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**REPORT No. 122/18**  
**CASE 11.656**

REPORT ON MERITS (PUBLICATION)

MARTA LUCÍA ÁLVAREZ GIRALDO  
COLOMBIA

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**I. SUMMARY**

1. On May 31, 1996, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission”, the “Commission” or the “IACHR”) received a petition presented by Marta Lucía Álvarez Giraldo (hereinafter “Marta Álvarez”, or “the alleged victim”)<sup>2</sup> in which she alleged that the Republic of Colombia (hereinafter “the State” or “the Colombian State”) was responsible for violations that she claimed Colombian prison and judicial authorities had committed against her while she was deprived of liberty. She alleges that her request for an intimate visit [*visita íntima*] was denied because of discrimination based on her sexual orientation. Although the petition was originally filed by Marta Álvarez, the Center for Justice and International Law (CEJIL), the National Network of Colombian Women [*Red Nacional de Mujeres de Colombia*], and Colombia Diversa subsequently became co-petitioners in the case before the Commission.<sup>3</sup>

2. On May 4, 1999, the Commission approved Report No. 71/99 where, without prejudging the merits of the case, it decided to proceed with the analysis of the merits, examining the violations of rights protected under articles 5 (right to humane treatment), 11 (right to privacy) and 24 (right to equal protection) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), read in conjunction with the general obligation to respect and ensure the Convention-protected rights, set forth in Article 1(1) of that international instrument, to the detriment of Marta Álvarez.

3. The petitioners alleged that Marta Álvarez’ rights to humane treatment, to privacy and to equal protection were violated by the prison and judicial authorities’ refusal to grant a request filed on her behalf in 1994 to allow her an intimate visit with her partner. They maintain that this decision was based on prejudice and negative stereotypes about Marta Álvarez, who they allege was the victim of discrimination on two fronts: on the one hand, for being a woman, and on the other for being a lesbian. They maintain that when it came to intimate visits, prison authorities made an arbitrary and unjustified distinction between incarcerated heterosexuals and incarcerated homosexuals. Thus, their enforcement of the regulations governing this right in Colombia was discriminatory. A petition for protection was filed in which Marta Álvarez demanded that her rights be protected from the arbitrary actions of the prisons authorities. However, the petition was dismissed based on arguments similar to those used by the prison authorities. The petitioners argue further that the prison conditions that the alleged victim endured were incompatible with her human dignity, specifically the fact that she was constantly being transferred to different prison facilities —without cause— and mainly as a means to make it impossible for her to continue to press for her right to intimate visits. They also allege that although Marta Álvarez eventually was allowed to receive an intimate visit in 2003, permission for that visit came about through a process different from the process that they contend violated her rights.

4. In the merits phase, the State argues that the matter had already been resolved in the domestic jurisdiction, thanks to a 2003 ruling of the Constitutional Court which protected Marta Álvarez’ rights to privacy, to free development of her personality, and to equal protection. The Constitutional Court ordered prison authorities to grant Marta Álvarez’ right to an intimate visit with her partner at the time. The State

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<sup>1</sup> Pursuant to Article 17(2) of the Commission’s Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not take part in the discussion or decision of the instant case.

<sup>2</sup> In the case, the names “Marta” Álvarez Giraldo and “Martha” Álvarez Giraldo refer to the same person. Hereinafter, the first version of the name will be used.

<sup>3</sup> During the processing of this case, the International Human Rights Law Group and the International Gay and Lesbian Human Rights Commission (IGLRHC) also served as co-petitioners.

maintains that with this decision, Marta Álvarez was able to immediately exercise her right to intimate visits. Accordingly, the State is asking the Commission to order the record on the case closed, as it believes that the requirements established in Article 48(1)(b) of the American Convention have been satisfied. The State specifically maintains that the original petition filed by Marta Álvarez concerned the prison authorities' initial refusal to allow Marta Álvarez to exercise her intimate visitation right. Therefore, inasmuch as that situation had been corrected, the State believes that the grounds for the original petition no longer exist. The State also furnishes information about the general measures it has taken to ensure that persons deprived of liberty are able to exercise their intimate visitation right under conditions of equality, as the Constitutional Court ordered in the decision to grant Marta Álvarez protection.

5. After examining the positions of the parties, the facts established and the applicable framework of human rights, the Inter-American Commission concludes in this report that the Colombian State is responsible for violation of the rights protected under articles 5(1), 11(2) and 24 of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Marta Álvarez. Furthermore, in application of the principle of *jura novit curia*, the Commission also finds that the State violated articles 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof. Based on these findings, the Commission made a series of recommendations to the State of Colombia in the present report.

## II. PROCESSING WITH THE IACHR SUBSEQUENT TO THE ADMISSIBILITY REPORT

6. The IACHR issued Admissibility Report No. 71/99 on May 4, 1999. On May 11, 1999, it notified the parties of the report and, pursuant to Article 48(1)(f) of the Convention and articles 45(1) and 45(2) of its Rules of Procedure then in force, placed itself at the disposal of the parties with a view to reaching a friendly settlement in the matter. Accordingly, the parties were given 30 days in which to present their observations on the Commission's offer.

7. On June 11, 1999, the State requested an extension of the deadline for filing its observations, which was granted. On July 2, 1999, a communication was received from the petitioners in which they expressed their interest in undertaking the friendly settlement process. That communication was relayed to the State for its observations. On July 9, 1999, the State requested another extension on the deadline for presenting its observations on the admissibility report and the friendly settlement offer. The Commission acceded to the State's request. On August 19, 1999, a communication was received from the State in which it indicated its willingness to proceed with the friendly settlement process. That communication was forwarded to the petitioners for their information.

8. On August 31, 1999, the Commission convened the parties to a hearing during its 104th regular session, slated for October 1, 1999, at IACHR headquarters. On October 30, 1999, the State conveyed information related to the friendly settlement process between the parties, which was forwarded to the petitioners for their observations. In a communication received on December 2, 1999, Marta Lucía presented updated information on her case, which was sent to the State for its observations.

9. Via a December 13, 1999 communication, the National Network of Colombian Women [*Red Nacional de Mujeres de Colombia*], the Center for Justice and International Law (CEJIL), the International Gay and Lesbian Human Rights Commission (IGLHRC) and the International Human Rights Law Group presented a request seeking precautionary measures for Marta Álvarez. On December 16, 1999, the Commission sent a request seeking information from the State concerning Marta Álvarez' situation; it gave the State 15 days to submit its response. In a communication dated December 29, 1999, the State presented its response in which it reported that the request had been brought to the "attention of the Office of the Director General of the National Penitentiary and Prison Institute, for the appropriate measures to be taken [...]".

10. On February 1, 2000, the petitioners presented their observations on the merits of the case and requested a decision from the IACHR, in keeping with Article 50 of the Convention. On February 23, 2000, the Commission forwarded to the State the relevant parts of the petitioners' observations and gave the State 30 days in which to submit its own observations. On March 24 and April 28, 2000, the State requested extensions of the deadlines for presenting its response, which the IACHR granted. The State's response was

received on June 7, 2000, and forwarded to the petitioners for their observations. On July 6, 2000, the petitioners requested an extension of the deadline set for their response. The IACHR acceded to their request.

11. The petitioners presented their response via a communication received on July 13, 2000. In their response, the petitioners expressed an interest in a resumption of the friendly settlement process. This communication was forwarded to the State, which was given 30 days to present its observations. On August 19, 2000, the Commission received the State's response concerning the proceedings in the internal friendly settlement process between the parties. This communication was forwarded to the petitioners on August 23, 2000. On September 5, 2000, the State presented additional information pertaining to the friendly settlement process, information that was then forwarded to the petitioners for their information. Thereafter, the parties sent information to the Commission pertaining to the merits of the case, without any further reference to the internal friendly settlement process. The Commission, therefore, decided to proceed with the processing of the parties' observations on the merits.

12. On January 17 and June 19, 2002, the petitioners presented additional observations on the merits of the case, which were forwarded to the State for its observations. On July 31, 2009, the State presented its brief of additional observations on the merits; the attachments were received on September 14, 2009. The relevant parts of this information were sent to the petitioners so that they might make whatever observations they deemed pertinent. On September 15, 2009, the State requested a public hearing, to be held during the Commission's 137<sup>th</sup> regular session. Because the Commission already had many hearings and working meetings slated for that session, it was unable to accommodate the State's request.

13. Via a communication dated May 7, 2010, the petitioners requested an extension of the deadline for presenting their response, which the IACHR granted. The petitioners presented their response in a brief dated August 17, 2010, which was forwarded to the State for its observations. The State's response was received on October 20, 2010 and forwarded to the petitioners for their information.

14. Via a communication dated June 20, 2012, the Commission forwarded to the State the relevant parts of three earlier briefs filed by the petitioners. By a note dated July 12, 2012, the State indicated that it was reserving its right to comment on the information the Commission had sent. On July 25, 2012, the IACHR asked the State to do what was necessary to send whatever observations it deemed appropriate within one month. On September 24, 2012, the State presented additional observations, which were forwarded to the petitioners.

15. By a communication dated February 14, 2013, the petitioners submitted additional observations on the merits, which were forwarded to the State. By a note of March 19, 2013, the State, for its part, submitted a request asking for an extension and then submitted its observations on June 7, 2013, which were forwarded to petitioners.

### **III. THE PARTIES' POSITIONS**

#### **A. The petitioners**

16. The petitioners argue that in the case of Marta Álvarez, a lesbian woman in prison, a number of rights were restricted disproportionately and without cause. The petitioners argue that the restrictions had nothing to do with the prison regime she was under and everything to do with the fact that she was a woman and a lesbian. They claim that she was thus the victim of dual discrimination: discrimination based on sex and on sexual orientation. Based on these considerations, the petitioners argue that being a woman and a lesbian in a Colombian prison meant that "one's rights were under constant threat or were violated in fact."<sup>4</sup>

17. Regarding discrimination based on sexual orientation, the petitioners maintain that at the time the events in this case occurred, lesbian women were punished on the mere suspicion that they had romantic relationships with other female inmates. They argue that a woman could be disciplined for being seen kissing or having any physical contact of an affectionate nature with other female inmates. They maintain that

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<sup>4</sup> Petitioners' brief, received February 1, 2000.

this disciplinary regime meant that women being disciplined had to endure tougher prison conditions, as they faced the harshest sanctions allowed under the Prison Code. For example, they could be held in solitary for as long as 60 days, and lose their family visitation rights. The petitioners further contend that a female inmate's sexual orientation was sometimes a factor in rating her prison conduct, which would affect her right to certain prison privileges. The petitioners also point out that unlike what happens at men's prisons, sexual orientation at women's prisons is a factor considered when grading conduct, which will determine whether parole or conditional release is granted. The petitioners also assert that prison transfer was frequently used as a means to punish lesbian inmates; the reason cited for the transfer frequently had to do with issues of internal order, leaving prison authorities "ample room for interpretation"; in practice, however, this became a "disguised disciplinary mechanism." Another type of abuse being alleged was confinement in the prison's "worst cellblock" for the mere fact of being lesbian, no matter how exemplary the woman's prison conduct or record may have been. The petitioners point that the prison authorities often use verbal violence and incite other female inmates to use physical violence against lesbian inmates.

18. As for the discrimination for being a woman, disciplinary procedures of the kind used in women's prisons were not employed in men's prisons. Specifically, the petitioners point out that Colombian prisons have traditionally allowed certain liberties so that male inmates can exercise their right to intimate visits with women. By contrast, the petitioners indicate that heterosexual women did not get the right to intimate visits until 20 years ago, and had to show proof of marriage or *de facto* union and proof of birth control, a requirement that was later declared unconstitutional. The petitioners point out that unlike male inmates, female inmates are required to go through all the administrative procedures to get an intimate visit. Furthermore, they contend that men can have intimate visits every 8 days, and in their own cells. By contrast, female inmates can have intimate visits only once a month or every 15 days, and the visit must be in a separate cell set aside for intimate visits.

19. The petitioners maintain that despite the national and international laws and jurisprudence on the subject of discrimination and the vulnerability of lesbian, gay, bisexual and trans persons deprived of liberty, Colombia's prison rules and practices are still not respectful of these persons' rights, and it is still impossible for such persons to exercise their right to have intimate visits. They point out that the various rulings of Colombia's high courts, including the *tutela* decision 499 of 2003, which ruled in Marta Álvarez' favor, "have not put an end to the arbitrary and abusive restrictions that were practiced and continue to be practiced in women's prisons when the inmates request intimate visits with persons of the same sex."<sup>5</sup>

20. The petitioners point out that Colombian law grants persons deprived of liberty the right to intimate visits. That right is governed by principles of "hygiene, security and morality", in accordance with the provisions of Article 112 of the Penitentiary and Prison Code, or Law 65 of 1993 (hereinafter "Penitentiary and Prison Code"). The rules for the practice of intimate visits were set forth in Resolution No. 5889 of August 20, 1993 (hereinafter "Resolution 5889/93") of the Office of the Director of the National Penitentiary and Prison Institute (hereinafter "INPEC"). They point out that the Constitutional Court has held that the intimate visit is a fundamental right, as it is an element of the right to the free development of one's personality; in 1998 the Council of State nullified the expression "spouse or permanent companion" used in Article 112 of the Penitentiary and Prison Code, which regulates intimate visits; in other words, by the time the events in this case occurred, the right to intimate visits was no longer premised on the existence of a marital relationship or declaration of cohabitation.

21. The petitioners highlight the fact that at the time of the events under consideration, nothing in Colombia's prison laws and regulations made any distinction based on the gender and/or sexual orientation of the couple that was asking to exercise the intimate visitation right. The petitioners, however, allege discriminatory practices on the part of prison authorities, practices that they claim violated female inmates' right to privacy and their right to express their sexuality. The petitioners single out three factors that, they argued, reflected these allegedly discriminatory practices, since female inmates' right to express their sexuality in prison was conditional upon those three factors. First, they claim that from the historical perspective male heterosexual inmates have enjoyed intimate visitation rights longer than their female counterparts have. They

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<sup>5</sup> The petitioners' brief, received February 14, 2013, p. 13.

explain that whereas in women's prisons, intimate visitation rights have only recently been approved, in men's prisons heterosexual inmates' intimate visitation rights are "longstanding practice in Colombia." They argue that the distinction is the result of, *inter alia*, "a tradition inherited from the religious community" which was originally in charge of running women's prisons in Colombia. They also point out that a study done by the Office of the Ombudsperson of Colombia in 1995 found that at that time at least 35% of women's prisons did not guarantee the right to intimate visits.

22. The second factor that the petitioners cite is that when it came to access to intimate visitation rights, a distinction was made between same-sex couples and heterosexual couples. The third factor is that prison authorities exercised a "broad degree of discretion" in interpreting who was entitled to this right and who was not; in practice this resulted in a violation of the principle of equal treatment, recognized in Colombia's domestic laws and in the American Convention.

23. The petitioners observe that Marta Álvarez was incarcerated on March 14, 1994, and was in the Pereira Women's Prison on the date the original petition was filed. She was in a relationship with M. H., a woman not in prison. The petitioners maintained that in July 1994, working through the (Pereira) Regional Ombudsperson's Office, Marta Álvarez filed a request with the competent authorities asking for authorization to receive an intimate visit from her partner. The petitioners contend that the authorization was promptly given by the Santuario 33<sup>rd</sup> Prosecutor's Office, and relayed to the Office of the Director of the Pereira Women's Prison so that the visit could take place. The petitioners allege that the authorization issued by the 33<sup>rd</sup> Prosecutor's Office satisfied the requirements spelled out in the applicable law; because the Prosecutor's Office was the authority competent to approve such a request, the Office of the Director of the Pereira Women's Prison where Marta Álvarez was incarcerated should have simply acted on the authorization. However, the petitioners contend that the prison and court authorities who later took cognizance of the matter rendered their own interpretation of the regulations, an interpretation based on prejudice and stereotypes: they held that the rule did not protect an intimate visitation right for same-sex couples, thereby denying Marta Álvarez' right to an intimate visit because she was a lesbian.

24. To illustrate the matter, the petitioners recount how, for example, the Director of the Pereira Women's Prison, despite having received all the documentation necessary to grant the intimate visit, instead initially turned to the Office of the Sectional Director of Prosecution Offices asking it to intervene and revise the order issued by the 33<sup>rd</sup> Prosecutor's Office; he expressed his concern over the consequences that might follow if he were to abide by the 33<sup>rd</sup> Prosecutor's order. The petitioners allege that, in a highly irregular measure, the Office of the Sectional Direction of Prosecution Offices responded by suggesting to the Director of the Woman's Prison that he suspend execution of the order until a legal appeal filed in the criminal case against Marta Álvarez was decided.

25. The petitioners contend that the documentation required to obtain authorization for an intimate visit was sent a second time to the Director of the Women's Prison, who proceeded to petition the judge hearing the criminal case against Marta Álvarez to authorize her transfer to a different prison. They also point out that the Director of the Women's Prison also sent the request for an intimate visit to the Office of INPEC's Regional Director, who in turn forwarded it to the Office of the National Director of INPEC; not one of these authorities acted promptly to reply to the request.

26. The petitioners observe that on January 20, 1995, the Regional Ombudsperson's Office filed a petition on behalf of Marta Álvarez, demanding protection of her right to equal protection, her right to free development of her personality, her right to privacy and her right of petition. The petitioners observe that the court of first instance delivered its decision on the petition for protection on February 2, 1995, in which the only one of these rights it protected was Marta Álvarez' right of petition; the prison authorities were ordered to reply to Marta Álvarez' request for an intimate visit. The petitioners contend that the prison authorities' response was to deny the request and to appeal the decision of the court of first instance on the petition for protection. The petitioners point out that on March 13, 1995, a court of second instance issued a ruling in which it denied protection of the other rights claimed; with that, the decision denying Marta Álvarez' right to an intimate visit became final.

27. The petitioners argue that after the ruling issued by the Court of first instance on the petition for protection—but before the court of second instance delivered its ruling on the matter—the Office of the Director of the Pereira Women’s Prison replied to the request for an intimate visit, denying it on two separate occasions. In his first reply, the Director argued that the request did not satisfy the requirements set out in the applicable regulation, since the competent authority to authorize the intimate visit was the Judge who had been presiding over the criminal case against Marta Álvarez since September 1, 1994. In the Director’s second reply, he claimed that authorization was denied because the right to intimate visitation did not apply to “homosexual prisoners, for [reasons of] security, discipline and morality.”<sup>6</sup>

28. The petitioners also contend that among the reasons cited was a reference to the fact that the rule governing intimate visits for prisoners did not expressly allow intimate visits in the case of same-sex couples. The petitioners’ argument here is that by construing this circumstance as a “gap in the regulation” of this right, the State engaged in discriminatory treatment incompatible with its own domestic laws and with the American Convention, since the principle of equal treatment cannot be restricted by claiming that the person’s “orientation is not heterosexual.” The petitioners argue that the authorities had cited security concerns, claiming that if the visit was allowed, “impersonation” might pose a risk, which in the petitioners view is a baseless argument when one considers all the security checks a visitor must undergo to get inside a prison.

29. The petitioners also argue that the Criminal court of second instance considered the fact that the Prison Director’s Office had already turned down the request for an intimate visit. According to the petitioners, that court held that “homosexual practices inside prisons interfere with the prisons’ objectives [... and] are inimical to the discipline that must exist inside prisons.”<sup>7</sup> The Court therefore considered that the limitation on the exercise of the alleged victim’s rights was justified, given the nature of the prison regime to which she had to conform. Here, the petitioners maintain that the court of second instance had established a distinction that was neither objective nor reasonable regarding the consequences of allowing “homosexual acts in prisons”. That distinction resulted in a decision that left the alleged victim’s rights unprotected by virtue of her sexual orientation. The petitioners contend that once the court of second instance had issued its ruling on the petition for protection, the decision became final on May 22, 1995, which meant that it was not subject to review by the Constitutional Court.

30. The petitioners also allege that in the wake of the ruling from the court of second instance on the petition for protection, INPEC authorities ordered Marta Álvarez transferred to the Anserma Circuit Prison. They contend that at that facility, Marta Álvarez’ conditions of incarceration “were significantly worse,”<sup>8</sup> which is why the Office of the Regional Ombudsperson intervened to have her transferred back to the Dosquebradas Women’s Prison. The petitioners contend that, thereafter, Marta Álvarez continued to be transferred from one prison to the next. They argue that the transfers were, in practice, a way of denying Marta Álvarez actual access to her intimate visitation right. They further contend that the transfers made the alleged victim’s life all the more difficult, because she was deprived of any chance of keeping her romantic relationship on an even keel. They contend that, taken together, the circumstances described herein doomed the relationship between Marta Álvarez and M. H. to failure.

31. The petitioners refute the State’s argument to the effect that the harm caused to Marta Álvarez was redressed at the domestic level by a 2003 decision of the Constitutional Court, under which she could have intimate visits with her partner at the time. They maintain that while the Court’s decision protected the alleged victim’s rights, it was delivered in a different case brought back in 1994. They allege further that the definitive decision in that case ultimately did not protect the rights of Marta Álvarez. They maintain that the violations alleged in that case have not yet been redressed at the domestic level.

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<sup>6</sup> Original petition received on May 31, 1996.

<sup>7</sup> Original petition received on May 31, 1996.

<sup>8</sup> In the brief accompanying her original petition, Marta Álvarez observed that at that prison “she shared her confinement with just one other female inmate; she had no type work, study, recreation or sports; the food was inferior to what she had received at the women’s prison; she had no social worker to counsel her, and the health service was inefficient.” Original petition received on May 31, 1996.



32. As for the law, the petitioners argue that under Article 1(1) of the American Convention, States may not discriminate on the basis of a person's "social condition", a concept that the petitioners interpret as including sexual orientation, as have a number of decisions by international organs for the protection of human rights. The petitioners make reference to those decisions that support their argument that international law protects "homosexual conduct between consenting adults [based on the] right to privacy." Specifically, the petitioners cite the judgments of the European Court of Human Rights in *Dudgeon v. United Kingdom*, for example, where the Court rejected the State's argument—which was similar to the one initially put forward by Colombia in this case—concerning the use of laws restricting the private life of homosexuals for moral reasons, which the Court deemed to be at variance with the tolerance that is one of the hallmarks of a democratic society.<sup>9</sup>

33. Based on the foregoing, the petitioners contend that one of the central issues in the analysis of this case is to determine whether persons deprived of liberty are considered to be entitled to the right to privacy and if so, to what extent. Although such persons are under a regime that restricts the exercise of certain basic rights, the protection of the right to privacy demands that the State not interfere—either by action or omission—in the most intimate aspects of a human being's privacy, such as the expression of one's sexuality—no matter what one's sexual orientation—and the consequences that follow from the expression of one's sexuality. The petitioners assert that international law recognizes that persons deprived of liberty are entitled to enjoy and exercise this right, as it is an "integral aspect of human dignity" and that in the case of prisoners, this right must be guaranteed in the same way that it is in the case of persons who are not behind prison walls.

34. The petitioners assert that the State arbitrarily interfered in Marta Álvarez' private life by denying her access to intimate visits with her partner because of the alleged victim's sexual orientation. The petitioners argue that this was in violation of Article 11(2) of the American Convention. They maintain that the scope of the right protected in that article includes protection of sexual autonomy, as this is a fundamental part of a person's intimacy and privacy, a realm in which the State cannot intervene unless it has a justification based on "necessity" in a democratic society; they further argue that any restriction must be expressly authorized by law, so that it does not become arbitrary or abusive.

35. The petitioners contend that the restriction imposed on the alleged victim does not meet these parameters, as it was the result of an interpretation skewed by the authorities' discrimination against Marta Álvarez' gender and sexual orientation. They further contend that the criteria that the prison and court authorities used to draw distinctions in the present case, disregarded Colombia's own laws, which protect a person's right to privacy, including maintaining one's sexual and affective life.

36. The petitioners maintain that the Colombian authorities' refusal to allow Marta Álvarez to exercise a right because of gender stereotypes and her sexual orientation was differential and unjustified treatment incompatible with Article 24 of the American Convention. They allege that the morality, disciplinary and security reasons invoked by the State to justify that treatment made no sense and were used in a thinly veiled attempt to justify a measure whose real purpose was to impose a disproportionate restriction on the alleged victim's rights because she was a woman and a lesbian.

37. The petitioners point out that one of the more serious aspects of the discrimination that this case involves is that the right whose exercise the State is alleged to have denied is in fact recognized in

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<sup>9</sup> The petitioners also argue that Colombia's own Constitutional Court explained that when the authors of the 1991 Constitution included in it the right to free development of one's personality (Art. 16) and the right to one's privacy and good name (Article 15), they did so in order to

[...] elevate the right to elect one's own life choices and to have one's own beliefs to a higher order of rights, specifically to make it a fundamental right. Accordingly, it underscored the liberal principle of no institutional interference in subjective matters that pose no threat to comity and social organization. It is obvious that homosexuality is within this realm of protection, and hence cannot be a factor in social discrimination.

In their brief of observations on the merits, received on February 1, 2000, the petitioners make reference to the Constitutional Court's arguments in its judgment ST-097-94. They also cite excerpts from Constitutional Court decision C-98-96, which also alludes to the constitutional protection of those rights, reasoning that "the protection that the authorities must provide to all persons and residents in Colombia [...] must, in this matter, be respect for sexual free choice."

Colombia's domestic laws without any provision for the distinctions that the prison authorities applied in practice. The petitioners contend that the violation of the alleged victim's rights was caused by the fact that the Colombian authorities were operating outside the boundaries of the law, thereby making the alleged victim's attempts to assert her rights futile.

38. Concerning the State's request that the record on the present case be closed, the petitioners contend that the State violated Marta Álvarez' rights for the time she was in the State's custody from 1994 to 2002, the year when she was finally allowed the intimate visit that the authorities had arbitrarily and routinely denied her. With regard to these violations, the petitioners maintain that Marta Álvarez never received an acknowledgement from the State of the violations it had committed against her, nor was the harm she suffered by the State authorities' actions ever fully redressed.

39. Finally, the petitioners contend that this situation had a particularly severe impact on Marta Álvarez' personal integrity, in violation of Article 5 of the American Convention. The petitioners maintain that by their conduct, the state authorities intruded into the most intimate sphere of the alleged victim's private life, altering an essential part of her life plan, such as the decision to enter into a relationship and to be able to satisfy her physical, sexual and emotional needs in a manner consistent with her sexual orientation and within the limits allowed by the incarceration regime. They also allege that during her incarceration, Marta Álvarez was harassed and persecuted by prison authorities, in the form of the repeated transfers that she was forced to endure and that were triggered by the claims she had filed with various bodies in her efforts to have her right to intimate visits recognized and by her sexual orientation.

## **B. The State**

40. The State asserts that the allegations made by the petitioners regarding the "context" of the treatment that lesbian women inmates received and, in general, regarding the discrimination against LGBTI persons in Colombia at the time of the events in this case, are not facts upon which the present case can be based.

41. In the admissibility phase, the State's contention was that Marta Álvarez' request for an intimate visit while she was in prison was out of order, first because it would mean affording her "exceptional treatment", which would affect discipline inside prisons; and second, because from the standpoint of the prison authorities, this was an issue of "homosexual practices for which society in general had little tolerance"; therefore, for cultural reasons, the intimate visit could not be allowed.

42. The State also alleges that the domestic legal system then in force regulated incarcerated persons' rights to intimate visits, without distinguishing between spouses or permanent partners. However, the State's contention is that the rules referred only to heterosexual couples for the sake of protecting the principles of equality and personal and family privacy within the social order, [and] for their protection, security and wellbeing. The State argues that there was therefore a general legal restriction imposed by the legal system itself that prevented prison authorities from allowing homosexual inmates in Colombia to have intimate visits with their same-sex partner. The State argues that while in society there might be cases of "homosexuality" that were protected by the constitutional right to free development of one's personality, the alleged victim in the present case was under the prison regime; given the nature of that regime, the practice of homosexuality could not be allowed, as it would have negative consequences for the system's operation.<sup>10</sup>

43. As for the rulings delivered on the petitions for protection on February 2 and March 13, 1995, the State alleges that while a person's sexual orientation cannot by itself be considered a "discrimination factor", sexual orientation comes under the right to free development of one's personality, which is not an absolute right; hence, under the domestic legal system, that right can be subject to certain limitations, which were justified in the present case based on considerations of prison policy and discipline.

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<sup>10</sup> Response from the State of Colombia, Ministry of Foreign Affairs, Note EE/DH/052995, November 21, 1996.

44. The State also makes reference to the new relationship that Marta Álvarez started with a woman who was incarcerated in another prison. It argued that Marta Álvarez' requests for "intra-penitentiary transport" to visit her partner had to be processed through a procedure different from the one used to request an intimate visit with someone who was not an inmate. Here, the State indicates that "inmate transport had to be requested from the judicial authority who presided over the criminal case for which the person [was] in prison [and it was] this authority [who could], taking security and public order into consideration, issue a permit for the respective transport, which [could] be carried out, practical and functional considerations like distance, cost and risk permitting."<sup>11</sup>

45. The State alleges that a petition for protection filed on behalf of Marta Álvarez and her partner resulted in the T-499/03 decision by the Constitutional Court delivered on June 12, 2003, in which it granted protection of Marta Álvarez' and her partner's fundamental rights to equal protection, privacy and free development of personality, and ordered the prison authorities to allow them to avail themselves of the right to the intimate visit they had requested. The State contends that with this decision, Marta Álvarez had "immediate access to intimate visits with her partner."

46. The State is therefore requesting that the present case be closed, since in its view the requirements set forth in Article 48(1)(b) of the Convention have been satisfied. It maintains that the facts that led to the original petition were corrected at the domestic level by filing a petition for protection, which was handled swiftly and observing all the rules of due process; the legal situation that caused a potential violation of Marta Álvarez' rights was remedied. It adds that based on these decisions, the competent authorities have adopted measures to guarantee equal treatment for everyone in a similar situation. Thus, in compliance with the order handed down by the Constitutional Court in its judgment T-499/03, the State contends that

The penitentiary and prison authorities developed a series of procedures to ensure that the homosexual inmate population has equal rights under the intimate visitation program; the appropriate policies were adopted to ensure that the ruling in question becomes established and lasting practice, [...] thereby making full reparations at the domestic level that guarantee general measures of non-repetition [and] and satisfaction.<sup>12</sup>

47. Likewise, and in keeping with its request that the Commission close this case, the State makes arguments pertaining to any claim, if such is the case, that the alleged victim might have to pecuniary compensation. Here, the State argues that Marta Álvarez has tacitly waived this right by not having filed the domestic remedies to obtain pecuniary compensation, specifically by filing an action with the administrative law courts seeking direct compensation. The State contends that the reparations for any damages caused to Marta Álvarez have been satisfactorily made with issuance of the Constitutional Court's 2003 judgment and the measures taken to put the Court's order into practice.

48. As to the factual basis of this case as determined by the Commission in its admissibility report, the State argues that the claim made by Marta Álvarez in the original petition has to do with the harm done to her because she was unable to exercise her right to an intimate visit while in prison; this situation was permanently resolved with the Constitutional Court's 2003 decision. Here, the State "does not dispute the fact that Marta Lucía suffered because she was [denied] access to intimate visits with her partner." However, in its view, the harm caused to the alleged victim does not amount to a violation of human rights and hence the State has not incurred any international responsibility, especially since the State remedied the situation that might have caused a violation of Marta Álvarez' rights. The State insists that, thanks to the petition seeking protective relief, Marta Álvarez was able to exercise her right to an intimate visit, which is the crux of the claim she is making to the IACHR, even if that right was exercised with a partner different from the one she had when she filed her original petition with the Commission.

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<sup>11</sup> Response from the State of Colombia, Ministry of Foreign Affairs, Note EE.1102, received June 7, 2000.

<sup>12</sup> Observations on the merits, presented by the State of Colombia, Ministry of Foreign Affairs, Note DDHH.GOI.No. 39475/0326, received July 31, 2009, and its attachments, received September 14, 2009.

49. The State also sent information regarding the measures the prison authorities took to allow intimate visits between same-sex couples in Colombia's prisons. It states that the INPEC authorities would be issuing a set of regulations that would spell out the practical circumstances and conditions under which intimate visits between same-sex couples could take place. INPEC was taking these steps in compliance with the Constitutional Court's 1993 judgment (T-222) in which it recognized that inmates have an intimate visitation right and that prisons must have adequate facilities that are private, hygienic and secure to guarantee the exercise of that right.

50. The Colombian State also mentions a number of directives and orders issued and circulated in Colombia's prisons between 2004 and 2006. These documents concerned visits to prisons, and described the rules regarding searches and the guidelines for intimate visits. The State adds that Permanent Directive No. 000012 was issued in 2011, under which awareness training has been undertaken with civil society in connection with the LGBTI inmate population, with emphasis on intimate visits. It also highlights Permanent Directive No. 000010, issued in July 2011, about respecting LGBTI persons in prisons nationwide, and two free convocations held in prisons in 2011 and 2012, for LGBTI inmates. The State is asking the Commission to take into consideration the series of state policies adopted to secure recognition and protection of the human rights of LGBTI persons and of persons deprived of liberty.

51. The State also reports on various procedures undertaken in compliance with judgment T-062 of 2011, to raise awareness among and train state personnel, both administrative personnel and those belonging to the prison guard service. These procedures are being implemented in a number of prison facilities, with support from the Ministry of the Interior and *Corporación Opción*. Thus, the State is asking the Commission to acknowledge the existence of a number of State policies whose purpose is to recognize and protect the human rights of LGBTI persons and persons deprived of liberty.

52. The State indicates that while it true that at the time of the events in this case, no extensive regulations were place on the subject of intimate visits for LGBTI persons, this does not mean that Marta Álvarez' human rights were violated; instead, her rights were protected. The State contends that because there were no specific regulations in place, officials and personnel did not have a frame of reference that would enable them to ensure their rights and at the same time act in a manner commensurate with the rule of law. The State also argues that it cannot be held internationally responsible for the absence of certain regulations and laws 20 years ago; instead, the focus should be on whether the State approaches a given situation in the same way it did 20 years ago or, to the contrary, has been adapting its legal system and practices.

53. The State contends that a delay in granting an intimate visit is not, *per se*, a human rights violation. The State argues that what has to be determined is whether that delay had some discriminatory connotation based on a person's sexual orientation. The State acknowledges that in fact there were some delays and "situations that somehow may have slowed the process of authorizing the requested visit." However, the State denies that it discriminated against Marta Álvarez by denying her an intimate visit, transferring her or instigating mistreatment of her because of her sexual orientation. The State also contends that there was one intimate visit between Marta Álvarez and her romantic partner at the time, M.I.S., which took place on December 16, 2002.

54. The State further argues that the prison facilities were at times overpopulated, which is why inmates were transferred to other prisons in various parts of the country, for the sake of ensuring their rights. The State goes on to say that Marta Álvarez' transfers were not disciplinary measures for misconduct; nor were they done because of her sexual orientation.

55. For all the foregoing reasons, the State maintains that none of the rights protected under the American Convention has been violated to the detriment of Marta Álvarez; to the contrary, in full observance of the international instruments and of constitutional guarantees, the latter were protected by the writ of *tutela*, which settled the controversy within the domestic legal system.

56. Finally, based on articles 48(1)(b) of the American Convention and 42(1)(a) of the IACHR's Rules of Procedure, the State asks the Commission to close the record on the case, applying the practice it

follows in the admissibility phase, which is that the situation to be examined is the one that exists at the time the IACHR issues its respective decision, while also bearing in mind the subsidiary nature of the Inter-American Human Rights System (hereinafter “IAHRS”) and the fact that because the situation originally presented has been resolved, the grounds for the original petition submitted to the organs of the IAHRS no longer exist.

#### **IV. PROVEN FACTS**

##### **A. History of the applicable law and general aspects of intimate visits in Colombia**

57. The Commission believes that certain preliminary questions have to be answered concerning the laws in force at the time of the events in the dispute between the parties, specifically between 1994 and 2002, which is when Marta Álvarez’ 1994 request for an intimate visit was denied. These include the provisions of the Penitentiary and Prison Code, and the rules issued by the prison authorities to regulate the intimate visitation regime for inmates in Colombian prisons. Both the Code’s provisions and the intimate visitation regulations were in force during the period under consideration

##### **1. General visitation regime established in the Penitentiary and Prison Code**

58. The Penitentiary and Prison Code (“Law 65/93”) regulated the general visitation regime for accused and convicted persons. On the matter of intimate visits, it provided that such visits should be handled according to certain guiding principles and that intimate visitation rules should be issued in the form of a regulatory provision. Specifically, Article 112 of that Code read as follows:

**ARTICLE 112. VISITATION REGIME.** When authorized by the competent prosecutors and judges, accused persons are entitled to receive visits from family members and friends, and must observe the respective prison’s established security and disciplinary rules. (...) The intimate visitation rules shall be spelled out in the general regulations, and shall be governed by principles of hygiene, security and morality.<sup>13</sup>

##### **2. Regulations issued by the National Penitentiary and Prison Institute concerning intimate visits**

59. Exercising its authorities under Law 65/93, the National Penitentiary and Prison Institute (“INPEC”) issued Resolution No. 5889 on August 20, 1993 (“Resolution 5889/93”) in which it regulated “intimate visits within the country’s prisons.”<sup>14</sup> Those Regulations provide that intimate visitation shall be governed by: i) principles of “equality, personal and family privacy, social order, protection, security and wellbeing, in accordance with each institution’s internal rules and the Penitentiary Code”; ii) intimate visitation is understood to be part of a regime under which “certain rights and freedoms may be restricted and suspended”; and iii) intimate visitation must be a practice in both men’s and women’s prisons equally, without prejudice to the rights that every person enjoys under the National Constitution.”<sup>15</sup>

60. Given that framework, the Regulations recognize that intimate visitation is a fundamental right and that “all prisons must have areas that are properly equipped for the effective exercise, without

<sup>13</sup> Article 112 of Law 65 of August 19, 1993. Official Gazette No. 40,999 of August 20, 1993. Cited in: Memorandum No. 5126 of December 27, 1994, signed by Lucy Elena Angulo de Morales, Head of INPEC’s Legal Office, and addressed to Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas. Annex to the petitioners’ brief of November 13, 1996, at 27 and 28.

<sup>14</sup> Resolution No. 5889 of August 20, 1993. Issued by the Director of the National Penitentiary and Prison Institute – INPEC. Annex 1 of the original petition received on May 31, 1996.

<sup>15</sup> *Consideranda* in Resolution No. 5889 of August 20, 1993. Issued by the Director of the National Penitentiary and Prison Institute – INPEC. Annex 1 of the original petition received on May 31, 1996.

discrimination, of the rights and liberties of intimate visitation, for those inmates (male and female) that request it, who shall be accorded equal treatment and equal opportunity.”<sup>16</sup>

61. The Regulations also provide that the requirements set out in this provision and those required under the internal rules of the prison in question must be satisfied in order to have an intimate visit.<sup>17</sup> Specifically, under these Regulations, the following requirements must be met:

ARTICLE TEN. Directors of the women’s and men’s prisons shall grant intimate visits to those male and female inmates who apply for it and upon satisfaction of the following requirements:

- 1) A written request from the inmate to the Director of the Prison
- 2) In the case of accused inmates (...)
- 3) In the case of convicted persons, a duly authenticated copy of the verdict sent by the judge or supplied by the inmate, for permission from the Director of INPEC if the intimate visit requires transport to another prison facility.
- 4) Proof of the inmate’s marital status, with the marriage certificate. In the case of civil unions, two statements confirming permanent cohabitation, made by persons not involved in the inmate’s trial, shall constitute proof.
- 5) A certificate of the inmate’s health issued by the prison physician, stating that the inmate does not suffer from any infectious-contagious disease, venereal disease or AIDS; if the other spouse or companion is not an inmate, he or she shall present a certificate of examination by a registered private physician, stating clearly the names and surnames of the physician and the address of his or her practice.<sup>18</sup>

## **B. Background regarding Marta Álvarez’ situation in detention centers**

62. The Commission will begin by making reference to the facts surrounding the imprisonment of Marta Álvarez and the conditions of her incarceration, her romantic relationship with a woman who was not in prison, and other background information concerning the disciplinary regime at the prison where she was an inmate. The following is a summary of the established facts that the Commission considers relevant for purposes of the analysis of the law that will be done in the section on the law.

### **1. Marta Álvarez’ incarceration in the Pereira Women’s Prison and other background information concerning the prison’s disciplinary regime**

63. Marta Álvarez was apprehended on March 12, 1994 and sentenced to 34 years and 4 months in prison; when the new penal code entered into force, her sentence was reduced to 20 years and 10 months.<sup>19</sup> Marta Álvarez served 9 years and 9 months in prison, from March 12, 1994 to December 18, 2003, and was

<sup>16</sup> Articles two and three of Resolution No. 5889 of August 20, 1993. Issued by the Director of the National Penitentiary and Prison Institute – INPEC. Annex 1 of the original petition received on May 31, 1996.

<sup>17</sup> Article four of Resolution No. 5889 of August 20, 1993. Issued by the Director of the National Penitentiary and Prison Institute – INPEC. Annex 1 of the original petition received on May 31, 1996.

<sup>18</sup> Paragraph five of this article was provisionally suspended by a decision of the Council of State, Administrative-Law Chamber – Section One, dated October 14, 1994 (Petition for Nullification filed by the Ombudsperson’s Office against National Authorities – File 3062). Circular No. 0175 of November 17, 1994, signed by the Office of the Director General of INPEC and addressed to the directors of prisons. Annex to the petitioners’ brief of November 13, 1996, at 32.

<sup>19</sup> The petitioners’ brief, received on February 14, 2013, p. 14. Brief from the State DIDHD.GOI No. 59591/1023, dated September 24, 2012.

released through Notice No. 101.<sup>20</sup> On March 14, 1994, Marta Álvarez entered the Pereira Women's Prison, located in the La Badea sector of the municipality of Dosquebradas.<sup>21</sup>

64. By way of context, on June 2, 1994 the Pereira Regional Ombudsperson's Office filed a petition of *amparo* against the Director of the Pereira Women's Prison, Gerardo Pinzón.<sup>22</sup> The petition was filed on behalf of a number of inmates at the Pereira Women's Prison, and sought protection of various rights, including the right to equal protection. The petition indicated that a number of the inmates "[were] being discriminated against or being punished for expressing homosexual preferences."<sup>23</sup> In response to the petition, and addressing the issue of some women inmates' sexual orientation, INPEC authorities said that their "homosexual conduct" was rejected by the other inmates and was not in keeping with the aims pursued by the prison facility as a place of re-socialization.<sup>24</sup>

65. The court of first instance granted the petition of *amparo* with respect to protection of the inmates' right to due process.<sup>25</sup> The Regional Ombudsperson's Office then challenged that decision on the grounds that it failed to protect the other rights asserted in the original petition. The court of second instance ruled that the right to be treated in a manner respectful of human dignity and the right to free development of one's personality had been violated by the detention conditions and other rules of conduct imposed. But the court of second instance confirmed the lower court's refusal to grant *tutela* for the alleged violation of the right to equal protection and free development of one's personality with respect to alleged discrimination based on sexual orientation, and wrote that the disciplinary measures adopted with respect to the inmates were for the commission of obscene acts and not because of their sexual orientation.<sup>26</sup>

<sup>20</sup> The petitioners' brief, received on February 14, 2013, p. 14. Brief from the State DIDHD.GOI No. 59591/1023, dated September 24, 2012, p. 2.

<sup>21</sup> The petitioners' brief, received on February 14, 2013, p. 15.

<sup>22</sup> The IACHR only has a partial copy of the proceedings in this case.

<sup>23</sup> Second instance *tutela* ruling, delivered by the Santa Rosa de Cabal Circuit Criminal Court, Risaralda. July 27, 1994. Record No. 2266. Attachment to the petitioners' brief of November 13, 1996, at 42 – 56.

<sup>24</sup> In a communication addressed to the Santa Rosa de Cabal Circuit Criminal Court, Risaralda, which was hearing the petition at the time, the Regional Director of INPEC – Viejo Caldas, stated the following:

[...] The comments made by the inmates themselves [...] reveal their displeasure and almost repudiation of the homosexual conduct of some inmates; they describe it as immoral and distasteful, as something that they, being prisoners, are forced to put up with, to see, hear and keep quiet about. And so we do not agree that this way of being should be expressed openly because these are the times in which we live, this is our environment, our idiosyncrasy and our culture; however much we may want to rid ourselves of our prejudices, every one of us continues to watch with apprehension, disgust and even shame when persons of the same sex kiss and embrace [...] The Constitution and the law are very clear in stating that certain rights and freedoms may be exercised provided the rights of others are not thereby violated [...] provided the established legal order is not violated, given the very special characteristics of prisons, which must aim to re-socialize and regenerate the inmate, not to pervert him, degenerate him; we cannot allow the prison environment to alter his personality [...] The women inmates complain about this type of behavior, which they don't like any more than the family members who visit them do; not to speak of the children who, depending on their age, don't understand what's happening [...] Such displays of affection between a man and a woman obviously don't cause the same sense of anxiety; but a kiss on the mouth –passionate or not- between two persons of the same sex is something women inmates see every day [...] The view of the Ombudsperson's Office is a very personal one, since the majority of society or the community does not accept this conduct. Ask yourselves this: what father wants to see his son kissing another male in public, or a daughter doing the same with a female friend? [...] The least we can do is to try to keep the world inside the prison as much like the outside world as possible [...] If not, we'll be creating an environment of degeneration, and cultivating deviant personalities among those who enter prison [...].

Communication of July 11, 1994, signed by Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas, addressed to the Santa Rosa de Cabal Criminal Circuit Judge, Risaralda. Attachment to the petitioners' brief of November 13, 1996, at 34 – 38.

<sup>25</sup> Second instance decision on the petition seeking *tutela* relief, delivered by the Santa Rosa de Cabal Circuit Criminal Court, Risaralda, July 27, 1994. Record No. 2266. Attachment to the petitioners' brief of November 13, 1996, at 42 – 56.

<sup>26</sup> Second instance decision on the petition seeking *tutela* relief, delivered by the Santa Rosa de Cabal Circuit Criminal Court, Risaralda, July 27, 1994. Record No. 2266. Attachment to the petitioners' brief of November 13, 1996, at 42 – 56.

66. Furthermore, the case file with the IACHR contains information from the “social behavior profile” that the authorities of the Pereira Women’s Prison had included in some inmates’ records. The Commission notes that the records mention the relationship that some inmates had with Marta Álvarez, underscoring her sexual orientation. For example, one of these documents describes the personality of one inmate as follows:

[...] from the time she arrived at the prison, she let her lesbian sexual inclinations be known, but did so while exercising self-control. She unconditionally supports the protests of inmate Marta Álvarez seeking protection to be able to engage in her lesbian conduct freely. At the present time she has an inseparable companion in the cellblock [...] a good girl who fell into her hands; she, too, gives unqualified support to Álvarez Giraldo. She is a hard worker, but can be carried away by her sexual inclinations.<sup>27</sup>

67. The following was written in the profile of another inmate:

[...] her record has been seriously blemished by her lesbian conduct; she has been disciplined a number of times for this behavior, which involves exhibitionism and reckless demonstrations of her lesbian or homosexual behavior; she is an unconditional supporter of the activities and protests that Marta Álvarez stages to flout the disciplinary rules in order to gain acceptance or tolerance of her lesbian conduct.<sup>28</sup>

## **2. The request that Marta Álvarez filed to be allowed intimate visits with her partner M. H. in 1994**

68. Starting in November 1992, she was in a relationship with M. H., which continued for the duration of Marta Álvarez’ imprisonment in the Pereira Women’s Prison.<sup>29</sup> M. H. visited Marta Álvarez every Sunday, “but it was impossible to have a few moments alone with her, since the visit took place in the prison yard, with all the other inmates present.”<sup>30</sup> At the beginning, Marta Álvarez was allowed to correspond with and receive visits from her partner M. H., under the general visiting system within the Pereira Women’s Prison.<sup>31</sup>

### **i) The authorization given by the Santuario 33<sup>rd</sup> Prosecutor’s Office and the measures taken by the Regional Ombudsperson’s Office and Marta Álvarez vis-à-vis the INPEC authorities.**

69. On July 21, 1994, in keeping with the regulations in force and at the request of Marta Álvarez, the Pereira Regional Ombudsperson’s Office sent the Santuario 33<sup>rd</sup> Prosecutor’s Office —the authority conducting the criminal case against Marta Álvarez— the documentation needed for her to be authorized to have an intimate visit with her partner M. H., at the Pereira Women’s Prison.<sup>32</sup>

<sup>27</sup> Social Behavior Profile of G.L.C.R., dated March 14, 1996. National Penitentiary and Prison Institute (INPEC), signed by the Director of the Pereira Women’s Prison. Attachment to the petitioners’ brief of November 13, 1998.

<sup>28</sup> Social Behavior Profile of M.R.C., dated March 14, 1996. National Penitentiary and Prison Institute (INPEC), signed by the Director of the Pereira Women’s Prison. Attachment to the petitioners’ brief of November 13, 1998.

<sup>29</sup> Decision of the Municipal Criminal Court. Dosquebradas Risaralda. Record No. 040 of February 2, 1995. Annex 15 of the original petition received on May 31, 1996. See also: Record of the statement made by M.H. before the Municipal Criminal Court Judge-Dosquebradas Risaralda, January 26, 1995. Attachment to the petitioners’ brief of November 13, 1996, at 92.

<sup>30</sup> The petitioners’ brief of February 14, 2013, p. 15. Allegation not contested by the State.

<sup>31</sup> This can be inferred from, for example, what Marta Álvarez told the Regional Director of INPEC when she asked to be allowed a conjugal visit with her partner. At the time, Marta Álvarez said “she [M.H.] visits me every Sunday; she calls me every Wednesday, and looks after my needs in general.” Communication of October 28, 1994, addressed to Luz Mary Valencia, Regional Director of INPEC, signed by Marta Lucía Álvarez. Annex 10 of the original petition received on May 31, 1996.

<sup>32</sup> Petition for protection, dated January 20, 1995, filed by the Pereira Regional Ombudsperson with the Dosquebradas Municipal Criminal Court Judge. Annex 12 of the original petition received on May 31, 1996.



70. On July 26, 1994, the 33<sup>rd</sup> Prosecutor's Office gave Marta Álvarez authorization to have the requested intimate visit.<sup>33</sup> The Women's Prison was notified of that authorization via Memorandum No. 590, of July 26, 1994.<sup>34</sup> Then Director of the Pereira Women's Prison claimed that he did not received that memorandum.<sup>35</sup>

71. On August 12, 1994, the Santuario 33<sup>rd</sup> Prosecutor's Office asked the Prison Director to inform Marta Álvarez that she had been granted "authorization to receive intimate visits from her partner [M. H.]."<sup>36</sup> On August 17, 1994, the Ombudsperson's Office requested information from Santuario's 33<sup>rd</sup> Prosecutor's Office concerning the decision on the request filed by Marta Álvarez. The Ombudsperson's Office received an "affirmative answer and an authenticated photocopy of memorandum 590."<sup>37</sup>

72. After receiving the August 12, 1994 communication from the 33<sup>rd</sup> Prosecutor's Office, the Director of the Pereira Women's Prison sent a letter dated August 18, 1994, in which he asked for a "review of the order given by the Santuario 33<sup>rd</sup> Prosecutor's Office" in connection with the intimate visit that Marta Álvarez was granted. In this communication, he stated that he was "troubled by the order or authorization that is being given, because this prison is a place for rehabilitation and special discipline and if the decision of the 33<sup>rd</sup> Prosecutor's Office is carried out, there is no way of knowing what the future consequences may be".<sup>38</sup>

73. On August 19, 1994 the 33<sup>rd</sup> Prosecutor's Office sent another memorandum to the Director of the Pereira Women's Prison, reiterating the authorization granted to Marta Álvarez to receive intimate visits from M. H.<sup>39</sup>

74. For her part, and given the request made by the Director of the Pereira Women's Prison, on August 22, 1994 the Sectional Director of Prosecution Offices suggested that the Director take no immediate action on the authorization granted by the Prosecutor's Office. The reason she cited was that an appeal had been filed in the case being prosecuted against Marta Álvarez in which the decision to indict was being challenged.<sup>40</sup>

75. On September 29, 1994, Marta Álvarez sent another request to the Director of the Pereira Women's Prison asking to be permitted to have an intimate visit with her partner M. H. Marta Álvarez attached to that request two sworn statements attesting to cohabitation, the authorization from the Santuario

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<sup>33</sup> Memorandum No. 635 of August 19, 1994, addressed to the Director of the Women's Prison, signed by Santuario's 33<sup>rd</sup> Prosecutor's Office and photocopy of fax # 273, dated August 12, 1994, sent to the Director of the Dosquebradas Women's Prison, and signed by Gloria Espinosa from the 33<sup>rd</sup> Prosecution Unit of Santuario (Risardalda). Annex 4 of the original petition received on May 31, 1996. See also: Petition for protection, dated January 20, 1995, filed by the Pereira Regional Ombudsperson with the Dosquebradas Municipal Criminal Court Judge. Annex 12 of the original petition received on May 31, 1996.

<sup>34</sup> Photocopy of fax # 273, dated August 12, 1994, sent to the Director of the Dosquebradas Women's Prison, and signed by Gloria Espinosa from the 33<sup>rd</sup> Prosecution Unit of Santuario (Risardalda). Annex 4 of the original petition received on May 31, 1996. See also: Petition for protection, dated January 20, 1995, filed by the Pereira Regional Ombudsperson with the Dosquebradas Municipal Criminal Court Judge. Annex 12 of the original petition received on May 31, 1996.

<sup>35</sup> Memorandum dated August 18, 1994, signed by the Director of the Women's Prison and addressed to the Sectional Director of Pereira's Prosecution Offices. Annex 5 de la original petition received on May 31, 1996

<sup>36</sup> Photocopy of fax # 273, dated August 12, 1994, sent to the Director of the Dosquebradas Women's Prison, and signed by Gloria Espinosa from the 33<sup>rd</sup> Prosecution Unit of Santuario (Risardalda). Annex 4 of the original petition received on May 31, 1996.

<sup>37</sup> Petition for protection, dated January 20, 1995, filed by the Pereira Regional Ombudsperson with the Dosquebradas Municipal Criminal Court Judge. Annex 12 of the original petition received on May 31, 1996.

<sup>38</sup> Memorandum dated August 18, 1994, signed by the Director of the Women's Prison and addressed to the Sectional Director of Pereira's Prosecution Offices, Elena Osorio Barrientos, with copy to the Regional Director of INPEC. Annex 5 of the original petition received on May 31, 1996.

<sup>39</sup> Memorandum No. 635 of August 19, 1994, addressed to the Director of the Women's Prison, signed by Santuario's 33<sup>rd</sup> Prosecutor's Office. Annex 3 of the original petition received on May 31, 1996.

<sup>40</sup> Memorandum DSF 775 of 22 August 1994, signed by Helena Osorio Barrientos, Directora Seccional de Fiscalías, addressed to Gerardo Pinzón, Director of the Pereira Women's Prison. Annex 6 of the original petition received on May 31, 1996.

Prosecutor's Office, a copy of the medical examination done of M. H., which stated that she was not suffering from any "infectious-contagious disease" and also indicated that she had undergone a general medical examination, whose results had been reported to the prison authorities.<sup>41</sup>

76. In a communication dated October 10, 1994, the Director of the Pereira Women's Prison informed the Regional Director of INPEC – Viejo Caldas, that an "unusual situation" had presented itself "for a second time" in connection with the authorization that the Santuario 33<sup>rd</sup> Prosecutor's Office had given allowing Marta Álvarez to receive an intimate visit from her partner M. H. In that connection, the Director of the Pereira Women's Prison indicated that, working in cooperation with INPEC's Regional Inspector, he had sent a letter to Pereira's Sectional Director of Prosecution Offices "to inform her about the case, no matter how embarrassing or degrading." However, the response he received from her had, broadly speaking, told him that he could defy the authorization if there was some legal provision that held otherwise.

77. On October 18, 1994, the Regional Director of INPEC – Viejo Caldas, requested a decision from the Office of the Director General of INPEC as to how the authorities at the Women's Prison should respond to the request for an intimate visit.<sup>42</sup>

78. On October 20, 1994, the Pereira Regional Ombudsperson's Office requested information from the Director of the Pereira Women's Prison as to whether the matter of the request for an intimate visit had been resolved; if no decision had been taken, it wanted an explanation of "the reasons for the failure to arrive at a decision in the matter."<sup>43</sup> On October 24, 1994, the Director of the Women's Prison sent a copy of this request to the Office of the Regional Director of INPEC - Viejo Caldas, asking that he intervene with the Ombudsperson's Office requesting that it not exert "this kind of pressure", since if the Director authorized the visit, the prison facility in his charge "would not be a place for re-socialization; instead it would be a place of corruption."<sup>44</sup>

79. The record in the case contains a letter that Marta Álvarez sent to the Regional Director of INPEC, dated October 20, 1994, in which she makes reference to the request she made to the prison authorities asking for an intimate visit. Her letter stated the following:

[...] I am in love with a woman who returns my love 100 percent and who, in my disgrace, has proven to me that the love she feels for me is greater than what I get from my own family. She is my real family.

It might sound strange to you that a woman would tell you that she's in love with another woman. I understand that. But please don't judge me by your own beliefs. I am who I am, and personally I don't understand why women would love men. But I don't sit in judgment of them. I live my life, and let them lead theirs [...].<sup>45</sup>

<sup>41</sup> September 29, 1994 communication signed by Marta Álvarez, addressed to Gerardo Pinzón, Director of the Pereira Women's Prison. Annex to the petitioners' brief of November 13, 1994, at 84. See also Demanda de Tutela de 20 de enero de 1995, presentada por la Defensora del Pueblo Regional Pereira, ante el Juez Penal Municipal Dosquebradas. Annex 12 of the original petition received on May 31, 1996.

<sup>42</sup> Memorandum No. 413 of October 18, 1994, signed by Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas, addressed to Colonel Norberto Peláez Restrepo, Director General of the National Penitentiary and Prison Institute. Annex to the petitioners' brief of November 13, 1996, at 58.

<sup>43</sup> Memorandum No. Q-2249 of October 20, 1994, addressed to Gerardo Pinzón Alvarado, Director of the "La Badea" Dosquebradas Women's Prison, signed by Marta Lucía Tamayo Rincón, Pereira Regional Ombudsperson, with copy to the office of the Departmental Prosecutor. Annex 8 of the original petition received on May 31, 1996.

<sup>44</sup> Memorandum No. 156 of October 24, 1994, signed by the Director of the Prison, Gerardo Pinzón, addressed to Luz Mary Valencia Correa, Regional Director of INPEC-Viejo Caldas. Annex 9 of the original petition received on May 31, 1996.

<sup>45</sup> Communication of October 28, 1994, addressed to Luz Mary Valencia, Regional Director of INPEC, signed by Marta Lucía Álvarez. Annex 10 of the original petition received on May 31, 1996.

80. On October 28, 1994, the Public Prosecutor's Office, acting through the (Risaralda Departmental) Office of the Attorney General of the Nation, asked the Regional Director of INPEC to send the Office of the Attorney General a report on the action taken on Marta Álvarez' request.<sup>46</sup> On November 3, 1994, the Regional Director of INPEC – Viejo Caldas requested an urgent opinion from INPEC's Legal Office. She pointed out that although the visit had already been authorized by the competent authority, the Director of the prison where Marta Álvarez was being held did not know how to respond; for its part, the Ombudsperson's Office insisted that the authorization granted be carried out.<sup>47</sup> That same day, the Regional Director of INPEC told Marta Álvarez that "the prison system had no precedent for her petition."<sup>48</sup>

81. On November 4, 1994, and in response to the request from the Office of the Attorney General of the Nation, the Regional Director of INPEC informed that office of the measures that had been taken in response to Marta Álvarez' request. She wrote that "a preliminary opinion" was needed, arguing that: i) there was no precedent for requests of this kind; ii) the applicable law (Law 65/93 and the General Regulations) did not expressly provide for this hypothetical; iii) the purpose of the "Inmate Disciplinary Regime" was to avoid acts that would be contrary to discipline or that might "endanger re-socialization as the condition *sine qua non* for an inmate to rejoin society", and that iv) under Law 65/93, the commission of acts contrary to "proper respect for the dignity of other inmates or the prison authorities" was classified as a misdemeanor.<sup>49</sup>

82. On November 24, 1994, the Director General of INPEC, in response to the question asked by the Regional Director of INPEC on October 18, 1994, told the Regional Director that "specific guidelines on the subject of intimate visits between homosexuals" would be set out in INPEC's "General Regulations" being drafted at that time, and would follow the principles established in Law 65/93.<sup>50</sup>

83. On December 5, 1994, INPEC's Legal Office told the Regional Director of INPEC that since this matter was within her purview and that of the Director of the Pereira Women's Prison, she should proceed to resolve the matter of Marta Álvarez' request for an intimate visit.<sup>51</sup> In reply, the Regional Director of INPEC again wrote to its Legal Office insisting that she had asked for their advice because there was no provision expressly authorizing or prohibiting intimate visits between same-sex couples. She argued that she needed an opinion on the legal basis for a decision on Marta Álvarez' request, taking into account, on the one hand, the "logical consequences that an affirmative decision could have for internal order, morality and the family unit"; on the other hand, if her request was denied, INPEC might face legal action.<sup>52</sup>

<sup>46</sup> Memorandum 3992 of October 28, 1994, signed by Luis Arquímedes Echeverría Granada, Risaralda Departmental Prosecutor, addressed to Luz Mary Valencia de Galvez, Regional Director of INPEC. Annex to the petitioners' brief of November 13, 1996, at 59. The record shows that this request was repeated as a matter of "urgency", via Memorandum PDR\_AVO\_325 of December 2, 1994. Annex to the petitioners' brief of November 13, 1996, at 70.

<sup>47</sup> Memorandum No. 441 of November 3, 1994, signed by Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas, addressed to Lucy Elena Angulo de Morales, Head of INPEC's Legal Office. Annex to the petitioners' brief of November 13, 1996, at 60.

<sup>48</sup> Memorandum No. 442 of November 3, 1994, addressed to Marta Álvarez and signed by Luz Mary Valencia Correa, Regional Director of INPEC-Viejo Caldas. Annex 11 of the original petition received on May 31, 1996.

<sup>49</sup> Memorandum No. 451 of November 4, 1994, signed by Luz Mary Valencia Correa, Regional Director of INPEC-Viejo Caldas, addressed to the Pereira Departmental Prosecutor. Annex to the petitioners' brief of November 13, 1996, at 66 and 67. The file on the case shows that this response was sent again to the Pereira Department Prosecutor's Office via memorandum No. 600-RVC-598 of December 6, 1994. Annex 27 to the original petition received on May 31, 1996.

<sup>50</sup> Memorandum DIG 10-856, dated November 24, 1994, signed by Norberto Peláez Restrepo, Director General of INPEC, addressed to Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas. Annex to the petitioners' brief of November 13, 1996, at 71.

<sup>51</sup> Memorandum No. 4923/OT of December 5, 1994, signed by Lucy Elena Angulo de Morales, Head of the INPEC Legal Office and addressed to Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas. Annex to the petitioners' brief of November 13, 1996, at 69.

<sup>52</sup> Memorandum No. RVC.600-622, dated December 12, 1994, signed by Luz Mary Valencia, Regional Director of INPEC – Viejo Caldas, addressed to Lucy Elena Angulo de Morales, Head of the INPEC Legal Office. Annex to the petitioners' brief of November 13, 1996, at 72 and 73.

84. On December 27, 1994, INPEC's Legal Office sent another communication to the Regional Director of INPEC - Viejo Caldas, in which it maintained that the "intimate visit" was for "heterosexual couples", since the word "*cónyuge*" refers to "either person (husband or wife) in a monogamous marriage." As for "intimate visits" between same-sex couples, the Legal Office stated that there was no provision in the prison regulations on the question of same-sex couples; hence it was unable to determine whether such a visit should be authorized. It went on to say that since the "Internal Rules for each prison facility" were about to be issued, it would be best to wait until those rules were in force before deciding whether a same-sex intimate visit was even possible.<sup>53</sup>

**ii) Petition seeking tutela relief, filed by the Office of the Regional Ombudsperson on behalf of Marta Álvarez**

85. On January 20, 1995, the Pereira Regional Ombudsperson's Office filed a petition seeking *tutela* relief with the Dosquebradas Municipal Criminal Judge, on behalf of Marta Álvarez, for protection of her rights to equality, free development of her personality, privacy, and her right of petition. The case was filed against the Director of the Pereira Women's Prison, the Office of the Regional Director and Office of the General Director of INPEC. It asked the court to order "the prison authorities [...] to immediately authorize a homosexual intimate visit" for Marta Álvarez.<sup>54</sup>

86. In its petition, the Ombudsperson's Office argued that five months after submitting a petition on behalf of Marta Álvarez to be accorded the right to an intimate visit, the prison authorities had failed to take action on the matter. The Ombudsperson's Office argued that when no response was forthcoming, in practice the prison authorities' inaction became a way of preventing Marta Álvarez from having an intimate visit, thereby violating her right to be treated as an equal, her right to free development of her personality, and her right to privacy.

87. The Ombudsperson also maintained that the prison authorities could not deny Marta Álvarez her right to an intimate visit based on her sexual orientation. She added that the Colombian legal system prohibits any form of discrimination; specifically, the Constitution made no distinction for the exercise of rights based on a person's sexual orientation; for its part, while Law 65/93 demanded that objective requirements had to be satisfied to be able to have intimate visits, it did not establish different treatment for inmates because they were homosexuals.

88. As for the rules regulating intimate visits, the Ombudsperson's Office held that since there was no provision requiring different treatment for same-sex couples, the provisions of Resolution 5889/93 should be applied to Marta Álvarez' request; hence, it asserted, the prison authorities' argument as to the lack of rules for visits of this kind was baseless.

89. On January 23, 1995, the court agreed to hear the petition.<sup>55</sup> The Dosquebradas (Risaralda) Municipal Criminal Court Judge proceeded to order a series of measures, among them the following: i) a request asking for the file of the administrative proceedings conducted in connection with Marta Álvarez' request to the prison authorities;<sup>56</sup> ii) a court review of Marta Álvarez' record at the Pereira Women's Prison, to determine

<sup>53</sup> Memorandum No. 5126, dated December 27, 1994, signed by Lucy Elena Angulo de Morales, Head of the INPEC Legal Office, and addressed to Luz Mary Valencia Correa, Regional Director of INPEC – Viejo Caldas. Annex to the petitioners' brief of November 15, 1996, at 27 and 28.

<sup>54</sup> *Tutela* petition, dated January 20, 1995, filed by the Pereira Regional Ombudsperson's Office with the Dosquebradas Municipal Criminal Judge. Annex 12 of the original petition received on May 31, 1996.

<sup>55</sup> Order from the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 23, 1995. Attachment to the petitioners' brief of November 13, 1996, at 11 and 12.

<sup>56</sup> Memorandum No. 031 of January 30, 1995, signed by the Municipal Criminal Court Judge, and addressed to the Office of the Regional Director of INPEC – Vieja Caldas. Attachment to the petitioners' brief of November 13, 1996, at 96; Memorandum No. 33 of February 1, 1995, signed by the Municipal Criminal Court Judge and addressed to the Office of the Risaralda Departmental Prosecution Service, requesting information from that authority as to whether it was conducting a "disciplinary investigation concerning noncompliance with the rules for observance of the right of petition." Attachment to the petitioners' brief of November 13, 1996, at 95. The

how long she had been in that facility and her membership on the Human Rights Committee;<sup>57</sup> and iii) statements taken from Marta Álvarez<sup>58</sup>, her partner M. H.,<sup>59</sup> the Director of the Pereira Women's Prison,<sup>60</sup> and the representative from the Office of the Regional Ombudsperson.<sup>61</sup>

90. In her statement, the *tutela* judge asked Marta Álvarez, *inter alia*, about when she had made her "homosexual decision", to which she replied: "I have always been homosexual [...] I have never loved a man, have never made love with a man; I don't like it, it's not natural for me." She also testified about how she was affected by not being able to have an intimate visit with her partner, and said the following:

having such an important part of me, which is my private persona, my sexuality, repressed [...], is causing me terrible psychological harm [...] they are forcing me to not express who I am, how I was born. I am a lesbian; I am homosexual; I am proud of what I am and ask to be respected for the person I am.

QUESTION. Could you please tell the court how you feel about the refusal to grant you permission for an intimate visit? REPLY: I feel very bad. Imagine, I was sharing the same home with [M. H.], the same bed, meals, everything. And from one moment to the next, it was all gone. I feel empty; I feel a part of me is missing, sincerely I do. I feel a sense of desperation, like I'm serving two sentences: one for the crime I committed and another for being a homosexual.<sup>62</sup>

91. During the proceedings, the Director of the Pereira Women's Prison again told the *tutela* judge that the request filed by Marta Álvarez could not be authorized because the applicable law contained no regulation on that matter. He said that Law 65/93 contemplated a kind of "classification of inmates"; homosexuals were not included; "quite the contrary, the law stipulates that inmates are to be segregated by sex [...] to avoid promiscuity and internal disorder." Consequently, as he saw it, the lawmaker had not anticipated this possibility; to the contrary, Law 65/93 made "obscene acts" serious offenses, not to be allowed "under any circumstances." He maintained that there was no isolated place inside the prison "where an intimate visit might eventually be permitted." He also pointed out that INPEC's General Regulations had not been issued,

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case record contains a memorandum sent by the Risaralda Departmental Prosecution Service to the Municipal Criminal Court Judge reporting that the Prosecution Service was conducting a disciplinary investigation into the Director of the Pereira Women's Prison "for an alleged violation of Article 6 of Decree 01/84, in response to a complaint filed by inmate Marta Lucía Álvarez Giraldo, according to Record No. 086-09458." Memorandum No. DPR-461 of February 7, 1995. Attachment to the petitioners' brief of November 13, 1996.

<sup>57</sup> Order from the Municipal Criminal Court Judge-Dosquebradas Risaralda, January 23, 1995. Attachment to the petitioners' brief of November 13, 1996, at 11 and 12. The court inspection was done on January 25, 1995, as documented in a record of that same date. Order from the Municipal Criminal Court Judge-Dosquebradas, Risaralda, January 25, 1995. Judicial inspection. Attachment to the original petition received on May 31, 1996, at 20.

<sup>58</sup> Record of the statement made by Marta Álvarez in the presence of the Municipal Criminal Court Judge-Dosquebradas Risaralda, January 24, 1995. Annex 14 of the original petition of May 31, 1996.

<sup>59</sup> M.H. said the following concerning her relationship with Marta Álvarez:

[...] We are a couple in love and intimacy. In the relationship, we act like a normal couple, we live in the same house, we share everything [...] we both have a right to privacy as a couple. We are both women, we both need what's best. I feel a physical need to be intimate with her, because I want to feel loved, and I love her very much. Simply that.

See: Record of the statement made by M.H. in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 26, 1995. Attachment to the petitioners' brief of November 13, 1996, at 92.

<sup>60</sup> Record of the statement made by Gerardo Pinzón in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 26, 1995. Attachment to the petitioners' brief of November 13, 1996, at 89-91.

<sup>61</sup> Gloria Quiceno Ramírez, representative of the Pereira Regional Ombudsperson's Office, made a statement on the process undertaken to get authorization for Marta Álvarez' conjugal visit. In her statement she expressed concern over the conduct of the prison authorities in the procedure followed to arrive at a decision on the request she had filed. See: Record of the Statement made by Gloria Quiceno Ramírez, in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 30, 1995. Attachment to the petitioners' brief of November 13, 1996, at 93 – 95.

<sup>62</sup> Record of the statement made by Marta Álvarez in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 24, 1995. Annex 14 of the original petition of May 31, 1996.

which was a necessary first step before internal regulations could be issued to govern the Pereira Women's Prison according to the INPEC guidelines.<sup>63</sup>

92. In his statement before the *tutela* judge, the Director maintained that: From what I have heard, the vast majority of the inmates do not approve; as they have told me personally, they are hoping that such intimate visits are never approved, because the consequences would be terrible for good families, especially those with normal sexual inclinations [...].

QUESTION: Could you please tell the Court how internal order or discipline among the inmates would be affected if homosexual intimate visits were allowed? REPLY: Obviously it would be scandalous to the point that the prison would cease to be a place for rehabilitation and become instead a cage of crazed women; in other words, it would be a total collapse of social and moral order. This is what I think [...] Doctor, do you believe that authorization of such visits would be good for society in general? If so, or if it became a reality, what impression would these types of obscene acts make on little children who come to visit their family members, or on adults? Can this be constructive for these people or will it be detrimental to society?<sup>64</sup>

93. In response to the *tutela* petition, the Office of the Regional Director of INPEC – Vieja Caldas, alleged that the Santuario 33<sup>rd</sup> Prosecutor's Office had made a mistake in authorizing the intimate visit for Marta Álvarez. The Office of the Regional Director of INPEC pointed out that, under Law 65/93 and Resolution 5889, the word “*COMPañERO (A)* [used in that law] could not be interpreted as attributing sexual inclinations to persons; [instead] it is solely for purposes of classification of prison facilities [in other words], the men must be segregated from the women.”<sup>65</sup>

### iii) The *tutela* judge's first instance decision

94. By a decision dated February 2, 1995, the Dosquebradas Municipal Criminal Court Judge granted *tutela* with respect to Marta Álvarez' right of petition, but denied *tutela* with respect to the other rights that the Office of the Ombudsperson had asserted in its petition.<sup>66</sup> In his decision, the judge analyzed the scope of the rights asserted in the complaint (the right of petition, the right to equal protection, the right to privacy and the free development of one's personality), and their application to the situation of Marta Álvarez. The judge wrote that the crux of the matter presented to the court was Marta Álvarez' “sexual choice to be a homosexual and her desire that her sexual choice be accorded the same respect given to the choice made by the other inmates who have freely and voluntarily opted to be heterosexual.” Here, the decision establishes that

<sup>63</sup> Record of the statement made by Gerardo Pinzón in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 26, 1995. Attachment to the petitioners' brief of November 13, 1996, at 89-91; and Communication dated January 25, 1995, in which the Criminal Judge was sent a copy of the administrative proceedings conducted in response to the request filed by Marta Álvarez. On that occasion, the official in question stated that “[...] Article 112 of Law [65/93 establishes the principles by which the conjugal visit is governed,] principles of hygiene, safety and morality [...] by MORALITY we understand the normal relations between couples. Article 5 of the Constitution protects the family as the basic institution of society. FAMILY to mean the freely taken decision of a MAN and a WOMAN [...] what then do I tell the children, spouses or permanent partners of inmates in my charge when they see their spousal relationship, family unit or children threatened by allowing a HOMOSEXUAL CONJUGAL visit? Communication of January 25, 1995, signed by Gerardo Pinzón, Director of the Pereira Women's Prison, addressed to the Municipal Criminal Court Judge-Dosquebradas, Risaralda. Attachment to the petitioners' brief of November 13, 1996, at 76 – 78.

<sup>64</sup> Record of the statement made by Gerardo Pinzón in the presence of the Municipal Criminal Court Judge – Dosquebradas Risaralda, January 26, 1995. Attachment to the petitioners' brief of November 13, 1996, at 89-91.

<sup>65</sup> Memorandum No. 600-RVC-0092 of January 25, 1995, signed by Bernardo Alfonso Sánchez, Regional Director of INPEC – Viejo Caldas, addressed to the Municipal Criminal Court Judge – Dosquebradas, Risaralda. Attachment to the petitioners' brief of November 13, 1996, at 22-26.

<sup>66</sup> Decision of the Municipal Criminal Court. Dosquebradas Risaralda. Record No.040. February 2, 1995. Annex 15 of the original petition received on May 31, 1996. Notification of the decision was on February 3, 1995, and was sent to the Office of the Director of the La Bada Women's Prison, to Marta Álvarez Giraldo, to the Office of the Ombudsperson, to the Office of the Regional and National Director of INPEC, and to the Pereira Regional Ombudsperson's Office. See: records of notifications dated February 3, 1995. Attachment to the petitioners' brief of November 13, 1996, at 115 – 120.

the “sexual choice” made by Marta Álvarez and her partner is a matter that “must be respected by all State authorities and private citizens” and that the jurisprudence of the Constitutional Court is that “homosexuality [...] cannot be a factor in social discrimination.”<sup>67</sup>

95. Taking this into account and given the facts submitted for his consideration, the *tutela* judge held that there was no way to clearly ascertain the presence of an “actual violation of the rights to equal protection, privacy and the free development of one’s personality,” since the request for an intimate visit had not been formally decided. The court went on to say that until such time as a decision on the matter was made, it was impossible to determine whether Marta Álvarez’ basic rights had in any way been affected.

96. Nevertheless, the court did find that the prison authorities had been negligent by virtue of the fact that no decision on the request had been made, which was in violation of Article 23 of the National Constitution concerning the right of petition. The Court considered that Marta Álvarez’ request was done according to the rules established in INPEC Resolution No. 5889/93, and that under that resolution, directors of prison facilities were to grant the intimate visit once they had established that the requirements had been met. Here, the court held that the competent prison authorities had an obvious “interest” in not reaching a decision on Marta Álvarez’ request, and had alleged a lack of “regulations governing homosexual intimate visits.”<sup>68</sup>

97. The judge thus held that given this omission, the right of petition was in need of protection, and therefore ordered the competent authorities to answer —either in the affirmative or the negative— the request presented by Marta Álvarez. He also wrote that as a *tutela* judge, “while [...] he was called upon] to protect all fundamental rights,” he could not “overstep the boundaries of his own authority.” Hence, he could not broach the issue of how to decide the matter or determine what the answer should be. He also wrote that the opinions expressed by the Director of the Pereira Women’s Prison and the Office of the Regional Director of INPEC to the effect that the intimate visit ought not to be granted because they considered it “immoral”, were not a response that recognized the right of petition established in the National Constitution.<sup>69</sup>

98. The ruling therefore ordered the Office of the Director of the Pereira Women’s Prison to answer the request that Marta Álvarez had presented on September 29, 1994, in accordance with the Contentious-Administrative Code and within two days of the date of notification of the judgment. It also ordered a copy of the proceedings sent to the Risaralda Departmental Prosecution Service, so that it might launch an investigation into “the conduct of the officials at the National Penitentiary and Prison Institute.”<sup>70</sup>

**iv) Compliance with the first instance tutela decision: the denial of the request for an intimate visit based on an alleged failure to comply with the rules then in force**

99. Acting in compliance with the first instance *tutela* decision, on February 5, 1995 the Director of the Pereira Women’s Prison informed Marta Álvarez that her request for an intimate visit, filed on September 29, 1994, did not meet the requirements set forth in Resolution No. 5889/93, specifically because those rules

<sup>67</sup> In citing the grounds for its decision, the court mentioned, *inter alia*, a judgment of the Constitutional Court dated March 7, 1994, in a case on “homosexuality in the Armed Forces”, which made freedom regarding life choices and individual beliefs a fundamental right and emphasized the liberal principle of no institutional interference in subjective affairs that do not affect social coexistence and organization.”

<sup>68</sup> Decision of the Municipal Criminal Court. Dosquebradas Risaralda. Record No. 040. February 2, 1995. Annex 15 of the original petition received on May 31, 1996.

<sup>69</sup> Decision of the Municipal Criminal Court. Dosquebradas Risaralda. Record No. 040. February 2, 1995. Annex 15 of the original petition received on May 31, 1996.

<sup>70</sup> Decision of the Municipal Criminal Court. Dosquebradas Risaralda. Record No. 040. February 2, 1995. Annex 15 of the original petition received on May 31, 1996. In compliance with what the court ordered on this point, the record shows that that on February 9, 1995, the case file was referred to the Risaralda Departmental Prosecution Service. See: Memorandum No. 50 of February 9, 1995, addressed to the Risaralda Departmental Prosecution Service, signed by the Municipal Criminal Court Judge – Dosquebradas, Risaralda. Attachment to the petitioners’ brief of November 13, 1996, at 115. The IACHR has no documents to show what the authorities did to follow up on the matter.

provided that the authority presiding over the criminal case against her had to give his or her authorization; in her case, authorization had been given by the Santuario 33<sup>rd</sup> Prosecutor's Office, whereas her case had, since September 1, 1994, been with the Santuario (Risaralda) Court of Mixed Jurisdiction. The Director therefore informed Marta Álvarez that the request had to be denied, but suggested that she obtain authorization from the Court of Mixed Jurisdiction and file a new request with the prison authorities for a decision on the matter.<sup>71</sup>

100. On February 7, 1995, and to "elaborate upon" the previous memorandum, a new letter was sent to Marta Álvarez, again from the Director of the Pereira Women's Prison. The new letter again denied Marta Álvarez' request, but this time informed her that Resolution 5889/93 contained no express provision for a "homosexual intimate visit at either men's or women's prisons in Colombia."<sup>72</sup>

101. The text of that communication also stated that while the resolution in question "makes reference to the inmate's spouse or partner for purposes of the intimate visit, it is alluding to a HETEROSEXUAL couple", which the Santuario 33<sup>rd</sup> Prosecutor's Office had not taken into consideration when it gave authorization for the intimate visit; furthermore, the Santuario 33<sup>rd</sup> Prosecutor's Office did not have jurisdiction for the reasons explained in the communication of February 5. The February 7 communication also stated that as for the question of a "hierarchical authority" the Office of the Director of the Women's Prison followed the interpretation of INPEC's Legal Office to the effect that the term "spouse" referred to "each partner (husband or wife) in a monogamous marriage;" hence, the intimate visit should be understood to apply only to opposite-sex couples.

102. The Director also pointed out that, under the Prison Code and the "guiding principles" established in Law 65/93,<sup>73</sup> that authority was empowered to "make reasonable distinctions for reasons of security, re-socialization, service of sentence and prison policy." She argued that: i) for purposes of prison policy, as established by the Office of the Director General of INPEC,<sup>74</sup> intimate relations during an intimate visit—between heterosexual couples— were informed by principles related to "family planning [and] birth control" and therefore the provisions invoked in the case of Marta Álvarez did not apply; ii) while INPEC's General Regulations, referred to in Article 112 of Law 65/93, had not yet been issued, Resolution No. 5889/93 was regarded as a complete set of mandatory rules regarding intimate visits in general; and iii) that for the sake of security, a "reasonable distinction" had to be made in the case in question, since it was possible that the same-sex person making the intimate visit could switch places with the inmate, which would create a threat to prison security and the prison system.

103. Finally, in her communication the Director of the Pereira Women's Prison cited reasons related to "morality," which she believed were relevant to the matter put to her for consideration. Specifically, she wrote the following:

[...] especially with regard to the rights of the FAMILY, SPOUSES, PERMANENT PARTNERS, and CHILDREN (minors and adolescents) of the inmates in my charge—rights recognized in articles 5, 42, 43, 44 and 45 of the Constitution of Colombia— internal order at the LA BADEA Women's Prison would be seriously affected by something so blatant and unusual that a lengthy process would be required to win tolerance and acceptance, which would only come as our society's prevailing traditions and beliefs evolve. THE REAL AND OBJECTIVE IMPACT WOULD BE ON A COMMUNITY LIKE OUR OWN PRISON POPULATION, WHICH IS SO UNIQUE.

<sup>71</sup> Memorandum No. D-013-620 REP dated February 5, 1995, addressed to Marta Lucía Álvarez Giraldo, signed by Blanca Delia Díaz Saray, Director of the Pereira Women's Prison. Annex 16 of the original petition received on May 31, 1996.

<sup>72</sup> That communication is signed by María Enerieth Pulido Mesa, as Director of the Pereira Women's Prison. See: Communication of February 7, 1994, addressed to Marta Álvarez. Annex 17 of the original petition received on May 31, 1996.

<sup>73</sup> Specifically, she referred to articles 13 and 3 of the Prison Code, on the application of the principles established in Law 65/93 as a frame of reference for interpretation purposes and the principle of equality, respectively.

<sup>74</sup> Circular 0098 of July 22, 1994, from the Office of the Director General of INPEC. Attachment to the petitioners' brief of November 13, 1996, at 123.



In my capacity as Director and in light of the provisions of Resolution 5889/93 of the Office of the Director General of INPEC, which all of us –DIRECTORS AND INMATES- must observe, I understand that your right to have your private, HOMOSEXUAL inclinations respected is protected under the Constitution and safeguarded under normal circumstances, but not with the limitations that your imprisonment imposes.

Our world is a special community composed of inmates, a small social group where their [illegible] the deprivation of liberty, so that the inmate is able to exercise her parental authority and thereby give her children a moral upbringing; to fully discharge her obligations to her husband to safeguard her marriage or her relations with her permanent partner; many inmates are female heads of household, to whom the State must give SPECIAL SUPPORT. Our moral duty is to assist them. Hence, our private interests must give way to the general interests of the 62 inmates currently in my charge.<sup>75</sup>

#### v) Second instance decision of the tutela judge

104. On February 8, 1995, the Regional Ombudsperson challenged the first instance decision on the *tutela* petition she filed,<sup>76</sup> and the case was referred to the Criminal Court Judge of the Santa Rosa de Cabal Circuit (Risaralda).<sup>77</sup> By a decision of March 13, 1995, the Judge of Second Instance upheld the decision being challenged, denied *tutela* of Marta Álvarez' rights to equality, free development of one's personality and privacy, and ordered the case sent up to the Constitutional Court for possible review.<sup>78</sup>

105. The judge of second instance pointed out that since the prison authorities had already answered Marta Álvarez' request, this time the analysis would focus on the question of whether the authorities' refusal to grant the requested intimate visit had violated Marta Álvarez' fundamental rights. As for the delay on the part of the prison authorities, the Judge repeated that this was a violation of Marta Álvarez' right of petition, and thus confirmed the first instance *tutela* decision with respect to that right.

106. As to the reasons given for denying Marta Álvarez the intimate visit, the judge first acknowledged that to protect the right to privacy recognized in the Constitution, "homosexual tendencies" should be respected, since "homosexuality is a personal choice and the State cannot force opposite-sex conduct upon her"; the principle of equality precluded acts of discrimination based on a person's sexual orientation. Nevertheless, the judge ruled that the right to the free development of one's personality is not an absolute right; instead, it can be subject to the limitations "imposed by the rights of others and the legal system." Accordingly, the judge was of the view that the following consideration could not be dismissed:

[O]ne reality in [the] country: many people reject homosexuality; most individuals (either hypocritically or sincerely) do not approve of homosexual practices. It is obvious that, little by

<sup>75</sup> Capitalization from the original text. Communication of February 7, 1994, addressed to Marta Álvarez. Annex 17 of the original petition received on May 31, 1996.

<sup>76</sup> The case file contains a communication addressed to the Municipal Criminal Court Judge-- Dosquebradas Risaralda, in which the Office of the Regional Ombudsperson stated that it was challenging the *tutela* decision of February 2, 1995. See: communication of February 8, 1995. Attachment to the petitioners' brief of November 13, 1996, at 178. It also contains an acknowledgement of receipt of the "brief to challenge the *tutela* decision", dated February 9, 1995. See: Acknowledgement "Received", signed by Jorge Nelson Cardona Noreña, Clerk. Attachment to the petitioners' brief of November 13, 1996. See also the petitioners' brief received on February 14, 2013, p. 17.

<sup>77</sup> Order from the Municipal Criminal Court – Dosquebradas, Risaralda, dated February 10, 1995. Attachment to the petitioners' brief of November 13, 1996, at 132; and Order of the Criminal Court of the Santa Rosa de Cabal Circuit, dated February 20, 1995, which concerns the court's hearing of the appeal filed. Attachment to the petitioners' brief of November 13, 1996, at 136.

<sup>78</sup> Decision of the Criminal Court Judge of the Santa Rosa de Cabal (Risaralda) Circuit, dated March 13, 1995. Record No. 2301 (second instance). Annex 19 to the original petition received on May 31, 1996, and to the petitioners' brief of November 13, 1996, at 137-152. Notification of the decision was sent to the Office of the Regional and National Director of INPEC, the Pereira Regional Ombudsperson's Office, the Office of the Director of the Pereira Women's Prison and Marta Álvarez on March 14, 1995. See: Records of March 14, 1995 notifications. Attachment to the petitioners' brief of November 13, 1996, at 153 – 154.

little, a tolerance and respect for those who have opted to have relations with persons of the same sex have to be cultivated; however, a judge cannot divorce himself from social reality.<sup>79</sup>

107. Thus, in the court's view, the case had failed to prove that Marta Álvarez had been the victim of discrimination for "merely expressing her homosexual preferences", especially when one considers, for example, that she was even a member of the Human Rights Committee at the prison where she was incarcerated. Thus, the decision was based on the fact that Marta Álvarez had to conform to a disciplinary regime that applied to all persons deprived of their freedom and whose purpose was re-socialization and to foster coexistence with the rest of the prison population; therefore, the prison officials were authorized to issue rules and regulations that would enable prisons "to control the lives of those incarcerated in these establishments." Following this same line of reasoning, the judge endorsed the interpretation of the "intimate visit" as referring expressly "to a heterosexual intimate visit" and that this was the only possible interpretation of the INPEC regulation. The judge therefore held that based on the legal system, there was no violation of the "fundamental rights of homosexuals" and that, in the case of Marta Álvarez, her rights had been limited but not denied and that the limitation was legitimate under the law and the Constitution and was a reasonable consequence of the prison regime to which she was subject.

108. Based on these considerations, the *tutela* judge concluded that:

This court finds that to permit the practice of homosexual acts within prisons is contrary to the discipline that must exist inside such establishments. Such practices could lead to serious clashes—hardly desirable—between those who do not accept such practices and those who do.

While the room for tolerance has to increase to accommodate behaviors that are considered out of the norm, the way that the majority of society thinks and is cannot be changed overnight; the majority are firmly convinced that homosexuality is reprehensible conduct, and that belief has been there for time immemorial. This is hardly news: look, for example, at how professors of sex education portray sexual acts between persons of the same sex as deviant acts. If this is what young people are taught in their classrooms, how can society be asked to become completely tolerant of these acts from one moment to the next?

Many people believe that allowing homosexual acts inside prisons, with complete freedom, would surely have serious consequences for what they consider their morals, their way of being and thinking, and those consequences would extend to their family members, to the families of inmates who would be tortured by the thought that their loved ones in prison could go down the same road.

Homosexual practices in prisons obstruct those institutions' objectives and therefore cannot be condoned.

109. In compliance with the decision of the *tutela* judge of second instance, on March 21, 1995 the matter was referred to the Constitutional Court for possible review.<sup>80</sup>

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<sup>79</sup> Decision of the Criminal Court of the Santa Rosa de Cabal (Risaralda) Circuit, March 13, 1995. Record No. 2301 (second instance). Annex 19 to the original petition received on May 31, 1996, and to the petitioners' brief of November 13, 1996, at 137-152.

<sup>80</sup> Order of referral, dated March 21, 1995. Attachment to the petitioners' brief of May 13, 1996, at 128.

## vi) Petition to the Constitutional Court seeking review

110. On May 17, 1995, the Office of the National Director of Judicial Appeals and Actions of the Office of the Ombudsperson asked the Constitutional Court to review the *tutela* decision. By order of May 22, 1995, Selection Chamber No. 5 refused the request.<sup>81</sup>

111. At this point in the analysis, based on the decisions referred to herein, the Commission has established that Marta Álvarez was not granted an intimate visit with her partner M. H., requested back in 1994 while she was incarcerated in the Pereira Women's Prison. The parties do not disagree on this point.

### 3. Marta Álvarez' transfer in 1995

112. The documentary evidence supplied indicates that on more than one occasion, Marta Álvarez filed complaints with various authorities claiming that after instituting the procedures to request an intimate visit, and despite the fact that she was a member of the "Human Rights Committee" at the prison, she began to be the target of disciplinary measures that had the effect of denying her intimate visits.<sup>82</sup> She asserted that hers was not the only case of this kind; instead, this was a generalized problem that affected other inmates at the prison and had to do with their sexual orientation.<sup>83</sup>

113. On September 29, 1994, Marta Álvarez filed a request with the Director of the Pereira Women's Prison asking for an intimate visit. The following day, September 30, 1994, the Director of the Pereira Women's Prison sent a request to the Santuario (Risaralda) Circuit Court Judge of Mixed Jurisdiction asking

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<sup>81</sup> Memorandum No. 006483 of May 17, 1995, addressed to Marta Lucía Tamayo, Pereira Regional Ombudsperson, signed by Myriam Ávila Roldán, National Director of Judicial Appeals and Actions in the Office of the Ombudsperson. Annex 22 of the original petition received on May 31, 1996; Memorandum No. 007288 dated June 2, 1995, addressed to Marta Lucía Tamayo, Pereira Regional Ombudsperson, signed by Myriam Ávila Roldán, National Director of Judicial Appeals and Actions in the Office of the Ombudsperson. Annex 23 of the original petition received on May 31, 1996.

<sup>82</sup> The alleged victim told the judge of first instance hearing her *tutela* petition the following:

I have been disciplined frequently and to an exaggerated extent since I began to assert my constitutional rights, so much so that I am being disciplined at the present time by being denied five Sunday visits; if the court should rule in my favor, the disciplinary action would become a pretext for denying me the conjugal visits. I became a member of the Human Rights Committee at about the time I began to demand my rights. I have been the victim of discrimination ever since. I would ask the court to review the disciplinary measures they have imposed in my case and to revoke them should the court find that my right to due process was violated.

Record of the statement given by Marta Álvarez in the presence of the Municipal Criminal Court Judge-Dosquebradas Risaralda, on January 24, 1995. Annex 14 of the original petition of May 31, 1996. The representative from the Pereira Regional Ombudsperson's Office told the *tutela* judge that

Since around [...] October of 1994, Martha has been disciplined for alleged disciplinary infractions in various ways: solitary confinement or loss of visiting privileges. It has been a way for them to protect themselves should Marta be granted the right to a conjugal visit. Many of these disciplinary actions have been unjust, especially because of the way her conduct has been classified and the degree of seriousness attached to it, since she is known to be someone who demands the basic rights both for herself and for the other inmates.

Record of the statement given by Gloria Quiceno Ramírez, Representative of the Pereira Regional Ombudsperson's Office, in the presence of the Municipal Criminal Court Judge - Dosquebradas Risaralda, January 30, 1995. Attachment to the petitioners' brief of November 13, 1996, at 93 - 95.

<sup>83</sup> For example, Marta Álvarez once sent a letter to the Pereira Regional Ombudsperson to the following effect:

[...] how far can the intolerance, repression, discrimination and homophobia on the part of the authorities of the La Badea Prison go? It has reached the point that [...] an inmate can face disciplinary punishment (confinement) on the mere suspicion of homosexual acts, like a supposed kiss. How is it possible that an inmate should be threatened with transfer to another prison, just for complaining to the prison authorities that her human rights have been violated, as happened in my case?

Communication of June 3, 1994, signed by Marta Álvarez and addressed to Marta Tamayo Rincón, Office of the Pereira Regional Ombudsperson. Annex 25 of the original petition received on May 31, 1996.

that the court authorize the transfer of Marta Álvarez to the Anserma Circuit Prison,<sup>84</sup> stating that Marta Álvarez was “hostile” to some of the other inmates at the Pereira establishment, which did not have sufficient space to separate the group in order “to afford her protection.” He also said that Marta Álvarez was “constantly creating problems with the guards, which affected order in the institution.”<sup>85</sup> The transfer was done on March 21, 1995. According to the information available, this transfer, combined with INPEC’s refusal to allow an intimate visit at the Pereira Prison, had the effect of ending her relationship with M. H. in March 1995.<sup>86</sup>

**a. Marta Álvarez’ situation from 1995 onward and subsequent efforts to again request an intimate visit**

114. The case file with the Commission contains documentation related to the amendments later introduced in the rules governing the right to intimate visits in Colombia, the situation of Marta Álvarez and subsequent action on petitions she filed with the prison authorities, again asking to be granted intimate visits with other partners, as her relationship with M. H. had ended.

**b. Amendments later introduced in the rules governing the right to intimate visits**

115. At the hearing the Commission held on October 1, 1999, the parties provided information concerning the new rules that had taken effect on the subject of intimate visits in Colombian prisons.<sup>87</sup> By the time these changes were introduced, the proceedings on the request that Marta Álvarez had presented back in 1994 asking for an intimate visit had ended with the definitive decision issued in the Constitutional Court’s order of May 22, 1995, which precluded review of the *tutela* decisions on the matter.

116. The information available shows that on October 31, 1995, INPEC’s Executive Board issued the “General Regulations to which the internal rules of prison establishments must conform” (hereinafter “INPEC’s General Regulations”),<sup>88</sup> which contain the following provisions on the subject of intimate visits:

**Article 29. Intimate visits.** When a male or female inmate files a request with the prison director, he or she shall be granted an intimate visit once a month, provided the requirements set forth in the next article have been met:

Visitors must comply with the security measures that the prison establishes.

The prison’s internal regime will determine the schedule of such visits.

Each prison shall endeavor to arrange a special place for intimate visits. While those places are being set up, the intimate visits may be made in the inmates’ cells or dormitories.

Before and after the visit, both the inmate and his or her visitor shall be searched in accordance with Article 55 of Law 65 of 1993. Under Article 22 of these regulations, visitors shall not bring any object to the visit.

**Article 30. Requirements for obtaining the intimate visiting permit.**

1. A written request from the inmate to the prison director, giving the name, identification number and domicile of the visiting spouse or permanent partner.

<sup>84</sup> The Commission does not have the documentation necessary to establish how the judicial authority answered this request. Nevertheless, from the parties’ narration of the facts, it appears that the transfer was not decided on that occasion.

<sup>85</sup> Memorandum of September 30, 1994, signed by Gerardo Pinzón Alvarado, Director of the Pereira Women’s Prison, addressed to the Santuario (Risaralda) Circuit Judge of Mixed Jurisdiction. Annex 7 of the original petition received on May 31, 1996.

<sup>86</sup> The petitioners’ brief of February 14, 2013, p. 17. Allegation not contested by the State.

<sup>87</sup> IACHR, Hearing, Case 11,656, *Marta Lucía Álvarez Giraldo*, 104<sup>th</sup> regular session, October 1, 1999.

<sup>88</sup> Agreement 011 of October 31, 1995, taken by the Executive Board of the National Penitentiary and Prison Institute – INPEC. The full text of this decision is published at the official website of the Office of the United Nations High Commissioner for Human Rights in Colombia, Section for compilation of norms pertaining to the protection of the human rights of persons deprived of liberty. Available [in Spanish] at: [http://www.hchr.org.co/documentoseinformes/documentos/carceles/4\\_Nacionales/1\\_Normas\\_basicas/3\\_Reglamentacion\\_modifa\\_regimen\\_carcel/Reglamentacion.htm](http://www.hchr.org.co/documentoseinformes/documentos/carceles/4_Nacionales/1_Normas_basicas/3_Reglamentacion_modifa_regimen_carcel/Reglamentacion.htm).

2. In the case of accused persons, authorization from the judge or prosecutor. If, for the intimate visit, an inmate has to be moved to another prison where his or her spouse or permanent partner is incarcerated, a record must be made of the permit granted by the court authority. The director of the prison and chief guard shall have the resources necessary to guarantee security during the transfer, provided this can be done.

3. In the case of convicted persons, authorization from the regional director. If an inmate has to be transported to another prison for the intimate visit, the regional director may grant permission after reviewing the circumstances. The prison director and the chief guard shall have the resources necessary to guarantee security during the transfer.

4. The director of each prison facility shall check to ensure that the visitor is the inmate's spouse or permanent partner.

Every prison shall establish a record with the information provided by the inmate concerning the visitor's identity, so as to ensure that the visit is always by the person authorized to visit.

117. On March 5, 1998, by a decision of the Contentious Administrative Chamber of the Council of State, part of Article 30 of INPEC's General Regulations was declared null and void. Specifically, the following phrases were repealed: "his or her spouse or permanent partner," "where his or her spouse or permanent partner is incarcerated" and "[t]he director of each prison facility shall check to ensure that the visitor is the inmate's spouse or permanent partner", which appeared in paragraphs 1, 2 and 4 of that article.<sup>89</sup> The decision held that the repealed language was in violation of Article 112 of Law 65/93 and articles 13 and 15 of the Constitution, on the right to equality and privacy, bearing in mind that Law 65/93 referred to the "intimate visit" in general terms, whereas the rule established in the INPEC Regulations excluded those cases in which the intimate visit would be with "a girlfriend (or boyfriend) or intimate (male or female) friend."<sup>90</sup>

118. An addition was later made to the IACHR's case file, which was a copy of a decision handed down by the Supreme Court's Chamber of Civil Cassation on October 11, 2001, whereby *tutela* was granted to Alba Nelly Montoya, an inmate at the Pereira Women's Prison. She had filed a *tutela* petition with the court seeking protection of her rights to equality, privacy and the free development of her personality, when prison authorities had refused to grant her an intimate visit with her same-sex partner.<sup>91</sup> The decision, which was in the petitioner's favor, held that the prison authorities' interpretation of the rules was inadmissible, which was that the provisions governing the intimate visit—based on Law 65/93 and the General Regulations of INPEC—should be understood as applying only to heterosexual couples. The court ruled that this right could not be denied solely on the basis of a person's sexual orientation, or using the argument that "homosexual conduct" was, in general, condemned by society, which was the argument that the INPEC officials had used in response to the complaint. The Chamber of Civil Cassation therefore ordered that the requested intimate visit be granted under the same conditions that applied in the case of heterosexual couples, and in observance of the principles established in the applicable norms.

### c. Marta Álvarez' transfers and her situation in other prisons

119. While the proceedings in the *tutela* petition were still in progress, in the interim between the first instance and second instance decisions, the Director General of INPEC issued a decision on February 23, 1995, agreeing to the transfer of a number of female inmates to other prisons. Marta Álvarez was ordered transferred to the Anserma (Vieja Caldas) Judicial Circuit Prison. According to this decision, the ordered transfers were in response to the "circumstances attending the prison emergency" that INPEC decreed on

<sup>89</sup> Decision of the Council of State. Contentious-Administrative Chamber. Section One. Case No. 4386. March 5, 1998. Information supplied during the hearing with the IACHR. See: Attachments. IACHR, Hearing, Case 11,656, *Marta Lucía Álvarez Giraldo*, 104th regular session, October 1, 1999.

<sup>90</sup> *Ibid.*

<sup>91</sup> Decision of the Supreme Court's Chamber of Civil Cassation, October 11, 2001. Attachment to the petitioners' brief of January 17, 2002.

February 1, 1995, for the purpose of “preventing acts that pose a grave and imminent threat to prison order and security.”<sup>92</sup>

120. From the information contained in the case file, the transfer was not authorized by the Santuario (Risaralda) Circuit Court of Mixed Jurisdiction. The case file indicates that the Pereira Regional Ombudsperson’s Office filed a complaint against INPEC’s order to transfer Marta Álvarez.<sup>93</sup> On May 30, 1995, it asked that court authority to study the possibility of transferring Marta Álvarez back to the Pereira Prison.<sup>94</sup> The Ombudsperson’s Office said that the Anserma Circuit Prison was a men’s prison and did not offer the conditions necessary to house women prisoners, specifically Marta Álvarez. The Ombudsperson’s Office argued that at the Anserma Circuit Prison, Marta Alvarez had no opportunity for study or work, that she was confined to a place that was “very small and often had to be locked in her cell because of an insufficient number of guards.” The Ombudsperson’s Office also pointed out that the prison was so far away that she was isolated from her family and attorneys. It also said that because the criminal case against her was being heard by the Santuario court, the Pereira Prison would be the easiest one in terms of enabling her transport to the respective judicial proceedings.<sup>95</sup>

121. No information appears in the Commission’s case file that would enable it to establish precisely what factors prompted Marta Álvarez’ transfer to the Anserma Prison or how the complaint brought by the Ombudsperson’s Office was ultimately resolved. Nevertheless, the Commission takes as established fact that Marta Álvarez was transferred to a prison that was for men, not women, and that the justification the prison authorities used had to do with prison security. The IACHR does not have any information that would enable it to establish precisely how long Marta Álvarez remained in the Anserma Circuit Prison. The petitioners told the Commission that Marta Álvarez was transferred back to the Pereira Women’s Prison after she spent 80 days in the Anserma prison.<sup>96</sup>

122. In March 1996, Marta Álvarez was transferred to the Women’s Prison in Medellín, where she remained for approximately four months.<sup>97</sup> Marta Álvarez said the following about this transfer: “No one cared that part of my family lived in Pereira, that I had no criminal record, and that at the time I was a monitor in the

<sup>92</sup> Decision No. 908 of February 23, 1995, Office of the Director General of the National Penitentiary and Prison Institute. Attachment to the petitioners’ brief of November 13, 1996, at 6 – 8.

<sup>93</sup> As part of the complaint it filed, the Office of the Ombudsperson took a number of measures, among them the following: i) it inquired whether the respective judicial authority had given its authorization, and was told that the Santuario (Risaralda) Circuit Court of Mixed Jurisdiction had not authorized the transfer; and ii) it asked the Office of the National Director of INPEC to send it the documentation that was the basis for its decision to transfer the inmate, and received in reply a copy of the decision dated February 23, which was sent by INPEC’s Legal Office. See: Log of petitions received. Office of the National Director of Judicial Appeals and Actions. Office of the National Director to Process Complaints, dated April 2, 1995. Record No. 0754. Attachment to the petitioners’ brief of November 13, 1996, at 1 – 2; telegram No. 0058 dated April 5, 1995, signed by Marta Lucía Tamayo Rincón, Pereira Regional Ombudsperson, addressed to Magnolia Villa Zapata, Santuario (Risaralda) Circuit Court Judge of Mixed Jurisdiction. Annex 20 of the original petition received on May 31, 1996; telegram No. 035 of April 18, 1995, signed by Magnolia Villa Zapata, Santuario (Risaralda) Circuit Court Judge of Mixed Jurisdiction, addressed to Marta Lucía Tamayo Rincón, Pereira Regional Ombudsperson. Annex 21 of the original petition received on May 31, 1996; Memorandum No. 1248 of May 3, 1995, signed by Marta Lucía Tamayo Rincón, Pereira Regional Ombudsperson, addressed to Norberto Peláez, National Director of INPEC. Attachment to the petitioners’ brief of November 13, 1996, at 4; Memorandum No. 13.OJU 1671/OT dated May 15, 1995, signed by Lucy Elena Angulo de Morales, Chief of INPEC’s Legal Office, addressed to Marta Lucía Tamayo Rincón, Pereira Regional Ombudsperson. Attachment to the petitioners’ brief of November 13, 1996, at 5; and Communication of May 15, 1995, signed by María Enerieth Pulido Mesa, Director, addressed to Gloria Quiceno, Representative of the Ombudsperson’s Office. Attachment to the petitioners’ brief of November 13, 1996, at 14.

<sup>94</sup> Memorandum No. Q-1548 dated May 30, 1995, addressed to the Santuario (Risaralda) Circuit Court Judge of Mixed Jurisdiction, Magnolia Villa Zapata, signed by the Pereira Regional Ombudsperson, Marta Lucía Tamayo Rincón. Annex 24 of the original petition received on May 31, 1996.

<sup>95</sup> Memorandum No. Q-1548 dated May 30, 1995, addressed to the Santuario (Risaralda) Circuit Court Judge of Mixed Jurisdiction, Magnolia Villa Zapata, signed by the Pereira Regional Ombudsperson, Marta Lucía Tamayo Rincón. Annex 24 of the original petition received on May 31, 1996.

<sup>96</sup> Petitioners’ brief received on February 1, 2000.

<sup>97</sup> Brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

education section of the prison and my conduct record was good.”<sup>98</sup> She was later transferred to the Bogotá National Women’s Prison, as she herself points out, because she was disciplined for having been involved in a “riot” although “an investigation into the facts” was never conducted.”<sup>99</sup>

123. In July 1997, Marta Álvarez was an inmate at the Bogotá National Women’s Prison, where she was elected a “representative of the gay community in prison” and conducted activities to promote and defend the rights of that community with the prison authorities, particularly with regard to the right to intimate visits for same-sex couples.<sup>100</sup>

124. After spending approximately twenty months in the Bogotá Prison, Marta Álvarez was transferred to the Cali Women’s Prison on March 22, 1998; in October of that year, she was ordered returned to the Bogotá Women’s Prison, and then transferred to the Pamplona Men’s Prison.<sup>101</sup> On April 19, 1999, she was transferred yet again, this time to the Bucaramanga Women’s Prison.<sup>102</sup> The information available indicates that at the time, Marta Álvarez had started a relationship with a woman called G., who was also in prison.

125. While in the Bucaramanga Prison, on August 19, 1999 Marta Álvarez and G. asked the Regional Director of INPEC to advise them of whether any decision had been made to transfer the two to another prison; if so, they requested that the INPEC Regional Director consider the possibility of allowing them to remain in the prison facility where they were being held at the time. In their request, they stated that they had been targets of intimidation by prison officials, who threatened that they would be transferred to another prison.<sup>103</sup>

126. In her brief to the Commission, Marta Álvarez said the following about her time in the Bucaramanga prison:

The psychological abuse I have received in some prisons because of my sexual orientation has reared its head again here at the Bucaramanga Women’s Prison. The Chief of the Prison Guards [...] has demonstrated his homophobia and antagonism towards the few couples there are in the prison and especially towards me [...] to the point that he forced me to resign from my position as the Inmates’ Representative on the Disciplinary Board, because according to him I do not have the moral fiber to represent the other inmates. I resigned because I did not feel I could counter his attacks. To accomplish his mission, he used disciplinary reports calculated to smear my record of good conduct, to discipline me and remove me from the Council. [...] And what seems to be blatantly discriminatory is the fact that I was placed in the prison’s worst cellblock, ‘for being gay’. ‘That’s the cellblock for gay girls.’ It doesn’t matter how exemplary your good conduct record may be, that it’s your first time in prison, that you have

<sup>98</sup> Brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

<sup>99</sup> Brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

<sup>100</sup> Marta Álvarez presented a list of petitions to the Office of the Prison Director for discussion. Among her petitions, she asked the following: i) that the gay community be represented on the prison’s Human Rights Committee; ii) that same-sex couples should be allowed to have conjugal visits, her argument being that the justification claiming the absence of a specific regulation for such visits constituted discriminatory treatment and a violation of the Constitution; iii) that the gay community be guaranteed protection of their constitutional rights; iv) that internal transfers or transfers between prisons should not be used to separate couples in prison, and that proximity to family should be fostered; and v) that the inmates’ sexual orientation should not be taken into account when grading conduct for the disciplinary boards and that having affective or intimate relations with other inmates should not be cause for disciplinary action. See: Communication of July 30, 1997, signed by Marta Álvarez and addressed to Yolanda Gómez, Director of the Bogota Women’s Prison. Attachment to the petitioners’ brief of November 13, 1998.

<sup>101</sup> In the account presented to the IACHR, Marta Álvarez stated that the Director of that prison had told her that she feared that if Marta Álvarez was in the prison, she would unleash the “problem of lesbianism”, which is why a decision had been made to transfer her to another prison. Brief received on December 2, 1999, signed by Marta Alvarez Giraldo.

<sup>102</sup> Brief received on December 2, 1999 signed by Marta Álvarez Giraldo.

<sup>103</sup> Communication dated August 19, 1999, signed by Marta Álvarez and G.A., addressed to the Regional Director of INPEC. Attachment to the brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

no criminal record and that you are socially personable. For the mere fact of being lesbian, they put them in the worst cellblock, where they are exposed to vices, theft, verbal and psychological abuse and the ever present possibility that they might be physically harmed.<sup>104</sup>

127. According to a communication sent to the Disciplinary Board of the Bucaramanga Women's Prison, on August 19, 1999, Marta Álvarez irrevocably resigned "the position she had held as the inmates' representative with the Disciplinary Board."<sup>105</sup>

128. Later, by a decision of the Office of the Director of the Bucaramanga Prison, on October 21, 1999 Marta Álvarez was ordered transferred to the El Socorro Judicial Circuit Prison, and G. was ordered transferred to the Pamplona Judicial Circuit Prison, based on the records of "their activities, motives and the problems they caused."<sup>106</sup>

129. As a result of a request seeking precautionary measures for Marta Álvarez in December 1999, information was added to the case file concerning the conditions in which she was held while at the El Socorro Prison. In the words of Marta Álvarez:

[...] they transferred me [...] and [...] separated me from [G.] who was transferred to Pamplona. They transferred me to this place, where someone goes to die, called El Socorro [...] Conditions here are very bad and we don't know what to do to get back to [Bucaramanga] or at least get me transferred to Pamplona. Conditions at that prison are more tolerable than [...] here. [...] Water seeps into the cells when it rains, the beds get wet, the dampness is terrible and so is the odor. I miss [G.] terribly and I know that she must feel very bad up there in Pamplona by herself. [G.] loves me with all her heart and I need her in my life these days, especially when the situation gets unbearable in such subhuman and depressing places. [...] The lieutenant who had us transferred slandered us shamelessly. I swear, he accused us of things we have never done [...] I need to be close to [G.].<sup>107</sup>

130. Marta Álvarez was transferred from El Socorro prison to the Bogotá Women's Prison in February 2000, where she remained only a few months. She was then transferred back to the Pereira Women's Prison in May 2000, where she remained until January 2002. From January to May 2002, she was in the Sevilla Prison. After four months there, she spent 15 days in the Caicedonia District Prison, until her transfer to the Armenia Women's Prison, where she remained until August 2002. Then, by Administrative Order dated August 15, 2002, she was transferred to the Ibagué District Prison.<sup>108</sup>

131. The parties are still disputing the reason behind Marta Álvarez' multiple transfers. The petitioners contend that they were done without disciplinary cause or any blemish on her record of conduct. They also contend that there were no objective or reasonable grounds for the transfers, nor were they done out of any "known and established necessity." They further contend that transfer was used frequently against Marta because of her sexual orientation and for her public advocacy of the human rights of homosexual persons

<sup>104</sup> Brief received on December 2, 1999, signed by Marta Álvarez Giraldo. See also: communication of October 7, 1999, signed by Marta Álvarez, and addressed to Lieutenant Henry Montoya, Chief of the Guard Unit at the Bucaramanga Women's Prison. Attachment to the brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

<sup>105</sup> Communication dated August 19, 1999, signed by Marta Álvarez, addressed to the Disciplinary Board of the Bucaramanga Women's Prison, with a copy to the delegate of the Human Rights Committee and Working Group. Attachment to the brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

<sup>106</sup> Decision No. 112, issued by the Director of the Bucaramanga National Women's Prison, dated October 21, 1999. Attachment to the brief received on December 2, 1999, signed by Marta Álvarez Giraldo.

<sup>107</sup> Communications dated October 23 and November 2, 1999, signed by Marta Álvarez Giraldo. Attachments to the request for precautionary measures, dated December 13, 1999.

<sup>108</sup> State brief DIDHD.GOI No. 59591/1023, dated September 24, 2012, par. 3.



in prison.<sup>109</sup> The State, for its part, claims that the transfers were done because of overcrowding and denies that the transfers were to discipline her, to punish her for some misconduct or because of her sexual orientation<sup>110</sup>.

**d. Marta Álvarez' new request for an intimate visit in 2002**

132. Marta Álvarez entered the Armenia Women's Prison on April 25, 2002, a transfer from the Caicedonia Prison. By that time, her relationship with G. (see *infra*) had ended. Marta Álvarez' last relationship while in prison was with M. S., and started while she was in the Armenia Women's Prison in May 2002.<sup>111</sup> Marta Álvarez and M. S. filed a request with the INPEC authorities to be accorded the intimate visit right. On May 6, 2002, the Director of the Armenia Women's Prison denied the request, "until a decision on the matter came from higher up." She maintained that:

As for the establishment of the homosexual intimate visit, a commission has been created for a decision on the matter. The commission is composed of one representative from the Ministry of Justice, one from the Ministry of Foreign Affairs and INPEC Offices; also participating is the Ombudsperson's Office and organizations that defend human rights.

Overcrowding is a factor (...) as it precludes any possibility of having or outfitting a special place for homosexual intimate visits at the present time, to take morality, hygiene, and security considerations into account and be respectful of the other inmates' rights. Just to be clear: rulings and decisions on petitions seeking *tutela* relief are not general (*erga omnes*); instead, they are only binding upon the party against whom relief was sought (particular nature) (...).<sup>112</sup>

133. On July 11, 2002, M. S. was transferred to the Manizales Women's Prison.<sup>113</sup> Marta Álvarez was transferred to the Ibagué Prison on August 15, 2002.<sup>114</sup> M. S. and Marta Álvarez continued to petition to be allowed the intimate visit.

134. On August 6, 2002, M. S. applied to the Manizales Office of the National Director asking for authorization to receive intimate visits from Marta Álvarez, based on the *tutela* judgment delivered by the Supreme Court in the case of Alba Nelly Montoya in October 2001 (see *supra*).<sup>115</sup> The Director denied her request on August 16, 2002, stating that the effects of the judgment she cited were only *inter partes*, and that she had no instructions that would allow her to accede to the request.<sup>116</sup>

135. In 2001, INPEC had issued Memorandum 0743 stating that effective December 14, 2001, a legal certificate issued by the Administrative Security Department ("DAS"), called a "legal pass," would be

<sup>109</sup> Annex 79. Petitioners' brief received on February 14, 2013, pp. 19-21. See also Annex 77. Martha Álvarez, "*Historias que Nadie Cuenta*" [Stories No One Tells], pp. 26-30. Attachment to the brief received from the petitioners on February 14, 2013.

<sup>110</sup> Annex 84. The State's Observations, Note 20135000003321-DDJ of May 27, 2013, sent via note MPC/OEA No. 790/2013 of June 7, 2013.

<sup>111</sup> Annex 79. Brief received from the petitioners on February 14, 2013, p. 22. Allegation not contested by the State.

<sup>112</sup> Annex 78. INPEC, "Villa Cristina" Women's Prison, Armenia Quindio, 615-RMA-No. 321-D, Re: Legally Required Response to the Petition, May 6, 2002, memorandum addressed to Martha Álvarez, signed by Maria Dignory Quintero Ospina. Attachment to the petitioners' brief received on February 14, 2013.

<sup>113</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>114</sup> Annex 80. The State's Observations, memorandum DIDHD No. 59591/1023, September 24, 2012, p. 2.

<sup>115</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>116</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

required.<sup>117</sup> On August 5, 2002, Marta Álvarez asked the Quindío Regional Ombudsperson's Office for an exception to the certificate requirement, as she was herself in prison.<sup>118</sup> On September 6, 2002, the Caldas Regional Ombudsperson referred the request to INPEC, stating that Marta Álvarez had a pass for 72 hours a month, and had plans to visit M. S. in Manizales.<sup>119</sup> Marta Álvarez traveled to Manizales in the hope that she would be allowed to see her partner or that she would at least be given a five-minute chat with her, but this was denied.<sup>120</sup> The State authorities cited security reasons to deny Marta Álvarez permission to visit M. S.,<sup>121</sup> on the grounds that she did not have a "Certification of Criminal Record, a document she had to have to visit the prison."<sup>122</sup>

136. On September 16, 2002, Marta Álvarez applied for an intimate visit. Her request was denied by the Director of the Ibagué Judicial District Prison, who argued that until such time as this issue is regulated and places are outfitted "to the necessary standards of hygiene and privacy, the homosexual visit cannot be granted." He stated further that the "homosexual intimate visit is not regulated either under Law 65/93 or the General Regulations, decision 0011 of 1995; a provision on this subject will have to be included in the new draft Prison Code."<sup>123</sup>

137. On October 8, Marta Álvarez asked the Caldas Regional Ombudsperson to intercede with the Director of the Manizales Women's Prison to allow her to have an intimate visit with M. S. on November 10, at which time she would use her 72-hour pass to visit her. The Ombudsperson proceeded to file a request with the Director of the Manizales Women's Prison at the time, who denied it citing, *inter alia*, "the reasons for their transfers, which were to maintain order within prisons."<sup>124</sup>

138. On November 5, 2002, the Caldas Regional Ombudsperson filed a petition seeking *tutela* relief on behalf of Marta Álvarez and M. S., against the Office of the Regional Director of INPEC and the Office of the Director of the Manizales National Women's Prison, for violation of their rights to human dignity, to equality, to privacy and to the free development of their personality.<sup>125</sup>

139. On November 20, 2002, the Caldas Council of the Judiciary decided the petition of *tutela* in favor of Marta Álvarez and M. S., based on the rights to equality, free development of one's personality and privacy, and ordered the Director of the Manizales National Women's Prison to allow the requested intimate

<sup>117</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>118</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>119</sup> Communication from the Caldas Regional Ombudsperson, September 6, 2002, cited in Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>120</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009, pp. 4, 5.

<sup>121</sup> Communication from the Caldas Regional Ombudsperson, September 6, 2002, cited in Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009.

<sup>122</sup> Annex 82. The State's brief of observations, memorandum No. DDHH.GOI.No. 39475/0326, July 27, 2009, received at the IACHR on July 30, 2009, par. 12.

<sup>123</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009, p. 6.

<sup>124</sup> Communication sent to Marta Álvarez on October 21, 2002, from the Director of the Manizales Women's Prison. Referenced in: Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court's Eighth Chamber of Review, June 12, 2003. Attachment to the State's brief of September 14, 2009, pp. 6, 7.

<sup>125</sup> Annex 81. Caldas Council of the Judiciary, Disciplinary Chamber, Constitutional Jurisdiction, Record No. 2002-0604-00, approved in Decision No. 35, Justice William Hernández Gómez writing, November 20, 2002. Annex 33 of the petitioners' brief received on February 14, 2013.

visit and, therefore, to take “all the appropriate measures for the petitioners to be granted [an intimate visit] under the same terms and conditions established for heterosexual inmates.”<sup>126</sup>

140. In compliance with that ruling, INPEC authorities authorized the intimate visit between Marta Álvarez and M. S., which took place on December 16, 2002.<sup>127</sup> There were no further visits between the two women, “since they were apparently having personal problems between them.”<sup>128</sup>

141. INPEC and the Director of the Manizales Women’s Prison appealed the first instance decision. However, the Bogotá Superior Council of the Judiciary upheld the decision on January 22, 2003.<sup>129</sup> It was then confirmed by the Constitutional Court in judgment T-499/03 of June 12, 2003.<sup>130</sup>

142. In keeping with the *tutela* decisions of first and second instance, mentioned above, the Constitutional Court’s judgment held that the prison authorities’ refusal had unfairly affected Marta Álvarez’ and M. S.’ rights to equality, privacy and free development of personality. It also held that freedom, privacy and equality must be guaranteed to ensure the exercise of one’s sexuality as part of right to the free development of one’s personality. The obligation to guarantee those conditions is incumbent upon every prison authority, without exception. The Constitutional Court also held that the requirements for allowing the requested visit constituted a disproportionate limitation on the exercise of those rights.

143. Nevertheless, the Constitutional Court’s judgment recognized that intimate visits, whether for homosexual or heterosexual couples, pose certain problems when access to another prison facility was involved. It therefore asked the Ombudsperson’s Office to institute “the judicial or administrative actions necessary so that the prison authorities would be ordered to issue the [necessary] regulations in order that prison directors might have clear, general and standard guidelines on the subject that enable them to guarantee the inmates’ exercise of their sexuality under conditions of equality, while safeguarding their dignity and privacy, without discounting the specific conditions at each prison.”<sup>131</sup>

144. By Notice No. 101 of December 18, 2003, Ibagué’s First Judge for Sentence Enforcement and Security Measures granted Marta Álvarez her freedom.<sup>132</sup>

#### **e. Other provisions of Colombian domestic law that apply to this case**

145. Under the Colombian Constitution in force at the time of the events in this case, the list of fundamental rights included the rights to equality, privacy and the free development of one’s personality.<sup>133</sup>

<sup>126</sup> Annex 81. Caldas Council of the Judiciary, Disciplinary Chamber, Constitutional Jurisdiction, Record No. 2002-0604-00, approved in Decision No. 35, Justice William Hernández Gómez writing, November 20, 2002. Annex 33 of the petitioners’ brief received on February 14, 2013.

<sup>127</sup> Memorandum No. 504 dated October 10, 2002, signed by Beatriz Ocho de Padilla, National Penitentiary and Prison Institute – INPEC, addressed to the Office of the Director of the Human Rights Program in the Ministry of Foreign Affairs. Annex 1 of the State’s brief of September 14, 2009.

<sup>128</sup> State brief DIDHD.GOI No. 59591/1023 of September 24, 2012, par. 8. See also Annex 77. Martha Álvarez, “*Historias que Nadie Cuenta*” [Stories No One Tells]. Attachment to the brief received from the petitioners on February 14, 2013, pp. 108-111.

<sup>129</sup> Annex 83. Superior Council of the Judiciary, Disciplinary Chamber, *Tutela* Petition, Record 20029604 01/510-T, January 20, 2003. Justice Guillermo Bueno Miranda writing. Annex 34 of the brief received from the petitioners on February 14, 2013.

<sup>130</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court’s Eighth Chamber of Review, June 12, 2003. Attachment to the State’s brief of September 14, 2009.

<sup>131</sup> Annex 75. *Tutela* Ruling. Judgment T-499/03. The Constitutional Court’s Eighth Chamber of Review, June 12, 2003. Attachment to the State’s brief of September 14, 2009.

<sup>132</sup> State brief DIDHD.GOI No. 59591/1023 of September 24, 2012, par. 8. See also Annex 77. Martha Álvarez, “*Historias que Nadie Cuenta*” [Stories No One Tells]. Attachment to the brief received from the petitioners on February 14, 2013.

<sup>133</sup> 1991 Constitution of Colombia. Title II “Rights, Guarantees and Duties.” Chapter 1 “Basic Rights.”

146. The text of articles 13, 15 and 16, provide for these rights as follows:

**Article 13.** All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms and opportunities, without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy.

The State shall promote the conditions necessary in order that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized.

The State shall especially protect those individuals who, on account of their economic, physical, or mental condition, are in obviously vulnerable circumstances and shall punish any abuse or mistreatment perpetrated against them.

**Article 15.** Every individual has the right to personal and family privacy and to his/her good reputation, and the State shall respect and ensure that they are observed. Similarly, individuals have the right to know, update, and correct information compiled about them in data banks and in the records of public and private entities.

Freedom and the other guarantees protected under the Constitution shall be respected when gathering, handling, and circulating data.

Correspondence and other forms of private communication are inviolate. They may only be intercepted or searched by court order, in the cases and according to the formalities that the law prescribes. For tax or legal purposes and for cases of State inspection, supervision, and intervention, the submission of accounting records and other private documents may be required, within the terms that the law provides.

**Article 16.** All persons are entitled to their free personal development, without any limitation other than those imposed by the rights of others and those prescribed by the legal system.

## V. THE LAW

### A. Preliminary question

#### 1. The request to close the record and the subject of the present case

147. At this phase of the present case, the State is arguing that the petition filed with the IACHR concerns Marta Álvarez' exercise of her right to an intimate visit while she was in prison. The State contends that the impediment was corrected at the domestic level, with the *tutela* decisions that ordered the prison authorities to grant Marta Álvarez' request for an intimate visit, which enabled her to exercise this right in practice. The State thus argues that the IACHR should order the record in the case closed, on the grounds that the reasons that prompted the petition no longer obtain.

148. The petitioners, for their part, maintain that the subject of the present case is an alleged difference in treatment based on the prison authorities' prejudices and discriminatory practices regarding women inmates' sexual orientation and their exercise of their sexuality. They contend that the effect was to arbitrarily restrict and violate rights recognized in the American Convention, to the detriment of Marta Álvarez. The petitioners argue that the State violated Marta Álvarez' rights while she was in the custody of the State between 1994 and 2002, the year when the State finally allowed the intimate visit. The petitioners further allege that Marta Álvarez never received any acknowledgement from the State of the violations she suffered, nor did she receive full reparations for the harm caused to her by the authorities' conduct.

149. The IACHR observes that the applicable provisions of the Convention and Rules of Procedure on the subject of the decision to close the record in a case, stipulate that at any time during the proceedings, the Commission may do an analysis to determine if the grounds for a petition or case still exist and whether the

information necessary for the adoption of a decision is available.<sup>134</sup> The fact that Marta Álvarez' request for an intimate visit was finally granted in December 2002, is a circumstance that the IACHR will necessarily consider in its analysis; however, *a priori*, it does not necessarily mean that the subject of the present case no longer requires evaluation in the merits phase to determine whether the facts that occurred between 1994 and 2002 constituted violations of the alleged victim's rights. As both the Commission and the Court have stated, the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed. Therefore, subsequent correction or reparation does not prevent the Commission or the Court from hearing the case.<sup>135</sup>

150. From the arguments made by the parties and from the evidence contained in the case file, the Commission observes that the present matter concerns: (i) the requests filed by Marta Álvarez to be granted the right to an intimate visit while she was in prison from 1994 to 2002; (ii) the prison and court authorities' response to these requests; and (iii) certain aspects about Marta Álvarez' situation while in prison and that are related to her application to be able to avail herself of the right to an intimate visit.

**B. The right to equal protection and non-discrimination (Articles 24, 1(1) and 2 of the American Convention)**

**1. Observations regarding the prohibition of any arbitrary difference in treatment and the principle of non-discrimination**

151. Article 24 of the American Convention provides that [a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." Article 1(1) of the American Convention states that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

152. Article 1(1) of the American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

153. Article 2 of the American Convention provides that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

154. The case law of the Inter-American Court and the Commission's decisions have repeatedly held that the right to equality and non-discrimination is the "central, basic axis of the inter-American human

<sup>134</sup> In application of articles 48(1)(b) of the American Convention and 42 of the Commission's Rules of Procedure.

<sup>135</sup> I/A Court H.R. *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110. Par. 75.

rights system”<sup>136</sup> and that it “entails obligations *erga omnes* of protection that bind all States...”<sup>137</sup> Here, the Court has held that “[n]on-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility,”<sup>138</sup> as there is “an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.”<sup>139</sup>

155. The Inter-American Court has established the following on the principle of equality:

[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.<sup>140</sup>

156. The Inter-American Court has defined the concept of discrimination as follows:

[...] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>141</sup>

157. The Inter-American Court has also established that both concepts are closely related, as “[t]he element of equality is difficult to separate from non-discrimination”<sup>142</sup> and that “[t]here is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.”<sup>143</sup> Thus, Article 1(1) of the American Convention has been used to interpret the word “discrimination” that appears in Convention Article 24, considering that the invocation of the “categories”

<sup>136</sup> See, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, September 17, 2010, para. 74; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 173(5).

<sup>137</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 173(5); IACHR, Application before the Inter-American Court of Human Rights in the case of Karen Atala and Daughters, September 17, 2010, par. 74.

<sup>138</sup> I/A Court H.R., *Case of Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, par. 268; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 85.

<sup>139</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 85.

<sup>140</sup> I/A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, par. 55.

<sup>141</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 92; IACHR, *Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families*, OEA/Ser. L/V/II.117, doc. 1 rev. 1, Annual Report of the IACHR 2002, March 7, 2003, par. 87; IACHR, Merits Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001. See also: UN, Human Rights Committee, General Comment No. 18, Non-discrimination, 10/11/89, CCPR/C/37, par. 7.

<sup>142</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 83.

<sup>143</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 85.

specifically listed in Article 1(1) has certain effects in the analysis of reasonability habitually used to determine whether a State is internationally responsible for violating Article 24 of the American Convention.<sup>144</sup>

158. The same reasoning applies in the present case, since the petitioners' allegations refer specifically to the various aspects that the right to equal protection and non-discrimination can have. In this respect, at least two different lines of argument have been identified: one is that the State had justified its restriction of Marta Alvarez' rights on the basis of prejudices against and stereotypes of homosexual persons, which meant that she was allegedly subjected to an arbitrary difference in treatment by virtue of her sexual orientation and that said arbitrary difference in treatment had prevented her from being granted the right to an intimate visit recognized under Colombia's legal system. The petitioners also allege that the State allowed the prejudices and stereotyped concepts of the public officials who intervened in this matter, both in the government and the judicial branch, to delay and obstruct the requests and petitions filed by Marta Álvarez.

159. The Commission therefore considers that the matter put to it for consideration involves issues that fall within the scope of Article 1(1) of the American Convention, and its Article 24. Hence, the Commission's analysis will be done on the basis of those provisions and the other rights protected under the American Convention that the petitioners claim were violated as a result of the alleged arbitrary difference in treatment supposedly committed to the detriment of Marta Álvarez.

160. In any examination of a case of alleged discrimination, it must be borne in mind that not every difference in treatment is discriminatory. The Court has defined the difference between the terms "distinction" and "discrimination": "distinctions" are differences in treatment that are compatible with the American Convention, because they are reasonable, proportionate and objective, whereas "discrimination" is used to refer to arbitrary differences that violate human rights.<sup>145</sup>

161. Since evaluating whether a distinction is "reasonable and objective" must be done on a case-by-case basis, the Commission, the Court, and other international courts and agencies have made use of a standard test involving several elements: (i) the existence of a legitimate goal; (ii) the suitability or logical means-to-end relationship between the goal sought and the distinction; (iii) the necessity, in order words, whether other less burdensome and equally suitable alternatives exist; and (iv) proportionality *strictu sensu*, i.e., the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other.<sup>146</sup>

## 2. Sexual orientation and gender as suspect categories of distinction

162. Based on the concept of human rights treaties as living instruments, whose interpretation must go hand in hand with evolving times and current living conditions,<sup>147</sup> and on international standards, the case law of the European Court of Human Rights and comparative law, the IACHR has previously established that sexual orientation is a suspect category of discrimination covered by the phrase "any other social condition" that appears in Article 1(1) of the American Convention. Hence, any distinction based on sexual orientation

<sup>144</sup> IACHR, Application before the Inter-American Court of Human Rights in the case of Karen Atala and Daughters, September 17, 2010, par. 78.

<sup>145</sup> I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, par. 211, citing *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 84.

<sup>146</sup> IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, par. 86.

<sup>147</sup> I/A Court H.R., *Case of Karen Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 83. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 114, and *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, par. 106. In the European Court, see ECHR, *Tyrer v. United Kingdom*, (No. 5856/72), Judgment of April 25, 1978, par. 31.

must be examined and pass the strict-scrutiny test.<sup>148</sup> Consequently, the Court has held that the expression “any other social condition” in Article 1(1) of the Convention should be interpreted from the perspective of the option most favorable to the person and in light of the evolution of fundamental rights in contemporary international law.<sup>149</sup> In its recent judgment in the case of *Karen Atala Riffo and Daughters*, the Court wrote the following:

[t]he sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation [...]

A right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. This would violate Article 1(1) of the American Convention. This inter-American instrument proscribes discrimination, in general, including categories such as sexual orientation, which cannot be used as grounds for denying or restricting any of the rights established in the Convention.<sup>150</sup>

163. When distinctions are based on these suspect categories, the consensus is that the evaluation done to measure the reasonableness of the difference in treatment must be particularly strict. This is because these categories are, by their nature, considered to be “suspect”<sup>151</sup> and, consequently, it is assumed that the distinction is incompatible with the American Convention. Thus, only “weighty reasons” may be invoked as justification, and those must be studied in close detail.<sup>152</sup> This strict analysis serves to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.<sup>153</sup>

164. It frequently happens that these categories coincide with population groups or sectors that have historically been victims of discrimination and/or of structural inequalities in the exercise and enjoyment of their rights.<sup>154</sup> Accordingly, the State has a heightened duty to protect and guarantee, that seeks to condemn

<sup>148</sup> IACHR, Application before the Inter-American Court of Human Rights in the Case of Karen Atala and Daughters, September 17, 2010, paragraphs 90-95.

<sup>149</sup> I/A Court H.R. *Case of Karen Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 85. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 115.

<sup>150</sup> I/A Court H.R. *Case of Karen Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, paragraphs 91, 93.

<sup>151</sup> The criteria used to determine what a suspect category is will be examined *infra*, par. 100.

<sup>152</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraphs 80 and 83; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc.5 rev.1 corr., October 22, 2002, paragraph 338; IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 36; IACHR, *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and nondiscrimination, Chapter VI; IACHR, Report No. 38/96, X and Y (Argentina), October 15, 1996, paragraphs 73 and 74. In this report, the Commission characterized the relevance of the end sought as an “absolute necessity.”

<sup>153</sup> IACHR, Application before the Inter-American Court of Human Rights, *Karen Atala and Daughters*, September 19, 2010, par. 88.

<sup>154</sup> For example, the Constitutional Court of Colombia has applied the following criteria to determine whether or not a category of distinction is suspect: “(i) it is based on people’s permanent features, which they cannot voluntarily change without the risk of losing their identity; (ii) they have historically been subjected to patterns of cultural perception that tend to denigrate them; and (iii) they do not *per se* constitute criteria on the basis of which a rational and equitable distribution or allocation of property, rights, or social responsibilities can be carried out.” Constitutional Court of Colombia, Judgment C-101/05, discussed in: IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V./II. doc.68, January 20, 2007, paragraph 80, note 113, and cited in IACHR, Application before the Inter-American Court of Human Rights, *Karen Atala and Daughters*, September 19, 2010, par. 94, note 84.



“practices that have the effect of creating or perpetuating in society a subordinate position for certain disadvantaged groups.”<sup>155</sup>

165. In the instant case, the alleged victim is both a woman and a lesbian, and also a prisoner. The Commission reiterates that when certain groups of women are discriminated against on the basis of “more than one factor” their vulnerability to violations of their human rights increases. This demands special measures of the State, to offer reinforced protection.<sup>156</sup> This principle of “reinforced protection” is recognized in various international instruments intended to combat violence and all other forms of discrimination against women.<sup>157</sup> That special protection requires the elimination of provisions or practices that discriminate against women.<sup>158</sup>

166. Thus, the evaluation of these aspects of the State’s conduct requires strict analysis, as sexual orientation and gender are suspect categories and, as mentioned in the above sections, the State’s conduct with respect to these categories is presumed to be incompatible with the American Convention.

### 3. Analysis of the present case

#### a. Examination of whether the prison authorities’ decision to deny Marta Álvarez an intimate visit was based on her sexual orientation

167. As established above, Marta Álvarez requested the intimate visit in 1994, while she was an inmate at the Pereira Women’s Prison. Her request was denied by the Office of the Director of the Pereira Women’s Prison, as shown by the communications sent to Marta Álvarez on February 5 and 7, 1995. As the established facts show, the authorities initially argued that her request did not meet the requirements set forth in the rules (Resolution No. 5889/93), as she did not have authorization from the prosecutor’s office in charge of her case at the time; instead, the authorization came from the prosecutor’s office that had previously been assigned her case.

168. Two days later, the authorities came up with other reasons to explain why her request for an intimate visit had been denied, and said that Resolution 5889/93 contained no express provision for a “homosexual intimate visit at either men’s or women’s prisons in Colombia.” The decision was also based on the fact that the rule regulating intimate visits at the time of the events, which was Resolution No. 5889/93, did not expressly state that same-sex couples could exercise this right. They argued that the language of that rule described the visit as “intimate” in nature, which was a reference to the union between a man and a woman. As can be inferred from the facts in this case, when the prison authorities gave their interpretation of the rule, they were aware of the fact that issuance of INPEC’s General Regulations—which would follow the principles set out in Law 65/93— was pending and that there was a gap in the regulations that could not be corrected until

<sup>155</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007, par. 75. This was one of the criteria considered by the Inter-American Court in its judgment in the case of Karen Atala, where it wrote that sexual orientation and gender identity are Convention-protected categories. In its analysis, the Court dismissed the Chilean State’s argument alleging that at the time of the events in that case, there was no consensus regarding sexual orientation as a prohibited category of discrimination. The Court held that it was inadmissible to restrict the rights of sexual minorities in order to “perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.” See: I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Judgment of February 24, 2012. Series C. No. 239. par. 92.

<sup>156</sup> IACHR, Merits Report No. 80/11, Case 12,626, *Jessica Lenahan (Gonzalez) et al. (United States)*, July 21, 2011, par. 113; IACHR, Report No. 28/07, Cases 12,496-12,498, *Claudia Ivette González et al. (Mexico)*, March 9, 2007, paragraphs 251-252. IACHR, *Legal Standards Related to Gender Equality and Women’s Rights in the Inter-American System: Development and Application*. OEA/Ser.L/V/II.143. Doc. 60, November 3, 2011, par. 132.

<sup>157</sup> See, for example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, “Convention of Belém do Pará”, Chapter III on “Duties of the States,” and the Convention on the Elimination of All Forms of Discrimination against Women, Articles 2-16. See, in particular, Article 9.

<sup>158</sup> IACHR, *Access to information on reproductive health from a human rights perspective*, OEA/Ser.L/V/II. Doc 61, November 22, 2011, par. 54.

the Regulations were drafted; they were also aware that the new Regulations might contain specific guidelines on the possibility of allowing same-sex couples to have intimate visits.

169. Furthermore, in this second decision, INPEC cited a number of reasons related to policy on the subject of prison security and morality, arguing the effects that allowing an intimate visit between a same-sex couple could have inside prison walls. Thus, according to the facts in this case, the decision reasons that: (i) a threat to prison security could result since this was a visit from a person of the same sex, and there was always the risk that the visitor could switch places with the inmate; (ii) the rights of the families, spouses, permanent partners and children of the other inmates in the prison had to be protected, since their marriages and relationships could be affected, given the low level of tolerance for same-sex couples; and (iii) the rules governing intimate visits were informed by principles of “family planning and birth control.” The decision acknowledges that Marta Álvarez has a “right to have her private, homosexual inclinations respected [...] under normal circumstances;” however in that second decision, the prison authorities contend that inasmuch as she was under a prison regime, and given the nature of that regime, her right had to be restricted.

170. The Commission observes that, with the exception of the original argument claiming that she did not have authorization from the competent authority, the reasons that the prison authorities cited reveal that the basis for the difference in treatment was Marta Álvarez’ sexual orientation, the expressions of her sexual orientation, and the authorities’ interpretation of the right to intimate visits, which they pegged to reproduction and family-planning. In its recent judgment in the case of Karen Atala, the Inter-American Court wrote that “in order to prove that a distinction in treatment has occurred in a particular decision, it is not necessary that the decision in its entirety be based ‘fundamentally and solely’ on the person’s sexual orientation. It is sufficient to confirm that, to a certain extent, the person’s sexual orientation was taken into account, either explicitly or implicitly, in adopting a specific decision.”<sup>159</sup>

171. Based on the explanation above given, the Commission must now examine whether the prison authorities’ decision to deny Marta Álvarez an intimate visit pursued some legitimate goal and, if so, whether the requirements of suitability, necessity and proportionality had been met.

172. To begin, the Commission notes that the reasons argued by INPEC concerning “prison security” and “protection of the rights of third parties” could, in the abstract, constitute legitimate goals that the State could have pursued at the time Marta Álvarez’ rights were restricted, in which case the first two arguments that INPEC made would satisfy the criterion of the legitimacy of the goal pursued.

173. In the case of the third argument, however, the Commission considers that an intimate visit cannot have human reproduction as its sole objective, while altogether disregarding the exercise of one’s sexuality *per se*, independent from reproduction. This is particularly relevant with respect to the negative social stereotypes associated with women’s exercise of their sexuality, on the one hand, and lesbian women’s on the other. Particularly, the IACHR notes the social stigma surrounding female sexuality, which is socially less valued. The 1995 Fourth World Conference on Women of the UN “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality (...) free of coercion, discrimination and violence.”<sup>160</sup>

174. Thus, the Commission does not consider that INPEC’s third argument pursues any legitimate goal. Hence, no other objective facts or evidence need be considered where this argument is concerned.

175. As for the suitability requirement, the Commission finds that the argument offered by INPEC is seriously flawed. First, on the matter of “prison security”, INPEC argues that to allow an intimate visit between persons of the same sex would enable the visitor to switch places with the inmate, which INPEC contends would allow inmates to escape. In the Commission’s view, such a scenario would only be feasible in

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<sup>159</sup> I/A Court H.R. *Case of Karen Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 94, citing ECHR, *E.B. v. France* (No. 43546/02), Judgment of January 22, 2008, paragraphs 88 and 89.

<sup>160</sup> UN, Report, Fourth World Conference on Women (Beijing, September 4-15, 1995). A/CONF.177/20/Rev.1, para. 96.

the absence of even the most basic prison security measures; implicit in this argument is the absurd notion that prison personnel check entering and departing visitors solely for their gender. And if one follows INPEC's logic, then similar problems might arise with any woman who visits a women's prison. Here, the Commission considers that there is no causal relationship between the means used and the goal pursued, pointing up how unsuitable the measure adopted was.

176. Second, with regard to the denial of Marta Lucia's intimate visits in order to "protect the rights of third parties," among them "the spouses, permanent partners and children of other inmates," the Commission finds that this reasoning only works if one assumes prejudices and stereotypes regarding affective relationships and/or sexual relations between persons of the same sex. While the facts of the case do show that the prison authorities argued that other female inmates "rejected sexual acts between women," the State cannot operate on the basis of these stereotyped assumptions, using them as justification to deny the rights of persons subject to its jurisdiction. To the contrary, the State must be about the business of gradually eradicating these very pernicious prejudices. If the harm that the State alleges cannot be shown, then there is no causal relationship between the means used and the goal pursued; hence, the measure is not suitable in this respect either.

177. Therefore, the other factors and evidence need not be examined with respect to the restriction imposed, since the facts of the case demonstrate that the restriction does not meet the requirements to be legitimate.

**b. Discriminatory conduct on the part of the prison authorities**

178. In the instant case, the IACHR notes that once the prosecutor had sent his authorization, and even though the prosecutor's office had authorized the intimate visit on two different occasions, the Director of the Pereira Women's Prison described the request and the intimate visit between two women as "abnormal", "shameful, "degrading" and "obscene". The prison authorities clearly labored under the weight of their own discriminatory prejudices, first to obstruct and then to deny Marta Álvarez' right to an intimate visit because she was a lesbian. The language used by the prison authorities to obstruct Marta Álvarez' exercise of her right connotes an atmosphere of institutional discrimination against lesbian women because of their sexual orientation, especially the expression of that sexual orientation.

179. The atmosphere of discrimination that the authorities perpetuated in the present case, was acknowledged by the State in the first brief it filed with the IACHR in this case. There it explained that society was not very tolerant of relations between persons of the same sex. The Inter-American Court has said the following in this regard:

While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. States are internationally compelled to adopt the measures necessary "to make effective" the rights established in the Convention, as stipulated in Article 2 of said Inter-American instrument, and therefore must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.<sup>161</sup>

180. Based on the foregoing considerations, the Commission concludes that the State violated, to the detriment of Marta Álvarez, the right to equal protection of the law recognized in Article 24 of the American Convention, read in conjunction with articles 1(1) and 2 thereof.

<sup>161</sup> I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239, par. 119.

### C. The right not to be the object of arbitrary interference with one's private life (Article 11(2) of the American Convention)

181. In its admissibility report, the Commission decided that the concept of a private life and the protection it was to be afforded in the case of persons legally deprived of their liberty would be examined in the merits phase of the present case.<sup>162</sup>

182. Article 11(2) of the American Convention reads as follows:

[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

183. In the present case, the IACHR has already determined that the factors the prison authorities cited as the reasons for denying Marta Álvarez an intimate visit constituted an arbitrary distinction that was incompatible with the Convention. Bearing this in mind, the Commission will now examine whether this decision also constituted arbitrary interference in Marta Álvarez' private life.

184. Accordingly, the Commission's arguments regarding the provision under examination will be presented in the following order: (i) general considerations about the content of the right to a private life and autonomy, and the permissible restrictions; (ii) some thoughts on the permissible restrictions on the exercise of the right to a private life in the case of prison inmates; (iii) intimate visits as an aspect of the right to a private life and autonomy, and (iv) analysis of the case at hand.

#### 1. Scope of the right to a private life and autonomy, and permissible restrictions

185. As for the scope of the right to a private life recognized in Article 11 of the Convention, the case law of the Inter-American Court and the Commission's decisions have established that the right to a private life should be understood in the broad sense, as encompassing all spheres of the intimate realm and autonomy of an individual, including the development of his or her identity.<sup>163</sup> That being the case, the decisions a person makes regarding his or her sexual life are a fundamental part of his or her private life, as sexuality "is an integral part of the personality of every human being [and] [i]ts full development depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love."<sup>164</sup> Sexual orientation constitutes a fundamental component of an individual's private life, as are the behaviors that attend the exercise of one's sexuality consistent with one's sexual orientation.<sup>165</sup> There is a "clear nexus" between sexual orientation and the development of the identity and life plan of an individual, including his or her personality and relations with other human beings;<sup>166</sup> in general, a person's sexual orientation "is also

<sup>162</sup> IACHR, Admissibility Report No. 71/99, Case 11,656, *Martha Lucía Álvarez Giraldo* (Colombia), May 4, 1999, par. 21.

<sup>163</sup> IACHR, Application before the Inter-American Court of Human Rights, *Karen Atala and Daughters*, September 17, 2010, par. 111, citing the judgment of the Constitutional Court of South Africa, Case CCT 11/98, *The National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, October 9, 1998, par. 32; I/A Court H.R., *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C. No. 216, par. 119; and I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C. No. 216, par. 129, citing European Court of Human Rights, *Case of Dudgeon v. United Kingdom*, Judgment of October 22, 1981, par. 41; European Court of Human Rights, *Case of X and Y v. Netherlands*, Judgment of March 26, 1985, par. 22; European Court of Human Rights, *Case of Niemietz v. Germany*, Judgment of December 16, 1992, par. 29; and European Court of Human Rights, *Case of Peck v. United Kingdom*, Judgment of January 28, 2003, par. 57.

<sup>164</sup> Universal Declaration of Sexual Rights. Declaration of the XIII World Congress of Sexology, Valencia (Spain) 1997. Revised and approved by the General Assembly of the World Association for Sexual Health (WAS) on August 26, 1999, at the XIV World Congress of Sexology (Hong Kong).

<sup>165</sup> I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239., par. 139, citing European Court of Human Rights, *Case of Clift v. United Kingdom* (No. 7205/07), Judgment of July 13, 2010. Final, November 22, 2010, par. 57.

<sup>166</sup> IACHR, Application before the Inter-American Court of Human Rights, *Karen Atala and Daughters*, September 17, 2010, par. 111.

linked to the notion of freedom and a person's right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions."<sup>167</sup>

186. A person's sexual orientation also includes the possibility of freely expressing that sexual orientation, as part of the free development of personality that is vital to a person's life plan.<sup>168</sup> Thus, factors that interfere with a woman's ability to decide matters related to the exercise of her sexuality must be free of any stereotyped notions regarding the scope and content of this aspect of her private life, especially when combined with consideration of her sexual orientation.

187. For its part, the main purpose of the provision contained in Article 11(2) of the Convention is to protect individuals from "arbitrary or abusive" State interference in the exercise of this right,<sup>169</sup> mindful that any such interference may involve elements of "injustice, unpredictability and unreasonableness."<sup>170</sup>

188. Given these considerations, the protection offered under Article 11(2) of the Convention prohibits any arbitrary or abusive State interference that affects aspects of an individual's sexual life, including his or her sexual orientation and the exercise of his or her sexuality. The European Court of Human Rights has written that States must have particularly convincing and weighty reasons to justify interference by the authorities based on a person's sexual orientation.<sup>171</sup>

## 2. Considerations regarding permissible restrictions on the exercise of the right to a private life in the case of a person deprived of liberty

189. While the exercise of some rights of persons in the custody of the State may be affected, this does not mean that those rights are completely forfeit by the very act of deprivation of liberty; the State is the guarantor of the exercise of these rights, while the individual is subject to certain statutory and regulatory obligations that he or she must observe.<sup>172</sup> While the principal element that defines the deprivation of liberty is the individual's dependence on the decisions made by the staff of the establishment where he or she is being held, the prison authorities themselves must not go beyond the ends that the deprivation of freedom is intended to serve, nor may they exceed the disciplinary authority that their office confers upon them.<sup>173</sup>

<sup>167</sup> I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C. No. 239, par. 136. Similarly, the Universal Declaration of Sexual Rights holds that the rights to sexual autonomy, sexual integrity and safety of the sexual body encompass "the possibility for individuals to express their full sexual potential" and "the ability to make autonomous decisions about one's sexual life within a context of one's own personal and social ethics. It also encompasses control and enjoyment of our own bodies free from torture, mutilation and violence of any sort." Universal Declaration of Sexual Rights. Declaration of the XIII World Congress of Sexology, Valencia (Spain) 1997. Revised and approved by the General Assembly of the World Association for Sexual Health (WAS) on August 26, 1999, at the XIV World Congress of Sexology (Hong Kong), Principles 1 and 2.

<sup>168</sup> IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, par. 111.

<sup>169</sup> IACHR, Merits Report No. 4/01, Case 11,625, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, par. 47.

<sup>170</sup> IACHR, Merits Report No. 4/01, Case 11,625, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001 par. 47; IACHR, Merits Report No. 38/96, Case 10,506, *X and Y* (Argentina), October 15, 1996, par. 91.

<sup>171</sup> European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, January 22, 2008, par. 91; European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, September 27, 1999, par. 89; European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, Applications Nos. 31417/96 and 32377/96, September 27, 1999, par. 82; European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, July 24, 2003, par. 37, cited in IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, par. 113, note 100.

<sup>172</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 49.

<sup>173</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, paragraphs 49 and 71.

190. International human rights law recognizes the right of all persons deprived of liberty to minimum conditions of detention compatible with their dignity as human beings.<sup>174</sup> The Inter-American Court has written the following in this regard:

Given this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.<sup>175</sup>

191. Furthermore, it is a widely accepted principle in international law that one of the basic rights that States must guarantee to persons deprived of liberty is that they be allowed to maintain contact with the outside world, subject to the legitimate limitations that incarceration implies.<sup>176</sup> This right includes the inmate's personal and direct contact with family, partners and other persons,<sup>177</sup> which is also a "condition essential for their social rehabilitation and reintegration into society."<sup>178</sup> Principle XVIII of the IACHR's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas reads as follows:

Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners.

They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law.<sup>179</sup>

192. Thus, the State's positive obligation to create conditions that ensure that the interpersonal relationships of persons in its custody will be maintained is because these relationships are part of their private life and privacy, a realm that is wholly their own and into which no one may intrude.<sup>180</sup> The Commission

<sup>174</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR through Resolution 1/08, at its 131st regular session, held March 3 to 14, 2008, Principle I; UN, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of May 13, 1977, par. 60(1). This has been the *jurisprudence constante* of the Inter-American Court since its judgment in the *Case of Neira Alegría et al. v. Peru*. Judgment of January 19, 1995. Series C No. 20, par. 60.

<sup>175</sup> I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C. No. 150, par. 87; I/A Court H.R., *Case of the "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C. No. 112, par. 153.

<sup>176</sup> See, for example: IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR through Resolution 1/08, at its 131st regular session, held March 3 to 14, 2008, Principle XVIII; UN, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of May 13, 1977, paragraphs 37-39.

<sup>177</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR through Resolution 1/08, at its 131st regular session, held March 3 to 14, 2008, Principle XVIII; UN, Human Rights Committee, General Comment No. 21 concerning humane treatment of persons deprived of liberty (Art. 10). 44<sup>th</sup> Session, U.N. Doc. HRI/GEN/1/Rev.7 at 176 (1992), par. 12.

<sup>178</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 23.

<sup>179</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR through Resolution 1/08, at its 131st regular session, held March 3 to 14, 2008.

<sup>180</sup> IACHR, Merits Report No. 38/96, Case 10,506, *X and Y* (Argentina), October 15, 1996, par. 91. The IACHR has written that these spheres of privacy include "the ability to pursue the development of one's personality and aspirations, determine one's identity." IACHR,

therefore considers that the logical consequence of making re-socialization one of the purposes that the custodial regime is intended to serve, is that respect for a person's private life is a right whose exercise must be permitted even during incarceration; the absolute suppression of this right would undermine the re-socialization purpose of sentences of incarceration delivered in the exercise of the State's punitive authority.

### 3. The visit as part of the right to a private life and autonomy

193. In cases involving persons deprived of liberty, several regional organizations for the protection of human rights have adopted a number of decisions maintaining that restrictions on the right of persons deprived of liberty to a private and family life have legitimacy to the extent that they are a function of the nature of incarceration, and provided they fit the usual and reasonable requirements of incarceration.<sup>181</sup> In the case of persons deprived of liberty, one of the ways through which their right to a private and family life is observed is a system of periodic visits that meets the requirements established by the authorities, within the parameters of their mandate to ensure that the essential purposes of incarceration are served.<sup>182</sup>

194. Here, the Commission has written that "visiting rights are a fundamental requirement for ensuring respect for the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family for all the affected parties."<sup>183</sup>

195. As part of this concept of the right to receive visits, and in keeping with the most widely accepted understanding of the right to a private life, some domestic legal systems —like the Colombian system being analyzed in the present case— have specifically recognized the inmates' right to intimate visits as a way of ensuring the exercise of one's sexuality and the most intimate sphere of a person's privacy, which cannot be entirely suppressed. In effect, the idea of protecting the sexual life of persons deprived of liberty has been recognized in a number of decisions taken by the constitutional courts of States Parties to the Convention. For example, in judgment T-424 of 1992, the Constitutional Court of Colombia wrote the following:

Personal fulfillment and the free development of one's personality require that both private citizens and the State recognize and respect the conduct in which the individual engages in order to live a healthy and balanced life, in both the physical and emotional sense. Love life with the spouse or permanent partner, including, logically, sex, is one of the main aspects of this intimacy.<sup>184</sup>

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Merits Report No. 4/01, Case 11,626, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, par. 46. Cited in: IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, par. 110, note 94.

<sup>181</sup> See, for example: IACHR, Merits Report No. 67/06, Case 12,476, *Oscar Elías Biscet et al.* (Cuba), October 21, 2006, par. 237; IACHR, Merits Report No. 38/96, Case 10,506, *X and Y* (Argentina), October 15, 1996, par. 97; European Court of Human Rights, *Case of Messina v. Italy* (Application No. 25498/94), Judgment of September 28, 2000, par. 61, cited in IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 576, note 664.

<sup>182</sup> IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR through Resolution 1/08 at its 131st regular session, March 3 to 14, 2008, Principle XVIII.

<sup>183</sup> IACHR, Merits Report No. 38/96, Case 10,506, *X and Y* (Argentina), October 15, 1996, par. 98. The case law of the Inter-American Court is that undue restrictions on the visits that a person deprived of liberty must be able to have is among a number of circumstances that, taken together, can create detention conditions that constitute a violation of the right to humane treatment. See, for example: I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C. No. 137, par. 221; I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C. No. 119, par. 102; I/A Court H.R., *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 7, 2004. Series C. No. 114, par. 150; I/A Court H.R., *Case of the "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C. No. 112, par. 152, and others. The European Court has also addressed the issue of restrictions on visiting rights in the case of persons deprived of liberty. See in this regard: European Court of Human Rights, *Laduna v. Slovakia* (Application No. 31827/02), Judgment of December 13, 2011. As for the situation of women deprived of liberty, the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, has emphasized that female prisoners must be assured access to their basic rights, including the right to family visits. UN, Report of the Special Rapporteur, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women," Mission to the Russian Federation*, E/CN.4/2006/61/Add.2, January 26, 2006, par. 86.

<sup>184</sup> Constitutional Court, Judgment T-424 of June 24, 1992. In other countries of the region, similar rulings have been delivered, such as the decision of Costa Rica's Supreme Court that analyzed the consequences of restricting a prisoner's visiting rights, writing that

196. As such, the Commission wishes to emphasize that the exercise of public power has certain limits that stem from the fact that human rights are attributes inherent to human dignity of all human beings.<sup>185</sup> In this regard, there are certain inviolable attributes of the human person that cannot be legally impaired or diminished by the exercise of public authority.<sup>186</sup> This suggests that States can limit the rights of persons deprived of liberty, including the right to private life, in a way that is compatible with its obligations of respect and guarantee of human rights, and that do not exceed the limitations derive from the deprivation of liberty. The IACHR has written that States must guarantee that intimate visits take place under basic conditions of privacy, sanitation, security, and respect on the part of prison staff.<sup>187</sup> More specifically, the IACHR has established that:

States must likewise guarantee that the conjugal visits of both male and female inmates take place in a manner that respects their dignity under basic conditions of sanitation, security, and respect on the part of prison staff. This implies creating rooms for this purpose and avoiding the practice of inmates receiving their partners in their own cells. Furthermore, States should adequately supervise and strictly monitor how such visits are arranged to prevent any type of irregularity, both in granting authorization for conjugal visits and how they are handled.<sup>188</sup>

197. The Commission also understands that given the context in which a prison operates, it is not just reasonable, but also necessary that prison authorities should demand compliance with certain conditions and requirements, as a way to enable the State to exercise effective control inside prisons.<sup>189</sup> However, establishing requirements that inmates have to meet in order to have access to the right of intimate visits must be done in accordance with the State's international obligations.

198. This includes the special protection that the State must afford to any persons in its custody who, because they are members of groups that have historically been the targets of discrimination, may be particularly vulnerable, such as women and lesbian, gay, bisexual, trans and intersex persons (LGBTI).<sup>190</sup> The special role of guarantor that the State assumes vis-à-vis these persons requires that it create the conditions necessary for them to overcome any of the obstacles that generally obstruct their access to certain rights because of the discrimination to which they are exposed. Under such circumstances, it is the State's obligation to ensure effective control so that such persons are able to live their lives in prison.

#### 4. Analysis of the case

199. The Commission observes that in the present case, the petitioners alleged that the Colombian State arbitrarily and abusively interfered in Marta Álvarez' private life by denying her a right given under

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the visiting system was a way of preserving "a couple's affective relationship". Judgment of March 16, 1994 (Case File No. 0383-A-94 Vote No. 1401-94).

<sup>185</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 66.

<sup>186</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 66.

<sup>187</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, paragraphs 586 and 579.

<sup>188</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, paragraph 586.

<sup>189</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 76. In this connection, the Inter-American Court has written that the conduct of the State in matters of prison security and safety is subject to certain limits, such that "[d]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life." I/A Court H.R., *Order of the Inter-American Court of Human Rights of July 7, 2004, Provisional Measures regarding Brazil, Matter of Urso Branco Prison, Provisional Measures, Order of April 22, 2003, consideranda 10*, and Order of July 7, 2003, *consideranda 12*.

<sup>190</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. OEA/Ser.L/V/II. Doc. 64, December 31, 2011, par. 628.



domestic law, based on discriminatory prejudices regarding her sexual orientation and because she was a woman. For their part, the prison authorities who denied Marta Álvarez' request for an intimate visit, argued that the restriction of this right was a reasonable consequence of the limitations that the prison regime imposed.

200. In this regard, the IACHR reiterates its finding *supra* in the sense that the denial of the right to intimate visit to Marta Lucía Álvarez was a disproportionate restriction which contravened the Convention because the State did not prove that there was a strict causation between the limitation of the right to intimate visit and the aims indicated by the State (prison security and protection of the rights of third parties). The Commission is of the opinion that that analysis is closely linked to the analysis of compatibility of State actions vis-à-vis the right enshrined in article 11.2 of the American Convention.

201. As previously established, any restriction imposed on a prisoner's exercise of a right must be in furtherance of the ends that the prison regime itself seeks to achieve. The facts established in this case show that the prison authorities used various devices to obstruct the exercise of the right to intimate visits, driven by their own personal prejudices regarding the alleged victim's sexual orientation. For example, when the 33<sup>rd</sup> Prosecutor's Office gave authorization for Marta Álvarez to have the requested visit, the first reaction of the Director of the Pereira Women's Prison was to claim that he had never received the memorandum; and when the request was filed a second time, he decided to turn to the Sectional Director of Pereira Prosecutor's Offices asking it to intervene, expressing his "concern" over the fact that authorization had been given, and arguing that he had "no way of knowing what the future consequences might be" if permission for the visit was granted. Approximately one month later, the 33<sup>rd</sup> Prosecutor's Office sent another memorandum authorizing the visit yet again. This time the Director of the Pereira Women's Prison reacted by sending a letter to the Regional Director of INPEC, to inform her of this "abnormal", "shameful", "degrading" and "obscene" case. Finally, after another request, this time from the Ombudsperson's Office, the Director of the Pereira Women's Prison said that if the Prosecutor's authorization was confirmed, the prison in his charge would become a nest of "corruption" rather than a place for "re-socialization." In the end, the obstruction on the part of the Prison Director finally caused INPEC's Legal Office to interpret the rule regulating the intimate visit so that such visits would only be for opposite-sex couples, until such time as the new regulations were issued. The IACHR also makes note of the language the Director used on the occasion of the petition filed by the Ombudsperson's Office seeking *tutela* relief. There, the Director again argued that sexual acts between same-sex persons were "obscene acts" and that if an intimate visit of that kind was permitted the prison would become a "cage of crazed women."

202. INPEC's decision was a narrow interpretation of the scope of this right, inasmuch as rules were already in place spelling out the restrictions that applied to the exercise of this right and that pertained to the person with whom the visit was requested; in other words, the right to an intimate visit could only be exercised in the case of visits between married couples or if proof of a *de facto* union could be shown. The IACHR notes that in effect, Marta Álvarez showed that her partner was a "permanent" companion, yet this was never taken into account by the prison authorities.

203. The IACHR must point out that INPEC's decision was not made on the basis of an objective evaluation of compliance with the requirements that the internal rules clearly spelled out as those that had to be met in order for the requested right to be granted; instead what it did was examine Marta Álvarez' sexual life, including her sexual orientation and the expression thereof, as a relevant and ultimately definitive factor in the decision to flatly deny her the exercise of this right. This evaluation arbitrarily interfered with Marta Álvarez' autonomy to make decisions about her personal life, a sphere that the domestic laws sought to protect by regulating the right to an intimate visit. Hence, there was no logical relationship to the alleged nature of the prison system that would justify the absolute restriction of a right that the system itself recognized.

204. The judicial case brought when the petition seeking *tutela* relief was filed on January 20, 1995, —a case heard by two different judges— did nothing to correct the problem; it did not reverse the decision to deny the intimate visit requested by Marta Álvarez, with the result that it simply rubberstamped the arbitrary interference in her private life.

205. Given the foregoing considerations, the Commission concludes that by having tolerated discriminatory treatment on the part of the prison and court authorities, in the form of disproportionate and unjustified interference in Marta Álvarez' private life, the State of Colombia violated Article 11(2) of the American Convention, read in conjunction with the duty of non-discrimination contained in Article 1(1) thereof.

**D. Judicial guarantees and judicial protection (Articles 8(1) and 25(1) of the American Convention)**

206. The Commission observes that in the facts under analysis, the request filed by Marta Álvarez for her right to an intimate visit was recognized by the court authorities who decided the petition of *tutela*. That petition was filed on her behalf by the Ombudsperson's Office.

207. Inasmuch as both parties have, since the start of the proceedings in this case, had an opportunity to make arguments regarding those court rulings, the Commission, in application of the principle of *jura novit curiae*, will include an analysis of the State's obligations regarding the rights contained in articles 8(1) and 25(1) of the Convention.

208. Article 8(1) of the American Convention reads as follows:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

209. Article 25(1) of the Convention provides that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

210. The Inter-American Court has held that for a judicial remedy to be considered effective, it is particularly important that the guarantees of due process be properly observed, one of which is the guarantee of the impartiality of the judges on the court. Thus, the Inter-American Court has held that the right to a hearing by a competent and impartial judge or tribunal is a basic due process guarantee.<sup>191</sup> Impartiality presupposes that the judge presiding over a particular case approaches the facts "of the case subjectively, free of all prejudice, and also offers sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality."<sup>192</sup>

211. The Commission is reminded of what the Court wrote to the effect that in order to determine whether a State has violated its international obligations owing to the acts of its judicial organs, the Court would

<sup>191</sup> See I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182; I/A Court H.R., *Case of the Constitutional Court v. Peru*, Judgment of January 31, 2001, Series C No. 71, par. 75. This right is also recognized in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>192</sup> See I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, par. 56, citing European Court of Human Rights, *Pullar v. United Kingdom*, Judgment of June 10, 1996, par. 30; European Court of Human Rights, *Fey v. Austria*, Judgment of February 24, 1993, par. 28.

have to examine the domestic proceedings,<sup>193</sup> which must be considered as a whole in order to establish whether the proceedings as a whole were in accordance with the American Convention.<sup>194</sup>

212. In the instant case, the IACHR observes that the judicial branch heard various opinions regarding Marta Álvarez' sexual orientation, which were then included in the reasoning of the first instance decision to explain why her request for an intimate visit had not been answered, and in the second instance decision to explain why the request was ultimately denied. It is apparent that the judicial process did not afford Marta Álvarez any protection, because these stereotypical notions of homosexual persons continued to be the center of the prison authorities' discussions; nor did it prevent arbitrary decisions based entirely on prejudice rather than the law. The Commission wishes to take particular note of the fact that although the judge of second instance had before him all the discriminatory reasoning that INPEC had used as grounds for its decision to deny Marta Álvarez an intimate visit, he, too, justified the difference in treatment the same way the prison authorities had, i.e., as a function of the prison regime to which she was subject. Here, the Commission already explained why it regards this reasoning as incompatible with the State's obligations under the Convention, and does not believe its position on the matter needs to be revisited. Nevertheless, it feels compelled to highlight the judge's observations regarding society's intolerance of homosexual practices, and how society's intolerance supposedly makes such practices incompatible with the prison system.

213. The Commission observes with concern that the prejudices and stereotyped images against homosexual persons not only served to legitimize the prejudicial and particularly discriminatory conduct of the prison authorities to the detriment of Marta Álvarez, but were also corroborated by the judicial branch, which served to promote and perpetuate those prejudices. From the foregoing it is apparent that in the instant case, the Judicial Branch did not adopt decisions based entirely on the law; instead, it assigned disproportionate weight to the importance of discriminatory prejudices and society's supposed intolerance for certain types of conduct.

214. Bearing these considerations in mind, the Commission considers that in the petition of *tutela* filed seeking protection of her fundamental rights, Marta Álvarez was never given a hearing, did not have the guarantee of an impartial judge and, in short, was denied effective access to justice. Here, the IACHR must again make the point that "there is a relationship between the guarantee of impartiality that must prevail in all judicial proceedings under Article 8.1 of the American Convention and the use of discriminatory prejudices to ground a decision."<sup>195</sup>

215. Based on the foregoing, the Commission concludes that the Colombian State violated the rights to judicial guarantees and to judicial protection, recognized in articles 8(1) and 25(1) of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of Marta Álvarez. Additionally, the IACHR understands that the analysis above with respect to the right established under article 24 applies to this section on judicial guarantees and judicial protection. Hence, the Commission understands that there has been a violation of the right to equality before the law enshrined under article 24 with respect to the rights to judicial guarantees and equal protection, established in article 8.1 and 25.1 of the American Convention.

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<sup>193</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, par. 146; I/A Court H.R., *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, par. 200; and I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99, par. 120.

<sup>194</sup> I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99, par. 120; I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Judgment of November 25, 2000. Series C No. 70, par. 189; and I/A Court H.R., *Case of the "Street Children" (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, par. 222.

<sup>195</sup> IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters v. Chile, September 17, 2010, par.148.

### E. Marta Álvarez' right to humane treatment (Article 5(1) of the American Convention)

216. Article 5(1) of the American Convention provides that: “[e]very person has the right to have his physical, mental, and moral integrity respected.”

217. In the present case, the petitioners are alleging that the prison authorities’ unfair and arbitrary refusal to allow Marta Álvarez to exercise her right to an intimate visit, also violated her right to humane treatment, as Marta Álvarez was denied the opportunity to satisfy needs associated with her sexuality and the expression of her sexual orientation; she was also denied the equivalent chance as a heterosexual couple to establish a same-sex couple relationship. The restriction on both aspects was total and absolute, the product of discriminatory treatment based on the fact that she was a lesbian. The petitioners maintain that this prevented her from making decisions about the most intimate sphere of her life, thereby affecting her life plan, all of which can be traced to the discriminatory treatment to which Marta Álvarez was subjected and not to the conditions of the prison regime she was under. They also maintain that as a result of this discriminatory treatment, the detention conditions to which Marta Álvarez was subjected were incompatible with her human dignity and the obligations the State has with respect to persons deprived of liberty.

218. The Commission has also determined that the restriction imposed on Marta Álvarez’ exercise of her right to intimate visits constituted discriminatory treatment and arbitrary interference in her private life. Taking this into consideration, the Commission deems that the denial of Marta Álvarez’ right to an intimate visit was absolute, for a prolonged period of time, and based on discriminatory prejudices, and therefore incompatible with the State’s duty to ensure that the “the detainee is not subjected to sufferings or hardships exceeding the unavoidable suffering inherent in detention” and that “the detainee’s health and welfare are adequately warranted,”<sup>196</sup> so that respect for the dignity of such persons is guaranteed under the same conditions as for that of free persons.<sup>197</sup>

219. It should also be noted that the denial of her right was upheld and allowed to stand because of the judicial branch’s lack of response, with the result that the *tutela* action instituted to secure protection of her rights was ineffective, as described in the preceding section.

220. From the facts established, being denied the opportunity to exercise a right recognized under Colombian law was not the only form of discriminatory treatment that Marta Álvarez suffered at the hands of the prison authorities; instead, the circumstances of her imprisonment indicate that she was subjected to hardships incompatible with her dignity as a human being.

221. The Commission observes that on a number of occasions, the alleged victim and the Ombudsperson’s Office complained that Marta Álvarez, like other lesbian inmates, was the target of reprisals and disciplinary measures —such as solitary confinement— because of her sexual orientation. While the State did not contest these allegations, the Commission does not have sufficient information to know what the truth is, or to establish the causal nexus between her sexual orientation, her expression of it, and the disciplinary measures.

222. Nevertheless, the IACHR highlights, as an example, the comments that appear in the case files of other women in prison with Marta Álvarez and the way in which they were related to her sexual orientation, to establish a profile of her conduct. Furthermore, where the transfers were concerned, the IACHR observes that her transfer to the Anserma Prison happened at a time when Marta Álvarez was awaiting a decision on her

<sup>196</sup> I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center at Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C. No. 150, par. 86; I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006. Series C No. 141, par. 105; I/A Court H.R., *Case of the “Juvenile Re-education Institute” v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C. No. 112, par. 154; and I/A Court H.R., *Case of the “Five Pensioners” v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C. No. 98, par. 116.

<sup>197</sup> UN, Human Rights Committee, General Comment No. 21 on Article 10 of the International Covenant on Civil and Political Rights: “*Humane Treatment of Persons Deprived of Their Liberty*,” 44th session, U.N. Doc. HRI/GEN/1/Rev.7 at 176 (1992), par. 3.

request for an intimate visit; apart from some generic references to security issues, she was never given an adequate explanation of why the transfer was made.

223. The Commission takes note of Marta Álvarez' statements to the effect that these transfers were made without regard for the consequences they would have on her contact with family members, for example, and that these transfers were not isolated events. The Commission also takes into account that during her time in prison, Marta Álvarez devoted herself to activities to promote and defend the human rights of women and lesbians and gays; she was also involved in educational activities. Marta Álvarez alleged that these activities became a pretext for prison authorities to take further reprisals against her.

224. The Commission finds that the language used by the authorities to explain matters pertaining to Marta Álvarez' situation clearly reveals a strong aversion to her, intended to stigmatize her and discriminate against her. The result was that she was left with no means to defend herself against the conduct of the very authorities charged with ensuring that her rights were respected.<sup>198</sup>

225. The combination of circumstances in the case of Marta Álvarez reveals the existence of an atmosphere hostile to her identity, her sexual orientation, and the expression of that sexual orientation, hostile to her activities to promote and defend the rights of gays and lesbians and hostile to the claims she filed with administrative and judicial authorities. This hostile environment was the context for and basis of the discriminatory treatment that Marta Álvarez received while in prison.

226. Based on the foregoing considerations, the Commission concludes that while she was in prison, the State of Colombia violated Marta Álvarez' right to humane treatment and her right to be treated in a manner compatible with her human dignity, in violation of Article 5(1) of the American Convention, read in conjunction with Article 1(1) thereof.

## **VI. CONCLUSIONS**

227. Based on the considerations of fact and of law set forth in this report, the Inter-American Commission on Human Rights concludes that the Colombian State violated, to the detriment of Marta Lucía Álvarez Giraldo, the rights protected under articles 5(1), 11(2), 8(1), 24 and 25(1) of the American Convention, in relation to the State's obligations under articles 1(1) and 2 thereof.

## **VII. REPORT No. 3/14**

228. On March 31, 2014, at the 150th regular session, the Commission approved Report No. 3/14 on the merits of the instant case, which encompasses paragraphs 1 to 227 supra, and issued the following recommendations to the State:

1. Make full reparations to Marta Lucía Álvarez Giraldo, both pecuniary and non-pecuniary, and include measures of satisfaction for the harm done.
2. To ensure, through the Instituto Nacional Penitenciario (National Penitentiary and Prison Institute - INPEC), that women and lesbian women are able to exercise their right to intimate visits, according to domestic law. In particular, to adopt protocols and directives aimed at state officials, including penitentiary authorities at all levels, with the purpose of ensuring this right; as well as to establish monitoring and inspection mechanisms for compliance.

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<sup>198</sup> Article 2 of the UN Code of Conduct for Law Enforcement Officials provides that "[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." Adopted by the United Nations General Assembly in its resolution 34/169 of December 17, 1979.

3. To undertake a reform of the regulations of INPEC regarding penitentiaries and prisons, with the purpose of ensuring the right of persons deprived of liberty not to be discriminated against based on their sexual orientation, in compliance with decision T-062 of 2011 issued by the Colombian Constitutional Court.

4. To adopt the necessary state measures, including training of state officials, and put monitoring mechanisms in place, to ensure that persons deprived of liberty are not subject to discriminatory treatment – including disciplinary actions due to demonstrations of affection between women in penitentiaries and prisons- by State authorities or by other persons deprived of liberty based on their sexual orientation.

5. Take the State measures necessary to ensure that persons deprived of their liberty in Colombia who, under Colombia’s domestic laws, have a right to receive intimate visits, are made aware of this report by the IACHR and of the domestic provisions relating to the right to intimate visits, without discriminating on the basis of sexual orientation or gender.

#### **VIII. MEASURES SUBSEQUENT TO REPORT No. 3/14**

229. On April 30, 2014, the Commission forwarded the report to the State, granting two-months for it to report on the measures taken by it to comply with the recommendations.

230. On June 26, 2014, the State reported to the Commission that it had held several inter-institutional meetings to address how to comply with the recommendations set forth in Report No. 3/14 and requested a three-month extension to provide further information, accepted suspension of the time period provided for in Article 51.1 of the American Convention and waived its right to file preliminary objections with respect to this time period, in the event that the matter would be referred to the Court.

231. The Commission granted the extension requested by it and, consequently, the State and the petitioners held several meetings and exchanged proposals over the course of 2014 and 2015, in order to reach a consensus on a suitable way forward toward implementation of the recommendations of IACHR Report No. 3/14 and reach a potential agreement on compliance. For this purpose, the Commission granted the extensions requested by the State.

232. Under submission No. 20155010100931-GDI of November 12, 2015, the Colombian State recognized its international responsibility for violations of the rights to humane treatment, privacy, a fair trial, equal protection and judicial protection, of the American Convention, in connection with the general obligations set forth in Articles 1.1 and 2 of the same instrument, to the detriment of Mrs. Marta Lucía Álvarez Giraldo. On that occasion, the petitioners deemed the recognition as “insufficient to express real willingness and capacity to comply effectively with the recommendations of the IACHR Report in this matter and, therefore, to seek full reparation to meet its international obligations” and also noted that it would be insufficient “because it does not recognize the factual and legal context of the determination of international responsibility.”

233. Subsequently, the parties continued to engage in dialogue in order to agree upon a method to bring about joint and coordinated implementation of the reparation measures.

234. Under Submission No. 20165010027451-GDI of March 17, 2016, the State cited the meetings it held with the petitioners, expressed its total willingness and capacity to comply with the recommendations issued in the Commission’s Merits Report No. 3/14 and expanded the scope of recognition of international responsibility as follows:

[...] The foregoing, not only based on the unfortunate situations, that surrounded the denial of the conjugal visits repeatedly requested by Mrs. Álvarez, but also in keeping with Report No. 3/14 issued by the Inter-American Commission on Human Rights.

Notwithstanding the foregoing, the State takes this opportunity to apologize to Mrs. Marta Lucía Álvarez Giraldo for the harm caused, also expressing to her the commitment and

willingness to provide full reparation to her, as well as so that incidents such as these do not occur in the future.

From this standpoint, Colombia recognizes that the violations of the rights of Marta Lucía Álvarez were the result of a number of situations stemming from her sexual orientation, which unfortunately triggered episodes of discrimination against Mrs. Álvarez.

In addition to the foregoing, the State is aware that the transfers ordered during the time of incarceration of Marta Lucía Álvarez, not only hampered the exercise of her right to conjugal visits, but also had a negative impact on her personal integrity.

Furthermore, some judicial rulings meant that Marta Lucía Álvarez should be the target of discrimination based on sexual orientation. In this way, the State recognizes that not only the actions of prison authorities, but also of judicial authorities, infringed the rights of the victim.

As a consequence of the situations mentioned above, of which Marta Lucía Álvarez Giraldo was a victim, because of her sexual orientation, for the State it is clear that through these situations, there was interference with her private life and personal sphere, [which is] the reason why the instant recognition of international responsibility is being done in good faith and with the understanding that because this is a measure of reparation, its effects are aimed at mitigating the harm cause to Mrs. Marta Lucía Álvarez Giraldo.

In this order of ideas, the Colombian State recognizes its international responsibility for the violations of the right to Humane Treatment (Article 5.1), to Private Life (Article 11.2), to a Fair Trial (Article 8.1) and to Equal Protection (Article 25.1), of the American Convention on Human Rights in connection with the general obligations set forth in Articles 1.1 and 2 of the same instrument, stemming from the incidents described above to the detriment of Mrs. Marta Lucía Álvarez Giraldo.

235. The petitioners welcomed the recognition of the State but asserted that two years later, no signs of significant advancement in compliance with the recommendations has been seen.

236. On September 8, 2016, a meeting was held between the parties, where the IACHR Executive Secretary took part virtually. At this meeting, the General Regulation of National Prison Establishments –ERON under INPEC was released. At said meeting, the petitioners pledged to submit observations on the regulation. The State, for its part, requested IACHR Executive Secretariat Staff to provide technical observations on said Regulation, which were forwarded to both parties on September 26 of the same year.

237. On July 14, 2017, the parties signed an Agreement on Compliance with the Recommendations of the Commission’s Report No 3/14. The reparation measures agreed upon by the parties were: i) Measures of compensation, which include indemnity payments for both pecuniary and non-pecuniary damages; ii) Measures of satisfaction, which include a ceremony of recognition and public apology, publication of the IACHR’s Final Merits Report, the publication and dissemination of the victim’s diary “Mi historia la cuento yo” [‘My Story, I Tell it’]; and iii) Measures of non-repetition, which include amendments to the General Prison Regulation and of internal regulations of each prison facility, the creation of a Working Group to follow-up on the internal regulations of national prison and jail facilities, the victim’s visit to the jails where she was deprived of liberty and the virtual constitutional observatory on judicial decisions.

## **IX. MERITS REPORT (FINAL) No. 29/18**

238. On March 31, 2018, the Commission approved Merits Report (Final) No. 29/18, with final conclusions and recommendations, and transferred it to the State on April 3, 2018, asking it to inform the Commission about measures adopted to comply with its recommendations, within one month.

239. Via Note No. 20186010023351-GDI dated April 27, 2018, the State presented its progress report on compliance; this information was transferred to the petitioners who, in a communication dated May 16, 2018, responded. On October 2, 2018, the State provided more information, which has been taken into account in this report.

## **X. FINAL CONCLUSIONS AND RECOMMENDATIONS**

240. The Commission takes note that the parties signed a “compromise agreement” wherein the representatives of the victim accepted the reparation for moral damages in the amount of 100 SMLM (the monthly minimum wage in force); said agreement was filed on September 15, 2017 with the Secretariat of the Administrative Court of Cundinamarca and, according to information available to the Commission, it is currently waiting on a resolution. On October 2, 2018, the State informed that said court approved the “compromise agreement” and that the INPEC will take the pertinent steps to make the payment of the compensation.

241. Additionally, the Commission notes that on December 6, 2017, the State of Colombia carried out a Ceremony of Recognition of Responsibility and Public Apology at “El Buen Pastor” Women’s Prison Center of Bogota, which was attended by more than 150 persons deprived of liberty, 103 civil society representatives, current and former public officials. The event was broadcast via videoconference to 118 prison facilities of the country and, in the course of the broadcast, Marta Lucía Álvarez’s diary “Mi historia la cuento yo” (“I tell my own story”) was officially released. The Commission additionally notes that Marta Lucía Álvarez’s diary was sent to 344 public libraries in the country and 103 law schools. In addition, 24 copies were sent to the Banco de la República and the following State entities: Secretariat of Planning - Directorate of Sexual Diversity, Ombudsman’s Office, Congress of the Republic, Ministry of Social Integration - LGBTI Subdirectorates, Office of the Comptroller General of the Republic and Office of the Attorney General of the Nation.

242. It must also be noted that on December 19, 2016, the General Regulation of National Prison Establishments, under the INPEC, was issued, whose sections on the rights of LGBTI persons was crafted jointly between the State and the victim’s representatives, with technical input from the IACHR.

243. Regarding the commitment to create a virtual constitutional observatory on judicial decisions, the Commission notes that the Ministry of Justice and Law included a page with favorable judicial decisions on the LGBTI population deprived of liberty, with special emphasis on decisions regarding intimate visits, on the webpage of the Observatory of Criminal and Penitentiary Policy. The State clarified that at the moment, only decisions of the Constitutional Court have been included.

244. The Commission notes that, as of April 27, 2018, the Working Group for follow-up on internal regulations of National Penitentiary Establishments (Monitoring Committee) had reviewed and discussed 57 internal regulations and approved 43. In this regard, the petitioners stressed that it is of the utmost importance that all regulations be changed soon and that it is not enough to change the regulations if there is no process of dissemination and appropriation of them by the prison population. They also noted that the Monitoring Committee has focused on the review and approval of internal regulations and has not shown any progress with respect to its other objective, which is to deal with thematic areas: intimate visits; corridor conditions; and introduction of variables for follow-up of complaints, according to the agreement signed between the parties on July 14, 2017.

245. Additionally, the parties have informed the Commission that, in compliance with the agreement, training content and methodology has been designed for a pilot project in two stages: a sensitization course and a training course. In November and December 2017, consultants of the Ministry of Justice conducted the pilot version of those modules and Marta Lucía Álvarez took part in some sessions, while her representatives took part in others. According to the provisions of the Agreement on Compliance and reported by the parties, the results of the pilot project will be the basis for implementation of the continued training program of the National Prison School of INPEC.



246. It was reported that during 2018, the Criminal and Prison Policy Directorate of the Ministry of Justice and Law redirected the training program in two ways: i) it adapted modules designed on the platform of the National Penitentiary School, through training the teaching staff, for which contents and methodology are being formulated, ii) sensitization and training for persons deprived of liberty, administrative personnel and custody and guard personnel of the INPEC in male detention facilities. The State added that in 2018 the process has been rethought with a "new masculinities" approach, based on the recognition that men are also subject to oppressive dynamics derived from gender categories and stereotypes, which are accentuated in masculinist contexts, such as prison.

247. The petitioners acknowledged the advances and disposition of the State regarding the adjustment of the Training Program of the Penitentiary School, applauded the permanent or continuing education nature of the training program and expressed its willingness to continue with follow-up meetings, in order to ensure the effective adoption and implementation of the Program and its financial budget for the short and medium term.

248. Lastly, the Commission takes note that in a communication of January 16, 2018, the parties reported that there has been full compliance with most of the measures agreed upon. Consequently, the parties jointly requested not to refer the case to the Court and for the Commission to issue the Article 51 Report (Final Report) as provided under the American Convention. This request was reiterated by the State in its communication dated April 27, 2018, and by the petitioners in its communication dated May 16, 2018. Accordingly, the Commission decided to not refer the case to the Inter-American Court and to proceed with the publication of the report.

249. Based on the totality of the available information, the Commission very positively evaluates the efforts of the Colombian State directed toward compliance with the recommendations. The Commission finds that they are very substantially complied with, and calls for the adoption of the necessary steps to achieve full compliance.

250. Based on those conclusions,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES TO THE STATE OF COLOMBIA THE FOLLOWING RECOMMENDATIONS, WITH A VIEW TOWARD FULL COMPLIANCE:**

1. Make full reparations to Marta Lucía Álvarez Giraldo, both pecuniary and non-pecuniary, and include measures of satisfaction for the harm done.

2. To ensure, through the *Instituto Nacional Penitenciario* (National Penitentiary and Prison Institute - INPEC), that women and lesbian women are able to exercise their right to intimate visits, according to domestic law. In particular, to adopt protocols and directives aimed at state officials, including penitentiary authorities at all levels, with the purpose of ensuring this right; as well as to establish monitoring and inspection mechanisms for compliance.

3. To undertake a reform of the regulations of INPEC regarding penitentiaries and prisons, with the purpose of ensuring the right of persons deprived of liberty not to be discriminated against based on their sexual orientation, in compliance with decision T-062 of 2011 issued by the Colombian Constitutional Court.

4. Continue adopting the necessary state measures, including training of state officials, and put monitoring mechanisms in place, to ensure that persons deprived of liberty are not subject to discriminatory treatment –including disciplinary actions due to demonstrations of affection between women in penitentiaries and prisons- by State authorities or by other persons deprived of liberty based on their sexual orientation.

5. Take the State measures necessary to ensure that persons deprived of their liberty in Colombia who, under Colombia's domestic laws, have a right to receive intimate visits, are made aware of this report by the IACHR and of the domestic provisions relating to the right to intimate visits, without discriminating on the basis of sexual orientation or gender.

## **XI. PUBLICATION**

251. In light of the foregoing considerations and in accordance with Article 47.3 of its Rules of Procedure, the Commission decides to publish this report and include it in its Annual Report to the OAS General Assembly. The Commission, in compliance with its mandate, will continue evaluating compliance with the recommendations reiterated in this report until they are fully implemented.

Approved by the Inter-American Commission of Human Rights in the city of Boulder, Colorado, on the 5<sup>th</sup> day of the month of October, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.