alternative measures to imprisonment,[181] in addition to supporting laws on quotas.[182]

105. Overpopulation of centers of detention and the consequent overcrowding is the result of the application of a criminal policy by States that favors imprisonment as the predominant response to crime, ignoring the social origins of most of the unlawful conduct. This policy ignores alternatives to imprisonment and is encouraged by public discourse -politicians and the media- that uncritically presents prison as the only way to improve public security, employing the saying that doesn't have any rational basis: "more people in prison means more security."

106. Overpopulation is the result of the excessive use of pretrial detention and the clear punitive trend that does not give due importance to the guarantees of constitutional rights, the rule of law and the international law of human rights and which is fostered by vindicative discourses and highly emotional messages that the mass media disseminate and that are also transmitted digitally, with some authorities and politicians utilizing it opportunistically and by some judges for fear of being stigmatized by press. The Court insists that it is incumbent on all State authorities, especially judges, to resist these types of pressures and revalue the strict observance of respect for the dignity of the individual and the juridical guarantees in defense of the republican and democratic form of government through appropriate planning and the implementation of rational criminal policies.

107. The Court reaffirms the need to cease the continuing generalized situation of overpopulation and overcrowding in the region by appropriate and effective measures to reduce the prison population. Overpopulation and overcrowding have a disproportionate impact on the enjoyment of rights and access to basic services in prison of groups that are especially vulnerable, making it imperative to implement such measures with a differentiated approach.

H. Prison management

108. It has already been established that the State, as the body responsible for installations of detention and reclusion, must ensure that the manner and the method of imprisonment do not exceed the inevitable level of suffering inherent in detention (*supra* para. 51). Moreover, oversight of sentences must guarantee treatment with dignity at all times (*supra* para. 52). Therefore, the obligations that the State ineluctably assumes in its role as guarantor must include the adoption of measures that favor maintaining a climate of respect for the human rights of those deprived of liberty, reducing overcrowding and ensuring that minimum conditions of detention are compatible with their dignity, which implies providing sufficient trained personnel to ensure the appropriate and

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quotas was presented as an option to ensure dignified conditions of habitability for the population deprived of liberty." This implied that as measures to mitigate the situation, new quotas and jails would be established. Subsequently, Judgments T-388 of 2013 and T-762 of 2015 again declared a state of unconstitutional matters "in view of the persistence of the massive and generalized violation of the rights of the persons deprived of liberty." Specifically, Judgment T-762 of 2015 defined the constitutionally assured minimum of total space for each inmate, in accordance with the terms of the ICRC. In this regard, it noted that the cell area that must be guaranteed to each inmate can never be less than 3.4 square meters and that each person deprived of liberty must have a minimum surface of 20 square meters, since verification of this point is binary -yes or no- in the interest of determining the surface of the ECI. This judgment specified that "the space for housing each inmate is determined by dividing the number of square meters of the prison set out for housing the inmates by the number of inmates." *Cf.* Constitutional Court of Colombia, Order 121/18 of September 22, 2018,

180 *Cf.* Court of Oversight of the First Judicial Circuit of San José. Corrective Measure of the Definitive Closing of the Center of Institutional Care of San José, No. 1023-2016 of June 20, 2016, p. 15.

181 Cf. Supreme Court of Justice of Argentina. Case of Verbitsky, Horacio s/habeas corpus, Resolution of May 3, 2005, p. 80.

182 *Cf.* Supreme Court of Buenos Aires by Resolution 3341-19.

effective control, custody and vigilance of the prison. In addition, in view of the nature of detention centers, the State must protect the inmates from violence that, in the absence of State control, may occur among the inmates[183] and avoid the presence of arms in the hands of the inmates.[184]

109. Prison personnel play an important role in the management of prisons and in the prevention of torture from the perspective of the international law of human rights. The Court has pointed out the importance of the suitable and proper training of prison personnel, with special emphasis on those in charge of security so as to ensure that inmates are treated with dignity, thus, avoiding the risk of acts of torture and of cruel, inhuman or degrading treatment,[185] which makes indispensable appropriate selection procedures, specialized training and work conditions that dignify the task of the prison staff.[186] On the suitability of security personnel in civil jails, the Court, in *Olivares Muñoz et al. v. Venezuela*, emphasized that the functions of security, custody and surveillance of the inmates should preferably by carried out by civilian personnel especially trained for prison work and not by police and military personnel.[187]

110. The Court has also indicated that among the measures of security that States must adopt regarding prisons is the appropriate training of the prison personnel who are in charge of security.[188] The Court has also held that, to ensure the adequate and effective control of prison blocks by prison guards, there should be periodic inspections to prevent violence and to eliminate risks, the results of which must be communicated to the competent authorities.[189] In several cases, the Court has ordered, as a guarantee of non-recurrence, the strengthening of the capacities of penitentiary institutions by training their staffs on human rights and by complying with the Court's jurisprudence.[190]

111. Using the diverse sources of the applicable international law, the Court has developed a series of guidelines concerning prison management that are based on respect for the human rights of persons deprived of liberty and are especially centered on the role of prison personnel.[191] Among the

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183 *Cf. Matter of the persons deprived of liberty in the "Dr. Sebastião Martins Silveira" Penitentiary in Araraquara, São Paulo with regard to Brazil.* Provisional Measure. Order of the Inter-American Court of September 30, 2006, Considering Paragraph 16; and *Matter of the Penitentiary Complex of Pedrinhas with regard to Brazil.* Provisional Measures. Order of the Inter-American Court of March 14, 2018, Considering Paragraph 74 and *Matter of the Penitentiary Complex of Curado with regard to Brazil*. Provisional Measures, Order of the Inter-American Court of November 28, 2018, Considering Paragraph. 53.

184 *Cf. Matter of Certain Penitentiaries of Venezuela. Penitentiary of the Western Central Region (Jail of Uribana) with regard to Venezuela*. *Provisional Measures.* Order of the Inter-American Court of February 13, 2013, Considering Paragraph 7 and *Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 28, 2018, Considering Paragraph 60.

185 *Cf*. *Case of Olivares Muñoz et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of November 10, 2020. Series C No. 415, para. 102. Similarly, Mandela Rules, *supra*, Rules 74, 75 and 76, Bangkok Rules, *supra*, Rule 29.

186 *Cf*. *Case of Olivares Muñoz et al. v. Venezuela*, *supra*, para. 102. Similarly, Mandela Rules, *supra*, Rules 74(3) and IACHR, Principles and Best Practices, *supra,* Principle XXIII.

187 *Cf*. *Case of Olivares Muñoz et al. v. Venezuela, supra*, para. 92.

188 *Cf*. *Matter of Certain Penitentiaries of Venezuela. Penitentiary of the Central Western Region (Jail of Uribana) with regard to Venezuela*. Provisional Measures. Order of the Inter-American Court of February 13, 2013, Considering Paragraph 11 and *Matter of the Penitentiaries of Mendoza with regard to Argentina*. Provisional Measures. Order of the Inter-American Court of November 26, 2010, Considering Paragraph 52.

189 *Cf, See, inter alia, Matter of Certain Penitentiaries of Venezuela (Penitentiary of the Central Western Region (Jail of Uribana) with regard to Venezuela. Provisional Measures*. Order of the Inter-American Court of February 13, 2013, Considering Paragraph 11.

190 *Cf*., *inter alia*, *Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations, supra*, para. 337 and *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 274.

191 See, *inter alia*, Penal Reform International, International Handbook of Good Prison Practices, Implementation of the UN Standard Minimum Rules for the Treatment of Prisoners, San José Costa Rica, 2002; ABA, Standards of Penal Justice in the Treatment of Prisoners; International Center for Prison Studies of London, Human rights approach to prison management. Handbook for prison staff. Second edition, 2009; Justice Study Center of the Americas (JSCA) and Rule of Law Programme

recommendations are: (i) select personnel by taking into account their capabilities, integrity and human quality and offer a remuneration that attracts and maintains personnel; (ii) establish channels of communications among the administration, the personnel and the prisoners; (iii) conduct initial and then periodic training of personnel on domestic and international standards to prevent torture; (iv) develop a strategy of communication about the achievements of the prison system that informs the public on the public service that the prison personnel provide; (v) provide oversight by independent bodies on the prison systems' compliance with domestic and international standards, and (vi) provide sufficient resources for prison administration.

112. In addition, the Court underscores that prison personnel should have certain characteristics or qualifications that meet the needs of the different prison populations. Thus, for example, feminine personnel are required for prisons for women (*infra* para. 135) and it is essential to contract interpreters and cultural facilitators for the indigenous population (*infra* paras. 299 y 327).

113. It is necessary to note that, in several countries, there is a disproportion between the number of inmates and staff, which leads to situations of self-government that cause tensions of power between gangs and persons deprived of liberty and results in an internal order belonging to a group of inmates who subject others to servitude and degrading conditions of humiliation. Thus, for example, between 2010 and 2019, the proportion of prisoners to staff has been one staff person for each two prisoners in Europe,[192] while in the Americas, the proportion ranges from one staff person for each two prisoners (Argentina and Chile) to one staff person for each nine inmates (in Honduras, for example.)[193]

114. Rule 78(1) of the Mandela Rules states that "so far as possible, prison staff shall include a sufficient number of specialists, such as psychiatrists, psychologists, social workers, teachers and trade instructors."[194] The European prison standards do not fix a specific number for each inmate, with the exception of physicians and health care workers. The European Prison Rules state that "[e]very prison shall have the services of at least one qualified general medical practitioner."[195] For its part, the UN Office for Project Services has determined that the proportion of one staff member for each five inmates may significantly reduce conflicts within the prisons.[196] In synthesis, the Court is of the opinion that a proportion between staff and inmates of one for each five, as an integral component of Article 5 of the Convention, should be respected.

I. Context caused by the COVID-19 pandemic and the particular harm to certain groups in the prison system

115. The Court deems it important to place on the record, in broad terms, the context of the process of preparing this advisory opinion due to the COVID-19 pandemic and the implications that the pandemic has on the human rights of persons deprived of liberty, an especially vulnerable population. As previously stated, the conditions of detention of prisoners in the Americas present exceptional characteristics that heighten the spread of this highly contagious illness. The Court has

for Latin America of the Konrad Adenauer Foundation, Penitentiary Systems and Penal Oversight in Latin America. A regional glance and approach options, June 2021.

192 *Cf*. Council of Europe, Statistics on the proportion of prison personnel to inmates between 2010 and 2019.

193 *Cf.* Penal Reform International. Report on Global Prison Trends of 2021. pp. 36 to 39. In Brazil, Resolution 01/2009 of the Nacional Council of Criminal and Penitentiary Policy (CNPCP), which recommended that for persons provisionally deprived of liberty and convicted there should be one prison staff member for each five inmates.

194 Mandela Rules, *supra*, Rule 78(1).

195 Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to the Member States on the European Prison Rules, Rule 41(1).

196 *Cf*. UNOPS. Technical and practical considerations based on the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), p. 50.

indicated that persons deprived of liberty are highly vulnerable due the spread of COVID-19 since they are generally in overpopulated and overcrowded conditions that do not allow for an adequate social distancing to prevent the spread of the virus, inadequate and deficient measures of hygiene[197] and limitations to effectively and timely claim a series of rights, such as health and information.[198] Therefore, States are required to adopt immediate, effective and innovative measures to contain a massive infection within its prisons.[199]

116. The Court also observes that, as a consequence of the extraordinary problems and challenges caused by the pandemic, the prison population has suffered a distinct harm to the exercise of its rights, such as the right to health and the suspension or reduction of access to basic services. Programs of visitation by family members and visitors to persons deprived of liberty have been suspended.[200] There has also been a differentiated and specific impact that the measures of control and mitigation adopted by States have on certain groups, such as women deprived of liberty who have not been able to have contact with their children because of restrictions imposed on visits by minors.

117. In view of this panorama, the inter-American system has emphasized the adoption of measures regarding two aspects: (i) the adaptation of conditions of detention so as to provide the necessary regular and emergency health care as well as specific care for COVID-19 and access to vaccines and seeking alternatives to prison visits[201] and (ii) a reduction of the prison population by implementing alternatives to imprisonment.[202] In its statement *COVID-19 and Human Rights: the problems and challenges must be addressed from a human rights perspective and with respect for international obligations,* the Court stated that "[g]iven the significant impact that COVID-19 may have on those persons deprived of liberty in prisons and other detention centers, and based on the State's special situation as guarantor, it is necessary to reduce the levels of over-population and overcrowding and to provide alternative measures to confinement, in an orderly and rational way."[203] Similarly, the UN High Commissioner for Human Rights has emphasized the need to establish priority groups of persons deprived of liberty to arrange for their release, principally the most vulnerable

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197 The hygienic condition in certain prisons is limited; "Twenty per cent of the inmates do not have access to sufficient drinking water, only 37% have soap and 29% of the prison population do not receive medical care" so that "the main tools to prevent and combat the spread of the virus are difficult to implement in prisons." IDB The jails of Latin America and the Caribbean in view of the health care crisis of COVID-19, August 2020, p. 5.

198 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Request of Provisional Measures and Monitoring Compliance of Judgment.* Order of the Inter-American Court of July 29, 2020, *Considering Paragraph* 24.

199 *Cf. Matter of the Unit of Socio-educative Internment, Penitentiary Complex of Curado, Penitentiary of Pedrinhas and Plácido de Sá Carvalho Penal Institute with regard to Brazil*. *Provisional Measures.* Order of the President of the Inter-American Court of April 20, 2021, Considering Paragraph 2.

200 The Inter-American Commission recommended ensuring "that all measures to limit contacts, communications, visits, release and educations, recreative and employment-related activities are taken very carefully after a strict review of proportionality." IACHR, *Pandemic and Human Rights in the Americas.* Resolution 1/2020, adopted by the IACHR on April 10, 2020, para. 48.

201 The Inter-American Commission has recommended adapting "the conditions of detention of persons deprived of liberty, particularly concerning food, health, sanitation and quarantine measures to prevent COVID-19 contagion inside the prison, and ensuring that all prison units have medical care available." IACHR, Resolution 1/2020, *supra,* para 47.

202 *Cf. Matter of the Unit of Socio-educative Internment. Penitentiary Complex of Curado, Penitentiary Complex of Pedrinhas and Plácido de Sá Carvalho Penal Institute with regard to Brazil*. *Provisional Measures.* Order of the President of the Inter-American Court of April 20, 2021, Considering Paragraph 2. For its part, the Commission has recommended ensuring that "in the case of persons at risk for the pandemic, requests for prison privileges and alternatives to a sentence of confinement be assessed. In the case of persons convicted of serious human rights violations or crimes against humanity, bearing in mind the legal interest at stake, the seriousness of the facts of the case, and the State's obligation to punish those responsible for such violations, such assessments require closer analysis and more stringent requirements, adhering to the principle of proportionality and the applicable." IACHR, Resolution 1/2020, *supra,* para. 46.

203 Statement of the Inter-American Court No. 1/20 of April 9, 2020, "*COVID-19 and Human Rights: the problems and challenges must be addressed from a human rights perspective and with respect for international obligations.*"

populations; for example, the elderly, those with a disability and those who are already sick.[204] The SPT, in turn, in its *Advice relating to the Coronavirus Pandemic,* underscored the need to reduce prison and other populations deprived of liberty, wherever possible, by plans for provisional or temporary early release and by the review the cases of individuals subjected to pretrial detention, among other recommendations.[205]

118. From the information provided, it can be noted that, in the course of the pandemic, States have implemented a series of measures to reduce the level of overpopulation in detention centers,[206] on the basis of objective standards of prioritization of older persons, those with disabilities, sick or pregnant women or women with children living in prison and also, in some cases, for indigenous persons that are the groups that are the focus of this advisory opinion.

119. The Court underscores the pernicious effects of overpopulation and overcrowding on the rights of persons deprived of liberty, which is exacerbated by the COVID-19 pandemic and, therefore, it reiterates that States, in their role as guarantor, must adopt measures that would protect and ensure the rights to life, to personal integrity and to health of persons deprived of liberty, including the adoption of measures that ensure the appropriate social distancing and a reduction of overcrowding, as well as adequate medical care. In the event of not being able to ensure such conditions inside the prison, States must evaluate, on the basis of objective standards (such as the type and seriousness of the offense for which the person is being deprived of liberty, the age of the person and the existence of diseases or any other factor that places the person at risk of COVID-19), the wisdom of adopting measures that would modify prison sentences or others that, without modifying them, would temporarily allow a change in the oversight (such as house arrest) during the pandemic that is endangering the life, health and/or physical integrity of prisoners.[207]

120. Bearing in mind that, according to Pan-American Health Organization (PAHO), the number of cases and deaths caused by COVID-19 has decreased and that the region has a high number of vaccinated persons,[208] the Court stresses that the experience accumulated during this time is crucial to strengthening the preparation, response and recuperation with respect to this virus and potential future pandemics and epidemics, as well as to using this experience to advance in the implementation of appropriate measures to decongest the prisons by reducing overpopulation and overcrowding that fosters the spread of diseases.

V
DIFFERENTIATED APPROACHES APPLICABLE TO WOMEN WHO ARE PREGNANT, GIVING BIRTH, POSTPARTUM OR BREASTFEEDING, AS WELL AS PRIMARY CARETAKERS, DEPRIVED OF LIBERTY

121. Women, throughout the world, represent between 2% and 9% of the prison population.[209] In Latin America, most of the women prisoners are confined for committing non-violent acts, mainly

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204 *Cf.* Statement of the High Commissioner of March 25, 2020.

205 *Cf.* SPT. Advice of the Subcommittee on the Prevention of Torture to the States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic, adopted on March 25, 2020.

206 *Cf*. *Case of the Miguel Castro Castro Prison v. Peru. Request of Provisional Measures and Monitoring Compliance of Judgment.* Order of the Inter-American Court of July 29, 2020, Considering Paragraph 38.

207 *Cf*. *Case of the Miguel Castro Castro Prison Vs. Peru. Request for Provisional Measures and Monitoring Compliance of Judgment.* Order of the Inter-American Court of July 29, 2020, Considering Paragraph 41.

208 *Cf*. PAHO, "Press conference on the situation of COVID-19 in the Americas," April 20, 2022.

209 *Cf.* SPT, Prevention of torture and ill-treatment of women deprived of liberty, CAT/OP/27/1, January 18, 2016, para. 9.

related to drug trafficking, with short sentences.[210] Thus, between 40% and 75% of women deprived of liberty are imprisoned for offenses related to drugs; in other words, an amount between two to three times greater than for men.[211] The Inter-American Commission of Women has verified that the great majority of these women are in prison for non-violent offenses due to poverty and the violence to which they are subjected. They are generally women who live in poverty, with little schooling and who are responsible for the care of their children, as well as of other family members who are dependent for their care, and who have been exposed to diverse forms of abuse and violence.[212]

122. According to a study of the Inter-American Development Bank, the majority of women in prison in Latin America are mothers with an average of three children. It is estimated that 87% of the women deprived of liberty in the region have children in comparison with 79% of the men.[213] In Argentina in 2013, it was calculated that 75% of the women in jail for economic offenses were the primary providers of their homes.[214] Argentina informed that, in a 2019 survey, 84% of the men deprived of liberty stated that their children were taken care of by their mothers, while 19% of the women jailed indicated that the fathers were responsible for the care of their children.[215] Similarly, in 2015, Panama estimated that 68% of the women deprived of liberty were unmarried[216] and 81% were mothers[217] with 65% of the women deprived of liberty being the head of family.[218] In Costa Rica, in 2017, 76% of women deprived of liberty were mothers,[219] 53.2% did not have a stable partner and 65% were non-remunerated domestic workers.[220] In Colombia, in 2020, 60% of women deprived of liberty had some primary schooling; at the same time, 94% were mothers, the majority of them minors, and 75% were the head of family with scant economic resources for sustaining the home, of which many were the principal providers.[221]

123. During the past 20 years, the percentage of women in jail increased by more than 50%, which does not correlate with the rate of increase of the general population, but rather with criminal policies

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210 *Cf*. IDB, *Inside the prisons of Latin America and the Caribbean: A look from the other side of the bars*, United States, 2019, p. 12. In 2013, a report of the UN Special Rapporteur on violence against women, its causes, conditions and consequences analyzed the main causes for the incarceration of women and identified the following: presence of violence, coercion, abortion, moral crimes, running away, protection (generally in cases of violence) or rehabilitation, anti-drug policies, political activity, pretrial detention and immigration refugee detention. Report of the UN Special Rapporteur on Violence against Women. Pathways to, Conditions and Consequences of Incarceration for Women, Rashida Manjoo, A/68/340.

211 *Cf.* Written observations presented by the Inter-American Commission of Women (file of observations, f. 47).

212 *Cf.* Written observations presented by the Inter-American Commission on Women (file of observations, f. 472). See also, Report of Special Rapporteur on the right to education, Vernor Muñoz, The right of persons in detention, A/HRC/11/8, of April 2, 2009, paras. 47 and 48.

213 *Cf*. IDB, Women in the Context of Confinement in Latin America. Characteristics and risk factors associated with certain criminal behaviors. Authors: Ana Safranoff and Antonella Tiravassi. Technical Note IDB-TN- 1409, pp. 9 and 17.

214 *Cf*. Cornell Law School's Avon Global Center for Women and Justice, Defensoría General de Argentina and the University of Chicago International Human Rights Clinic. Women in prison in Argentina: Causes, Conditions and Consequences, May 2013, p. 2.

215 Observations of Argentina (file of observations, f. 49) and Penitentiary Ombudsman of Argentina, Beyond prison: paternities, maternities and troubled childhoods for the imprisonment. Autonomous City of Buenos Aires, 2019, p. 28.

216 *Cf*. UN Regional Office against Drugs and Offenses for Central America and the Caribbean in Panama (UNODC ROPAN). Analysis of the Situation of Women Deprived of Liberty in Panama from an approach of gender and law, 2015, p. 35. D

217 *Cf*. Analysis of the Situation of Women Deprived of Liberty in Panama from an approach of gender and law, *supra*, p. 36.

218 *Cf*. Analysis of the Situation of Women Deprived of Liberty from an approach of gender and law, *supra*, p. 36.

219 *Cf.* Written observations presented by the Office of the Public Defender of Costa Rica (file of observations, f. 2044).

220 *Cf.* State of the Nation. Second Report on the State of Justice (2017). Chapter 7: Deprivation of liberty: confinement and its causes, p. 290.

221 *Cf.* Ministry of Justice of Colombia. Demographics of women deprived of liberty in penitentiaries and prisons (2020), pp. 27 and 35.

that lack a gender perspective.[222] It is estimated that the number of women in prisons increased, between 2000 and 2017, three times more than for men.[223] This led, in 2011, to the universal adoption of a complementary body of rules to the Mandela Rules that contemplate the special needs of women deprived of liberty.[224] Due to its specificity and its nature as an authorized guide in the field, the Court, in this section, will take special note of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) to establish the content and the scope of the treatment referred to in Article 5(2) of the Convention.

124. Moreover, acknowledging that some aspects related to the treatment due under a differentiated approach can be related to equality between men and women, as well as to the prevention and the sanction of acts of violence against women based on reasons of sex and on the roles of gender, the Court will take into consideration, as references for interpretation, the pertinent provisions of the Convention of Belém do Pará and the Convention on the Elimination of All Forms of Discrimination against Women since those instruments complement the international *corpus iuris,* of which he American Convention forms part, on the protection of the personal integrity of women.[225]

125. In its request, the Commission asked the Court's opinion on the States' specific obligations to ensure adequate conditions of detention due to the particular circumstances of pregnant, postpartum or breastfeeding women who are deprived of liberty. To do so, the Court will deal with the matter in the following order: (A) the need to adopt special measures to make effective the rights of women who are pregnant, postpartum or breastfeeding, or primary caretakers, deprived of liberty; (B) priority in the use of alternative or substitute measures in the application and the oversight of sentences in the case of women who are pregnant, giving birth, postpartum or breastfeeding, or when they are primary caretakers; (C) principle of separation of women and men and appropriate installations for women who are pregnant, postpartum or breastfeeding, or when they are main caretakers; (D) prohibition of measures of solitary confinement and physical coercion; (E) access to sexual and reproductive health without discrimination; (F) adequate food and physical health and specialized psychological care during pregnancy, birth or postpartum periods; (g) prevention, investigation and eradication of obstetric violence in prison; (H) access to hygiene and adequate clothing, and (I) assurance that the women or primary caretakers deprived of liberty have contact, in an appropriate environment, with their children who are outside the walls of the prison.

A. The need to adopt special measures to make effective the rights of women who are pregnant, postpartum or breastfeeding, or primary caretakers, deprived of liberty

126. Since women historically constitute a small proportion of the imprisoned population, prison as an institution of social control has traditionally been conceived, designed and structured from an androcentric perspective directed toward a young and marginalized masculine population deprived of liberty for violent crimes.[226] From its origin, it has had an impact on the treatment of women in

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222 World Prison Brief, World Female Imprisonment List, *Women and girls in penal institutions, including pretrial detainees/remand prisoners*, 4th ed. (2017).

223 The World List of Women in Prison, which collects information up to 2017, notes that the population of women deprived of liberty has increased in a sustained manner, approximately 53%, in every continent since 2000. This increase cannot be explained by the increase in the world population (according to the UN the increase of the world population isa round 21% between mid-2000 and mid-2016), nor by the increase of the total of the prison population, if it is considered that since 2000 the increase in the male population was around 20%. *Cf. Study of the Platform, World Prison Brief and the Institute for Criminal Policy Research.* See also, Penal Reform International: *Global Prison Trends 2020,* p. 6 and Open Society Justice Initiative. *Women in Pretrial Detention: Presumed innocents suffering eventual punishment and abuses.*

224 *Cf*. Bangkok Rules, *supra*, Preliminary observations, paras. 1 to 12. See, also, SPT, Prevention of torture and the ill-treatment against women deprived of liberty, para. 10.

225 *Cf. Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 276.

226 *Cf.* SPT, Prevention of torture and ill-treatment against women deprived of liberty, CAT/OP/27/1, *supra*, para. 9.

prison and on the lack of an adequate infrastructure that meets their needs so that they are treated with dignity. The primary difficulties identified in the request and in the observations are: (i) lack of specialized pre- and postpartum medical care; (ii) lack of adequate protocols of birth; (iii) improper use of leg shackles and handcuffs; (iv) lack of appropriate clothing and nutrition, and (v) deprivation of contact between detained mothers and their children or other persons under their care.

127. In view of this panorama and from a gender perspective, the Court considers that, as has been developed *supra*, the principle of equality and non-discrimination requires States, through their systems of criminal justice and prison administration, to employ a differentiated approach for women prisoners so that the treatment given to the masculine population not be repeated. Similarly, the UN Special Rapporteur against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has expressed that "[d]ifferent imprisonment and treatment policies, services and even infrastructure are required to address women's distinct needs and ensure their protection."[227] In summary, the differentiated approach entails the adoption of differentiated criminal and prison policies that meet the profile and vulnerabilities of women deprived of liberty or under house arrest, such as social conditions and responsibilities of care, with the goal of their satisfactory reintegration into society.

128. It is obvious that certain special conditions, such as pregnancy, birth, postpartum and breastfeeding, place women in prison in a heightened situation of vulnerability since their lives and physical integrity may run a greater risk. The Court has already recognized the special vulnerability of pregnant women[228] that is even greater when they are deprived of liberty[229] since they require specific services, such as those related to pre- and postpartum care and birth services and because they may be subjected to prejudicial practices and specific forms of violence, ill-treatment and torture, as the Court verified in *Manuela et al. v. El Salvador.*[230] Therefore, under the international law of human rights, the situations of women deprived of liberty, who are pregnant, giving birth, postpartum or breastfeeding, are an aspect of special attention that requires a differentiated approach to ensure protection of their rights.[231]

129. This differentiated approach, in the terms that will be developed *infra*, does not imply, in any way, a discriminatory treatment, but rather it responds to special conditions, particularities and needs that may increase the risk of violations of rights in an environment such as a prison governed by eminently masculine standards, which require the adoption of a differentiated approach with a gender perspective and special measures in the design and oversight of penal and prison policies.[232] States

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227 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 16.

228 *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, para. 177.

229 *Cf. Case of the Miguel Castro Castro Prison v. Peru, supra*, paras. 275, 300 and 322; *Case of Gelman v. Uruguay. Merits and Reparations*. Judgment of February 24, 2011, para. 97 and *Matter of the Penitentiary of the Andean Region with regard to Venezuela.* Order of the Inter-American Court of September 6, 2012, Considering Paragraph. 14.

230 *Cf. Case of Manuela et al. v. El Salvador, supra,* para. 200.

231 American Declaration, Article VII. Similarly, Article 4(2) of the UN Convention on the Elimination of All Forms of Discrimination against Women states that '[a]doption by States Parties of special measures including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory" and Article 12(2). Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation"; CEDAW Committee. General Recommendation No. 24: Article 12 of the Convention (Women and health), UN Doc. A/54/38/Rev.1, 2009, para. 27; Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment states, "[m]easures applied under law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, […] shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority."

232 Mandela Rules, *supra*, Rule 2(2). The Mandela Rules state that "the individual needs of prisoners, in particular the most vulnerable categories in prison settings" shall be taken into account. Complementarily, the Bangkok Rules state that "the distinctive needs of women prisoners" shall be taken into account and that "[p]roviding for such needs in order to accomplish substantial gender equality shall not be regarded a discriminatory." Bangkok Rules, *supra*, Rule 1.

have been recommended to incorporate a gender approach into their prison policies, in line with the Bangkok Rules.[233]

130. In addition to the above, the Court emphasizes that, according to the pertinent information, a high percentage of imprisoned women are responsible for the care of children or other dependents or are the heads of single-parent households and, therefore, the interpretation of the pertinent provisions must inevitably consider this reality, which is based on historic inequalities between men and women and the roles of gender. Similarly, it is also necessary to respond to the children's best interests when they are involved in decisions that are adopted with respect to their imprisoned parents or primary caretakers, as will be addressed in the following section (*infra* paras. 188 and 189).

131. Therefore, the Court will now address the specific obligations that arise for States under the Convention with respect to the specific vulnerabilities that confront women who are pregnant,[234] giving birth, postpartum or breastfeeding, or when they are primary caretakers, notwithstanding more specific approaches that are necessary with respect to the intersectional vulnerabilities based on sex and gender and other conditions that will also be addressed, such as belonging to an indigenous community or being elderly.[235]

B. Priority in the use of alternative and substitute measures in the application and oversight of sentences in the case of women who are pregnant, giving birth, postpartum or breastfeeding, or when they are primary caretakers

132. Due to the adverse effects that imprisonment may have on women who are pregnant,[236] giving birth, postpartum or breastfeeding and children when their head of household mothers or primary caretakers are detained[237] or when they are, at an early age, living with their mothers in prison, there is a need to reformulate the penal and prison policies regarding these groups of mothers. Specifically, the international law of human rights promotes prioritization of the use of alternative or substitute measures that would meet the profile of women who are subjected to the penal system, as long as they have committed non-violent offenses, represent a low risk for public safety, and the deprivation of liberty may cause serious damage to the children, whether they are separated from their mothers or whether they are imprisoned with them. The Bangkok Rules, as specific guidelines in the area, provide in Rule 64 that:

> Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the women represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

133. The Court deems that women deprived of liberty, who are pregnant, postpartum or breastfeeding or with responsibilities of care, must be given preference for alternative or substitute measures to detention or imprisonment or for moderate forms of detention, such as house arrest or the use of electronic bracelets or anklets, depending on the degree of the offense -such as the

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233 *Cf.* SPT, Prevention of torture and ill-treatment against women deprived of liberty, CAT/OP/27/1, *supra*, para. 52.

234 These considerations are also applicable to other pregnant women.

235 The SPT has stressed that sexist violence and discrimination against women and for reasons of gender by "recalling that gender-based violence and discrimination against women" […] are exacerbated when combined with other factors, such as social class, ethnicity, age, sexual orientation, nationality, migration status, health status, type of offense committed and exception regimes of detention." SPT, Prevention of torture and ill-treatment against women deprived of liberty, CAT/OP/27/1, *supra*, para. 51.

236 Other pregnant women face similar situations.

237 *Cf.* Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 27.

commission of non-violent offenses- and the minimum risk that a woman offender represents to society, as well as the best interests of the children.[238] This means that deprivation of liberty should only be used in exceptional circumstances.

134. The Court reaffirms that, in ordering alternative or substitute measures for women who are pregnant or have small children, States must ensure that the basic needs of food, work, health and education are satisfied by providing access to specific programs and to social assistance, with the purpose of increasing opportunities for reintegration, as well as of mitigating possibilities of criminal recidivism and of reversing the socioeconomic and legal barriers that might have an adverse impact on the effective implementation of this type of measures, such as their poverty, employment opportunities and responsibilities of care.

C. Principle of separation between women and men and appropriate installations for women who are pregnant, postpartum or breastfeeding, or when they are primary caregivers

135. When, due to the particular circumstances of the offense, it is not possible to decree alternative or substitute measures and, therefore, deprivation of liberty is ordered, Article 5(5) of the Convention establishes the principle of separate places of detention for men and women. Similarly, the Mandela Rules specify that "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."[239] The Court considers that all women deprived of liberty must be placed in a physically separate space from men and, moreover, in blocks or sections that are less restrictive and have a lower level of security, which responds to the low level of risk that the women represent, and with sufficient space to meet their specific needs.[240] The Court also stresses that, pursuant to international requirements, the guards should be women.[241]

136. The Court also notes that, due to the low number of detained women, prisons assigned exclusively for women are generally located far from their homes or places of origin, which impacts on the right to maintain contact with their family members and on their health and mental well-being.[242] Therefore, it is essential to prioritize the placement of women with responsibilities of care in centers that are as close as possible to their residences or to those of their family in order to maintain family ties and support for their needs of care.[243]

137. With specific reference to women who are pregnant, postpartum or breastfeeding, or when they are the primary caretakers, there are abundant standards in the international law of human rights that call on States to ensure differentiated spaces adapted to their needs -maternal-infant

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238 Bangkok Rules, *supra*, Rule 2(2). *Cf.* Report presented by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, A/HRC/31/57, *supra*, paras. 27 and 28; Report of the Special Rapporteur on the right to education, Vernor Muñoz, The right to education of persons in detention, A/HRC/11/8, *supra*, para. 102 and Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "The Children of Incarcerated Parents," September 30, 2011, para. 30 and Human Rights Council, Resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37, of April 19, 2012, para. 3. 69(a). See, for example, Argentina, Criminal Code, Articles 10 and 32(e) and (f) of Law 24.660, amended by Law 26.472 (file of observations, f. 2678) and Brazil, Law 13.769, of December 19, 2018 and Supreme Federal Tribunal, Habeas Corpus 143.641, São Paulo, 2018.

239 Mandela Rules, *supra*, Rule 11(a).

240 *Cf.* Bangkok Rules, *supra*, Rules 12 and 41(d) and Report of the UN Special Rapporteur on Violence against Women: Pathways to Conditions and Consequences of the Incarceration for Women, Rashid Manjoo, A/68/340, *supra*, p. 85.

241 Rule 53(1) and 8(a) and 2 Mandela Rules. See also, *Matter of the Prison of the Andean Region with regard to Venezuela*. Order of the Inter-American Court of September 6, 2012, Considering Paragraph 14.

242 *Cf.* Penal Reform International (PRI) and the Association for the Prevention of Torture (APT), *Women in detention: a guide to gender-sensitive monitoring*, 2013, p. 7.

243 Bangkok Rules, *supra,* Rules 4 and 26.

modules-[244] with cells that remain open and access to open air spaces and recreation. Cribs and beds with fire-proof mattresses must be available when their children live in prison. States must also incorporate specially adapted installations that are appropriate for the care of children living in prison, such as maternal daycare facilities or gardens that do not have a prison aspect, but rather one that fosters their integral development.[245]

138. The Bangkok Rules state that the prison regime must be flexible enough to respond to the needs of women who are pregnant, postpartum or breastfeeding, or when they are primary caretakers, and must enable women prisoners to participate in prison activities;[246] to provide women prisoners with the maximum possible opportunities to spend time with their children,[247] and to ensure that the environment provided for raising those children is as close as possible to that of a child who lives outside prison.[248]

139. Therefore, the Court considers that States must regulate[249] and put into practice differentiated spaces adapted to the needs of women who are pregnant, postpartum or breastfeeding, with children living in prison, or are primary caregivers and must also allow them to participate in activities that are offered in prison, such as remunerated work that includes differentiated jobs and hours,

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[244] The Mandela Rules specify that [i]n women's prisons there shall be special accommodations for all necessary prenatal and postnatal care and treatment." Mandela Rules, *supra*, Rule 28. The Principles and Best Practices have established that "[i]n women's or girls' institutions there shall be special accommodations, as well as adequate personnel and resources for pre-natal and post-natal care" and treatment of women and girls." IACHR, Principles and Best Practices, *supra,* Principle X.

[245] The Principles and Best Practices add that "where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child." IACHR, Principles and Best Practices, *supra,* Principle X.

[246] *Cf.* Bangkok Rules, *supra,* Rule 42.

[247] *Cf.* Bangkok Rules, *supra,* Rule 50.

[248] *Cf.* Bangkok Rules, *supra,* Rule 51(2).

[249] Argentina notes in Article 192 of Law 24.660 of the sentence of deprivation of liberty that: "the installations for women shall have special accommodations for the pregnant inmates and those who are about to give birth. The necessary measures shall be adopted so that the birth takes place in a maternity ward." Bolivia regulates this matter in two legal instruments: the Code of Children and Adolescents and in the Law of Oversight of the Sentence and Monitoring. The former establishes in Article 106 that "exceptionally, a child under the age of six (6) may stay with the mother, but in no case in the prisons for men. Nurseries and centers for child development shall be available in places near prisons for women." The Law of Oversight of the Sentence and Monitoring, in its Article 26, indicates that children under the age of six in prisons shall be placed in nurseries. Its Article 84 establishes the minimum infrastructure, indicating that prisons must have a physical infrastructure adequate for its functions, purposes and goals. In a list that establishes the minimum that prisons must have mentions nurseries for children under six years of age. The legislation in Brazil establishes that prisons for women must have a section for women who are pregnant and for women giving birth and a nursery for children older than six months and under seven years of age in order to aid the defenseless child whose guardian is in prison. Colombia regulates in its Code of Prisons that the installations shall have an appropriate environment for nursing mothers that would favor the proper psychosocial development of children under three years of age who live with their mothers. In Chile, the material is governed by Supreme Decree 518, which establishes the Regulations of Prison, which establishes that prisons for women there must have accommodations with adequate spaces and conditions for pre-natal and post-natal care, as well as for the care of nursing children of the inmates. It adds that the places where there are no centers, women inmates must remain in accommodations separated from the other prisoners, although they may participate in joint activities with male prisoners. In Panama, when the law that reorganized the prison system refers to prisons for women it defines them as those for the care of women and those that have adequate installations for the care of nursing children of women inmates. It adds that in the places where there are no centers, the women are to be in installations separated from the rest of the prison population. Article 47 of the law states that the prisons for women must have an area for nursing mothers. Peru establishes in Article 81 of its Code on the oversight of sentences that the prisons for women or the sections for them must have obstetrical and gynecological materials and that the special accommodations for women with children must have an environment and the necessary materials for infant care. The same law, when it lists the special accommodations that it defines as those designed for care, indicates that they include "centers for mothers with children, who have a place for a nursery." Argentina. Law on the oversight of deprivation of liberty of July 8, 1996; Bolivia. Code of the Child and Adolescent of October 27, 1999. Bolivia. Law of the Oversight on the Sentence and Monitoring of December 20,2001; Brazil. Law on Oversight of the Sentence of July 11, 1984. Colombia. Law 65 of 1993, which issued the Code of Prisons of August 20, 1993; Chile. Regulations on Prisons, August 21, 1998; Panama. Law that reorganized the prison system, August 1, 2003; Peru. Code on the Oversight of the Sentence, August 2, 1991.

educational training and cultural, sports and recreational activities.

D. Prohibition of measures of solitary confinement and physical coercion

140. Article 5(2) of the Convention prohibits torture and cruel, inhuman or degrading treatment or punishment, which implies that all restrictive or disciplinary measures that contravene that norm must be considered prohibited and violative of the Convention. For its part, Rule 43 of the Mandela Rules specifies a series of practices that are not permitted, among them (a) indefinite solitary confinement; (b) prolonged confinement; (c) placing a prisoner in a dark or a permanently lighted cell; (d) corporal punishment or reduction of a prisoner's food or drinking water and (e) collective punishment. In turn, Rule 44 defines solitary confinement as the confinement of prisoners for 22 hours or more a day without meaningful human contact and prolonged solitary confinement for a period in excess of 15 consecutive days.

141. Rule 45 of the Mandela Rules establishes that:

> 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
> 2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children as referred to in other United Nations standards and norms in crime prevention and criminal justice continue to apply. [underlining added]

142. The prohibition of punishment of solitary confinement and similar measures found in Rule 45(2) is also stated in Rule 22 of the Bangkok Rules, which refers to the special vulnerability of certain categories of women and the best interests of children and states that solitary confinement or disciplinary segregation is not to be applied to pregnant women, nor to women with children nor those nursing their children in order "to avoid causing possible health complications to those who are pregnant or penalizing their children in prison by separating them from their mothers."[250] Similarly, Principle XXII of the Principles and Best Practices prohibits measures of solitary confinement of pregnant women; of mothers living with their children inside prisons and of children deprived of liberty.[251]

143. Therefore, with respect to adult women in general, international law requires that solitary confinement can only be ordered as a measure of *ultima ratio* for relatively serious disciplinary infractions when there are no other less harmful means and should be the result of an administrative process with guarantees of due process. Moreover, solitary confinement must not exceed 15 days nor be indefinite. The Court has established that being held incommunicado can only be used exceptionally in view of the serious effects that it causes since isolation from the outside world produces moral suffering and mental disturbances which makes anyone particularly vulnerable and exacerbates the risk of aggression and arbitrariness in prison.[252] The Court recalls that, under its contentious jurisdiction, it has ruled on the effects on inmates of isolation and has indicated, *inter alia*, that prolonged isolation and coercive incommunicado are, per se, cruel and inhuman treatment, harmful to a person's mental and moral integrity and to the right to the respect of the inherent dignity of the human being."[253]

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250 UNODC. Commentary on the Bangkok Rules, 2009, Commentary 22.

251 *Cf.* IACHR, Principles and Best Practices, *supra,* Principle XXII.

252 *Cf. Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 87 and *Case of Pollo Rivera et al. v. Peru. Merits, Reparations and Costs*. Judgment of October 21, 2016. Series C No. 319, para. 159.

253 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra*, para. 94 and *Case of Pollo Rivera et al. v. Peru, supra*, para. 159.

144. The Court considers violative of Article 5(2) of the Convention the application of solitary confinement as a disciplinary measure or for any other purpose for women who are pregnant, postpartum or breastfeeding and for women with children.[254] The Court also considers that disciplinary sanctions cannot include the prohibition of contact of women with their family members, especially their children.[255] In like manner, disciplinary measures that consist in prohibiting visits to pregnant women or those with children are prohibited.[256]

145. In *Manuela et al. v. El Salvador*, the Court recognized that the use of handcuffs and other like devices as instruments of physical coercion of women detained or deprived of liberty who have recently given birth is contrary to Article 5(2) of the Convention.[257] Moreover, the Mandela Rules and the Bangkok Rules establish that "[i]nstruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth."[258]

146. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has pointed out that "[t]he use of shackles and handcuffs on pregnant women during labour and immediately after childbirth is absolutely prohibited and representative of the failure of the prison system to adopt protocols to unique situations faced by women."[259] The Special Rapporteur on violence against women, its causes and consequences has also pointed out that this practice may be considered violence against women and other human rights violations.[260]

147. In view of the foregoing, the Court underscores that there is a broad international consensus regarding the absolute prohibition on the use of shackles and handcuffs on pregnant women during their transfer to medical centers as well as before, during and immediately after childbirth.[261] This is due, in large part, to the negative impact that the use of these mechanisms can have on their physical and mental health[262] and to the absence of a reasonable basis to immobilize women who are in these

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254 Bolivia specifically prohibits the punishment of solitary confinement for women with children when nursing. Chile regulates in Article 86 of the Prison Rules that placement in a solitary cell is prohibited for pregnant women and during six months after giving birth, for nursing mothers and for those who have their children with them. Panama establishes that pregnant women deprived of liberty have the right to be excused from any treatment incompatible with their state, forty-five days before and six months after childbirth. Peru, in Article 30 of the Sentencing Code establishes prohibitions to apply the punishment of solitary confinement to pregnant women and those who have children with them. *Cf*. Bolivia. Law of the Enforcement of the Judgment and Monitoring, *supra*, Article 134; Chile. Regulations of the Prisons, *supra*, Article 86; Panama. Law of the Reorganization of the Prison Administration, *supra*, Article 68.7. Perú. Code of Criminal Enforcement, *supra*, Article 30.

255 *Cf.* Bangkok Rules, *supra,* Rules 22, 23 y 14.

256 *Cf.* Bangkok Rules, *supra,* Rule 23. See also, Court of Appeals of Concepción, Chile, Rol 216-2018 and Court of Appeals of Valparaíso. Rol 72-2017 (file of observations, fs. 2388 to 2401).

257 *Cf. Case of Manuela et al. v. El Salvador, supra*, paras. 198 to 200.

258 Mandela Rules, *supra*, Rule 48 and Bangkok Rules*, supra*, Rule 24.

259 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 21.

260 *Cf.* Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, on a human rights-based approach to mistreatment and violence against women in reproductive health services with a special focus on childbirth and obstetric violence A/74/137, of July 11, 2019, para. 22.

261 *Cf*. Report presented by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, paras. 21 and 70(h). See also, Supreme Court of Chile, Rol 92795-16 (file of observations, fs. 2368 to 2386).

262 For example, the American College of Obstetricians and Gynecologists and the American Psychological Association (APA) have condemned the practice of the use of shackles since they place in risk the health of the woman and may ca use severe pain and trauma. See, the American College of Obstetrician and Gynecologists, *Health Care for Confined Women*. Available at: https://www.acog.org/advocacy/policy-priorities/health-care-for-incarcerated-women#:~:text=ACOG%20supports%20policies%20restricting%20the,person%20and%20fetus%20at%20risk and APA, *APA and its members are fighting to prevent the unnecessary shackling of pregnant female inmates — a practice that speaks to larger health and mental health needs for women in prisons and jails.* Available at: https://www.apa.org/monitor/2016/06/restraint-inmates

delicate health conditions. The use of restraints in women before, during and after childbirth constitutes violence and gender discrimination[263] and may be an act of torture and/or cruel, inhuman or degrading treatment.[264] Therefore, it is imperative that States, by adopting the corresponding legislative or other measures, eradicate the use of restraining or immobilizing measures on imprisoned women who are close to childbirth, in labor or have recently given birth.

E. Access to sexual and reproductive health without discrimination

148. The Court has held that sexual[265] and reproductive[266] health is a component of the right to health, which has special implications for women due to their biological capacity to become pregnant and to give birth. It is related to reproductive autonomy and freedom with respect to the right to take autonomous decisions regarding their life plan, their body and their sexual and reproductive health, free of all violence, coercion and discrimination. It also refers to access to reproductive health services and information, education and the means to allow them to exercise their right to decide freely and responsibly on the number of children that they desire and the spacing of the births.[267] In addition, it includes the underlying determinants of sexual and reproductive health, including access to safe and potable water, adequate health and adequate nutritious food.[268]

149. The Court reiterates the instrumental nature of the right to access to information in the area of health since it is an essential means to obtaining informed knowledge and, thus, is necessary for the effective realization of the right to autonomy and freedom in the area of reproductive health.[269] In this regard, "[i]nformed consent consists in a prior decision to accept or to submit to a medical act in the broad sense, obtained freely; in other words, without threats or coercion, improper inducement or incentives, manifested after obtaining the adequate, full, trustworthy, understandable and accessible information, as long as this information has been truly understood, which would allow the full consent of the individual."[270]

150. The right to sexual and reproductive health must meet the elements of availability,

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263 *Cr.* Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, on a human rights-based to mistreatment and violence against women in reproductive health services with a special focus on childbirth and obstetric violence, A/74/137, *supra*, paras. 15 and 22.

264 *Cf*. Report presented by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra,* para. 21. For example, the ECHR has stated that there is no justification for the use of handcuffs or the shackling of women in pre-natal or post-natal periods receiving gynecological care since it may be considered inhuman or degrading treatment. *Cf*. ECHR, *Case of Korneykova and Korneykov v. Ukraine*, No. 56660/12. Judgment of March 24, 2016, paras. 111 to 116. See, similarly, CAT. Conclusions and Recommendations, CAT/C/USA/CO/2, of July 25, 2006, para. 33.

265 Sexual health, according to the definition of the World Health Organization (WHO) is "a state of physical, emotional, mental and social well-being in relation to sexuality." WHO, Health Topics, Definition of "sexual health." Available at: https://www.who.int/es/health-topics/sexual-health#tab=tab_2

266 Reproductive health, as described in the Programme of Action of the International Conference on Population and Development, refers to the ability to reproduce and the freedom to adopt informed, free and responsible decisions on procreation. It also includes the access to a series of information, goods, establishments and reproductive health services that would allow people to adopt informed, free and responsible decisions on reproductive behavior. *Cf*. Programme of Action of the International Conference on Population and Development, Cairo, UN A/CONF.171/13/Rev.1, 1994, Chapter VII, para. 7(2).

267 *Cf*. *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. 148; *Case of I.V. v. Bolivia*, *supra*, para. 157 and Case of *Manuela et al. v. El Salvador*, *supra*, para. 192.

268 *Cf*. ESCR Committee. General Comment 22 (2016), on the right to sexual and reproductive health (Article 12 of the (ICESCR), E/C.12/GC/22, of May 2, 2016, para. 7.

269 *Cf*. *Case of I.V. v. Bolivia*, *supra*, para. 163.

270 *Cf. Case of I.V. v. Bolivia*, *supra*, para. 166.

acceptability, quality and accessibility.[271] The Court understands that the component of accessibility is crucial to effectively guarantee this right to persons deprived of liberty, which includes physical accessibility; that is, that goods and services are available within safe physical and geographical reach for women deprived of liberty, so that they are able to receive timely services and information;[272] affordability, in that the essential goods and services must be provided at no cost and are based on the principle of equality to ensure that health costs do not represent a disproportionate charge,[273] and accessibility to information so that women are able to seek, receive and impart information and ideas on matters of sexual and reproductive health generally and also to receive specific information on the state of their health.[274]

151. The ESCR Committee has expressed that "[a]ll individuals and groups should be able to enjoy equal access to the same range, quality and standard of sexual and reproductive health facilities, information, goods and services, and to exercise their rights to sexual and reproductive health without experiencing any discrimination"[275] and that "[t]he sexual and reproductive health needs of particular groups should be given tailored attention."[276] Specifically, the Committee sustained that the deprivation of liberty implies a greater vulnerability and specific needs that require that the State adopt measures to ensure that the women inmates have the information, goods and sexual and reproductive care.[277]

152. As deprivation of liberty historically has involved barriers to access to this right, the Court considers that the State has a reinforced obligation to ensure access, without discrimination, to quality sexual and reproductive health care to women deprived of liberty and to adopt measures to eradicate practical barriers to the full realization of the right to sexual and reproductive health,[278] such as (i) a medical examination upon being admitted to prison conducted by a female medical specialist[279] to identify any type of sexual abuse or other forms of violence that they may have been subject to before admittance and to determine their sexual and reproductive health needs;[280] (ii) the necessary sexual and reproductive health information and care in general, access to gender-based preventive health services, access to and the free provision of anti-contraceptive methods, family planning and the prevention and treatment of sexually transmitted diseases;[281] (iii) complete and timely care in the event that they have been victims of violence or sexual rape, including access to prophylactic therapies, emergency anti-contraceptives and psychosocial care,[282] and (iv) information on pregnancy and the status of the health of the fetus, as well as on the recommended medical controls and their results.[283] All examinations and procedures must meet the requirements of privacy,

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271 *Cf*. ESCR Committee. General Comment 14, *supra*, para. 12 and General Observation 22, *supra*, paras. 11 to 21 and 25.

272 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 16.

273 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 17.

274 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 18.

275 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 22.

276 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 24.

277 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 31.

278 *Cf*. ESCR Committee. General Comment 22, *supra*, paras. 45 and 46 and IACHR, Principles and Best Practices, *supra,* Principles IX and X.

279 When this is not possible, she has the right to request that a female accompany her and that there be a female member of personnel present. *Cf*. Bangkok Rules, *supra*, Rules 6, 8 and 10(2).

280 *Cf*. Bangkok Rules, *supra*, Rule 6(e).

281 See, similarly, *Case of I.V. v. Bolivia, supra*, paras. 155 to 164 and *Case of Manuela et al v. El Salvador, supra*, paras. 192 and 193.

282 *Cf*. Bangkok Rules, *supra*, Rules 6 (e), 7, 25 (e), 42 (a) and 60.

283 *Cf. Mutatis mutandis*, ESCR Committee. General Comment 22, *supra*, para. 18.

confidentiality and dignified treatment.[284]

F. Adequate nutrition and specialized physical and psychological health care during pregnancy, childbirth and postpartum

153. The Court has already determined that the rights to health and to food are recognized in general terms by Article 26 of the Convention and that adequate food and nutrition are among the basic determinants of the right to health. (*supra* paras. 80 and 87). In addition, the Court has held that "[t]he States must adopt special measures to secure women, especially during pregnancy, delivery and lactancy, access to adequate medical care services."[285] In this section, the Court will address, under a differentiated approach with special emphasis on the particularity of the deprivation of liberty, the needs of specialized medical care, "taking into account the characteristics and factors that solely belong to women,"[286] as well as the right to adequate food for the nutritional needs of women during pregnancy, childbirth, postpartum or breastfeeding. The Court shall also take into consideration that, as the World Health Organization (hereinafter "the WHO") has emphasized, "maternal nutrition is a fundamental determinant of fetal growth, birth weight and infant morbidity."[287]

154. Diverse specialized instruments and authorized documents recognize these fundamental rights[288] by indicating that women who are pregnant, postpartum or breastfeeding have special health and nutritional needs that must be adequately met by the State in its special role as guarantor of the rights of persons deprived of liberty.[289]

155. Moreover, the Court has indicated that prison health services must maintain a level of quality

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[284] *Cf*. *Manuela et al. v. El Salvador, supra*, para. 203 and ESCR, General Comment 14, *supra*, para. 12. See also, CEDAW, General Recommendation 24, *supra*, para. 22.

[285] Cf. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, *supra*, para. 177.

[286] Among others, the CEDAW Committee has mentioned biological factors that differ for women in comparison to men, such as the menstrual cycle, their reproductive function and menopause, as well as socio-economic factors that vary for women in general and for some groups of women in particular, such as the different forms of violence that can affect their health. CEDAW Committee. General Recommendation 24, *supra*, para. 12.

[287] *Cf*. WHO, Executive Council. Nutrition of women in pre-conception period, during pregnancy and the breastfeedingfeeding period. EB130/11 of December 20, 2011, p. 2, para. 12.

[288] Article i2 of the Convention on the Elimination of All Forms of Discrimination against Women specifies that "States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation." Article 48 of the Bangkok Rules specifies that:

> 1. Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.
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> […]
>
> 3. The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes.

Principles and Best Practices establishes that women and girls deprived of liberty shall be entitled to access to specialized medical care that corresponds to their physical and biological characteristics and that they shall have access to gynecological and pediatric care before, during and after giving birth. IACHR, Principles and Best Practices, *supra,* Principle X.

[289] For example, Argentina establishes in the Law of the Comprehensive Protection of the Rights of Children and Adolescents that women deprived of liberty shall be given special assistance during pregnancy and childbirth; Brazil regulates the matter in Article 14(3) of its Law of Criminal Oversight, by stating that women shall receive medical care, especially during pre-natal and post-natal periods and the newborn shall also receive medical care and Panama regulates this matter in the Law to reorganize the prison system by noting that in Article 68 that "pregnant women have the right to receive specialized medical care during pregnancy, prepartum and postpartum, as well as to receive the appropriate medical, gynecological, obstetrical services." Argentina. Law of the Comprehensive Protection of the Rights of Children and Adolescents. October 26, 2005, Article 17; Brazil, Law of Criminal Oversight. July 11, 1984, para. 143 and Panama, Law to reorganize the prison system. August 1,2003, Article 68.

equal to that for those who are not deprived of liberty (*supra* para. 86). The Court considers that, under the principle of equality and non-discrimination, prepartum, childbirth and postpartum care provided to women detained in prison must be equal to that outside prison. Furthermore, whenever women are under the total control of prison authorities, the State is obligated to prevent irreparable harm to the rights to physical and mental health, personal integrity and life of pregnant women,[290] as well as during childbirth and postpartum. Therefore, the provision of mental health care by specialized doctors, as well as providing and facilitating treatment programs in prison and in the community for drug abuse, is essential.[291]

156. The specialized sources indicate that, as a general rule, childbirth should occur outside the prison. In the event that is not possible, the Court stresses the importance of prioritizing the right of children born in prison to the registration of their birth and to their right to nationality.[292] The registration should take place as soon as possible and should exclude any reference to the prison in which the birth took place.[293]

157. States have a special obligation to ensure that access to food by women deprived of liberty who are pregnant, giving birth, postpartum or breastfeeding is adjusted to the needs at each of these stages and conditions. Treatment programs must also take into account the medical and nutritional needs of the prisoners who have recently given birth and whose babies are not living with them in prison.[294] The Court considers that women who are pregnant, postpartum or breastfeeding have the right to receive specialized nutritional plans created by qualified medical personnel to meet their specific needs.

158. It is especially important that States observe the multiple standards in the area of specialized physical and psychological health care during pregnancy, childbirth and postpartum as minimum international obligations that guide the actions and implementation of prison policies and that direct States to:

a) Adopt special measures to ensure that women deprived of liberty are treated with dignity and have adequate access to specialized medical services, "specially during pregnancy, delivery, [postpartum] and lactation."[295]
b) Ensure that a qualified doctor, a pediatrician and an obstetric guard are available 24 hours within the facility for pregnant women and small children[296] and that there is easy access to

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290 *Cf. Matter B with regard to El Salvador. Provisional Measures.* Order of the Inter-American Court of May 29, 2013, Considering Paragraphs 14 and 17.

291 The Bangkok Rules state that "[p]rison health services shall provide or facilitate specialized treatment programmes designed for women and substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds." In addition, "[t]he provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes." Bangkok Rules, *supra,* Rules 15 and 62.

292 See, American Convention, Article 20 and Convention on the Rights of the Child, Article 7. See also, *mutatis mutandis*, *Case of the Girls Yean and Bosico v. Dominican Republic.* Judgment of September 8, 2005. Serie C No. 130.

293 The Mandela Rules state that "[a]rrangements shall be made wherever practicable for children to be born outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate." The Principles and Best Practices reaffirm that the birth "shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospital or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate." Mandela Rules, *supra,* Rule 28, IACHR, Principles and Best Practices, *supra,* Principle X.

294 *Cf.* Bangkok Rules, *supra*, Rule 48.

295 *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, *supra*, paras. 177 and 178 and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 132.

296 *Cf.* CEDAW Committee. *Alyne da Silva Pimentel Teixeira v. Brazil*. Communication 17/2008. CEDAW/C/49/D/17/2008, of August 10, 2011, paras. 7(3) and 8(2)(a), Final Observations on the fourth and fifth periodic reports on Nepal, para. 32(c),

gynecologists, tocologists and obstetricians.[297] The ESCR Committee has indicated that "to lower rates of maternal mortality and morbidity requires emergency obstetric care and skilled birth attendance."[298]

c) Fully inform women who are pregnant, postpartum or breastfeeding on their medical condition and ensure access to precise and timely information on reproductive and maternal health during all stages of pregnancy; information that is based on scientific evidence and offered without bias, free of stereotypes and discrimination, including a plan for the birth with the attending health facility and the right to mother-child contact.[299]

d) Seek the free, informed and voluntary consent before any medical examination or procedure regarding sexual and reproductive health.[300]

e) Ensure privacy by not providing information to hospital or health centers on the reasons for detention and the criminal status of the women.[301] Care must be taken to protect confidentiality during the entire process.

f) Ensure that pregnant women are transferred as soon as possible to civil hospitals for the birth. If this is not possible, the birth must be under the responsibility of a specialized doctor in appropriate facilities for childbirth.[302] In any case, if security personnel who are not doctors are required to be present, they should be female and dressed in civilian clothes.

g) Verify that the transfer of women during pregnancy, prepartum, childbirth, postpartum or breastfeeding is carried out, without handcuffs or shackles, in the custody of female personnel and by appropriate means that comply with the necessary measures of hygiene and support.[303]

h) Plan for care that is sensitive to cultural practices.[304]

i) Promote the presence of a woman companion of the prisoner's confidence and choice during the entire process of the birth.[305]

j) Ensure permanent contact with the newborn child, especially during the first moments after birth (even if still in the neonatology area).[306]

k) Provide a specialized nutritional diet formulated by qualified medical personnel to meet the specific needs at each stage of pregnancy and facilitate maternal breastfeeding.[307]

l) Offer, as a prison service, courses on prepartum care, breastfeeding and care of the newborn child to all women deprived of liberty who are in the final trimester of pregnancy.

m) Ensure specialized psychological care and support.[308]

n) Provide or facilitate programs of care and specialized support in the area of the unlawful use

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U.N. Doc. CEDAW/C/NPL/CO/4-5, of July 29, 2011. See also, CEDAW Committee, Final observations on the sixth periodic report on Angola, para. 31(b), U.N. Doc. CEDAW/C/AGO/CO/6, of March 27, 2011 and Final observations on the second, third and fourth periodic report on Bolivia, para. 43, U.N. Doc. CEDAW/C/BOL/CO/4, of April 8, 2008. SPT, *Recommendation to Peru,* CAT/OP/PER/1, para. 48.

297 *Cf.* SPT, Prevention of torture and mistreatment against women deprived of liberty, CAT/OP/27/1, *supra*, para. 28.

298 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 28.

299 *Cf, Mutatis mutandis*, ESCR Committee. General Comment, *supra*, para. 18.

300 *Cf*. *Case of I.V. v. Bolivia*, *supra*, para. 166.

301 *Cf*. *Mutatis mutandis, Case of Manuela et al. v. El Salvador*, *supra*, para. 224.

302 *Cf.* Mandela Rules, *supra*, Rule 28 and IACHR, Principles and Best Practices, *supra,* Principle X.

303 *Cf*. Mandela Rules, *supra*, Rules 47, 48 and 49. See also, Supreme Court of Chile, RoI 72.975-16, Judgment of December 1, 2016 (file of jurisprudence, fs. 5085 to 5101).

304 *Cf*. ESCR. General Comment 22, *supra*, para. 20.

305 *Cf*. WHO. Summary of the recommendation on intrapartum care for a positive childbirth experience, 2018 and Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, A human rights-based approach to mistreatment and violence against women in reproductive health services, with a focus on childbirth and obstetric violence, A/74/137, *supra*, para. 81(e).

306 In these circumstances, there is a guarantee of joint internment with the mother and of providing information on that internment.

307 *Cf.* See*, inter alia*, CEDAW, Article 12; Mandela Rules, *supra*, Rule 22 and Bangkok Rules, *supra*, Rule 48.

308 *Cf.* Bangkok Rules, *supra*, Rules 12, 35, 42(4) and 48.

of drugs for women.[309]

o) Promote the training of judicial and prison personnel on the matter of childbirth, on how to act during the prepartum stage and on the importance of acting efficiently and sensitively with respect to the particular situation of detained pregnant women so that the personnel are able to deal promptly with complaints and concerns related to pregnancy.[310]

p) Make available a simple, effective and independent mechanism to present complaints regarding the failure to comply with these requirements.[311]

159. The Court deems that, in order that these standards are effective in practice, States must provide a normative framework and protocols regarding the specialized prepartum, delivery and postpartum medical care that would ensure that pregnant women and other child-bearing persons deprived of liberty be effectively provided, free of charge, with goods and services related to reproductive health, including routine medical checks, before and after the birth, and psychological care, which is a State's specific obligation to effectively oversee and to regulate access to basic services in prisons and other detention centers to ensure that it does not diminish nor violate the right to sexual and reproductive health.[312]

G. Prevention, investigation and eradication of obstetric violence in prisons

160. Bearing in mind the diverse conceptions on obstetric violence as a human rights violation,[313] the Court considers that violence exercised on women during pregnancy, childbirth and after childbirth is a gender-based form of violence, particularly obstetric violence, that is contrary to the Convention of Belém do Pará, which obligates States to prevent and to abstain from acts of gender-violence during access to reproductive health services, including childbirth, with an increased duty in the case of women deprived of liberty.[314] The Court underscores that pregnant women deprived of liberty are especially vulnerable to be subjected to obstetric violence and, therefore, the State must strengthen measures of prevention of such violence in the obstetrical health services that it provides to this population.

161. For this, the WHO suggested a human rights-focused vision that encourages respectful maternal care during the entire process of pregnancy and childbirth, which implies organized care for every woman in a manner that would maintain their dignity, privacy and confidentiality; that would ensure their physical integrity and appropriate treatment, and that would allow them to make

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309 *Cf.* Bangkok Rules, *supra*, Rule 15.

310 *Cf*. Bangkok Rules, *supra*, Rule 33. See also, ESCR Committee. General Comment 22, *supra*, paras. 13, 21 and 45 and Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, A human rights-based approach to mistreatment and violence against women in reproductive health services, with a focus on childbirth and obstetric violence, A/74/137, *supra*, para. 69.

311 *Cf.* Bangkok Rules, *supra*, Rule 25.

312 *Cf*. ESCR Committee. General Comment 22, *supra*, para. 60.

313 The Inter-American Commission has considered obstetric violence as encompassing "all situations of disrespectful, abusive, neglectful treatment or denial thereof that take place during the pregnancy, childbirth or postpartum period, in private or public health facilities." IACHR. Violence and discrimination against women and girls: Best practices and challenges in Latin America and the Caribbean. OAS/Ser.L/V/II. Doc. 233. November 14, 2019, para. 181; IACHR. Indigenous women and their human rights in the Americas. OAS/Ser.L/V/II. Doc. 44/17. April 17, 2017, para. 80. The Special Rapporteur on violence against women, its causes and consequences considers that obstetric violence is violence suffered by women during maternity care in health centers. Special Rapporteur on violence against women, its causes and consequences. A human rights-based approach on mistreatment and violence against women in reproductive health services, with a focus on childbirth and obstetric violence, A/74/137, *supra*, para. 12. See also, CEDAW Committee. *Case of S.F.M v. Spain*. CEDAW/C/75/D/138/2018. 2020, para. 8.

314 See, for example, a decision that expresses the obligation to respect humanized births, since otherwise there would be an obstetric violation. Court of Guarantees of Concepción, Chile, RIT 341-2019, of April 5, 2019, and Court of Appeals of Concepción, Rol 8642-2019, of September 13, 2019 (file of observations, fs. 2403 to 2415). See, also, Argentina, Law 25.929 on Humanized Birth" of September 21, 2004.

an informed decision and receive constant support during the birth process.[315] Health care should also involve effective communication between care providers and women in labor by simple and culturally acceptable methods.[316]

162. The Court underscores the need to guarantee access to justice for women who are victims of obstetrical violence,[317] including those who are deprived of liberty, specifically through the classification of such violence[318] and access to administrative and judicial recources, as well as to effective and transparent reparations for violations of the right to sexual and reproductive health.[319] It is particularly necessary to facilitate secure channels of complaints, giving women deprived of liberty the necessary remedies to resolve them and the appropriate conditions of confidentiality and protection, about which the prisoners must be informed.

H. Access to hygiene and adequate clothing

163. The Court reiterates that women have special needs regarding personal hygiene, which should be provided by the States as guarantors of the rights of persons deprived of liberty. The Bangkok Rules establish that the accommodations must have the "facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating."[320] Therefore, the Court is of opinion that the prison administration must ensure to women deprived of liberty, while menstruating, access to and a supply of water for personal hygiene, as well as free access to the required amount and frequency of items of personal hygiene, including sanitary towels, tampons, menstrual cups and postpartum suppositories, among others.[321] It is also necessary to ensure the supply of items of hygiene for children living with them in prison, such as diapers and handwipes. This is even more essential in the case of low-income mothers or those who do not receive regular family visits.

164. With respect to clothing, Rules 19 and 20 of the Mandela Rules establish that prisoners may use their own clothes or be given uniforms, depending on national norms. In no case, however, can the clothes be degrading or humiliating. All clothing, including bed clothes, must be maintained clean and in good order to ensure conditions of hygiene compatible with dignity. In the case of pregnant women, the Court is of the opinion that, in accordance with commonly accepted parameters, they should be allowed to wear clothing adapted to their condition. Also, children living with their mothers in prison must never be made to wear a uniform and prison authorities must ensure that they are

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315 *Cf.* WHO. *Summary of the recommendation on intrapartum care for a positive childbirth experience*, 2018, pp. 5 to 8.

316 In this regard, MESECVI recommended:

> [i]ncluding] provisions that not only make obstetric violence a punishable offense, but that also elaborate on the elements of what constitutes a natural process before, during and after birth, without excessive reliance on medication and in which women and adolescent girls are appropriately informed and enjoy the necessary guarantees to ensure their free and voluntary consent to the procedures associated with their sexual health.

Cf. Follow-up Mechanism of the Implementation of the Inter-American Convention to Prevent, Sanction and Eradicate Violence against Women (MESECVI), Second Hemispheric Report, 4/2012, pp. 39 and 40.

317 The UN Working Group on the issue of discrimination against women in law and in practice recommended "[p]revent[ing] the instrumentalization of women in the birthing process and ensure that penalties are incurred for gynecological or obstetrical violence, including performing abusive caesarian sections, refusing to give women pain relief during birth or surgical termination of pregnancy and performing unnecessary episiotomies." UN, Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44, of April 8, 2016, paras. 106(g) and (h).

318 *Cf.* MESECVI, Second Hemispheric Report, 4/2012, *supra*, para. 120.

319 *Cf.* ESCR Committee. General Comment 22, *supra*, paras. 49(h)) and 64 and *Case of I.V. v. Bolivia*, *supra*, para. 310.

320 *Cf.* Bangkok Rules, *supra*, Rule 5.

321 *Cf.* Bangkok Rules, *supra*, Rule 5; Mandela Rules, *supra*, Rule 15 and IACHR, Principles and Best Practices, *supra,* Principle XII.

provided with clothing appropriate to their age and to the climate. Finally, the Court is of the opinion that women who are pregnant, postpartum or breastfeeding must receive clothes designed to meet the specific needs related to their changing condition, including those that minimize accidents and risks of tripping and falling.

I. Ensure that the ties with the mothers or primary caretakers deprived of liberty develop in an adequate environment with their children who are outside prison

165. The Court considers it important to encourage physical contact between the mother and breastfeeding children due to the importance of the mother-child tie and the nutrition of the mother's milk. As stated previously, it is a priority in these cases to apply alternative or more moderate measures. If that is not possible, nursing children must be authorized to remain with their mothers as long as this decision in the specific case is in their best interests (*infra* paras. 181, 185 and 191) and, therefore, there must be separate and adequate accommodations for the needs of the children and for the mothers (*supra* paras. 137 to 139), as well as to ensure contact with other parent and significant adults, such as grand-parents and the broader family (*infra* paras. 206 and 207). If this is not possible and as a last resort, available measures must be made for the children's alternative care by family members or qualified persons so as to guarantee that ties are maintained with their mothers. In the latter case, the Court is of the opinion that mothers deprived of liberty should be placed close to the family group;[322] that they should be provided with the necessary means to maintain contact with their children, and that measures should be adopted to prevent irregular adoptions.[323] The Court stresses that the contact of prisoners with the outside world and, especially, with their children and family members is crucial to reduce the negative impact of imprisonment and separation on the well-being of the women, as well as to facilitate their social reintegration.

166. In *The Miguel Castro Castro Prison v. Peru*, the Court underscored the "States' obligation to take into consideration the special attention that must be offered to women due to maternity, which implies, among other measures, ensuring that appropriate visits be permitted between mother and child."[324] As mentioned, "[d]isciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order."[325] More specifically, the Bangkok Rules state that "[v]isits involving children shall take place in an environment that is conducive to a positive visiting experience, including with respect to staff attitudes and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged where possible."[326] Therefore, States must ensure the possibility of periodic visits of children with their mothers or primary caretakers who are deprived of liberty with the frequency and length necessary to maintain ties and in conditions that respect the children's dignity and privacy.[327]

167. Following the guidelines and standards established in the diverse sources of international law, the Court considers that it is essential to ensure the following aspects so as to not violate the rights of children to family visits and to maintain contact with their mothers or primary caretakers deprived of liberty:

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322 *Cf. Case of López et al. v. Argentina, supra*, para. 102 and Bangkok Rules, *supra*, Rule 4.

323 *Cf. Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of March 9, 2018. Series C No. 351.

324 *Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 330.

325 Mandela Rules, *supra*, Rule 43(3).

326 Bangkok Rules, *supra*, Rule 28.

327 *Cf.* Committee on the Rights of the Child, Report and recommendations of the Day of General Discussion on "The Children of Incarcerated Parents" of September 30. 2011, paras. 38 to 40 and Bangkok Rules, *supra*, Rules 4, 21 and 26.

a) Provide clear and precise information on the organization of visits, the requirements, the elements necessary to enter, among other issues. In this regard, enable the children to make the visits on days and times that interfere as little as possible with their daily activities.
b) Facilitate the entry of recreational games and activities that favor ties between children and their mothers during the visits.
c) Ensure that, under no circumstances, are minor children who visit their parents in prison subjected to intrusive body searches or other measures that violate their dignity, prioritizing the use of technological equipment.
d) Ensure adequate material and hygienic conditions in waiting and visiting spaces. These places must respect the right to privacy, be appropriate and friendly for the stay of the children, allowing physical contact, and provide games and recreational items that create a comfortable and pleasant space for a family gathering.
e) Promote family ties in spaces outside prisons, whether in their own home or in appropriate governmental or non- governmental installations with free mother-child contact.

168. Finally, in the case of non-national women, the Court notes that Rule 53 of the Bangkok Rules indicates that "[w]here relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign-national women prisoners to their home country, especially if they have children in their home country, shall be considered as early as possible during their imprisonment." The Court considers that they should seek the necessary agreements to facilitate family reunification. Meanwhile, the use of telephonic and video calls should be facilitated to ensure communication between mothers or primary caregivers and their children.

VI
DIFFERENCIATED APPROACHES APPLICABLE TO CHILDREN LIVING IN DETENTION CENTERS WITH THEIR MOTHERS OR PRIMARY CAREGIVERS

169. In this section, the Court will address the rights of children living in detention centers with their mothers or primary caretakers who are serving sentences of deprivation of liberty. The Court will center its interpretation on the case of mothers since, according to the pertinent laws, they are deprived of liberty in places in which women are permitted to live with their children. Nonetheless, the standards herein established may also apply where the children live with their fathers or primary caretakers, regardless of gender,[328] in cases of both parents having joint responsibility of their care.

170. It should be recalled that in its *Advisory Opinion OC-17/02,* the Court defined the term "child" to mean "any person who has not yet attained 18 years of age, unless the applicable domestic law stipulates a different age of majority."[329] The Court clarifies that this definition does not refer to children or adolescents in conflict with the criminal law or who have been deprived of liberty for any other reason under the domestic law, but rather it is directed, as already mentioned, to those children whose mothers (or primary caretakers, where it is allowed) are imprisoned and, particularly, to the specific obligations of States to holistically ensure the rights of children living with them in prison, whether they were born while their mother was deprived of liberty or because they had subsequently entered prison with their parent.

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328 In this regard, a global study on children deprived of liberty has noted that "[a]lthough most States allow convicted mothers to co-reside with their young children in prison, only eight States explicitly permit fathers to do so. Even in places where fathers as primary caregivers are allowed to co-reside with their children, there are (almost) no appropriate "father and child units" in the prisons, which means that there are practically no children co-residing in prison with their father." Report of the Independent Expert who led the UN global study on children deprived of liberty, Manfred Nowak, Global study on children deprived of liberty, A/74/136, of July 11, 2019, para. 37. See also, Bangkok Rules, *supra*, Preliminary Observations, para. 2(12).

329 *Juridical condition and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17*,* para. 42 and sole Operating Point and *Case of Mendoza et al. v. Argentina*, *supra*, para. 140.

171. It must be recalled that children are holders of the human rights that belong to all human beings and that they also enjoy special rights due to their condition, which are accompanied by specific duties of the family, the society and the State.[330] The Court has repeatedly emphasized the existence of a "very comprehensive *corpus iuris* of international law on the protection of human rights of the child," which is utilized as a source of law for the Court to establish "the content and the scope" of the obligations that States have assumed through Article 19 of the Convention[331] with respect to children, particularly in specifying the "measures of protection" to which that article refers.[332] Specifically, the Court has already stated that the Convention on the Rights of the Child[333] is the international treaty that has the greatest claim to universality, which makes manifest "a broad international consensus (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter,"[334] having been ratified by almost all the OAS Member States. In the context of this advisory opinion, the Court wishes to stress that, as it has done on other occasions, although this is not the opportunity to issue a direct interpretation of the Convention on the Rights of the Child since its provisions are not the purpose of the request, undoubtedly the principles and rights included therein decisively contribute to defining the scope of the American Convention when the holder of rights is a child.[335] In addition, as has been expressed, the Court will also take into account the range of international instruments that refer to the protection of the rights of the child, with special attention on those most pertinent to the matter being analyzed.

172. The Court has already emphasized that, in protecting the rights of children and in adopting measures to achieve that protection, the following four guiding principles of the Convention on the Rights of the Child should transversally inspire, and be implemented throughout, the entire system of comprehensive protection:[336] the principle of non-discrimination;[337] the principle of the best interests of the child;[338] the principle of respect for the right to life, survival and development, and the principle of respect for the opinion of children in all procedures affecting them in a manner that ensures their participation.[339] In interpreting the provisions presented in the request, the Court will also specifically apply those guiding principles that are pertinent to respond in this section and to identify the special measures that are required to make effective the rights of children.

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330 *Cf.* Advisory Opinion OC-17/02*, supra*, para. 54 and *Case of Mendoza et al. v. Argentina*, *supra*, para. 140.

331 Article 19 of the American Convention. Rights of the Child: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of the family, society, and the state."

332 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, paras. 192 to 194 and *Case of Mota Abarullo et al. v. Venezuela, supra*, para. 79.

333 Convention on the Rights of the Child*,* adopted on November 20, 1989, entered into force on September 2, 1990.

334 Advisory Opinion OC-17/02*, supra*, para. 29 and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 350, para. 41.

335 *Cf*. Advisory Opinion OC-21/14, *supra*, para. 57.

336 *Cf*. Committee of the Rights of the Child, General Comment 5: General measures of application of the Convention on the Rights of the Child (arts. 4, 42 and 44(6)), CRC/GC/2003/5, of November 27, 2003, para. 12.

337 Article 2 of the Convention on the Rights of the Child obligates the States to respect the rights set forth in that instrument and to ensure its application to each child within their jurisdiction, without any distinction, which requires the States "actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures." Committee of the Rights of the Child, General Comment 5, *supra*, para. 12. See also, Committee of the Rights of the Child, General Comment 6: Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, September 1, 2005, para. 1.

338 Article 3(1) of the Convention on the Rights of the Child requires that the best interests of the child be the primary consideration in all actions concerning them. *Cf*. Committee of the Rights of the Child, General Comment 5, *supra*, para. 12 and General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3(1), CRC/C/CG/14, May 29, 2013.

339 Article 12 of the Convention on the Rights of the Child establishes the right of the child to express [his or her opinion] freely in "all matters affecting the child" and that "the views of the child being given due weight in accordance with the age and maturity of the child. *Cf.* Committee of the Rights of the Child. General Observation 5, *supra*, para. 12 and General Observation 12: The right of the child to be heard*,* CRC/C/GC/12, of July 20, 2009.

173. In addition, the Court emphasizes that it has already made observations on the general lack of valid and official statistics on children living in prisons with their parent or adult representative and, thus, this group is one of the most invisible in the context of prisons.[340] The Committee on the Rights of the Child has stated that the "collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation."[341] On this point, Rule 68 of the Bangkok Rules establishes that "[e]fforts shall be made to organize and promote research on the number of children affected by their mothers' confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and programme development, taking into account the best interests of the children."[342]

174. The Court considers that, to ensure the right to equality and non-discrimination, States must identify children living in prison with a parent as an especially vulnerable group and must create measuring sticks to monitor their status, their needs and have up-to-date registries on how many reside in each prison, as well as to develop and deeply analyze the required policies and norms for the comprehensive protection of their rights.[343]

175. In accordance with the Commission's request, the Court will take up the following: (A) general considerations on the applicable guiding principles and on the right to equality and non-discrimination; (B) the right to a family life of the children with respect to their parents and/or adult representatives deprived of liberty; (C) the access to the right to health and to the food for children living in detention centers, and (D) the adequate and integral development of children with special attention to communitarian integration, socialization, education and recreation.

A. General considerations with respect to the applicable guiding principles and to the right to equality and non-discrimination

176. Article 19 of the Convention, as does Article VII of the American Declaration,[344] refers to the obligation to adopt measures of protection for each child as a child, which spreads its effects in the interpretation of all the other rights when the case refers to minor children. The Court understands that the due protection of the rights of children, as holders of rights, must take into consideration their characteristics and the need to foster their development, offering them the necessary conditions so that they live and develop their aptitudes, taking full advantage of their potential.[345]

177. The Convention of the Rights of the Child establishes in its Article 2 that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." The Committee on the Rights of the Child has indicated

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340 See, for example, Report of the Independent Expert who directed the UN Global study on children deprived of liberty, Manfred Nowak, Global study on children deprived of liberty, *supra*, para. 87.

341 *Cf.* Committee on the Rights of the Child, General Comment 5, *supra*, para. 48.

342 *Cf.* Bangkok Rules, *supra*, Rule 68.

343 The Committee on the Rights of the Child has indicated, with respect to Article 2 of the Convention on the Rights of the Child, that "[t]his non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes." Committee on the Rights of the Child, General Comment 5, *supra*, para. 12.

344 Article VII. Right to protection for mothers and children.

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

345 *Cf*. Advisory Opinion OC-17/02*, supra*, para. 56 and *Case of the Massacre of the Los Josefinos village v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 3, 2021. Series C No. 442*,* para. 92.

that States have the responsibility to oversee and combat discrimination, no matter its form or wherever it is found, both in the family and in the communities, schools and other institutions.[346] In this regard, it has specified that special attention must be given to the most vulnerable groups of small children and those who run the risk of discrimination, including children living with their mothers in prison.[347]

178. Children who have a parent, primary caretaker or adult representative deprived of liberty are often the object of stigmatization, discrimination and social condemnation and run a greater risk of suffering violence in school and in the community.[348] The adolescent representatives of the Regional Platform for the defense of the rights of children of incarcerated parents (NNAPES) explained the situation during the public hearing by stating that "we have not committed a crime; nevertheless we are treated treat as delinquents; we are the voices of more than two million children and adolescents in Latin America and the Caribbean who live in this situation." It is important to point out that, for the first time, adolescents appeared before the Court in advisory proceedings on their own behalf and personally shared their lives and articulated their needs, which contributed enormously to the interpretive work of the Court. Therefore, the principle of equality and non-discrimination has a direct relationship in that children cannot be discriminated against because their parents, primary caretakers or adult representatives are being deprived of liberty.

179. The Court underscores that Article 5(3) of the Convention states that "punishment shall not be extended to any person other than the criminal." Punishment of deprivation of liberty of a parent, primary caretaker or adult representative cannot affect or extend to the child living with them in prison since the child does not have a problem with the law. These children should not be considered, under any concept, as prisoners. The UN Minimum Rules for the Treatment of Prisoners, by stating that "children who live in prison with a parent shall never be treated as prisoners,"[349] agrees with the Bangkok Rules, which state "children in prison with their mothers shall never be treated as prisoners."[350]

180. Since most of the children who live in prisons with their mothers are young boys, they run a special risk of discrimination since, among other reasons, they are susceptible to having fewer possibilities of access to conditions that ensure integral development in comparison with boys livng outside prison. The Committee on the Rights of the Child has stated that "[d]iscrimination may take the form of reduced levels of nutrition; inadequate care and attention; restricted opportunities for play, learning and education; or inhibition of free expression of feelings and views."[351] The Court stresses that, when boys live with a parent, primary caretaker or adult representative deprived of liberty, they should receive equal protection and access to rights as boys living outside prison.

181. Thus, the Court is of the opinion that, when it is a matter of imposing and implementing punishment on a parent or adult representative caring for a child, especially during early childhood, judicial and prison authorities must also evaluate the family situation and incorporate a focus of the rights of the child so that the officials are guided by the principles of the best interests of the child, non-discrimination, development and mental well-being, participation of children and the principle of

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346 *Cf*. Committee of the Rights of the Child. General Comment 7: Realization of the right of the child in early infancy, CRC/C/GC/7, of November 14, 2005, para. 12.

347 *Cf*. Committee of the Rights of the Child. General Comment 7, *supra*, para. 24.

348 *Cf*. Office of the Special Representative of the Secretary General on Violence against Children, *Children speak on the effects of the deprivation of liberty: the case of Latin America,* 2019, p. 27. See also, the Report of the UN Secretary General on the protection of children against abuse, A/73/265, of July 30, 2018, para. 63.

349 Mandela Rules, *supra*, Rule 29.

350 Bangkok Rules, *supra*, Rule 49.

351 Committee on the Rights of the Child. General Comment 7, *supra*, para. 11. See, similarly, ESCR Committee. General Comment 20*, supra*, para. 10.

doing no harm.[352]

B. Right to family life of children with respect to their parents, primary caretakers and/or responsible adults deprived of liberty

182. Article 17 of the Convention recognizes that the family is a fundamental component of society and is entitled to protection. The family to which each child has a right is, first and foremost, the biological family, including the closest family members, which should protect the child and which, in turn, should be the primary subject of the protective measures of the State.[353] The Court has already indicated that this right implies not only directly ordering and enforcing measures of protection for children, but that it also favors, as broadly as possible, the development and strengthening of the family unit,[354] since the mutual enjoyment of harmonious relations between parents and their children is a fundamental element of family life.[355] The Court has also specified that Article 11(2) of the Convention,[356] which recognizes the right of everyone to receive protection against arbitrary or abusive interferences to family life, is an implicit part of the family's right to protection.[357] The Court's case law has established that the separation of children from their families is, under certain circumstances, a violation of this right.[358]

183. According to the standards established in the Convention on the Rights of the Child, the State must not only abstain from unduly interfering in a child's private or family relations, but also, depending on the circumstances, it must take positive steps to ensure the full exercise and enjoyment of the child's rights.[359] This requires the State, as guarantor of the common good, to safeguard the predominant role of the family in protecting the child and to provide public assistance to the family through measures that promote family unity.[360] Article 9 of the Convention states the following:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
> 3. State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if contrary to the child's best interests.

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352 *Cf. The children speak about the impact of deprivation of liberty: the case of Latin America*, *supra*, p. 13. CHECK OTHERS

353 *Cf. Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs.* Judgment of April 27, 2012. Series C No. 242, para. 119 and *Case of the Massacre of the Los Josefinos village v. Guatemala*, *supra*, para. 91.

354 *Cf.* Advisory Opinion OC-17/02, *supra,* para. 66 and *Case of the Massacre of the Los Josefinos village v. Guatemala*, *supra*, para. 84.

355 *Cf.* Advisory Opinion OC-17/02, *supra,* para. 72 and *Case of Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs*. Judgment of March 13, 2018. Series C No. 352, para. 191.

356 Article 11. Right to Privacy

[…]

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

357 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 170 and *Case of Rochac Hernández et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of October 14, 2014. Series C No. 285, para. 105.

358 *Cf. Case of the Massacre of Las Dos Erres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 187 and *Case of Rochac Hernández et al. v. El Salvador*, *supra*, para. 104.

359 *Cf.* Convention on the Rights of the Child, Articles 7, 8, 9, 11, 16 and 18.

360 *Cf. Case of the Massacre of Las Dos Erres v. Guatemala, supra*, para. 190 and *Case of Carvajal Carvajal et al. v. Colombia*, *supra*, para. 192.

> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned. [emphasis added]

184. The Court notes that, separation from the parents, primary caretakers and/or adult representatives and life in prison may have an impact on the human rights and integral development of the child, especially during early childhood, a stage of life that is crucial for the development of the brain and the capacities of the child. The Committee on the Rights of the Child has stated that young children are especially vulnerable to the adverse consequences of separations due to their physical dependency and emotional ties with their parents or guardians.[361] Small children are also extremely sensitive to their environment and rapidly acquire an understanding of persons, places and routines that form part of their lives, in addition to being conscious of their own unique identity.[362] The SPT has noted that "the prevalence of gender role stereotypes of women as caregivers, a mother's absence can lead to her children being deprived of care. This is even more likely to be the case given the selective nature of the criminal justice system, which means that most persons who are deprived of liberty, including the women among them, come from the poorest sectors of society."[363]

185. Bearing in mind that children have the right to grow in a family and social environment appropriate for their development, the Court considers it necessary to specify that any decision that it adopts, related to the admittance, stay and/or release from prison of a child, who has a parent, primary caretaker or responsible adult in prison, as well as that related to the separation from such parent or caretaker, should always follow a rigorous individual evaluation with due consideration to the protection of the rights and best interests of those children.

186. The Court will now develop standards on: (1) consideration of the best interests of the child in all decisions that affect the child, particularly with respect to life in prison; (2) general principle of the priority of alternative or substitute punishments for mothers, primary caretakers or adult representatives; (3) age limits for stays in prison and separation of the child from the mother or primary caretaker deprived of liberty, and (4) maintenance of ties with the other parent or significant adult.

B.1) Consideration of the best interests of the child in all decisions that affect the child, particularly with respect to life in prison

187. The Court has understood that, pursuant to Article 19 of the Convention, "the State is obligated to advance special protection measures in the best interest of children, carrying out its role as guarantor with greater caution and responsibility because of their unique vulnerability."[364] The best interests of the child are based on the true dignity of the human being, the characteristics of children and the need to foster their development.[365]

188. Article 3 of the Convention on the Rights of the Child states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

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361 *Cf.* Committee of the Rights of the Child, General Comment 7*, supra,* para. 18.

362 *Cf.* Committee of the Rights of the Child, General Comment 7, *supra,* para. 14.

363 SPT, Prevention of torture and mistreatment against women deprived of liberty, CAT/OP/27/1, *supra*, para. 31.

364 *Cf. Case of Vera Rojas et al. v. Chile, supra*, para. 104 and *Case of Guzmán Albarracín et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of June 24, 2020. Series C No. 405, para. 116.

365 *Cf.* Advisory Opinion OC-17/02*, supra*, para. 56 and *Case of Vera Rojas et al. v. Chile, supra*, para. 105.

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[366] With respect to this principle, the Committee on the Rights of the Child has stated that "[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions; for example, by a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."[367]

189. The detention or deprivation of liberty of a parent, primary caretaker or adult representative is a judicial measure that, although it does not directly affect children and cannot extend to them (*supra* para. 179), obviously does affect them. Therefore, it must be recalled that the best interests of the child, as a guiding principle, implies that the child is the primary consideration in the design of public policies and the creation and application of norms in all aspects of the child's life,[368] which is closely connected to the obligation to fully respect the right of children to participate and to be heard in all aspects of decisions that affect them and to duly take into account the children's opinions and experiences, depending on their age and maturity.[369]

190. The Court has established that children have special rights and that there are corresponding duties on the part of the family, the society and the State. Moreover, their condition requires special protection that must be understood as an additional and complementary right to the other rights that the Convention recognizes to everyone. The predominance of the best interests of the child must be understood as the need to comply with all other rights of childhood and adolescence that obligate the State and extends its effects to the interpretation of all other rights in the Convention when a case involves children.[370]

191. The Mandela Rules state that "[a] to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned."[371] The Bangkok Rules have a similar provision.[372] Thus, it can be concluded that, in order to evaluate children's best interests, the children must be heard and their opinion taken into account with respect to their willingness to live in prison with their parent in the terms that will now be described.

192. The best interests of the child are a priority that applies at the moment of interpretation and when it is necessary to decide conflicts between rights. The deprivation of liberty of adult representatives imposes a special consideration regarding the rights of children and adolescents. The right to live with their parents in a family setting (Articles 17 and 19 of the American Convention and, especially, Article 9 of the Convention on the Rights of the Child), the rights to survival and development according to the principle of human dignity, among others, must be taken into consideration. Thus, any decision on imprisoning the mother or adult representative must consider the situation, age and affective and psychological needs of the child and adolescent. The best interests of the child are arrived at by listening to the child, taking into account the rights involved and a reasoning that gives preponderance to the rights of the child or adolescent in the specific case. This requirement is applicable both to the courts and to the decisions of prison authorities.

193. Article 12 of the Convention on the Rights of the Child establishes that the "States Parties

366 *Cf*. Convention on the Rights of the Child, Article 3.

367 *Cf.* Committee of the Rights of the Child, General Comment 5, *supra*, para. 12.

368 *Cf.* Advisory Opinion OC-17/02*, supra*, Operating Paragraph 2.

369 *Cf.* Committee on the Rights of the Child, General Comment 12, *supra*, para. 123.

370 *Cf. Case of González et al. ("Campo Algodonero") v. México, supra*, para. 408, and *Caso of the Río Negro Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 4, 2012, para. 120.

371 *Cf.* Mandela Rules, *supra*, Rule 29.1.

372 *Cf.* Bangkok Rules, *supra*, Rules 2(1) and 49.

shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." This provision adds that "[for] this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."[373] The Committee on the Rights of the Child has established that such a provision applies both to young and older children. As holders of rights, even young children have the right to express their views, which should be given "due weight depending on the age and maturity of the child."[374]

194. Therefore, in the opinion of the Court, the decision on whether a child, who has a parent, primary caretaker or adult representative deprived of liberty, should be admitted or stay in prison, and under what circumstances, must be adopted on the basis of the best interests of the child as the primary element over any other consideration. Judicial or prison administrations must be guided by the best interests of the child when taking any measure or applying any proceeding that may affect the child. The Court stresses that the weighing and determination of the best interests of the child by State authorities cannot be based on negative gender-based stereotypes or prejudices on the role of women with respect to maternity and their capacity to deal with it,[375] but rather it should be based on duly proven considerations of the consequences that accompany this decision for the well-being and full development of the child. Similarly, States must adapt, review and, if necessary, modify the norms and procedures that, in applying them, might affect, or that do not duly take into account, the best interests of the child.

195. Moreover, taking into account that institutionalized care can never be a satisfactory alternative for children, the Court considers that, in assessing whether a child should live in prison with his or her mother or primary caretaker, all circumstances and possible alternatives, such as living with other members of the family or under community-based initiatives, must be weighed.[376] These alternatives must be evaluated, rigorously and individually, pursuant to the guidelines on the methods of alternative care of children,[377] taking into account the best interests of the child and the child's opinion, depending on the age and levels of development and maturity.

196. Finally, the Court considers that, if it is decided that the best option for the child is living in prison with the mother or primary caretaker, it must be ensured that: (i) the child's admittance into the prison is registered, respecting the confidentiality of the child's identity;[378] (ii) the necessary information on the rights of the child is provided; (iii) a periodic evaluation of the situation of the child is made by specialized personnel and the need to continue living in prison; (iv) these decisions taken by administrative authorities are subject to judicial control, and (v) the contact and maintenance of the ties with the other parent, family members and significant adults.

B.2) General principle of the priority use of alternative or substitute punishments for the mothers, primary caretakers or adult representatives

197. In view of the above, decisions on the imposition and oversight of sanctions against mothers

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373 *Cf.* Convention on the Rights of the Child, Article 12.

374 Committee on the Rights of the Child, General Comment 7, *supra*, para. 12(1).

375 See, *mutatis mutandis*, *Case of Atala Riffo and daughters v. Chile, supra,* para. 140 and *Case of Ramírez Escobar et al. v. Guatemala, supra,* paras. 296 and 297.

376 *Cf.* Bangkok Rules, *supra*, Rule 52.

377 UN General Assembly. *Guidelines on the alternative care of children*, A/RES/64/142, of February 24, 2010. See, also, African Charter on the Rights and Welfare of the Child, Adopted by the Organization of African Unity on July 11, 1990, Art. 30.

378 *Cf.* Bangkok Rules, *supra*, Rule 3.2.

or adult representatives with children under their care must balance the legitimate interest of the State with all the other circumstances that make up the family environment and the best interests of the child in a way that incarceration would only be imposed and enforced as a last resort, which, in no case, is passed on to the child. The Committee on the Rights of the Child has manifested that "[i]n cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children."[379]

198. Rule 2(2) of the Bangkok Rules establishes the general principle stating that "[p]rior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children." Rule 64 of the same Rules states that "[n]on-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children."[380]

199. The laws of some countries of the region offer the possibility of granting house arrest to pregnant women or women with dependent children. In Argentina, the law states that the supervising judge of the sentence or the competent judge may order that the sentence be served under house arrest, among other possibilities, for pregnant women and for mothers of a child under the age of five.[381] In Brazil, the Law of Criminal Supervision has established that deprivation of liberty shall be overseen progressively by applying a less rigorous regime to be determined by a judge in the case of a pregnant woman or a mother or person responsible for a child or persons with disabilities.[382] The Code of Criminal Procedure establishes that the judge may substitute pretrial detention with house arrest in the case of pregnant women or women with a child under the age of 12, as long as the woman has not committed a violent offense or a serious threat against someone or has committed an offense against her child or dependent, or a man who has sole responsibility for a minor child.[383]

200. Bearing in mind the rights involved and the aforementioned sources, the Court considers it would be more appropriate to impose non-custodial measures, such as house arrest, on women with dependent children who have been sentenced for committing an offense in order that the children may enjoy their right to family life with their parents in a prison-free environment that is appropriate for the children's integral development.

B.3) Age limits for being in prison and the child's separation from the parent or primary caretaker deprived of liberty

201. The norms of international law do not establish a specific age limit for children of inmates to reside in prison. Rule 52 of the Bangkok Rules states that "[d]ecisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws." It adds that "[t]he removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials."

379 Cf. Committee on the Rights of the Child. General Comment 14, *supra*, para. 69.

380 Bangkok Rules, *supra*, Rule 64.

381 *Cf.* Argentina. Law on the oversight of deprivation of liberty, of July 8, 1996, Article 32(2). Article 10(e) of the Criminal Code of Argentina, of April 30, 1921, has the same terms.

382 *Cf.* Brazil. Law of Criminal Oversight, of July 11, 1984, Articles 71 and 112(3).

383 *Cf.* Brazil. Code of Criminal Procedure, of October 3, 1941, Article 318(V) and (VII).

Finally, that article states that "[a]fter children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised."[384]

202. A review of the domestic laws of the American States demonstrates that a majority of countries authorize children to reside with their mothers until a certain age, but do not establish a uniform age limit.[385] Argentina has established, in Article 195 of the Law of oversight of deprivation of liberty, that children under the age of four may remain with the inmate.[386] Uruguay imposes the same age limit, but Article 29 of its Decree Law that establishes norms on imprisonment states that "in special cases, with the opinion of psychological or psychiatric specialists of the Council of the Child or the Institute of Criminology and with a report of the prison authority, the age limit may be extended to eight years of age."[387] In Bolivia, the Code of Children and Adolescents establishes the limit of six years of age.[388] In Colombia, the limit is three years of age.[389] Peru, in turn, establishes in its legislation that children may remain until three years of age, with a prior investigation by the social assistance system.[390] Children normally leave when they reach the maximum age that they are permitted to remain with their mothers in prison, in accordance with the domestic legislation.

203. A summary of the age limit set forth in domestic laws that govern how long minors may remain with their mothers in prison demonstrates the following: (i) until six months of age;[391] (ii) until one year of age;[392] (iii) until two years of age;[393] (iv) until three years of age;[394] (v) until four years of age;[395] (vi) until the age of five;[396] (vii) until the age of six;[397] (viii) until the age of seven;[398] and (ix) until the age of eight,[399] which demonstrates that there is a rather considerable variation in the manner in which domestic laws have fixed the limit.

204. The Court notes that it might be advisable that States, in their respective laws, contemplate

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384 Bangkok Rules, *supra*, Rule 52.

385 Law Library of the Library of Congress of the United States of America. Law, *Laws on Children Residing with Parents in Prison,* July 24, 2020. Available at: https://tile.loc.gov/storage-services/service/ll/llglrd/2015296887/2015296887.pdf

386 *Cf.* Argentina. Law on the Oversight of deprivation of liberty, of July 8, 1996, Article 195.

387 Uruguay. Standards on imprisonment and prison personnel, Article 29.

388 *Cf.* Bolivia. Code of the Child and Adolescent, of October 27, 1999, Article 106(c).

389 *Cf.* Colombia. Law 65 of, 1993, which issued the Code of Prisons and Jails of August 20, 1993, Article 153.

390 Peru. Code of Criminal Oversight, of August 2, 1991, Article 103.

391 *Cf.* Panama. Regulations of the Prison System, of July 25, 2005, Article 27.

392 *Cf.* Cuba, Regulations of the Prison System, of December 1, 2016, Article 73(1).

393 This is the case of Chile and Nicaragua. *Cf.* Written observations of Chile (file of observations, f. 167) and Nicaragua (file of observations, f. 361).

394 This is the case of six States (Colombia, Costa Rica, Ecuador, Mexico, Peru and Venezuela). *Cf.* Colombia. Law 1709 January 20, 2014, Article 26; Costa Rica, Regulation 40840-JP of the National Prison System, Article 94; Ecuador. Resolution SNAI-SNAI-2020-0031-R Quito, D.M., July 30, 2020, Article 72; Mexico. National Law of Criminal Enforcement of June 16, 2016, Article 10(VI); Peru. Code of Criminal Enforcement. Legislative Decree 654 of August 2, 1991, Article 103, and Venezuela. Law of the Prison Regime of 2000, Article 88.

395 This is the case of seven States (Argentina, Canada, Dominican Republic, Guatemala, Honduras, Paraguay and Uruguay). *Cf.* Argentina. Law 24.660 on the Oversight of Deprivation of Liberty of July 8,1996, Article 195, Canada. Commissioner's Directive 768 Institutional Mother-Child Program of January 24, 2020, Article 16; Dominican Republic. Law 24,660 on the Oversight of Deprivation of Liberty of July 16, 1996, Article 195 Guatemala. Law of the Prison Regime, Decree 33-2006, Article 52; Honduras. Law of the National Prison System; Paraguay. Law 5162 Code of the Criminal Enforcement, and Uruguay. Law 14.470 of December 11, 1975, Article 29.

396 *Cf*. El Salvador. Law on Prisons, Legislative Decree 1027 of April 24, 1997, Article 70.

397 *Cf.* Bolivia. Law 548 Code of the Child and Adolescent of July 17, 2014, Article 106.

398 *Cf.* Brazil. Law 7210 of Criminal Oversight of July 11, 1984, Article 89.

399 *Cf*. Uruguay. Law 14.470 of December 11, 1975, Article 29.

a maximum age in light of the principle that criminal responsibility is personal and does not extend to the child and because of the effect on the child of a prolonged stay in prison, especially upon reaching the age of obligatory schooling. However, to separate a child from an imprisoned parent on the sole basis of reaching a certain age, without taking into consideration any other factor, could result in arbitrary decisions that place at risk or violate the rights of the child. Therefore, the Court considers that any decision on separating a child from an imprisoned parent or primary caretaker and his or her release, including issues on alternatives to care, must always be adopted by taking into account the specific circumstances and the best interests of the child.

205. Regardless of the pertinence or the advisability of setting an abstract legal limit and bearing in mind the different sources of international law, the Court considers that States must ensure that any decision involving the separation of a child in prison from the incarcerated mother or primary caregiver and his or her departure, including those related to alternatives of care, complies with the following requirements: (i) that the decision is individualized, considering the specific circumstances of each case; (ii) that the opinion of the child is heard, depending on the age and level of maturity, and those opinions are taken into account in adopting a decision; (iii) an assessment and determination of best interests is made and (iv) upon release, a continued relationship between the parent or primary caretaker who remains imprisoned and the child, when it is in the child's best interests, is ensured. Finally, when due to their age, the children have to integrate into life in society, States must establish clear protocols and procedures to ensure adequate preparation for the transition and separation of the child from the imprisoned parent or primary caretaker, including the provision of psychological care and social support.[400]

B.4) Maintenance of ties with the other parent, family members or significant adults

206. With respect to the relationship with the other parent or with significant adults, the Court considers that States must ensure that a child who living with the mother in prison can maintain a personal relationship and direct contact with the father and his family members who are not living with him, always taking into account the best interests of the child. The Convention on the Rights of the Child specifies that the State must "respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[401]

207. In the event that the other parent is also imprisoned, there should be agile and efficient mechanisms so that the child can maintain contact or ties with that person.[402] Therefore, the Court is of the opinion that, in determining initially where the person will continue to be incarcerated with the child and in evaluating possible transfers to other establishments,[403] the impact that the location of the prison may have on the strengthening and continuity of the right to the child's family life must be examined so as not to affect or arbitrarily prejudice the right of maintaining contact with the other parent or significant adult. The Court reiterates that, in these cases, attempts must be made to find a prison as close as possible to the family home[404] and must guarantee transport (*supra* para. 165).

C. Access to the rights to health and to nutrition of children who reside in detention centers

208. The Court notes that children, who reside with their mothers or primary caretakers while they

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400 *Cf*. Report of the Independent Expert who directed the UN Global study on children deprived of liberty, Manfred Nowak, Global study on children deprived of liberty, *supra*, para 54.

401 *Cf*. Convention on the Rights of the Child, Article 9(3).

402 *Cf*. Bangkok Rules, Rules 26, 28, 43 and 45.

403 *Cf*. IACHR, Principles and Best Practices, *supra,* Principle IX.

404 *Cf. López et al. v. Argentina, supra*, paras. 93 to 102.

are serving sentences, are extremely vulnerable to human rights violations that occur within the penal system due to their social condition as children and their specific needs of development. The Court considers that the impact that this may have on their integral development must be minimized and that the necessary measures to ensure the appropriate development of their physical, mental and emotional capacities must be adopted through specialized health care and adequate nutrition, among others. The Court will now address the essential components of (1) the right to health and (2) the right to food.

C.1) Right to health

209. The Court has held that the right to health is protected by the American Convention (*supra* paras. 77 to 84). In addition, Article 24 of the Convention on the Rights of the Child establishes that "the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health,"[405] which should be heightened in cases of children with disabilities, and points out that States must strive to ensure that no child is deprived of the right to those health care services.[406] The Committee on the Rights of the Child has indicated that the right to health extends "not only to timely and appropriate prevention, heath promotion, curative, rehabilitative and palliative services, but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health."[407] For its part, General Comment 14 of the ESCR Committee establishes, with respect to access to the right of health, the requirement that "that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services."[408]

210. In accordance with the right to equality and non-discrimination, the Court reiterates that children living with their mothers or primary caretakers in prison must have access to the right to health under the same conditions as children who live outside prison. More specifically, Article 29(b) of the Mandela Rules stipulates that provision shall be made for "[c]hild-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists."[409] The Bangkok Rules clarify that "[i]f a woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided."[410] Those rules add the obligation of the prison services to supply or facilitate programs of specialized treatment for the special needs of pregnant women and women with children.[411] Moreover, the Rules mention that "awareness-training on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies."[412] The Subcommittee for the Prevention of Torture has repeatedly recommended that "children living in prisons with their mothers have

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405 *Cf. Case of Furlán and family members v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 138, citing the Convention on the Rights of the Child, Articles 24 and 26. The Court has also affirmed that "the special care and assistance necessary for a child with disabilities must include, as a fundamental element, support to the families responsible for their care during treatment, especially mothers, upon whom caregiving work traditionally falls." *Case of Vera Rojas et al. v. Chile*, *supra*, para. 111.

406 *Cf.* Convention of the Rights of the Child, Article 24.

407 *Cf*. Committee on the Rights of the Child. General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), CRC/C/GC/15, April 17, 2013, para. 2.

408 *Cf.* ECHR Committee. General Observation 14*, supra,* para. 22.

409 Cf. Mandela Rules, *supra*, Rule 29(b).

410 *Cf.* Bangkok Rules, *supra*, Rule 9.

411 *Cf.* Bangkok Rules, *supra*, Rule 15.

412 *Cf.* Bangkok Rules, *supra*, Rule 33(3).

access to health-care services and that their development be monitored by specialists."[413]

211. In conclusion, access to health of the children living in prison with their mothers must be guaranteed, since the aforementioned legal sources include the obligation to ensure the right to health to both mothers or caretakers and to the children living with them in prison. The children of inmates, undoubtedly, have the same right to health services in equal conditions as children living outside prison. Therefore, it is necessary to ensure: (i) access to a medical screening by specialized personnel upon the child's admission to prison; (ii) periodic controls and free access, in conditions of equality, to specialized pediatric health care; (iii) provision of vaccinations done on a national scale and the medicines that are necessary, free of charge; (iv) pertinent measures to prevent and reduce infant mortality, and (v) a confidential registry of the health data.

C.2) Right to nutrition

212. The Court has held that the right to nutrition is protected by the American Convention and is one of the determinant factors of the right to health (*supra* para. 87). Rule 48(1) of the Bangkok Rules indicates that adequate and timely food shall be supplied free of charge to pregnant women, babies, children and mothers in a healthy environment where there are opportunities for regular exercise. The same article states that women prisoners must not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.[414]

213. With respect to nutrition, the Court considers that the States must ensure that children living in prison with their mothers receive a balanced and nutritious diet that is adequate according to age and development needs. The Committee on the Rights of the Child has underscored that "[a]dequate nutrition and growth monitoring in early childhood are particularly important," so that, in the prison context, the States are obligated to adopt measures "to ensure access to nutritionally adequate, culturally appropriate and safe food and to combat malnutrition." It is recommended that, during the first six months of life, breastfeeding should be "protected and promoted and [it] should continue alongside appropriate complementary food preferably until two years of age."[415] The Court is of the opinion that the necessary eating and drinking implements for children instruments should be provided free of charge and that the instruments used on the newly born should be sterilized.

D. The adequate and integral development of children, with special attention to communitarian integration, socialization, education and recreation

214. The Court has held that, in the terms of Article 19 of the American Convention, "the ultimate goal of protecting children is the development of [their] personality and the enjoyment of their recognized rights."[416] For its part, Article 6(2) of the Convention on the Rights of the Child recognizes the intrinsic right to life and the obligation of States to ensure, to the maximum extent possible, the child's survival and development in the broadest sense possible, as a holistic concept that covers physical, mental, spiritual, moral, psychological and social development.[417] This provision is integrally connected with the respect and guarantee of all the other rights found in that international treaty and, in particular, the principle of the best interests of the child, the rights to health and to an adequate standard of living and education. Therefore, the Court determines that States should adopt

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413 SPT, Report of the visit to Argentina of the Subcommittee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/ARG/1, of November 27, 2013, para. 52.

414 *Cf.* Bangkok Rules, *supra*, Rule 48.

415 *Cf*. Committee on the Rights of the Child. General Comment 15, *supra*, paras. 43 to 45. Similarly, Panama ensures in its prison laws that a woman deprived of liberty has the right to be provided all the facilities to nurse her child of under six months of age. *Cf*. Panama. Law of the reorganization of the prison system, *supra*, Article 68(7).

416 *Cf. Case of Vera Rojas et al. v. Chile*, *supra*, para. 104.

417 *Cf*. Committee on the Rights of the Child. General Comment 5*, supra*, para 12.

all necessary measures to ensure the survival and the development, in safe conditions, of children living in prison, who are especially vulnerable, including the accommodation of hygienic and healthy installations, access to educational services, adequate nutrition, timely health and psychological care, if necessary, among others.

215. In the opinion of the Court, mothers, primary caretakers and responsible adults must have access to adequate support to properly raise the child, a responsibility shared by both parents since Article 19 places the duty not only on the State, but also on society and the family. The State has the obligation to ensure that the latter two adopt the protective measures that every child requires. Thus, the status of the child is not limited to its relationship with the State, but it also extends to that which the child has, or should have, with the family and society as a whole, which, with respect to the latter two, the State must enable and ensure.[418] The Committee on the Rights of the Child has indicated that States are "required to render appropriate assistance to parents, legal guardians and extended families in the performance of their child-rearing responsibilities, including assisting parents in providing the living conditions necessary for the child's development and ensuring that children receive the necessary protection and care." It adds that "realizing children's rights is in large measure dependent on the well-being and resources available to those with responsibility for their care."[419]

216. With respect to early childhood, the Committee on the Rights of the Child has urged the States Parties to "take all necessary steps to ensure that parents are able to take primary responsibility for their children, to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children's care; and to take action where young children's well-being may be at risk."[420] The Committee believes that low-quality institutional care rarely promotes healthy physical and psychological development and can have serious negative consequences on long-term social adjustment, especially for children under three years of age but also for those under five years of age.

217. Therefore, in view of the State's special role as guarantor, the Court considers that when children live with their mothers or primary caretakers in prison, it is the State's responsibility to provide the necessary means to assure a proper upbringing, with their survival and integral development free from fear. When it is best for children to live with the mother or primary caretaker in prison, the children must be provided with special protective measures that promote the integral development of their personality, talents and mental and physical capacities to their utmost potential, which should include as a minimum, medical care, access to early childhood and basic education and areas for play and recreation with direct access to natural light and open air spaces.

218. The characteristics of prison installations are an essential issue. States must ensure that the installations where the children of inmates live are separated from the rest of the prison population. The children must have a physical environment adapted to their needs that ensures their development, including day-care areas or play and recreation spaces,[421] with qualified personnel in charge of their care when they are not under the care of their parent, as well as educational material and toys, and with educational services, appropriate pediatrics and nutrition. In the case of women or primary caretakers with minor children, it is important to require, as has been stated, that the cells do not have a prison aspect and are permanently open.

219. It is noted that the Bangkok Rules state that "[p]rison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children

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418 *Cf*. Advisory Opinion OC-21/14, *supra*, para. 67.

419 *Cf*. Committee on the Rights of the Child. General Comment 7, *supra*, para. 20.

420 *Cf.* Committee on the Rights of the Child. General Comment 7, *supra*, para. 18.

421 *Cf.* Committee on the Rights of the Child, General Comment 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31), CRC/C/GC/17, of April 17, 2013, para. 51.

in prison with their mother and children visiting prisoners."[422] Therefore, obligatory training on human and gender rights and rights of the child must be given to all prison staff. The training and sensibilization on the rights pertaining to early childhood should also include judges and the personnel who work in the criminal justice system.

220. Another central aspect is the recognition that play and recreation have a preponderant role in the life of every child and "are essential to the health and well-being of children and promote the development of creativity, imagination, self-confidence, and self-efficacy, as well as physical, social, cognitive and emotional strength and skills."[423] Therefore, children living in prison should be able to enjoy, in conditions of equality, the rights appropriate to the needs of each age and their importance in ensuring the health, well-being and development of the child.[424]

221. With reference to the right to education, the Court recalls that "the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention."[425] The Court has explained that this right, with respect to children, is derived from that article as interpreted in accordance with Article 28 of the Convention of the Rights of the Child; Article 26 of the American Convention and Article 13 of the Protocol of San Salvador, which recognizes the right to education.[426] Moreover, as the ESCR Committee has indicated, education must be "accessible" to all, "especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds." The Committee also emphasized that the prohibition of discrimination in education "applies fully and immediately to all aspects of education and encompasses internationally prohibited grounds of discrimination."[427] Therefore, "[s]pecial attention must be given to ensuring that all children subject to compulsory education have access to, and participate in, such education."[428]

222. Bearing in mind that access to basic education in primary schools is compulsory and free,[429] the Court is of the opinion that such education must be offered without discrimination to children living in prison with their mothers or primary caretakers, preferably at outside institutions or schools that comply with the elements of availability, accessibility, acceptability and adaptability.[430] In addition, transfers must be done with dignity both inside and outside prison.

223. Finally, States should adopt all measures, according to a child's age and level of development, that would develop, progressively and without stigmatization, communitarian integration and socialization and their social environment, with the assistance of multidisciplinary teams.

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422 *Cf.* Bangkok Rules, *supra*, Rule 21.

423 *Cf*. Committee on the Rights of the Child. General Comment 17, *supra*, para. 9.

424 *Cf.* Committee on the Rights of the Child. General Comment 17, *supra*, paras. 16 and 25.

425 *Cf*. Advisory Opinion OC-17/02, *supra*, para. 84.

426 *Cf. Case of the Girls Yean and Bosico v. Dominican Republic, supra*, para. 185. Although in this case, the Court refers to "primary" education, it is understood to apply to the right of education in all its aspects. Moreover, with respect to the mention of Article 6 of the American Convention, the Court has held that Article 49 of the OAS Charter, the provisions of which remit to Article 26, contemplates the right to education. *Cf. Case if Gonzales Lluy et al. v. Ecuador, supra*, para. 234 and footnote 264 and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 117.

427 *Cf*. ESCR Committee, General Comment 13, The right to education (Article 13 of the International Covenant of Economic, Social and Cultural Rights), E/C.12/1999/10, December 8, 1999, paras. 6 and 31. The Committee clarified that the obligation of non-discrimination "is subject to neither progressive realization nor the availability of resources."

428 *Cf.* Report of the Special Rapporteur on the right to education, Vernor Muñoz, The right to education of persons in detention, A/HRC/11/8, *supra*, para. 101(a).

429 *Cf.* ESCR Committee, General Comment 13, *supra*, para. 51.

430 *Cf.* ESCR Committee, General Comment 13, *supra*, paras. 9 to 10 and 31 to 34.

VII
DIFFERENCIATED APPROACHES APPLICABLE TO LGBTI PERSONS DEPRIVED OF LIBERTY

224. The Court has been asked to determine the specific obligations of States regarding lesbians, gays, bisexual and transgender persons deprived of liberty due to their special characteristics and needs. Although the Commission did not mention intersex persons in its questions, the Court deems it pertinent to include them since they can be exposed to the same discrimination and violence in prisons as transgender persons and those with non-binary gender identities.[431]. Therefore, in responding to the questions posed by the Commission, the Court will use the acronym LGBTI. As it did in its *Advisory Opinion OC-24/17*, the Court will use this acronym indistinctly and without it meaning a lack of acknowledgement of other manifestations of gender expression, gender identity or sexual orientation.[432]

225. The Court has already established that sexual orientation,[433] gender identity[434] and gender expression[435] are protected categories under Article 1(1) of the Convention.[436] Thus, the State cannot act against a person on the grounds of sexual identity, gender identity and/or expression.[437]

226. With respect to the Commission's questions, the Court will refer to the following questions in its interpretation of the pertinent provisions brought to its attention: (A) general considerations on the right to equality and non-discrimination and the situation of LGBTI persons deprived of liberty; (B) the principle of separation and the determination of the placement of a LGBTI person in prison; (C) the prevention, investigation and registration of violence against LGBTI persons deprived of liberty; (D) the right to health of transgender persons deprived of liberty with respect to the beginning or continuation of the transition process, and (E) the intimate visits of LGBTI persons deprived of liberty.

A. General considerations on the right to equality and non-discrimination and the situation of LGBTI persons deprived of liberty

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431 In this regard, while intersexuality is not a sexual orientation nor a gender identity, when the sexual anatomy of a person does not physically adjust to the defined cultural standards for a feminine or masculine body, intersex persons can be exposed to discrimination and violence in prison, with special relevance as to their placement within the prison. See, similarly, Association for the Prevention of Torture (APT). Toward an effective protection of LGBTI persons deprived of liberty: 2019, Handbook for Monitoring, para. 85 and Prison Policy of Malta, Policy for Prisoners Trans, Variable Gender and Intersex of August 6, 2016, item 3(10).

432 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 32(v).

433 It refers to the emotional affective and sexual attraction by persons of a different gender than yours or of the same gender, or of more than one gender, as well as the intimate and/or sexual relations with these persons. Sexual orientation is a broad concept that creates space for self-identification. Moreover, sexual orientation may vary during a continuum, including exclusive and non-exclusive attraction to the same sex or to the opposite sex. Everyone has a sexual orientation, which is inherent in the identity of the person. *Cf.* Advisory Opinion OC-24/17, *supra*, para. 32(l).

434 It refers to the internal and individual experience of gender of how each person feels it, which may correspond or not with the sex assigned at birth, including the personal experience of the body (which may involve, or not, the modification of the appearance or the corporal function through medical, surgical or other means, as long as it is freely chosen) and other expressions of gender, including clothes, way of speaking and habits. Gender identity is a broad concept that creates space for self-identity and refers to the experience that a person has of his own gender. Thus, the identity of gender and its expression also takes many forms, some persons do not identify neither as men or women or identify as both. *Cf.* Advisory Opinion OC-24/17, *supra*, para. 32(f).

435 It is understood as an external manifestation of the gender of a person, through the physical aspect, which may include the manner of dressing, hair styling or the use of cosmetics, or by mannerisms, the manner of speaking, of habits and of personal behavior, of behavior or personal references, among others. The expression of gender of a person may or may not correspond with his self-perceived gender identity. *Cf.* Advisory Opinion OC-24/17, *supra*, para. 32(g).

436 *Cf. Case of Atala Riffo and children v. Chile*, *supra,* para. 93 and Advisory Opinion OC-24/17, *supra*, para. 78.

437 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 78.

227. The Court, in its case law, has recognized that LGBTI persons have historically been victims of structural discrimination, stigmatization, different forms of violence and violations to their fundamental human rights.[438] The different forms of discrimination against LGBTI persons "present themselves in numerous ways both in the public and private spheres."[439] In the opinion of the Court, one of the most extreme forms of discrimination against LGBTI people is that which occurs in violent situations.[440] According to the Court, this violence is due to prejudices based on sexual orientation and gender identity or expression, perceived or real, of a person.[441] This type of violence "may be driven by the desire to punish those seen as defying gender norms."[442]

228. The Court, in its decisions, has verified a context of violence against LGBTI persons in the region.[443] The OAS General Assembly, in various resolutions, has recognized that LGBTI persons are subject to different forms of violence and discrimination in the region, based on the perception of their sexual orientation and gender identity or expression, and has condemned acts of violence, violations of human rights and all forms of discrimination on the grounds of sexual orientation and gender identity and expression.[444] The Court notes that the Inter-American Commission in its 2015 Report on violence against LGBTI persons, verified that, from January 2013 to March 2014, there were at least 770 acts of violence against LGBTI persons, in general, in the OAS Member States. Of these, 176 involved non-lethal violence and 594 homicides.[445] In effect, violence against LGBTI persons for reasons of prejudice occurs in all the countries of the hemisphere.[446]

229. The Court also notes that there is a clear connection between the criminalization of LGBTI persons and the offenses of transphobic and homophobic hate, police abuse and stigmatization.[447] The Court considers it important to emphasize that the imposition of sanctions and/or criminalization of persons based on their sexual orientation, gender identity or expression is contrary to the

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438 *Cf. Case of Atala Riffo and daughters v. Chile*, *supra,* paras. 92 and 267 and *Case of Pavez Pavez v. Chile. Merits, Reparations and Costs*. Judgment of February 4, 2022. Series C No. 449, para. 68.

439 *Cf*. Advisory Opinion OC-24/17, *supra*, para. 36 and *Case of Vicky Hernández et al v. Honduras, supra*, para. 68.

440 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 36; *Case of Azul Rojas Marín et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 12, 2020. Series C No. 402, para. 91 and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 68.

441 *Cf. Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 92 and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 69.

442 *Cf. Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 92 and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 69. See, similarly, UN, Report of the Office of the High Commissioner for Human Rights. *Discrimination and violence against persons on the grounds of sexual orientation and gender identity*, A/HRC/29/23, of May 4, 2015, para. 21; UN, Report of the Office of the High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence committed against persons because of their sexual orientation and gender identity*, A/HRC/19/41, of November 17, 2011, paras. 20 and 21 and Organization for Security and Co-operation in Europe – OSCE, *Hate Crimes in the OSCE Region – Incidents and Responses, 2006 Annual Report, OSCE/ODIHR*, Warsaw, 2007, p. 53.

443 *Cf*. *Case of Azul Rojas Marín et al. v. Peru, supra*, paras. 46 to 51 and *Case of Vicky Hernández et al. v. Honduras, supra,* paras. 30 to 35.

444 *Cf*. OAS, General Assembly Resolutions: AG/RES. 2928 (XLVIII-O/18), Human rights and the prevention of discrimination and violence against LGBTI people, adopted at the fourth plenary session, held June 5, 2018; AG/RES. 2908 (XLVII-O/17), Human rights, sexual orientation and gender identity and expression, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Human rights, sexual orientation and gender identity and expression, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human rights, sexual orientation and gender identity and expression, June 5, 2014; AG/RES. 2807 (XLIII-O/13), Human rights, sexual orientation and gender identity and expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human rights, sexual orientation and gender identity and expression, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human rights, sexual orientation and gender identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human rights, sexual orientation and gender identity, June 42009 and AG/RES. 2435 (XXXVIII-O/08), Human rights, sexual orientation and gender identity, June 3, 2008.

445 *Cf.* IACHR. Violence against lesbian, gay, bisexual, trans and intersex people in America, OAS/Ser.L/V/II.rev.2 Doc. 36, November 12, 2015, paras. 102 and 103.

446 Cf. IACHR. Violence against lesbian, gay, bisexual, trans and intersex people in America, *supra*, para. 102.

447 *Cf*. Report of the Special Rapporteur on the question torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 15.

international law of human rights.[448] Therefore, States must undertake an adequate control of conventionality and eliminate those regulations from their juridical order. This is imperative for the OAS Member States that impose the death penalty as a result of the criminalization of consensual sexual relations between adults of the same sex.

230. The violence suffered by LGBTI persons in prisons,[449] which "can take many forms and may include bullying, harassment, verbal or psychological violence, exploitation, as well as physical and sexual violence, including rape."[450] Moreover, transgender detainees, in particular transgender women, face unique exposure to violence, especially of a sexual nature.[451] Thus, the absence of public policies on self-identification, classification, risk assessment and internment contributes to transgender women being placed in jails and other places where they are exposed to a high risk of rape and sexual violence.[452]

231. According to the UN Special Rapporteur on questions of torture and other cruel, inhuman or degrading treatment or punishment, this heightened exposure to violence is due to three main factors: (i) the other inmates perception of inferiority with respect to LGBTI persons; (ii) their detention in worse conditions than that of the larger prison population, and (iii) the incitement and tolerance of violent acts by prison personnel.[453] In view of this panorama, the Court has considered it imperative to take into account the vulnerability in which LGBTI persons deprived of liberty find themselves, *inter alia*, suffering physical and psychological abuses.[454]

232. Given this generalized situation of violence, the SPT has stated that prison authorities often

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[448] *Cf*. See*, mutatis mutandis*, Advisory Opinion OC-24/17, *supra*, para. 39 and Principles of Yogyakarta+10, *supra*, Principle 33. See, similarly, Committee on Human Rights. *Toonen v. Australia*. Communication 488/1992, CCPR/C/WG/44/D/488/1992, of March 31, 1994, paras. 8(1) to 9; ESCR Committee: Final comments on the second periodic report on Sudan, E/C.12/SDN/CO/2, of October 9, 2015, para. 19; Final comments on the third periodic report on Tunisia, , E/C.12/TUN/CO/3, of November 14, 2016, paras. 24 and 25; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 69; Report of the Independent Expert on the protection of violence against violence and discrimination on the grounds of sexual orientation and gender identity of the Independent Expert on the protection against violence and discrimination on the grounds of sexual orientation and gender identity, Víctor Madrigal-Borloz, A/72/172, of July 19, 2017, paras. 29 to 48; Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Anand Grover, A/HRC/14/20, of April 27, 2010, paras. 2, 6 and 7; ECHR, *Case of Dudgeon v. Great Britain* [GS], No. 7525/76. Judgment of October 22, 1981, para. 61 y 63; Case of *Candaso Norris v. Ireland* [GS], No. 10581/83. Judgment of October 26, 1988, paras. 46 and 47; *Case of Modinos v. Cyprus* [GS], No. 15070/89. Judgment of April 22, 1993, paras. 24 and 25; *Case of A.D.T. v. Great Britain*, No. 35765/97. Judgment of July 31, 2000, paras. 38 and 39 and IACHR, Violence against lesbians, gay, bisexual, trans and intersex persons in the Americas, *supra*, para. 60. CAPS?

[449] The UN Committee against Torture has expressed its concern on the question of sexual and physical abuse by police and prison personnel against LGBTI people in some countries of the region. *Cf.* UN, Committee against Torture, Final comments of the Committee against Torture with regard to Argentina, May 24, 2017, para 35; Colombia, CAT/C/COL/CO/5, May 29, 2015, para. 27; Costa Rica, CAT/C/ARG/CO/5-6, July 7, 2008, CAT/C/CRI/CO/2, para. 11; Ecuador, CAT/C/ECU/CO/3, February 8, 2006, para. 17; United States of America, CAT/C/USA/CO/2, July 25, 2006, para 37 and CAT/C/USA/CO/3-5d, December 19, 2014, para. 21; Paraguay, CAT/C/PRY/CO/4-6, December 14, 2011, para. 19 and Perú CAT/C/PER/CO/5-6, January 21, 2013, para. 22.

[450] APT. Towards the Effective Protection of LGBTI Persons Deprived of Liberty. A Monitoring Guide of 2019, *supra*, para. 63.

[451] *Cf*. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Nigel S. Rodley, A/56/156, of July 3, 2001, p. 23 and Association for the Prevention of Torture (APT). Toward the effective protection of LGBTI persons deprived of liberty: 2019 Handbook for Monitoring, *supra*, p. 64.

[452] *Cf*. SPT. Ninth Annual report, CAT/C/57/4, of March 22, 2016, para. 66.

[453] The UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment has received information that "members of sexual social minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards." Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Nigel S. Rodley, A/56/156, *supra*, para. 23.

[454] *Cf. Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 28, 2018, Considering Paragraph 154.

subject LGBTI persons to segregation, isolation or solitary confinement as measures of protection, which deprive them of opportunities of reductions in their sentences or of opting for parole.[455] At the same time, State officials are not trained to meet the specific needs of these persons, which, in turn, is responsible for an increase in violence and in the lack of access to the different services offered in prison.[456]

233. For example, specific medical care for their needs is often denied to LGBTI persons.[457] Different national mechanisms of prevention of torture have reported discrimination and abuses against LGBTI persons deprived of liberty during the COVID-19 pandemic,[458] as well as difficulties in access to health services for reasons of gender and for treatment of HIV.[459]

234. The Court notes that some States of the region have begun to implement actions to reverse the situation of violence and discrimination against LGBTI persons deprived of liberty.[460] In this regard, the Court reaffirms that the situation of LGBTI persons is not necessarily the same in all the countries of the region since the degree of recognition and their access to fundamental rights varies depending on the State.[461] The Court welcomes this important progress in recognizing the rights of this prison population and will bear it in mind in developing its considerations in this section since they are specific best practices in treating LGBTI people deprived of liberty with dignity.

235. The Court clarifies that, in referring to LGBTI persons, it does so in the understanding that, despite their heterogeneity, it is a population with common experiences of prison violence and discrimination that arise from prejudices based on sexual orientation and gender identity and expression. In this regard, the Court will make the pertinent indications in developing standards when it refers to different groups within that terminology, taking into account their special needs (*supra* para. 224).

236. In view of the history of violence and discrimination against LGBTI persons, as well as their specific needs during deprivation of liberty, the Court will proceed to respond to the specific questions raised by the Commission. The Court also deems it pertinent to emphasize that, in cases of States

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455 *Cf*. SPT, Ninth Annual Report, CAT C/57/4, *supra*, para. 64.

456 *Cf*. SPT, Ninth Annual Report, CAT C/57/4, *supra*, para 60.

457 *Cf*. Report of the Special Rapporteur on the question on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 48.

458 *Cf.* See, *inter alia*, National Mechanism for the Prevention of Torture in Peru, Special Report No.4: Conditions of the persons deprived of liberty in the context of the Covid-19 health emergency, June 19, 2020, p 43.

459 *Cf*. Declaration of the Inter-Institutional Working Group of the Joint Program of the United Nations on VIH/SIDA (ONUSIDA) (ONUSIDA, UNDP, UNFPA and UNODC) on key populations on the need to ensure access to quality, safe and non-discriminatory services for the key populations and migrants with VIH in the context of the COVID-19 pandemic, of July 8, 2020. Available at: https://www.undp.org/press-releases/covid-19-ensuring-access-quality-safe-and-non-discriminatory-services-hiv-key

460 See, for example, Argentina. Law 26.743 May 23, 2012; Ministry of Security, Specific Program for Trans Women during the confinement housed under the authority of the Federal Prison Services, Resolution 37/2020 of March 6, 2020 and Ministry of Justice and Human Rights, Protocol of Priority Allocation of the Electronic Devices, of September 13, 2016; Brazil, Ministry of Justice and Public Security, Technical Note 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8, 2021; Chile, Supreme Court Rol 937-2017; Court of Appeals of Antofagasta Rol N° 31-2017; Colombia, General Regulations for Detention Centers, Resolution 006349 of the National Institute of Prisons (INPEC) of December 19, 2016 and Constitutional Court of Colombia, Judgment T062-11 of February 4, 2011; Costa Rica, Ministry of Justice and Peace, Guidelines for the care of persons with sexual orientation, gender identity and expression, enrolled at any of the levels of the Costa Rican Prison System of 2018 and National Institute of Criminology, Circular 01-2019 on the "Procedure on the care and follow-up of the LGBTI population of the National Prison System of El Salvador, Ministry of Justice and Public Security, General Directorate of Prisons, Protocol of Actions of prison personnel for the care of LGBTI people, of February 2019, and Mexico, National Commission on Human Rights, Ruling on the care of members of the LGBTITTI populations in prison of November 12, 2018.

461 *Cf*. Advisory Opinion OC-24/17, *supra*, para. 44 and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz, A/HRC/35/36, of April 19, 2017, para. 18.

that are not able to fully comply with these international obligations, as long as the specific case permits it, they may exchange sentences of deprivation of liberty and pretrial detention for other sanctions or precautionary measures that are less harsh than the imprisonment of LGBTI persons.[462]

B. The principle of separation and the determination of the placement of an LGBTI person in prison

237. Various international instruments on the treatment of persons deprived of liberty recognize a general principle of the separation of persons on the grounds of their sex, after having placed that personal data in the prison registry.[463] In the advisory proceedings, it was stated that prison environments were developed not only from an androcentric point of view (*supra* para. 126), but also from the dominant logic of the binarity of sex,[464] of cisnormativity[465] and of heteronormativity,[466] which presents special challenges for the respect and guarantee of the rights of transgender persons, as well as persons with non-binary gender identities. Thus, the lack of recognition of gender identity in the context of prisons implies a risk of violating rights and of greater exposure to violence (*supra* paras. 230 to 232). Moreover, there is a consensus in the international law of human rights that generally states that the classification and separation of persons deprived of liberty can never justify a treatment inferior to that of other inmates, nor does it imply torture or other cruel, inhuman or degrading treatment or punishment.[467]

238. Since its *Advisory Opinion OC-24/17*, the Court has underscored that States must ensure the recognition of gender identity, since it is of vital importance for the full enjoyment of other human rights. Similarly, the Court verifies that the lack of recognition of that right may, in turn, impede the exercise of other fundamental rights and, therefore, have an important differentiated impact toward transgender persons, who, as has been seen, are generally in a position of vulnerability. The respect and recognition of gender identity and expression has special consequences in the treatment of persons deprived of liberty. The lack of access to recognition of gender identity is a determinant factor in the continuation of discriminatory acts against transgender persons and can also be an important obstacle to the full enjoyment of all human rights recognized by international law.[468]

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462 Some courts have considered that the special vulnerability of LGBTI persons should be taken into account in determining their stay in prison, which may lead to the adoption of less serious measures, such as house arrest. *Cf*. Argentina, Second Chamber of the Federal Chamber of Criminal Cassation, Case CFP 10082/2013/TO1/8/CFC1, Judgment of April 24, de 24, 2020, ps. 30 to 32. The Handbook on Prisoners with special needs states that "[a]s with all offenders, LGBT offenders who have committed non-violent offences and who do not pose a risk to society should benefit from non-custodial sanctions and measures, better suited to their social reintegration. In this context, sentencing authorities should be made aware of the extreme vulnerability of LGBT persons in prisons." UN Office on Drugs and Crime (UNODC), Handbook on Prisoners with special needs, 2009, p. 120.

463 *Cf.,* See*, inter alia*, IACHR, Principles and Best Practices, *supra,* Principle XIX and Mandela Rules, *supra*, Rule 11.

464 The binary system of sex corresponds to the social and cultural model dominant in Western culture that "considers gender and sex as consisting of two, and only two, rigid categories, namely male/man and female/woman. Such a system or model excludes those who do not fit within the two categories (such as transexual or intersex persons). *Cf*. Advisory Opinion OC-24/17, *supra*, para. 32(c) and IACHR, Rapporteurship of LGBTI Rights. Basic Concepts.

465 Cisnormativity is an idea or expectation according to which, all persons are cisgender and that those persons who are assigned the masculine sex at birth always grow up as men and those that are assigned the feminine sex at birth always grow up to be women. *Cf*. Advisory Opinion OC-24/17, *supra*, para 32(g); IACHR, Violence against lesbian, gay, bisexual, trans and inter sex persons in the Americas, *supra*, para. 32 and Inter-American Commission on Human Rights, Rapporteurship on LGTBI Rights. Basic Concepts.

466 Heteronormativity is a cultural bias in favor of heterosexual relations, which are considered normal, natural and ideal and are preferred over relations between the same sex or the same gender. That concept calls for legal, religious, social and cultural rules that obligate persons to act in accordance with dominant and imperative heterosexual patterns. *Cf*. Advisory Opinion OC-24/17, *supra*, para. 32(h); IACHR, Violence against lesbian, gay, bisexual, trans and intersex persons in the Americas, *supra*, para. 31 and Inter-American Commission on Human Rights. Rapporteurship on LGBTI Rights, Basic Concepts.

467 *Cf*. IACHR, Principles and Best Practices, *supra,* Principle XIX.

468 *Cf*. Advisory Opinion OC-24/17, *supra*, para. 114.

239. In view of the risk of violence to which LGBTI persons are subjected in prisons, the determination of the placement of a LGBTI person in prison must seek to ensure their safety, respecting their gender identity and/or sexual orientation. In referring to this placement of LGBTI persons in prison, the Court has referred to the Handbook on Prisoners with special needs of the UN Office against Drugs and Crime (UNODC), which states that LGBTI persons deprived of liberty should not be placed in cells with other prisoners who could put their lives at risk.[469] The Handbook recommends that States should apply a classification system that "recognizes the risks faced by LGBT prisoners" and should follow the essential principle of housing them "in whichever environment will best ensure their safety."[470] It thus recommends: (a) taking into account the concerns and views of the prisoner; (b) never placing LGBTI prisoners in dormitories or cells together with prisoners who may pose a risk to their safety; (c) never assuming that it is appropriate to house transgender prisoners according to the sex assigned at birth, but rather it be done in consultation with the prisoner concerned and considering the different needs of housing, and (d) ensuring that there is no discrimination in the quality of accommodation provided for LGBTI prisoners.[471]

240. The SPT has recommended to States that decisions on the internment of transgender persons be adopted on a case-by-case basis, taking into account the specific needs of each person and "considering seriously their views as to their safety and […] and with their informed consent" and "the involvement of transgender activists and experts particularly desirable."[472] The SPT also has emphasized that "[e]ven measures that appear to be protective can often operate to the detriment of individuals."[473] In this regard, "solitary confinement, isolation and administrative segregation are not appropriate methods of managing the security of persons, including lesbian, gay, bisexual, transgender and intersex persons, and can be justified only if used as a last resort, under exceptional circumstances, for the shortest possible time and with adequate procedural safeguards."[474] For its part, the OAS has indicated the possibility that the recognition of self-perceived gender identity may facilitate the transfer of persons deprived of liberty to prisons of their choice.[475]

241. The Court notes that the different means by which a State determines the placing of an LGBTI person in prison not only follows the standards on respect for their gender identity, but also on the prevention of violence. The Court has identified the following State practices in the region in the placement of LGBTI persons deprived of liberty: (i) housing LGBTI persons in blocks for vulnerable or at-risk prisoners (including persons who committed sexual offenses);[476] (ii) creation of special

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469 *Cf. Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures*. Order of the Inter-American Court of November 15, 2017, Considering Paragraphs 102 and 103, citing UNODC, Handbook on prisoners with special needs, *supra*, p. 116.

470 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 116 and 121

471 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 116 y 121.

472 SPT, Ninth Annual Report, CAT C/57/4, *supra*, p. 76. See, similarly, Observations presented by ILANUD (file of observations, f. 599).

473 SPT, Ninth Annual Report, CAT C/57/4, *supra*, para. 64.

474 SPT, Ninth Annual Report, CAT C/57/4, *supra*, para. 78. For ILANUD, the protection of LGBTI persons cannot suppose more serious measures during confinement in comparison with the other prison population and, in case that isolation is imposed as a final recourse to protect the life and integrity of these persons, this measure must be provisional and brief. Observations presented by ILANUD (file of observations, f. 600).

475 *Cf*. OAS, Panorama of the legal recognition of gender identity in the Americas, OAS/Ser.D/XXVII.5, May 2020, p. 74.

476 *Cf*. APT. Towards the Effective Protection of LGTBI Persons Deprived of Liberty: A Monitoring Guide of 2019, pp. 41, 68, 71, 74 and 76.

blocks;[477] (iii) prisoners and the prison administration agreeing spaces of safety[478] and (iv) recurring to isolation, especially for transgender persons.[479]

242. Bearing in mind the standards of the international law of human rights,[480] as well as the pertinent State practice, the Court will proceed to determine the required minimum standards for housing a LGBTI person in prison, in accordance with the terms of Article 5 of the Convention. The Court notes that, pursuant to Article 5(1) and (2), States have the obligation to register the sex of the person deprived of liberty and to separate the men prisoners from the women prisoners. In accordance with an evolving interpretation of the text of the Convention and the international standards on the matter, the Court considers that transgender and intersex persons deprived of liberty must be assigned the name and gender with which they identify, according to their express wishes. With respect to persons who do not identify within the binary scheme of gender, the prison authorities must so note it in the registry together with their social name.[481] The States must ensure that the information on sexual orientation and gender identity of a person remains confidential.[482]

243. With respect to the foregoing, the Court clarifies that, according to the principle of equality and non-discrimination, the determination of the placement of prisoners cannot be based on preconceived notions of their gender identity. The Court has indicated that it is possible for persons to be discriminated against on the grounds of the perception that others have on their relationship with a social group or sector, regardless of whether that corresponds to reality or to the self-identification of the person.[483] Thus, States have the obligation, in the context of deprivation of liberty, to provide opportunities that would allow prisoners to freely and voluntarily state their gender identity, confidentially and safely, before or after their admittance to prison.

244. The Court also considers that the States must ensure that the measures adopted to place a LGBTI person in prison do not, in practice, involve automatic isolation or incommunicado; a treatment inferior to that of the other prisoners, nor an exclusion from prison activities. In *Matter of the Penitentiary Complex of Curado with regard to Brazil,* the Court noted that, although specific blocks had been constructed for this population, LGBTI prisoners continued to be subjected to physical, psychological and sexual violence because they were lodged in inadequate and overpopulated spaces that did not protect them.[484] Although the Court recognizes the valuable progress made by some

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[477] For example, the gender or sexually diverse persons are placed in special areas within the prisons in Brazil. In El Salvador, the "sectorization" of the LGBTI prison population is recommended "if necessary." *Cf*. Ministry of Justice and Security of Brazil, Technical Note 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8, 2021, para. 52 and Ministry of Justice and Public Security of El Salvador, General Directorate of Prisons, Protocol of Actions of prison personnel for the care of LGBTI persons, of February 2019, point 4.

[478] *Cf.* Colombia, General Regulations for Detention Centers, Resolution 006349 of the National Penitentiary and Prison Institute (INPEC) of September 19, 2016, Article 36, para. 4.

[479] *Cf.* APT. Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide of 2019, p. 71 and IACHR. Violence against lesbians, gay, bisexual, trans and intersex persons in the Americas *supra*, para. 159.

[480] The Yogyakarta Principles explicitly refer to the standards that the State should follow in determining the placement of persons deprived of liberty respecting their gender identity. Specifically, Principle 9 indicates that the States "[e]sure that placement in detention avoids further marginalizing persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse" and "[e]sure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity." Yogyakarta Principles, *supra*, Principles 9 (A) and 9 (C).

[481] *Cf.* Colombia, General Rules for Detention Centers, Resolution 006349 of the National Penitentiary and Prison Institute (INPEC) of December 19, 2016, Article 26, para. 2.

[482] *Cf.* Colombia, General Rules for Detention Centers, Resolution 006349 of the National Penitentiary and Prison Institute (INPEC) of December 19, 2016, Article 26, paras. 1 and 2.

[483] *Cf. Case of Perozo et al. v. Venezuela, Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Serie C No. 195, para. 380 and Advisory Opinion OC-24/17, *supra*, para. 79.

[484] *Cf. Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 15, 2017, Considering Paragraph 95.

States in designating a specific section or wing of their prisons for LGBTI prisoners, it is necessary to ensure that the housing in those places does not imply an inferior treatment in comparison to the other prisoners or an exclusion from prison activities. Consequently, periodic judicial control and independent monitoring are especially important in overseeing sentences and the conditions of detention.

245. With respect to isolation used as a means of protection during deprivation of liberty, the Court emphasizes that this measure seriously heightens the suffering inherent in confinement and thus should always be a last resort to maintain prison order and security and should be for the briefest time possible. There is no question that prolonged isolation and coercive incommunicado are, per se, cruel and inhuman treatment and, thus, in violation of the right to personal integrity (*supra* para. 143), which means that the automatic application of isolation to a person deprived of liberty is incompatible with Article 5(1), 5(2) and 5(6) of the Convention.[485]

246. The Court considers that, to order the isolation of a person deprived of freedom, the authorities must weigh in each specific case the safety of the individual against the physical and mental stress that such a measure provokes, by determining the necessity, appropriateness and proportionality of such a measure.[486] In addition, especially in the case of LGBTI prisoners, States have the obligation to take all necessary measures to determine whether the isolation is based on stereotypes.[487] To ensure the above, States must allow periodic external monitoring of the conditions of detention of LGBTI persons, as well as undertake a judicial control pursuant to the obligations set out in this opinion.[488]

247. In light of the international norms, the Court considers that the placement of LBTI persons in a prison must be determined by State authorities according to the particularities of each prisoner and his or her specific risk in the special context of each State, always taking into account as principal guidelines respect for gender identity and expression; the avoidance of any situation that produces problems of coexistence; the participation of the person involved, and the protection against violence against him or her and in comparison to the other prisoners.[489]

248. Each installation or prison administration should have the technical and multidisciplinary professional team that rationally determines the most appropriate and adequate placement of persons deprived of liberty in accordance with their self-perception and sexual orientation so as to respect their dignity, avoiding their deterioration and reducing the possibilities of conflicts and violence, The indications of these technical bodies should be monitored by the judges overseeing the sentences (*supra* paras. 53 to 56).

C. The prevention, investigation and registration of violence against LGBTI persons deprived of liberty

249. The Commission specifically consulted on measures that States should adopt to prevent

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485 *Cf*. See, *mutatis mutandis*, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 94.

486 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 94. See, also, ECHR, *Case of Stasi v. France*, No. 25001/07. Judgment of October 20, 2011, para. 75.

487 *Cf*. See, in also, ECHR, *Case of X v. Turkey*, No. 24626/09. Judgment of October 9, 2012, paras. 56 to.58.

488 Thus, for example, Rule 83(1) of the Mandela Rules stipulates that "There shall be a twofold system for regular inspections of prisons and penal services. (a) Internal or administrative inspections conducted by a central prison administration; (b) External inspections conducted by a body independent of the prison administration, which may include competent international or regional bodies." Mandela Rules, *supra*, Rule 83(1).

489 See, similarly, Report of the Special Rapporteur on summary executions, Report of the Special Rapporteur on summary or arbitrary executions, Agnes Callamard, on the adoption of a gender approach with respect to arbitrary executions, A/HRC/35/23, of June 8, 2017, para. 110(e).

violence against LGBTI persons that do not involve segregation from other prisoners. In this regard, the Court has indicated that LGBTI persons must not be automatically subjected to isolation in prison under the pretext of providing them protection (*supra* paras. 245 and 246).

250. In addition, in its written observations the Commission explained that it requested that the Court address the obligation to investigate these acts of violence. The Commission also posed a question on the obligation of registering incidents of violence against LGBTI prisoners. The Court considers that the obligation to prevent, investigate and register acts of violence against LGBTI prisoners is intimately related since the formulation of effective public policies of prevention is made difficult for the lack of official data. The Court deems it appropriate to divide its analysis as follows: (1) registration of data related to violence against LGBTI prisoners; (2) prevention and protection in view of the violence against LGBTI prisoners and (3) obligation to investigate violence against LGBTI prisoners.

C.1) The registration of data related to the violence against LGBTI prisoners

251. The Court considers that the obligation to act with due diligence to prevent and to investigate violations to the personal integrity or the life of LGBTI persons requires that States have statistical and individualized information on the existence of a risk in order to respond to it.[490] Thus, the Court has held that comprehensive information on the violence to which LGBTI persons are subjected should be collected in order to learn the magnitude of this phenomenon and, subsequently, to design strategies to prevent or eliminate new acts of violence and discrimination.[491]

252. The Court cannot ignore that, nationally and regionally, there is a paucity of statistical information on the situation of LGBTI persons, which also means an absence of data on persons deprived of liberty who belong to this group.[492] According to the SPT, the lack of statistics on mistreatment and torture on the grounds of sexual orientation and gender identity is due to the absence of appropriate methods of self-identification and of the compilation of data and its processing,[493] which contributes to the invisibilization of LGBTI persons.[494]

253. In response to this paucity, the OAS General Assembly has urged the States "to produce data on homophobic and transphobic violence with a view to fostering public policies that protect the human rights of lesbians, gays, and bisexual, transexual, and intersexual people (LGBTI)."[495] The UN

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490 *Cf*. Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 11.

491 *Cf. Case of Azul Rojas Marín et al. v. Peru, supra*, para 252 and *Case of Vicky Hernández et al. v. Honduras, supra,* para. 176.

492 In this regard, the Inter-American Commission has stated that the majority of the OAS Member States do not collect data on violence against LGBTI persons. This was also stated, for example, in the written observations by (file of observations, f. 594) and the APT together with the National Mechanisms for the Prevention of Torture (file of observations, f. 2646.11). See, also, Prison Ombudsman of Argentina; Almas Cautivas, Casa de las Muñecas Tiresias, Casa Hogar Paola Buenrostro; International Consortium on Policies of Drugs; Dejusticia; Equis: Justice for Women; Red Corpora en Libertad and Washington Office on Latin America. Report on trans women deprived of liberty, pp. 8 and 9.

493 SPT, Ninth Annual Report, CAT/C/57/4, *supra*, para. 59.

494 In this regard, the OHCHR and the SPTE have stated that "official statistics tend to understate the number of incidents, and prejudicial and inexact categorization of cases results in misidentification, concealment and underreporting. The systemic failure in data collection often results in the virtual invisibility of the concerns and problems of lesbian, gay, bisexual, transgender and intersex persons." Report of the UN Office of the High Commissioner for Human Rights, A/HRC/29/23, para. 25 and SPT, Ninth Annual Report, CAT/C/57/4, *supra*, para 59.

495 OAS, AG/RES. 2807 (XLIII-O/13) Human rights, sexual orientation and gender identity and expression, adopted at the Fourth Plenary Session, held on June 6, 2013, Resolution 4. For its part, the Committee of Ministers of the Council of Europe has recommended that the States should "ensure that relevant data are gathered and analyzed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on "hate crimes: and hate-motivated incidents related to sexual orientation or gender identity." Council of Europe. Recommendation CM / Rec

Independent Expert on the protection against violence and discrimination for reasons of sexual orientation and gender identity has recommended that States "design and implement comprehensive data collection procedures in order to be able to uniformly and accurately assess the type, prevalence, trends and patterns of violence and discrimination against lesbian, gay, bisexual, transgender and gender-diverse persons. Data should be disaggregated by community and also by other factors, such as race, ethnicity, religion or belief, health status, age, class, caste and migration or economic status," as well as creating "effective systems for recording and reporting hate crimes based on sexual orientation and gender identity."[496]

254. The Court considers that it is necessary to collect comprehensive information on violence against LGBTI persons, particularly those deprived of liberty, in order to design effective strategies that prevent and eliminate new acts of violence and discrimination. Therefore, the Court is of the opinion that the States are obligated, pursuant to Articles 1(1) and 2 of the Convention, to design and implement, through the corresponding State institutions, a system to collect data and statistics on cases of violence against LGBTI prisoners in order to precisely and uniformly evaluate the type, prevalence, trends and patterns of violence and discrimination against LGBTI persons, disaggregating the data by community, race, ethnicity, religion or belief, health status, age, caste and migration or economic status."[497] In addition, the number of cases that were effectively prosecuted should be specified, identifying the number of accusations, convictions and acquittals. This information should be disseminated to ensure its access to the general population without identifying the victims.

C.2) The prevention and protection regarding violence against LGBTI persons deprived of liberty

255. The Court recalls that the States have the duty to adopt the necessary measures to protect and ensure the rights to life and to personal integrity of those who are deprived of liberty and to abstain, under any circumstance, to act in a manner that would violate those rights.[498] Therefore, the obligations that the State ineluctably assumes as guarantor include the adoption of measures that would favor maintaining a climate of respect for the human rights of persons deprived of liberty, reduce overcrowding and ensure that the minimum conditions of detention are compatible with the prisoners' dignity, which entail providing sufficient trained personnel to ensure adequate and effective control, custody and surveillance of the prison. In addition, given the characteristics of prisons, the State must protect prisoners from the violence that, in the absence of State control, might occur among the prisoners (*supra* para. 108).

256. The State also has an increased obligation to protect vulnerable groups faced with specific risks from being subjected to torture when they are in custody (*supra* para. 46). Regarding the particular situation of LGBTI prisoners, the Court has indicated that the State's duty with respect to known situations of discrimination and risk requires the adoption of all available means to protect and ensure the enjoyment of the rights to life and to personal integrity of persons in custody. This acquires a particular urgency when the State is aware of situations that would violate the personal integrity of such persons.[499]. The Court recalls, on this point, that LGBTI persons are exposed in a

(2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity. Recommendation adopted by the Committee of Ministers of the Council of Europe on March 31, 2010, Point I.A.5.

496 *Cf*. Report of the UN Independent Expert on protection against violence and non-discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz, A/HRC/41/45, May 14, 2019, para. 78.

497 *Cf.* Report of the UN Independent Expert on protection against violence and non-discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz, A/HRC/41/45, *supra*, para. 78.

498 *Cf.* See, *inter alia, Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures*. Order of the Court of May 22, 2014, Considering Paragraph 15 and Order of the Inter-American Court of November 28, 2018, Considering Paragraph 53.

499 *Cf. Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of October 7, 2015, Considering Paragraphs 37.

generalized way to distinct forms of violence, which are exacerbated in prisons (*supra* paras. 227 and 230).

257. In light of the international standards on the matter[500] and of its case law,[501] the Court considers that in order to prevent violations of the rights to personal integrity and to life of LGBTI prisoners, States have the following minimal obligations: (a) carrying out an individualized study of risk at the time of admission to prison, which may be used as a basis to determine the special measures of protection that are required (*supra* para. 251); (b) abstaining from imposing sanctions or disciplinary measures because of the sexual orientation or gender identity of the persons; (c) training and sensitizing prison personnel and population on the rights of LGBTI persons, the discrimination to which they are subjected and the right to equality and non-discrimination;[502] (d) permitting transgender persons to choose the gender of the staff that conducts body searches, which should be exceptional;[503] (e) establishing mechanisms for reporting violence against LGBTI persons in prison (*infra* para. 263);[504] (f) informing LGBTI persons on their rights and the available mechanisms of reporting and (g) ensuring external independent monitoring of prisons (*supra* paras. 45, 244 and 246).

C.3) The obligation to investigate cases of violence against LGBTI persons deprived of liberty

258. The Court notes that preventing violence against LGBTI persons can also be achieved by eliminating impunity of violent acts. Therefore, the Court deems it timely to make specific considerations on the obligation to investigate acts of violence against LGBTI prisoners.

259. The OAS General Assembly has urged Member States to investigate acts of violence and violations of human rights against persons based on their sexual orientation and gender identity and to ensure that the persons responsible face judicial consequences, ensuring access to justice of the victims in conditions of equality.[505] The UN Committee against Torture has also expressed similar views on this matter.[506]

260. For its part, the Yogyakarta Principles stipulate that States must ensure that "all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted and duly punished."[507] In addition, States must "[t]ake all reasonable steps to identify victims of torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to sexual

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[500] See*, inter alia*, IACHR, Principles and Best Practices, *supra,* Principle XXIII; Mandela Rules, *supra*, Rule 76; Bangkok Rules, *supra*, Rules 31, 33, and 38; Yogyakarta Principles, *supra*, Principles 9(D), 9(H), 9(G), 10(A) and 10(C); Code of Conduct for Law Enforcement Officials, *supra*, Articles 3 to 5; UNODC, Handbook on Prisoners with special needs, *supra*, p. 122; SPT, Ninth Annual Report, CAT/C/57/4, *supra*, para. 76 and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 70.

[501] *Cf*. *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 248 and *Case of Vicky Hernández et al. v. Honduras*, *supra*, paras. 168 and 169.

[502] *Cf*. Ministry of Justice and Public Safety of Brazil, Technical Note 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8, 2021, para. 70 and Ministry of Justice and Public Safety of El Salvador, General Directorate of Prisons, Protocol of acts of prison personnel for the care of LGBTI persons of February 2019, Point 2.

[503] *Cf.* See, *mutatis mutandi*, Bangkok Rules, *supra*, Rule 19 and IACHR, Principles and Best Practices, *supra,* Principle XXI.

[504] *Cf.* Yogyakarta Principles, *supra*, Principle 29.

[505] *Cf.* See, *inter alia,* OAS, General Assembly, Resolutions on Human Rights, Sexual Orientation and Gender Identity adopted in 2009 (AG/RES. 2504) and 2010 (AG/RES. 2600).

[506] *Cf.* See, *inter alia,* UN Committee on Torture. Final Observations on Honduras, CAT/C/HND/CO/2, of August 26, 2016, para. 50 Final Observations with regard to Panama, CAT/C/PAN/CO/4, of August 28, 2017, para. 45.

[507] Yogyakarta Principles, *supra*, Principle 29(B).

orientation or gender identity, and offer appropriate remedies and reparation and, where appropriate, medical and psychological support."[508]

261. The Court reminds that LGBTI persons are exposed to torture and sexual abuse in prison and it reiterates that Article 8 of the Inter-American Convention to Prevent and Punish Torture clearly establishes that "if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."[509] Thus, the duty to investigate set forth in the American Convention is reinforced by Articles 1, 6 and 8 of the aforementioned Inter-American Convention, which obligate the State to "take effective measures to prevent and punish torture within their jurisdictions," as well as "to prevent and punish […] other cruel, inhuman or degrading treatments or punishments."

262. In *Azul Rojas Marín et al. v. Peru*, the Court clarified that the standards for investigating sexual violence are applicable, regardless of whether the victims are men or women.[510] The Court considers that those standards apply with respect to all persons, regardless of their sex, gender identity or expression or sexual orientation.

263. In the specific case of violence perpetrated against LGBTI persons, the Court has held that, when investigating violent acts such as torture, State authorities have the obligation to take all reasonable measures to ascertain whether there are discriminatory motives. This obligation implies that, when there are specific indications or suspicions of violence based on discrimination, the State must do everything reasonable, according to the circumstances, to collect and secure the evidence, explore all practical means to discover the facts and issue fully reasoned, impartial and objective decisions, without omitting facts that could indicate violence based on discrimination. The authorities' failure to investigate possible discriminatory motives may, per se, be a form of discrimination, contrary to the prohibition established in Article 1(1) of the Convention.[511]

264. States should, *inter alia*, create appropriate mechanisms to inspect the institutions; present, investigate and resolve complaints, and establish appropriate disciplinary or legal proceedings for cases of improper professional conduct or for any violation of the rights of prisoners.[512]

265. Therefore, States must ensure that the LGBTI population has accessible mechanisms to report violations of its human rights,[513] avoiding revictimization.[514] These investigations should be undertaken *ex officio* and carried out with a gender perspective, following the guidelines set out in the Court's case law.

D. The right to health of transgender persons deprived of liberty with respect to the beginning or continuation of the process of transition

266. The Court has held that the right to health is protected by the American Convention (*supra*

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508 Yogyakarta Principles, *supra*, Principle 10(B).

509 *Cf. Case of Gutiérrez Soler v. Colombia*. Judgment of September 12, 2005. Series C No. 132, para. 54; *Case of Vélez Loor v. Panama, supra*, para. 240 and *Case of Olivares Muñoz et al. v. Venezuela, supra*, para. 134.

510 *Cf. Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 179.

511 *Cf. Case of Azul Rojas Marín et al. v. Pe*ru, *supra*, para. 196.

512 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala, supra,* para. 179.

513 *Cf. Case of Quispialaya Vilcapoma v. Peru, Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2015. Series C No. 308, para. 207 and *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 176.

514 *Cf*. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, A/HRC/31/57, *supra*, para. 70.

para. 80). The State, on the basis of the principle of non-discrimination, has the obligation to ensure the physical and mental health of persons deprived of liberty, specifically by providing periodic medical reviews and, where applicable, adequate, timely and, if necessary, specialized medical treatment in accordance with the special needs of care of prisoners (*supra* para. 77). With respect to medical care, States have the duty to ensure that, during medical treatment or counselling, sexual orientation or gender identity are not considered illnesses.[515]

267. The Court has already indicated that "gender identity is both an integral and determining component of the personal identity of an individual; consequently, its recognition by the State is critical to ensuring that transgender persons can fully enjoy all human rights," including the right to health.[516] In *Advisory Opinion OC-24/17*, the Court recognized that gender identity includes "the personal sense of the body […] which may involve, if freely chosen, modification of bodily appearance or function through medical, surgical or other means."[517] Thus, the personal sense of the body may imply the modification of bodily appearance or function through medical, surgical or other means.[518]

268. In the case of transgender persons, respect for their gender identity is closely related to access to adequate health services. The Court stresses that medical treatments that reaffirm the gender identity of transgender persons, including surgical procedures and hormonal treatment as long as they are freely chosen, permit development of the personality and contribute to the physical and emotional well-being of transgender persons. Above all, it contributes to reaffirm the self-perceived gender identity.[519]. Consequently, in complying with their international obligation to recognize the gender identity of all persons, States must ensure those medical treatments, to the extent that they are available in the community, that are necessary so that transgender persons can adapt their body, including their genitalia, to their self-perceived gender identity.

269. The Court has held that medical treatment of persons deprived of liberty must be appropriate for their special needs. Therefore, States must provide the specific treatments that may be required by prisoners, ensuring the follow-up of the treatments that had been initiated before imprisonment. In this regard, the Court points out that various States have undertaken important advances in the matter and now allow surgical and/or hormonal treatments to match the person's body to his or her gender identity.[520]

270. The Court concludes that States have the obligation to adopt provisions to ensure that transgender prisoners have the necessary and timely specialized medical care. States must, in general, provide persons deprived of liberty adequate access to medical care and counselling

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515 *Cf.* Yogyakarta Principles, *supra*, Principle 18 and SPT, Ninth Annual Report, CAT/C/57/4, *supra*, para. 81.

516 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 98.

517 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 32 (f).

518 *Cf*. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity, Víctor Madrigal-Borloz, A/73/152 2/26, of July 12, 2018, para. 2.

519 *Cf.* For the WHO, "gender incongruence" is a condition that "is characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to 'transition,' in order to 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 possible." The UN Independent Expert on Sexual Orientation and Gender Identity states that this new category is intended to facilitate access to gender-affirming treatment. *Cf*. WHO. Classification (CIE-11). ICD-11 for Mortality and Morbidity Statistics (Version: 05/2021), Gender incongruity and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz, A/73/152, *supra*, para. 13.

520 *Cf*. See, *inter alia*, Congress of Argentina. Law 26.743 Gender Identity, Article 11; Constitutional Court of Colombia, Judgments of T918, T-876 de 2012 and T-771 de 2013; Ministry of Health of Peru, Technical Norm on Health of Comprehensive Care of Feminine Transgender Population (NTS No. 126-MINSA/2016/DGIESP); Ministry of Justice and Peace of Costa Rica, Guidelines for the care of persons with sexual orientation and diverse gender identity at any level of the Costa Rican Prison System of 2018, paras. 33 and 35 and Ministry of Justice Public Security of Brazil, Technical Note and 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8, 2021, para. 52.

appropriate to their needs, recognizing any particular need based on their sexual orientation or gender identity, even for reproductive health and hormonal therapy or any other kind, as well as sex-reassignment treatments, if they so desire.[521]

E. Intimate visits of LGBTI persons deprived of liberty

271. Intimate visits in prisons are a means of ensuring the rights to form a family, to a private life and to sexual health.[522] As recognized by the Court, LGBTI persons have the right to intimate visits during deprivation of liberty.[523] In this section, the Court will address the specific obligations of States, under the Convention, to ensure the right to intimate visits of LGBTI persons.

272. Article 11 of the Convention prohibits any arbitrary or abusive interference in the private life of persons deprived of liberty, referring to such aspects as their private and family life, home or correspondence. Private life "encompasses the way in which individuals see themselves and how they decide to project themselves towards others,[524] this being an essential and indispensable condition for the free development of the personality."[525] Sexual orientation is also part of a person's intimacy.[526] The Court understands, moreover, that the free exercise of sexuality is an integral part of the personality and intimacy of every person and, thus, is protected by the right to private life.[527]

273. The Court has consistently held that the Convention does not protect a specific type of family[528] and that, in accordance with the principle of equality and non-discrimination, States must guarantee access to all the figures already existing in the domestic judicial order to ensure the protection of all the rights of families formed of couples of the same sex.[529]

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521 *Cf.* Yogyakarta Principles, *supra*, Principle 9(B). Also, the UNODC Handbook on prisoners with special needs recommends that the authorities "[c]over the special health needs of homosexual, bisexual and transexual prisoners, including treatment available in the community for sex dysphoria, such as hormonal therapy as well as gender-reassignment surgery, if it is available in the community. Offer programs for HIV prevention and informative pamphlets on the transmission of HIV/AIDS and protective means for all prisoners, including homosexuals, bisexuals and transexuals." UNODC, Handbook on prisoners with special needs, *supra*, p. 122.

522 According to the World Health Service (WHO), sexual health is "a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as to the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence." *Cf.* WHO. Programme of Action of the International Conference on Population and Development of 1994. For UNODC, "the exercise of sexuality must be included as part of the right to health, considering that sexuality responds to the integral development of the human being." *Cf.* UN Office on Drugs and Crime (UNODC), Technical Consultative Opinion No. 003/2013, addressed to the General Directorate of the Prison System of Panama of April 26, 2013, p. 9.

523 *Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 23, 2016, Considering Paragraph 58. In this regard, Principle 9(E) of the Yogyakarta Principles establishes that: "The States […] [e]sure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of the partner." *Cf.* See, *inter alia,* General Rules of Detention Centers, Resolution 006349 of the National Penitentiary and Prison Institute (INPEC) of Colombia, of December 19, 2016, Article 71(1); Ministry of Justice and Public Security of Brazil, Technical Note 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8. 2021, para. 48 and National Institute of Criminology, Circular 01-2019 on the "Procedure on the care and follow-up of the population of the National Prison System" of 2019 and Handbook on prisoners with special needs, *supra*, p. 121.

524 *Cf. Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010. Series C No. 216, para. 119 and *Case of Manuela et al. v. El Salvador, supra,* para. 204.

525 *Cf. Case of Gelman v. Uruguay, supra*, para. 97 and *Case of Pavez Pavez v. Chile*, *supra*, para. 58.

526 *Cf*. *Case of Atala Riffo and Daughters v. Chile*, *supra,* para. 167.

527 *Cf. Case of Atala Riffo and Daughters v. Chile, supra*, paras. 136, 167 and 141 and Advisory Opinion OC-24/17, *supra*, para. 93. See, similarly, Constitutional Court of Colombia. Judgment T-499 of June 12, 2003.

528 *Cf*. *Case of Atala Riffo and Daughters v. Chile, supra*, para. 142 and Advisory Opinion OC-24/17, *supra*, para. 174.

529 *Cf*. Advisory Opinion OC-24/17, *supra*, Opinions 7 and 8.

274. With respect to sexual identity, the Court has held that "affective life with a spouse or permanent companion, which logically includes sexual relations, is one of the main aspects of this circle or sphere of intimacy," which is also influenced by the sexual orientation of the person and which depends on his or her self-identification.[530] In this regard, the Court recognizes that the exercise of sexuality is a main aspect of the affective life of the individual and, especially, of spouses and permanent companions.[531]

275. In applying the principle of equality and non-discrimination, the Court reiterates that intimate visits of LGBTI persons deprived of liberty must be guaranteed (*supra* para. 271). Provisions that prohibit intimate visits of LGBTI persons, in addition to perpetuating de facto discrimination, do not meet any legitimate interest found in the Convention.[532] Rules that require a certain civil status may become arbitrary and discriminatory limitations of this right.[533] Therefore, it is necessary that States weigh the appropriateness, necessity and proportionality of the limitations that they impose on intimate visits. As a guideline, the Court considers that the free exercise of human sexuality for those deprived of liberty should require, as the only requirement, that it is shown that the persons have the sole intention of maintaining sexual relations[534] or maintaining an affective relationship.[535]

276. Finally, with respect to intimate visits, States must guarantee, as a minimum, the same conditions of safety, privacy and hygiene as for the rest of the prison population.[536] When the visiting individuals are transgender, States should ensure that the bodily searches and/or inspections at the time of entry are conducted by prison personnel of the gender that corresponds to gender identity of the visitor.[537] If the visitors are intersex or transgender persons with non-binary gender identities, they should be able to choose the gender of the prison personnel that conducts the search or inspection.

VIII
DIFFERENTIATED APPROACHES TO PERSONS BELONGING TO INDIGENOUS PEOPLES DEPRIVED OF LIBERTY

277. In this section, the Court will address the specific obligations of States with respect to the care of persons belonging to indigenous peoples deprived of liberty due to their special characteristics

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530 *Cf*. Advisory Opinion OC-24/17, *supra*, para. 93 and *Case of Pavez Pavez v. Chile*, *supra*, para. 64.

531 *Cf.* Constitutional Court of Colombia. Judgment T-424 of June 24, 1992 and Constitutional Chamber of the Supreme Court of Costa Rica. Vote 1401 of March 16, 1994.

532 See, similarly, Constitutional Chamber of the Supreme Court of Costa Rica, Judgment 13800 of October 12, 2011, Considering Paragraph V.

533 In this regard, the SPT has expressed that the States should "ensure that all persons deprived of their liberty are able to receive regular visits, including conjugal visits, regardless of whether the partnership is formally recognized by the State; such visits should not be restricted on grounds of sex, nationality, sexual orientation or for any other discriminatory reason." SPT. Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina, CAT/OP/ARG/1, *supra*, para. 70.

534 The Uruguayan normative has express it in this manner. Thus, Article 74 of the Resolution 119/08 of the General Directorate of Prisons of Uruguay established that "[i]ntimate visits between persons who have no intention other than maintaining a sexual relationship shall be allowed."

535 *Cf.* UNODC has determined that "intimate visits should not be limited to spouses or permanent companions but can be maintained between two persons that an affective relationship proven by a social report." UNODC, Technical Consultative Opinion 003/2013, *supra*, p. 13.

536 *Cfr.* UNODC, Technical Consultative Opinion No. 003/2013, *supra*, p. 29.

537 See, for example, Ministry of Justicia and Public Security of Brazil, Technical Note 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ of August 8, 2021, para. 46 and General Rules for the National Detention Centers, Resolution 006349 of the National Penitentiary and Prison Institute (INPEC) of Colombia, of December 19, 2016, Article 68 para. 4.

and needs.[538] Notwithstanding the independence of the State authority that judges offenses that involve persons who belong to indigenous peoples, the Court will center on addressing what has been asked by the Commission; in other words, "the deprivation of liberty that takes place in the prison system, under prison authorities."

278. In responding to the questions posed by the Commission, the Court will refer to the following points: (A) general considerations on the right to equality and non-discrimination and the situation of indigenous persons deprived of liberty; (B) the preference of alternative punishments to imprisonment with respect to indigenous persons; (C) the preservation of cultural identity of indigenous persons deprived of liberty; (D) the use of indigenous languages during the deprivation of liberty and the adoption of culturally appropriate measures of reinsertion and reintegration and (E) the prevention of violence against indigenous persons deprived of liberty.

279. Under the Court's case law, "recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law."[539] Therefore, in determining the pertinent international obligations, the Court will interpret the provisions of the Convention by taking into account "the characteristics that differentiate the members of indigenous peoples from the general population and that make up their cultural identity."[540]

A. General considerations on the right to equality and non-discrimination and the situation of indigenous persons deprived of liberty

280. Ethnic origin is a category protected by the Convention. Therefore, the Court has held that "no norm, decision or practice of domestic law, applied by either State authorities or by private individuals, may reduce or restrict the rights of an individual based on […] ethnic origin."[541] The Court has taken in account that ethnicity refers to socio-cultural communities that share, among others, characteristics such as cultural, linguistic, spiritual and historical and traditional origins. Within this category are indigenous people, with respect to whom the Court has recognized that they have their own characteristics that make up their cultural identity,[542] such as their customary law, economic and social characteristics, values, traditions and customs.[543] Thus, the Court has deemed it essential that States, in protecting indigenous peoples, take into account their specificities, as well as their special vulnerability.[544]

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538 The Court's case law on the rights of indigenous peoples has indicated that its jurisprudence regarding indigenous peoples' rights is "also applicable to tribal peoples because both share the same distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival." *Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, para. 86.

539 *Cf. Case of the Kichwa Indignenous People of Sarayaku v. Ecuador. Merits and Reparations.* Judgment of June 27, 2012. Series C No. 245, para. 213 and *Case of the Maya Kaqchikel Indigenous People of Sumpango et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of October 6, 2021. Series C No. 440, para. 137.

540 *Cf. Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para. 81 and *Case of the Maya Kaqchikel Indigenous People of Sumpango et al. v. Guatemala, supra*, para. 137.

541 *Cf. Case of Norín Catrimán et al. v. Chile, supra* para. 357, para. 206 and *Case of the Maya Kaqchikel Indigenous People of Sumpango et al. v. Guatemala, supra*, para. 137.

542 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of June 17, 2005. Serie C No. 125, para. 51 and *Case of the Maya Kaqchikel of Sumpango Indigenous People et al. v. Guatemala, supra*, para. 138.

543 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, para. 63 and *Case of the Buzos Miskitos (Lemoth Morris et al). v. Honduras, supra,* para. 101.

544 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, para. 63 and *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. vs. Guatemala, supra*, para. 138.

281. The Court is conscious of the broad ethnic and cultural diversity in the Americas. The indigenous persons in the region have not been unaffected by the accelerated process of urbanization.[545] The Economic Commission for Latin America and the Caribbean has pointed out that, while in 2010 around 50% of the indigenous population resided in urban centers, this percentage fluctuated considerably depending on the State.[546] The amount of contact that the indigenous groups had with other communities also varied, with some indigenous groups existing in isolation and others that had recently initiated contact with Western culture. The Inter-American Commission has pointed out that, "[t]he western hemisphere is home to the largest number of indigenous peoples living in voluntary isolation and initial contact in the world. They are the last peoples who were not colonized and who do not have permanent relations with today's predominant national societies. These peoples and their ancestors have lived in the Americas since long before current States came into existence."[547] The Court considers that these indigenous peoples are in a special situation of vulnerability that requires the adoption of specific measures to guarantee their rights.[548]

282. Given their special relationship with the land and their community, indigenous peoples are a group disproportionately affected by deprivation of liberty, which is an obstacle to the full exercise of the right to the cultural identity of indigenous peoples, the effects of which extend to the whole community. The Court has stated that the prolonged length of pre-trial detention may have different effects on members of indigenous groups owing to their economic, social and cultural characteristics and in the case of the community leaders may also have a negative consequence on the values, practices and customs of the community or communities in which they exercise their leadership."[549] The UN Special Rapporteur on Indigenous Peoples has also pointed out that the deprivation of liberty of an indigenous person may have "long-term impacts on a family's livelihood, as the detained person may be the primary breadwinner or may miss planting or harvesting seasons."[550] The Rapporteur also indicated that indigenous persons deprived of liberty, especially indigenous women, are subject to a high degree of violence, racist and discriminatory acts and inadequate access to health services.[551]

283. In Colombia, INPEC has identified that, in the case of imprisoned indigenous persons, the most frequent offenses are trafficking, fabricating or carrying drugs and homicide, the former being the most common in women and the latter the most common among men.[552] In Mexico, the National Institute of Women stated that the principal offenses of imprisoned indigenous women are homicide and "offenses against health," usually related to drugs.[553] At the same time, imprisonment may be

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545 *Cf.* ECLAC, The Indigenous Peoples of Latin America – Abya Yala and the 2030 Agenda for Sustainable Development. Tensions and Challenges from a Territorial Perspective (Patterns in the Territorial Distribution). 2020, pp. 160 and 161.

546 *Cf.* ECLAC, The Indigenous Peoples of Latin America. Progress in the last decade and pending challenges for the guarantee of their rights, 2014, pp. 64 and 65.

547 *Cf*. IACHR, Rapporteurship on the Rights of Indigenous Peoples, Indigenous peoples in voluntary isolation and initial contact in the Americas: Recommendations on the full respect of their human rights. OAS/Ser.L/V/II. Doc.47/13, of December 30, 2013, para. 1.

548 *Cf.* IACHR, Rapporteurship on the Rights of Indigenous Peoples in voluntary isolation and initial contact in the Americas: Recommendations on the full respect of their human rights, OAS/Ser.L/V/II. Doc.47/13, of December 30, 2013, para. 2.

549 *Cf*. *Case of Norín Catrimán et al. v. Chile, supra*, para. 357.

550 Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, A/HRC/39/17, of August 10, 2018, para. 76.

551 *Cf*. Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, A/HRC/30/41, para. 42.

552 *Cf.* INPEC (2016). Characterization of the Indigenous and Afro-Colombian Population by INPEC, pp. 31 and 32.

553 *Cf.* INMUJERES (2012). Situation of indigenous women deprived of liberty.

used as a mechanism to censure and to criminalize indigenous leaders.[554] In those cases, their prosecution is characterized by prolonged periods of pretrial detention.[555]

284. It has been pointed out that the overrepresentation of imprisoned indigenous persons in the world is due to direct or indirect discrimination in laws, policies, strategies in applying the law and other practices.[556] Nonetheless, the number of indigenous persons deprived of liberty varied considerably depending on the State. Thus, 31% of the prison population (143,975 persons) in Canada during the period 2020-2021 were indigenous persons.[557] In Mexico, in October 2010, around 3.4% of the prison population self-identified as indigenous (7.185 persons, 246 women and 6.939 men).[558] In Brazil, at the State level in 2020, 1.084 indigenous persons were deprived of liberty (50 women and 1.034 men); on the federal level there was one indigenous man deprived of liberty.[559] In Panama, in 2014 indigenous women represented 4% of the population of women deprived of liberty.[560]

285. Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples (hereinafter "Convention 169") is the only specific international treaty on the rights of indigenous peoples and tribes; there are also the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter "UNDRIP") and the American Declaration on the Rights of Indigenous Peoples (hereinafter "ADRIP").[561] The Court understands that these instruments represent international minimum standards applicable to the protection of the human rights of indigenous persons. As demonstrated in its case law,[562] the Court will use those instruments in responding to the questions presented by the Commission.

286. The Court notes that the majority of the States Parties to the American Convention recognize,

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554 *Cf*. Report of the Special Rapporteur on the situation of human rights and fundamental liberties of the indigenous peoples, Rodolfo Stavenhagen, E/CN.4/2004/80, of January 26, 2004, p. 17 and Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tuali Corpuz, A/HRC/39/17, *supra*, p. 45.

555 *Cf*. Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tuali Corpuz, A/HRC/39/17, para. 50; UN Group against Arbitrary Detention. Opinion 53/2020, regarding Messaoud Leftissi (Algeria); Opinion 64/2018, regarding Francisca Linconao Huircapán (Chile); Opinion 19/2017, regarding Pestana Rojas and Martínez Hernández (Colombia); Opinion 19/2016, regarding Mauro Vay Gonon, Mariano García Carrillo and Blanca Julia Ajtun Mejía (Guatemala); Opinion 56/2015, regarding Nestora Salgado García (Mexico); Opinion 33/2012, regarding Hugo Sánchez Ramírez (Mexico); Opinion 62/2011, regarding Sabino Romero Izarra (Venezuela) and Opinion 36/2011, regarding Basilia Ucan Nah (Mexico).

556 Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tuali Corpuz, A/HRC/42/37 of August 2, 2019, para. 42.

557 It is estimated that 1.673.785 indigenous persons lived in Canada in 2016. *Cf*. Government of Canada, Statistics of the Prison System, years 2020 to 2021. Available at: https://www150.statcan.gc.ca/n1/pub/71-607-x/71-607-x2019018-eng.htm; Table 35-10-0016-01 Custody admissions of adults to prison by indigenous identity. Available at: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601 and Statistics of Indigenous Peoples. Available at: https://www.statcan.gc.ca/en/subjects-start/indigenous_peoples

558 In Mexico, 25 million persons self-identified as indigenous in 2019. *Cf*. National Commission of Human Rights of Mexico. Analysis of the Human Rights of Indigenous Persons Deprived of Liberty. Analysis of the Human Rights of Indigenous Persons Deprived of Liberty; Secretariat of Citizen Security and Protection of Mexico. Monthly report on statistical information on the national prisons and National Institute of Indigenous Languages of Mexico. Percentage of the Indigenous Population in Mexico.

559 According to the last national census in 2010, it is estimated that there were 817.963 indigenous persons in Brazil. *Cf*. Department of Prisons of Brazil. Composition of the prison population by race from June to December 2020.

560 Analysis of the Situation of Women Deprived of Liberty in Panama with a focus on gender and rights. March 2015,

561 The United Nations Declaration of the Rights of Indigenous Peoples was adopted on September 13, 2007 by the UN General Assembly. The American Declaration on the Rights of Indigenous Peoples was adopted by the OAS on June 15, 2016.

562 *Cf.* See*, inter alia, Case of the Pueblo Indígena Xucurú Indigenous People and its members v. Brazil. Preliminary Objections, Merits, Reparations and Cost*s. Judgment of February 5, 2018. Series C No. 346, para. 116 and *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, supra*, para. 94.

in their constitutions[563] or in their laws,[564] the indigenous peoples who reside within their territories. Some States also regulate the acts of the traditional justice mechanisms of indigenous peoples,[565] as well as the observance of indigenous customs in proceedings before the regular courts.[566] The Court also welcomes the advances in laws and pubic policies that some States of the region have undertaken to meet the specific situation of indigenous persons deprived of liberty,[567] which will be taken into account by the Court in the development of the standards in this section, inasmuch as they represent best practices in the oversight of sanctions of this group of persons.

287. The Court has found it essential that States take into consideration the heterogeneity of the indigenous peoples in the Americas, as well as the level of recognition of their rights in international, constitutional and legal norms with respect to the implementation of the obligations found in this section. As a starting point, the Court underscores the necessity that the representatives and authorities of indigenous peoples actively participate in the preparation, implementation and evaluation of the States' criminal policies and that relations of dialogue and cooperation be established between these authorities and the regular justice.[568]

B. The preference of alternative punishment to prison with respect to indigenous persons

288. With respect to the deprivation of liberty of indigenous persons, Article 10 of Convention 169 reads as follows:

> 1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
> 2. Preference shall be given to methods of punishment other than confinement in prison.

289. Along the same line, the Principles and Best Practices establish that "[i]n imposing penalties laid down by general law on members of indigenous peoples' preference shall be given to methods of punishment other than confinement in prison, in conformity with their customs or customary laws, where these are compatible with the legal system in force."[569]

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563 *Cf*. Constitution of Argentina of 1994, Article 75(17); Constitution of Bolivia of October 22, 2015, Articles 2 and 3; Constitution of Brazil of 1988, Article 231; Constitution of Colombia of July 4, 1991, Article 96; Constitution of Ecuador of 2008, Articles 56 and 57; Constitution of Guatemala of May 31, 1985, Articles 66 to 69; Constitution of Honduras of May 4, 2005, Article 346; Constitution of Mexico of 1917, Article 2; Constitution of Nicaragua of 1987, Articles 180 and 181; Constitution of Panama of 1972, Article 90; Constitution of Paraguay of 1992, Article 62 Constitution of Peru of 1993, Article 89.

564 *Cf*. Indigenous Law of Chile, No. 19.253 of October 5, 1993, Article 1 and Indigenous Law of Costa Rica of November 29, 1997, Articles 1 and 2.

565 *Cf*. Constitution of Bolivia of October 22, 2015, Articles 179, 190-192; Constitution of Colombia of July 4, 1991, Article 246; Constitution of Ecuador of 2008, Article 57(10); Constitution of Mexico of 1917, Article 2 (A) II; Constitution of Paraguay of 1992, Article 63 and Constitution of Peru of 1993, Article 149.

566 *Cf*. Indigenous Law of Chile, No. 19.253 of October 5, 1993, Article 54 and Constitution of Paraguay of 1992, Article 63.

567 *Cf.* See*, inter alia,* Argentina, Law 26.206 of December 4, 2006; Brazil, Ministry of Justice and Public Security, Technical Nota 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ and National Council of Justice of Brazil, Resolution 287 of June 25, 2019; Chile, Gendarmerie, Resolution 3925 of July 29, 2020; Colombia, National Penitentiary and Prison Institute. General Regulation of the National Prisons of December 19, 2016 and Paraguay, Ministry of Justice, Protocol of Care of Indigenous Peoples Deprived of Liberty, Resolution 480.

568 ECLAC has recommended that in the design and implementation of public policies of territorial impact, consideration is given to the enormous heterogeneity of the situations of the different indigenous peoples. Ensuring the right of participation of the participation of the indigenous peoples contributes to the policies being more realistic and effective in the territories. CEPAL, Guaranteeing indigenous people's rights in Latin America. Indigenous Peoples in the Americas. Progress in the past decade and remaining challenges, *supra*, pp. 69 and 70.

569 IACHR, Principles and Best Practices, *supra,* Principle III. 1.

290. In analyzing the consequences of the deprivation of liberty of indigenous persons, the SPT has explained that the ties of indigenous persons to their community "determine the structure of the individual and collective identity of community members."[570] Therefore, for indigenous persons, the deprivation of liberty may be a cruel, inhuman or degrading treatment or punishment and even a form of torture.[571] The Committee for the Elimination of Racial Discrimination (hereinafter "the CERD"), the Mechanism of Independent Experts on Indigenous Persons and the SPT urge the States to give preference to methods of rehabilitation of indigenous persons, rather than confinement.[572]

291. The Court has recognized that "[t]the culture of the members of the indigenous communities directly relates to a specific way of being, seeing and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity and, therefore, of the cultural identity."[573] In effect, "the close relationship that indigenous people have with the land […] is the very foundation of their cultures, their spiritual life, their identity and their economic survival."[574] Moreover, the Court has repeatedly stressed that the State, being responsible for detention centers, has the duty to safeguard the health and well-being of persons deprived of liberty and to ensure that the manner and method of deprivation of liberty do not exceed the inevitable level of suffering inherent in detention.[575]

292. In view of the foregoing, the Court understands that the separation of indigenous persons from their community and territory, basic components of their cultural identity, may lead to deep suffering that goes beyond that inherent in confinement in prison and may have a negative impact on members of the indigenous community. Moreover, and without ignoring that pretrial detention has procedural ends that are different than those of deprivation of liberty, the Court considers that, in practice, both measures have the effect of removing indigenous persons from their land and community. Therefore, the Court considers that, pursuant to Articles 1(1), 5(2) and 5(3) of the Convention and to the specialized *corpus iuris* on the rights of indigenous peoples, there is an international obligation to ensure that the deprivation of liberty of indigenous persons is not the norm, but rather the exception.[576] In complying with this obligation, States must offer alternative punishments to prison, as well as precautionary measures other than pretrial detention, that are

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570 SPT, Sixth Annual Report, CAT/C/50/2, of April 23, 2013, para. 93. Similarly, the Constitutional Court of Bolivia has stated that deprivation of liberty is a practice contrary to the values and worldview of indigenous peoples, which results in "the loss of a member of the community." Technical report 120/2015 of March 24, 2015, of the Technical Secretariat of the Constitutional Court of Bolivia and Constitutional Judgment 1189/2017-S1, of October 24, 2017.

571 *Cf*. SPT, Sixth Annual Report, CAT/C/50/2, *supra*, para. 93.

572 *Cf*. CERD. General recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of criminal justice, A/60/18, of March 25, 2006, para. 36; Mechanisms of Experts on the rights of indigenous peoples, Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous legal systems and access to justice for indigenous women, children, youth and disabled persons, A/HRC/27/65 of August 7, 2014, para. 11 and SPT, Sixth Annual Report, CAT/C/50/2, *supra*, para. 88.

573 *Cf*. *Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, para. 135 and *Case of Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs*. Judgment of November 25, 2015. Series C No. 309, para. 130.

574 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79, paras. 148, 149 and 151 and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 93.

575 *Cf. Case of Quispialaya Vilcapoma v. Peru, supra*, para. 117. Similarly, the Mandela Rules establish that deprivation of liberty and like measures "are affective by the very fact of taking from these persons the right of self-determination by depriving them of their liberty" and, therefore "the prison system shall not […] aggravate the suffering inherent in such a situation." Mandela Rules, *supra*, Rule 3.

576 This international obligation has been incorporated into the domestic legislation of the OAS Member States that have ratified ILO Convention 169. In addition, various domestic courts have emphasized the implementation of this precept. *Cf*. *Inter alia*, Constitutional Court of Ecuador, Judgment 113-14-SEP-CC of July 30, 2014, p. 30.

applicable to indigenous persons, except on those occasions when imprisonment is necessary.[577] Although the foregoing is a recognition of the particularities of the cultural and the communitarian form of life of indigenous peoples, the Court reiterates the guidelines and rules of exceptionality that govern pretrial detention to which all persons have the right on an equal basis (*supra* para. 27).

293. The Court recalls that, when sanctions are imposed on members of indigenous peoples, their economic, social and cultural characteristics must be taken into account (*supra* para. 288). Therefore, in assessing criminal responsibility and determining the appropriate punishment of indigenous persons, judicial authorities of the regular criminal system should: (i) analyze the particular situation of each person, his or her role and how he or she fits into the respective community,[578] as well as his or her self-identification as an indigenous person[579] and the specific characteristics and conditions of the indigenous people to which he or she belongs; (ii) determine, in each case, whether any reason of attributability, justification or exculpation applies due to the economic, social and cultural characteristics of the person;[580] (iii) consider, from the viewpoint of indigenous culture, the impact that the deprivation of liberty would have on the person and on the indigenous community and (iv) apply, preferentially, sanctions and precautionary measures that do not involve the deprivation of liberty.[581] In order to achieve an intercultural approach in the administration of criminal justice, the characteristics of the person being prosecuted must be assessed from the perspective of his or her culture, with the support of anthropologists and sociologists, interpreters and on-site visits, among others,[582] which also requires that the jurisdictional authorities establish a dialogue and a coordination with the representatives of the indigenous community (*supra* para. 287).

294. The Court points out that, in the case of indigenous peoples, the exceptionality of the deprivation of liberty as a punishment or a precautionary measure has additional connotations with respect to the presumption of innocence[583] due to the uprooting, the cultural impact and the risk of double jeopardy. In cases of isolated peoples or those of recent contact, the exceptionality of the sanction of imprisonment is heightened by the lack of integration into the Western community and

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577 In Brazil and Ecuador, for example, the domestic authorities have adopted measures that allow, in the case of indigenous persons, the implementation of punishments other than imprisonment, such as a regime of "semi-liberty." *Cf*. National Council of Justice of Brazil, Resolution 287 of June 25, 2019, Article 10 and Constitutional Court of Ecuador, Judgment 113-14-SEP-CC of July 30, 2004, p. 29. See, similarly, Constitutional Court of Colombia, Judgment T-975 of September 18, 2014.

578 *Cf*. *Case of Norín Catrimán et al. v. Chile, supra,* para. 357 and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra,* para. 162. See, similarly, Constitutional Court of Ecuador, Judgment 113-14-SEP-CC of July 30, 2004, p. 29.

579 *Cf*. ADRIP, ARTICLE I(2). See, also, National Council of Justice of Brazil, Resolution 287, of June 25, 2019, Article 3.

580 The SPT has stated that "[i]n cases where the national justice system has jurisdiction over persons of indigenous cultural backgrounds, adequate legal instruments need to be provided to enable, where appropriate, an assessment of the responsibility of those persons (taking into account, for example, cultural predispositions or other grounds that might justify an exemption from criminal liability). In such cases, it is always preferable to try the case within the indigenous justice system." SPT, Sixth Annual Report, CAT/C/50/2, *supra*, para. 87. The Constitutional Court of Colombia has ruled similarly. *Cf*. *inter alia*, Constitutional Court of Colombia, Judgment T-975 of December 18, 2014, paras. 5(2), 2(1) to 5(2)(2)(2).

581 *Cf*. SPT, Sixth Annual Report, CAT/C/50/2, *supra*, para. 88 and National Council of Justice of Brazil, Resolution 287, pf June 25, 2019, Article 10. In the case of Canada, the Criminal Code states that the criminal courts should seek "that all available punishment, except imprisonment, be reasonable in the circumstances and consistent with the damage caused to the victims or the community be considered for all delinquents, with special attention to the circumstances of the indigenous delinquents." Criminal Code of Canada of 1985, Section 718.2(e). With respect to the implementation of this precept, see, Supreme Court of Canada, Case of *R. v. Glaude* of April 23, 1999 (file of jurisprudence, f. 1080).

582 *Cf.,* See*, inter alia*, Constitutional Court of Ecuador, Judgment 112-14-JH/21 of June 21, 2021, paras. 96, 97 and 152.

583 Regarding these peoples, the Inter-American Commission has stated that "[i]ndigenous peoples living in voluntary isolation and initial contact are holders of human rights in a unique position of vulnerability, and among the few who cannot advocate for their own rights. This reality makes ensuring respect for their rights especially important. Given the impossibility of them advocating for their own rights, States, international organizations, members of civil society, and other actors in the defense of human rights must ensure that their human rights are respected to the same extent as those of all inhabitants of the Americas, taking into account the particularities of their situation." IACHR, Rapporteurship on the Rights of Indigenous Peoples, Indigenous peoples in voluntary isolation and initial contact in the Americas: Recommendations for the full respect of all their human rights, *supra*, para. 2.

the lack of awareness of the unlawful content of the act because of cultural conditioning.[584]

C. Preservation of the cultural identity of the indigenous persons deprived of liberty

295. As the Court affirmed in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* and *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, the right to participate in cultural life, derived from Article 26 of the Convention, includes the right to cultural identity.[585] This right is also recognized in the Article XIII of the ADRIP.

296. The ICESCR establishes "the right of everyone: (a) to take part in cultural life."[586] Convention 169 also proclaims the right to culture and identifies its importance for indigenous peoples, including the protection of indigenous languages.[587] Both the ADRIP and the UNDRIP identify, as part of the "right to culture," a right to "practice" and a right to "transmit" and they ensure access and participation in cultural life to indigenous peoples. Both instruments also protect the right to preserve and revitalize their culture and languages.

297. In the case of indigenous persons, the right to participate in cultural life can manifest itself, notwithstanding other aspects, in a particular way of life related to the use of resources of the land and the right to live on reservations protected by law.[588] The ESCR Committee has established that "taking part in cultural life" implies participation in, access to and contribution to cultural life, whether alone or as a community, in the case of indigenous people.[589]

298. In its case law, the Court has stated that the right to cultural identity is a fundamental right of a collective nature of the indigenous communities that must be respected in a multicultural, pluralist and democratic society. This implies the obligation of States to ensure that the indigenous peoples are duly consulted on matters that have or may have an impact on their cultural and social life, in accordance with their values, practices, customs and forms of organization.[590] Thus, as a guideline, it is essential that States ensure the participation of indigenous authorities in designing and developing public policies involving the deprivation of liberty of members of their communities (*supra* para. 287), as well as in the proper uses of the exercise of their autonomy, which makes the norms of the domestic legal system complementary to the practices, habits and customs of the indigenous peoples respecting the measures of deprivation of liberty, which are not necessarily directed to confinement in prison.

299. It is also relevant that States undertake policies to articulate the needs of indigenous persons with the justice and prison administrations. The Court welcomes the best practices adopted in Chile and in the State of Oaxaca, Mexico. In Chile, the "intercultural facilitators" are indigenous persons who articulate the needs of other indigenous persons subject to judicial proceedings with various State institutions, such as the judiciary and the health system; for example, the presence of an intercultural facilitator and a defense attorney is required when the suspect belongs to an indigenous

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584 *Cf.* Constitutional Court of Ecuador, Judgment 112-14-JH/21 of July 21, 2021, para. 159 and Technical Report 120/2015 of March 24, 2015, of the Technical and Decolonialization Secretariat of the Plurinational Constitutional Court of Bolivia and Plurinational Constitutional Judgment 1189/2017-S1, of October 24, 2017.

585 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 231 and *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, supra*, para. 120.

586 PIDESC, Article 15.

587 *Cf.* ILO Convention 169, Article 28(3).

588 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 240 and Human Rights Committee. General Comment 23. Right of minorities (Article 27), para. 7.

589 *Cf.* ESCR Committee*.* General Comment 21*, supra*, para. 15.

590 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra*, para. 217 and Advisory Opinion OC-23/17, *supra*, para. 113.

people and has difficulties in communicating in the Spanish language.[591] In Oaxaca, there are periodic visits by "cultural promoters," who have facilitated indigenous persons deprived of liberty to maintain communication and a cultural and linguistic linkage with their communities. The cultural promoters enter prisons to spend time with the indigenous inmates, converse in their language, eat traditional food and hold rituals when there are celebrations in the community in order to maintain a spiritual connection with their loved ones.[592]

300. As explained, the deprivation of liberty of indigenous persons may result in disproportionate suffering as a consequence of the separation of the individual from relations with the community and the land, which are the essential foundation of their culture, their spiritual life, their integrity and their economic survival (*supra* paras. 291 and 292). Thus, it is essential that States provide an effective protection that takes into account the particularities of the indigenous peoples, their economic and social characteristics, as well as their special vulnerability, customary law, values, practices and customs[593]

301. Consequently, States must take into consideration the data that differentiate the members of indigenous peoples from the general population and that form their cultural identity.[594] Therefore, in those exceptional cases in which the deprivation of liberty of an indigenous person is necessary, the accommodations and services provided in prison must be adapted as much as possible to the requirements of the proper exercise of the right to cultural identity.

302. In its request, the Commission asked the following question: "What specific obligations do States have to ensure that indigenous people deprived of liberty may preserve their cultural identity, in particular their customs, traditions and diet?" The Court will now proceed to identify the international obligations regarding: (1) the placement of indigenous persons deprived of liberty; (2) the preservation of indigenous traditions and customs during the deprivation of liberty; (3) the access to culturally appropriate food during the deprivation of liberty and (4) the use of traditional practices and medicines.

C.1) The placement of indigenous persons deprived of liberty

303. The Court deems it timely to offer some considerations on the placement of indigenous persons when they are deprived of liberty with respect to the special implications resulting from the separation of indigenous persons from their communities and their lands. (*supra* paras. 282 and 292). In *Norín Catrimán et al. v. Chile*, the Court stressed that, given the importance of the ties of indigenous persons with their place of origin or their communities, it is especially important that States, to the extent possible, facilitate the transfer of inmates to prisons that are closest to the locality where their families reside.[595]

304. Therefore, the Court is of the opinion that, when conditions allow, States should place indigenous persons deprived of liberty in prisons closest to their communities, in consultation with the corresponding indigenous authorities.[596] When this is not possible, States should provide the

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591 *Cf*. Ombudsperson of Chile. Resolution 529 of August 27, 2014, Article 11 (file of observations, f. 2181).

592 *Cf*. Written observations of the Ombudsperson of the State of Oaxaca, México (file of observations, f. 2639).

593 *Cf*. *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, para. 63 and *Sawhoyamaxa Indigenous Community v. Paraguay, supra*, paras. 82 and 83.

594 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* para. 51.

595 *Cf. Case of Norín Catrimán et al. v. Chile*, *supra*, para. 408.

596 Thus, for example, the Law of Criminal Enforcement and Monitoring of Bolivia stipulates that "[…] when the prisoner is a member of an indigenous or peasant community, at the time of classification, the opinion of the authority of the community to which he or she belongs shall be considered with the purpose that the enforcement of the sentence complies most effectively

indigenous persons more flexible times for visits that would allow periodic visits with their family members and members of their community.[597]

C.2) The preservation of indigenous traditions and customs during deprivation of liberty

305. In its request, the Commission asked that the Court determine the international obligations that ensure that indigenous persons deprived of liberty can "preserve their cultural identity, in particular their customs, traditions and diet." With respect to the "customs" and "traditions" of indigenous persons, the Court understands that such manifestations of indigenous culture are protected by the right to freedom of conscience and religion and by the right to cultural identity.

306. The right to freedom of conscience and religion is stipulated in Article 12 of the Convention and allows persons to maintain, change, profess and impart their religion and their beliefs. This right is one of the foundations of a democratic society. In its religious dimension, it "constitutes a transcendental element in the protection of the convictions of believers and in their lifestyles."[598] This right is also recognized in Convention 169, the ADRIP and the UNDRIP and its exercise by indigenous peoples implies (i) maintaining and protecting their religious and cultural places and their private access to them; (ii) using and controlling their cult objects and (iii) obtaining repatriation of their human remains.[599]

307. In the context of the deprivation of liberty, the exercise of the right to freedom of conscience and religion requires specific measures by the States. The Principles and Best Practices stipulate that States must ensure the right to freedom of conscience and religion of persons deprived of liberty, which includes the rights to: (i) profess, manifest, practice, maintain and change their religion, according to their beliefs; (ii) participate in religious and spiritual activities and exercise their traditional practices, and (iii) receive visits from their religious or spiritual representatives.[600]

308. The Mandela Rules stipulate that, so far as practicable, every person deprived of liberty "shall be allowed to satisfy the needs of his or her religious life by attending the services provided in the prison and having in his or her possession the books of religious observance and instruction of his or her denomination."[601] The Rules also state that (i) if there are a sufficient number of inmates of the same religion, a qualified representative of that religion must be appointed or approved, who may hold regular religious services and to make visits in private to inmates of his or her religion;[602] (ii) the right to speak with a representative of his or her religion is never to be refused[603] and (iii) the decision of any person deprived of liberty to meet or not to meet with a representative of his or her

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with the ends of the punishment and respects the cultural identity of the prisoner. Plurinational State of Bolivia, Law 2298 of December 20, 2001, Article 159. See, similarly, Ministry of Justice of Paraguay, Protocol of Care of Indigenous Persons Deprived of Liberty, Resolution 480, Article 3(1)(11)

597 The Handbook of Prisoners with Special Needs recommends that States "make every effort to place offenders from minority groups and indigenous peoples as close as possible to their homes to increase chances of continued links with their families and their communities" and, when this is not possible "to allow longer visiting hours to compensate for less frequent visits, to permit additional telephone calls and where resources allow, to cover the cost of the calls." UNODC, Handbook on Prisoners with special needs, *supra,* p. 77. *Cf.* See, *mutatis mutandis, Case of López et al. vs. Argentina, supra*, para. 102.

598 *Cf. Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 154 and *Case of Pavez Pavez v. Chile*, *supra*, para. 75.

599 *Cf.* ILO Convention 169, Article 5(a); ADRIP, Article XVI and UNDRIP, Article 12.

600 *Cf*. IACHR, Principles and Best Practices, *supra,* Principle XV. See, similar, ECHR, *Case of Mozer v. Moldavia and Russia* [GS], No. 11138/10. Judgment of February 23, 2016, para. 201.

601 Mandela Rules, *supra*, Rule 66.

602 *Cf*. Mandela Rules, *supra*, Rules 65(1) and 65(2).

603 *Cf*. Mandela Rules, *supra*, Rule 65(3).

religion is to be respected.[604]

309. The Bangkok Rules state that "[p]rison authorities shall recognize that women prisoners from different religious and cultural backgrounds have distinctive needs and may face multiple forms of discrimination in their access to gender- and culture-relevant programmes and services. Accordingly, prison authorities shall provide comprehensive programmes that address these needs, in consultation with women prisoners themselves and the relevant groups."[605]

310. In view of its case law and the international standards on the matter, the Court considers that, pursuant to Articles 5(2) and 12 of the Convention, States have the obligation to allow indigenous persons deprived of liberty to exercise their cultural and religious practices within the prison.[606] This means that the States must ensure that indigenous persons can: (a) profess, manifest, practice, maintain and change their religion, according to their beliefs; (b) participate in religious and spiritual rites and exercise the traditional practices;[607] (c) elect their representatives among the prison population, who can organize periodic ceremonies and visit the prisoners who so request; (d) receive outside visits from representatives of their religion and of their community;[608] (e) have access, as practicable, to specific places to practice their religion and (f) wear their traditional clothing and maintain the length of their hair.

C.3) Access to culturally appropriate food during deprivation of liberty

311. Under its case law, the Court has found that the right to food of indigenous persons is protected under Article 26 of the Convention and is intimately related to the rights to a life with dignity and to participate in cultural life.[609]

312. With respect to the specific standards in the area of food of persons deprived of liberty, the Mandela Rules stipulates that "[w]ithin the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food."[610] The Principles and Best Practices specifically stipulate that persons deprived of liberty have the right to receive "food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns."[611]

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604 *Cf.* Mandela Rules, *supra*, Rule 65(3). Similarly, the Handbook for Prisoners with special needs stipulates that the States should ensure that the spiritual/religious needs of the indigenous peoples are met, including "access to a minister of their own religion, being able to undertake communal worship, being provided with special diets and being able to fulfil special hygiene requirements." UNODC, Handbook for Prisoners with special needs, *supra*, p. 73.

605 Bangkok Rules, *supra*, Rule 54.

606 The CERD has emphasized that States, as a measure to combat racial discrimination in the systems of administration of criminal justice, should make "the necessary changes to the prison regime for prisoners […] so as to take into account their cultural and religious practices." CERD, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of criminal justice, adopted in its 65th Session (2005), Recommendation 5(f).

607 *Cf.* See*, inter alia,* Ministry of Justice and Public Security of Brazil, Technical Note 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, Article 32 and National Penitentiary and Prison Institute of Colombia, General Regulations of the National Prisons of December 19, 2016, Article 19.1.

608 *Cf.* See, *inter alia*, National Council of Justice of Brazil, Resolution 287 of June 25, 2019, Article 14(IV) and National Penitentiary and Prison Institute of Colombia. General Regulations of the National Prisons of December 19, 2016, Articles 68(6) and 83.

609 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* para. 167 and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 220.

610 Mandela Rules, *supra*, Rule 114.

611 IACHR, Principles and Best Practices, *supra,* Principle XI.1.

313. The Court has established that there are factors that should be taken into account in considering whether, in addition to its nutritional value, the food is "adequate."[612] In this regard, in its case law on the matter, the Court has referred to General Comment 12 of the ESCR Committee, in which the Committee emphasized that, in order that the food be acceptable to a culture, account must be taken, as far as possible, of "perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies."[613]

314. Thus, the Court is of the opinion that the international obligation to provide food to indigenous persons, as derived from Article 26 of the Convention, in addition to meeting the nutritional requirements necessary to maintain their health, must also meet the values and traditions of their culture. Thus, the State must permit that, whenever possible, indigenous persons deprived of liberty can prepare their own food, in accordance with their cultural guidelines. It is also necessary that States facilitate the provision of food to persons deprived of liberty by other members of the indigenous community, as well as by organizations that defend the rights of indigenous peoples.[614]

C.4) The use of traditional practices and medicines

315. In its request, the Commission posed the following question: "What are the duties of the State in relation to medical care for indigenous people deprived of liberty, in particular with respect to their medicinal practices and traditional medicines?" To respond, the Court will refer to the applicable international obligations and standards, as well as to its own jurisprudence.

316. According to the WHO, traditional medicine consists in the sum total of the knowledge, capabilities and practices based on the theories, beliefs and experiences of the different cultures, whether explicable or not, used to maintain health and prevent, diagnose, improve or treat physical or mental illnesses.[615] Thus, certain persons in indigenous communities devote themselves to treat and cure physical, mental and spiritual illnesses, occasionally using plants with medicinal properties.[616] For 2006, the WHO calculated that 80% of the indigenous peoples of the Americas rely on traditional healers as their principal health care providers.[617]

317. The international law of human rights clearly recognizes the right of indigenous peoples to

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612 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 274.

613 ESCR Committee, General Comment 12, *supra*, para. 11.

614 See, Ministry of Justice and Public Security of Brazil, Technical Note 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, Article 29 and National Council of Justice of Brazil, Resolution 287 of June 25, 2019, Article 14(II).

615 WHO. Strategy of the WHO on traditional medicine 2014-2023, p. 15. Available at: https://apps.who.int/iris/bitstream/handle/10665/95008/9789243506098_spa.pdf?sequence=1

616 For WHO, it concerns traditional healers who are "local health specialists whose abilities to heal are said to be their birth right. Generally, these individuals start training and working at an early age. The abilities of others may be revealed later in life as a result of a severe illness of a near-death experience. Sone may go on fasts or on a vision quest where their gifts and their responsibilities are revealed and explained to them by the sprits. Some may work with plants, some may counsel, and some may heal with their hands and through ceremonies […]." WHO/PAHO, Resolution on the Health of Indigenous Peoples in the Americas, Adopted by the 47th Directive Council at the 58th Session of the Regional Committee Washington, D.C., USA, September 25-29, 2006, Glossary.

617 *Cf.* Resolution on the Health of Indigenous Peoples in the Americas, *supra*, para 4.

use their own medicinal practices, which is expressly recognized in Convention 169,[618] the UNDRIP[619] and the ADRIP.[620] According to the latter instrument, in the practice of traditional medicine, indigenous persons have the right to the "use and protection of their vital medicinal plants, animals and minerals of vital interest and other natural resources for medicinal use in their ancestral lands and territories."[621]

318. The ESCR Committee has specified that, in order that the health services be appropriate from a cultural perspective, it is essential to take into account "preventive care, curative practices and traditional medicine." In the case of indigenous peoples, States are required to provide resources so that they "establish, organize and control those services so that they may enjoy at the highest attainable level physical and mental health" and that they protect "medicinal plants, animals and minerals that are necessary for the full enjoyment of the indigenous peoples."[622]

319. For its part, the ADRIP establishes that States "in consultation and coordination with indigenous peoples shall promote intercultural systems and practices in the medical and health services provided in indigenous communities, including training indigenous technical and professional health care personnel."[623] The WHO has urged the States to develop and implement plans of action to integrate traditional medicine with health services, mainly at the primary levels of medical care.[624] Similarly, the then Special Rapporteur on the rights of indigenous peoples has pointed out that health services should "incorporate and strengthen the traditional medicine and health practices of indigenous peoples."[625]

320. The Court has stated that health care personnel should take into account the specificities and needs of patients, such as their culture, religion, lifestyles, as well as level of education, which is part of the obligation to provide culturally acceptable health care.[626] In this regard, the Court has agreed

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618 Article 25 (1). Governments shall ensure that adequate health services are made available to the peoples concerned or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health. (2). Health service shall, to the extent possible, be community based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

619 Article 24(1). Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access without any discrimination to all social and health services. (2) Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

620 Article XVIII. Health (1). Indigenous peoples have the collective and individual right to the enjoyment of the highest attainable standard of physical, mental, and spiritual health. (2). Indigenous peoples have the right to their own health systems and practices, as well as to the use and protection of their vital medicinal plants, animals and minerals, and other natural resources for medicinal use in their ancestral lands and territories. (3). States shall take measures to prevent and prohibit indigenous peoples and individuals from being subjects of research programs, biological or medical experimentation or sterilization without their free, prior and informed consent. Likewise, indigenous peoples and individuals have the right, as appropriate, to access in their data, medical records, and documentation of research conducted by individuals and institutions, whether public or private. (4). Indigenous peoples have the right to use, without discrimination of any kind, all the health and medical care institutions and services accessible to the general population. States, in consultation and coordination with indigenous peoples, shall promote intercultural systems and practices in the medical and health services provided in indigenous communities, including training of indigenous technical and professional health care personnel. (5). States shall ensure the effective exercise of the rights contained in this article.

621 ADRIP, Article XVIII.

622 ESCR Committee. General Comment 14, *supra*, para. 27.

623 ADRIP, Article XVIII(4).

624 *Cf.* WHO. Resolution WHA67.18 of the World Assembly on Health, of May 24,2014, Point 2(2).

625 Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, A/69/267, of August 6, 2014, para. 19.

626 *Cf. Case of I.V. v. Bolivia*, *supra*, para. 192.

with the ESCR Committee in pointing out that, in guaranteeing the right to health, States should, *inter alia*, ensure that the installations and health services respect culturally appropriate standards.[627]

321. The Court reaffirms, therefore, that the State's duty to safeguard the health and well-being of inmates includes the obligation to provide culturally adequate treatment to indigenous persons deprived of liberty.[628] With respect to this duty, the Court has pointed out that, based on the principle of non-discrimination, the right to health of persons deprived of liberty implies the provision of periodic medical reviews and, where applicable, an appropriate, timely and, if necessary, specialized medical treatment in accordance with the special needs of care that persons deprived of liberty require (*supra* para. 77).

322. Thus, in the case of indigenous persons, appropriate, timely medical care that meets the "special needs of care," requires, owing to their worldview, the use of traditional medicine and practices. Consequently, the Court is of the opinion that the States have the following specific obligations: (a) promote intercultural systems or practices in their health services, so that the medical care provided to indigenous persons takes into consideration their cultural guidelines; (b) allow indigenous persons deprived of liberty to bring into prison those plants and traditional medicines, as long as they do not represent a danger to their health or that of third persons and, (c) allow the admittance into the prisons of persons who apply the traditional medicine of the indigenous community for the medical care of indigenous persons.[629]

D. The use of indigenous languages during deprivation of liberty and the adoption of culturally appropriate measures of reinsertion and reintegration

323. The Commission consulted the Court on "What special measures must States adopt in relation to the activities or programs implemented within prisons, as well as in disciplinary hearings, in light of the cultural and linguistic particularities of indigenous people?" In view of the complexity of the question posed, the Court will analyze the obligations into two parts: (1) the use of indigenous languages during deprivation of liberty and (2) the culturally adequate measures of reinsertion and reintegration.

D.1) The use of indigenous languages during deprivation of liberty

324. Indigenous peoples have the right to speak and receive information in their own language, which is protected by the right to freedom of thought and expression, established in Article 13 of the Convention. In this regard, the Court has stated that "[l]anguage is one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture."[630] Article 13 of the UN Declaration on the Rights of Indigenous Peoples states the following:

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627 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 121(d), citing the ESCR Committee, General Comment 14, *supra*, para. 12.

628 With respect to this obligation, the Handbook on Prisoners with special needs states that the health care offered in prison must take into account the cultural background of the prisoners. UNODC, Handbook on Prisoners with special needs, *supra*, p. 78.

629 Thus, for example, in Colombia the directors of prisons are authorized to form, in conjunction with indigenous communities "brigades of traditional health for the care of the imprisoned indigenous population." National Penitentiary and Prison Institute of Colombia. General Regulations of the National Prisons of December 19, 2016, Article 93, para. 1. See, similarly, Gendarmerie of Chile, Resolution 3925 of July 29, 2020, Article IV and Ministry of Justice and Public Security of Brazil, Technical Note 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, Article 27, in relation to Resolution 254, of June 31, 2002, of the Ministry of Health of Brazil.

630 *Cf. Case of López Álvarez v. Honduras, supra*, para. 171 and *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, *supra*, para. 127.

> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
> 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood, in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

325. Similarly, the ADRIP stipulates that "States, in conjunction with indigenous peoples, shall make efforts to ensure that those peoples can understand and be understood in their own languages in administrative, political, and judicial proceedings, if necessary, through the provision of interpretation or by other effective means."[631]

326. In the context of deprivation of liberty, interpretation becomes an enabling mechanism of a multiplicity of rights of the indigenous population, which requires the adoption of positive measures by States, especially regarding interpreters and cultural facilitators and to receiving information in their language on their rights.[632] The Handbook on Prisoners with special needs recommends that States should (i) "ensure that they comply with the linguistic requirements of minority groups and indigenous peoples, including the translation of prison rules and regulations, interpretation during disciplinary hearings and prisoner programmes, as well as the provisions of reading materials in minority languages;" (ii) ensure that "prison rules are explained verbally, notwithstanding whether they have been provided in written form or not," and (iii) "[n]ot […] penalize members of minority groups and indigenous peoples for using their own language in prison and correspondence."[633]

327. In light of the norms and standards expressed above, the Court considers that the exercise of the rights protected by the Convention requires the presumption that indigenous prisoners can express themselves and receive information in their own language. Consequently, States should (a) ensure that any information provided to the rest of the prison population, especially that related to their rights, the status of their proceedings and the medical treatment received be translated to the language of the indigenous persons. If they do not know how to read, they should be read to by interpreters; (b) provide interpretation of those administrative and judicial proceedings and procedures that might affect the rights of indigenous prisoners when they do not speak the language in which the proceedings are conducted or when they expressly wish to speak in their own language and (c) refrain from prohibiting indigenous persons deprived of liberty to express themselves in the language that they choose, which would be a discriminatory treatment contrary to the Convention.[634]

D.2) The measures of culturally appropriate reinsertion and reintegration

328. The Court notes that the realization of the purposes of the oversight of deprivation of liberty (*supra* paras. 51 and 52) acquires a special meaning when persons deprived of liberty are indigenous. This requires the adoption of measures that are culturally appropriate, in coordination with the indigenous peoples, taking into consideration the link that the prisoners maintain with their land and community. These programs should take into account the conditions of socio-economic exclusion and the effects of discrimination that affect persons who belong to indigenous communities.

329. With respect to access to education, the ADRIP expresses that "States, in conjunction with

631 *Cf*. ADRIP, Article XIV(4).

632 Thus, the Mandela Rules state that, if a prisoner does not understand the most commonly used languages, he or she shall be provided with an interpreter so that he has knowledge of all information regarding his or her rights, obligations and any other issue concerning life in prison. In turn, the Principles and Best Practices state that indigenous prisoners have the right to be informed in a language that they understand regarding their rights and guarantees, the reasons for their detention and the charges presented against them, as well as to have a translator or interpreter during the proceedings. *Cf*. Mandela Rules, *supra,* Rules 54 and 55 and IACHR, Principles and Best Practices, *supra,* Principle V.

633 UNODC, Handbook on Prisoners with special needs, *supra*, p. 78.

634 *Cf*., See, *mutatis mutandis*, *Case of López Álvarez v. Honduras, supra*, para. 173.

indigenous peoples, shall take effective measures to enable indigenous individuals living outside their communities, particularly children, to have access to education in their own languages and cultures."[635] The Court has recognized that States have "the obligation to guarantee access to free basic education and its sustainability."[636] In particular, "when it comes to satisfying the right to basic education of indigenous communities, the State must promote this right from an ethno-educational perspective."[637] This implies adopting "positive measures to ensure that the education is culturally acceptable from an ethnically differentiated perspective."[638] Moreover, indigenous persons have the right to "revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures."[639]

330. Consequently, the Court is of the opinion that the realization of the purpose of oversight of deprivation of liberty, established in Article 5(6) of the Convention, requires that, in the case of indigenous persons, "States adopt measures that allow access to traditional knowledge, education, and intercultural and bilingual educational material"[640] Thus, prison programs and services should be appropriate, accessible and meet the cultural needs of each person with an intersectional approach.[641] To implement such measures, the Court stresses that States should work in conjunction with the corresponding indigenous communities and authorities.[642]

E. Prevention of violence against indigenous persons deprived of liberty

331. Finally, the Commission consulted the Court on the specific obligations that States have "for the prevention of all acts of violence against indigenous persons deprived of liberty."

332. In this regard, the Court reiterates that States have the obligation to adopt the necessary measures to protect and ensure the rights to life and to personal integrity of those who are deprived of liberty and to refrain, under any circumstance, from acting in a manner that would violate these rights.[643] Therefore, the obligations that the State must ineluctably assume as guarantor include the adoption of measures that favor maintaining a climate of respect for the human rights of persons deprived of liberty, among which are reducing overcrowding and ensuring that the minimum conditions of detention are compatible with their dignity, which implies providing sufficient trained

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635 ADRIP, Article XV(4).

636 *Cf Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 211. Similarly, Article 13(3) of the Protocol of San Salvador, in the Area of Economic, Social and Cultural Rights indicates that "Primary education should be compulsory and accessible to all without cost."

637 *Cf*. *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 211. See, also, Article 27(1) of the ILO Convention 169.

638 *Cf*. *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 211. The ESCR has ruled in similar terms in its General Comment 13, *supra*, para. 50.

639 ILO Convention 169, Article 13(1).

640 *Cf.* UNODC, Handbook on Prisoners with special needs, *supra*, p. 77. In the region, see, for example, Argentina, Law 26.206 of December 4, 2006, Articles 52 and 55; Chile, Gendarmerie, Resolution 3925 of July 29, 2020, Article I; Brazil, Ministry of Justice and Public Security, Technical Note 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, pats. 40; National Council of Justice of Brazil, Resolution 287 of June 25, 2019, Article 14(VI).

641 *Cf*. Bangkok Rules, *supra*, Rule 54 and UNODC, Handbook on Prisoners with special needs, *supra*, p.77.

642 In applying this standard, it should be observed that "[t]he principles of self-determination and non-discrimination permeate the broad range of economic and social rights," and, thus "in the area of education, general and contextualized standards guarantee the equal rights of indigenous individuals to education without discrimination, as well as the right to establish their own educational institutions, in conformity with their own convictions. In addition, the right to work enshrined in various instruments of general applicability encompasses the right of indigenous peoples to pursue traditional occupations, such as sustainable pastoralism, hunting, gathering, fishing and shifting cultivation, as well as equal access to pursue such occupations." Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, A/69/267, *supra*, para. 19.

643 *Cf.,* See*, inter alia, Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of May 22, 2014, Considering Paragraph 15.

personnel to ensure adequate and effective prison control, custody and surveillance. Moreover, given the characteristics of prisons, States must protect the inmates from violence that, in the absence of State control, may occur among the prisoners (*supra* para. 108).

333. In the prison context, States should, *inter alia*, create adequate mechanisms to inspect the institutions through visits, investigations and to resolve complaints and establish appropriate disciplinary or judicial proceedings for cases of undue professional conduct or violations of the rights of the prisoners (*supra* para. 264). In the case of indigenous persons, the OAS Member States have declared that they "shall adopt, in conjunction with indigenous peoples, the necessary measures to prevent and eradicate all forms of violence and discrimination, particularly against indigenous women and children."[644]

334. On this point, the Handbook on Prisoners with special needs recommends that States: (i) sensitize their officials to eliminate racial bias; (ii) formalize cooperation with representatives of indigenous peoples in the community and recommend the introduction of appropriate policies and rules to eliminate discrimination; (iii) establish mechanisms of constant monitoring of ethnic, racial and ancestry discrimination; (iv) ensure that indigenous persons are placed in spaces that offer protection of prisoners at high risk and that are equal to those of the majority of the prison population and (v) diligently investigate complaints of discrimination based on ethnicity, race and ancestry, as well as on harassment and abuse by prison personnel or the other prisoners and take the appropriate disciplinary measures.[645]

335. Similarly, the CERD has recommended "[g]uarantee[ing] to all prisoners whose rights have been violated the right to an effective remedy before an independent and impartial authority;" that "the independent authorities in the States parties that are responsible for supervising prison institutions should include members who have expertise in the field of racial discrimination and sound knowledge of the problems of racial and ethnic groups," which "when necessary, such supervisory authorities should have an effective visit and complaint mechanism."[646] For its part, the Human Rights Committee has indicated that measures of protection should never mean isolation, which disproportionately affects indigenous persons.[647]

336. Therefore, the Court is of the opinion that Articles 1(1), 4, 5(1), 5(2) and 5(6) of the Convention impose the following specific obligations to prevent violence against indigenous persons deprived of liberty: (a) train and sensitize prison personnel on the specificities of the indigenous cultures; (b) establish mechanisms of supervision in prison, as well as for denouncing and investigating violations of human rights, that are independent and that there are culturally sensitive personnel trained in investigating violence against indigenous persons; (c) increase the number of indigenous prison personnel; (d) develop, in conjunction with indigenous communities and authorities, prison policies on violence and discrimination, and (e) ensure that the adopted measures to protect indigenous persons do not imply an inferior treatment to that provided to other prisoners, including isolation.

IX
DIFFERENTIATED APPROACHES TO OLDER PERSONS DEPRIVED OF LIBERTY

337. To develop the content of Article 5(2) of the Convention with respect to older persons, the

644 *Cf*. ADRIP, Article VII(3).

645 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 76 to 79.

646 *Cf.* CERD, General Comment XXXI on the prevention of racial discrimination in the administration and functioning of criminal justice, *supra*, para. 38.

647 *Cf*. Human Rights Committee. Case of *Brough v. Australia*, U.N. Doc. CCPR/C/86/D/1184/2003, Communication 1184/2003 of March 17, 2006, para. 9(4).

Court will use, among other instruments, the IACPHROP. According to this treaty, an "older person" is one who has reached 60 years of age, unless the domestic law establishes a different age, the limit of which is not more than 65 years of age.[648] Although the Commission did not submit specific questions related to disabled persons, the Court notes that the process of ageing can contribute to situations of disability (*infra* paras. 341, 354 and 355) and, therefore, deems it pertinent to include considerations on this issue in developing this section.

338. The Court will now address the States' specific obligations to ensure the rights of older persons deprived of liberty in the following order: (A) the need to adopt special measures to make effective the rights of older persons deprived of liberty; (B) the appropriateness for older persons of substitute or alternative measures of oversight of sentences of the deprivation of liberty; (C) the rights to accessibility and to personal mobility of older persons; (D) the right to health of older persons; (E) the right of older persons to outside contact with their family members and (F) the reinsertion and social reintegration of older persons.

A. The need to adopt special measures to make effective the rights of older persons deprived of liberty

339. Prison statistics reveal that older persons are a minority of the total prison population[649] and that older women represent an even smaller percentage; in other words, they are "a minority within a minority."[650]

340. According to the UNODC, the number of older persons deprived of liberty is increasing due, among other reasons, to the longer life expectancy in some countries and to the tendency towards the application of longer sentences and more severe convictions, such as life sentences.[651] In this regard, older persons may find themselves in prison as a result of some of the following situations: (a) having been condemned when young to long sentences so that over the years they have become accustomed to life in prison and whose social reinsertion would be complex; (b) having been convicted on more than one occasion so that they have been in and out of prison, including multiple times, also being accustomed to prison and, thus, with difficulties for readaptation and (c) having been sentenced at an advanced age, with multiple difficulties to adapt to life in prison and sometimes subject to discrimination and violence by other prisoners.[652]

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[648] *Cf*. IACPHROP, Article 2. Agreeing with the IACPHROP, this advisory opinion employs the concept "older persons" which includes those relative to "elderly persons" and "older adult persons." It also used the parameter of 60 years of age, regardless of the disparity of the standards that might exist internationally.

[649] According to information from the Inter-American Development Bank (IBD), the prison situation in Latin America and the Caribbean is that, on average, 92% of the prisoners are men, whose median age is 34 years old. Persons 65 and over, in different States, represent a significantly lower percentage: Argentina, 5.3%; Bahamas, 3%; Barbados, 3.4%; Brazil, 4.8%; Chile, 5.6%; Costa Rica, 7.39%; El Salvador, 4.9%; Guyana, 5.5%; Honduras, 9.3%; Jamaica, 5.4%; Peru, 7.4% Suriname, 3.9% and Trinidad and Tobago, 7.5%. These data show that, on average, approximately 6% of the persons deprived of liberty in the region are 65 years old or older. *Cf*. IDB, *Within the prisons of Latin America and the Caribbean: A view from the other side of the bars*, 2019, p. 10 and *The prisons of Latin America and the Caribbean and the health crisis of COVID-19*, 2020, p. 5. In Canada, during the period 2018-2019, of the 4,749 persons admitted to federal prisons, 251 were more than 60 years of age (5.29%), of whom 12 were women (0.25% of the total and 4,78% of the group of older persons) and 239 men (5.03% and 95.22%). *Cf*. *Public Safety Canada*, *Corrections and Conditional Release Statistical Overview 2019*, Canada, 2020, p. 50. In the case of Mexico, up to August 202, the federal and common prisons held 222,018 persons, of which 7.502 were 60 years of age or older (3.38%). Of the latter, 283 were women (0.13% of the general prison population and 3.77% of the total of older persons) and 7,219 men (3.25% and 96.23%). *Cf*. Secretariat of Citizen Security and Protection, Government of Mexico, *Monthly statistics report on national prisons*, August 2021, pp. 42 and 44.

[650] *Cf*. WHO, Regional Office for Europe, *Women's health in prison: correcting gender inequity in prison health*, Denmark, 2009, p. 16.

[651] *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 126 and 128 and WHO, Regional Office for Europe, *Prisons and Health*, Denmark, 2014, p. 165.

[652] *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 128.

341. In any case, older prisoners belong to a heterogenic group in terms of their needs, which depend on different factors associated with the course of life, the person's health and eventual disabilities, among others. The IACPHROP refers to ageing as "a gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences" (Article 2). These changes may affect the older person's health[653] or the psychosocial condition[654] and have an impact on the deterioration of the body, including the mobility, sensory and cognitive functions.[655] There are also specific needs that depend on gender, a factor that impacts on the changes produced by ageing.[656]

342. The Court has emphasized "the importance of giving prominence to older persons as subjects of rights" who require "special protection" and, consequently, "comprehensive care," respecting their "autonomy and independence."[657] Positive measures must be adopted, determined according to the specific needs of protection of the holders of rights, either due to their personal condition or to their specific situation,[658] as is the case with older persons.[659]

343. The Court also recalls that age is a category protected by Article 1(1) of the Convention, since this concept is included as part of the broad term "any other social condition."[660] Consequently, the prohibition of discrimination due to age, when it concerns older persons, is also protected by the Convention and entails, among others, "the application of inclusive policies that cover the whole population and ease of access to public services."[661]

344. The special needs of older persons due to the ageing process are heightened by the conditions of vulnerability of the prison population. The Court underscores that, in the case of this group, there exists an intersectional joining of the factors of discrimination, such as sex, gender, sexual

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653 According to WHO, ageing is associated with "the gradual accumulation of a wide variety of molecular and cellular damage" which, over time, "leads to a gradual decrease in physiological reserves" with the resulting "generalized and progressive deterioration of many functions of the body, greater vulnerability […] and greater risk of illness." *Cf*. WHO*, World report on ageing and health*, *supra*, p. 27.

654 Old age –understood as a "[s]ocial construct of the last stage of the life course," Article 2 of the IACPHROP– that frequently entails a different set of important psychosocial changes, referred to the social roles and positions, as well as a "the need to deal with the loss of close relationships." *Cf*. WHO*, World report on ageing and health.* 2015, p. 27.

655 WHO reports that, with age, the muscle mass tends to shrink, a matter that may be associated "with declines in strength and musculoskeletal function." Moreover, ageing is associated with declines in both vision and hearing, although each person is affected differently. As to the cognitive functions, "ageing is associated with a decrease in the capacity to tackle complex tasks" that require answering several questions at the same time or switching attention. *Cf*. WHO*, World report on ageing and health*, *supra*, pp. 55 to 58.

656 According to the Committee on the Elimination of Discrimination against Women, "[g]ender-specific physical and mental health conditions and diseases" related to age and the specific characteristics of women "tend to be overlooked," which makes it essential to adopt "a comprehensive health-care policy aimed at protecting their health needs." CEDAW, General Recommendation 27 on older women and the protection of their human rights, December 16, 2010, U.N. Doc. CEDAW/C/GC/27, paras. 21, 45 and 46.

657 *Cf*. *Case of Poblete Vilches et al. v. Chile, supra*, para. 132.

658 *Cf*. *Case of Ximenes Lopes v. Brazil, supra*, para. 103 and *Case of Guachalá Chimbo et al. v. Ecuador, supra*, para. 86. The ESCR Committee has also stated that "respect for the rights of older persons requires special measures to be taken." *Cf*. ESCR Committee, General Comment 6, The economic, social and cultural rights of older persons, E/C.12/1995/16/Rev.1, December 8, 1995, para. 10.

659 The IACPHROP requires that "[i]n their policies, plans and legislation on ageing and old age, States Parties shall develop specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination. Article 5). For its part, the Protocol of San Salvador states, in its Article 7, that "[e]veryone has the right to special protection in old age."

660 *Cf*. Advisory Opinion OC-18/03, *supra*, para. 101 and *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 122.

661 *Cf*. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 122. Complementarily, the IACPHROP requires adopting and implementing specific measures and adjustments legislatively and public policies applicable for older persons that would guarantee an "active and healthy ageing," understood as "optimizing opportunities for physical, mental and social well-being" (Article 2). See, ESCR Committee, General Comment 20, *supra*, para. 29 and Madrid Plan of International Action on Ageing, Second World Assembly on Ageing and the Political Declaration, Madrid, Spain, April 8-12, 2002, p. 11.

orientation, ethnic origin and migratory condition, that increases the vulnerability associated with the life cycle and the deprivation of liberty.[662]

345. On this point, the Court stresses the importance of States maintaining current and verifiable information, data and statistics on the realities of older persons and, specifically, those deprived of liberty, as a basis for designing, adopting and implementing decisions, public policies and measures aimed at making effective those rights. Such data must be based on appropriate methodologies that reflect the heterogeneity of this group so as to best meet their specific needs.[663]

346. Therefore, in view of the prevailing conditions in the prisons of the region and the fact that the characteristics and needs of older persons have not been taken into account,[664] States must implement policies and programs and make reasonable adaptations that respond to those specificities and requirements, all of which impact on the specific obligations that must meet the special needs caused by changes associated with ageing[665] in order that the respect for human dignity that Article 5(2) recognizes and ensures to all persons deprived of liberty be observed.

B. The appropriateness of substitute or alternative measures to the enforcement of deprivation of liberty for older persons

347. The Court is conscious of the special needs of older persons, the differentiated harm that deprivation of liberty can entail for older persons deprived of liberty and the possibility that prison systems do not adequately meet their multiple needs has led to the recommendation of applying to this group non-custodial punishments or parole,[666] which should include the needs of reinsertion and

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662 See, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, Human rights of older women: the intersection between ageing and gender, A/76/157, of July 16, 2021, para. 15.

663 *Cf*. Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/HRC/45/14, July 9, 2020, paras. 80 y 83.

664 *Cf*. WHO, Regional Office for Europe, *Prisons and Health*, Denmark, *supra*, p. 165.

665 See, Mandela Rules, *supra*, Rule 2(2). According to the information provided, certain OAS Member States have recognized the necessity of providing care to older persons deprived of liberty that responds to their special needs, citing the following examples: (a) in Argentina, the Federal Prison Service has scheduled the implementation of the "Program of comprehensive care for persons of the third age deprived of liberty," the object of which is "promotion and primary care of their health and other needs;" (b) in Costa Rica, the Regulation of the National Prison System, No. 40849-JP, of January 9, 2018, establishes in its Article 40 the "Level of Care for Older Persons," with the purpose of "developing processes and procedures that meet the specificities of this group;" and (c) in Ecuador, the Regulation of the system of social rehabilitation, Resolution SNAI-SNAI-2020-0031-R of July 30, 2020, states, in its Article 98 the priority care for older persons deprived of liberty.

666 The legal orders of the different OAS Member States foresee the possibility of applying non-custodial measures, even including eliminating the punishment for older persons, persons with disabilities or persons with certain health ailments. See, (a) Argentina, Law 26.660, Law of the Enforcement of the Deprivation of Liberty, of July 8,1996, Article 32(a),(b),(c) and (d); (b) Bolivia, (i) Law 2298, Law of the Criminal Enforcement and Supervision, of December 20, 2001, Article 196, (ii) Law 1970, Code of Criminal Procedure, of March 25, 1999, Article 433(a), (b) and (c) and (iii) Law 2298, Law of Criminal Enforcement and Supervision, of December 20, 2001, Article 174(1); (c) Brazil, Law 7210, Law of Criminal Enforcement, of July 11, 1984, Article 117(1) and (2); (d) Colombia, Law 65, Penitentiary and Prison Code, of August 20, 1993, Article 106; (e) Costa Rica, Regulation of the National Prison System, No. 40849-JP, of January 9, 2018, Article 134; (f) Ecuador, Regulation of the social rehabilitation system, Resolution SNAI-SNAI-2020-0031-R of July 30, 2020, Article 268; (g) El Salvador, Legislative Decree 1027, Law on Prisons, of April 24, 1997, Articles 39-A, 39-C, and Article 39-E;(h) United States, *Second Chance Act of 2007: Community Safety Through Recidivism Prevention* (434 U.S.C. 60541), section 231 (g); (i) Guatemala, Decree 33-2006, Law on the Prison Regime, of September 5, 2006, Article; (j) Mexico, National Law of Criminal Enforcement of July 16, 2016, Article 146;(k) Paraguay, Law 5162, Code of Criminal Enforcement, of October 17, 2014, Article 239 and (k) Dominican Republic, Law 24.660, Law of the Enforcement of Deprivation of Liberty, of July 8, 1996, Article 33.

social reintegration,[667] as well as of avoiding criminal recidivism.[668]

348. The Court notes that in order to determine the viability of applying non-custodial punishment to older persons, as well as defining the type of measure, it is necessary to consider such factors as the type and the severity of the offense, the health of the offender, the risk to life based on medical reports,[669] the conditions of detention and facilities in order to be properly attended, the purpose of the imposed sanction and the rights of the victims.[670]

349. In the case of non-violent or low-grade offenses committed by older persons, alternative sanctions to prison may be appropriate by implementing a program of accompaniment and supervision, which may include certain conditions or obligations imposed on the person as long as they are in accord with his or her capacities and aptitudes, without neglecting the psychological and social assistance that might be necessary.[671]

350. With respect to persons convicted of committing offenses involving serious violations of human rights, the Court reiterates that, during the oversight of deprivation of liberty in prison, the State must ensure adequate, specialized and continuous care. In analyzing the appropriate alternative or substitute measures to deprivation of liberty that would comply the sentence under other conditions outside prison, but that would not imply the eradication of the sentence or a pardon, the competent authorities should consider the health of the prisoner, the conditions of detention and the facilities necessary to be attended adequately (either in the prison or by transfer to a medical center) and the distress that such a measure would cause to the victims and their family members. Such an evaluation must take into account and must assess other factors or standards such as: whether a considerable part of the sentence has been served and whether the civil reparation imposed as part of the sentence has been paid; the conduct of the prisoner with respect to the clarification of the facts; the recognition of the seriousness of the offenses perpetrated and the rehabilitation and the effects that the release would have on society and on the victims and their families.[672]

C. The rights to accessibility and to personal mobility of older persons deprived of liberty

351. The Court recalls that Article 5(2) of the Convention ensures "respect for the inherent dignity" of the person deprived of liberty, which includes providing, within the prison, conditions of infrastructure and access so that the prisoners have a life with dignity with respect to their conditions

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667 The Tokyo Rules make this manifest by stating that the implementation of this type of measures should "take into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender." Tokyo Rules, *supra*, Rule 1(5).

668 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 135, 136, 138 and 141. See, European Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT), Health care services in prisons, Extract from the 3rd General Report, 1993, para. 70.

669 *Cf*. *Case of Barrios Altos and Case of La Cantuta v. Peru. Monitoring Compliance of Judgment*. Order of the Inter-American Court of May 30, 2018, Considering Paragraph 52. See, Council of Europe, Recommendation R(98)7 of the Committee of Ministers to the Member States on the ethical and organizing aspects of medical care in prison, adopted on April 8,del 1998, para. 51.

670 *Cf*. Tokyo Rules, *supra*, Rule 3(2) and IACPHROP, Article 13.

671 *Cf*. Tokyo Rules, *supra*, Rules 10, 12 and 13. See, UNODC, Handbook on Prisoners with special needs, *supra*, pp. 135 and 136.

672 *Cf. Case of Barrios Altos and Case of La Cantuta v. Peru. Monitoring Compliance of Judgment.* Order of the Inter-American Court of May 30, 2018 and *Case of Barrios Altos and Case of La Cantuta v. Peru. Request of Provisional Measures and Monitoring Compliance of Judgment.* Order of the Inter-American Court of April 7, 2022.

and to their needs.[673]

352. The physical space in which older persons are housed in prison must be safe and easily accessible.[674] The Court, with respect to the specific risks for older persons and other vulnerable groups, has pointed out the need to provide exclusive "wings" or "separate sections" in prisons for such persons.[675] Persons deprived of liberty should be provided with an environment and conditions that "minimize any differences between prison life and life at liberty,"[676] which may be considered contrary to the general rule of segregating older persons from the other prisoners,[677] which may lead to their isolation.[678]

353. Thus, a decision to house older persons deprived of liberty together with the other prisoners must consider (i) the interest in providing them with an environment comparable to life outside prison and the benefit of living together with other inmates[679] and (ii) the safety conditions, considering the risk to their personal integrity or their life in sharing daily life with the prison population as a whole. Consequently, it is a decision that the competent authorities must take by considering the prison conditions and the level of risk that may exist for older persons.[680] In any case, their safety, life and personal integrity must be ensured if it is decided to house older persons among the rest of the prisoners.[681]

354. The physical space where older persons deprived of liberty are accommodated must meet their special needs so as to ensure their accessibility and mobility and, thus, an autonomous and independent life that allows them to fully participate in all aspects of daily life within the prison.[682]

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673 *Cf*. IACPHROP, Article 7(1). See, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/30/43, of August 13, 2015, paras. 45, 46 and 60. See, also, the UN Principles for older persons that states such persons "should be able to live in environments that are safe and adaptable to […] to changing capacities." *Cf.* UN Principles for older persons, adopted by the General Assembly on December 16, 1991, Resolution 46/91, Principle 5.

674 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 137.

675 *Cf*. *Matter of the Penitentiary Complex of Curado with regard to Brazil. Provisional Measures.* Order of the Inter-American Court of November 23, 2016, Considering Paragraphs 4, 5 and 38 and *Matter of the Plácido de Sá Carvalho Criminal Institute with regard to Brazil.* Order of the Inter-American Court of November 22, 2018, Considering Paragraph 66. The same notion can be found in diverse international instruments, such as Rule 11 of the Mandela Rules and Principle XIX of the Principles and Best Practices.

676 *Cf*. Mandela Rules, *supra*, Rule 5(1).

677 As the Committee of Ministers of the Council of Europe indicated that: "Prisoners with serious physical handicaps and those of advanced age should be accommodated in such a way as to allow as normal a life as possible and should not be segregated from the general prison population." *Cf*. Council of Europe, Recommendation R(98)7 of the Committee of Ministers to the Member States on the ethical and organizing aspects of medical care in prison, adopted on April 8, 1998, para. 50. See, also, Human Rights Watch, *Old persons behind bars: The aging prison population in the United States*, 2012, pp. 55 and 56.

678 The IACPHROP considers, in its Article 4(a), the "isolation" of older persons as one of the "practices that contravene" the rights recognized in that international instrument.

679 According to WHO, "allowing older prisoners to live with the general prison population is important to protect them from isolation and to ensure their access to all the programmes and activities offered in the prison." *Cf*. OMS, Regional Office for Europe, *Prisons and Health*, *supra*, p. 157.

680 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 129 and 130.

681 The Committee of Minister of the Council of Europe has also indicated that the "prison authorities should strive to create environments in which all prisoners can be safe and free from abuse […] that enable all prisoners to mix." *Cf*. Council of Europe, Revised commentary to Recommendation R(2006)2 of the Committee of Ministers to the Member States on European prison rules, Council on Penological Co-operation, 2017-2018, Commentary to Rule 52.

682 See, similarly, Article 7 of the IACPHROP recognizes the right of older persons to lead an autonomous and independent life and its Article 26 states that older persons have the "right to accessibility to the physical, social, economic, and cultural environment, as well as personal mobility." According to the Independent Expert on the enjoyment of all human rights by older persons in order that older persons are in conditions to live autonomously to the greatest extent possible it is necessary to promote […] environments that are sensible to the needs of older persons and to help these persons to maintain themselves

The Court reiterates the need to avoid prison overcrowding (*supra* para. 107), which heightens the risk for older persons in view of the vulnerability that accompanies ageing. It must be remembered that changes caused by ageing do result in the deterioration of the body, including the mobility and sensory and cognitive functions (*supra* para. 341). Therefore, depending on the situation and needs of each older person deprived of liberty, the rights of persons with a disability could also be claimed.[683]

355. Consequently, the interpretation of Article 5(2) of the Convention also involves utilizing the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (hereinafter "the IACEDPD") and the Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD"). With respect to both instruments, the Court has pointed out that they contain a social model on disability; in other words, "disability is not only defined by the presence of a physical, mental, intellectual or sensory impairment, but is interrelated with the barriers or limitations that exist socially for persons to exercise their rights effectively." Thus, persons with a disability encounter different types of limitations or barriers, including physical or architectural, communicative, attitudinal or socioeconomic,[684] which the State is obligated to identify and remove by promoting practices of social inclusion and adopting positive differentiated measures.[685]

356. The Court has indicated that applying the social model to respond to disabilities in the prison environment requires ensuring "accessibility to persons with disabilities deprived of their liberty […] in accordance with the principle of non-discrimination and the interrelated elements for the protection of health; namely, availability, accessibility, acceptability and quality, including the provision of reasonable accommodation, to enable [them] to live with the greatest independence possible and in equality of conditions with other persons deprived of liberty."[686]

357. As a disability is among the changes inherent in ageing, in accordance with the social model to address disability,[687] the States must, *inter alia*, "adapt the environment so that a person with any impairment can function and enjoy the greatest independence possible, thereby ensuring that he or she can participate fully in all aspects of life on an equal basis with others;" […] "identify the obstacles

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autonomous and active to effectively participate in all aspects of life in a way that the enjoyment of all human rights by older persons becomes an integral part of the totality of the policies and programs that affect them, including the planning and the service of care. *Cf.* Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, The right to autonomy and care, A/HRC/30/43, *supra* and Written observations of the Independent Expert on the enjoyment of all human rights by older persons (file of observations, f. 526). After examining the situation of a person with a disability who was deprived of liberty, what the Committee on the Rights of Persons with Disabilities stated merits special importance: [t]he State Party is under an obligation to ensure that prisons afford accessibility to all persons with disabilities who are deprived of their liberty," which includes "the identification and removal of obstacles and barriers to access, so that persons with disabilities […] may live independently and participate fully in all aspects of daily life in their place of detention." *Cf*. Committee on the Rights of Persons with Disabilities, *X v. Argentina*, CRPD/C/11/D/8/2012, Communication 8/2012, of June 18, 2014, para. 8(5).

683 The Court has stated that a person of an advanced age and "suffers from a permanent disability" is "in a particularly vulnerable situation." *Cf*. *Case of García Lucero et al. v. Chile. Preliminary Objection, Merits and Reparations, supra*, para. 231. According to WHO, "the greatest burden of disability" that affects older persons is estimated to come from sensory impairments, back and neck pain, chronic obstructive pulmonary disease, depressive disorders, falls, diabetes, dementia and osteoarthritis. *Cf*. WHO*, World report on ageing and health*, *supra*, pp. 60 and 61.

684 *Cf*. *Case of Furlán and family members v. Argentina, supra*, para. 133; *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 207 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 85.

685 *Cf*. *Case of Furlán and family members v. Argentina*, *supra*, para. 108; *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 208 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 86. See, IACPHROP, Articles 4(a) and 26; CROPD, Articles 5(3) and (4), 9 and 20 and CIADDIS, Article III. The ESCR Committee has indicated that the States are obligated to "take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities." *Cf*. ESCR Committee, General Comment 5, *supra*, para. 9.

686 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 215.

687 *Cf*. *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 116.

and barriers of access and, consequently, proceed to eliminate or adapt them, thereby ensuring that persons with disabilities have access,"[688] and also adapt prison installations to meet the special needs of persons with disabilities, which includes making reasonable adaptations to the infrastructure of prisons regarding the different services that they provide in order to make them accessible to such persons.[689]

358. Similarly, States must facilitate access to the means necessary for rehabilitation by eliminating barriers that persons with disabilities deprived of liberty encounter.[690] On this latter point, the rights to accessibility and to personal mobility also require measures to ensure the "habilitation and rehabilitation" of persons with disabilities,[691] so that they may achieve the utmost independence and physical capacity in order that they can effectively participate in all aspects of life.[692]

359. Therefore, it is especially important that, upon admission to prison, persons with disabilities are initially screened in order to identify their specific health needs, including aspects of their physical and mental health (*supra* para. 85 and *infra* para. 378), as well as possible problems of mobility, hearing or sight,[693] which acquires special relevance for the reasons previously expressed.

360. Based on the above, the States' obligation to effectively ensure the rights to accessibility and to mobility of older persons deprived of liberty also include that the prisons must be designed according to the technical directives that ensure access to all persons, as well as to identify, eliminate or adjust the obstacles and barriers of access that may exist in such places.[694]

361. Specifically, the Court is of the opinion that it is necessary to attend to the following aspects that have as their purpose ensuring the accessibility and mobility of older persons:

a) Their housing should be in dormitories or cells located on ground floors, minimizing the need to use steps;[695]
b) They should be given single-tier beds rather than bunk beds;[696]
c) It is essential to ensure easy access and use, in equality of conditions with the other persons deprived of liberty, of the sanitary installations and spaces for personal hygiene, which should have adequate measures of safety (handrails, railings, handholds, grab bars and non-slip mats), as well as equipment for their use (hand showers with a hose, bathroom and shower chairs and faucet handles, among others);[697]

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688 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 214.

689 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 217.

690 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 216. See, IACPDHOP, Articles 13 and 19.

691 According to WHO, the term "rehabilitation" encompasses "a set of measures that assist individuals who experience, or are likely to experience, disability to achieve and maintain optimal functioning in interaction with their environments." A distinction is sometimes made between "habilitation," which aims to help those who acquire disabilities congenitally or early in life to develop maximal functioning" and "rehabilitation" where those who "have experienced a loss in function are assisted to regain maximal functioning." Nevertheless, the latter term may encompass both types of intervention. "*Cf*. WHO*, World Report on disability*, *supra*, p. 108.

692 *Cf*. CROPD, Article 26.

693 *Cf*. Mandela Rules, *supra*, Rules 7(d), (f) and (g) and 8(b); UNODC, Handbook on Prisoners with special needs, *supra*, p. 137 and WHO, Regional Office for Europe, *Prisons and Health*, *supra*, p. 157.

694 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, paras. 214, 216 and 217. See, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/33/44, July 8, 2016, paras. 79 and 80 and WHO*, World report on disability*, *supra*, p. 16.

695 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 136.

696 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 136 and WHO, Regional Office for Europe, *Prisons and Health*, *supra*, p. 16

697 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 216. See, Mandela Rules, *supra*, Rules 15 and 16 and

d) They should also be ensured, in equality of conditions with the other prisoners, access to the physical spaces and services of the prison, including patios, libraries, dining halls, places to study or work, common use areas, medical services, psychologists, psychiatrists, social or legal workers; in doing so, they should be ensured that there is a reasonably short distance between their accommodations and the areas in which they participate in the prison's different activities;[698]
e) The physical spaces and services of the prison should be adapted to ensure easy access and use, as well as to avoid accidents and falls;[699] this includes adequate illumination, installing ramps and elevators, providing spaces that allow the use of wheelchairs, determine the appropriate height of the installations, make the equipment and implements accessible (sliding doors and non-slippery surfaces, among others), and install adequate safety measures (handrails, railings, handholds, grab bars and non-slip mats, among others);[700]
f) It is necessary that the signs in the prison installations have adequate formats, easy to read and to understand for everyone, which includes the use of Braille;[701]
g) If necessary to ensure accessibility and personal mobility, the use of technical devices and equipment such as wheelchairs, walkers, canes, crutches, hearing aids and glasses, among others, should be authorized; if persons with disabilities cannot provide them by their own means, the prison authorities should provide them[702] (*infra* para. 370);
h) only in exceptional cases, for duly justified reasons of safety, can the above (g) be denied, in which case prison authorities must provide appropriate alternatives;[703]
i) even if, by observing the specific obligations set out above, it is not possible to ensure personal mobility, the authorities should facilitate access to assistance with trained personnel or, if necessary, with animals trained especially for those tasks,[704] and
j) if the above is not adequate and sufficient to ensure accessibility and personal mobility, in view of the situation and the condition, reasonable adjustments should be made when a specific case merits it.[705]

UNODC, Handbook on Prisoners with special needs, *supra*, p. 138. The ECHR held to be degrading treatment the situation of a person with disability that, among other circumstances, due to conditions of the center where she was detained, "could not go to the toilet or keep clean without the greatest difficulty." *Cf*. ECHR, *Case of Price v Great Britain*, No. 33395/96. Judgment of July 10, 2001, para. 30. See, also, ECHR, *Case of Grimailovs v. Latvia*, No. 6087/03. Judgment of June 25, 2013, paras. 158 and 159; *Case of Mircea Dumitrescu v. Romania*, No. 14609/10. Judgment of July 30, 2013, para. 59 and *Case of Semikhvostov v. Russia*, No. 2689/12. Judgment of February 6, 2014, para. 81.

698 *Cf*. Committee on the Rights of Persons with Disability, *X v. Argentina*, *supra*, para. 8.5. See, also, ECHR, *Case of Grimailovs v. Latvia*, *supra*, para. 157.

699 *Cf*. WHO, Regional Office for Europe, *Prisons and Health*, *supra*, p. 165.

700 *Cf Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 216. See, Committee of the Rights of Persons with Disability, *X v. Argentina*, *supra*, para. 8(5). The ECHR held "degrading and humiliating" the situation of an older person deprived of liberty who used a wheelchair and who could not leave his cell and move around the prison "by his own means," requiring the support of other persons, due to the failure to adapt the installations to his needs. *Cf*. ECHR, *Case of Vincent v. France*, No. 6253/03. Judgment of October 24, 2006, para. 103. See, also, ECHR, *Case of Semikhvostov v. Russia*, *supra*, para. 85.

701 *Cf*. IACPHROP, Article 26.

702 *Cf*. CRPD, Article 20(b) and UNODC, Handbook on Prisoners with special needs, *supra*, p. 52.

703 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 51.

704 *Cf*. CRPD, Article 20(c) and UNODC, Handbook on Prisoners with special needs, *supra*, pp. 51 and 52. The ECHR has stated that the State's obligation to ensure appropriate conditions of detention includes attention to the special needs of persons with physical disabilities, which means that the authorities the authorities cannot pass off this responsibility to other prison staff. *Cf*. ECHR, *Case of Grimailovs v. Latvia*, *supra*, paras. 161 and 162. See, also, ECHR, *Case of Farbtuhs v. Latvia*, No. 4672/02. Judgment of December 2, 2004, para. 60 and *Case of Semikhvostov v. Russia*, *supra*, paras. 84 and 85.

705 The Committee on the Rights of Persons with Disabilities has indicated that "[a]ccessibility is related to groups, whereas reasonable accommodation is related to individuals." Thus, the States are obligated to provide accessibility, which includes identifying and eliminating the obstacles and barriers that hinder them before receiving a request on a specific case. The reasonable accommodations respond precisely to the necessity of guaranteeing accessibility of a person who is in a particular situation that is not included in the first obligation. Finally, "[t]he obligation to implement accessibility is *unconditional*, i.e.,

D. The right to health of older persons deprived of liberty

362. The Court has held that the rights to health and to food are recognized, in general terms, by Article 26 of the Convention and that food and adequate nutrition are among the determinant basic factors of the right to health (*supra* paras. 80 and 87). Therefore, the first aspect to be protected is to ensure access to drinking water and to keeping clean, as well as such toilet articles as are necessary for health and cleanliness,"[706] including those for cases of incontinence. The food provided to older prisoners must be of good quality, balanced and with a sufficient nutritional value,[707] which meets their special dietary needs,[708] according to their condition and their prescribed medicines.[709]

363. Imprisonment, per se, may aggravate the health of older persons,[710] In view of the specific content of Article 19 of the IACPHROP, medical care and health services available to older persons deprived of liberty must take into account their particular circumstances and the different changes that accompany ageing in order that this group is provided with comprehensive care.[711]

364. States must therefore, where applicable, ensure appropriate treatments for alcohol abuse and the use of drugs or other substances.[712] It is also necessary to attend to all aspects of the mental health of older persons deprived of liberty, which include depression, isolation, anxiety and fear of dying, for which individual programs should be designed.[713] In that regard, prison authorities must develop strategies to prevent suicide and self-harm of older prisoners by providing psychological and/or psychiatric care.[714]

365. The need to provide health services at an equivalent level to that ensured outside of prison signifies that, in the case of older prisoners, those services are also aimed at strengthening "an active

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the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity." *Cf.* Committee on the Rights of Persons with Disabilities, General Comment 2, Article 9: Accessibility, May 22, 2014, U.N. Doc. CRPD/C/GC/2, paras. 25 and 26.

706 *Cf*. Mandela Rules, *supra*, Rule 18.

707 *Cf*. *Case of López Álvarez v. Honduras, supra*, para. 209 and *Case of Pacheco Teruel et al. v. Honduras*, *supra*, para. 67.

708 In Ecuador, the Regulations of the system of social rehabilitation, Resolution SNAI-SNAI-2020-0031-R of July 30, de 30, 2020, establishes in its Article 51 that older persons shall be provided with special diets. In Peru, Article 136 of Supreme Decree 015-2003-JUS, Regulations of the Code of Criminal Enforcement of October 2, 2013, states that a "special ration of food" shall be given to older persons.

709 The Court has held that "the State must also supply adequate food and the specific diet prescribed for persons who suffer […] diseases," and, therefore, prison system staff must monitor nutrition processes, based on the diets prescribed by the medical personnel." *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 186. See, WHO, Regional Office for Europe, *Prisons and Health, supra,* p. 177.

710 According to WHO, many persons deprived of liberty experience "accelerated ageing" in that "they develop chronic illnesses and dyabilities" approximately 10 to 15 years before the rest of the population. Because of the style of life of each person, the socio-economic circumstances, the rare of infrequent medical care or the use of substances, among other factors, together with "the depression and the fear of dying, and particularly dying in prison, that affect the mental well-being" of older prisoners," not omitting the violence of which they could become victims, the anxiety of prison life and the isolation that may result from the loss of relationships and contact with family members and close friends. *Cf.* WHO, Regional Office for Europe, *Prisons and Health, supra,* pp. 156 and 166. See, Human Rights Watch, *Old behind bars: The aging prison population in the United States, supra*, p. 17.

711 *Cf*. IACPHROP, Article 12 and 19 and UN Principles on older persons, *supra*, Principle 11. See, also, San José Charter on the rights of older persons in Latin America and the Caribbean adopted at the Third Inter-Governments Conference on ageing in Latin America and the Caribbean of 2012.

712 *Cf*. Mandela Rules, *supra*, Rule 30 and Bangkok Rules, *supra*, Rules 15.

713 *Cf*. IACPHROP, Article 6. See, Mandela Rules, *supra*, Rule 25(1).

714 *Cf*. Mandela Rules, *supra*, Rules 16 and UNODC, Handbook on Prisoners with special needs, *supra*, p. 31.

and healthy ageing,"[715] which is understood as "[t]he process of optimizing the opportunities for physical, mental and social well-being," of participation and of relying on protection, safety and care, with the goal of extending healthy life expectancy and quality of life."[716] Thus, the health services in meeting the needs of older persons, in addition to considering "the approaches that ameliorate the losses associated with older age," must also aim at strengthening their "recovery, adaptation and psychosocial growth" to enable them to face the health problems that often accompany ageing and, eventually, to provide well-being in the broadest sense possible.[717]

366. In general terms, prison authorities must design and implement comprehensive policies and approaches to promote an active and healthy ageing, providing appropriate environments for older prisoners, adapting the activities and services to their needs and designing individual programs in line with the condition of each person.[718] States have the responsibility to provide older persons deprived of liberty with programs that include physical activities, sports and outdoor exercise, adequate conditions for recreation and rest with a constant medical presence to meet particular needs.[719]

367. The availability of care and health services, in the case of older persons deprived of liberty, also implies taking into account the degree of satisfaction of the specific health needs.[720] Therefore, States must adequately provide and organize the supplies, equipment, services and personnel necessary for "evaluating, promoting, protecting and improving" the physical and mental health of prisoners,"[721] including dental health.[722] This includes a medical screening upon admission to prison (*supra* paras. 85 and 359 and *infra* para. 378), as well as continuous and subsequent periodic reviews in order to identify and treat any suffering or illness and, in turn, to prevent their appearance or exacerbation.[723]

368. Older persons deprived of liberty must be ensured access to medical care each time that it is considered necessary,[724] which requires that the prison authorities are aware of their health and that they make available, where applicable, the necessary medical care, even if not requested, which requires, in turn, respecting the right to informed consent (*infra* para. 375). This is more important in the case of older persons deprived of liberty since they may not be in a condition to expressly request the care due to their state of health, but which doesn't excuse the State from its obligations.[725].

369. In meeting the special needs of older persons, coordination with the health services should

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715 *Cf*. IACPHROP, Articles 2 and 19(b).

716 *Cf*. IACPHROP, Article 2.

717 *Cf*. WHO*, World report on ageing and health*, *supra*, pp. 5, 27, 28, 30 and 31.

718 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, pp. 131 and 158.

719 *Cf*. Mandela Rules, *supra*, Rules 23 and 42.

720 *Cf*. WHO*, World report on ageing and health*, *supra*, p. 16.

721 *Cf*. Mandela Rules, *supra*, Rule 25(1) and WHO, Regional Office for Europe, *Health in prisons*, *supra*, pp. 7 and 8. See, also, ECHR, *Case of Mouisel v. France*, No. 67263/01. Judgment of November 14, 2002, p. 39 and *Case of McGlinchey et al. v. United Kingdom*, No. 50390/99. Judgment of July 29, 2003, p. 57.

722 *Cf*. Mandela Rules, *supra*, Rule 25(2) and WHO, Regional Office for Europe, *Prisons and Health*, *supra*, p. 173.

723 *Cf*. Mandela Rules, *supra*, Rule 30 and Bangkok Rules, *supra*, Rule 6. See, ECHR, *Case of Iacov Stanciu v. Romania*, No. 35972/05. Judgment of July 24, 2012, paras. 180 to 186.

724 *Cf*. Mandela Rules, *supra*, Rule 31.

725 *Cf*. Committee on Human Rights, *Lantsova v. Russian Federation*, Communication No. 763/1997, CCPR/C/74/D/763/1997, of March 26, 2002, para. 9(2). The Committee affirmed that "it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection" and added that "the State Party by arresting and detaining individuals takes the responsibility to care for their life," and that "the State Party by organizing its detention facilities [has the responsibility] to know about the state of health of the detainees as far as may be reasonably expected."

include the design and implementation of programs of prevention of the specific conditions that accompany ageing.[726] Thus, medical care and health services for older persons deprived of liberty should be adapted to the parameters defined by geriatrics and gerontology.[727]

370. In the case of a disability, prison authorities must provide the appropriate care, including physiotherapy, occupational or language therapy and treatments for sensory impairments, as well as ensure access, where applicable, to protheses, wheelchairs, walkers, canes, hearing aids and glasses.[728]

371. The Court has held that the need to protect health, as part of a State's obligations, increases when a person has a serious or chronic illness or when the person's health progressively deteriorates, which is especially important when the person is deprived of liberty.[729] Thus, prison authorities must optimize their capacity to administer complex chronic medical treatments,[730] to the extent that the person's health and the conditions of the prison installation permit, and must maintain a close cooperation and coordination with external health services so as to ensure timely and adequate care for each person.[731]

372. The incorporation of a gender perspective makes it essential to identify and anticipate the specific needs of health care for older women[732] and, at the same time, consider the heterogeneity of those needs resulting from the specific conditions of each person.[733] In this regard, the services of health care must be "aimed expressly at women,"[734] which includes preventive care, Papanicolaou tests and examinations to detect breast, uterine and other types of cancer that affect women.[735] In addition, health programs and services must ensure appropriate care with respect to the changes associated with ageing that involve women, such as those related with eventual postmenopausal and post-reproductive physical and mental conditions and illnesses.[736]

373. Since mental health is the condition that most likely may lead to imprisonment of older

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726 *Cf*. IACPHROP, Article 19(a), (b) and (e); ESCR, General Comment 6, The economic, social and cultural right o folder persons, December 8, 1995, E/C.12/1995/16/Rev.1, paras. 34 and 35 WHO*, World report on ageing and health*, *supra*, pp. 32 and 187.

727 *Cf*. Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/30/43, *supra*, para. 76 and 77 and WHO, Regional Office for Europe, *Prisons and Health*, Denmark, 2014, p. 166.

728 *Cf*. CRDP, Articles 4(1)(g); 20(b); 25 and 26 and CIADDIS, Article III(2)(b).

729 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 188.

730 This includes, among other afflictions, cardiac and pulmonary problems, diabetes, hypertension, cancer and Alzheimer's and Parkinson's diseases. *Cf*. WHO, Regional Office for Europe, *Prisons and Health, supra,* p. 157. See, Report of the Independent Expert on the enjoyment of all human rights for older persons, Rosa Kornfeld-Matte, A/HRC/30/43, *supra*, para. 88.

731 *Cf*. Mandela Rules, *supra*, Rules 24 and 27 and WHO, Regional Office for Europe, *Prisons and Health*, Denmark, 2014, p. 166. See, *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 189.

732 *Cf*. Bangkok Rules, *supra*, Rule 1; Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/30/43, *supra*, para. 88 and Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, Human rights of older women: the intersection of ageing and gender, A/76/157, *supra*, para. 84(j).

733 *Cf*. IACPRHOP, Article 5. See, Mandela Rules, *supra*, Rule 25(1).

734 *Cf*. Bangkok Rules, *supra*, Rule 10. See, European Committee on the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CPT), Women deprived of liberty, Extract of the Tenth General Report, 2000, para. 30.

735 *Cf*. Bangkok Rules, *supra*, Rule 18 and WHO, Regional Office for Europe, *Prisons and Health, supra*, p. 161.

736 *Cf*. WHO, Regional Office for Europe, *Prisons and Health, supra*, p. 161 and WHO, Regional Office for Europe, *Women's health in prison: correcting gender inequity in prison health, supra*, p. 16. See, Committee on the Elimination of Discrimination against women, General Comment 27 on older women and the protection of their human rights, December 16, 2010, CEDAW/C/GC/27, para. 46 and General Assembly, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, on the human rights of women: the intersection between ageing and gender, A/76/157, *supra*, para. 36.

persons, health services and prison staff in general should be trained to identify symptoms of mental disturbances in order to care for them and to provide the corresponding specialized support.[737]

374. Thus, the health care services for older persons deprived of liberty must have a multidisciplinary team of sufficient properly trained medical and nursing personnel who act with full clinical independence with specialized knowledge in psychology, psychiatry and geriatrics[738] and, in the case of care for older women, in matters of feminine health, including gynecology.[739]

375. The Court recalls that informed consent is a fundamental feature of the right to health[740] and that older persons deprived of liberty have the right to "express their prior and informed consent, in a voluntary, free and explicit manner regarding any medical decision, treatment, procedure, or research," without which the corresponding authorities and health professionals cannot proceed.[741] Informed consent is based on respect for the autonomy of the patients and the freedom to make their own decisions according to their life plan,[742] recognizing the dignity, autonomy and independence of older persons,[743] which includes the possibility of expressly manifesting the anticipated intent and specific instructions of the older person with respect to any intervention in the area of health care, including palliative care.[744]

376. This right is only effective if the information provided to obtain the consent is appropriate, clear, timely and easily understood and commensurate with the older person's cultural identity, level of education and communication needs, which includes the right "to be given clear and timely information about the potential consequences and risks of such a decision."[745] In the case of persons with disabilities, medical personnel must examine the actual condition of the patient and provide the necessary support so that he or she may take their own appropriate and informed decision.[746] Under the Court's case law, "exceptions do exist where health care personnel may act without requiring consent in cases in which this cannot be given by the person concerned and an immediate urgent or emergency medical or surgical intervention is necessary, given a serious risk to the patient's health

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737 *Cf*. Bangkok Rules, *supra*, Rule 13. According to UNODC, the loss of family ties and the death of family members and friends have an influence on the mental well-being of older prisoners, with special effect on older women. *Cf*. UNODC, Handbook of Prisoners special needs*, supra*, p. 131.

738 *Cf*. IACPHROP, Article 19(1). See, Mandela Rules, *supra*, Rule 25(2); Committee on the Elimination of Discrimination against Women, General Comment 27 on older women and the protection of their human rights, December 16, 2010, CEDAW/C/GC/27, para. 45; Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/30/43, *supra*, para. 85 and Assembly General, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/33/44, July 8, 2016, para. 47.

739 See, European Committee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT), Women deprived of liberty, Extract of the Tenth General Report, 2000, para. 32.

740 *Cf*. *Case of Poblete Vilches et a. v. Chile*, *supra*, para. 160 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 110. The Court has held that the violation of the right to informed consent implies not only a violation of the right to health, but also to the right to personal liberty, the right to dignity and to private life and the right to information. *Cf*. *Case of I.V. v. Bolivia*, *supra*, paras. 163 and 165 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 110. See, also, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/64/272, August 10, 2009, paras. 8, 9 and 18.

741 *Cf*. Mandela Rules, *supra*, Rule 32(1)(b) and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/64/272, *supra*, paras. 51 to 53 and 80.

742 *Cf*. *Case of I.V. v. Bolivia*, *supra*, para. 159 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 118.

743 *Cf*. IACPHROP, Articles 3(c) and 7. See, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/64/272, *supra*, paras. 18 and 52.

744 This will could be expressed, modified or broadened at any time solely by this person, through legally binding instruments, in accordance with the domestic law. *Cf*. IACPHROP, Article 11. See, Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Anand Grover, A/64/272, *supra*, paras. 9 and 15.

745 See, IACPHROP, Article 11 and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/64/272, *supra*, paras. 15 to 17 and 23.

746 *Cf*. *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 121. See, CRDP, Article 25(d).

or life."[747]

377. Persons with a limited life expectancy who experience a serious deterioration in their intrinsic capacity[748] have the right to palliative care,[749] which is aimed at improving their quality of life until its end.[750] In this regard, prison authorities must provide persons with terminal illnesses treatments to control pain,[751] which requires respecting the right to informed consent and, therefore, to provide care as the patient had advised, where applicable. Similarly, it is necessary to furnish adequate professional psychological support[752] that "encompasses the patient, their environment, and their family."[753] Furthermore, access to spiritual or religious support that the person requests must be facilitated.[754] The Court considers that older persons who have a terminal illness and receive palliative care should not remain in prison unless the prison has those services or unless the sentence could be served under house arrest or in a specialized center that offers the care and appropriate treatment and includes spaces, equipment and qualified personnel.[755] In those cases, the authorities, within their competences, must determine the propriety of applying alternative punishments to deprivation of liberty in a prison.[756]

378. In accordance with the available sources of international law, the Court holds that a State's obligations to ensure the health and medical and psychological care of older persons deprived of liberty include:

a) ensuring access to water for drinking and personal hygiene of persons deprived of liberty, as well as providing them with quality food that has sufficient nutritional value, accommodating their special diets, according to their condition and to what has been medically prescribed;
b) providing the inmates with the necessary sanitary articles for their health and hygiene;
c) the medical care and health services, both physical and mental that are provided to older

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747 *Cf*. *Case of I.V. v. Bolivia*, *supra*, para. 177 and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 132. The Court has held that the urgency or emergency refers to the immanence of a risk and, therefore, to a situation in which the intervention is necessary since it cannot be postponed, except in those cases in which it is possible to wait to obtain the consent. See, IACPHROP, Article 11.

748 According to WHO, "intrinsic capacity" is "the composite of all the physical and mental capacities that a person can draw on." WHO, World report on ageing and health, *supra*, p. 30.

749 According to the definition found in the IACPHROPP, "palliative care" refers to the "[a]ctive, comprehensive, and interdisciplinary care and treatment of patients whose illness is not responding to curative treatment or who are suffering avoidable pain, in order to improve their quality of life until the last day of their lives. Central to palliative care is control of pain, of other symptoms, and of the social, psychological, and spiritual problems of the older person, It includes the patient, their environment, and their family. It affirms life and considers death a normal process, neither hastening nor delaying it." (Article 2) For their part, WHO and PAHO, "palliative care" means "the prevention and relief of suffering by means of the early identification, assessment and treatment of pain and other problems, physical, psychosocial and spiritual." It, thus, "aims to improve the quality of life of patients, adults or children, and their families when facing life-threatening illness. It means prevention and relief of suffering through early identification and correct assessment, treatment of pains and other problems as physical, psychosocial or spiritual." WHO, World report on ageing and health, 2015, p. 153 and Pan-American Health Organization (PAHO), "Palliative Care"

750 Such care encompasses "a primordial care to control pain, other symptoms and social, psychological and spiritual problems of older persons." *Cf*. IACPHROP, Articles 6, 12(e) and 19. See, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/30/43, *supra*, para. 131 and UNODC, Handbook on Prisoners with special needs, *supra*, pp. 152 and 157.

751 This includes ensuring the availability and accessibility of the medications recognized as essential, in this regard, by WHO OMS. *Cf*. IACPHROP, Article 19(m) and Report of the Special Rapporteur on torture and cruel, inhuman or degrading punishment or treatment, Juan E. Méndez, A/HRC/22/53, of February 1, 2013, paras. 54 and 86.

752 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 154.

753 *Cf*. CIPDHPM, Articles 2, 12(e) and 19(l) and WHO*, World report on ageing and health*, 2015, p. 153

754 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 154

755 *Cf*. *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 184

756 See, for example, Criminal Code of Argentina, Article 10; Law of Criminal Enforcement and Supervision. Law 2298 of Bolivia, Article 93 and Technical Handbook for providing health care services CAPRECOM-INPEC 2011, Article 105.

persons deprived of liberty must take into account their special needs and the different changes that accompany ageing;

d) where applicable, pertinent treatments must be ensured for alcohol abuse or the use of drugs and other substances;
e) responding to everything related to the mental health of older persons deprived of liberty, including problems of depression, isolation, anxiety and fear of dying;
f) developing strategies to prevent suicide and self-harm of older prisoners, providing psychological and psychiatric treatment;
g) ensuring the availability, accessibility, acceptability and quality of medical care and health services for older persons deprived of liberty so that, in addition to safeguarding their health and fulfilling their physical, mental and social well-being, the care must promote an active and healthy ageing;
h) performing an initial medical screening in order to detect any need for health care and design the necessary measures for treatment, as well as continual and subsequent periodic evaluations;
i) the medical services inside prisons must be organized and coordinated with the administration of general health care, providing appropriate and timely procedures for diagnosing and treating the sick, as well as for their transfer when the state of their health requires care in specialized installations;
j) in the case of some disability, measures for their habilitation and rehabilitation must be ensured, being the responsibility of prison authorities to provide the corresponding care, including physiotherapy, occupational or language therapy and treatments for sensory impairments, as well as to ensure access, where applicable, to prosthetic devices, wheelchairs, walkers, canes, crutches, hearing aids and glasses;
k) optimizing the capacities of prison systems to administer complex chronic medical treatments to the extent that the state of the health of the persons and the conditions of the prison allow, and maintaining close cooperation and coordination with the outside health services;
l) incorporating a gender perspective with respect to the systems of medical care and health services for older persons deprived of liberty to identify and anticipate the needs of the specific health care of older women and taking account of the specific conditions of each person;
m) the services of health care for older persons deprived of liberty must have a multidisciplinary team of properly trained medical and nursing personnel in sufficient numbers who act with complete clinical independence, with specialized knowledge in psychology, psychiatry and geriatrics and, in the case of older women, in matters of feminine health, including gynecology;
n) ensuring that older persons deprived of liberty can express their free and informed consent, in a prior, voluntary and express manner, in the area of health with respect to any treatment, procedure or research, including palliative care, and
o) the persons who have a terminal illness and receive palliative care should not remain in prison, unless the prison has those services or, if not, serve their sentences under house arrest or in a specialized center.

E. The right of older persons deprived of liberty to outside contact with their families

379. The Court has ruled on the protection of the family and, particularly, on the State's duty to ensure contact between persons deprived of liberty and their families. The Court has held that Articles 11(2)[757] and 17(1)[758] of the Convention directly and complementarily protect family life. In this

[757] Article 11(2) of the American Convention: "No one may be the object of arbitrary or abusive interference with his private life, is family, his family, his home, or his correspondence, or the unlawful attacks on his honor or reputation."

[758] Article 17(1) of the American Convention: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

regard, the Court has affirmed that the family merits special protection by the State, the purpose of which is to support the development and the strengthening of the nuclear family[759], as well as to act to protect persons from being victims of arbitrary or unlawful interferences to their families[760] and to foster effective respect for family life.[761]

380. The Court has also pointed out that "persons deprived of liberty have the right to as much contact as possible with their families, representatives, and the outside world."[762] The protection of family life and the obligation to foster and ensure contact between persons deprived of liberty and their families entails specific obligations on the part of the State, aimed at adopting "the most appropriate measures to facilitate and enable" such contact.[763] The Court reiterates that such obligations are based on the importance of the family as a "natural and fundamental group unit of society" (Article 17(1) of the Convention), which requires protection against arbitrary interference (Article 11(2)) and in the pertinent and positive impact that family support and the maintenance of family relations have on the reinsertion and social reintegration of persons deprived of liberty (Article 5(6)).[764]

381. To ensure this right, older persons deprived of liberty should be placed in prisons close to their homes in order to encourage visits, communication and contact with their families.[765] Therefore, in initially determining where a person deprived of liberty will be housed, as well as evaluating possible transfers to other installations,[766] the competent authorities must consider the effect that the housing in a certain place would have on the strengthening and continuity of the family relations.[767] Additionally, prison authorities must allow and support the periodic communication between older persons deprived of liberty and their families and their close friends by correspondence or by using electronic, digital or other available means of telecommunication.[768]

382. Moreover, prison authorities must ensure appropriate spaces so that family visits are conducted as normally and intimately as possible,[769] within limits for reasons of security, and that

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759 *Cf. Case of the Afro-descendant Communities displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2013. Series C No. 270, para. 325 and *Case López et al. v. Argentina, supra*, para. 98.

760 Cf. Advisory Opinion OC-17/02, supra, para. 71 and Case of López et al. v. Argentina, supra, para. 98.

761 *Cf. Case of the Dos Erres Massacre v. Guatemala*, *supra*, para. 189 and *Case of López et al. v. Argentina*, *supra*, para. 98

762 *Cf. Case of López et al. v. Argentina*, *supra*, para. 118. See, IACHR, Principles and Best Practices, *supra,* Principle XVIII.

763 *Cf. Case of Norín Catrimán et al. v. Chile, supra*, para 407 and *Case of López et al. v. Argentina*, *supra*, para. 101.

764 The Court has affirmed that "contact with family and the outside world is crucial for the social rehabilitation of persons deprived of liberty." *Case of López et al. v. Argentina*, *supra*, para. 118.

765 *Cf.* Mandela Rules, *supra*, Rules 59 and Bangkok Rules, *supra*, Rule 4. See, also, Council of Europe, Recommendation R(2006)2 of the Committee of Ministers to the Member States on the European prison rules, adopted January 11, 2006, Rules 17(1) and 17(2).

766 *Cf.* IACHR, Principles and Best Practices, *supra,* Principle IX.

767 *Cf. Case of López et al. v. Argentina*, *supra*, paras. 161 and 173. See, also, *Matter of María Lourdes Afiuni with regard to Venezuela. Provisional Measures*. Order of the President of the Inter-American Court of December 10, 2010, Considering Paragraph 12 and Order of the Inter-American Court of March 2, 2011, Considering Paragraph 6. Even when the transfer has not been requested by the inmate, it is necessary that the competent authorities, where applicable, ask his opinion. *Cf. Case of López et al. v. Argentina*, *supra*, para. 118.

768 *Cf.* Mandela Rules, *supra*, Rule 58(1).

769 The Council of Europe has stated that the "arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible." *Cf.* Council of Europe, Recommendation R(2006)2 of the Committee of Ministers to the Member States on the European prison rules, adopted on January 11, 2006, Rules 24(4) and 54(9).

physical contact should be permitted without imposing disproportionate limitations.[770] The authorities must also allow conjugal or companion visits of older persons, without discrimination, for which it is essential to have premises that "ensure fair and equal access with due regard to safety and dignity."[771] Similarly, it is advisable that, where applicable, prison authorities are flexible in applying the rules on visits and communications with families, especially in cases when the visits do not occur on a regular basis.[772]

383. Prison systems must also plan for authorizing the release of older persons deprived of liberty as a mechanism to favor contact with their families,[773] as long as security conditions permit and it is recommended under a program or individual plan (*infra* para. 395).

384. In the event that older persons deprived of liberty have lost contact with their family members, the prison social services should attempt to reestablish such contact, as long as the prisoner so desires. The competent authorities must also support the work of civil organizations with older persons deprived of liberty by incorporating into their programs visits to prisons and the implementation of projects with that population.[774]

385. The Court, therefore, holds that the specific obligations of States in the area of the right of older persons to maintain outside contact with their families include:

a) making efforts to place them in prisons close to their home and that, in deciding where a person will be admitted or transferred, the authorities consider the effect that his stay in a determined place could have on the strengthening and continuity of family relations;
b) allowing and supporting periodic communication of persons deprived of liberty with their families and close friends through correspondence or by using electronic, digital or other means of telecommunications;
c) fostering visits to older persons deprived of liberty by family members and close friends, which requires ensuring appropriate premises so that they are carried out as normally and intimately as possible;
d) the family visits may only be restricted by a limited time and in the strict measure required by security and order and not as a disciplinary sanction;
e) ensuring conjugal or companion visits of older persons without discrimination, for which it is essential to make spaces available that guarantee equitable and equal access and the proper attention is given to safety and dignity;
f) anticipating authorizing the release of older persons deprived of liberty as a mechanism to favor contact with their families as long as safety conditions allow it and it is recommended under an individual program or plan;
g) in the event that the older persons deprived of liberty have lost contact with their families and close friends, the social services of the prison system should attempt to reestablish such contact, as long as it is the desire of the inmate, and
h) facilitating the work of civil organizations with older persons deprived of liberty by incorporating into their programs visits to prisons and implementing projects with that

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770 In this regard, the Mandela Rules provide that "disciplinary sanctions or restrictive measures shall not include the prohibition of family contact," which may only be restricted for a limited time period and as strictly required for the maintenance of security and order." Mandela Rules, *supra*, Rule 43(3). See, also, *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of October 14, 2019. Series C No. 387, paras. 76, 91 and 92; Bangkok Rules, *supra*, Rule 23 and Council of Europe, Recommendation R(2006)2 of the Committee of Ministers to the Member States on the European prison rules, adopted on January 11, 2006, Rule 24(2).

771 *Cf*. Mandela Rules, *supra*, Rule 58(2) and Bangkok Rules, *supra*, Rule 27.

772 See, European Committee for the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (CPT), Imprisonment, Extract of the Second General Report, 1992, para. 52.

773 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra,* p. 139.

774 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra,* p. 139.

population.

F. The reinsertion and social reintegration of older persons deprived of liberty

386. The Court, in its case law, has pointed out that "rehabilitation and social readaptation" of persons deprived of liberty requires that prisons ensure access, without discrimination, to educational, work and recreational programs.[775] Thus, the Court stresses that, regardless of the terminology used, it is important to emphasize that the purpose of Article 5(6) of the Convention and the content of Article 13 of the IACPHROP[776] is to provide persons deprived of liberty with programs that, meeting their special needs, allows them to reintegrate into community life[777] without returning to unlawful conduct.[778]

387. For their part, prison authorities must design and implement programs aimed at supporting the social reintegration of older persons deprived of liberty, which should include strategies and plans of different areas, including instruction, education and culture;[779] professional orientation and training: social assistance, sanitation, psychological and spiritual aid; employment counselling, physical development and rest and recreation.[780] Such programs should be adapted to the needs and capacities of older persons and also require the incorporation of a gender perspective that meets the particular needs and circumstances of older women.[781]

388. Those programs should be directed to strengthening family relations, which is a fundamental element in achieving the reintegration of older persons deprived of liberty[782] (*supra* para. 384), as well as to stimulating the participation of social organizations in designing and implementing strategies and scheduled plans in order to achieve the inclusion and social reintegration of those persons.[783]

389. In any case, attention to the special needs of older persons deprived of liberty requires the sensibilization and appropriate training of personnel who work in prisons and who work in the different services, including vigilance, medical assistance and care, sanitation, psychology, legal or social assistance, in order that their activities are aimed at ensuring the effective enjoyment of older persons rights and aid in their reinsertion into life in society.[784]

390. Similarly, social reintegration requires designing and defining an individualized program or plan that determines the assistance and monitoring that the person requires in the different areas,

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775 *Cf*. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 146; *Case of Pacheco Teruel et al. v. Honduras*, *supra*, para. 67 and *Case of Mota Abarullo et al. v. Venezuela*, *supra*, para. 102.

776 Article 13 of the IACPHROP, in expressly referring to older persons deprived of liberty, states that they shall have access to "special and comprehensive programs, including rehabilitation mechanisms for their reintegration in society."

777 According to the UNODC, the concept "social reintegration programmes" is employed to make specific reference to interventions designed to assist the offenders who have been placed in an institution (such as a prison) "the primary objective of which is to provide offenders "the assistance and supervision that they may need to desist from crime,"; in other words, to "successfully reintegrate into the community." This assistance and supervision include strategies of rehabilitation, education and programs prior to release offered in prison, as well as interventions of conditional liberty and assistance after release. *Cf*. UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, *supra*, p. 6.

778 See, Mandela Rules, *supra*, Rules 87 and 88(1).

779 *Cf*. Basic Principles for the Treatment of Prisoners. General Assembly, Resolution 45/119, Annex, adopted December 14, 1990, Principle 6.

780 *Cf.* Mandela Rules, *supra*, Rules 4, 92, 104, 105 and 107 Bangkok Rules, *supra*, Rules 29 and 46.

781 *Cf*. Bangkok Rules, *supra*, Rules 29 and 40.

782 *Cf*. *Case of López et al. v. Argentina*, *supra*, para. 118.

783 *Cf*. Basic Principles for the Treatment of Prisoners. General Assembly, Resolution 45/119, Annex, adopted December 14, 1990, Principle 10 and Mandela Rules, *supra*, Rules 88 and 107.

784 *Cf*. IACPHROP, Article 31(b) and Mandela Rules, *supra*, Rules 75 and 76(2).

among others.[785] Such a program, designed with the participation of the inmate, should meet the particular needs and circumstances, capacities, aptitudes and perspectives for when the sentence is fully served;[786] thus, the importance of the initial screening of older persons upon their admittance to the prison in order to identify their specific needs, state of health, family contacts and community relations.

391. In line with the above, prison systems must also ensure that older persons have access to opportunities of paid employment according to their circumstances, capacities and aptitudes, as long as their physical and mental conditions allow.[787] Therefore, States have the obligation to establish programs and mechanisms to plan for prisoners' release at the completion of their sentences with a view that older persons can reintegrate into society, with special emphasis on those who have been in prison for a prolonged period or have developed a disability.

392. On the other hand, Rule 90 of the Mandela Rules establishes that "[t]he duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient aftercare directed towards the lessening of prejudice against him or her and towards his or her social rehabilitation." Therefore, the individual program designed to support social rehabilitation must also include a preparatory plan for release that proposes strategies for implementation prior to release and the actions of accompaniment to be provided upon release.[788]

393. This plan should take into account the complex situation that awaits older persons upon their reintegration into society after serving long sentences, as well as the absence of family and support links. Therefore, the State must accompany and assist such persons in reestablishing ties with the community and, where applicable, satisfying their medical, housing and social assistance needs.[789]

394. Thus, the State's obligation in the reinsertion and social reintegration of persons deprived of liberty, with special reference to older persons, requires accompanying them after their release. This entails that prison authorities, in coordination with social and charitable services, as well as organizations and institutions of civil society, including hospitals and geriatric centers, coordinate and ensure the different services, among which are: (a) facilitating official identity and other documents that a person requires for employment and social purposes;[790] (b) providing and facilitating, where applicable, housing, clothing and food, so that the person can subsist during the period immediately after release, as well as transportation so that he or she may arrive to his destination safely;[791] (c) facilitating the identification of employment options and of permanent decent housing in accordance with the capacities and the needs of the person,[792] and (d) continuing, without interruption or alteration, the medical, psychological or psychiatric care that the person received during imprisonment.[793]

395. The Court stresses that the purpose of social integration of older persons deprived of liberty

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785 *Cf*. UNODC, *Guide to the Introduction to the Prevention of Recidivism and the Social Reintegration of Offenders, supra*, p. 34.

786 *Cf*. IACPHROP, Article 13; Mandela Rules, *supra*, Rule 40.

787 *Cf*. Mandela Rules, *supra*, Rule 96.

788 *Cf*. Mandela Rules, *supra*, Rule 107. See, also, Council of Europe, Recommendation R(2006)2 of the Committee of Ministers to the Member States on the European Prison Rules, adopted January 11, 2006, Rule 107(1).

789 *Cf*. UNODC, Handbook on Prisoners with special needs, *supra*, p. 141.

790 *Cf*. Mandela Rules, *supra*, Rule 108(1).

791 *Cf*. Mandela Rules, *supra*, Rule 108(1). See, also, Council of Europe, Recommendation R(2006)2 of the Committee of Ministers to the Member States on the European Prison Rules, adopted January 11, 2006, Rules 33(7) and 33(8).

792 *Cf*. Mandela Rules, *supra*, Rule 108(1) and Bangkok Rules, *supra*, Rule 46.

793 *Cf*. Mandela Rules, *supra*, Rule 110 and Bangkok Rules, *supra*, Rule 47.

requires the active intervention of their families and of society as a whole. As to the latter, a collective response is essential to secure inclusion and to support reinsertion of older persons deprived of liberty into community life, which requires a change of attitude that avoids prejudice and discrimination, and that promotes a culture of respect and a reassessment of the role and contribution of older persons. Thus, the different sectors of society must contribute in the educational, employment, cultural and political areas to achieve the "full inclusion, integration and participation" of older persons, recognizing and respecting their dignity, independence and autonomy.[794]

396. On the basis of the foregoing, the Court holds that the States' obligations to ensure the reinsertion and social reintegration of older persons deprived of liberty include:

a) ensuring, as an essential principle, a treatment with dignity, without discrimination, during their time in prison;
b) designing and implementing programs directed to support the reintegration of older persons deprived of liberty, adapted to their needs and circumstances and that include a gender perspective that meets the particular needs and circumstances of older women;
c) programs to achieve, to the extent possible, the strengthening of family relations and stimulate the participation of social organizations;
d) designing and defining an individualized plan or program that determines the area of assistance and monitoring that older persons require for their social reintegration, which should be designed with their participation and should include their needs, capacities, aptitudes and perspectives for the completion of their sentences;
e) ensuring that older persons in prison have access to paid employment opportunities in accordance with their circumstances, capacities and aptitudes, as long as their physical and mental condition allows, and
f) individual programs that include a preparatory plan for the release of the older person that proposes strategies to be implemented prior to the release and the actions of accompaniment to be provided to the released prisoner and, in addition, prison authorities, in coordination with the corresponding social and charitable services, as well as organizations and institutions of civil society, should organize and ensure for the released older persons by: (i) facilitating official identity and other documents that a person requires for employment and social matters; (ii) providing and facilitating, if necessary, housing, clothing and food, so that the person can subsist during the period immediately after release, as well as transportation to arrive safely to his or her destination; (iii) facilitating the identification of employment opportunities and of decent permanent housing that is in accordance with their capacities, and (iv) continuing, without interruption or alteration, the medical, psychological or psychiatric treatments that they were receiving during their imprisonment.

X
OPINION

397. Therefore, in interpretation of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and of other human rights instruments,

THE COURT,

DECIDES

[794] *Cf.* IACPHROP, Articles 3, 7, 18, 20 and 27. See, Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, A/HRC/39/50, of July 10, 2018, paras. 76 and 77.

unanimously, that:

1. It is competent to issue this Advisory Opinion, in the terms of paragraphs 13 to 31 of this Advisory Opinion.

AND IS OF THE OPINION

unanimously, that:

2. States should apply a differentiated approach in attending to the special needs of the distinct groups deprived of liberty to ensure that the oversight of their sentences respects their human dignity, in the terms of paragraphs 32 to 120 of this Advisory Opinion.

3. States should adopt a differentiated approach in the treatment of women who are pregnant, giving birth, postpartum or breastfeeding, as well as primary caretakers, deprived of liberty, in the terms of paragraphs 121 to 168 of this Advisory Opinion.

4. States should adopt a diffentiated approach in the treatment of children living in prison with their mothers or primary caretakers, in the terms of paragraphs 169 to 223 of this Advisory Opinion.

5. States should adopt a differentiated approach in the treatment of LGBTI persons deprived of liberty, in the terms of paragraphs 224 to 276 of this Advisory Opinion.

6. States should adopt a differentiated approach in the treatment of persons belonging to indigenous peoples deprived of liberty, in the terms of paragraphs 277 to 336 of this Advisory Opinion.

7. States should adopt a differentiated approach in the treatment of older persons deprived of liberty, in the terms of paragraphs 337 to 396 of this Advisory Opinion.

Judges Elizabeth Odio Benito, Humberto A. Sierra Porto and Eduardo Ferrer Mac-Gregor informed the Court of their individual opinions.

DONE, at San José, Costa Rica, on May 30, 2022.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Registrar

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Registrar

PARTIALLY DISSENTING OPINION OF
JUDGE ELIZABETH ODIO BENITO

ADVISORY OPINION OC-29/22

OF MAY 30, 2022

REQUESTED BY THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

DIFFERENTIATED APPROACHES WITH RESPECT TO CERTAIN GROUPS OF PERSONS DEPRIVED OF LIBERTY

(Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights treaties)

I.- REFLECTIONS ON THE CONTEXT

Before expressing my position on Chapter VII of this Advisory Opinion OC-29/22 and since this will be my final opportunity to participate in an advisory opinion of the Court, I wish to offer some ideas on this important topic: discrimination, violence against women and human rights.

Perhaps it is only an unfortunate coincidence or perhaps it is the eternal historical return of many centuries of a perverse cycle that condemns women to suffer invisibility and endless violence.

That perverse coincidence has over time reunited social, psychological, juridical, phenomenon of philosophical aspirations that continue, about which there is not any doubt, to erase women (the feminine sex) as political subjects. What, as Amelia Valcarcel says, had cost feminism so much to achieve.

We women are effaced by submerging us and diluting us into social-juridical categories, such as child bearers and menstruating persons, and men as semen producers, persons with testicles and the like. A discourse that has turned very aggressive wherever one goes. They claim that those of us who do not share those new paradigms and who criticize them -without the rights of defense- that we are denying all the human rights of certain groups (LGTBQI) and, above all, the right of trans persons, which, of course, is not the case. Those rights have never been challenged.

Simultaneously, faced with this supposed “progress” of the international law of human rights to, as they say, protect human groups, -protected, in and of themselves- we live in a world of uncontained and increasing sexual, physical, psychological, social, political violence, against women for being women, that reach hallucinating levels in each country of this ever-increasingly precarious planet.

The daily press informs here of a 14-year-old girl stabbed 30 times by her boyfriend (Mexico), of 28 women killed daily there by their partners (Bolivia). We learn of brutal sexual rapes in the war of Russia in Ukraine. And how in Afghanistan women simply don’t exist, erased by the Islamic laws that govern that country. All these crimes are committed against women for being women.

Faced with this irrefutable reality, trans persons allege one more thing: that they are the victims of the most overwhelming violence.

In all mammals, sex exists and is divided in two: masculine and feminine. On that, the reproduction of the species depends. For more than 600 million years, it has existed and simply has been proved, it is not assigned. It is a biological fact there are always some variants that statistically are not very revealing.

Since the most remote times, women have suffered discrimination and violence of all sorts by men who, because of their physical strength, assign themselves absolute power. Against this violent, unjust, discriminatory patriarchy, we women have fought to obtain recognition of our existence, our equality and our rights.

If one closely examines the annals of history since the beginning of writing (as Irene Vallejo does exquisitely in “Papyrus: The Invention of Books in the Ancient World”), notable women appear in all the cultures. Many of them left their mark in politics, philosophy, science, literature. But their names and images were effaced. They were invisible women.

It was not until the 20th century that, after the creation of the international community and the new juridical order, did women begin to emerge as holders of rights in international law and in national legislation.

No right is graciously recognized nor granted. Each and every one of them that is contained in the human rights covenants of 1966 (civil and political; social, economic and cultural) we have had access to thanks to struggles, often cruel. And, finally, in 1993 the United Nations declared that the rights of women were also human rights.

In the decade of the 70s, feminism, a fundamental political and philosophical wave of the modern era, developed the distinction between sex and gender. Sex is biological and gender is a cultural concept that clarifies the stereotypes that are attributed to each sex.

The *queer* theory wishes to impose on us that sex and gender are the same, but they are not, nor will they ever be. As we indicated, sex is biological and gender a social instrument of analysis. According to Amelia Valcarcel, “we must avoid confusing desires with rights and fears with reasoning.” Sex is not a desire nor a self-perception.

Decades ago, the inimitable Simone de Beauvoir clairvoyantly stated that no victory of women lasts forever; that any social, political, economic change could put into doubt our

advances and it would be necessary to begin the struggle once more, from the beginning, as Sisyphus and his rock.

This is precisely what is occurring to us women with the *queer* theory: they wish to destroy us; they wish to efface us from history again. We no longer figure in any statistics, nor are we identified as women in the tragedies of violence that batter us.

As a result of this "progress," men who are trans who identify or perceive themselves as women are occupying our public spaces in many Western countries and displace us in sports, in jobs, in political positions, etc.

This delusional theory claims that, in order not to discriminate against trans persons and protect their legitimate human rights, all the feminine sex, in our entirety, we cease to be what we are, women, to integrate those controversial categories that I mentioned. This theoretically would also affect the masculine sex, but it would obviously affect men much less.

Trans persons -women and men- confront very serious problems in their search for respect and recognition as a human group. Their rights deserve to be protected and, in addition to all the international instruments (Universal Declaration of Human Rights, conventions, covenants, resolutions, etc.), their struggles should be protected in specific instruments. But they cannot pretend that the instruments that contain and protect the rights of women (CEDAW, Belém do Pará, etc.) apply to them under categories of doubtful epistemology.

The topic of this advisory opinion is the discrimination that certain vulnerable groups suffer in detention and, among those groups, transexual persons -men and women. They are referred to specifically in Chapter VII of the Opinion, on which my separate opinion is based.

I am opposed to the idea that nothing impedes transexual persons who self-identify as women from being received in detention centers for women and live with them in the same spaces. What impedes them are the frequent and painful cases of violations and pregnancies suffered by women in detention caused by these transexuals who enjoy absurd privileges.

Before analyzing the juridical texts that follow, I wish to be very emphatic regarding the rights of transexual persons: the criticisms that I have made regarding *queer* theory are not in any way against any right of transexual persons.

Recently, the Universidad Complutense of Madrid honored me by granting me a *Doctorate honoris causa*. In accepting it, I stated that:

> … in international fora, in academic halls, from my political offices, I have often stated that peace, liberty, democracy and, above all, justice are only possible in a world where equity and equality include all of us. In a world where the human rights are respected by the governments and by the people without exclusion nor discrimination.

These are, in summary, the ethical principles that govern my personal and professional life and that have guided all my decisions on the Inter-American Court.

I defend and will always defend all the human rights for everyone and I shall not accept any type of discrimination regarding their fundamental rights. However, in the same way and with the same energy and conviction, I shall fight so that women continue to be women. And our human rights that have cost us so much, be rights by and for women.

And, in the endless struggle against violence of any kind that destroys us, discriminates against us and that we have suffered since time immemorial for women being women, I shall raise my voice without doubts and without fear, wherever it is necessary.

II.- THE PRINCIPLES OF YOGYAKARTA AS AN ALLEGED SOURCE OF INTERNATIONAL LAW

I note with concern that Chapter VII of this advisory opinion on the differentiated approaches for LGBTI persons deprived of liberty not only refers to the Principles of Yogyakarta, but that it also utilizes it as a source of international law. My concern for its consequences is both of form and of substance.

As common doctrine, Article 38 of the Statute of the International Court of Justice (ICJ) enumerates a series of sources that range from international conventions to international custom and the general principles of law. Judicial decisions and "teachings of the most highly qualified publicists" are an auxiliary means of interpretation.

From a formal perspective, we observe that the Principles of Yogyakarta were drafted by a score of experts in the international law of human rights. They came from different countries, acted in their personal capacity and, therefore, the document that they drafted reflected their entirely personal views.

The document, therefore, does not fall within any of the clauses of Article 38 of the Statute of the ICJ and is, even less so, an obligatory document for the countries of the international community.

Nor can it be said that it is *soft law*, which is defined as those declarations or principles drafted by important academics or by specialized bodies and that acquire an important juridical value when they are adopted by international bodies, such as the UN General Assembly, or due to the recognition that they earn to the extent to which they are considered expressions of customary international law or authorized doctrine.[1] It is for this reason that UN bodies, (among them the General Assembly and the Human Rights Council) have rejected on various occasions to adopt the Principles of Yogyakarta as a global charter on LGBTI rights that fully represents the international collective of countries.

It is also appropriate to emphasize that the supposed universality of these principles collide with the fact that the very limited number and nationality of those experts who met in their personal capacity demonstrates that the group does not represent even their countries of origin. Even less so can it be said that they represent all or the majority of the member countries of the United Nations.

The legitimation of the discourse regarding the document of Yogyakarta creates new forms of oppression against girls and women and enters into direct conflict with CEDAW,

[1] Uprimny Y.R. «Las grandes teorías de la interpretación jurídica». in: Interpretación judicial. Bogotá, Escuela Judicial Rodrigo Lara Bonilla / Universidad Nacional de Colombia, 2006

the Convention of Belém do Pará, the agreements of the 1995 Conference of Beijing and the Convention of Istanbul, in that it erases with the stroke of a pen the cause of the structural inequality between men and women; in other words, the sex.

The direct application of the Principles of Yogyakarta as a source of law also creates problems of substance. As I indicated in my partially dissenting opinion in *Vicky Hernández et al. v. Honduras,*[2] and as I indicated *supra*, sex and gender are categories that were never interchangeable.[3] The Principles of Yogyakarta pursue erroneously, it is said to be in a desire to protect vulnerable groups, that "gender identity," a notion that can even change from one day to another, substitutes and erases the sex that one was born with.

There is no current source in international law that states that the free self-determination of gender is a human right. But what is very embedded in the international law of human rights is all of the decades of feminist struggle and theory[4] that have been achieved by women, which they now pretend not to acknowledge.

Elizabeth Odio Benito
Judge

Pablo Saavedra Alessandri
Registrar

[2] *Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs.* Judgment of March 26, 2021. Series C No. 422.

[3] Partially dissenting opinion of Judge Elizabeth Odio Benito. Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs. Judgment of March 26, 2021. Series C No. 422, para. 8.

[4] Partially dissenting opinion of Judge Elizabeth Odio Benito. *Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs.* Judgment of March 26, 2021. Series C No. 422, para 15.

CONCURRING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO

ADVISORY OPINION OC-29/22

OF MAY 30, 2022

REQUESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DIFFERENTIATED APPROACHES WITH RESPECT TO CERTAIN GROUPS OF PERSONS DEPRIVED OF LIBERTY

(Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other international human rights instruments)

1. With the customary respect for the decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), this opinion has the purpose of indicating some discrepancies with the Court's analysis regarding economic, social, cultural and environmental rights (hereinafter "ESCER"), particularly with respect to the scope and content of the obligations of States regarding women who are pregnant, giving birth, postpartum or breastfeeding, persons belonging to indigenous peoples, LGBTI and older persons deprived of liberty, as well as children living in prison with their mothers or main caretakers, on the basis of Article 26 of the American Convention on Human Rights (hereinafter "the Convention"). To do so, I will refer to: (i) the standards on the minimum conditions of imprisonment derived from Article 5 of the Convention and (ii) the problems implied by the lack of a distinction between the obligations of immediate enforcement and those of progressive development.

2. This opinion complements the position already expressed in my partially dissenting opinions in *Lagos del Campo v. Peru,*[1] *Dismissed workers of Petroperú et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Muelle Flores v. Peru,*[4] *Hernández v. Argentina,*[5] *ANCEJUB-SUNAT v. Peru,*[6] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,*[7] *Employees of the Fireworks Factory of*

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[1] *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[2] *Cf. Case of the Dismissed Workers of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[3] *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[4] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[5] *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[6] *Cf.* Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 39. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs*. Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Santo Antônio de Jesus v. Brazil,[8] *Casa Nina v. Peru,*[9] *Guachalá Chimbo v. Ecuador,*[10] *FEMAPOR v. Peru;*[11] as well as my concurring opinions in *Gonzales Lluy et al. v. Ecuador,*[12] *Poblete Vilches et al. v. Chile,*[13] *Cuscul Pivaral et al. v. Guatemala,*[14] *Buzos Miskitos v. Honduras,*[15] *Vera Rojas et al. v. Chile,*[16] *Manuela et al. v. El Salvador,*[17] *Former Employees of the Judiciary v. Guatemala,*[18] *Palacio Urrutia v. Ecuador*[19] and *Pavez Pavez v. Chile.*[20]

A. Standards on the minimum conditions of imprisonment derived from Article 5 of the Convention.

3. In prior opinions, I have expressed the reasons why I consider that there are logical and juridical inconsistencies in the jurisprudential position assumed by the majority of the Court regarding the direct and autonomous justiciability of the ESCER through the use of Article 26 of the Convention. This position ignores the rules of interpretation of the Vienna Convention on the Law of Treaties,[21] changes the nature of the obligation of progressivity,[22] disregards the will of the States expressed in the

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[8] *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 15, 2020. Series C No. 407. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[9] *Cf. Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[10] *Cf. Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[11] *Cf. Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, Merits and Reparations*. Judgment of February 1, 2022. Series C No. 448. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[12] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[13] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[14] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[15] *Cf. Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras*. Judgment of August 31, 2021. Serie C No. 432. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[16] *Cf. Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2021. Series C No. 439. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[17] *Cf. Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 2, 2021. Series C No. 441. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[18] *Cf. Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations*. Judgment of November 17, 2021. Series C No. 445. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[19] *Cf. Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of November 24, 2021. Series C No. 446. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[20] *Cf. Case of Pavez Pavez v. Chile. Merits, Reparations and Costs*. Judgment of February 4, 2022. Series C No. 449. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[21] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[22] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

Protocol of San Salvador[23] and undermines the legitimacy of the Court;[24] to mention only some of the arguments.

4. I take this opportunity to demonstrate how the position that has predominated in the Court since 2017 regarding Article 26, which was the determinant in the development of this advisory opinion, weakens the solidity of the standards established since the Court's early jurisprudence with respect to minimum conditions for the deprivation of liberty.

5. Since the 90s, the Court has analyzed prison conditions on the basis of Article 5 of the Convention.[25] Beginning with a literal, systematic and definitive interpretation of the right to personal integrity contained in that article, the Court has determined that States have the obligation to ensure the rights of persons deprived of liberty and provide them with conditions of alimentation, health and a minimum infrastructure for a dignified existence.[26] In this regard, the Court has indicated that from Articles 5 and 1(1) of the Convention arises the obligation to provide natural ventilation and light, a bed, minimum conditions of hygiene, basic alimentation and access to potable water, regular medical attention and adequate care.[27] It also indicated that such conditions are necessary to ensure the rights to life and to personal integrity and that they are an inescapable obligation due to the prisoners' condition of submission as regards the State.[28] Thus, when a State does not satisfy these conditions, such as overcrowding and unjustified isolation and incommunicado, they become violations of the right to personal integrity and are, therefore, the basis of the international responsibility of the State.[29]

6. The non-existence of a jurisprudential position on the autonomous and direct justiciability of the ESCER was not an obstacle for the Court, since the beginning of the century, to rule on the situation of persons who are held in prison systems of the region. As was consolidated in *Pacheco Teruel et al. v. Honduras*,

> The Court has incorporated in its jurisprudence the principal standards on prison conditions and on the duty of prevention that the State must ensure to persons deprived of liberty. In particular, the Court has established that:

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[23] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[24] *Cf. Case of the Dismissed Workers of Petroperú et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[25] Article 5. Right to Humane Treatment. 1. Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

[26] *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, para. 170.

[27] *Cf. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, paras. 150 to 157. In the same sense: *Case of Fleury et al. v. Haiti. Merits and Reparations*. Judgment of November 23, 2011. Series C No. 236, paras. 85 to 86.

[28] *Cf. Matter of the Penitentiaries of Mendoza with regard to Argentina. Provisional Measures*. Resolution of the Inter-American Court of Human Rights of November 22, 2004, Considering paragraph 10.

[29] *Cf. Case of the Miguel Castro Castro Jail v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006, para. 315.

a. overcrowding constitutes, per se, a violation to personal integrity; it also impedes the normal performance of the essential functions of prison systems;
b. separation by categories must occur between the unconvicted and the convicted and between minors and adults, with the objective that persons deprived of liberty receive treatment appropriate to their condition;
c. everyone deprived of liberty must have access to potable water for drinking and water for personal hygiene; the absence of a supply of potable water is a serious fault of the State of its duties as guarantor of the persons under its custody;
d. food that is provided in prisons must be of good quality and have a sufficient nutritional value;
e. medical care must be provided on a regular basis, supplying the appropriate care that is necessary by qualified medical personnel when necessary;
f. education, work and recreation are essential functions of prisons and should be provided to all persons deprived of liberty with the goal of promoting the rehabilitation and social readaptation of the inmates;
g. visits must be guaranteed in prisons. Reclusion under a restricted regime of visits may be contrary to personal integrity under certain circumstances;
h. cells must have sufficient light, natural or artificial, ventilation and adequate conditions of hygiene;
i. sanitary services must have conditions of hygiene and privacy;
j. States cannot allege economic difficulties to justify prison conditions that do not comply with the international minimum standards in the area and that do not respect the inherent dignity of the human being, and
k. disciplinary measures that constitute cruel, inhuman or degrading punishment or treatment, including corporal punishment, prolonged isolation, as well as any other measure that could place the physical or mental health of the inmate in danger are strictly prohibited.[30]

7. However, the Court here chooses a different rationale. Although it mentions Article 5 of the Convention, it also uses Article 26 to establish some obligations on a State Party, especially in the area of alimentation and health; for example, when it refers to the right to alimentation of indigenous persons[31] or to the right to health of older persons.[32]

8. This is not a rhetorical difference and it may have negative effects on the efficacy of the obligations, many of which are drawn from the interpretation of the right to personal integrity. It is natural that the juridical inconsistencies of the idea of the justiciability of the ESCER, to which I made mention, are translated into the standards on the minimum conditions of detention and that, in this way, the degree of efficacy that the States have is reduced. Although a majority within the Court that has opted for the justiciability of Article 26, the Court should take into account that, internally, there still exists a discussion on the binding nature of the obligations that arise from this article.

9. Therefore, I believe that this advisory opinion would have reached a higher degree of efficacy if it had maintained the jurisprudential construction associated with Article 5 of the Convention, about which there is no doubt as to its content, mandatory and justiciability for the States Parties. This would not place in doubt its immediate enforcement and it would, more effectively and legitimately, receive the

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30 *Cf. Case of Pacheco Teruel et al. v. Honduras.* Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 67.

31 *Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty* (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022, para. 314 and ss.

32 *Cf.* Advisory Opinion OC-29/22, *supra*, para. 362 and ss.

priority and special attention required by pregnant persons, older persons, indigenous persons and LGBTI persons deprived of liberty as well as children living in prison with their parents. This was, perhaps, the intention of the Inter-American Commission on Human Rights in posing the question to the Court without including Article 26 as a parameter of analysis. Nonetheless, the majority of the Court, with the purpose of reiterating its jurisprudence, decided to include it in justifying its decision, thus affecting the strictness of the standards of the minimum conditions of deprivation of liberty.[33]

B. The lack of a distinction between the obligations of immediate enforcement and progressive development

10. As I have stated in previous opinions, the Court recurs to the economic, social, educational, scientific and cultural norms contained in the Charter of the Organization of American States (hereinafter "the OAS Charter"), to the inter-American *corpus* iuris and to an evolving interpretation to justify the creation *ex post* of the rights to health and alimentation and broadens its competence to admit the direct justiciability of those rights. The Court here does not even make that argument but rather limits itself to reiterate the jurisprudential decisions in which it mentions the ESCER.[34] Therefore, my purpose in this opinion is not to emphasize the shortcomings of the Court's reasoning but rather to place in evidence its negative effects.

11. The juridical and reasonable interpretation of Article 26 is that from that article is derived an obligation according to which "the available resources" of the States are always directed to broaden the spectrum of protection of rights already recognized by the Convention, without reducing, except under extraordinary circumstances of social interest, its guarantees after reaching a certain level of protection or curtailing completely a particular right after its long acceptance.[35] In this regard, the treaty that gives competence to the Court expressly recognizes that the guarantee of the rights that emanate from the economic, social, educational, scientific and cultural norms of the OAS Charter depends on the available resources of each State and, as a consequence, compliance of the standards that the Court defines is not immediately enforceable.

12. On the other hand, the theory of the direct justiciability of the ESCER chooses to ignore the existence of obligations of progressive development. Thus, in this advisory opinion, although in referring to the rights to health and alimentation, the Court makes various of the standards highly detailed and enforceable goals or aspirations (in the code of progressive development) and apparently gives them the nature of obligations of immediate enforcement, but it doesn't provide parameters for their implementation. For example, by establishing the scope of the right to health of LGBTI persons deprived of liberty, the Court made obligatory the medical treatments associated with the transition of gender, including the adequation of their genitals.[36] Similarly, when it refers to the guarantee of the right to health of older persons, it found the obligation of specialized medical examinations to women, such as the Papanicolaou and examinations for breast, uterine and other types of cancer.[37] While these are contained in the right to health, I believe that they should be guaranteed progressively, taking into account the contexts and available resources of each State. On the other hand, I also believe that there are certain components of

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33 *Cf.* Advisory Opinion OC-29/22, *supra*, para. 42.

34 *Cf.* Advisory Opinion OC-29/22, *supra*, paras. 87, 91 and 314.

35 *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 7.

36 *Cf.* Advisory Opinion OC-29/22, *supra*, para. 268.

37 *Cf.* Advisory Opinion OC-29/22, *supra*, para. 372.

the right to health, such as access to good medical service and treatment of illnesses, to which this advisory opinion also refers, that for their relationship with the right to physical integrity or to life are of immediate enforcement.

13. This creates a profound practical difficulty. The Court establishes a broad, detailed and enforceable catalogue of obligations that, although they are components of rights that must be ensured, due to their economic situation it is impossible for States of the region to comply with them immediately. However, in spite of the fact that reality imposes the establishment of guidelines by which the domestic public authorities can identify the obligatory components that, due to their relation to substantive rights, must be attended to immediately and those that may be materialized progressively, the Court gives the same treatment to all the obligatory standards or contents that it derives from the text of the Convention. I believe that a more rigorous decision would have defined, on the basis of Article 5, the minimum conditions of detention (obligations of immediate enforcement) and those derived from Article 26, which may be complied with by the States, depending on the availability of its resources (obligations of progressive development).

14. Lastly, I point out that the lack of a distinction between immediately enforceable obligations and progressive development creates an excessive intervention in national criminal policy. Assuming that the standards set out in the advisory opinion are immediately enforceable, the Court indicates more than once that States must opt for alternative punishments when they cannot ensure their obligations with respect to the rights of persons deprived of liberty who belong to certain vulnerable groups. Moreover, although it only does so in responding to questions on older persons, the Court even determines the offenses for imposing this type of sanction and the conditions for its applicability.[38] This is not the Court's business inasmuch as it deals with convicted persons and are, therefore, decisions associated with managing criminality and the reaction to crimes and their prevention, which depend on the conditions of each State and its resources.

15. In conclusion, I agree with the general sense of the opinion to the extent that it determines the specific obligatory content that is derived for States with regard to the rights of pregnant persons, older persons, indigenous persons, LGBTI persons deprived of liberty, as well as children living in prison with their parents. However, I believe that the Court errs in using Article 26 as a determinant of the opinion, not only because it results in a lessening of the juridical efficacy of the standards on the minimum conditions of detention derived previously from Article 5, but also because it broadens its scope and content to a level that will be difficult for the State to comply with immediately.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar

[38] *Cf.* Advisory Opinion OC-29/22, *supra*, paras. 134, 195 and 349.

SEPARATE OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT

ADVISORY OPINION OC-29/22

OF MAY 30, 2022

REQUESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DIFFERENCIATED APPROACHES WITH RESPECT TO CERTAIN GROUPS OF PERSONS DEPRIVED OF LIBERTY

(Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other instruments concerning the protection of human rights)

I. INTRODUCTION: THE DIFFERENCIATED APPROACH AND PERSONS DEPRIVED OF LIBERTY AS A POPULATION VULNERNABLE TO STRUCTURAL PROBLEMS

1. Advisory Opinion OC-29/22 (hereinafter "OC-29") broadly covers the *differentiated approaches* that States must apply to meet the special needs of distinct groups deprived of liberty to ensure that the oversight (hereinafter also "supervision") of their sentences respects human dignity. In particular, the request is directed to underlining the State's obligations regarding the treatment of the following specific groups in a situation of special risk: women who are pregnant, giving birth, postpartum or breastfeeding, or primary caretakers; LGBTI persons; indigenous persons; older persons and children living in prison with their mothers or primary caretakers.[1]

[1] *Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty. (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and the other instruments concerning the protection of human rights).* Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29.

2. Although the consultation is limited to the aforementioned groups that were specifically indicated in the request of the Inter-American Commission on Human Rights, it should be noted that the Court also applies the "differentiated approach" to other groups -and in other contexts of deprivation of liberty[2]- that were not explicitly developed in OC-29. Thus, the initial section entitled "General Considerations," is especially important as it emphasizes the postulates relating to *human dignity* as a general principle of the treatment owed to persons deprived of liberty, as well as considerations on the right to *equality and non-discrimination, differentiated approach and intersectionality*.

3. Thus, for example, the differentiated approach also applies to *persons with a disability*. Although the Commission does not specifically refer to this group, the Court considered it especially pertinent to include particular aspects of persons with a disability in the section on older persons since the process of ageing may lead to situations of disability.[3] Therefore, depending on the situation and needs of each older person deprived of liberty, the rights of persons with a disability could also be claimed.[4]

3. It is also important to point out the broad interest that was generated by the request for this advisory opinion as it received *written observations* from 10 American States, two OAS organs, five international bodies, 12 international associations and State bodies and 70 non-governmental organizations, national associations, academic institutions and individuals from civil society. [5] The majority of them also participated in the public hearing to orally present their comments. The Court also received input on regional jurisprudence from 11 high and national courts[6] (including one from a country that has neither ratified nor adhered to the American Convention).[7] The Court "examined, considered and analyzed" them and "expressed its appreciation for these valuable contributions that provided the Court with insight on the different issues raised by this request,"[8] as reflected throughout the opinion.[9]

5. While I concur with the interpretations found in OC-29, I present this separate opinion to emphasize and analyze in more detail two general aspects that I believe important for the inter-American public order: (a) the development of the differentiated approach, which the request centers on persons deprived of liberty (paras. 6-24) and (b) the situation of structural vulnerabilities that prisoners suffer, as well as some pertinent experiences (paras. 25-42). Finally, I present my thoughts on some of the questions regarding the advisory opinion (paras. 43-51).

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[2] The Court centers "its interpretation on those groups specified by the Commission and that are subjected to deprivation of liberty in prison." *Cf.* para. 26 of OC-29/22.

[3] *Cf.* para. 337 and ss. of OC-29/22.

[4] *Cf.* para. 354 of OC-29/22.

[5] The request for an advisory opinion presented by the Commission, as well as the written observations are available on the webpage of the Court at:

https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2224

[6] Information on national jurisprudence on the subject of the request was received from the following high courts: Superior Tribunal of Justice of Brazil; Supreme Court of Canada; Supreme Court of Justice of Chile; Supreme Court of Colombia; Supreme Court of Justice of Costa Rica; Supreme Court of Justice of the Dominican Republic; National Court of Justice of Ecuador; Supreme Court of the Nation of Mexico; Supreme Court of Justice of Panama, and Supreme Court of Justice of Uruguay.

[7] Supreme Court of Canada.

[8] See, OC-29/22, paras. 6 to 11.

[9] See, especially, paras. 100, 121, 122, 203, 249, 252, 299 and 353 of OC-29.

II. THE DIFFERENTIATED APPROACH: A TOOL TO ADDRESS VULNARABILITIES

6. The transversal theme of OC-29 is the utilization of the "differentiated approach"[10] for each group at risk, as can be seen throughout OC-29.[11] The Court considers that "the application of a *differentiated approach* to prison policies would enable identifying how the characteristics of the group and the prison environment would affect the guarantee of the rights of certain groups of persons deprived of liberty that are minorities and marginalized in prison and would determine the specific risks of the infringement of rights, according to their particular characteristics and needs, in order to define and implement a set of specific measures directed to overcome the discrimination (structural and intersectional) that affects them."[12]

7. Although the Court had already developed a differentiated approach in its case law, this is the first occasion that it expressly rules on one of the tools that would visibilize, within the "groups," the existing sub-groups and since their characteristics are the result of their needs -understood as the satisfaction of rights- they are the object of specific emphasis in the design of the mechanisms of guarantee or implementation, as well as in establishing special public policies.

8. I, therefore, believe it necessary to emphasize some decisions where the Court has utilized the concept of a "differentiated approach" and also to refer to some laws that contemplate that approach. As will be seen, such an approach had essentially centered on reparations and not necessarily on a preventive mechanism/tool. Finally, the importance of this tool will be developed from the perspective of vulnerability.

a) *The differentiated approach in the case law of the Court*

9. Notwithstanding its general jurisprudence regarding persons deprived of liberty,[13] there are specific precedents where the Court mentioned or expressly manifested the need to adopt a differentiated approach, especially regarding reparations where it incorporated this perspective depending on the different vulnerabilities that exist or coexist in the person to whom it is directed.

10. In *Tiu Tojin v. Guatemala* (2008), concerning the forced disappearance of a women and her daughter, both members of an indigenous community, in resolving the question of the reparation of the obligation to investigate and punish those responsible for the violation of human rights, the Court ruled on the Commission's request that it analyze the "[n]eed to avoid *differentiated obstacles in detriment of the victims"* […] " […] as members of the Maya

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[10] See Section IV of OC-29/22 regarding "General considerations on the need to adopt differentiated measures or approaches with respect to certain groups of persons deprived of liberty" (paras. 32 to 120), especially "*The right to equality and non-discrimination, differentiated approach and intersectionality"* and specifically paras. 51, 57, 62, 68, 71, 107, 116, 124, 127, 129, 137, 139 and 153.

[11] See, OC-29, paras. 46, 64, 67, 117, 118, 141, 200, 209, 337, 341, 353, 354, 355, 356, 357, 369, 375, 378-j and 390 as well as Points 2 to 7.

[12] *Ibidem*, para. 68.

[13] See *Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos No. 9: Personas privadas de la libertad,* San José, Corte IDH/Cooperación Alemana (GIZ), 2020.

Indigenous People."[14] The Court held that "to guarantee the victims' right to a fair trial -as members of the Maya indigenous community- [...] the State must ensure that they understand and are understood in the legal proceedings started, thus offering them interpreters or other effective means for said purpose. Similarly, the State shall guarantee, as far as possible, that the victims of the present case do not have to make excessive or exaggerated efforts to access the centers for the administration of justice in charge of the investigation of the present case."[15]

11. Also, in *Río Negro Massacres v. Guatemala* (2012), the Court ordered that "the State must remove all obstacles, *de facto* and *de jure*, that maintain impunity in this case, and initiate, continue, facilitate, or re-open the necessary investigations to determine and, as appropriate, punish all those responsible for the human rights violations perpetrated during and after the five massacres that are the purpose of this case" and, therefore, [i]t must investigate the facts of this case *ex officio* and effectively, [...] taking into account also the differentiated impact of the alleged violation on the children and women of the community of Río Negro."[16]

12. Finally, in *Bedoya Lima et al. v. Colombia* (2021), the Court underscored that, "when adopting measures to protect journalists, States must apply a *strongly differentiated approach* that takes into account gender considerations; conduct a risk analysis; and implement protective measures that consider the aforementioned risk faced by women journalists as a result of gender-based violence."[17]

b) *The differentiated approach in domestic laws*

13. We find, in domestic law, the application of the differentiated approach in the context of care for the victims of human rights violations. For example, Mexico,[18] Colombia,[19] Argentina[20] and Bolivia[21] contemplate that approach in their laws. The laws of the first three countries contain some sort of a definition of differentiated approach.

14. In the case of Mexico, according to the General Law on Victims "the existence of population groups with particular characteristics or with greater vulnerability due to their age, gender, sexual preference or orientation, ethnicity, condition of disability and others is recognized;" [...] "recognizing also that certain damages [...] require a specialized treatment [that responds] to the attention of such particularities and degree of vulnerability" of the victims. "The various authorities in the application of this Act shall offer, within the scope of their respective competences, special guarantees and protection measures to groups exposed to a greater risk of violation of their rights, such as children, young people, women, older adults, persons with disabilities, migrants, members of indigenous peoples, human rights

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[14] *Cf. Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, paras. 92 and ss.

[15] *Ibidem*, para. 100.

[16] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 4, 2012. Series C No. 250, para. 257(b).

[17] *Cf. Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs*. Judgment of August 26, 2021. Series C No. 431, para. 91.

[18] *Cf. General Law on Víctims of January 9, 2013*.

[19] *Cf. Law 1448 of 2011* on measures of care, assistance and integral reparations to the victims of the internal armed conflict and on other provisions.

[20] *Cf. Law 2737 on the rights and guarantees of victims of crimes*.

[21] *Cf. Law 464 on the Plurinational Service of Assistance to Victims, December 23, 2013.*

defenders and persons in a situation of internal displacement. The best interests of child shall at all times be recognized."[22]

15. In the case of Colombia, Law 1448 establishes that "[t]he *principle of differentiated approach* recognizes that there are populations with particular characteristics due to age, gender, sexual orientation and a situation of a disability. Therefore, the measures of humanitarian aid, care, assistance and integral reparation established in this law will have this approach. The State shall offer special guarantees and protective measures to the groups exposed to a greater risk of violations […] such as women, adolescents, children, older persons, persons with a disability, peasants, social leaders, members of trade unions, human rights defenders and victims of forced displacement." In particular, "in the adoption and implementation by the National Government of policies of assistance and reparation in developing this law, they should adopt differentiated standards that respond to the particularities and degree of vulnerability of each of the groups. The State shall also make efforts so that the measures of care, assistance and reparation contained in this law contribute to the elimination of the schemes of discrimination and marginalization that could be the cause of victimizing acts."[23]

16. Finally, in the case of Argentina, Law 27.372 indicates that "[t]he actions of the authorities shall respond to the following principles: Differential approach: the measures of help, care, assistance and protection of the victim shall be adopted depending on the degree of vulnerability due to age, gender, sexual preference or orientation, ethnicity, condition of disability and the like […]."[24]

c) The differentiated approach from the perspective of vulnerability.

17. It should not be forgotten that the Court, in general, had some sort of a notion of "differentiated approach" due to vulnerability when, in 2006, it held that there were different groups that were vulnerable. In *The Pueblo Bello Massacre v. Colombia,* the Court held that, under the Convention (specifically, Articles 1(1) and 2), "[t]here are *special obligations that derive from [the general] obligations, which are determined in function of the particular needs for protection of the subject of law*, either owing to his personal situation or to specific situations in which he finds himself."[25]

18. The Court, at that time, offered a definition of the differentiated approach, but had not conceptualized such a tool of visibility of the specific needs in guaranteeing the rights of a determined vulnerable group. As a tool of the visibilization of specific needs, the differentiated approach has few roots in national or international law, as developed in sub-sections (a) and (b).

19. If we review the main human rights instruments, only the Inter-American Convention on Protecting the Human Rights of Older Persons expressly contemplates, as part of the general principles, "[d]ifferentiated treatment for the effective enjoyment of rights of older persons."[26] However, that instrument does not explain what should be understood by such treatment.

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22 *Cf. General Law on Victims, supra*, Art. 4

23 *Cf. Law 1448 of 2011, supra,* Art. 13.

24 *Cf. Law 2737 on the rights and guarantees of victims of crime, supra*, Art. 4.

25 *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 111.

26 Inter-American Convention on Protecting the Human Rights of Older Persons, Art. 3(l).

20. According to the doctrine, the differentiated approach is based on the principle of equity since it seeks to achieve true and effective equality that recognizes diversity and the possible disadvantage that a group, or a sub-group within a group, suffers in the guarantee of their rights. Thus, the Directive of the differentiated approach for the effective enjoyment of the rights of persons in a situation of internal displacement with a disability in Colombia establishes that this approach: "is an ethical principle of intervention that *must be reflected in the political and programmatic mechanisms* constructed in plans of action, [and] *must respond* to the needs of the persons in situations of displacement with a disability."[27] (emphasis added).

21. On the other hand, it is important to point out that the differentiated approach "seeks to visibilize specific vulnerabilities and infringements of specific groups and individuals [within the group] and to prioritize actions to protect and restore the infringed rights. It is, thus, necessary to identify the gaps and risks of protection of each group and to develop tools to resolve them, to promote equitable participation and to plan and implement affirmative measures based on systematic characterizations to guarantee the effective enjoyment of the rights of different groups."[28] With the differentiated approach, it is necessary to center on "the characteristics of the target population or the groups involved in the care, in terms of gender, age and ethnicity, as well as their sociocultural patterns"[29] or any consideration of heightened vulnerability.

22. Thus, "the differentiated approach in contemporary public policies is an ethical imperative in that historically excluded groups, whether due to their participation or their lifestyle, or because of their ethnicity, sex, gender identity, life cycle and disability, today claim the exercise of a citizenship of recognition and redistribution, a free choice to live a life according to their preferences and capacities; this has created processes of self-affirmation with the option to be distinct, to be different, without losing the capacity of enjoying and participating in other human choices. In other words, the right to exercise citizenship while being different in scenarios of a participative democracy, of equalitarian inclusion of citizens in the political scene and the taking of decisions in the intimate, private and public spheres."[30]

23. This approach should guide authorities to adapt each action to addressing the cultural particularities of the most vulnerable groups and populations in a society. The differentiated approach is the basis of human rights programs, since it obligates recognizing the communitarian and personal particularities of the persons.[31]

24. Under the Convention and as a tool of the visibilization of the vulnerabilities within the vulnerabilities (intersectional), the differentiated approach finds its basis, in the first place, on Article 1(1) since it attempts to avoid discrimination based on determined personal traits or situations and, in the second place, on Article 24 since, as it has been interpreted by the Court, this provision not only provides a mandate of formal equality, but also of material equality

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[27] *Cf. Directriz de enfoque diferencial para el goce efectivo de derechos de las personas en situación de desplazamiento forzado con discapacidad en Colombia*, Ministry of Social Protection and UNHCR, Colombia, 2011, p. 95.

[28] *Cf. Ibidem*, p. 27.

[29] *Cf. Ibidem*, p. 48.

[30] *Cf.* Baquero Torres, María Inés, *El enfoque diferencial en discapacidad: un imperativo ético en la revisión del Plan de Ordenamiento Territorial de Bogotá D.C.*, Bogotá, Publication of the Corporación Viva la Ciudadania, June 2009, p. 1, referring to Castells Manuel. (1997) La Era de la Información. El poder de la Identidad. Siglo XXI Editores. Mexico, p. 2

[31] *Cf. Directriz de enfoque diferencial para el goce efectivo de derechos de las personas en situación de desplazamiento forzado con discapacidad en Colombia*, *op. cit.*, p. 29.

and equality of opportunities in guaranteeing rights,[32] the ultimate purpose of the differentiated approach.

III. PERSONS DEPRIVED OF LIBERTY AS A POPULATION VULNERABLE TO STRUCTURAL PROBLEMS IN CONDITIONS OF DETENTION

25. Under the Brasilia Regulations regarding Access to Justice for Vulnerable People, "[*c]onfinement,* ordered by a competent public authority, can generate difficulties to exercise fully before the justice system the rest of rights pertaining to the person in confinement, especially if any of the other causes of vulnerability listed in the previous sections concur." Thus, "[t]o the effects of these Regulations, confinement is understood as that which has been ordered by a public authority, whether for reasons of crime investigation, a criminal sentence, mental illness or any other reason."[33] Therefore, *mutatis mutandis,* what the Regulations identify is that, including in the supposition of being deprived of liberty, persons must have their rights guaranteed when it must be taken into account that their situation is aggravated by the existence of other vulnerabilities.

26. As OC-29 indicates, the Court notes that "in the States Parties to the Convention, the generalized conditions of overpopulation and overcrowding greatly increase the vulnerability and the insufficient access to basic services. In the words of ILANUD (Latin American Institute for the Prevention of Crime and Treatment of the Offender) 'in the majority of countries [of the region] overpopulation is the norm, and of these countries, in almost all there are critical rates of overpopulation' with an 'exaggerated increase in overcrowding, with rates of over 120 per cent.' Thus, in the 18 States analyzed by ILANUD in its written observations, the average density in prisons reaches 184%."[34]

27. On the other hand, we are able to see, as a structural violation, the generalization of a same problem or a series of institutional problems -by act or omission of the public authorities- that can infringe one or more rights of a set of persons which, if not resolved, would lead to discrimination, inequality or impunity.[35] An issue, which is in line with the above, that generally conforms to the situation of persons deprived of liberty in the region. Since the structural conditions violate rights, structural measures must be adopted.

28. The issue that the Court addressed in its opinion was not a minor one. A population that is deprived of liberty because of their personal situation cannot, on their own, ensure rights that are the basis of human dignity; for example, water, food or health. Therefore, as the Court has indicated, the State acquires a role of "guarantor" of the rights of every person who is under its custody."[36] The prison population, as the Inter-American Commission stated

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[32] *Cf. Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective* (interpretation and scope of Articles 13, 15, 16, 24, 25 and 26 in relation to Articles 1(1) and 2 of the American Convention on Human Rights, of Articles 3, 6, 7 and 8 of the Protocol of San Salvador, of Articles 2, 3, 4, 5 and 6 of the Convention of Belem do Pará, of Articles 34, 44 and 45 of the OAS Charter, and Articles II, IV, XIV, XXI and XXII of the American Declaration of the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 157 and OC-29/22, para. 41.

[33] *Cf. Brasilia Regulations regarding Access to Justice for Vulnerable People*, XIV Ibero-American Judicial Summit Brasilia, March 4-6, 2008, Regulation 10 (22).

[34] OC-29/22, para. 100.

[35] See, in general, Abramovich, Victor, "De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos", in *Revista de la Pontificia Universidad Católica de Perú*, 2009, No 63.

[36] *Cf.* OC-29/22, para. 33.

in its request, presents different problems -even though they could be considered as structural- when their rights are materialized, since public policies often ignore that population.[37]

29. The Court has recognized that the prison population confronts structural problems that have as a consequence the detriment to or the lack of a guarantee of human rights recognized in the Convention. In this regard, the Court has stated that there are serious situations, such as overcrowding and overpopulation in prisons, and, therefore, it has considered it necessary to "implement structural measures to change this situation."[38].

30. The Commission, in its *Report on the human rights of persons deprived of liberty in the Americas*, is aware of the structural problems that affects the prison population. The Commission is emphatic in stating that the "[o]vercrowding of persons deprived of liberty could constitute in and of itself a form of cruel, inhuman or degrading treatment, violating the right to humane treatment and other internationally recognized human rights. This situation amounts to a serious structural deficiency, which totally defeats the essential purpose that the American Convention assigns to punishments of deprivation of liberty reform and social rehabilitation of convicts."[39]

31. Although there are a variety of court decisions and in comparative law on the prison conditions of persons deprived of liberty, there are few decisions that address the structural problems and that adopt parameters of guarantee or reparation from a structural perspective (structural remedies). In comparative law, there are two important experiences: the decisions of the Constitutional Court of Colombia (hereinafter "the CCC") and the pilot judgments of the European Court of Human Rights that have addressed the issue of prison conditions.

32. The CCC has delivered decisions of protection that are particularly pertinent in this area: T-153 and T-606 both in 1998 and, subsequently, T- 388 of 2013 and T- 762-2015. Specifically, in the first two decisions, the CCC identified that the issues that had been addressed by the plaintiffs were not isolated (and were a larger problem than the specific case and were considered to be a generalized problem). As an introduction to the development of the pertinent issues in these decisions, it should be noted that while the 1998 decisions analyze determined prisons -each decision refers to the circumstances of one specific prison- the decision of 2013 analyzes 17 prisons.

33. In the first place, T-153 indicated that "the problem of prisons and the conditions of life in them do not occupy a privileged place in the political agenda. In spite of knowing for decades that the prison structure is inadequate, that the rights of the inmates are violated, that the sentences do not meet their primary function of resocialization and that the prisons of the country are packed with unions that do not observe a diligent attitude of the political bodies of the State looking to resolve this situation." As part of the structural remedies, the CCC emphasized that "it ordered that […] a plan of construction and repair be designed to resolve the situation of overcrowding and that the current sentences conform to the minimum requirement for housing the inmates." The CCC, identifying that one of the main problems of the lack of guarantee of the rights of persons deprived of liberty was economic issues, considered that "from a constitutional point of view, it was necessary to provide the necessary budget to convert prisons into centers where fundamental rights were observed. The

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[37] *Cf.* OC-29/22, para. 2.

[38] *Cf. Matter of the Penitentiary Complex of Pedrinhas with regard to Brazil. Provisional Measures.* Resolution of the Inter-American Court of Human Rights of October 14, 2019, Considering Paragraphs 24 and 25.

[39] *Cf.* IACHR, Report on the human rights of persons deprived of liberty in the Americas, OAS/Ser.L/V/II.Doc.64. December 31, 2011, para. 460.

investment in prisons cannot be subject to transactions. Nor can it be objected to. The State has the constitutional obligation to offer inmates the conditions for a life with dignity."[40]

34. On the other hand, T-606 declared the serious and systematic violation of the right to health of the prisoners. Worthy of note is the order issued by the CCC, in which it specifically ordered that the "National Penitentiary and Prison Institute [INPEC], in coordination with the Ministries of Treasury, Health and Justice and Law and with the National Department of Planning, begin, no later than the following [48 hours] after notification of this decision, the administrative, budgetary and contracting proceedings that are necessary to constitute and to agree to a subsidized social security health system in full operation […] that covers all the places for the detained and convicted in the country." [41] [emphasis added]

35. In third place, the CCC, in T- 388/13, in its analysis of 17 centers of deprivation of liberty identifies the lack of attention to the structural needs of certain vulnerable groups, such as women, detained non-nationals, indigenous and Afro-descendant persons, LGBTI persons and children and adolescents, all of them as subjects of special protection.

36. In particular, the considerations of the CCC are especially pertinent by pointing out that "[t]he penitentiary and prison system of Colombia, once again, finds itself in a state of affairs that is contrary to the Constitution. The penitentiary and prison installations in the country are in a structural crisis. It is not the absence of progress nor the actions of the authorities, because they have made efforts to solve the unconstitutional state of affairs demonstrated in the constitutional jurisprudence in 1998. In fact, it is in great part thanks to the actions of public policy that the Constitutional Court understood that the state of affairs had been resolved at the end of the 20th century. However, the factual evidence, as well as the information that is public knowledge, once again demonstrates that the Colombian penitentiary and prison system is in a state of affairs grossly contrary to the existing constitutional order, which entails a failure to recognize human dignity, a basic principle of a social state of law. In other words, the penitentiary and prison system of today is incompatible with a social and democratic state of law."[42] Specifically, the CCC pointed out that there was a structural violation of the right to the dignity of the person (for a reclusion free of overcrowding, lack of adequate infrastructure, right not to be subjected to extreme temperatures, lack of access to public services, lack of adequate and sufficient food and lack of access to water), rights to health, to physical and mental integrity and to live in a healthy and hygienic environment, to education, to recreation and to re-establish the links with the family and close friends.[43]

37. Finally, in T-762-2015, the CCC verified that the structural situations identified in 1998 and 2013 still persist.[44] This new decision indicated that "*the level of overcrowding has*

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[40] Judgment T-153/98 of April 28, 1998. Magistrate Eduardo Cifuentes Muñoz.

[41] Judgment T-606/98 of October 27, 1998. Magistrate José Gregorio Hernández Galindo.

[42] *Cf.* Judgment T- 388/13 of June 28, 2013. Magistrate María Victoria Calle Correa.

[43] *Cf.* Judgment T- 388/13 of June 28, 2013. Magistrate María Victoria Calle Correa.

[44] In T-762/15, the CCC indicated that: "*This Court has issued Judgments T-153/98 and T-388/13, in which the Constitutional Court declared the existence of a State of Unconstitutional Affairs (ECI) "in the prisons" and in the "Penitentiary and Prison System," respectively. In those judgments, this Corporation found errors of a structural nature that require the harmonious collaboration of the State bodies to overcome them. These two judgments are important judicial reference points as they have analyzed and understood the penitentiary and prison problematic of the country, especially by the constitutional judge. Judgment T-153/98, after a historical analysis of the phenomenon of prison occupation in the country, identified as one of the focuses of action against overpopulation, among others, the necessary adaptation of the physical infrastructure of the penitentiary and prison system of the epoch. Almost 15 years later, T-388/13 recognized that the efforts in the creation of an infrastructure that would broaden the coverage were, for the most part, successful. For that reason and observing that in spite of the efforts the crisis still exists, in that decision greater emphasis was placed on the need to adapt the criminal policy of the country to the standards*

resulted, in the installations of reclusion, in a systematic violation of the rights of persons deprived of liberty since it impedes them from having appropriate places to sleep, eat, attend to their physiological needs, have conjugal and intimate visits, have recreational, training and resocialization activities, among others."[45]

38. The European Court of Human Rights (hereinafter "the ECHR") in pilot judgments[46] that have been delivered on the matter, has dealt basically with two rights (it has found structural violations in them): (i) the violation of Article 3 that prohibits inhuman and degrading treatments for the poor conditions of detention -overcrowding, limitations of showers, lack of fresh air activities, lack of privacy in using sanitary facilities, lack of medical care, etc.- and (ii) the violation of Article 13 that obligates the States to ensure an effective judicial remedy (here the violation arises because the domestic remedies do not permit questioning the conditions of detention).[47] However, the judgment in the case of *W.D. v. Belgium* is different since, in addition to these two issues, it incorporates, on one hand, the violation of Article 5(1) and 5(4) of the European Convention on Human Rights and, on the other, it has as its main object the lack of medical treatments for persons deprived of liberty who have mental illnesses.

39. In the case of *W.D. v. Belgium*, the ECHR used the figure of pilot sentences to deal with a problem of a structural nature that previously had not been dealt with in the area of persons deprived of liberty. The plaintiff alleged that his detention of more than nine years in a penitentiary in which his mental illness was not adequately treated -where there were also no special and differentiated places of deprivation of liberty for his mental illness— and where there were no realistic expectations of integration, was an inhuman and degrading treatment in violation of Article 3 of the European Convention and Article 5(1) and (4) (right to liberty and security/right to a speedy review of lawfulness).[48]

40. In particular, and as a result of the *W.D.* case, the State recognized that, within its jurisdiction, there was "a structural problem," but that it was not necessary to apply the pilot procedure. Notwithstanding the aforementioned argument, the ECHR considered that it was necessary to apply that procedure for two reasons: (a) since four prior judgments had demonstrated the same situation and (b) that there were 50 pending petitions on the same

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of the protection of human rights of the persons deprived of liberty, since from that perspective it is possible to achieve much more sustainable results." Cf. Judgment T- 762/15 of December 16, 2015. Magistrate Gloria Stella Ortiz Delgado.

[45] *Cf*. Judgment T- 762/15 of December 16, 2015. Magistrate Gloria Stella Ortiz Delgado.

[46] In this regard, "European case law has recognized systemic and structural problems by means of the so-called pilot judgments. Pilot judgments are rulings the European Court has adopted against the State concerned -owing to an accumulation of different cases with similar characteristics- obliging it to adopt domestic laws (general measures) that rectify the underlying *structural problem* that originated the violation of the European Convention. In this type of case, the ECHR notes the existence of a systemic problem, suspends proceedings in identical cases -the domino effect- and requires the State to take general measures. The plaintiff (in the pilot case) and all those affected by the structural problem will have their proceedings postponed until the State concerned has adopted those measures." *Cf.* My separate opinion in the *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 20, 2016. Series C No. 318, para. 60.

[47] See, for example, ECHR, Case of *Ananyev v. Russia*, Judgment of January 10, 2012; Case of *Torreggiani et al. v. Italy,* Judgment of January 8, 2013; Case of *Neshkov et al. v. Bulgaria,* Judgment of January 27, 2015; Case of *Rezmives et al. v. Romania*, Judgment of April 25, 2017; Case of *Varga et al. v. Hungary,* Judgment of March 10, de 10, 2015 and Case of *Sukachov v. Ukraine,* Judgment of January 30, 2020. For a more detailed analysis, see: Turturo Perez de los Cobos, Sara, *Los estándares europeos sobre prisiones. El impacto de las sentencias piloto,* Centre for Political and Constitutional Studies, Madrid, 2021.

[48] *Cf.* ECHR*, Case of W.D. v. Belgium.* Judgment of September 6, 2016, para. 95.

matter.[49] Thus, the European Court considered that the situation of the plaintiff could not be separated from the general problem that has its origin in a specific structural disfunction of the Belgian internment that has affected and will probably affect many persons in the future and it is a practice incompatible with the Convention.[50]

41. Thus, as the aforementioned decisions demonstrate, the prison population is immersed in cycles of structural violations that necessarily need structural remedies to reverse the situation. To address these structural problems, it will be necessary to take into account, in principle, the vulnerability that causes the deprivation of liberty and also the different strata that may be present and accentuate as much as possible the solidifying of a determined right in light of the intended beneficiary.

42. The standards developed in OC-29 are basically a structural response that the different subgroups have needed for years to ensure their rights within prisons and the States must adopt structural mechanisms to reverse this situation that causes the persons deprived of liberty to suffer.

IV. CONCLUSIONS

43. OC-29 has three fundamental aspects: (a) the incorporation of different economic, social, cultural and environmental rights derived from Article 26 of the American Convention; (b) that the human rights standards consider at all times the *differentiated approach*, in accordance with the specificities of the groups addressed, and (c) it constitutes an important input so that States take domestic action (preventive) so that in the future there are no violations against the general prison population and against the subgroups of that population in particular.

44. With respect to the first point, although the Commission presented the request of an advisory opinion concerning the rights contained in Articles 1(1), 4(1), 5, 19, 11(2), 13, 17(1) and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, the Court considered it appropriate to add Article 26 of the American Convention in order to give a comprehensive answer to the request.[51] The inclusion of this article allows the Court to directly visibilize the specificities that States must take into consideration at the moment of ensuring the rights to health, to water and to an adequate diet[52] or with respect to the right to cultural identity in the case of indigenous people.[53] These considerations respond to the advances in the inter-American jurisprudence in the area of economic, social, cultural and environmental rights, which traditionally were mainly subsumed into the rights to life, personal integrity,[54] or access to information (for example, oral cultural manifestations).[55]

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[49] *Cf. Ibidem.,* paras. 71 and 165. Similarly: Case of *L.B.,* Judgment of October 2, 2012, Case of *Claes,* Judgment of January 10, 2013, Case of *Swenenn,* Judgment of January 10, 2013 and Case of *Dufoort,* Judgment of January 10, 2013, all against Belgium.

[50] ECHR, *Case of W.D. v. Belgium.* Judgment of September 6, 2016, para. 164.

[51] *Cf.* OC-29/22, para. 76.

[52] *Cf. Ibídem*, paras. 77 to 99.

[53] *Cf. Ibídem*, paras. 295 to 301.

[54] *Cf. Case of Pacheco Teruel et al. v. Honduras. Merits, Reparations and Costs.* Judgment of April 27, 2012. Series C No. 241.

[55] *Cf. Case of López Álvarez v. Honduras. Merits, Reparations and Costs.* Judgment of February 1, 2006. Series C No. 141.

45. In the second place, as was expressed in the Section II, OC-29 exhaustively develops the special needs of guarantee of the different conventional rights, using the *differentiated approach* as a tool to address vulnerabilities with the view that the population deprived of liberty not only should not be considered as a homogenous group with the same needs, but, on the contrary, it should be considered that within that group (persons deprived of liberty) there are other realities that coexist and converge -intersectionality- that compel the adoption of specific needs to effectively materialize the conventional rights (differentiated approach) with respect to (i) women who are pregnant, giving birth, postpartum or breastfeeding, as well as primary caretakers; (ii) children living in prison with their mothers or primary caretakers; (iii) LGBTI persons; (iv) indigenous persons, and (v) older persons. Although the Court only addresses these groups -in view of the specific request of the Commission- it is also a starting point for other vulnerable groups, for example persons with a disability[56] or non-national persons deprived of liberty.[57]

46. Finally, as to the third point, the Court, from its very first advisory opinions, has incorporated important jurisprudential developments regarding the content of substantive rights. Thus, for example, restrictions to the death penalty under the terms of Article 4(2) and 4(4) of the Convention,[58] the content of freedom of expression in pluralistic and democratic societies[59] or the application of judicial guarantees in the context of states of emergency.[60] Similarly, it has also given its opinion on the standards that must be observed when it is an issue of determined groups in situations of disadvantage, as are undocumented migrants[61] or children and adolescents.[62]

47. It is important to underscore that the Court has stated that its advisory function fulfills a "preventive function." The Court has indicated that "all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS […] and the Inter-American Democratic Charter […], with a source that, by its very nature, also contributes, *especially in a preventive manner,* to achieving the effective respect and guarantee of human rights."[63]

48. The Court, in OC-29, has been emphatic in recalling that "pursuant to international law, when a State is a party to an international treaty, such as the American Convention on Human Rights, such treaty is binding for all its organs, including the Judiciary and the Legislature, […]. Accordingly, the Court considers that *the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction* which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is "the protection of the fundamental rights of the human being."

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[56] See, *supra,* para. 3.

[57] The Court indicated that "[a]though it might be applicable to a variety of vulnerable groups in prison, the Court will limit the approach to those that were specifically indicated by the Commission." OC-29, para. 41.

[58] See, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights).* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3.

[59] See, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.

[60] See, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9.

[61] See, *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

[62] See, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17.

[63] See, *Rights and guarantees of children in the context of migration and or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 31.

49. In this context, OC-29 inserts itself into a context of the structural violations that the prison population suffers in the region and that the Inter-American Commission placed in evidence in its request, by indicating that that population suffers "in a context of the extreme vulnerability of individuals who belong to groups in special situations of risk —derived not only from the deplorable conditions of detention that characterize the prisons in this region, but also from the disproportionate impact of the lack of differentiated protection— ."[64]

50. As an expression of the above considerations -in other words, the importance of the subject matter and the preventive contribution in the area- it is clear that "the response to the request will not only be valuable to the countries of the region since it will clarify the content and scope of State obligations, but also to the development of standards to guarantee the principle of equality and non-discrimination with respect to the special particularities and needs of the groups identified by the Commission during the stage of supervision of their deprivation of liberty, which will be of great importance for their protection and for an increased compliance with the human rights standards in a matter of great juridical significance in the region."[65]

51. The considerations of the Court in OC-29 offer a response to the specificities of each group addressed and, in the framework of its advisory function, are an input of protection (for domestic protection) through control of conventionality that provides States with specific parameters to address situations of disadvantage that the sub-groups confront during their deprivation of liberty.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar

[64] OC-29/22, para. 2.

[65] *Ibídem*, para. 28.