

case and the nature of the allegations made.¹⁰⁹ On the other hand, it is also crucial for the Court to examine, in particular, GBV cases in a consistent and coherent manner. In section 2, this paper identified that the Court has adopted either the systemic approach or specific approach in domestic violence cases, with a recent development that combines the two. However, concerning other forms of GBV, there are so far only two cases – *B.S. v Spain*¹¹⁰ and *Sabalić v Croatia*¹¹¹ – in which the Court examined the complaints under Article 14.¹¹² Moreover, in light of the solid jurisprudence on domestic violence, Section 3 further explored the possibility for the Court to have examined the *Tërshana* case under Article 14 by adopting the systemic and specific approaches or resorting to the positive obligation to conduct an effective investigation arising from Article 14.

As the first case regarding an acid attack against women brought before the Court, *Tërshana v Albania* could have been a golden opportunity for the Court to establish that another form of GBV – in addition to domestic violence – constitutes gender discrimination. This paper hopes to provide insights for the Court so it can provide a more comprehensive protection of women’s rights by recognizing the discriminatory nature of not only ‘violence at home’ but also ‘violence beyond home’.

109 Mačkić, *Proving Discriminatory Violence*, supra fn 49, p 39.

110 *B.S. v Spain*, Judgment, App no 47159/08, 24 July 2012.

111 ECtHR, *Sabalić v Croatia*, Judgment, App no 50231/13, 14 January 2021.

112 The figure was taken from the Violence Against Women factsheet produced by the Press Service of the Court, updated in November 2022.

3. A DISPROPORTIONATE IMPACT REQUIRES A DIFFERENTIATED APPROACH: AN ASSESSMENT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM’S EFFORT TO PROMOTE EQUALITY AND NON-DISCRIMINATION OF LGBTI+ PERSONS IN THE PRISONS OF THE AMERICAS

Anderson Javiel Dirocie De León¹¹³

A. INTRODUCTION

On 25 November 2019, the Inter-American Commission on Human Rights (IACHR/the Commission) submitted an advisory opinion request to the Inter-American Court of Human Rights (IACtHR/the Court) on ‘differentiated approaches to persons deprived of liberty’. With its request, the IACHR sought an interpretation of ‘the differentiated obligations that the principle of equality and non-discrimination imposes on the States in the context of deprivation of liberty, in order to address the situation of real inequality of groups that are in a special situation of

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risk'.¹¹⁴ In particular, the Commission inquired about women who are pregnant, or postpartum and breastfeeding, LGBT persons, indigenous people, older persons and children living in prison with their mothers.

Although the request included specific questions for each of the different groups mentioned above, in essence, the IACHR formulated two general questions. First, whether it is possible to justify under Articles 24 and 1(1) of the American Convention on Human Rights (ACHR/the Convention) the need to adopt differentiated approaches or measures to guarantee that the specific circumstances of these groups do not affect the equality of their conditions vis-à-vis the other persons deprived of liberty. Second, it queried the specific implications of the content of those provisions for the scope of the correlative obligations of the state in this matter.

In this context, this paper presents an overview of the advisory opinion request, particularly in relation to LGBT persons. It analyses the general questions raised by the Commission and the plausible answers in the Inter-American Human Rights System (IAHRS). In particular, it elaborates on the specific questions concerning LGBT persons in prison. The paper addresses the potential of the IACtHR to develop relevant standards to address the disproportionate impact on LGBTI+ persons of the dire imprisonment conditions in the region and the lack of differentiated protection. It also shows the shortcomings of the request in terms of the lack of an intersectional approach as it engages with each of the groups. Lastly, the paper focuses on the issue of the effectiveness of a potential decision from the Court by discussing some of the challenges that could affect its impact on the situation of LGBTI+ persons in prisons in the Americas.

B. THE ADVISORY OPINION REQUEST IN CONTEXT: INTERNATIONAL STANDARDS ON DEPRIVATION OF LIBERTY AND THE SITUATION OF LGBTI+ PERSONS IN THE PRISONS OF THE AMERICAS

Understanding the importance of the IACHR's advisory opinion request and the potential decision from the IACtHR requires discussing the context in which such a request takes place. To address this context and with it the practical relevance of the request, this section contrasts the existing international standards concerning deprivation of liberty in international law, with special emphasis on those deriving from the IAHRS, and the actual situation of the prisons in the American continent. Special attention is given to LGBTI+ persons and the disproportionate impact they face when deprived of their liberty in these prisons.

¹¹⁴ Inter-American Commission on Human Rights (IACHR), Request for an Advisory Opinion Submitted to the Inter-American Court of Human Rights on Differentiated Approaches to Persons Deprived of Liberty, 2019, §2.

1. GUIDING PRINCIPLES ON DEPRIVATION OF LIBERTY

The ACHR expressly refers to the essential aim pursued by the imposition of sanctions restricting the right to personal liberty. Article 5(6) establishes that 'punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners'.¹¹⁵ This aim is consistent with the purpose attributed to the deprivation of liberty in other international human rights instruments. For instance, the International Covenant on Civil and Political Rights provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.¹¹⁶ In the same vein, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provide that the purposes of imprisonment and similar measures 'can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life'.¹¹⁷

The IACHR has referred to Article 5(6) ACHR as a provision with 'its own scope and content, whose effective enforcement implies that the States must adopt all measures necessary to achieve these purposes'.¹¹⁸ In addition, it has identified 'the reintegration into society and family life, as well as the protection of both the victims and society' as essential aims of punishments consisting of deprivation of liberty.¹¹⁹ It is this understanding of the essential purpose of the deprivation of liberty that has given rise to the development of three principles within the IAHRS for the protection of human rights in the context of prisons: (i) the principle of humane treatment; (ii) the principle of the state's special position of guarantor; and (iii) the principle of compatibility between respect for the fundamental rights of persons deprived of liberty and the attainment of the aims of citizen security.¹²⁰

The principle of humane treatment has been recognized in several international instruments.¹²¹ In the Inter-American context, it finds its basis in Article 5(2) ACHR, which, in addition to prohibiting the subjection of persons to torture, cruel, inhuman, or degrading punishment or treatment, imposes the positive obligation to treat all persons deprived of liberty with due respect for their inherent dignity. For its part, the IACtHR has recognized that, by virtue of the aforementioned article, persons deprived of liberty have the right to 'live in prison conditions that are

¹¹⁵ Art 5(6), American Convention on Human Rights (ACHR), 1961.

¹¹⁶ Art 10(3) International Covenant on Civil and Political Rights, 1976.

¹¹⁷ Rule 4, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 2015.

¹¹⁸ IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, 2011, §605.

¹¹⁹ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 2008, Preamble.

¹²⁰ IACHR, Report on the Use of Pretrial Detention in the Americas, 2013, §17.

¹²¹ UNGA Res 43/1973, 9 December 1988, Principle 1; UNGA Res 45/111, 14 December 1990; IACHR, Principles and Best Practices, supra fn 7, Preamble.

compatible with [their] personal dignity'.¹²² In the same vein, the Court has indicated that in accordance with Article 27(2) of the Convention this right cannot be suspended under any circumstances. In other words, this right is part of the non-derogable core and states cannot allege economic hardship, war, public danger or other public threats 'to justify imprisonment conditions that do not respect the inherent dignity of human beings'.¹²³

In relation to the principle of the state's special position of guarantor, the IACtHR's jurisprudence has been consistent, holding that '[t]he State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody'.¹²⁴ This special subjection between persons deprived of liberty and the state implies enhanced responsibilities to guarantee, in accordance with the principle of humane treatment, the conditions necessary to develop a dignified life and to effectively exercise those rights that cannot be derogated or whose restriction is not a natural implication of the deprivation of liberty permissible under international law. In that sense, the Court has indicated that 'otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable'.¹²⁵

The third guiding principle concerns the compatibility between respect for the fundamental rights of persons deprived of liberty and the attainment of the aims of public safety. In short, this principle means that respect for and protection of the human rights of persons deprived of liberty 'is not at odds with the aims of citizen security, but is instead an essential element for the realization thereof'.¹²⁶ In the same sense, the Court has recognized that deprivation of liberty often brings, as an unavoidable consequence, the impairment of the enjoyment of other human rights in addition to the right to personal liberty, such as, for example, the restriction of the rights to privacy and to the privacy of family life. Nonetheless, it has emphasized that such restrictions must be strictly limited 'since, under international law, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare'.¹²⁷

Considering these three principles, read together with the Inter-American *corpus juris*, it can be affirmed that a positive obligation is clearly imposed on states to take appropriate measures to ensure that the conditions of detention observe due respect

122 IACtHR, *Raxcacó Reyes v Guatemala*, Judgment (Merits, Reparations and Costs), 15 September 2005, §95; See also IACtHR, *Bulacio v Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, §126.

123 IACtHR, *Montero-Aranguren et al (Detention Center of Catia) v Venezuela*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 5 July 2006, §85.

124 IACtHR, *Juvenile Reeducation Institute' v Paraguay*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 September 2004, §152; See also IACtHR, *Caesar v Trinidad and Tobago*, Judgment (Merits, Reparations and Costs), 11 March 2005, §97; IACtHR, *Tibi v Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, §129.

125 *Juvenile Reeducation Institute' judgment*, supra fn 12, §153.

126 IACHR, Report on the Use of Pretrial Detention in the Americas, supra fn 8, §17.

127 *Juvenile Reeducation Institute' judgment*, supra fn 12, §154.

for the dignity of the person deprived of liberty. All this in view of the special relationship of subjection between the state and that person. Likewise, the deprivation of liberty cannot restrict rights beyond those strictly affected by the natural implication of the imposition of the sentence, which, as has been discussed, has as its essential purpose the reform and social readaptation of the convicted persons. On the contrary, the situation of special vulnerability of the person deprived of liberty, due to the intensity in which the state can regulate their rights and obligations, requires the latter to assume enhanced responsibilities, as well as special measures with a view to ensuring respect and protection of the effective exercise of human rights.

2. THE SITUATION IN THE PRISONS OF THE AMERICAN CONTINENT AND ITS DISPROPORTIONATE IMPACT ON LGBTI+ PERSONS

In light of the above standards, it is now appropriate to address succinctly the main challenges in respecting and guaranteeing the human rights of persons deprived of liberty in the real context of prisons in the Americas and, more broadly, its impact on LGBTI+ persons. Regarding the actual context of prisons, the IACHR itself has identified the following problems as the most serious and widespread in the region:

- (a) Overcrowding and overpopulation
- (b) The deficient conditions of confinement – both physical conditions and the lack of basic services
- (c) The high incidence of prison violence and the lack of effective control by the authorities
- (d) The use of torture in the context of criminal investigations
- (e) The excessive use of force by those in charge of security at prisons
- (f) The excessive use of preventive detention, which has direct repercussions on overpopulation of the prisons
- (g) The lack of effective means for protecting vulnerable groups
- (h) The lack of labour and educational programmes, and the lack of transparency in the mechanisms of access to these programmes
- (i) Corruption and the lack of transparency in prison management¹²⁸

Similarly, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders has identified the following five essential issues of concern regarding prison systems in Latin America:

- (a) Lack of integral policies (criminological, of human rights, penitentiary, of rehabilitation, of gender, of criminal justice)
- (b) Overcrowding, originated by budget reductions and lack of adequate infrastructure

128 IACHR, Report on the Human Rights of Persons Deprived of Liberty, supra fn 6, §2.

- (c) Poor quality of life in detention centers
- (d) Insufficient penitentiary personnel, without adequate training
- (e) Lack of labour and education programmes for imprisoned persons.¹²⁹

In this context of structural deficiencies in the prison systems of the American region, LGBTI+ persons deprived of liberty comprise a particularly vulnerable group in the criminal justice system.¹³⁰ Incarcerated LGBTI+ individuals are particularly vulnerable, not only suffering the consequences of the prejudicial views existing in their societies more broadly, but also being subjected to human rights violations in the penitentiary centres, both by officers and other inmates, which are enabled due to their deprivation of liberty.¹³¹ The most common forms of violence stemming from identifying or being perceived as LGBTI+ are based on precepts regarding non-conformity with the heteronormative system: women who are perceived as 'masculine' are subjected to harassment, physical abuse and 'forced feminization', while gay men or trans women are constantly subjected to sexual servitude, which amounts to a form of torture or sexual slavery.¹³² In the case of trans persons, who experience a higher incidence of violence and discrimination, the situation becomes particularly harmful when they are placed in centres that do not correspond to the gender with which they identify. This action not only constitutes a clear disrespect toward their identity, but also puts them in a situation of greater risk depending on their case.¹³³

Generally, prison systems are governed by the principle of separation according to the sex assigned to the person at birth, which in practice constitutes a true binary cisgender system. Consequently, intersex, trans and non-binary people face challenges when trying to be placed in spaces that respect their gender diversity. Normally these people are taken to sex-determined centres based on the genitalia they possess at the time of their arrest, without taking into consideration their self-perceived gender or their gender expression. The discrepancy between the sex-determined placement and the actual gender identity and expression of the person exposes them to a greater wave of verbal, physical and sexual aggression as part of the stigmatization suffered by LGBTI+ people in general.¹³⁴

¹²⁹ E. Carranza (ed), *Cárcel y Justicia Penal en América Latina y el Caribe*, Siglo XXI, 2009, p 29 (my translation).

¹³⁰ United Nations Office on Drugs and Crime, *Handbook on Prisoners With Special Needs*, 2009, p 105, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf (last accessed 4 February 2023).

¹³¹ Association for the Prevention of Torture (APT), *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019, pp 40–41, https://www.apr.ch/sites/default/files/publications/apt_20181204_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf (last accessed 4 February 2023).

¹³² IACHR, *Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons in the Americas*, 2015, §148.

¹³³ Consejo Latinoamericano de Estudiosos del Derecho Internacional y Comparado, Capítulo República Dominicana (COLADIC-RD), *Escrito de observaciones relativo a la solicitud de opinión consultiva sobre enfoques diferenciados en materia de personas privadas de libertad presentada por la Comisión Interamericana de Derechos Humanos el 25 de Noviembre de 2019*, 25 November 2019, §52.

¹³⁴ *Ibid.*, §53.

Similarly, due to fear of harassment, discrimination and isolation, LGBTI+ people are forced to hide their sexual orientation or gender identity (when possible), which deprives them of living and expressing their identity as they see fit; this, in turn, can have a negative impact on their future life. In this sense, the IACtHR has indicated that whoever decides to assume their self-perceived gender identity is the holder of legally protected interests connected to the right to privacy, free development of personality and sexual self-determination in accordance with their gender self-identity.¹³⁵ Consequently, under no circumstances can they be subjected to restrictions simply as a result of fear, stereotypes or social and moral prejudice lacking reasonable grounds.¹³⁶ The fact that a person cannot express their gender identity or sexual orientation without coercion or unjustified controls and without limits, other than those imposed by the rights of others and the legal order, implies a clear violation of their life project, which is a key element of the right to free development of personality and, therefore, of the right to privacy.¹³⁷ Additionally, such interference would violate the right to freedom of expression as it would limit the expression of an essential element of the person's identity.¹³⁸

Due to the multiple problems generated by the heteronormative, cisgender and binary vision prevailing in prisons, some centres have resorted to isolation and segregation of LGBTI+ persons. Indeed, prison authorities resort to individual cells for the LGBTI+ individual's alleged protection, sometimes for weeks, months or even years. This practice of solitary confinement can cause severe mental and physical pain or suffering to the extent that it has been considered that it can amount to cruel, inhuman, or degrading treatment or punishment and even torture.¹³⁹ In some cases, it can also be the result of informed discussions between prison authorities and inmates who prefer to be in isolation rather than exposed to permanent abuses.¹⁴⁰ Such facts show that traditional prisons certainly do not represent a safe place for LGBTI+ persons and the few protection measures implemented in these cases can be detrimental to the rights of this group.

¹³⁵ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17, 24 November 2017, §95.

¹³⁶ *Ibid.*

¹³⁷ See IACtHR, *Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2012, §143.

¹³⁸ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §96; See also IACtHR, *López Álvarez v Honduras*, Judgment (Merits, Reparations and Costs), 1 February 2006, §§164, 169.

¹³⁹ Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc A/66/268, 5 August 2011.

¹⁴⁰ APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty*, supra fn 19, p 74.

C. DIFFERENTIATED APPROACHES TO LGBTI+ PERSONS DEPRIVED OF LIBERTY

As indicated in the introduction above, the IACHR's request raises two general questions. First, whether it is possible to justify under Articles 1(1) and 24 ACHR, the need for states to adopt differentiated measures or approaches to ensure that equality is observed in the conditions of vulnerable groups in prisons vis-à-vis other inmates. In case of an affirmative answer to this question, the Commission queries the scope of these articles with respect to the obligations that states must have in providing differentiated treatment to these groups in order to guarantee the protection of the rights of these persons. The following subsections address these two issues with the aim of providing an overview of how the Inter-American framework could respond to the situation of inequality in prisons and its differentiated impact on LGBTI+ persons. First to be discussed are the state obligations deriving from the principle of equality in the context of prisons and, second, the state's obligations concerning differentiated treatment or special measures required to ensure equality of LGBTI+ persons deprived of liberty.

1. THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION AND ITS IMPLICATIONS FOR STATE OBLIGATIONS IN THE CONTEXT OF DEPRIVATION OF LIBERTY OF VULNERABLE GROUPS

To address the question on the possibility of justifying under Articles 1(1) and 24 the adoption of differentiated approaches in favour of vulnerable groups in prisons, we must study in a broad sense the principle of equality and non-discrimination and, more specifically, the provisions that enshrine it in the ACHR. The principle of equality and non-discrimination entails the recognition of an essential idea in the international protection of human rights: that all human beings are equal. The IACtHR has referred to this notion of equality, affirming that it 'springs directly from the oneness of the human family and is linked to the essential dignity of the individual'.¹⁴¹ The Court has also established that 'the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on this principle and permeates the entire legal system.'¹⁴²

The ACHR contains two specific provisions that give practical meaning to this principle. The first is Article 1, which enshrines the obligation to respect the rights in the Convention itself without discrimination of any kind. The second provision is Article 24 on equality before the law, which establishes that all persons are equal before the law and, consequently, are entitled, without discrimination, to equal protection. It can be noted that, according to the doctrine, we are faced with what has been called a subordinate clause with respect to Article 1, and an autonomous

¹⁴¹ IACtHR, *Proposed Amendments to the Naturalization Provision of The Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, §55.

¹⁴² IACtHR, *Atala Riffo and Daughters v Chile*, Judgment (Merits, Reparations and Costs), 24 February 2012, §79.

clause with respect to Article 24. The IACtHR has referred to the distinction between these two provisions and has explained:

The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee 'non-discrimination' in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to 'equal treatment before the law.' In other words, if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.¹⁴³

It should also be noted that the principle of equality is not limited to formal equality, which defines this principle as a neutral imposition of consistent treatment. On the contrary, in its substantive or material conception, this principle involves considering the actual impact of such treatment.¹⁴⁴ Consequently, the principle of equality may require states to treat certain persons differently in order to overcome historical patterns of disadvantage.¹⁴⁵ It is these two conceptions of the principle of equality that, in its negative formulation as non-discrimination, underpin both the prohibition of direct and indirect discrimination.

In this sense, the Court has previously referred to the fact that international human rights law not only prohibits deliberately discriminatory policies and practices, but also those with a discriminatory impact on certain categories of persons¹⁴⁶ and that, consequently, states must not only 'abstain from taking any action that is directly or indirectly addressed, in any way, at creating situations of discrimination *de jure* or *de facto*',¹⁴⁷ but also 'are obliged to "take positive steps to reverse or to change discriminatory situations that exist in their societies to the detriment of a specific group of people"'.¹⁴⁸

In effect, the jurisprudence of the Court acknowledges the specific situation of certain vulnerable groups and, consequently, the particular protection that the state must adopt in their favour. For instance, with regards to children, it has emphasized that not only do they have the same rights as all human beings (adults or otherwise), but they also have 'special rights derived from their condition, and

¹⁴³ IACtHR, *Apitz Barbera et al ('First Court of Administrative Disputes') v Venezuela*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 5 August 2008, §209.

¹⁴⁴ D. Moeckli, 'Equality and Non-Discrimination', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010, pp 191-192.

¹⁴⁵ *Ibid*, p 189.

¹⁴⁶ IACtHR, *Nadege Dorzema et al v Dominican Republic*, Judgment (Merits, Reparations and Costs), 24 October 2012, §234.

¹⁴⁷ *Ibid*, §236.

¹⁴⁸ *Ibid*.

these are accompanied by specific duties of the family, society, and the State'.¹⁴⁹ Similarly, based on the actual situation of foreigners subject to criminal proceedings, the Court has highlighted the importance of providing a translator to those who do not know the language in which the proceedings are conducted, as well as, in the cases of foreigners, the right to be informed in a timely manner that they can count on consular assistance.¹⁵⁰ In relation to indigenous peoples, the Court adopted a similar approach in determining that 'it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs'.¹⁵¹

With regards to women, the IACtHR has referred to the need to adopt positive measures to guarantee effective and equal access to justice in the case of rape as a manifestation of discrimination against women.¹⁵² In the particular context of prisons, the Court has indicated, for example, 'that female detainees must be supervised and checked by female officer and pregnant and nursing women must be offered special conditions during their detention'.¹⁵³ In the same sense, in an order for provisional measure, the Court has emphasized 'the State's duty to offer special attention to pregnant and nursing women during their detention. Moreover, it is the duty of the State to protect women against all forms of discrimination and violence, even more when they are held in custody of the State, which is why they must be separated from men and be supervised and checked by female officer'.¹⁵⁴

Another relevant example can be noted in the context of juvenile detention. In this connection, the Court has considered that, for example, in addition to the state's obligations deriving from the right to life of all persons, it finds an additional obligation in Article 19 ACHR: 'On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principles of the best interests of the child. On the other hand, to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty, as the child's detention or imprisonment does not deny the child his or her right to life or restrict that right'.¹⁵⁵

149 IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, 28 August 2002, §54.

150 IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/19, 1 October 1999, §120.

151 IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment (Merits, Reparations and Costs), 17 June 2005, §63.

152 IACtHR, *V.R.P. et al. v Nicaragua*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 8 March 2018, §293.

153 IACtHR, *Miguel Castro-Castro Prison v Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, §303.

154 IACtHR, *Matter of the Andean Region Penitentiary Center With Regard to Venezuela*, Precautionary Measures, Order, 6 September 2012, §14.

155 'Juvenile Reeducation Institute' judgment, *supra* fn 12, §160.

The above decisions of the Court show that pursuant to Articles 1 and 24 ACHR, differentiated approaches or special measures are not only permitted, but states have an obligation to adopt them in order to guarantee the equality of groups subjected to situations of structural inequality. In turn, this jurisprudence is consistent with state practices in the region. In this sense, Article 342 of the Code of Criminal Procedure of the Dominican Republic, as well as the Single Regulatory Decree of the Administrative Sector of the Interior of the Republic of Colombia, are two key examples to consider in this respect. For instance, Article 342 of the Dominican Code of Criminal Procedure adopts a differentiated approach regarding the special conditions for serving the sentence in favour of persons over 70 years of age, persons with a terminal illness or supervening dementia, pregnant or nursing mothers and persons addicted to drugs or alcohol. In the case of the Colombian Single Regulatory Decree, state authorities must adopt measures that recognize the particularities of the population that due to different grounds are in circumstances of vulnerability and required differentiated protection and affirmative-action policies.¹⁵⁶

In light of the above, in the framework of the IACHR's advisory opinion request, it will be possible for the Court to conclude, without any doubt, that in matters of deprivation of liberty and pursuant to the principle of equality and non-discrimination, special measures or differentiated approaches are valid, admissible and justifiable in accordance with the ACHR. In this sense, the following subsection discusses the scope and content of this obligation vis-à-vis LGBTI+ persons deprived of liberty.

2. EQUALITY AND NON-DISCRIMINATION OF LGBTI+ PERSONS IN THE PRISONS: STATE OBLIGATIONS AND SPECIAL MEASURES

LGBTI+ persons have historically been discriminated against and, as such, face disproportionate human rights violations in relation to other persons who do not belong to a vulnerable group, both inside and outside of prisons. Both the Court and the Commission have identified the special situation of vulnerability of this group given the frequent human rights violations they experience in American societies, and which are exacerbated in the context of prisons.¹⁵⁷ In these circumstances, principles such as non-discrimination, equality before the law and the right to humane treatment are of particular importance for LGBTI+ persons. Considering the principle of equality and non-discrimination, it is imperative for states to take positive action to guarantee their rights in accordance with the framework of equal treatment in the terms of the international *corpus juris*. In this sense, the IACtHR has indicated that 'States are obliged to adopt positive measures to reverse or to change discrimi-

156 Art 2.2.2.1.3.4, Presidencia de la República de Colombia, Decreto 1066 de 2015, 26 de mayo de 2015 (my translation).

157 See IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, *supra* fn 23; IACtHR, *Azul Rojas Marin v Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 12 March 2020; IACHR, *Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons*, *supra* fn 20, §32; IACtHR, *Vicky Hernández et al v Honduras*, Judgment (Merits, Reparations and Costs), 26 March 2021.

natory situations existing within their society that prejudice a specific group of persons. This entails the special obligation of protection that the State must exercise with regard to the actions and practices of third parties, who with its acquiescence or tolerance, create, maintain or facilitate discriminatory situations.¹⁵⁸

It is in this context that the Commission, in its request for an advisory opinion, puts forward the following questions to the Court regarding the obligations of states to ensure adequate conditions of detention for LGBTI+ persons:

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 LGBT 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 regard to the particular medical needs of transgender persons deprived of liberty and, in particular, if applicable, with regard 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 regard to recording different types of violence against LGBT persons deprived of liberty?¹⁵⁹

This paper does not propose to supplant the Court in its exercise of providing a definitive answer to these questions. On the contrary, the objective of this subsection is to provide a glimpse of some of the possible answers to these questions based on the sources of law relevant to the Court. Thus, in order to address the differentiated approaches imposed by the principle of equality in the case of LGBTI+ persons deprived of liberty, a series of specific obligations and special measures that states must observe to guarantee the rights of such persons in prisons are identified.

a. Gender Identity, Gender Expression and Intimate Visits

With respect to the questions that are particularly related to gender identity, gender expression and intimate visits, three aspects of special importance are identified regarding the state's obligations towards LGBTI+ persons deprived of liberty. First, states must adopt differentiated approaches centred on the principle of self-identification and respect for gender identity and expression. It is the obligation of states to provide adequate medical care to LGBTI+ persons, including for the specific needs of transgender persons. Similarly, states must guarantee intimate visits in conditions that respect personal and family privacy, sexual and reproductive rights, as well as the free development of personality.

With respect to the principle of self-identification, the IACtHR has established that sexual orientation, gender identity and gender expression are protected cate-

¹⁵⁸ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §65.

¹⁵⁹ IACHR, Request for an Advisory Opinion, supra fn 2, §2.

gories under Article 1(1) ACHR.¹⁶⁰ In this regard, it has reiterated on several occasions that discrimination based on any of these protected categories constitutes a violation of the Convention.¹⁶¹ In the case of persons deprived of liberty, the question arises as to how the gender identity with which the person identifies should be considered when determining the penitentiary unit to which they should be admitted. The answer is in the principle of self-identification as assumed by both the IACHR and the IACtHR.¹⁶² In other words, in order to respect a person's gender identity, it is essential to consider how that person self-identifies.

In this vein, the Court has indicated that gender identity is linked to freedom and the possibility of every human being to self-determine and freely choose what gives meaning to his or her existence.¹⁶³ This means that the possibility to express someone's gender must also be understood as a protected component of a person's identity. Therefore, non-recognition of gender identity may constitute censorship of those gender expressions that do not correspond to cis and heteronormative standards.¹⁶⁴ Consequently, the principle of self-determination of the individual should serve as the basis for determining which facilities they should be placed in. In practical terms, the observance of this principle implies that the gender identity of persons held in detention centres should be recognized and that this recognition should not entail abusive and pathologizing requirements such as surgical operations.¹⁶⁵ By the same token, the failure to consider the gender identity of a person when placing them in a penitentiary centre amounts to discriminatory treatment, which in turn constitutes a violation of the ACHR.¹⁶⁶

It should also be noted that in states that do not allow changes to gender markers in official documents, it is even more difficult to place the person in a centre corresponding to the gender with which they identify. In this situation, states are obliged to respect and guarantee to all persons the possibility of registering or adapting the components of name, gender and image in their official identity documents. This would make it easier for people to be recognized in detention centres according to their gender identity. The Court itself has previously referred to the right of every person to define their gender identity and to have it recorded in official documents.¹⁶⁷

¹⁶⁰ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §68.

¹⁶¹ *Atala Riffo and Daughters* judgment, supra fn 30, §105; IACtHR, *Flor Freire v Ecuador*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 31 August 2016, §118.

¹⁶² IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §93; La Comisión Interamericana de Derechos Humanos (CIDH), *Violencia contra personas LGBTI*, 2015, <http://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf> (last accessed 4 February 2023); IACHR, Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons, supra fn 20, §11.

¹⁶³ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §93.

¹⁶⁴ *Ibid*, §97.

¹⁶⁵ United Nations, *Living Free & Equal: What States are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People*, 2016, p 44, <https://www.ohchr.org/sites/default/files/Documents/Publications/LivingFreeAndEqual.pdf> (last accessed 4 February 2023).

¹⁶⁶ COLADIC-RD, Escrito de observaciones, supra fn 21, §65.

¹⁶⁷ IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §115.

Concerning the state's obligation to provide adequate medical care for LGBTI+ persons, this is closely related to the right to humane treatment under Article 5 ACHR.¹⁶⁸ Article 5 includes within its broad spectrum the sphere of the right to health¹⁶⁹ as it guarantees the right to physical, mental and moral integrity which in turn implies guaranteeing access to adequate medical care.¹⁷⁰ Consequently, states must protect the physical, mental and moral integrity of persons deprived of liberty by guaranteeing them a regular medical checkup.¹⁷¹ Similarly, ensuring effective medical assistance for persons deprived of liberty safeguards the right to health, contained within the scope of the right to life and the right to humane treatment enshrined in the Convention.

Other instruments of the IAHRs expressly recognize the right to health. For instance, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador) in its Article 10 or the American Declaration of Human Rights in its Article XI. Precisely, in the Protocol of San Salvador, as in the ACHR, there are provisions indicating that the rights contained therein, such as the right to health, must be guaranteed without any discrimination whatsoever.¹⁷² Therefore, in the case of LGBTI+ persons deprived of liberty, their right to health must be guaranteed and free of charge, since the provision of free medical services to persons deprived of liberty is the responsibility of the state.¹⁷³ Consequently, every prison must have a healthcare service that can evaluate and protect the physical and mental health of inmates, particularly those who have special health needs, as indeed many trans persons may have.¹⁷⁴

In the case of transgender persons deprived of liberty, medical attention has a special relevance. Discrimination that affects LGBTI+ persons places them in a cycle of exclusion that often includes lack of access to services and social benefits inside and outside prisons.¹⁷⁵ Transgender persons not only have the right to be guaranteed adequate medical attention by the state, but this medical attention should also include any special need such as gender-affirming treatment. This is supported in the Yogyakarta Principles Plus 10 where it is indicated that states

168 IACHR, Report on the Human Rights of Persons Deprived of Liberty, *supra* fn 6, §13.

169 IACtHR, *I.V. v Bolivia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 30 November 2016, §154.

170 IACHR, Application to the Inter-American Court of Human Rights in the case of Pedro Miguel Vera Vera Et Al Against the Republic of Ecuador (Case No. 11.535), 24 February 2010, §42.

171 *Montero-Aranguren et al* judgment, *supra* fn 11, §102.

172 Art 3, Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador'.

173 Rule 24, the Nelson Mandela Rules, *supra* fn 5.

174 Rule 25, *ibid*.

175 IACHR, Preliminary Report on Poverty, Extreme Poverty, and Human Rights in the Americas, 2016, §366.

have to provide access to and continuation of gender-affirming treatment.¹⁷⁶ In this regard, the failure to consider the human rights situation and special health needs of trans persons deprived of their liberty may result in cruel, inhuman and degrading treatment.¹⁷⁷

The third aspect concerns the state's obligations with respect to intimate visits. The right to receive intimate visits in detention centres must be guaranteed to all persons without discrimination. Undoubtedly, these visits are part of the private sphere of the person, and in that sense, denying an intimate visit based on sexual orientation or gender identity is a clear violation of the right to privacy and family life.¹⁷⁸ In addition, such a restriction, depending on the particularities, could also raise a case for a violation of Article 11(2) ACHR, which deals with the protection of honour and dignity. The specific situation of LGBT+ persons deprived of liberty implies that states must not only guarantee intimate visits but must do so in a manner that does not force the inmate or the visitor to reveal private information such as their orientation or any aspect of their identity beyond what is strictly necessary to safeguard security in the prison. The information handled in this regard shall be safeguarded in such a way that neither the inmate nor their intimate visitor is exposed on the premises to other inmates, prison staff or other visitors. The intimate visit to the LGBTI+ person may not expose them to greater risks, nor may it involve revealing private information about themselves or their visit that may make them susceptible to further stigmatization.

b. Violence Against LGBTI+ Persons

With respect to the questions concerning violence committed against LGBTI+ persons deprived of liberty, it is necessary to note some special obligations and measures related to the prevention, investigation and punishment of violence against LGBTI+ persons. In the context of prevention, states must ensure that prisons have supervision mechanisms that allow security agents to quickly and effectively identify any type of aggression against vulnerable persons within the centre. This supervision should include a prevention scheme in which officers are fully aware of the special risk situation of LGBTI+ persons and the constant aggressions to which they may be subjected as a result of social stigmas. Such a prevention scheme requires providing training to security personnel on issues such as equality and non-discrimination, sexual orientation, gender identity and gender expression.

Another key element to support the prevention of future cases is adopting a special registry of complaints related to violence against LGBTI+ persons deprived of liberty. Such information could contribute to reducing the invisibility of violence against

176 Principle 9(H), The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (last accessed February 2023).

177 UN, *Living Free & Equal*, *supra* fn 53, p 44.

178 See ECtHR, *Kungurov v Russia*, Judgment (Merits and Just Satisfaction), 18 February 2020, §§16–20.

these persons and would make it possible to address this problem with public policies and adequate resources. Similarly, states must ensure that adequate procedures are in place to ensure the efficient reception and processing of complaints so that the relevant authorities can act upon them. This should be a simple procedure, with as little bureaucracy as possible in order to efficiently meet the needs of the victim.

In turn, regarding the investigation and administration of justice for cases of violence against LGBTI+ persons in prisons, states must observe Inter-American standards of due diligence. The IACtHR has already referred to protocols of this nature in cases of violence against LGBTI+ persons. In addition, due to the particular gravity of sexual violence, which could also be classified as sexual torture under the relatively broader definition of torture of the Inter-American Convention to Prevent and Punish Torture, the enhanced duty to investigate implies the adoption of special measures that allow for expeditious, impartial and effective investigations. Similarly, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women imposes enhanced due diligence obligations upon states in cases relating to violence against lesbian, bisexual and trans women.¹⁷⁹

To that end, states must ensure that situations of violence are reported without delay to a judicial or other competent authority that is independent of the authority responsible for the detention and that has the powers and means to conduct such an investigation. States should also implement, *mutatis mutandis*, the relevant standards of the Istanbul Protocol¹⁸⁰ and the Minnesota Protocol¹⁸¹ that may be applicable to investigations of sexual violence in prisons. Although these two protocols constitute soft-law instruments, the Inter-American Court has previously resorted to them in its decisions as a guide to somehow operationalize the obligations derived from the ACHR and other Inter-American instruments.¹⁸²

States not only have the obligation to investigate and punish but also offer victims reparations with the aim of transforming discriminatory patterns. Likewise, states must guarantee through their domestic law that the real conditions faced by LGBTI+ people in prisons are considered by domestic courts when imposing a sentence so that it does not disproportionately affect the person beyond what is strictly necessary to achieve its essential purpose. A concrete example that can be cited as good practice is a case in Argentina where a judge recognized the special vulnerability of a transgender woman and placed her under house arrest after she had originally been detained in a men's prison where she was subjected to insults, threats and beatings by prison guards.¹⁸³

179 See *Vicky Hernández et al* judgment, supra fn 45, §§135–136.

180 Office of the UN High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), 9 August 1999.

181 OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, 2017.

182 See IACtHR, *Vargas Areco v Paraguay*, Judgment (Merits, Reparations and Costs), 26 September 2006, §§93–136; IACtHR, *'Street Children' (Villagrán Morales and Others) v Guatemala*, Sentence Enforcement Supervision, Resolution, 27 January 2009, §23.

183 APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty*, supra fn 19, p 79.

These special measures and differentiated approaches are not exhaustive but rather illustrative of the multiple avenues that could be pursued by states to comply with their international obligations regarding the principle of equality and non-discrimination in the context of the deprivation of liberty of LGBTI+ persons.

D. AN ADVISORY OPINION REQUEST ON LGBTI+ PERSONS DEPRIVED OF LIBERTY: SHORTCOMINGS AND LIMITATIONS

The Commission's resort to the advisory jurisdiction of the IACtHR in this matter does not come without its shortcomings, both in general terms with respect to the limitations resulting from the advisory function of the Court and more specifically in terms of the formulation of this specific request. In this regard, the following subsections discuss two aspects of particular relevance: first, the need for an intersectional approach neglected in the formulation of the request and, second, some of the challenges that would be faced by effective compliance with an eventual decision of the Court.

1. THE NEED FOR AN INTERSECTIONAL APPROACH

In addition to the already discussed state obligations deriving from the principle of equality and non-discrimination with respect to LGBTI+ persons deprived of liberty, the differentiated approaches or special measures to be adopted in this regard must necessarily have an intersectional approach. This intersectional approach to the issues raised with respect to each of the groups referred to in the Commission's request is of utmost importance, not only for the Court's decision but also for the states applying the standards and adopting the measures established in that decision. However, the IACHR's request itself seems to neglect this aspect by engaging with each of the groups separately and consequently losing sight of the intersectional discrimination to which LGBTI+ persons who also belong to other vulnerable groups are subjected to.

Intersectional discrimination means that 'some victims of discrimination are discriminated against because of several traits associated with negative stereotypes deeply rooted in society, which, on the one hand, amplifies the severity of the injury to their dignity and, on the other hand, somehow transforms the type of injury'.¹⁸⁴ This discrimination is not simply additive, that is, it involves more than discrimination on two or more grounds. It is, on the contrary, discrimination resulting from different grounds that cannot be separated from each other and due to their connection create unique forms of disadvantage.¹⁸⁵

In order to address this type of discrimination, an intersectional approach plays a key role by making it possible to recognize the heterogeneity of different his-

184 F. R. Martínez, 'La discriminación múltiple, una realidad antigua, un concepto nuevo', *Revista Española de Derecho Constitucional* 84 (2008) 254 (my translation).

185 G. de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law', *17 Human Rights Law Review* 4 (2017) 634.

torically marginalized persons and the risk factors deriving from their particular situation as members of vulnerable groups. This approach also allows aspects of the discrimination suffered by these people that would otherwise be invisible to be addressed, which is essential for combating discrimination and promoting conditions of equality in the context of deprivation of liberty. In other words, only with this approach can standards for special measures truly encompass the different experiences of people belonging to more than one group at special risk in prisons.

While the Commission does not apply this approach in the formulation of the request, nor refers to it in its subsequent submissions, both the Court and the states can still adopt this intersectional approach. A clear example of how this approach was neglected in the formulation of the request can be noted in the questions regarding special measures for children living with their mothers in prisons. In this case, an intersectional approach would imply reframing the issue to focus any special measure on the protection of the family bond between the person who plays the role of main caregiver of the child regardless of their gender or reproductive capabilities. Instead, the way in which the question is formulated seems to highlight the importance of protecting an implicit child-mother bond which in fact entails an eminently patriarchal perspective.

In practical terms, with respect to LGBTI+ persons deprived of liberty, intersectionality within the differentiated approaches or special measures regarding persons deprived of liberty will serve as the framework for the recognition of the special needs of those LGBTI+ persons who are themselves members of other groups referred to in the request such as indigenous people, pregnant persons or elderly persons. Therefore, it would ensure that these persons are not excluded from other special measures as a result of belonging to more than one group. The cross-cutting nature of this approach will allow for a much more comprehensive approach to the content and scope of the obligations of states in terms of equality and non-discrimination in the context of deprivation of liberty pursuant to Articles 1(1) and 24 of the Convention.

2. CHALLENGES TO THE EFFECTIVENESS OF THE DECISION

There are multiple challenges that come to mind with respect to how a decision from the Court can effectively impact the situation of LGBTI+ persons in prisons. These range from common arguments reflecting the de-prioritization of human rights in prisons such as the often-cited lack of resources to improve the conditions in the correctional facilities, to the lack of political will and social prejudice when it comes to LGBTI+ persons, including those in prison. However, addressing such challenges in detail is not the objective of this subsection. Instead, it discusses the issue of effectiveness from a broader perspective by focusing on the advisory function of the Court and its limitations.

The issue of compliance (or lack thereof) with the contentious decisions of the IACtHR has always been a topic of concern in the IAHRs. Regarding advisory opinions, the issue is even more complicated as it revolves around the question

of whether these decisions are binding.¹⁸⁶ Undoubtedly, the debate on the legal effect of advisory opinions is a wide-ranging issue in international human rights law to the point that the Court's own position has evolved over time. In its firsts advisory opinions, the Court affirmed both that advisory opinions 'lack the same binding force that attaches to decisions in contentious cases'¹⁸⁷ and that its advisory jurisdiction fulfills a 'consultative function'.¹⁸⁸ Years later, the Court revised its position and held that these decisions have 'undeniable legal effects'¹⁸⁹ without providing much detail on these effects.

Regardless of the position that this author adheres to, what is undeniable is that the discussion reveals a lack of clarity that widens the margin of discretion of states in interpreting the effects of these decisions. In turn, this implies that progressive advisory opinions on issues of high social and political polarization, such as the rights of LGBTI+ persons, end up being ignored by states where advanced criteria are often more necessary. A clear example of this is Advisory Opinion OC-24. Although this includes innovative standards in favour of same-sex couples and respect for gender identity, its reception is far from being generalized among the states subject to the jurisdiction of the Court.

Another practical implication of the lack of clarity as to the legal effects of advisory opinions is that the value attached to the standards developed therein will ultimately be subject to the determination of state authorities with special emphasis on domestic courts. This means that a victory in favour of the human rights of LGBTI+ persons deprived of their liberty within the Court would be no more than the starting point for multiple battles at the domestic level in each of the states with constant risks of less favourable outcomes.

Lastly, it should be noted that as the Court increases its advisory jurisprudence, it is also increasing the fear of instrumentalizing this advisory function to address complex political issues or resolve matters that could very well be encompassed in a contentious case.¹⁹⁰ It would be far-fetched to conclude that this advisory request falls into one of these two scenarios. However, this issue is relevant to the extent that it essentially underscores a criticism that at the very least attempts to

186 See Separate Opinion of Judge Eduardo Vio Grossi in IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, p 88; J. C. Hitters, '¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos?', 10 *Revista Iberoamericana de Derecho Procesal Constitucional* 19 (2008) 149; H. F. Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y procesales*, Instituto Interamericano de Derechos Humanos, 2004, p 990.

187 IACtHR, 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, 24 September 1982, §51.

188 IACtHR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, 8 September 1983, §32.

189 IACtHR, *Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights)*, Advisory Opinion OC-15/97, 1 November 1997, §26.

190 M.-C. Fuchs and M. B. López, '¿Quo vadis, opiniones consultivas?', *Aportes: Revista de la Fundación para el Debido Proceso* 23 (August 2021) 34, https://www.dplf.org/sites/default/files/aportes_23_esp_0.pdf (last accessed February 2023).

undermine the legitimacy of the Court's advisory jurisdiction. In any case, it should be clearly stated that these challenges in no way mean that the advisory opinion request or the eventual decision of the Court could not constitute a milestone in favor of the rights of these vulnerable groups. On the contrary, it has already served as an opportunity for states, international organizations, academic institutions and members of civil societies to discuss the issue and provide their views to the Court.

E. CONCLUSIONS

Correctional facilities in the Americas are challenging spaces for the protection and exercise of human rights in general. In addition to the already dire detention conditions, the specific circumstances of each of the groups referred in the IACHR's request leave no doubt regarding the need for the states to adopt differentiated approaches and special measures to ensure that such circumstances do not affect the equality of conditions of these persons vis-à-vis other persons deprived of liberty. This conclusion would be the only course of action through which states could ensure their full compliance with their obligations under Articles 24 and 1(1) ACHR.

Regarding LGBTI+ persons deprived of their liberty, an interpretation of the Inter-American *corpus juris* and other relevant sources pursuant to the principle of equality and non-discrimination would lead the Court to identify special measures in favour of this group. Similarly, when dealing with the scope of the obligations, the legal framework makes it plausible for the Court to address the differentiated approaches regarding gender identity, intimate visits and the prevention, investigation and punishment of violence against LGBTI+ persons in prison.

Nonetheless, this effort to improve respect for human rights of vulnerable groups in prisons by both the Commission with its request and eventually the Court with its decision, could still be hampered by the inherent limitations of the Court's advisory or non-contentious jurisdiction. Not only will there be criticism of the legitimacy of any forward-thinking measures or standard identified by the Court, but it will also face questioning as per the binding effect of advisory decisions. Be that as it may, the direct or indirect value of an advisory opinion on this matter cannot be undermined, especially as it has the potential of shedding light on a long-neglected issue such as the disproportionate effect of detention conditions on those most vulnerable.

Lastly, the long path towards the full realization of effective conditions of equality and non-discrimination in the Americas must be traversed with an intersectional approach that, in a cross-cutting manner, allows the adoption of relevant measures to address discrimination and overcome the stigma and prejudices that are widely rooted in our societies. The Court has a unique opportunity to highlight the important role of this approach to ensure that states adequately consider the reality of these groups when discharging their obligations under the Convention.

4. GAYS' ANATOMY: DISSECTING DISCRIMINATION AGAINST LGBTIQ IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Giulio Fedele¹⁹¹

A. INTRODUCTION: EQUALITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Since Aristotle and Plato, there is a common understanding that equality embodies a basic principle whereby 'likes should be treated alike'.¹⁹² Some think that this proposition is in fact so self-evident and logical that if we look closer we will find the concept to be 'empty'.¹⁹³ Nevertheless, the principle encompasses several meanings, this being only one of them.¹⁹⁴

Equality represents the principle underlying most/all human rights instruments. Amongst them, the European Convention on Human Rights (ECHR/the Convention) plays a key role in the protection of rights in the regional context of Europe. Although the Convention does not include any explicit provision establishing a 'right to equality', this fundamental value is protected by way of the principle of non-discrimination, which is enshrined in Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Since Article 14 is of an ancillary nature, meaning that it applies in conjunction with other Convention rights, a more general provision against discrimination is also included in Article 1 of Protocol No. 12, adopted in 2000. The provision ex-

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¹⁹² Reference to equality in Plato can be found in *Gorgias*, 507E-508A; *Laws*, VI.757; *Phaedo*, 74; *The Republic*, VIII.558. For Aristotle see *Ethica Nicomachea*, V3.1131a-1131b; *Metaphysica*, I.5.1055b-1056b.

¹⁹³ I am referring to the seminal article, P. Westen, 'The Empty Idea of Equality', 95 *Harvard Law Review* (1983).

¹⁹⁴ On the various significances of the concept of equality see S. Fredman, *Discrimination Law*, Oxford University Press, 2011, especially pp 1-33.