
THE CONTENT AND SCOPE OF THE RIGHT TO CARE AND ITS INTERRELATION WITH OTHER HUMAN RIGHTS

CONTRIBUTION WITHIN THE FRAMEWORK OF THE REQUEST FOR AN
ADVISORY OPINION BY THE REPUBLIC OF ARGENTINA BEFORE THE
INTER-AMERICAN COURT OF HUMAN RIGHTS

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Programme for the Study of Human Rights in Context

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GHENT UNIVERSITY, BELGIUM

27 of October 2023

SUMMARY

The deprivation of liberty of women and girls generates negative impacts on care work. In Latin America, the majority of detained women are mothers, heads of families or caregivers and their detention has impacts on children and other people who receive or require special care from them. The notion of ‘care’ also has great relevance in cases where children live with their incarcerated caregivers and in situations where detainees have disabilities or illnesses. Moreover, precariousness and the lack of goods and services in prison place a heavy burden on women who are forced to support or maintain their incarcerated family members.

This contribution is made within the framework of the request for an advisory opinion requested by the Republic of Argentina to the Inter-American Court of Human Rights (IACtHR) on care and its interrelation with other human rights. Throughout this document, it is argued that States must adopt policies and programmes to recognise, reduce, support and reward care both inside and outside places of detention. Likewise, measures aimed at incorporating an analysis of care in criminal prosecution processes, preventive detention and custodial sentencing, alternatives to detention, and programmes and activities with a focus on social reintegration or reintegration are also discussed.

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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: Peru, Ecuador, Colombia, Nicaragua, El Salvador and Guatemala.⁴ 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.

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The purpose of this contribution is to provide some reflections on the right to care and its interrelation with other human rights within the framework of the request for an Advisory Opinion presented by the Republic of Argentina to the Honourable Inter-American Court of Human Rights (IACtHR) on January 20, 2023.⁵ As such, this contribution will focus on the

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

² Program for the Study of Human Rights in context [website](#)

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

⁴ For the purposes of this contribution, the term “person deprived of liberty” is used broadly to refer to any person who is in any form of detention or imprisonment or custody of a person by order of a judicial or administrative authority or other public authority, in a public or private institution from which they cannot freely leave. See UN: General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 4(2): Resolution approved by the General Assembly, January 9, 2003, A/RES/57/199, adopted on December 18, 2002 and in force since June 22, 2006.

⁵ República de Argentina, 2023, Ministerio de Relaciones Exteriores, Comercio Internacional y Culto, Solicitud de Opinión Consultiva a la Corte IDH, [link](#)

impacts of the deprivation of liberty on care.⁶ As the Argentinian State referred to in its request, the IACtHR has addressed care in relation to the deprivation of liberty in its 2022 Advisory Opinion OC-29 on differentiated approaches with respect to certain groups of persons deprived of liberty.⁷

Notwithstanding this positive development, the present document shows additional aspects that could be included by the IACtHR in its forthcoming Advisory Opinion, in order to reinforce the protection of those who carry out care work as well as their beneficiaries. That said, the reflections presented below focus on the questions contained in the first consultation posed by the Republic of Argentina on the understanding of the IACtHR regarding the right of people to care, be cared for and self-care, States obligations from a gender, intersectional and intercultural perspective, the minimum essential contents and scope of the right to care that States must guarantee and the public policies that must be implemented in relation to care in order to ensure the effective enjoyment of this right.⁸

This document is divided into 7 sections each containing recommendations on the policies and actions that States should implement in line with the right to care: Section I. sets out the legal foundation of the right to care against the effects of deprivation of liberty. Section II. describes the population growth of women deprived of liberty in Latin America particularly in light of the adoption anti-drug policies in recent years, as well as the effects on care tasks that fall mainly on women and girls. Section III. addresses care in various dimensions, from criminal investigation and prosecution, non-custodial measures, care tasks within places of detention, the protection of people who require special care, support and treatment and programmes designed for the reintegration of the sentenced population. Section IV. develops the different aspects of caring for children who live with their caregivers in places of detention. Section V. indicates the impacts of detention on care work carried out outside places of detention. Section VI. presents some policies that States should adopt to promote gender equal care, going beyond the criminal sphere. Section VII. proposes that care should play a role in the adoption of protection measures by States and in the course of the adoption of provisional and precautionary under the Inter-American Human Rights System.

⁶ Id. p. 6.

⁷ IACtHR. 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. Serie A No. 29.

⁸ Supra note 5, Request for Advisory Opinion, p. 9.

I. FOUNDATION OF THE RIGHT TO CARE: THE LINK TO OTHER HUMAN RIGHTS

IMPACTUM considers that the recent Resolution 54/6 on the importance of care and support from a human right perspective, approved by the United Nations Human Rights Council⁹ at its 54th session,¹⁰ should be taken into account for this upcoming Advisory Opinion. The resolution refers to various international legal instruments such as, the Universal Declaration of Human Rights,¹¹ the International Covenant on Civil and Political Rights,¹² the International Covenant on Economic, Social and Cultural Rights,¹³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴ the Convention on the Rights of the Child,¹⁵ the Convention on the Rights of Persons with Disabilities¹⁶ and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁷

Resolution 54/6 is relevant as it refers to the situation of girls and women who carry out care work, including those who are deprived of their liberty.¹⁸ This resolution reaffirms the need for policies aimed at creating care systems that take into account the impacts of detention on the right to care, to be cared for, and to self-care.¹⁹ Furthermore, the resolution is based on the notion of universality, indivisibility, and interdependence of human rights, providing a benchmark to allow care to be viewed in relation to other human rights.²⁰

⁹ UNHRC, Membership of the Human Rights Council, [website](#) The Latin American and Caribbean States with Membership in the United Nations Human Rights Council are: Argentina, Bahamas, Bolivia (Plurinational State of), Brasil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, Uruguay, Venezuela (República Bolivariana de).

¹⁰ UN, Human Rights Council, 2023, 54th session from 11 September to 13 October 2023, Resolution on the Promotion and protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, [link](#)

¹¹ UN, General Assembly, Universal Declaration of Human Rights, Resolution 217 A (III), Adopted 10 December 1948.

¹² UN, General Assembly, the International Covenant on Civil and Political Rights,¹², Resolution 2200^a (XXI), Adopted 16 December 1966, Entry into force 23 March 1976

¹³ UN, General Assembly, The International Covenant on Economic, Social and Cultural Rights, Resolution 2200A (XXI), Adopted 16 December 1966, Entry into force 3 January 1976.

¹⁴ UN, General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, General Assembly, Resolution 34/180, Adopted 18 December 1979, Entry in force 3 September 1981.

¹⁵ UN, General Assembly, Convention on the Rights of the Child, Resolution 44/25, Adopted 20 November 1989, Entry in Force 2 September 1990.

¹⁶ UN, General Assembly, Convention on the Rights of Persons with Disabilities, Resolution A/RES/61/106, Adopted 12 December 2006, Entry in force 3 May 2008.

¹⁷ UN, General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Resolution 2106 A (XX), Adopted 21 December 1965, Entry in Force 4 January 1969.

¹⁸ Supra note 9, Consejo de Derechos Humanos, Resolución sobre el cuidado, pp. 1-3.

¹⁹ Supra note 5. Solicitud de Opinión Consultiva, p. 20.

²⁰ Supra nota 9, Consejo de Derechos Humanos, Resolución sobre la importancia de los cuidados, p. 1.

At the regional level, *IMPACTUM* considers that care links with other human rights contained in the American Convention on Human Rights (ACHR)²¹ such as, the right to life (article 4), personal integrity (article 5), the prohibition of slavery or servitude (article 6), the protection of honor and dignity (article 11), the protection of the family (article 17), the rights of the child (article 19), equality before the law (article 24) and the progressive development of economic, social and cultural rights (article 26). Similarly, the equitable distribution of care tasks is essential for compliance with the principle and purpose of reintegration of the sentence enshrined in article 5(6) of the ACHR.

Care is also related to various rights enshrined in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the “Protocol of San Salvador.”²² Rights such as, the Right to Work (article 6), the Right to Just, Equitable and Satisfactory Conditions of Work (article 7), including the Right to Rest and Enjoyment of Free Time (article 7(h)), the Right to Social Security (article 9), the Right to Health (article 10), the Right to Food (article 12), the Right to Education (article 13), the Protection of the Elderly (article 17) and the Protection of People with Disabilities (article 18) are all linked to care.

Based on the duty to guarantee human rights (article 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 from exercising their autonomy, adversely affects their full, equal and effective 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.²³

To achieve equality between men and women, States must adopt different types of measures that promote the social and legal valuation of care and the participation and commitment of men in care work, in accordance with article 2 of the ACHR.²⁴ This would assist in reversing

²¹ OAS, American Convention on Human Rights, Adopted 22 November 1969, Entry in force 18 July 1978.

²² OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador”, Adopted 17 November 1978, Entry in force 16 November 1999.

²³ Supra nota 9, Resolución importancia de los cuidados y el apoyo desde una perspectiva de derechos humanos, pp. 2-3.

²⁴ Supra note 21

situations of discrimination or those where care practices are assigned based on premises of gender inferiority/superiority and on stereotypical roles for men and women in line with, article 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁵ and article 8(b) of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (Convention of Belem do Pará).²⁶

In relation to the right to receive care, instruments such as the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities²⁷ and the Inter-American Convention on Protecting the Human Rights of Older Persons²⁸ are also of relevance. Furthermore, according to the principle of inconsequential punishment (article 5(3) of the ACHR), States have the duty to prevent the negative impacts of detention stemming from the suspension or interruption of care and should impose less harmful alternative measures or restorative justice mechanisms to ensure that punishment in no way falls onto the beneficiaries of care.²⁹

Taking this legal framework into account, IMPACTUM suggests that the IACtHR:

- Recognise and make visible the effects of deprivation of liberty on care and reaffirm the rights to care of detainees and their families in the upcoming Advisory Opinion.

Additionally, IMPACTUM recommends that – in line with international law – the IACtHR urges States to:

- Recognise, reduce and reward unpaid care work that falls on girls and women deprived of liberty in juvenile criminal systems, prisons or penitentiary systems, house arrests and other forms of detention.

²⁵ Supra note 14.

²⁶ OAS, General Assembly, Inter-American Convention to Prevent, Punish and Eradicate Violence against Women “Convention of Belem do Pará”, Adopted 9 June 1994, Entry in force 5 March 1995.

²⁷ OAS, General Assembly, Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, AG/RES. 1608 (XXIX O/99), Adopted 7 June 1999, Entry in force 14 September 2001.

²⁸ OAS, General Assembly, Inter-American Convention on Protecting the Human Rights of Older Persons, Adopted 15 June 2015, Entry in force 11 January 2017.

²⁹ CICR, 2018, Informe mujeres y prisión en Colombia: desafíos para la política criminal desde un enfoque de género, pp. 146-148, [link](#).

II. CONTEXT: GROWTH OF THE FEMALE POPULATION DEPRIVED OF LIBERTY IN LATIN AMERICA AND ITS RELATIONSHIP WITH CARE

In the 2022 Advisory Opinion OC-29, the IACtHR highlighted that between 40% and 75% of women detained in Latin America are held for drug-related crimes, representing a rate of two or three times higher than that of men.³⁰ Similarly, in its 2023 report on Women Deprived of Liberty in the Americas,³¹ the Inter-American Commission on Human Rights (IACHR) pointed out that in the context of the fight against drugs, the female population deprived of liberty has grown more rapidly and at a higher rate than the general prison population.³² Furthermore, the IACHR stressed that in Nicaragua, Mexico and Uruguay³³ preventive detention is automatically imposed for crimes related to drug trafficking.³⁴ Moreover, it noted that in El Salvador, Guatemala and Honduras, the replacement of preventive detention by alternative measures is prevented.³⁵ Lastly, the Commission found that although it is men who usually lead illicit drug businesses, in Nicaragua, Brazil, Argentina, Mexico, Peru, Uruguay, and Colombia, the proportion of women in preventive detention is higher than that of men.³⁶

In this context, the IACtHR identified that the majority of women deprived of liberty carry out care work³⁷ and has classified single mothers, heads of households and caregivers as a group in a particularly vulnerable situation.³⁸ Nonetheless, despite the fact that the percentage of caregiver men who are detained is lower than women who perform caregiver roles, the IACtHR considers that the rules established in its 2022 Advisory Opinion OC-29 extend to them based on the principle of co-responsibility of both parents regarding care tasks.³⁹

³⁰ Supra nota 7, Corte IDH, enfoques diferenciados de detención, para. 121.

³¹ IACHR, Report on Women Deprived of Liberty in the Americas: Adopted by the Inter-American Commission on Human Rights 8 March 2023, [link](#).

³² Id. paras. 27, 38, 39.

³³ Id. para. 72.

³⁴ Id. para. 71.

³⁵ Id. para. 72.

³⁶ Id. paras. 42, 74. Además de los delitos de drogas, la CIDH también muestra que en países como Bolivia, Costa Rica, México, Colombia y Argentina el porcentaje de mujeres en prisión preventiva es mayor al de los hombres y concluye que las mujeres tienen un mayor riesgo a pesar de no cometer delitos violentos como los hombres de ser detenidas preventivamente.

³⁷ Supra nota 7, Corte IDH, enfoques diferenciados de detención. para. 122.

³⁸ Id. paras. 122, 126.

³⁹ Id. para. 169. Ver también pie de página 328.

III. ANALYSIS OF CARE

3.1. DURING THE CRIMINAL INVESTIGATION AND TRIAL

The Inter-American Court of Human Rights has stressed that judicial authorities must take into account responsibilities of caring for children and people with disabilities when imposing a precautionary or custodial measure.⁴⁰ Based on the best interests of the child,⁴¹ IACtHR has established that the authorities must listen to the affected children or adolescents and give priority to their rights, objectively establishing the effects of separation from their caregivers or the effects that would stem from living with them in detention.⁴²

The IACtHR has indicated that children⁴³ whose caregivers are deprived of their liberty may be stigmatised and suffer violence and discrimination in the school environment.⁴⁴ In a similar vein, the IACHR has maintained that the detention of women may expose children to poverty, marginalisation, abandonment, involvement in criminal organisations or their institutionalisation.⁴⁵ The IACtHR has recognised that detention affects the economic and emotional support of children or other dependents,⁴⁶ and exposes women to hardship when they lack the economic resources to provide themselves with basic goods and services that the prison system does not provide them.⁴⁷

In this framework, the IACtHR focused on the impacts of detention on care but did not address the possible influence that the performance of care work could have on the commission of crimes. In this regard, the International Committee of the Red Cross (ICRC) in its report on women and prison in Colombia stated that:

“[...] the number of children, being the head of the family and the low level of schooling all have an impact on the need to look for various job alternatives,

⁴⁰ Id. paras. 197-200.

⁴¹ Id. paras. 130, 192.

⁴² Id. para. 193.

⁴³ Según el artículo 1 de la Convención sobre los derechos del niño, se entiende por niño todo ser humano menor de dieciocho años de edad, salvo que, en virtud de la ley que le sea aplicable, haya alcanzado antes la mayoría de edad.

⁴⁴ Supra nota 7, Corte IDH, enfoques diferenciados de detención. paras. 178-181.

⁴⁵ Supra nota 28, CIDH, informe mujeres privadas de la libertad, para. 86.

⁴⁶ Supra nota 7, Corte IDH, enfoques diferenciados de detención. para. 73.

⁴⁷ Id. paras. 73, 85.

which are often precarious or related to the commission of crimes as a means to making ends meet for themselves and their dependents. This fact is confirmed by the nature of the crimes committed: theft and drug trafficking that perhaps provide them with easy income.”⁴⁸

Similarly, the IACHR indicated that, at the time of prosecution, the authorities usually do not attach legal importance to the context of risk faced by women, resulting in the non-application of grounds of inculpability and increasing the risk of criminal proceedings followed by long prison sentences.⁴⁹ This is also worrying taking into account the proportion of women deprived of liberty for first time drug offences often committed without violence, in addition to legal provisions that prohibit any type of subrogation or criminal benefit for such crimes.⁵⁰

The IACtHR has held that when the authorities determine that it is not appropriate for children to live with their caregiver in penitentiary or prison centres, it must be rigorously evaluated whether care by another family member or the community is an appropriate alternative in the best interests of the child.⁵¹ Moreover, the IACtHR has indicated that women with care responsibilities must be placed in penitentiary or prison centres close to their places of residence⁵² and that regular family visits of sufficient frequency and duration must be guaranteed.⁵³

For these reasons, IMPACTUM considers that this Advisory Opinion should incorporate the IACHR recommendation that State authorities should:

- *Adopt judicial, legislative and other measures aimed at legally recognising the context of risk that women face, which in turn allows for the particularities surrounding the commission of crimes to be considered by judicial operators as mitigating circumstances. In particular, States should implement actions to ensure that, when judging women, judicial authorities have the power to consider mitigating*

⁴⁸ Supra nota 26, CICR, Informe Mujeres y Prisión en Colombia, p. 163

⁴⁹ Supra nota 28. CIDH, informe mujeres privadas de la libertad, para. 291.

⁵⁰ Supra nota 26, CICR, Informe Mujeres y Prisión en Colombia, p. 151.

⁵¹ Supra nota 7, Corte IDH, enfoques diferenciados de detención, paras. 185, 195, 197, 204.

⁵² Id. para. 136. De manera similar, la ley modelo propuesta por la Oficina de Naciones Unidas contra la Droga y el Delito (UNODC) en su artículo 7 numeral 2 establece que “Se asignará a los reclusos, en la medida de lo posible y en consulta con el interesado, a establecimientos penitenciarios cercanos a su domicilio o a lugares que brinden más posibilidades de facilitar su reinserción social, teniendo presentes sus obligaciones de cuidado de otras personas y la disponibilidad de programas y servicios pertinentes.” UNODC, 2022, Incorporación de las Reglas Nelson Mandela en la Legislación Penitenciaria Nacional, Ley Modelo sobre el Sistema Penitenciario con comentarios, [link](#).

⁵³ Id. paras. 166, 201.

factors, making it possible to apply sanctions proportional to the seriousness of the crime committed (...).⁵⁴

3.2. GRANTING ALTERNATIVE MEASURES TO THE DEPRIVATION OF LIBERTY

With respect to the countries of Northern Central America, the IACHR has maintained that the regulations on alternative measures to detention lack a comprehensive gender perspective that considers the differentiated impacts of detention on people under the care of persons deprived of liberty and the specific situation of risk that they face in detention.⁵⁵ Consequently, the IACHR recommends that when evaluating the granting of alternative measures to detention, the differential and incremental impact of the custodial sentence with respect to the people under its care should be considered.⁵⁶

In a similar vein, the IACtHR expressed in its Advisory Opinion OC-29 of 2022 that States must reform their criminal and penitentiary policies in order to prioritise the access of female caregivers to alternative or substitute measures in place of preventive detention or prison sentences.⁵⁷ The Court also recognised the possibility of using other forms of moderate detention such as house arrest, electronic bracelets or ankle bracelets.⁵⁸ In parallel with the implementation of these measures, the IACtHR determined that States must adopt actions to prevent the repetition of crime, reverse socioeconomic and legal barriers and ensure the satisfaction of the needs of caregivers related to their food, work, health via specific social protection programs.⁵⁹ Furthermore, the IACtHR emphasised that States must allow continuity with care work while at the same time providing access to training and employment.⁶⁰

On this note, the IACHR warns that sometimes alternative measures such as house arrest are solely granted in a restricted manner to accommodate pregnancy, maternity, parenting and care.⁶¹ For the IACHR, the above reinforces a stereotypical role of women as mothers or

⁵⁴ Supra nota 28. CIDH, informe mujeres privadas de la libertad, para. 291.

⁵⁵ Id. para. 178.

⁵⁶ Id. para. 317.

⁵⁷ Supra nota 5, Corte IDH, enfoques diferenciados de detención, paras. 132-134.

⁵⁸ Id.

⁵⁹ Id. para. 134.

⁶⁰ Id. paras. 132-134.

⁶¹ Supra nota 28. CIDH, informe mujeres privadas de la libertad, para. 180.

caregivers and excludes other gender elements that cause women to face different risks during their detention.⁶² For these reasons, IMPACTUM suggests that:

- Legislation on alternative measures to detention should not be reduced exclusively to reproduction, motherhood and care⁶³ and that other elements should be considered for its granting, such as the particular and historically disadvantaged position that women have in society; their risk situation due to socioeconomic vulnerability; their history of previous victimisation; other risk situations linked to their age and ethnic-racial origin; and absence of aggravating circumstances in the commission of the crime.⁶⁴
- Support women and caregivers who cannot afford the cost of bail and fines to access alternatives to detention, other benefits or criminal substitutes

An example of a good practice relating to this matter is Law 2292 of 2023, approved by the Congress of Colombia, which allows women deprived of liberty who are heads of families, to replace their prison sentence with unpaid public service tasks, provided they have sentences of less than or equal to 8 years.⁶⁵ To do this, the law established that it must be proven that the commission of the crime was associated with conditions of marginality that affected the maintenance of the home.⁶⁶ Additionally, the law provides that the sentence of public utility work should not reproduce gender stereotypes and roles⁶⁷ and that there must be an employability policy designed for women and their resocialisation.⁶⁸

3.3. CARE WORK INSIDE PLACES OF DETENTION: PUNISHING ABUSES AND VIOLATING HUMAN RIGHTS

The imposition of cleaning, laundry, cooking, affection or other activities may arise from abuse by prison staff or power hierarchies among detainees.⁶⁹ Performing such tasks may also be a way of surviving and accessing goods and services for some detainees. In its 2015 report on violence against LGBTI people, the IACHR documented that in some cases, transgender women are forced to perform sex work in prison in order to have access to food, water, and

⁶² Id.

⁶³ Id. para. 316.

⁶⁴ Id. para. 317.

⁶⁵ Congreso de la República de Colombia, Ley 2292 de 2023, artículos 2, 5, [website](#).

⁶⁶ Id. artículo 2.

⁶⁷ Id. artículo 5, párrafo.

⁶⁸ Id. artículo 6.

⁶⁹ CIDH, (2015), Informe sobre Violencia contra Personas Lesbianas, Gay, Bisexuales, Trans e Intersex en América, paras. 83, 153, disponible en: [website](#)

toilet facilities.⁷⁰ Similarly, the IACtHR highlighted that LGBTI people may face a greater risk of abuse and exploitation in places of detention.⁷¹

As such, under the principle of human dignity, the absolute prohibition against cruel, inhuman or degrading treatment (article 5, ACHR),⁷² the prohibition against slavery and servitude (article 6 ACHR), the right to personal liberty (article 7, ACHR), the right to equality and the prohibition of discrimination (article 24, ACHR), States have the duty to prevent the imposition of care and other work in an unequal or discriminatory manner, in humiliating conditions or those equivalent to slavery, as a form of punishment or as conditions for accessing goods and services.

As such, IMPACTUM considers that:

- *Penitentiary and judicial authorities must prevent and sanction the discriminatory imposition of maintenance and cleaning tasks or imposition of such tasks as a means to access basic goods and services in places of detention.*

3.4. [PEOPLE WHO REQUIRE MEDICAL TREATMENT AND SPECIAL CARE](#)

In relation to people who suffer from diseases and require special care, the IACtHR has affirmed that States must, when necessary, guarantee their transfer to other penitentiary establishments or civil hospitals and that there must be health care protocols and effective mechanisms for transfer in emergencies or serious situations in place.⁷³ Similarly, the IACtHR has referred to the duty to provide palliative care for people with terminal illnesses and their release in cases where the penitentiary systems cannot provide it.⁷⁴

Furthermore, the IACtHR has emphasised the States duty to guarantee access to medical care for transgender people;⁷⁵ preventive care, curative practices and traditional medicines for \

⁷⁰ Id. para. 287.

⁷¹ Supra note 7, IACtHR, Differentiated Approaches to Persons Deprived of Liberty, para. 230. In some contexts, it has been documented that trans women are forced into sex work in order to access basic supplies for personal hygiene or other items: Engaged journalism, 2021, the reality of transgender women in Ecuador's prisons, [website](#)

⁷² TEDH, sentencia S.P y otros vs. Rusia, 2 de mayo de 2023, paras. 57-60, 85, 94, 100, y apéndice, [website](#) Según este tribunal, la omisión o tolerancia de las autoridades a prácticas de sometimiento entre los detenidos que incluyen labores de cuidado constituyen un trato inhumano y degradante tal como lo ha expresado la Corte Europea de Derechos Humanos.

⁷³ Supra note 7, IACtHR, Differentiated Approaches to Persons Deprived of Liberty, paras. 85, 158, literal f.

⁷⁴ Id. paras. 375, 377.

⁷⁵ Id. para. 270.

indigenous peoples;⁷⁶ comprehensive care for older people, including their accommodation and the continuity of medical, psychological or psychiatric treatment upon regaining freedom;⁷⁷ and the care that people with disabilities may require.⁷⁸

In relation to elderly persons, the IACtHR has ruled that when necessary, States have the duty to provide accommodation, clothing, food and transportation during the immediate period following their release.⁷⁹

⁷⁶ Id. para. 318.

⁷⁷ Id. paras. 342, 396. literal f.

⁷⁸ Id. para. 370.

⁷⁹ Id. para. 396. literal f.

For the IACtHR, States must guarantee the continuation, without interruption or alteration, of any medical, psychological or psychiatric treatments that the person has been receiving during their incarceration.⁸⁰

Bearing this framework in mind, *IMPACTUM* suggests complementing the approach of the IACtHR with the following measures to be imposed on State authorities:

- *Guarantee care programmes and a general health system in penitentiary systems.*
- *Guarantee that social security and protection systems provides people with disabilities, older adults or people with chronic or terminal illnesses, the care and support required, especially for those who lack support networks or whose families do not have sufficient means to ensure their care during detention or when they regain freedom.*
- *Inform and guarantee access to institutional support and assistance mechanisms. In case of ineffectiveness, people should have simple remedies before the judicial authorities to guarantee their protection.*

In this regard, it is interesting to note that the Constitutional Court of Colombia considers that, in line with the principle of solidarity, health and social protection systems must support the family and guarantee the transfer of people to health institutions in cases where the family lacks the physical or economic possibility to do so.⁸¹

⁸⁰ Id.

⁸¹ Corte Constitucional Colombia, sentencia T-015 de 2021, para. 25. [website](#).

3.5. REINTEGRATION OR SOCIAL REINSERTION PROGRAMMES

The IACHR has stated that in some penitentiary systems the offer of reintegration programmes aimed at detained women is reduced to activities that respond to assigned gender roles, emphasising the tasks they usually perform at home and limiting the development of new skills. According to the IACHR, this type of emphasis prevents women from accessing other programmes that would allow them to acquire other types of knowledge and skills.⁸² The Constitutional Court of Colombia has held that some socio-legal research indicates that the skills that women acquire in prison have little relevance for the labour market.⁸³

As such, IMPACTUM considers that:

- State authorities must generate reintegration programmes that allow women to acquire various skills without exclusively placing emphasis on domestic and care work. To achieve this, there must be coordination and articulation between the penitentiary authorities and the public institutions in charge of labour and educational policy, as well as the private sector.

⁸² Supra note 29, IACHR, Women Deprived of Liberty, para. 236-238, 250, 259.

⁸³ Corte Constitucional de Colombia, sentencia C-256 de 2022, para. 328, [website](#).

IV. MEASURES FOR THE CARE OF CHILDREN WHO LIVE WITH THEIR CAREGIVERS DEPRIVED OF LIBERTY

The IACtHR emphasised that in penitentiary centres there should be units or daycare centres where children can remain with their parents or main caregivers and that such spaces must be separated from the rest of the detained population,⁸⁴ be open⁸⁵ and adapt to the needs of children in order to guarantee their development.

Furthermore, the IACtHR stated that the authorities must guarantee the transfer of children from penitentiary centres to external educational institutions.⁸⁶ In addition to guaranteeing that women can dedicate time to caring for their children or other dependents, the Inter-American Court stressed that their participation in other prison activities must also be facilitated.⁸⁷ To this end, the IACtHR determined that prison authorities must have qualified personnel who can collaborate with care, and set differentiated schedules so that people who perform care tasks in places of detention can access educational training programs, sports activities, recreation and paid work activities.⁸⁸

The IACtHR considers that when children reach the legal age limit to remain with their mothers or primary caregivers, separation decisions must be based on an individual analysis of the case, the opinion of the child, an evaluation of their best interest and the continuity of contact with the caregiver in cases of outsourcing. Additionally, the IACtHR indicates that States must “establish clear protocols and procedures to ensure adequate preparation for the transition and separation of the child from the incarcerated caregiver, including the provision of psychological care and social support.”⁸⁹

Additionally, the IACtHR specified that States have the obligation to offer courses on the care of the newborn⁹⁰ and highlighted that children have the right to health, food, education and recreation based on the principle of equivalence with the programmes offered to the community outside of prison.⁹¹

⁸⁴ Supra nota 7. Corte IDH, enfoques diferenciados de detención, paras. 165, 218.

⁸⁵ Id. para. 218.

⁸⁶ Id. para. 222.

⁸⁷ Id. paras. 138-9.

⁸⁸ Id. paras. 139, 218.

⁸⁹ Id.

⁹⁰ Id. para. 158.

⁹¹ Id. paras. 208, 210-1, 217.

Based on the abovementioned, *IMPACTUM* considers that this Advisory Opinion should include the following measures by State authorities:

- Guarantee that daycare centres or units where children remain with their caregivers in places of detention are equipped with kitchens, education, recreation and play areas. Likewise, ensure the integration of penitentiary systems with external care programmes and systems.
- Allow mothers and caregivers to take their children or other dependents to school or daycare centres, playgrounds and medical facilities in the community.⁹² In the development of these activities, States must guarantee the protection of women and children and take reasonable measures to prevent their stigmatisation.⁹³
- Guarantee the right of people deprived of liberty to work in order to financially provide for people under their responsibility and care. For this purpose, the minimum requirements promoted by the International Labour Organisation (ILO) must be guaranteed,⁹⁴ such as fair and proportional salary, decent and safe working conditions and connection to the social security system in health and pension.
- Support initiatives that promote women's entrepreneurship and association, as well as their training for work and formalisation. These initiatives could be implemented in places of detention, through the training of caregivers as an alternative to unemployment and a way to prevent recidivism.
- Guarantee that prison staff who support care work are properly trained and that their work is regulated, recognised, compensated and balanced with administrative or security functions that correspond to them.
- Adopt policies and programmes aimed at caring for the caregiver and training strategies for reconciling care with relaxation activities, meditation and exchange with other caregivers.⁹⁵

⁹² Supra note 29. Report IACHR Women Deprived of Liberty. para. 310.

⁹³ La Regla Nelson Mandela 19.3 establece que “En circunstancias excepcionales, cuando el recluso salga del establecimiento penitenciario para fines autorizados, se le permitirá que use sus propias prendas o algún otro vestido que no llame la atención.”

⁹⁴ Organización Mundial del Trabajo (OIT), (2011), El trabajo desde las cárceles y la inserción laboral de las personas liberadas del sistema penitenciario, situación legal y reglamentaria, pp. 105, 106, disponible en: [link](#)

⁹⁵ La Alcaldía de Bogotá, Colombia implementó un programa llamado espacios de respiro con el fin de ofrecer a las mujeres cuidadoras una alternativa para su autocuidado, El Sistema de Cuidado para las mujeres llega al corazón de Bogotá, 2022, [link](#)

V. DEPRIVATION OF LIBERTY AND ITS IMPACT ON EXTERNAL CARE WORK

Detention has numerous negative effects such as: the overload of care tasks, their abandonment or delegation to other people⁹⁶ and the deepening of economic poverty. In 2023, the International Network of Women Relatives of Persons Deprived of Liberty (RIMUF)⁹⁷ went before the IACHR and described the additional burdens imposed by the deprivation of liberty, requesting recognition as a group in a particularly vulnerable situation.⁹⁸ Some RIMUF members indicated that in certain contexts women must care for their imprisoned relatives due to the inability of the State to provide services and basic elements such as food, health, clothing, medicines.⁹⁹ This situation worsens in contexts where detainees must pay rent for space within the jail or prison or where basic necessities are set at exorbitant prices.¹⁰⁰ In its proposal of principles and good practices on the protection of female relatives of persons deprived of liberty, RIMUF notes that detention increases care work and imposes disproportionate costs, especially on women who visit, deliver groceries and advocate for the well-being of their detained family member.¹⁰¹

In light of the abovementioned, IMPACTUM considers that States have the duty to:

- Recognise female relatives of persons deprived of liberty as a group in a particular vulnerable situation.
- Prioritise the relatives of people deprived of their liberty in policies, programmes and care plans, so that they can reduce or mitigate the economic impacts derived from detention. To achieve this, care systems must implement actions that reduce the time dedicated to care work, as well as provide for compensation and access to other activities.

⁹⁶ CICR, 2019, Informe Mujeres y prisión en Colombia: desafíos para la política criminal desde un enfoque de género, p. 104, [link](#)

⁹⁷ RIMUF es una red que comprende diversas asociaciones y organizaciones de mujeres familiares de personas privadas de la libertad en países como Argentina, Brasil, Colombia, Costa Rica, El Salvador, España, México y Ecuador.

⁹⁸ CIDH, audiencia 9 sobre impacto de las mujeres familiares de personas privadas de la libertad en las Américas, 12 de julio de 2023, periodo 187 de sesiones, [link](#) ver también RIMUF, informe el impacto de la cárcel en las mujeres familiares y las afectaciones a sus derechos humanos, [link](#)

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ RIMUF, principios y buenas prácticas sobre la protección de los derechos de las mujeres familiares de personas privadas de la libertad (Principios de Bogotá), p. 1, [link](#)

- Prevent the penitentiary system from outsourcing and imposing burdens on the families of people deprived of liberty by not providing them with goods and services or requiring high costs for their access. To this end, it is necessary to identify, prevent and eradicate usury and corruption practices in internal markets or those surrounding penitentiary centres.
- Recognise the unpaid care tasks performed by women who are relatives of persons deprived of liberty as productive work.
- Ensure the maintenance of family ties and provide families with information on the situation of their relatives deprived of their liberty.¹⁰²
- Integrate the valuation of care work into the economic reparation to which women who are victims of unlawful harm during their detention are entitled. In this regard, a good practice of the Council of State of Colombia should be noted, whereby it considered the domestic and care work of the parents of a woman who was unjustly deprived of her liberty as productive work. The Court found that when there is no evidence that the person receives remuneration for such activities (as was the case in this situation) it can be presumed that such activities are equivalent to the prevailing statutory minimum monthly wage.¹⁰³
- Incorporate care work into official survey systems and document care inside places of detention.
- Record (in individual files) any obligations related to the care of another person that the prisoner had before being arrested and provide institutional support when there are no other persons who can fulfil the care obligations.¹⁰⁴

¹⁰² Id. p. 11.

¹⁰³ Consejo de Estado de Colombia, Consejo de Estado Sala de lo Contencioso Administrativo Sección Tercera Subsección C, Consejero ponente: ENRIQUE GIL BOTERO, Bogotá, D.C., diez (10) de diciembre de dos mil catorce (2014) Radicación número: 05001-23-31-000-2004-04210-01(40060).

¹⁰⁴ UNODC, 2022, Incorporación de las Reglas Nelson Mandela en la legislación penitenciaria nacional, Ley Modelo sobre el Sistema Penitenciario con comentarios, artículos 4.b.ix, y 4.c, [link](#)

VI. NON-PUNITIVE MEASURES TO ENSURE CARE FROM A HUMAN RIGHTS PERSPECTIVE

Some States¹⁰⁵ may use criminal law against those who do not comply with their alimony obligations in favour of dependent family members. Although this measure has a legitimate purpose of protecting those who require care, support and maintenance, it is highly harmful since, in addition to punishing the non-compliant person, it does not improve the situation of the effected people and can impose additional burdens on other persons obliged to meet the needs of the detained person. Additionally, the International Network of Women Relatives of Persons Deprived of their Liberty (RIMUF) emphasises in its report on ‘the impact of prison on women family members and the effects on their human rights’ that:

“The detention of a man reinforces the exclusive and naturalised role of women with respect to care tasks, especially of children, which is assumed by partners, mothers, grandmothers, aunts and sisters.”¹⁰⁶

Although some of the criminal legislation cited provides for the absence of responsibility of the person who does not have the financial means to provide food assistance, in general these regulations do not promote other types of care beyond providing money to the family. In this sense, based on the best interests of the child, the State should adopt policies and programmes that constitute systems and networks of support and care, improve maternal and paternal leaves to guarantee the strengthening of ties and relationships between parents and their sons and daughters and provide for progressive educational and cultural change that promotes awareness among men and women regarding the care of their children and other dependents.

Based on the above, IMPACTUM believes that under the principles of *ultima ratio*, exceptionality and fragmentation of criminal law, States should:

- Adopt policies and programmes that contribute to comprehensive care for children, such as the legal enshrinement of the right to paid paternal and maternal leave in a similar period for men and women. This could help both parents create and strengthen

¹⁰⁵ Código Penal de Perú, artículo 128, exposición a peligro de persona dependiente; Código Penal de El Salvador, artículo 201, incumplimiento de los deberes de asistencia económica; Código Penal de Guatemala, artículo 242, negación de asistencia económica; Código Penal de Nicaragua, artículo 217, incumplimiento de los deberes alimentarios. A manera de ejemplo, el Código Penal colombiano (Ley 599 de 2000) en su artículo 233 establece el delito de inasistencia alimentaria y lo define como: “El que se sustraiga sin justa causa a la prestación de alimentos legalmente debidos a sus ascendientes, descendientes, adoptante, adoptivo, cónyuge o compañero o compañera permanente, incurrirá en prisión de dieciséis (16) a cincuenta y cuatro (54) meses y multa de trece punto treinta y tres (13.33) a treinta (30) salarios mínimos legales mensuales vigentes.

¹⁰⁶ RIMUF, informe el impacto de la cárcel en las mujeres familiares y las afectaciones a sus derechos humanos, p.16, [link](#)

emotional ties with newborn or adopted children. Similarly, these types of provisions may mitigate labour discrimination against women due to possible pregnancies, since parents would also have the right to leave work to accompany and attend to the needs of their children after birth or adoption.

- Adopt measures that contribute to the change of cultural imaginaries to promote the recognition and appreciation of care, the redistribution of care and the involvement and commitment of men and fathers deprived of liberty. These initiatives should be replicated in the area of deprivation of liberty through incentives such as prison benefits or sentence reduction.¹⁰⁷
- Create and sustain public nurseries or nursery schools where food, education and recreation are provided free of charge to children after the expiration of maternal and paternal leave. These spaces should also have adequate infrastructure and properly paid staff specialised in nutrition, psychology and pedagogy.

¹⁰⁷ Como una buena práctica se resalta las escuelas de cuidado para hombres en ciudades como Bogotá, Colombia. Ver Secretaria de Cultura, Recreación y Deporte Alcaldía Mayor de Bogotá, 2022, “Escuela de Hombres al Cuidado”: una apuesta para la eliminación de las violencias, [link](#) Daga, Giuliana, 2022, ¿Qué son los sistemas de cuidado en la región y cómo pensarlos para la primera infancia?, [link](#)

VII. SPECIAL SUPPORTS AND THE ADOPTION OF URGENT PROTECTION MEASURES IN FAVOUR OF PERSONS THAT REQUIRE CARE

Detention generates impacts on people other than the offender. In this sense, the authorities must adopt appropriate measures to mitigate the significance of the penalty, protect the best interests of the child, avoid their distancing or lack of communication with their caregivers, prevent risks to their physical, psychological and emotional integrity and situations such as abandonment, school dropouts, and drug use.¹⁰⁸ Likewise, in precarious conditions of detention, protective measures must be adopted that safeguard the life, integrity and health of the entire detained population and especially those who are in a more vulnerable situation such as people with disabilities, chronic diseases, degenerative diseases, the terminally ill, pregnant women, women in a state of lactation and childbirth, as well as children who live with their caregivers.

In this sense, IMPACTUM highlights the position of the State as guarantor of fundamental rights and the important role of the precautionary measures of the IACHR¹⁰⁹ and provisional measures of the IACtHR¹¹⁰ to protect the right to care of people deprived of their liberty and other people effected by their detention who are in a situation of extreme gravity and urgency, when domestic protection mechanisms are not sufficient or adequate.¹¹¹

¹⁰⁸ Supra note 26, CICR, informe mujeres y cárceles en Colombia, pp. 100-106.

¹⁰⁹ Reglamento de la CIDH, aprobado por la Comisión en su 137º período ordinario de sesiones, celebrado del 28 de octubre al 13 de noviembre de 2009; y modificado el 2 de septiembre de 2011 y en su 147º período ordinario de sesiones, celebrado del 8 al 22 de marzo de 2013, para su entrada en vigor el 1º de agosto de 2013, artículo 25.

¹¹⁰ CADH, artículo 63(2) y Reglamento de la CIDH, artículo 76(2).

¹¹¹ Reflexiones sobre las medidas provisionales y cautelares, ver; Burbano Herrera, Clara y Haeck, Yves, The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights, Toward a Tangible Impact, en von Bogdandy, y otros (editores), *Almost magical transformations on the ground: How the Inter-American Human Rights System and Jus Constitutionale Commune Impact Latin-America*, Oxford University Press, Oxford, 2023 (proximamente); Burbano Herrera, Clara, y Haeck, Yves *Medidas Provisionales de la Corte Interamericana: algunas reflexiones, Aportes DPLF, Revista de la Fundación para el Debido Proceso*, p 31-33, 2021; Burbano Herrera, Clara, *Medidas Provisionales en Situaciones de Vida o Muerte*, México, Porrúa, 2012; Burbano Herrera, Clara y Haeck, Yves, “The Innovative Potential of Provisional Measures Resolutions for Detainee Rights in Latin America through Dialogue between the Inter-American Court of Human Rights and Other Courts”, en Eva Rieter y Karin Zwaan (eds), *Urgency and Human Rights: Perspectives on the Protective Potential of Interim Measures in Human Rights Cases and the Legitimacy of Their Use*, The Hague, TMC Asser Press & Springer, 2020, 223-244; Burbano Herrera, Clara y Haeck, Yves, Chapter 26, “Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems”, *NQHR 2010*, 332-360, republished in Fausto Pocar (ed.), *International Human Rights Institutions and Enforcement*, Cheltenham, Edward Elgar

Given the extremely serious and urgent situation that may rise by virtue of not incorporating the perspective of care in relation to the deprivation of liberty, the Advisory Opinion recommends States to:

- Make visible the role played by precautionary measures issued by the IACHR and the provisional measures by the IACtHR in protecting care from the impacts of detention and the need to prevent irreparable damage.
- Consider the vulnerable situation of people who go to the IACHR or the IACtHR and assess the impacts of detention on their right to care and other related human rights.
- Remind States of their obligation to implement the protection measures granted by the IACHR and the IACtHR in accordance with their obligations to respect the object and purpose of the ACHR and comply in good faith with their international commitments.
- Urge States to develop communication and dissemination campaigns on the different protection procedures and mechanisms to protect people deprived of liberty and prevent additional harm and suffering.

Publishing, 2019, 2 volumes (Series 'Human Rights Law' – Series Editor: Sarah Joseph); Burbano Herrera, Clara y Haeck, Yves, "Provisional Measures – Inter-American Court of Human Rights", in *Max Planck Encyclopedia of Procedural Law*, Hélène Ruiz Fabri (ed.), Oxford, Oxford University Press, 2019; Burbano Herrera, Clara y Haeck, Yves, "The Impact of Precautionary Measures on Persons Deprived of Liberty in the Americas", in Par Engström (ed), *The Inter-American Human Rights System: Impact Beyond Compliance*, London, Palgrave Macmillan, 2018, 89-113; C Burbano Herrera, F Viljoen, 'Danger and Fear in Prison: Protecting the Most Persons Vulnerable by Regional Human Rights Bodies through Interim Measures', (2017) *Netherlands Quarterly of Human Rights*, 163- 193, y *Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights*", Adopted in May 2021.

CONCLUSION

IMPACTUM values and appreciates the openness of the IACtHR to receiving reflections and proposals of civil society organizations, academia, national, regional and international institutions and States. IMPACTUM recognises that the interpretation of the IACtHR in its Advisory Opinion OC-29 of 2022 has made it possible to make the impacts of detention on care work visible and to delimit the obligations of States related to caregivers deprived of liberty. However, in light of recent developments on the right to care, IMPACTUM highlights that this forthcoming Advisory Opinion presents an opportunity to complement the protection in favour of those in charge of care, as well as their beneficiaries.

Finally, IMPACTUM calls for the analysis of care and its interrelation with other rights to include the situation of people deprived of liberty and to consider the effects of detention in light of the needs of people who require special support or care. In this way, IMPACTUM highlights 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.¹¹²

Ghent, 27 of October 2023



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¹¹² UN, Sustainable Development Goals, Goal 5: Achieve gender equality and empower all women and girls, [link](#); UN Sustainable Development Group, Leave No One Behind, [Link](#)