

CONTRIBUTION TO THE HUMAN RIGHTS COUNCIL RESOLUTION 54/6 ON THE CENTRALITY OF CARE AND SUPPORT FROM A HUMAN RIGHTS PERSPECTIVE

IMPACTUM AND HUMAN RIGHTS IN CONTEXT RESEARCH GROUPS

GHENT UNIVERSITY

INTRODUCTION

This contribution was prepared within the framework of the IMPACTUM research project (Assessing the Impact of Urgent Measures in Protecting At-Risk Detainees in Latin America)¹ and the Programme for Studies on Human Rights in Context² of Ghent University (Belgium).³ IMPACTUM is funded by the European Research Council (ERC) and aims to examine the various impacts of provisional and precautionary measures adopted by regional and international human rights bodies in favour of persons deprived of liberty in six Latin American countries: Colombia, Ecuador, El Salvador, Guatemala, Nicaragua and Peru. The Programme for Studies of Human Rights in Context, which operates within the Law and Criminology Faculty at the University of Ghent, is a research programme conducting studies on the promotion, advancement and respect of human rights, democracy and the rule of law. Ghent University is an open, pluralistic, and socially engaged university. Founded in 1816, it offers more than 200 programmes, conducting research in a wide range of disciplines.

Prof Dr Clara Burbano Herrera, principal investigator of IMPACTUM, Director of the Programme for Studies of Human Rights in Context and Research Professor of Human Rights at the Faculty of Law and Criminology at Ghent University (Belgium), Prof Dr Yves Haeck, Director of the Programme for Studies of Human Rights in Context and Professor of Human Rights at the Faculty of Law and Criminology at Ghent University (Belgium), doctoral researchers at Ghent University, Kate Murphy, Germán Parra Gallego and Charlotte Vercammen and researcher Luna Negro participated in the drafting of this document.

The purpose of this contribution is to provide input to the United Nations Office of the High Commissioner for Human Rights (OHCHR) for the preparation of a comprehensive thematic study on the human rights dimension of care and support. In this sense, in the following section, IMPACTUM and HUMAN RIGHTS IN CONTEXT will respond the four questions posed by OHCHR, focusing on women deprived of liberty.

1. LEGAL PROTECTION OR RECOGNITION OF CARE AS A HUMAN RIGHT

IMPACTUM and HUMAN RIGHTS IN CONTEXT research teams consider that care in its three dimensions of receiving, giving, and self-providing care is a human right. Under the concept of indivisibility, interdependence and universality of human rights, care intersects with several civil, political, social, economic, cultural and environmental rights.⁴ In the following paragraphs, we present some judgments and legislation in Colombia as well as decisions by the Inter-American System of Human Rights that show a progressive recognition of care as a human right.

¹ IMPACTUM ERC Research Project, [website](#)

² The Programme for Studies of Human Rights in Context, [website](#)

³ Ghent University, Belgium, [website](#)

⁴ OAS, American Convention on Human Rights, Adopted 22 November 1969, Entry in force 18 July 1978, the right to life (Art 4), personal integrity (Art 5), the prohibition of slavery or servitude (Art 6), the protection of honour and dignity (Art 11), the protection of the family (Art 17), the rights of the child, (Art 19), equality before the law (Art 24) and the progressive development of economic, social and cultural rights (Art 26). Similarly, the equitable distribution of care tasks is essential for compliance with the principle and purpose of reintegration of the sentence enshrined in Art 5(6) of the ACHR. Based on the duty to guarantee human rights (Art 1(1) of the ACHR), States should remove barriers that prevent women and girls from effectively enjoying their rights. The traditional social and cultural imposition of care work on women prevents them for exercising their autonomy, adversely effects their full, equal and effective

Colombian jurisprudence

- In 2023, the Colombian Constitutional Court recognised the right to care and its three dimensions as a fundamental right.⁵ It held that care relates to dignity and solidarity which are pillar principles of a Social Rule of Law. It also stressed that the Colombian Constitution considers care as a fundamental right of children and that it can be inferred from the States´ mandate to specially support women who are heads of households. Additionally, it emphasised the co-responsibility between State, society and family in the protection and assistance of the elderly.⁶
- In 2021, the Constitutional Court of Colombia concluded that, in line with the principle of solidarity, health and social protection systems must support the family and guarantee the transfer and transport of people to health institutions when they lack the physical or economic possibility to do so.⁷
- In 2014, the Council of State recognised domestic activities and caregiving as productive work, ordering compensation to be provided to a woman unjustly deprived of her liberty who was formerly caring for her parents. As such, the Court granted economic reparation to be paid to the woman declaring establishing that when there is no evidence of remuneration for care work (as was the case in her situation) it should be presumed that such activities are equivalent to the prevailing statutory minimum monthly wage. The Court applied this (newly formulated) rule, calculating the total amount of reparation by multiplying the minimum wage by each month that she spent in detention.⁸

Colombian Legislation

In 2023, Colombian Congress passed Law 2292, which allows women deprived of liberty who are heads of families, to replace their prison sentence with unpaid community work, provided they have convictions of eight years or below. The law established that it must be proven that the commission of the crime was associated with conditions of marginalisation. Additionally, the law provides that community work should not reproduce gender stereotypes and roles and that there must be an employment policy designed for women and their resocialisation.⁹

The Inter-American Human Rights System

- In 2023, the Inter-American Commission of Human Rights (IACHR) launched a report on women deprived of liberty in the Americas that refers to different dimensions on care adversely impacted by deprivation of liberty.¹⁰
- In 2023, the Republic of Argentina¹¹ requested the Inter-American Court of Human Rights (IACtHR) to deliver an Advisory Opinion on the content and scope of the right to care and its interrelation with other human rights. Eight States backed the request and provided information on their legislation, policies and programmes, and over 121 institutions, NGO, academia experts and individuals made submissions.¹²

participation in the labour market, hinders their involvement in decision-making and leadership processes and restricts their access to educational processes and health services, including sexual and reproductive health services. OAS, Additional Protocol to the ACHR in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador”, Adopted 17 November 1978, Entry in force 16 November 1999. The Right to Work (Art 6), the Right to Just, Equitable and Satisfactory Conditions of Work (Art 7), including the Right to Rest and Enjoyment of Free Time (Art 7(h)), the Right to Social Security (Art 9), the Right to Health (Art 10), the Right to Food (Art 12), the Right to Education (Art 13), the Protection of the Elderly (Art 17) and the Protection of People with Disabilities (Art 18) are all linked to care.

⁵ Colombian Constitutional Court, Judgment, T-583 of 2023, paras. 90-147, [Link](#).

⁶ Id. para. 97.

⁷ Colombian Constitutional Court, Judgment T-015 de 2021, para. 25. [Link](#).

⁸ Consejo de Estado de Colombia, Sala de lo Contencioso Administrativo Sección Tercera Subsección C, Consejero ponente: Enrique Gil Botero, Bogotá, D.C., 10 de diciembre de 2014, Radicación número: 05001-23-31-000-2004-04210-01(40060).

⁹ Congress of the Republic of Colombia, Law 2292 of 2023, Arts 2, 5, and 6, [Link](#).

¹⁰ IACHR, Report on Women Deprived of Liberty in the Americas, 8 March 2023, [Link](#).

¹¹ IACtHR. Request for an Advisory Opinion submitted by Argentina before the IACtHR 20 January 2023. [Link](#).

¹² Id. [Link](#).

IMPACTUM and HUMAN RIGHTS IN CONTEXT¹³ and other institutions also referred to the impacts of deprivation of liberty on care work.¹⁴

- In 2022, the IACtHR delivered an Advisory Opinion on differentiated approaches with respect to certain groups of persons deprived of liberty.¹⁵ This instrument tackled States' obligations towards women living with their children in detention¹⁶.
- The IACHR has issued precautionary measures and the IACtHR provisional measures to protect the life, integrity, health and family contact on behalf of persons deprived of liberty and their families.¹⁷ These protective measures are said to be essential to protect the rights to receive care by detainees and especially for those at higher risk such as pregnant and breast-feeding individuals, the elderly, persons with disabilities, or with chronic and terminal illnesses.¹⁸

2. CONCRETE POLICY OR PROGRAMMATIC MEASURES TO PROMOTE AND ENSURE THE RIGHTS OF CAREGIVERS AND RECIPIENTS OF CARE AND SUPPORT

Despite the different care systems in some Latin American countries,¹⁹ there is a need for standardised, improved, and widespread programmes that support caregiving women deprived of liberty, their children and their relatives who perform caregiving tasks.

3. CHALLENGES WITH REGARD TO CARE WORK AND DEPRIVATION OF LIBERTY

The need to tackle barriers to the implementation of an alternative to detention for caregivers

- In many cases, the lack of knowledge by public defenders, prosecutors, prison and justice officials is a barrier to the implementation of alternatives to detention for caregivers. There are also bureaucratic barriers for accessing alternatives to detention.
- Lack of judicial and ombudsman institutions' follow-up and evaluation of implementation of these measures.²⁰
- House arrest as an alternative to prison conviction is on many occasions insufficient to ensure the right to care. Often women in that situation are left without State's support to get an income, vocational training, work opportunities, healthcare, financial aid and authorisation for accompanying children at school.²¹
- Women without sufficient economic resources do not have access to alternatives to detention, lacking the ability to cover the costs of bail or pay for electronic monitoring devices.²²

The need to conduct criminal investigations with a gender perspective

¹³ Id. [Link](#).

¹⁴ Id. Such as Defensoría General de la Nación Argentina [Link](#); Asociación Interamericana de Defensas Públicas, (AIDEP) and Documenta [Link](#)

¹⁵ IACtHR. Differentiated Approaches with respect to certain groups of Persons Deprived of Liberty (Interpretation and scope of Arts 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the ACHR and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022. Serie A No. 29. [Link](#).

¹⁶ Id. pp. 43-72.

¹⁷ IACtHR, orders on provisional measures, [Link](#); IACHR, precautionary measures, [Link](#).

¹⁸ See, Burbano Herrera, Clara, and Haeck Yves. "The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights: Toward a Tangible Impact." *The Impact of the Inter-American Human Rights System: Transformations on the Ground*, edited by Armin von Bogdandy et al., OUP, 2024, pp. 153–75

¹⁹ See States' Submissions to the IACtHR in the proceedings on the request by Argentina on the content and scope of care as a human right, and its interrelationship with other rights for and advisory opinion, Chile, [Link](#); Colombia, [Link](#); Costa Rica, [Link](#); Ecuador, [Link](#); Mexico, Panama, [Link](#); Paraguay, [Link](#).

²⁰ Supra note 10, IACHR, Women Deprived of Liberty in the Americas, paras 169, 205, 206, 220, 290, 299, 300 (e), 324, and 326.

²¹ Supra note 15, IACtHR, Differentiated approaches with respect to certain groups of Persons Deprived of Liberty, paras. 132-134.

²² Supra note 10, IACHR, Women Deprived of Liberty in the Americas, paras. 208, 211, 318

- Lack of a gender approach by judicial authorities who do not consider the possible influence of care responsibilities in the commission of crime. Authorities usually do not give legal importance to the context of risk faced by women, resulting in the non-application of grounds of inculpability or mitigation of responsibility and increasing the risk of criminal proceedings followed by long prison sentences for caregivers.²³ The proportion of women deprived of liberty for first time for drug offences, often committed without violence, is closely linked to legal provisions that prohibit any type of subrogation or criminal benefit for such crimes.²⁴

The need to take seriously the effective social reintegration of women deprived of their liberty

- The scarce reintegration programmes for women in Latin American prisons focuses on activities that reproduce gender stereotypes, excluding other crafts and professions required in labour markets.²⁵

The need to reconsider the loss of legal guardianship and custody of children by parents deprived of liberty

- In some Latin American countries, there are laws that automatically withdraw or suspend custody and guardianship of children to parents with a criminal conviction and their prolonged absence.²⁶ Those decisions may be taken without a previous independent judicial assessment based on the best interest of the children, and free from the influence of stigmas and stereotypes that fall over persons under criminal justice system.²⁷

The need to reconsider criminal punishment for not providing economic care

- In some Latin American countries, criminal law is used to tackle the lack of provision of economic assistance to children by their parents (alimony).²⁸ This measure does not necessarily lead to reparations or to satisfying the needs of the family. In addition, it may impose additional burdens on other persons who are obliged to meet the needs of the detained person, when prison systems do not provide them basic goods and services. Also, it exacerbates care work especially for partners, mothers, grandmothers, aunts and sisters.²⁹ In 2023 alone, Colombia had 500 persons detained for this crime, with 8,000 cases at the trial phase and 182,000 active investigations.³⁰

4. DATA ON WOMEN DEPRIVED OF LIBERTY AND THEIR ROLE AS CAREGIVERS

- Region: In Latin American and Caribbean countries (LAC), women deprived of liberty represent 5.5% of total prison population.³¹
- In 2000, the number of women deprived of liberty in LAC was 37,671. In 2022, this number increased to 94,900.³²
- In the context of “war against drugs”, the female population deprived of liberty has grown more rapidly and at a higher rate than the general prison population.³³ Women and girls in prison

²³ Id. para. 291.

²⁴ CICR, 2018, Informe mujeres y prisión en Colombia: desafíos para la política criminal desde un enfoque de género, p. 151. [Link](#).

²⁵ Supra note 10, IACHR, Women Deprived of Liberty, para. 236-238, 250, 259. Colombian Constitutional Court, Judgment C-256 de 2022, para. 328. [Link](#).

²⁶ Honduras, Código de Familia, Ley 76-84 adoptada en 1984, artículo 200, [Link](#); Bolivia, Código Niña, Niño y Adolescentes, Ley 548 adoptada el 17 de julio de 2014, [Link](#); Nicaragua, Código de Familia, Ley 870 adoptada el 24 de junio de 2014, artículo 295, 296, [Link](#); Brasil, Estatuto da Criança e do Adolescente, Lei nº 8.069, de 13 de julho de 1990, artigo. 23, [Link](#); Colombia, Código Civil colombiano, Ley 84 de 1973, artículo 310, [Link](#).

²⁷ Supra note 10, IACHR, Women Deprived of Liberty, paras. 95-97.

²⁸ Código Penal de Perú, Decreto Legislativo 635 de 1991, artículo 128, [Link](#); Código Penal de El Salvador, Decreto 1030 de 1997, artículo 201, [Link](#); Código Penal de Guatemala, Ley 17-73, artículo 242, [Link](#); Código Penal de Nicaragua, Ley 641 de 2007, artículo 217, [Link](#); Artículo 217, Código Penal colombiano, Ley 599 de 2000, artículo 233, [Link](#); Código de la Niñez y de Adolescencia en Ecuador, Ley 100 del 3 de enero de 2003, artículo 22, [Link](#).

²⁹ RIMUF, informe el impacto de la cárcel en las mujeres familiares y las afectaciones a sus derechos humanos, p.16, [Link](#).

³⁰ Ámbito Jurídico, 14 March 2023, Esta es la alternativa del Gobierno para sustituir penas por inasistencia alimentaria, [Link](#).

³¹ World Prison Brief, World Female Imprisonment List, December 2021. p. 14, [Link](#).

³² Id.

³³ Supra note 10, IACHR, Women Deprived of Liberty in the Americas, paras. 27, 38-39.

worldwide have increased by nearly 60% since 2000 while in the LAC countries this growth has been 151.9%.³⁴

- In Latin America there are around six million relatives of persons deprived of liberty among which, three and a half million are children and adolescents.³⁵
- 87% of the women deprived of liberty have children in comparison with 79% of the men.³⁶
- Argentina:
 - In 2013, 75% of the women in jail for economic offenses were the primary providers of their homes.³⁷
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.³⁸
- Panama
 - In 2015, 81% of women deprived of liberty were mothers, and 65% the head of family.³⁹
- Costa Rica
 - In 2017, 76% of women deprived of liberty were mothers, and 65% were non-remunerated domestic workers.⁴⁰
- Colombia:
 - In 2020, 94% of women deprived of liberty were mothers, in the majority cases of minors, and 75% were the head of family with scant economic resources for providing for its needs.⁴¹
 - Between 1991 and 2018 the rate of women in prison per 100,000 inhabitants, women increased more than three times, going from 9.9 in 1991 to 31.5 in June 2018.⁴²
 - In 1991, there were 1,500 women deprived of liberty, in June 2018 this figure was 7,944. This marks an increase of 429%.⁴³

Conclusion

IMPACTUM and HUMAN RIGHTS IN CONTEXT value and appreciate the openness of the OHCHR to receiving reflections and proposals of civil society organisations, academia, national and international institutions and States.

We recommend the OHCHR the inclusion and analysis of the situation of people deprived of liberty and to consider the impact of detention in light of the needs of people who require special support or care. In this way, we highlight that an inclusive and integrative perspective can contribute to achieving gender equity in accordance with the principle of leaving no one behind within the framework of the United Nations Sustainable Development Goals.

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³⁴ Supra note 31, World Female Imprisonment List.

³⁵ Association for the Prevention of Torture (APT), 2022, Women relatives as agents for prevention of torture: the International Network of Women Relatives of Persons Deprived of Liberty, [Link](#).

³⁶ Supra note 15, IACtHR, Differentiated approaches with respect to certain groups of Persons Deprived of Liberty, para. 122.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id. See also, supra note 24, pp. 146-148.

⁴² Id. Supra note 36.

⁴³ Id.