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JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS

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INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RAPPORTEURSHIP ON THE RIGHTS OF THE CHILD

Save the Children.

Luxembourg

Organization of American States

ISBN 978-0-8270-5678-7

Organization of American States

IACHR 50 years defending HUMAN RIGHTS

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OEA/Ser.L/V/II.
Doc. 78
13 July 2011
Original: Spanish

JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS

2011
Internet: http://www.cidh.org

OAS Cataloging-in-Publication Data

Inter-American Commission on Human Rights. Rapporteurship on the Rights of the Child.

Juvenile justice and human rights in the Americas.

p. ; cm. (OEA documentos oficiales ; OEA Ser.L/V/II Doc.78)(OAS official records ; OEA Ser.L/V/II Doc.78)

ISBN 978-0-8270-5678-7

1. Juvenile justice, Administration of--America. 2. Juvenile delinquency--America. 3. Children's rights--America. 4. Legal assistance to juvenile delinquents--America. 5. Human rights--America. 6. Youth--Civil rights--America. 7. Teenagers--Civil rights--America. I. Title. II. Series. III. Series. OAS official records ; OEA/Ser.L/V/II

OEA Ser.L/V/II. Doc.78 Eng.

Cover design based on the entry submitted by *Karina Meneses Dubois* to the 2009 Poster Contest to commemorate the IACHR's 50th Anniversary

Document published thanks to the financial suport of UNICEF, the Inter-American Development Bank (IDB), Luxembourgh and Save the Children-Sweden.
Positions herein expressed are those of the Inter-American Commission on Human Rights and do not reflect the views of of UNICEF, the Inter-American Development Bank (IDB), Luxembourgh and Save the Children-Sweden.

Approved by the Inter-American Commission on Human Rights on July 13, 2011

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This report was prepared in the framework of the memorandum of understanding between the Inter-American Commission on Human Rights (IACHR), the United Nations Fund for Children (UNICEF) and the Office of the High Commissioner for Human Rights (OHCHR). Its preparation and publication has been possible thanks to the financial support of UNICEF, the Inter-American Development Bank, the Government of Luxembourg and Save The Children-Sweden. The Commission also wishes to acknowledge the cooperation of the Special Representative of the Secretary General on Violence against Children.

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EXECUTIVE SUMMARY

1. The Inter-American Commission on Human Rights (IACHR) has had multiple occasions to deal with the issue of juvenile justice and its relationship to human rights when examining and deciding the petitions and cases submitted to it, and the precautionary measures requested of it, when conducting its visits and adopting reports on the situation of human rights in the member States of the Organization of American States (OAS), and at the public hearings convened during its sessions. Based on the information it received, the Commission has decided to prepare a thematic report to examine juvenile justice in the Americas and to make recommendations to the member States with a view to strengthening and improving their institutions, laws, policies, programs and practices in the area of juvenile justice and to ensure that those systems are implemented in accordance with the international *corpus juris* on the rights of children and adolescents. To make the preparation of this report possible, the IACHR signed a memorandum of understanding with the Regional Office for Latin America and the Caribbean of the United Nations Children's Fund (UNICEF) and with the United Nations' Office of the High Commissioner for Human Rights (OHCHR). It also received financial support from the Inter-American Development Bank (IADB), Save the Children - Sweden, and the Government of Luxemburg. The Commission also wishes to acknowledge the cooperation of the Special Representative on Violence Against Children Office.

2. The States of the region are confronted every day with the problems associated with criminal offenses committed by persons under the age of 18. International law has clearly established that a juvenile justice system must be in place for children and adolescents who violate criminal laws. But this special justice system does not apply to all children; instead, it applies only to those who have reached the minimum age at which they can be held accountable for violations of criminal law. Once that minimum age has been reached, the juvenile justice system must be applied to all children and adolescents, without any exceptions. Therefore, it is unacceptable for States to exclude from that system any person who has not yet attained adulthood, which, under international law, is at the age of 18.

3. The report adopted by the IACHR identifies the international principles of human rights that juvenile justice systems must observe. This report underlines the member States' obligations vis-à-vis the human rights of children and adolescents accused of violating criminal law. The report makes it clear that a juvenile justice system must ensure that children and adolescents enjoy all the same rights that other human beings enjoy; but it must also provide them with the special protections that their age and stage of development necessitate, in keeping with the main objectives of the juvenile justice system, namely, the rehabilitation of children and adolescents, their comprehensive

[1] The Commission wishes to thank consultants Diya Nijhowne and Javier Palummo, for the preparation of this report, and to single out for special recognition the contributions of consultant Daniela Salazar and Santiago J. Vázquez.

development and their reincorporation into society to enable them to play a constructive role within it.

4. In its report, the Commission observes that juvenile justice systems must respect the principles of law that specifically apply to minors, and the special ways in which the general principles of law are applied to persons who have not yet attained their adulthood. For example, a juvenile justice system must respect the principle of legality, which means that the system cannot impinge upon the life of children and adolescents by invoking a supposed need for protection or prevention of crime; instead, juvenile justice systems must be applied solely on the basis of pre-existing law in which a certain conduct has been classified as a criminal offense. Juvenile justice systems must also guarantee the principle of last resort, which means, for example, that it must consider alternatives to adjudication in the case of violations of criminal law, and non-custodial measures or other forms of deprivation of liberty, which in the case of persons under the age of 18 is to be used only as a last resort. Accordingly, the Commission urges States to move in the direction of eliminating penalties of incarceration in the case of children and adolescents.

5. Furthermore, juvenile justice systems must be specialized, which means that they must feature laws, procedures, authorities and institutions specifically designed for children and adolescents alleged to have violated criminal law. All those working within the juvenile justice system must have received special instruction in children's rights and be trained to work with children. In its report, the Commission also highlights the point that the due process guarantees, such as the right to a competent judge, the presumption of innocence, the right of defense, the right of appeal and others, must be fully respected in juvenile justice proceedings. The Commission explains the special ways in which these guarantees are observed when persons under the age of 18, who require specific protections, are involved.

6. The Commission commends the legislative strides that many States have taken in recent years. It notes that most States of the region have a special legal framework in place in the area of juvenile justice. In many cases, the framework adopted measures in conformity with international standards on the subject. The Commission also recognizes the efforts made by some countries to bring their juvenile justice practices, institutions and facilities into line with international standards, especially in those States where economic resources are limited.

7. However, the Commission is troubled by the weaknesses within the juvenile justice systems in the region, despite the legislative progress made in many countries since the adoption of the U.N. Convention on the Rights of the Child. Indeed, the Commission observes that there is a significant gap between the language of the States' laws and the experiences of children and adolescents accused of violating criminal laws. In this report, the Commission examines how, with the exception of a few examples of best practices, the juvenile justice systems of the Americas are characterized by discrimination, violence, lack of specialization, and an abuse of the measures used to deprive juvenile offenders of their freedom.

8. One of the chief causes of concern to the Commission is the fact that in a number of States of the Americas, very young children are held responsible and accountable for violations of criminal law; in some States, children as young as 7 can face criminal prosecution. The Commission is also disturbed by the fact that in the vast majority of States in the region, children and adolescents of 15, 16 and 17, are denied access to the specialized juvenile justice systems and are frequently tried in the ordinary adult criminal justice system, even though they are minors. Under some juvenile justice systems, children and adolescents are often transferred to ordinary courts, where they receive adult sentences and are forced to serve their sentences in adult prisons. Many children and adolescents in the region are thus being denied the protections afforded by the juvenile justice system. In summary, the IACHR is troubled by the practice on the part of some States of denying or offering fewer procedural guarantees, lowering the minimum age of criminal responsibility, and stiffening penal sentences.

9. The Commission is also troubled by the fact that in some cases, children below the minimum age at which they can be held criminally responsible, are deprived of their liberty through so-called "protective" proceedings that end in punitive measures against the minor; all too often these proceedings are not conducted in strict observance of due process guarantees. The information compiled shows that on occasion, children and adolescents who have been abused, are indigent or have been deprived of their social and economic rights, are treated as criminals or routinely held responsible for violations of criminal law because of their condition in life, and are subjected to the juvenile justice system without ever having violated any criminal law. The same thing happens in the case of children and adolescents deemed to be "beyond parental control," children and adolescents in "irregular situations," children and adolescents accused of "status offenses," i.e., acts they committed that would not be criminalized if committed by adults, or children or adolescents who have mental illnesses or diminished mental capacity who are criminalized instead of being given the proper medical care.

10. The first contact of children and adolescents with the juvenile justice system is through the police, and is frequently a traumatic experience. The police often treat children and adolescents in a discriminatory manner and selectively arrest those that are poorest, belong to minorities, or those identified as belonging to certain groups because of their appearance. The IACHR has learned of police practices in which children and adolescents are routinely detained based on their appearance, or simply for being in certain places or because they are assumed to be 'at-risk', or abandoned because they are living on the streets or wandering around; the police sometimes round up such children and adolescents because of an increase in crime in some area, or because they are assumed to be gang members. It often happens that children and adolescents who commit or are accused of committing crimes are removed from any contact with family and community - contacts which are essential for the enjoyment of their rights and their development.

11. Despite the international laws requiring that whenever possible, alternatives to adjudication are to be used in the case of children and adolescents, the IACHR report reveals that alternatives of this type are rarely used in most States of the region. The Commission also observes that in some States, officials of the judicial system,

especially those outside the major cities, have little or no training in the area of children and human rights. Thus, the proceedings conducted in the juvenile justice system do not always observe due process guarantees and the principle of the best interests of the child.

12. Similarly, although deprivation of liberty should be used only as a last resort in the case of children and adolescents, and should be for the shortest time possible, the Commission's report shows that most juvenile justice systems in the Americas resort to deprivation of liberty, both before trial and after conviction. The IACHR also observes that the principles that must govern the sentences administered, such as the principle of proportionality, are often ignored in favor of prolonged sentences on the pretext that such sentences aid in the "rehabilitation" of children and adolescents. In some member States, this criterion leads to the imposition of indefinite sentences in which the children and adolescents will remain deprived of their liberty until such time as the person is deemed "rehabilitated" or reaches a certain age.

13. The IACHR is also troubled by the failure to observe the human rights of children and adolescents when they are deprived of their liberty. In its report, the Commission observes that conditions in the facilities in which children and adolescents are deprived of their liberty are, in general, inadequate and often breed violence among the children or adolescents, or by State authorities. Furthermore, the detention conditions do not always properly guarantee the other rights of children and adolescents, rights that must never be restricted they are in custody, such as the right to life, to physical integrity, to health, to food, and to education and recreation.

14. The report also examines how corporal punishment, solitary confinement, the use of psychotropic drugs to control juveniles, and other cruel, inhuman and degrading treatment continue to be used to discipline children and adolescents deprived of their liberty in the Americas, despite the fact that these punishments are strictly prohibited under international human rights law.

15. The foregoing is compounded by the fact that, in many States, there are no mechanisms for filing complaints or securing independent supervision of the situation of children and adolescents accused of violating criminal laws or deprived of their liberty; in those States that do have such mechanisms, they are underfunded and therefore have very little effect. Thus, the States are not complying with their obligation to adequately prevent, investigate, punish and repair human rights violations of which children and adolescents are frequently victims during all phases of the juvenile criminal justice system.

16. In its report, the Commission calls upon the member States to undertake to comply with their international obligations to protect and guarantee the human rights of children and adolescents in their juvenile justice systems. It also makes a number of specific recommendations concerning the measures that the States must take to adapt their juvenile justice systems to international standards in this area.

JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Commission" or the "IACHR") is a principal organ of the Organization of American States (hereinafter the "OAS"), charged with promoting the observance and protection of human rights in the hemisphere. The human rights of children[2] have, over the course of some years, been a subject of particular concern to the IACHR. For this reason, at its 100th session, held in Washington, D.C., September 24 through October 13, 1998, the Commission decided to create the Rapporteurship on the Rights of Children (hereinafter the "Rapporteurship"). The Commission conferred on the Rapporteurship the mandate to study and promote activities to evaluate the human rights situation of children in the OAS member States (hereinafter the "member States" or "the States") and to propose effective measures so that the member States would adapt their domestic laws and practices with a view to respecting and guaranteeing for children the enjoyment and exercise of their human rights.

2. Through the system of cases, petitions, precautionary measures, hearings, visits and reports, the Commission and the Rapporteurship have devoted special attention to the problems of children in the Americas. The situation of children and adolescents accused of violating criminal law has been a constant source of concern to the IACHR. Therefore, at its 128th session, the Commission decided to prepare a study to identify the progress that the member States have made in this area and the challenges they still face. This report was prepared within the framework of the memorandum of understanding between the Inter-American Commission on Human Rights (IACHR), the United Nations Fund for Children (UNICEF) and the Office of the High Commissioner for Human Rights (OHCHR). Its preparation and publication has been possible thanks to the financial support of UNICEF, the Government of Luxemburg, Save The Children -Sweden and the Inter-American Development Bank. The Commission also wishes to acknowledge the cooperation of the Special Representative of the Secretary General on Violence against Children.

3. International law has clearly established that a specialized system of juvenile justice must be in place for children, and must respect and ensure, in the case of children, the same rights that all other persons enjoy. But it must also afford them the special measures of protection to which they are entitled by virtue of their age and stage of development. This is the meaning of Article 19 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), which provides that "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." This provision must be understood as an additional and complementary right that the Convention establishes for

[2] For the purposes of the report, when the Commission uses the term "children" it is referring indiscriminately to all boys, girls and adolescents, understood as every human being below the age of eighteen, as provided in the Convention on the Rights of the Child and in the international *corpus juris* on the subject. For purposes of juvenile justice, in this report the IACHR makes no distinction between "children" and "adolescents".

persons who, because of their physical and emotional development, need special protection.[3] Moreover, Article VII of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration") requires that the States guarantee children and adolescents the special protection, care and aid that they require.

4. In order to gather information on the implementation of the juvenile justice systems in the member States, in August 2008[4], the Commission sent the member States and civil society organizations a request for information in the form of a questionnaire, which is attached to the present report.[5] The following were the States that answered the questionnaire: Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Suriname, The United States, Uruguay and Venezuela. The information that these States and several civil society organizations supplied was very helpful to the Commission.

5. In preparing this report, the Commission and staff of the Executive Secretariat visited a number of member States.[6] During those visits, meetings were held with authorities and representatives of civil society who work in areas related to juvenile justice. The visits gave the Commission an opportunity to observe the workings of the courts and institutions where juvenile justice cases are examined, public defender's offices and the detention facilities[7] in which children accused of violating the law are held. The delegation from the Commission also held meetings with UNICEF field personnel and academics with expertise in issues of juvenile justice.

6. The Commission also conducted five regional consultations[8] to which government representatives, NGOs and academics from the region were invited, and two

[3] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54*; Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 164 and I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 147.

[4] Whenever possible, the information supplied by the States has been updated to December 2009 and, in some cases, to the date of approval of this report.

[5] The questionnaire was prepared by the IACHR's Rapporteurship on the Rights of the Child in cooperation with UNICEF's Regional Office for Latin America and the Caribbean (TACRO).

[6] For this report, staff of the Executive Secretariat visited the following specific countries: Suriname, Guyana, Trinidad and Tobago, Belize, Barbados, Saint Lucia and Jamaica. The present report is also based on information compiled during visits that the Commission made to El Salvador, Guatemala and Honduras (2004), Haiti (2005 and 2008) and Jamaica (2008).

[7] The detention centers visited were the following: Opa Doeli Remand Center in Suriname; New Opportunities Corps in Guyana; the Youth Training Center in Trinidad and Tobago; the Wagner Boys Facility, located in the Kolbe (adult) Prison in Belize; the Boys Training Center in Saint Lucia; Delmas 33 in Haiti, and Stoney Hill Remand Center in Jamaica.

[8] The consultations were conducted in Paraguay (November 20 and 21, 2008), Costa Rica (March 2 and 3, 2009), Bogota (March 5 and 6, 2009), Barbados (May 27, 2009), and Washington, D.C. (August 31, 2009).

meetings with experts in juvenile justice[9] to seek their input concerning the human rights standards that apply to children facing the juvenile justice system.

7. The Commission recognizes that the member States have made important efforts to bring their domestic laws into line with the U.N. Convention on the Rights of the Child (hereinafter "the CRC") and the American Convention on Human Rights. The bulk of that effort has gone into ensuring that domestic laws comply with international standards on juvenile justice. Indeed, some member States have approved special laws and statutes on the subject of juvenile justice. Some member States are considering bills to amend laws currently in force on this subject.

8. The foregoing notwithstanding, the Commission is troubled by the fact that some of these bills would be a retrograde step, leaving the domestic laws even more detached from the international standards on juvenile justice. For example, the Commission has been informed of bills to amend laws that would eliminate procedural guarantees in the case of children in conflict with the law, which would lower the minimum age for application of juvenile justice, lower the minimum age for referral to the regular criminal system as an adult, stiffen penalties, and other regressive changes.

9. Furthermore, the Commission would again make the point that "even though the Convention on the Rights of the Child is one of the international instruments that has the greatest number of ratifications, not all countries of this continent have harmonized their domestic legislation with the principles set forth in that Convention, and those that have done so, face difficulties applying them."[10] Thus, in a number of member States, laws and mechanisms that are based on the child and adolescent protection concept coexist alongside provisions that recognize children as subjects with their own rights, set forth in the CRC. Furthermore, most Caribbean member States still have work ahead to adapt their laws to comply with their international obligations vis-à-vis the rights of the child, particularly those accused of violating criminal laws.

10. In the Commission's view, far-reaching legal reforms are still needed to adapt the member States' domestic laws to international human rights norms on juvenile justice. Even in those member States whose laws on this subject are more advanced, the Commission notes a considerable disparity between the language of the law as approved

[9] The meetings of experts were held in Uruguay (September 29, 2009) and Washington, D.C. (October 23, 2009). The first meeting included judges, academics and experts from Uruguay, Argentina, Ecuador, Chile and Brazil, among them the following: Miguel Cillero, Edgidio Crotti, Susana Falca, Andrés Franco, Emilio García Méndez, Eloisa Machado, Stella Maris Martínez, Ricardo Pérez Manrique, Farith Simon and Carlos Uriarte. The second meeting included representatives from the United States, Canada, Trinidad and Tobago, Guyana, Mexico and Panama. The second meeting featured academics and experts from Mexico, Panama, the Bahamas, Trinidad and Tobago, Guyana, Puerto Rico, Canada, and the United States, among them the following: Elena Azaola, Jorge Giannareas, Hazel Thompson-Ahye, Wendy Singh, Nicholas Bala, David Fathi, Alberto Concha-Eastman, Alexandra Guedes, and Nadine Perrault. Representatives from UNICEF and from the IACHR and its Executive Secretariat participated in both consultations.

[10] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. In I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 22.

by the member State and the reality that children accused of violating the law encounter. Hence, full implementation of the existing rules and modification of institutional practices are the main challenges that the member States must face when it comes to children accused or convicted of violating criminal law.

11. The Commission's report, therefore, includes a number of recommendations to enable member States to fully comply with their international obligations vis-à-vis the rights of the child. The Commission hopes that this report will prove to be a useful tool for the member States and helpful to them in fulfilling their obligation to respect and ensure the human rights of all children facing the juvenile justice system.

II. THE JUVENILE JUSTICE SYSTEM

12. In this chapter, the Commission will examine the relevant principles and guarantees that should govern the specialized system of justice that applies to children in conflict with the law. The IACHR's analysis will be carried out in light of the model that is premised upon comprehensive protection[11] of the rights of children and adolescents and contemporary international human rights law that recognizes children as subjects of their rights and not as objects of protection. The principles and guarantees to be analyzed in this report refer to and must be observed by the entire specialized juvenile justice system, including police authorities, the Public Prosecutor's Office, public defenders and all agencies that have a hand in enforcing any measures and penalties ordered.

13. The Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the I/A Court H.R.") has highlighted that it is obvious that a child participates in criminal court proceedings under different conditions from those of an adult: "to argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings."[12]

14. Thus, in application of the legal framework for the protection of human rights, children who have violated, or have been accused of violating, criminal law must not only be accorded the same guarantees that every adult enjoys, but special measures of protection as well. The Commission will reference certain norms, principles and guarantees that member States must observe when enforcing juvenile justice in a manner that respects and ensures this special protection that children and adolescents require.

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[11] The Commission has held that the Convention on the Rights of the Child implies a substantial change in the manner in which the topic of children is addressed. This change involves replacing the "Irregular Situation Doctrine" with the "Comprehensive Protection Doctrine"; in other words, it means moving away from the concept of 'minors' as objects of protection in favor of a concept in which children are the subjects of their rights. IACHR, *Third Report on the Situation of Human Rights in Paraguay, 2001*, Chapter VII, para. 11.

[12] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. In I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 96.

A. *Corpus juris* of the Human Rights of Children and Adolescents

15. Under the international law on the interpretation of treaties, the American Convention and the CRC are part of a body of related norms or *corpus juris* for the protection of the rights of children and adolescents. That *corpus juris* must be taken into account when interpreting Article 19 of the American Convention[13] and Article VII of the American Declaration[14], which guarantee children's rights to special measures of protection on the part of their family, society and the State.

16. The concept of a *corpus juris* on the subject of children is an acknowledgement of the existence of a body of basic rules whose purpose is to guarantee the human rights of children and adolescents. The Inter-American Commission referred to this concept in the following terms:

> For an interpretation of a State's obligations vis-à-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere[15].

17. The Court emphasized the fact that the *corpus juris* is a source of law to establish the content and scope of Article 19 of the American Convention, and is the product of the evolution of international human rights law on the subject of children, which is now premised on a recognition of children as subjects of rights:

> Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention[16].

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[13] Article 19: Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

[14] Article VII: All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

[15] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention*, March, 10 1999, para. 72.

[16] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 37 and 53; and *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 32, para. 194.

18. Therefore, the juridical framework for the protection of children's human rights is not confined to Article 19 of the American Convention or Article VII of the American Declaration. Instead, for the purposes of interpretation, it also includes, *inter alia,* the 1989 Convention on the Rights of the Child (hereinafter "the CRC")[17], the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter "the Beijing Rules")[18], the 1990 United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter "the Tokyo Rules")[19], the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (hereinafter "the Havana Rules"),[20] and the United Nations Guidelines for the Prevention of Juvenile Delinquency (hereinafter "the Riyadh Guidelines")[21], as well as international human rights instruments that are general in scope.

19. For the purposes of interpretation, that *corpus juris* also includes the decisions adopted by the United Nations Committee on the Rights of the Child (hereinafter, the "Committee on the Rights of the Child") in furtherance of its mandate, such as General Comment No. 10 on children's rights in juvenile justice.[22] That perspective represents a significant step forward that reveals the existence of a common framework of international human rights laws on the subject of children, as well as the interdependence, at the international level, of the various international systems for the protection of children's human rights.

20. The IACHR emphasizes that those member States that have not yet ratified the American Convention are just as bound by the *corpus juris* on children's rights, because Article VII of the American Declaration provides that all children have a right to special protection, care and aid.

B. The Best Interests of the Child and the Juvenile Justice System

21. Article 3 of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

22. The Court has established that the best interests of the child are a reference point to ensure the effective realization of all rights contained in the CRC. Their observance will allow the child to fully develop his or her potential.[23] It has also held that

[17] Adopted and open for signature and ratification by the United Nations General Assembly in its resolution 44/25 of November 20, 1989. Entered into force on September 2, 1990.

[18] Adopted by the United Nations General Assembly in its resolution 40/33 of November 29, 1985.

[19] Adopted by the United Nations General Assembly in its resolution 45/110 of December 14, 1990.

[20] Adopted by the United Nations General Assembly in its resolution 45/113 of December 14, 1990.

[21] Adopted by the United Nations General Assembly in its resolution 45/112 of December 14, 1990.

[22] Adopted by the Committee on the Rights of the Child of April 25, 2007.

[23] See I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 59.

"the prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children."[24]

23. Following this same line of reasoning, the Commission has held that, based on the comprehensive protection doctrine underlying the Convention on the Rights of the Child, the best interests of the child should be understood as the effectiveness of each and every one of a child's human rights.[25] This was also the Inter-American Court's finding where it held that:

> ... the phrase "best interests of the child", set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives.
>
> ...
>
> The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in performing its natural function of providing protection to the children who are members of the family.[26]

24. In this regard, State institutions, organs and authorities, as well as private persons authorized for or involved in the regulation, application and operation of the juvenile justice system must always bear in mind the best interests of the child. The Commission considers that the best interests of the child should be a guiding principle of interpretation that reconciles two realities at the moment of regulating the juvenile justice system: on the one hand, recognition of the child's capacity to reason and his/her autonomy, which means that the child ceases to be a mere object of protection; on the other hand, recognition of the child's vulnerability, given the child's material incapacity to fully satisfy his or her basic needs, especially in the case of children from disadvantaged sectors of society or groups that are targets of discrimination, such as women[27].

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[24] I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary objection, Merits, Reparations and Costs, Judgment of September 8, 2005. Series C No. 130, para. 134.

[25] See IACHR. *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, para. 25.

[26] See I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 53 and 137.

[27] In this regard, the best interests of the child imply a rejection of doctrines like the "irregular situation doctrine," which makes the child an object of compassion or repression and in large part is premised on an undue perfectionism or paternalism; but it also implies a rejection of doctrines that largely ignore the vulnerability of children and adolescents in a manner inimical to proper satisfaction of their basic needs. See González Contró, Mónica, *Derechos Humanos de los Niños: una propuesta de fundamentación*, UNAM, Mexico,

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25. Likewise, the Committee on the Rights of the Child has stated that:

> Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children[28].

26. Like the Committee on the Rights of the Child, the Commission believes that protection of the best interests of the child means, *inter alia,* that the traditional objectives of criminal justice –namely, repression and punishment- must give way to reparation, rehabilitation and social reintegration of children and adolescents through the diversion of cases, or the use of other means of restorative justice, such as those discussed in the corresponding sections of this report, with as little recourse as possible to adjudication and precautionary measures or punishments involving the deprivation of liberty.[29]

27. Finally, the best interests of the child imply, among other considerations, that in juvenile justice proceedings and processes, each case will be examined on an individual basis, as every child's needs are different,[30] and that proper weight will be given to the child's own opinion in accordance with his or her respective age and maturity,[31] and with the opinion of the child's parents, guardians and/or representatives or closest family members.[32]

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2008. The Committee on the Rights of the Child has expressly addressed the doctrine of the "irregular situation". See, Committee on the Rights of the Child, CRC/C/15/Add. 187, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Argentina,* CRC/C/15/Add. 187, October 9, 2002, paras. 15, 40 and 6.

[28] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 10.

[29] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 10, and General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 57.

[30] See ECHR. *Case of Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Judgment, Grand Chamber, 6 July 2010, para. 138. In cases in which children under the age of criminal responsibility violate criminal laws, the legal exclusion shall be generic, and no case-by-case analysis is necessary. I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 105.

[31] See Committee on the Rights of the Child, General Comment No. No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, paras. 29 and 59.

[32] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 43 to 45.

C. The Objectives of Juvenile Justice

28. In describing the rights of any child alleged to have violated criminal laws or accused of or found guilty of having violated those laws, Article 40 of the Convention on the Rights of the Child emphasizes the desirability of promoting the child's reintegration and of the child's assuming a constructive role in society.

29. As for the guidelines and fundamental principles that must guide the exercise of criminal action in cases in which children are accused of violating criminal law, the Inter-American Commission, in keeping with the standards established by the *corpus juris* described earlier, has observed that there is a clear tendency in international human rights law to afford greater protection to children than to adults, and to limit the role of *ius puniendi.*[33]

30. The Inter-American Commission has observed that Article 19 of the American Convention is the source of particular obligations for guaranteeing juvenile offenders their rehabilitation in order to allow them to play a constructive and productive role in society.[34] Along this same line of reasoning, the Inter-American Court has noted that when the State apparatus has to intervene in offenses committed by children, it should make substantial efforts to guarantee their rehabilitation in order to "allow them to play a constructive and productive role in society".[35]

31. Thus, a juvenile justice system whose policy on crime is geared merely toward retribution and which puts considerably less emphasis on such fundamental goals as prevention and promotion of the opportunities for successful reincorporation into society, would be incompatible with the international standards on the matter.

32. Under Article 40 of the CRC, States parties must endeavor to promote measures for dealing with children alleged of, accused of, or recognized as having violated, criminal law without resorting to judicial proceedings, such as referral to alternative (social) services, whenever appropriate and desirable.[36] Generally speaking, international human rights law favors reserving those penalties that most severely restrict a child's fundamental rights for only the severest of crimes; thus, the trend in juvenile justice systems is toward abolishing penalties of imprisonment or deprivation of liberty. Even in the case of criminalized offenses, laws protecting the child must advocate some form of punishment other than imprisonment or deprivation of liberty.[37] Furthermore, in those cases in which

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[33] IACHR, Report No. 41/99, Case 11.491, Admissibility and Merits, *Minors in Detention* (Honduras), March 10, 1999, para. 113.

[34] IACHR, Report No. 62/02, Case 12.285, Merits, *Michael Domingues* (United States), October 22, 2002, para. 83.

[35] I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 185.

[36] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 24 and 25.

[37] IACHR, Report No. 41/99, Case 11.491, Admissibility and Merits*. Minors in Detention* (Honduras), March 10, 1999, para. 117.

a child or adolescent is found to be responsible for serious offenses that carry penalties of imprisonment or deprivation of liberty, the State's exercise of *ius puniendi* should be guided by the principle of the best interests of the child.

33. As for the manner in which these penalties are to be applied, the Beijing Rules provide that "restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum" (Rule 17.1.b). Therefore, even in the case of serious crimes that carry heavy penalties, the law must offer the judge the means by which to enforce this type of penalty in a manner consistent with the best interests of the child. In other words, "the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society" (Rule 17.1.a).

34. These standards are based on the premise that when exercising its *ius puniendi* with respect to minors, the State must, when minors are involved, not only strictly comply with its international human rights obligations but also give special consideration to the particular situation of children and to their special need for protection. This applies both with regard to determining their responsibility for violations of criminal law and when applying the penalties that such responsibility carries. The Commission has emphasized how different the State's punitive response must be when the offenders are under the age of 18, precisely because they are children when they commit the offense and therefore the blame that attaches to them and, by extension, the penalty, should be less in the case of children than it would be for adults.[38]

35. Based on these considerations, the Commission must again make the point that to achieve the goals of juvenile justice, States must make the best interests of the child a paramount consideration when regulating the juvenile justice system or when applying a punishment or penalty. In case of trial or punishment, States must do everything within their power to ensure the rehabilitation of children in the juvenile justice system, so as to cultivate their self-esteem and sense of dignity and thus enable them to successfully rejoin society and play a constructive role in it. The Commission considers that the retributive aspect of the regular criminal justice system does not serve the purposes of the juvenile justice system, if its goal is to fully rehabilitate and reintegrate the juvenile offender.

D. Age-based Criteria for Holding Children and Adolescents Responsible for Violations of Criminal Law

36. The Commission urges all the States to take the necessary steps, including amendment of their laws, to ensure that the juvenile justice system applied to children and adolescents accused of committing a crime is a specialized system that makes exception for their age, so that no child is criminally prosecuted by the rules of criminal

[38] Cf. IACHR, Report No. 62/02, Case 12.285, Merits. *Michael Domingues* (United States), October 22, 2002, para. 80.

responsibility that apply to adults, and no child under the minimum age of criminal responsibility will face the juvenile justice system.

1. Upper Age-limit at which Children and Adolescents are Held Criminally Responsible under the Juvenile Justice System

37. The American Convention on Human Rights does not define the term "girl, boy and, adolescent". Besides, the Inter-American Court, in its Advisory Opinion number 17, established that the term "child" "obviously, encompasses boys, girls, and adolescents" and that "taking into account international norms and the criterion upheld by the Court in other cases, "child" refers to any person who has not yet turned 18 years of age"[39]. The Court specifically took into account the definition of a child or adolescent that appears in Article 1 of the Convention on the Rights of the Child and the international *corpus juris* on the subject.

38. International law has clearly established the age of adulthood at 18. The Commission therefore considers that if the body of evidence in a given case shows that the accused had not yet turned 18 at the time the alleged offense was committed, then the juvenile criminal justice system must apply. Similarly, the Committee on the Rights of the Child has stated that it

> ... wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of Article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice[40].

39. Nevertheless, according to the information the Commission has received, some persons under the age of 18 in the region are precluded from the juvenile justice system because certain member States have determined that children of 17, 16 and even less than 16 years of age may be tried as adults. Furthermore, children have been denied their freedom and held under the same conditions as adults, despite the fact that under international law, only those over 18 years of age can be held criminally responsible as adults.

40. The Commission is extremely disturbed by the fact that in a number of member States, children who have not turned 18 years of age are excluded from the juvenile justice system. When persons under the age of 18 are required to face the regular justice system, they are being denied their status as children, and their rights are being violated.

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[39] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 42.

[40] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 36 and 37.

41. For example, according to information the Commission received, in Bolivia, the law holds that children are subject to criminal prosecution starting at the age of 16[41]. In 13 States in the United States, the upper age limit for the juvenile justice system is less than 18 years of age; in Connecticut, North Carolina and New York, children over the age of 15 are tried as adults.[42] In most States of the Caribbean, children can be prosecuted under the juvenile justice system only until the age of 16.

42. In Argentina, although Decree-Law 22,278 provides that a child or adolescent under the age of 16 cannot be held criminally responsible, the Commission notes that under the same law children between the ages of 16 and 18 who commit crimes can be tried as adults. Although the judicial authority is empowered either not to impose any sentence at all, or to reduce the sentence to one that an attempt to commit the crime of which the child was convicted would carry, the law allows a judge, at his or her discretion, to impose the same penalties prescribed under the regular criminal justice system[43]. The same is true of the system for enforcement of a sentence. This treatment, which draws no distinction between adult and child, may be incompatible with the principle of the proportionality of the sentence and the lesser culpability of children in light of the best interests of the child, which must guide the consideration of conduct of adolescents in conflict with the law.[44]

43. The Commission is deeply concerned by the fact that in a number of member States, persons under the age of 18 face the regular criminal justice system, in utter disregard for their status as minors. The Commission considers that whenever a person was not 18 years of age at the time of the commission of the offense with which that person is accused, he or she must be treated in accordance with the rules of the special juvenile justice system.

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[41] Ombudsman of Bolivia. *IX Report of the Ombudsman to the National Congress (2006)*, p. 143. Available (in Spanish only) at: http://www.defensoria.gob.bo/filesinformes/flinfnoveno79987501.pdf.

[42] Michele Deitch, et al. *From Time Out to Hard Time: Young Children in the Criminal Justice System*. University of Texas at Austin, LBJ School of Public Affairs, 2009, p. 22. Available at: http://www.utexas.edu/lbj/news/story/856/.

[43] Article 4: The imposition of sentence with regard to the minor to whom article second refers will be subordinated to the following requisites:

1. That previously it has been declared his penal or civil responsibility, in accordance with the procedural norms.

2. Must be eighteen (18) years of age.

3. That has been submitted to a period of tutelary treatment not less than one (1) year, extendable in necessary cases up to adulthood.

Once these requisites are complied with, if the forms of the fact, the precedents of the minor, the result of the tutelary treatment and the direct impression gathered by the judge will make it necessary to apply to him a sanction, it will be resolved as such, being able to reduce it in the form foreseen for the try.

[44] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 10.

44. Finally, like the Committee on the Rights of the Child, the Commission is recommending that member States allow the rules of the juvenile justice system to be applied to persons who are 18 or over, generally until the age of 21, either as a general rule or as an exception.[45] Accordingly, the Commission is encouraging the member States to adopt domestic laws regulating prosecution and sentencing in the case of young people over the age of 18 who are convicted of offenses committed while still minors, so that they are not moved automatically into the adult prison system simply because they turn 18.

2. Minimum Age at which Children and Adolescents are Held Criminally Responsible under the Juvenile Justice System

45. The rules of the criminal justice system do not apply to all children under the age of 18 who are suspected of violating the law; instead, they apply only to those who have reached the minimum age of criminal responsibility. Paragraph 3 of Article 40 of the CRC provides that States parties shall establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. Rule 4 of the Beijing Rules recommends that the commencement age for criminal responsibility should not be fixed too low, bearing in mind the facts of emotional, mental and intellectual maturity.

46. While the instruments of international law do not set a minimum age of criminal responsibility, the Committee on the Rights of the Child has recommended that States set the minimum at between 14 and 16 years, and has urged them not to lower the minimum age of criminal responsibility below that age range. The Committee on the Rights of the Child has also held that a minimum age of criminal responsibility below the age of 12 is not internationally acceptable, even less so in the case of a juvenile prosecuted in the regular criminal justice system.[46]

47. The Commission observes in this regard that within the region, there is enormous disparity with respect to the minimum age of criminal responsibility and that a number of member States even consider that children under the age of 12 are criminally responsible. For example, in Grenada, Trinidad and Tobago, and certain States in the United States, children who are aged 7 can be held criminally responsible. In Antigua and Barbuda, Saint Kitts and Nevis and Saint Vincent and the Grenadines, criminal responsibility begins at age 8. In the Bahamas, Guyana, and Suriname, children are held criminally responsible starting at the age of 10, whereas in Barbados it starts at age 11.

48. In other member States, such as Dominica, Saint Lucia, Jamaica, Belize, Bolivia, Brazil, Canada, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Panama, Peru and Venezuela, the minimum age at which one can be held criminally responsible is 12. In Haiti, Guatemala, Nicaragua and the Dominican Republic, the minimum age of criminal responsibility is 13. In Chile, Colombia, Paraguay and Uruguay, children can be held criminally responsible as from the age of 14. The highest age limit in the region is in

[45] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 38.

[46] Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice,* CRC/C/GC/10, April 25, 2007, paras. 32 and 33.

Argentina, where the minimum age of criminal responsibility is 16 and then only in the case of crimes that are prosecuted by the state, and not for crimes that carry a sentence of more than two years' imprisonment, with a fine or disqualification.

49. The IACHR believes that the American Convention, the American Declaration, the Convention on the Rights of the Child, and any other human rights treaty must be regarded as "living instruments" and must be interpreted "in the light of present-day conditions."[47] Here, the Commission is concerned over the fact that the age of 12 continues to be regarded as the internationally accepted absolute minimum age of criminal responsibility for children and adolescents in the juvenile justice system, when a number of States in the world and in the region have set the minimum age of criminal responsibility much higher.

50. According to the information obtained, at least one member state has lowered its minimum age of criminal responsibility for children and adolescents facing the juvenile justice system, thus deviating from the international trend.[48] The Commission regrets this situation and is disturbed by the fact that in some member States, the minimum age of criminal responsibility in the juvenile justice system is very low, while still other member States are advocating initiatives to lower that age. The Commission believes that these measures and initiatives are at odds with international standards on the subject and the principle of non-regressivity.

51. Cases where children under the minimum age of criminal responsibility engage in conduct criminalized by law, should not elicit a criminalization and punishment response but rather a socio-educational one in light of the best interests of the child, the *corpus juris* on the rights of children and due process guarantees. This type of scenario, however, is outside the scope of the juvenile justice system and therefore beyond the purview of this report.

52. Another matter of concern for the Commission is that some States have two minimum ages of criminal responsibility or "minimum age ranges", which means that children who fall between the two minimum ages can be held criminally responsible if they are deemed to be sufficiently mature. Here, the Commission concurs with the position taken by the Committee on the Rights of the Child, which is that the system of two

[47] This was the interpretation of the European Court of Human Rights, which held that "*the Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions*". See ECHR, *Case of Tyrer v. United Kingdom*, Application No. 5856/72, Judgment, April 25, 1978, para. 31. For its part, the IACHR has observed that "this evolutionary interpretation of the American Convention is consistent with the interpretation rules established in Article 31 of the Vienna Convention on the Law of Treaties between States of 1969, by virtue of which the Inter-American organs have applied a method of interpretation that takes the system in which the respective treaties are inscribed into account." *See* IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System,* OEA/Ser.L/II., Doc. 56/09, December 30, 2009, para. 10.

[48] Panama lowered the minimum age of criminal responsibility in the case of child and adolescent offenders from 14 to 12 years of age. *See* Article 2 of Law No. 6 of 2010, which amends Article 7 of Law No. 40 of 1999 on the Special Regime of Criminal Responsibility for Adolescents.

minimum ages is often not only confusing, but leaves much to the discretion of the court or judge and may result in discriminatory practices.[49]

53. The Commission is also particularly troubled by the fact that in some States of the region, an exception to the minimum age of criminal responsibility is made when the crime or crimes alleged to have been committed are serious in nature. In the Commission's view, if a state determines that a child under a certain age does not have the capacity to violate criminal law, it is unacceptable for the child to be held criminally responsible when the violation involves an especially serious crime. The Commission notes that the Committee on the Rights of the Child has also expressed its concern over the exceptions made to the minimum age principle when the crimes alleged to have been committed are serious offenses.[50] Finally, the Commission concurs with the position of the Committee on the Rights of the Child to the effect that where there is no proof of age, or if it cannot be determined that the child is at or above the minimum age of criminal responsibility, then the child cannot be held responsible for a crime.[51]

54. The Commission is concerned by the fact that although they have set a minimum age of criminal responsibility under the juvenile criminal justice system, a number of member States still have laws, policies and practices that enable them to incarcerate children under the minimum age at which they can be held criminally responsible. In Argentina, for example, although Decree-Law 22,278 provides that a child or adolescent under the age of 16 cannot be held criminally responsible, the Commission observes that some children and adolescents under 16 years of age are deprived of their liberty for the sake of their "protection" based on the fact that Article 1 of that law states that "if the studies show that the minor has been abandoned, is indigent, is in material or moral danger, or has behavioral problems, the judge shall decide the matter once and for all, in a reasoned judgment and after a hearing with the parents or guardian."

55. Provisions like Article 1 above are used in a number of member States as a means to detain children who have not yet reached the legal minimum age of criminal responsibility, on the pretext of "protecting them", without even affording them the guarantees of due process of law. The Commission recognizes that while special measures may occasionally be needed to protect the best interests of the child, this does not mean that a child should be held criminally responsible or deprived of liberty before the child has reached the minimum age of criminal responsibility by invoking the need to "protect" the child. This is also the position of the Committee on the Rights of the Child.[52] Even when

[49] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 30.

[50] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 34.

[51] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 35.

[52] "Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in

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intended to serve the best interests of the child, such special measures must be the exception, be explicitly regulated by law, and be appropriate, necessary and proportionate; otherwise they may be deemed arbitrary or discriminatory.

56. Member States must ensure that children who have not reached the minimum age of criminal responsibility are not prosecuted for their conduct, much less deprived of their liberty.

57. The insistence of the American Convention, the American Declaration and the Convention on the Rights of the Child that child and adolescent offenders are to be treated differently through a separate, special juvenile justice system, is a function of the intent of the States to minimize the justice system's response to juvenile offenders, given their need for special measures of protection.[53]

58. The right to non-discrimination enshrined in Article 2 of the Convention on the Rights of the Child and the best interests principle in Article 3(1) are not compatible with the setting of an arbitrary age below 18 at which children could become subject to the criminal law, inevitably to their detriment. The Commission believes that a more constructive debate is now long overdue on how best to ensure that the required aims of a juvenile justice system are fulfilled, in which the child is "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"[54] .

59. The Commission does not believe that retribution is an appropriate element in a juvenile justice system, if the aims of reintegration and rehabilitation are to be fully utilized. The Commission notes as an example, that Mr. Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe, proposed that it is time to go beyond a debate on the arbitrary setting of a minimum age of criminal responsibility and instead to consider how best to separate the concepts of "responsibility" and "criminalization" and stop criminalizing children[55]. The Commission affirms the need for a new debate, but recognizes that this is a complex matter; removing children completely from the criminal justice system must neither absolve them of responsibility for their

…continuation
their best interests". Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 31.

[53] The Committee on the Rights of the Child made express reference to the criminalization of child offenders as follows: "This negative presentation or criminalization of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g. zero-tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures)." See, Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice,* CRC/C/GC/10, April 25, 2007, para. 96.

[54] Convention on the Rights of the Child, Article 40.

[55] See Mr. Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe views at http://www.coe.int/t/commissioner/Viewpoints/070611_en.asp

actions, nor deny them due process in the determination of whether allegations made against them are true. Such a debate is beyond the scope of this report. But meanwhile the Commission strongly urges Member States to move progressively closer toward 18 the age at which children could be responsible under the juvenile justice system.

E. General Principles of the Juvenile Justice System

60. The *corpus juris* on children's rights clearly provides that children have the same rights as all other persons, as well as the special rights that follow from their status as minors. In the case of children, their status presupposes that certain principles will be observed and guaranteed through the adoption of specific, special measures that ensure that children are able to exercise and enjoy their rights when they face the juvenile criminal justice system. The IACHR will examine each of these principles in this section of its report.

1. The Principle of Legality in Juvenile Justice

61. The Inter-American Court has held that both in the case of adults and in the case of persons under the age of 18, State action is justified:

> … when the former or the latter carry out acts that criminal laws consider punishable , therefore, it is necessary for the conduct that leads to State intervention to be defined as a crime. Thus, the rule of law is ensured in this delicate area of relations between the person and the State[56].

62. The principle of *nullum crimen nulla poena sine lege praevia* (legality) in criminal law, recognized in Article 9 of the American Convention, must apply to the juvenile criminal justice system. The Court has stated the following on this principle:

> The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, …. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from types of behavior that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws … that fail to narrowly define the criminal behavior, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention[57].

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[56] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 108.

[57] I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru.* Merits, Reparations, Costs. Judgment of May 30, 1999. Series C No. 52, para. 121.

63. Article 40 of the CRC expressly recognizes the principle of legality where it provides that no child shall be alleged as, accused of or recognized as having violated, a criminal law by reason of acts or omissions that were not prohibited by the juvenile justice system at the time of their commission. Similarly, Guideline 56 of the Riyadh Guidelines provides that:

> … legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.

64. Furthermore, Article 7 of the American Convention states clearly that no one shall be deprived of his or her physical liberty except for the reasons and under the conditions established beforehand by the constitution of the state party concerned or by a law established pursuant thereto. When examining Article 7 of the American Convention, the Court has stated that there are material and formal requirements that must be observed when taking a measure or applying a penalty that deprives someone of his or her liberty:

> ... no one shall be deprived of his physical liberty, except for reasons, cases or circumstances specifically established by law (material aspect), but, also, under strict conditions established beforehand by law (formal aspect)[58].

65. The Tokyo Rules also provide that certain requirements common to all penalties must be observed in the case of minors as well, such as the existence of a court ruling establishing the minor's responsibility for a criminal offense; the ruling is to spell out the sentence that will be enforced and for how long.[59]

66. The IACHR has clearly established that depriving a minor of his or her liberty for acts that the juvenile criminal justice system has not criminalized is a violation of that minor's right to personal liberty:

> The Commission considers that the practice of incarcerating a minor, not because he committed a criminalized offense but simply because he was abandoned by society or was at risk, or is an orphan or a vagrant, poses a grave threat to … children. The State cannot deprive of their freedom children who have committed no crime, without incurring international

[58] I/A Court H.R., *Case of Gangaram-Panday v. Suriname*, Merits, Reparations, Costs. Judgment of January 21, 1994. Series C No. 16, para. 47; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 131; *Case of Durand and Ugarte v. Peru,* Merits, Judgment of August 16, 2000, Series C No. 68, para. 85;*Case of Bámaca-Velásquez v. Guatemala*, Merits, Judgment of November 25, 2000. Series C No. 70, para. 139; I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations, Costs. Judgment of June 7, 2003. Series C No. 99, para. 78; *Case of Bulacio v. Argentina*, Merits, Reparations, Costs. Judgment of September 18, 2003. Series C No. 100, para. 125; and *Case of the Juvenile Re-education Institute v Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 224.

[59] Tokyo Rules, Rules 3.1 and 11.1.

> responsibility for the violation of their right to personal liberty (Article 7 of the Convention). Depriving a minor of his liberty unlawfully, even if it be for a criminalized offense, is a serious violation of human rights. The State cannot argue the need to protect the child as grounds for depriving him of his liberty or of any other rights inherent in his person. Minors cannot be punished because they are at risk, that is to say, that because they need to work to earn a living, or because they have no home and thus have to live on the streets. Far from punishing minors for their supposed vagrancy, the State has a duty to prevent and rehabilitate and an obligation to provide them with adequate means for growth and self-fulfillment.[60].

67. The Court, for its part, has stated that:

> No one shall be subject to arrest or imprisonment for causes or methods that – although qualified as legal – may be considered incompatible regarding for the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion[61].

68. Subjecting children and adolescents to the juvenile justice system or depriving them of their liberty for the mere fact of having had social or economic problems is clearly not a legitimate, objective or reasonable end to pursue.[62] If a state has enacted legislation to create the appearance of legality but gives the pertinent authorities enormous latitude, that law becomes arbitrary or discriminatory if it is applied to some children but not to others.

69. The Inter-American Court has stated unequivocally that certain types of conduct have no place in a juvenile justice system:

> It is unacceptable to include in this hypothesis the situation of minors who have not incurred in conduct defined by law as a crime, but who are at risk or endangered, due to destitution, abandonment, extreme poverty or disease, and even less so those others who simply behave differently from how the majority does, those who differ from the generally accepted patterns of behavior, who are involved in conflicts regarding adaptation to the family, school, or social milieu, generally, or who alienate themselves from the customs and values of their society. The concept of crime committed by children or juvenile crime can only be

[60] IACHR, Report No. 41/99, Case 11.491, Admissibility and Merits*, Minors in detention* (Honduras), March 10, 1999, paras. 109 and 110.

[61] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 83.

[62] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 21.

applied to those who fall under the first aforementioned situation, that is, those who incur in conduct legally defined as a crime, not to those who are in the other situations.[63]

70. The Court has explicitly held that children requiring measures to protect their rights must not be subject to punitive treatment. On the contrary, they require prompt and careful intervention on the part of well-equipped and well-staffed institutions in order to resolve their problems or mitigate their consequences.[64]

71. Therefore, in order for the juvenile justice system to apply, a child or adolescent (at or above the minimum age of criminal responsibility and under age 18) must have committed an act that is already criminalized by law and that is a punishable offense.[65] Nevertheless, the Commission notes that some member States criminalize conduct that would not be a criminal offense if committed by an adult, as well as behavior that is a function of a child's socioeconomic vulnerability.

72. In many member States, indigent children who resort to begging or who run away from home because of social problems and therefore need protection are subjected to the juvenile criminal justice system even though they have not violated any law. This is a violation of the principle of legality.[66] The Commission is also troubled by the fact that within the region, the juvenile justice system is used to institutionalize children suffering from mental disabilities, on the pretext of their protection; given their mental disability, such children could never be held responsible for violation of any law. Hence, depriving them of their liberty is also a violation of the principle of legality, recognized in Article 9 of the American Convention.

73. The IACHR would remind the States that children and adolescents who are the victims of poverty, abuse, abandonment and neglect, and those suffering from disorders or learning disabilities or other health problems, cannot be deprived of their liberty or be made to face the juvenile criminal justice system when they have not violated any law; nor should children who have engaged in behavior that would not constitute violations of criminal law if committed by an adult. In particular, States must avoid "status" offenses that label certain minors as "delinquent," "incorrigible," or "unmanageable" on the basis of complaints, sometimes by parents, that the children need discipline and supervision due to behavioral or attitude problems that do not amount to criminal conduct.

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[63] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 110.

[64] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, point 12.

[65] Convention on the Rights of the Child, Article 40.2.a; Riyadh Guidelines, guideline 56. See also I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 108 to 111.

[66] See IACHR, Report Nº 16/08, Case 12.359, *Cristina Aguayo Ortiz et al.* (Paraguay). Admissibility, March 6, 2008.

74. The Commission reiterates that children coping with social or economic problems must be helped by the social services or child protection services, but not subjected to the juvenile justice system. Whatever the case, the child's material and procedural rights must be preserved. Any action that affects them must be entirely lawful, objective and reasonable, and be relevant in both substance and form, serve the best interests of the child and abide by the procedures and guarantees that at all times enable verification of necessity, proportionality, suitability and legitimacy.[67]

2. The Principle of Last Resort

75. Article 37(b) of the Convention on the Rights of the Child provides that States parties shall ensure that no child is deprived of his or her liberty unlawfully or arbitrarily and that arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort. This provision is an acknowledgement of the fact that children and adolescents are in the process of maturing and that States have an obligation to take special measures to protect them, as provided in Article 19 of the American Convention and Article VII of the American Declaration

76. The principle of last resort, which is based on those articles, means that deprivation of liberty, whether for pretrial detention or as a sentence, must be a last resort - as must application of the juvenile justice system or adjudication. Obviously the often adverse consequences of prosecuting a person for violation of criminal laws, especially when it implies deprivation of liberty, are compounded when children or adolescents are involved, as they are still in the process of maturing. For that reason, the use of the juvenile justice system with respect to children and adolescents must be limited, and the state's punitive intervention must be reduced to the greatest extent possible, especially where deprivation of liberty is involved.

77. On the matter of preventive detention, the Court has highlighted that detention is the most severe measure that can be applied to someone accused of violating the law, which is why it should be used only as a last resort, given the limits imposed by the right to the presumption of innocence and the principles of necessity and proportionality that are essential in a democratic society.[68] In the specific case of the deprivation of liberty of children, the Court has added that the use of preventive detention as a rule of last resort must be applied with even greater rigor, since the norm should be to resort in the first place to other, non-custodial measures as alternatives to preventive detention.[69] Finally,

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[67] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 113.

[68] I/A Court H.R., *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 228 and *Case of Suárez Rosero v Ecuador.* Merits. Judgment of November 12, 1997. Series C No. 35, para. 77.

[69] According to the I/A Court, these measures might include, *inter alia,* "strict supervision; permanent custody; foster care; removal to a home or educational institution; care, guidance and supervision orders; counseling; probation, educational and vocational training programs and other alternatives to confinement in institutions." 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, paras. 228 and 230.

the Court has held that with regard to any deprivation of liberty of children or adolescents, the right to personal liberty cannot be divorced from the principle of "the best interests of the child ...; it is the child's vulnerability that necessitates special measures of protection".[70]

78. The information the Commission has received reveals that within the region, the deprivation of liberty of children is the rule rather than the exception, and that the number of children placed in preventive detention is much higher than the number who actually go to trial to determine whether they have violated the law. This means that the police authorities are detaining a much larger percentage of children without this necessarily meaning any further action in their case. Furthermore, detention is not confined to cases of *flagrante delicto;* instead, it is also used to deal with truancy, runaways, and street children, etc.

79. Another issue related to the principle of last resort is regulation of the statute of limitations in the case of juvenile justice. The Commission observes that the statute of limitations for criminal action is different in each State. For example, in Bolivia, the statute of limitations expires after four years in the case of crimes that carry a sentence of six or more years, after two years for those that carry a sentence of imprisonment of less than six years but more than two years, and six months for all other crimes.[71] In Guatemala, the statute of limitations is five years in the case of crimes against life, sexual crimes and crimes against a person's physical integrity; three years for any other type of crime that is prosecuted by the state, and six months for crimes charged by private parties and petty offenses.[72] In Uruguay, the statute of limitations is two years for very serious crimes, and one year for serious crimes.[73] The Commission is recommending that statutes of limitations within the juvenile justice system be shorter than those in the regular criminal justice system for the same punishable offense, in keeping with the principle of the exceptionality of prosecution.

80. The Commission reiterates that the juvenile justice system – especially the deprivation of liberty of children - must be used only as a last resort and only by way of exception, and for as short a time as possible. States must take whatever measures they can to minimize children's contact with the juvenile justice system and regulate, in a proportional way, the statutes of limitations and limit the use of the deprivation of liberty – whether as preventive detention or sentence- when criminal laws are violated.

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[70] 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, para. 225.

[71] Article 222 of the Child and Adolescent Statute.

[72] Article 225 of the Child and Adolescent Comprehensive Protection Act.

[73] Article 103 of the Child and Adolescent Statute.

3. The Principle of Specialization

81. Article 5(5) of the American Convention on Human Rights clearly provides that children accused of violations of criminal law are to be subject to a specialized system of justice. That article reads as follows:

> Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

82. Similarly, Article 40(3) of the Convention on the Rights of the Child provides that:

> States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.

83. For its part, the Court has held that one obvious consequence of dealing with matters that pertain to children in a different way, specifically matters involving unlawful conduct, is the establishment of specialized jurisdictional bodies to hear cases involving conduct defined as crimes and attributable to children, and a special procedure whereby these alleged violations of the law are heard.[74] The Commission, for its part, has also spoken of the need for special treatment and specialized courts.[75]

84. The Court has also explained that in a specialized criminal jurisdiction for children,[76] those who exercise authority at the various stages of trial and in the different phases of the administration of juvenile justice are to be especially trained and qualified in the human rights of the child and child psychology, in order to avoid any abuse of authority, and to ensure that the measures ordered in each case are suitable, necessary and proportional.[77]

85. That specialization requires laws, procedures and institutions specifically for children, as well as special training for all those working in the juvenile justice system. These specialization requirements apply to the entire system and to all those who work within it, including non-legal personnel who advise the courts or who enforce the measures ordered by the courts, and the staff of the institutions in which children are deprived of their liberty. The specialization requirements also apply to the police force if they have contact with children.

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[74] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 109.

[75] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention,* March 10, 1999, para. 125.

[76] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 211.

[77] Convention on the Rights of the Child, Article 40(4) and Beijing Rules, Rule 6.3.

86. One of the Commission's main concerns with respect to the principle of specialization within the region is the situation in those States where minors can be barred from the juvenile justice system and tried by adult courts. For example, the information compiled by the Commission[78] reveals that in the United States, more than half of the States allow children aged 12 and above to be transferred to adult courts; in 22 States children, even as young as seven years old, can be tried and convicted in adult courts. According to the information received, there are four principal transfer mechanisms. First, there are legal provisions under which certain violations of the law are automatically prosecuted in adult courts.[79] Second, judges are empowered to decline the juvenile court's jurisdiction in a case, so that the case is transferred to adult courts. Third, the prosecutor has discretionary authority to present cases in an adult court rather than a juvenile court. And fourth, 34 States have laws currently in force to the effect that "once an adult, always an adult", which means that a child previously tried as an adult will automatically be tried in adult court for any subsequent alleged violations of criminal law, petty offenses are not generally included.

87. In some States, like Antigua and Barbuda and Jamaica, children charged along with an adult are tried in an adult court rather than a juvenile court.[80] In other States, judges have discretionary authority to determine whether a child should be transferred to adult courts. For example, in Suriname, this can be done in the case of children between the ages of 16 and 18.[81]

88. The Commission finds these practices disturbing. They not only deny accused children the protection of a specialized juvenile court, but also subject them to other grave consequences, such as the possibility that they might be sentenced as an adult

[78] Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System,* Austin Texas: University of Texas at Austin, LBJ School of Public Affairs, pp. xiii, 21, 22. Available at: http://www.utexas.edu/lbj/news/story/856/.

[79] For example, in Georgia, any youth over the age of 13 is handed over to the adult courts if he or she is accused of homicide, murder in the second degree, sodomy involving rape, child abuse with aggravating circumstances, sexual battery with aggravating circumstances, or assault with a firearm. Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System,* Austin Texas: University of Texas at Austin, LBJ School of Public Affairs, p. 19. Available at: http://www.utexas.edu/lbj/news/story/856/.

[80] With regard to Antigua and Barbuda in 2004, the Committee on the Rights of the Child observed the following: "A juvenile (defined as a person under the age of 16 years) can be tried as an adult if charged with an adult for a homicide." Committee on the Rights of the Child, Consideration of State Reports under Article 44 of the Convention. Final Observations: Antigua and Barbuda, CRC/C/15/Add.247, November 3, 2004, para. 68(a). Furthermore, Section 72(2) of Jamaica's Child Care and Protection Act provides that: "Subject to subsection (3), a charge made jointly against a child and a person who has attained the age of eighteen years shall not be heard by a Children's Court." (Subsection 3 states that where, in the course of any proceedings before a Children's Court, it appears that a person so jointly charged has attained the age of eighteen years, it may continue hearing the case with all the powers of a court in relation to the person who has attained the age of eighteen years). See also Jamaica's Child Care and Protection Act, 2004.

[81] In its Concluding Observations on Suriname, the Committee on the Rights of the Child urged the State to review and "ensure the abolishment of the rules providing judges with discretionary power to treat a child between the ages of 16 and 18 as an adult." Committee on the Rights of the Child. Consideration of the Reports Submitted by States Parties under Article 44 of the Convention. Final Observations: Surinam, CRC/C/SUR/CO/2, June 18, 2007, para. 70 (a).

or receive a tougher sentence than they would have received in a juvenile court. In the United States, for example, although a child cannot be sentenced to death, in some States a child sentenced in an adult court faces the full range of other sentences available for adults, including life imprisonment. Something similar happens in Argentina where Decree-Law 22,278 retains a system in which juvenile offenders are sentenced and/or released according to the provisions of the adult criminal justice system. This means that minors can receive the maximum penalties allowed under Article 80 of the Argentine Penal Code, namely imprisonment and confinement for life.

89. The Commission observes that a number of member States have established separate juvenile justice systems for children who violate criminal laws. However, these systems are not necessarily specialized in practice. Furthermore, the personnel staffing these systems do not always receive training in children's growth and development and children's human rights, the kind of training that would enable them to exercise their discretionary authority with respect to children in a manner consistent with all the principles of human rights. Furthermore, in most States, access to the specialized juvenile justice systems is limited, especially beyond the main cities.

90. The Commission notes that a number of positive initiatives have been undertaken with regard to the instruction and training for judges, prosecutors and defense attorneys who work with children in conflict with the law.[82] Nonetheless, the IACHR observes that there are enormous disparities within the region and in the interior of the member States when it comes to the training and preparation of the officers of the juvenile justice systems. According to the information received, even in those States that have specialized juvenile courts, judges have not received any type of training or instruction in the laws pertaining to children, their rights and their growth and development. In some cases, judges and government officials told the Commission that the judges serving in the specialized courts of the juvenile justice system met the requirements for their positions because they were women and mothers,[83] but not because they were specialists in juvenile justice. The Commission was also told of cases in which the judges ended up on the juvenile court bench by a rotation system, where they would remain for one year. This is not sufficient time to develop experience and expertise in this area.[84] The Commission would emphasize how important it is for the States to strengthen and develop training programs in specialized juvenile justice for judges as well as prosecutors and public defenders.

[82] For example, the IACHR has been informed that since 1998, a Course on Jurisdictional Protection of Children's Rights for Judges, Attorneys and Prosecutors has been held each year under a joint initiative undertaken by the UNICEF offices in Argentina, Chile and Uruguay; in 2005, Paraguay joined the initiative. As of 2004, those who take the course earn academic credits from the Universidad Diego Portales in Chile, provided they pass the evaluation. The purpose of the course is to train defense attorneys, prosecutors and judges in the judicial systems for protecting children's rights, in order to cultivate skills and knowledge that will promote application of an approach focusing on ensuring children's human rights.

[83] This information is based on interviews with government officials and court officials in Suriname and Guyana in April 2009.

[84] This information is based on interviews with government officials and court officials in Suriname in April 2009.

91. The Commission is troubled by the fact that outside the major cities, there are often no judges specifically appointed or trained to deal with cases involving children accused of violating criminal laws, with the result that the degree of specialization of the court system is even less. In many States, in districts beyond the capital or major cities, juvenile offenders are tried by judges serving in the regular courts. In fact, it frequently happens that the same judges hear legal cases of all types; if there is a family court judge, he or she is also assigned cases involving juvenile offenders. The geographic distribution of the juvenile justice system is a basic criterion by which to evaluate a State's capacity to try and punish juvenile offenders in accordance with the standards of international human rights law. While the Commission recognizes that it is not always possible to post, throughout the national territory, judges devoted exclusively to hearing juvenile cases, they nonetheless have to be properly trained to be able to decide cases involving juvenile justice, in observance of all the specific rights and guarantees established for children.

92. The IACHR must point out that the principle of specialization applies to all personnel who play a role in the juvenile justice system, including other auxiliary staff of the courts, such as experts as well as the personnel charged with enforcing the measures ordered by the courts, including those tasked with supervising compliance with non-custodial measures. The Commission recalls Rule 81 of the Havana Rules, which states that personnel of the juvenile detention facilities:

> ... should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counselors, social workers, psychiatrists and psychologists. These and other specialist staff should normally be employed on a permanent basis. This should not preclude part-time or volunteer workers when the level of support and training they can provide is appropriate and beneficial.

93. Under the principle of specialization, police officers must also have special training in the rights of children accused of violating criminal law and their particular needs according to their development. Rule 12 of the Beijing Rules reads as follows:

> In order to best fulfill their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose.

94. The Commission is troubled by the fact that, in many States of the region, it is not usual to require specific training of all personnel; in fact, security staff in detention facilities often have no training at all regarding the specific rights and needs of children. In this regard, the Commission is concerned about the lack of training in the medical, psychiatric, or psychological areas in order to respond to the special needs of certain children and adolescents.

95. The IACHR also observes that it is vital that all procedures and the infrastructure of the juvenile justice system be tailored to ensure the rights of the child. Furthermore, the infrastructure must be progressively brought up to an optimal standard. The Committee on the Rights of the Child has singled out certain minimum standards which the Commission believes must be observed:

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms[85].

96. The Commission notes that efforts to tailor infrastructure and procedures to the special needs of the juvenile justice systems vary within the region. For example, during an in loco visit, the IACHR observed that the Family Court serving the city of Belize, though overcrowded, has gone to some effort to adapt to children's needs. It has set up separate waiting rooms for children and has prioritized cases involving juvenile offenders over other domestic matters. At the same time, most of the family or special juvenile courts in the Caribbean have not made sufficient effort to make it easier for children to exercise their rights in juvenile court proceedings.

97. For example, during its visit to Jamaica, the IACHR noted that no measures had been taken to ensure that the environment of the juvenile courts was less intimidating to children and their families. On a visit to the Kingston Children's Court, the Commission learned that the Juvenile Court and the Family Court share the same facilities. The overcrowding is so severe that people were sitting on the stairs. Hearings are not scheduled, so that persons arrive at 10:30 a.m. and wait all day for a hearing; often they have to return another day. A dress code is enforced, but people are not notified of these rules before arriving at court and those who are not properly attired are not allowed into court. In the hearing room, the judge sits on a podium and the children and their parents have to stand below the judge, looking up at him or her. No chairs are provided for seating. According to the attorneys, the police intervene and order the accused to address the judge as "Your Honor" or to stand up straight. Similar scenes were repeated in many juvenile courts in the region.

98. The IACHR again emphasizes the point that promoting routine, comprehensive programs to instruct the officers of the juvenile courts in children's growth and development and their human rights is a necessity and an obligation. The Commission also recommends that the professional competency of all personnel serving in the juvenile justice system should be regularly reinforced and developed through training, supervision and evaluation. The Commission urges the States to ensure that the juvenile justice system is accessible throughout their national territory and to take the measures necessary to

[85] Committee on the Rights of the Child, General Comment No. No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 34.

ensure that the procedures by which the juvenile justice system operates and the facilities in which it operates are suitable for children and conducive to their participation.

4. The Principle of Equality and Non-Discrimination

99. Article 24 of the American Convention recognizes the principle of equality, which includes the prohibition of any arbitrary difference in treatment, such that any distinction, restriction or exclusion by the State that, even though provided by law, is neither objective nor reasonable would be a violation of the right to equality before the law, notwithstanding any violations of other Convention-protected rights when the difference in treatment is applied in practice. The Court has held that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity".[86] In determining whether a difference in treatment is arbitrary, the Commission has used four criteria: legitimate end, suitability, necessity and proportionality.[87] And so, if a child or adolescent is subjected to some difference in treatment, that difference will have to be examined on the basis of those four criteria to determine whether it is both reasonable and objective and, therefore, whether it is or is not compatible with Article 24 of the Convention.

100. For its part, Article 1(1) of the American Convention prohibits discrimination in the exercise of the rights protected under the American Convention. As to the scope of these provisions, from its earliest case law, the Inter-American Court has held that Article 1(1) includes a prohibition on discrimination in the exercise and application of the rights recognized therein, whereas Article 24 of the American Convention prohibits any type of discrimination, not only with regard to the rights embodied therein, but also with regard "to all the laws that the State adopts and to their application."[88] The

[86] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55.

[87] See, IACHR, Application before the Inter-American Court of Human Rights in the case of Karen Atala and daughters, dated September 17, 2010, Case No. 12.502, Chile, paras. 85 and 86. Available at http://www.cidh.oas.org/demandas/12.502SP.pdf. While the Inter-American Court has applied these parameters to the analysis of restrictions on the exercise of various rights protected by the American Convention, for the Commission these criteria would imply the following in the analysis of equality and non-discrimination: i) for the Commission, the suitability requirement is the means-to-end relationship between the measure that interferes with or restricts the exercise of a right and the end that the means is intended to accomplish. The suitability test does not in principle include any value judgment regarding the measure. It is an objective test used to determine whether any logical causal relationship exists; ii) as for the necessity requirement, for the Commission this includes a determination as to whether the state had other, less restrictive but equally suitable means to help achieve the legitimate end being sought; and iii) in the case of the proportionality requirement *stricto sensu,* the Commission observed that it balances the sacrifice represented by the restricted right or the right that the state has curtailed against the benefits to be gained in terms of accomplishing the end sought. The Inter-American Court, for its part, took these criteria into consideration when deciding cases related to restrictions on the exercise of rights recognized in the American Convention. See, for example, I/A Court H.R., *Case of Chaparro-Álvarez and Lapo Íñiguez v. Ecuador*. Judgment of November 21, 2007. Series C No. 170, para. 93; *Case of Kimel v. Argentina*. Merits, Reparations, Costs. Judgment of May 2, 2008. Series C No, paras. 58, 70, 74 and 84; *Case of Tristán-Donoso v. Panama*. Judgment of January 27, 2009. Series C No. 193, para. 56, and *Case of Escher et al. v. Brazil*. Preliminary Objections, Merits, Reparations, Costs. Judgment of July 6, 2009, para. 129.

[88] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 186.

Court echoed this distinction where it held that "if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur."[89]

101. The Inter-American Commission has consistently maintained that the development of the right to equality and non-discrimination reveals a number of related concepts. One concerns the prohibition of any arbitrary difference in treatment, mentioned earlier. The other concerns the obligation to create conditions of real equality for groups that have historically been excluded and that are at greater risk of becoming the targets of discrimination.[90] Here, the Court has observed that: "there are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness."[91] These distinctions could constitute affirmative actions that endeavor to achieve substantial equality through differentiated treatment of, for example, historically disadvantaged groups.

102. Although the analysis of the arbitrary or discriminatory nature of a difference in treatment means that the distinction or exclusion will have to be tested to determine whether it is objective and reasonable,[92] there are cases in which the scrutiny for compliance with the parameters of legitimate end, suitability, necessity and proportionality is more exacting.[93] This is because by their very nature, those categories are considered "suspect." In such cases, the distinction is presumed to be incompatible with the American Convention and a higher burden of proof rests with the States to disprove that *prima facie* presumption.[94] Furthermore, the reparations to be made for this type of discrimination must "be designed to change this situation, so that their effect is not only of restitution, but also of rectification" and must be geared toward identifying and eliminating the causal factors of discrimination, especially in the case of structural discrimination.[95]

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[89] I/A Court H.R.. *Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objections, Merits, Reparations, Costs. Judgment of August 5, 2008. Series C No. 182, para. 209.

[90] See IACHR, Application in the case of Karen Atala and daughters of September 17, 2010, Case No. 12.502, Chile, para. 80. Available at http://www.IACHR.oas.org/demandas/12.502SP.pdf

[91] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46.

[92] See I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 55.

[93] See IACHR, Application in the case of Karen Atala and daughters of September 17, 2010, Case No. 12.502, Chile. para. 88. See also Courtis, Christian, "*Dimensiones conceptuales de la protección legal contra la discriminación*", in *Revista Derecho del Estado*, No. 24, 2010, pp. 16 and 122.

[94] See IACHR, Application in the case of Karen Atala and daughters of September 17, 2010, Case No. 12.502, Chile. para.89. Available at http://www.IACHR.oas.org/demandas/12.502SP.pdf

[95] I/A Court H.R., *Case of González et al ("Cotton Field") v Mexico*. Preliminary Objections, Merits, Reparations, Costs. Judgment of November 16, 2009. Series C No. 205, paras. 450 and 451.

103. The Commission has also examined the concept of indirect discrimination or the disproportionate impact of laws, actions, policies, etc., that while seemingly neutral, have a differential impact on certain groups.[96]

104. According to the varying interpretations of the right of equality, a State's actions and omissions may be related to rights enshrined in the American Convention or they may be related to any undertaking of the State that does not affect the enjoyment of Convention-protected rights.[97] These are the reasons why the IACHR has insisted that although certain criteria may be used as a basis, the applicable Convention provisions must be determined on a case-by-case basis by means of an analysis that takes into account the individual or group of people affected, the reasons behind the alleged discrimination, the rights or interests at stake, the actions or omissions that gave rise to the discrimination, and other considerations.[98]

105. The principle of equality and non-discrimination is also part of the international *corpus juris* on the rights of children and adolescents. Thus, Article 2 of the Convention on the Rights of the Child provides that:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

106. Then, too, the general principles of the Beijing Rules set some minimum standards for handling juvenile offenders and are to be applied impartially and without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, economic position, birth or any other condition. Rule 4 of the

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[96] IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, para. 90. See also I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary objection, Merits, Reparations and Costs, Judgment of September 8, 2005. Series C No. 130, para. 141; European Court of Human Rights, *Hoogendijk v. the Netherlands*, Application No. 58641/00, 2005; Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights* (article 2, para. 2 of the International on Economic, Social and Cultural Rights), E/C.12/GC/20, July 2, 2009, para.10; and Human Rights Committee, Communication No. 993/2001, CCPR/C/78/D/998/2001, *Althammer v. Austria*, August 8, 2003, para. 10.2.; Committee for the Elimination of Racial Discrimination, Communication No. 31/2003, CERD/C/66/D/31/2003, March 7, 2005, *L.R. et al. v. Slovakia*, para. 10.4.

[97] See, IACHR, Application in the case of Karen Atala and daughters, dated September 17, 2010, Case No. 12.502, Chile, para. 80. Available at http://www.IACHR.oas.org/demandas/12.502SP.pdf

[98] See, IACHR, Application in the case of Karen Atala and daughters (Case 12.502) against the State of Chile, September 17, 2010, para. 81. Available at http://www.IACHR.oas.org/demandas/12.502SP.pdf.

Havana Rules provides that the Rules are to be applied impartially, without discrimination of any kind as to race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin and disability.

107. The Committee on the Rights of the Child has also examined the application of the principle of non-discrimination with respect to children.[99]

108. Given the above, the Inter-American Court's interpretation is that:

> It can be concluded that, due to the conditions in which children find themselves, differentiated treatment granted to adults and to minors is not discriminatory per se, in the sense forbidden by the Convention. Instead, it serves the purpose of allowing full exercise of the children's recognized rights[100].

109. The fact that treating children and adolescents differently from adults may not be discriminatory *per se* does not mean that any differentiated treatment of children and adults is justified. In this report's discussion of the principle of legality, the Commission pointed out that subjecting children to the juvenile justice system for "status offenses", i.e., types of behavior that do not constitute either crimes or misdemeanors when committed by an adult, is a violation of the principle of legality. But it may also be a violation of the principle of non-discrimination if the difference in treatment is not based on some objective and reasonable justification.

110. The Commission observes that within the region children are often referred to as being 'beyond parental control'.[101] Behavior such as using foul language, truancy or frequenting bars can end up in the child being sent to institutions to deprive them of their liberty. According to the information that Jamaica's Office of the Children's Advocate supplied to the Commission, in 2007, 382 children were ordered to be sent to

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[99] See, *inter alia*, Committee on the Rights of the Child. Consideration of the Reports Submitted by States Parties under Article 44 of the Convention. Final Observations: Paraguay CRC/C/15/Add.166, November 6, 2001, paras. 27 and 28; Committee on the Rights of the Child. Consideration of the Reports Submitted by States Parties under Article 44 of the Convention. Final Observations: Guatemala CRC/C/15/Add.154, July 9, 2001, paras. 26 and 27; and Committee on the Rights of the Child. Consideration of the Reports Submitted by States Parties under Article 44 of the Convention. Final Observations: Belize, CRC/C/15/Add.99 May 10, 1999, para. 16.

[100] I/A Court H.R, *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 55.

[101] For example, Section 24 of Jamaica's Child Care and Protection Act provides that: 24. - (1) The parent or guardian of a child may bring the child before a juvenile court and where such parent or guardian proves to the court that he is unable to control the child, the court may make an order in respect of the child if satisfied (a) that it is expedient so to deal with the child; and (b) that the parent or guardian understands the results which will follow from, and consents to the making of the order. (2) An order under subsection (1) may - (a) be a correctional order; or (b) provide for the child - (i) to be committed to the care of any fit person, … or (ii) to be placed for a specified period, not exceeding three years, under the supervision of a probation and after-care officer, a children's officer or of some other person to be selected for the purpose by the Minister." See Jamaica's Child Care and Protection Act, 2004.

correctional institutions and were admitted. Of these, the largest number (42) consisted of children admitted because they were acting 'beyond parental control'.[102]

111. Furthermore, the education laws in some States of the United States use the juvenile justice system to deal with problems like truancy. For example, the Commission has been told that in the United States, although the Federal Juvenile Justice and Delinquency Prevention Act prohibits the incarceration of children for violations of criminal laws because of their status *status offences*, children who are truant from school after a court has ordered them to attend, can be deprived of their liberty since the laws in a number of States allow incarceration in cases in which valid court orders are disobeyed.[103] The Commission must emphasize that the juvenile justice system cannot address problems with school conduct unless a criminal law has been violated.

112. Here, the Committee on the Rights of the Child has observed that:

> It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. … These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish an equal treatment under the law for children and adults[104].

113. The Commission observes that Guideline 56 of the Riyadh Guidelines provides that:

> In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.

114. With regard to discriminatory treatment among groups of children, the Commission is troubled by the plight of children who are victims of race-based discrimination within the juvenile justice system. The IACHR observes that children from minority communities in the Americas, such as Afro-descendant children and indigenous children, as well as Latino children in the United States, are overrepresented in detention facilities and occasionally receive harsher sentences for the criminal acts they commit. Children belonging to these minority groups are also more likely to experience violence at the hands of police and correctional officers.

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[102] Office of the Children's Advocate (Jamaica), Annual Report, Fiscal Period 2007/2008, p. 21.

[103] Federal Juvenile Justice Advisory Committee, Annual Report 2008, p. 3.

[104] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 8.

115. In its Report on the Situation of Human Rights in Brazil, the IACHR highlighted the fact that social indicators revealed that Brazilians of African descent were more likely to be suspects, investigated, tried and convicted than the rest of the population.[105] According to information received by the Commission, in the United States, over half the children aged 12 and under who have been transferred to adult courts charged with committing crimes against persons have been Afro-descendants. Other reports also point up the discrimination in the sentencing process in the United States in the case of children belonging to racial minorities, who are more likely to receive longer sentences than other children, even though the offense committed is the same.[106] The Commission has also been told that in some States like California and Pennsylvania in the United States, Afro-descendant children are 20 times more likely to receive life sentences without the benefit of parole.[107]

116. After an official visit to Canada, the United Nations' independent expert on minority questions had the following to say:

> Every community I talked with raised serious issues of policing .... The concerns included racial profiling as a systemic practice, over-policing of some communities in which minorities form a large percentage of the population and disturbing allegations of excessive use of force leading to deaths particularly of young black males[108].

117. In its General Comment No. 11, on indigenous children and their rights under the CRC, the Committee on the Rights of the Child observes with concern the disproportionately high rate of incarceration among indigenous children and commented that "in some instances this may be attributed to systemic discrimination from within the justice system and/or society."[109] The Commission, too, has received information to the effect that in Canada, children from aboriginal communities represent 4.5% of the total population, but 24.9% of all children deprived of their liberty.[110] However, the Commission also finds that measures are being taken to avoid the disproportionately high numbers of

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[105] IACHR, *Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc 29, rev.1,* September 29, 1997, Chapter IX, para. 24. See also: IACHR, Report No 26/09, Case 12.440 *Wallace de Almeida* (Brazil), March 20, 2009, paras. 61 to 67.

[106] Human Rights Watch, *When I Die They Will Send Me Home: Youth Sentenced to Life Without Parole in California*, Vol. 20, No.1 (G), January 2008, p. 29. Available at: http://www.hrw.org/en/reports/2008/01/13/when-i-die-they-ll-send-me-home.

[107] Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System.* Austin Texas, University of Texas at Austin, LBJ School of Public Affairs, pp. 32 and 34. Available at: http://www.utexas.edu/lbj/news/story/856/.

[108] Gay McDougall, United Nations independent expert on minority issues. Statements made upon conclusion of an official visit to Canada, October 23, 2009. Available at: http://www2.ohchr.org/english/issues/minorities/expert/index.htm.

[109] Committee on the Rights of the Child, General Comment No. 11, *Indigenous children and their rights under the Convention,* CRC/C/GC/11, February 12, 2009, para. 74.

[110] Bala, Nicholas and Anand, Sanjeev, *Youth Criminal Justice Law*, Toronto, Irwin Law, 2009, Ch. VIII (Sentencing under the Youth Criminal Justice Act).

minorities in the juvenile justice system. Canada's Youth Criminal Justice Act provides that all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.[111]

118. The Commission also observes that children in the Americas are often the victims of discrimination by virtue of their socioeconomic circumstances. Within the region, children are routinely subjected to punishment for types of behavior that are manifestations of socioeconomic problems, like vagrancy, begging or indigence. The Commission has examined the admissibility of one case that involved the alleged deprivation of liberty of children because they were alleged to be street children or indigent children.[112] It is also disturbed by the fact that the decisions about whether to bring charges or to release a child who is deprived of his or her liberty frequently hinge on the degree of supervision that they can received from their parents. If a child comes from a single-parent household, that household is deemed less capable of supervising the child than a household in which both parents are present. Likewise, when the father or mother has drug or alcohol problems or has had trouble with the law, or are simply poor, their capacity to supervise the child is presumed to be compromised and will influence a judge's decision about whether or not to incarcerate a child.

119. In Guyana's response to the questionnaire, the Commission received disturbing information to the effect that in 2007, and again in 2008, approximately 50% of the children ordered into the country's only correctional facility were sent there for vagrancy. The historical notion of the juvenile justice system as an extension of social services and as a way of solving children's social problems has resulted in unlawful interventions in the case of children from the socioeconomically disadvantaged sectors. The IACHR also notes that a study was undertaken in 2003 to verify the human rights violations that occurred in Guatemala during implementation of the so-called "Plan Escoba". The study found that the majority of those detained were poor, uneducated children from marginal areas. In 70% of the cases, they were arrested for possession of narcotic drugs. However, in many of these cases, Guatemala's National Civil Police supplied fraudulent evidence to justify the arrests.[113]

120. The Commission also observes that girls in the Americas are frequent targets of discrimination by the juvenile justice system because of their gender. Girls are

[111] Section 3(1)(c)(iv) of Canada's Youth Criminal Justice Act provides that "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should … respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements." Section 38(2)(d) states that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young person."

[112] See, IACHR, Report No. 16/08, Case 12,359, *Cristina Aguayo Ortiz et al. v. Paraguay*. Admissibility, March 6, 2008.

[113] World Organisation Against Torture (OMCT), *Violaciones de los Derechos Humanos en Guatemala*, UNTB/CAT/36/2006/GUA/ESP, October 2006; Available at: http://www.omct.org/files/2005/09/3070/guatemala_cat36_0406_esp.pdf; and ICCPG, *Transparentando el Plan Escoba*, Guatemala, 2003.

often incarcerated for having committed acts that do not constitute crimes if committed by an adult or acts for which boys, unlike girls, are rarely punished, such as alcohol consumption and smoking, running away from home or having sexual relations, due to gender stereotypes associated with a concept of women's subordination to men.[114] Furthermore, because girls represent a relatively small percentage of the offenders in the juvenile justice system, correctional facilities for girls often either do not exist or are in a terrible condition when compared with the facilities for boys. Thus, girls who violate the law are more likely than boys to be sent to adult correctional facilities, where they are routinely intermingled with the adult population. Girls' particular needs frequently go unaddressed, such as the need for reproductive health services. Furthermore, because there are so few women on the police force and among prison guards, girls often become the victims of physical, psychological and sexual abuse in the juvenile justice systems of the hemisphere. As the I/A Court H.R. has observed, *de facto* and *de jure* differences based on gender stereotypes associated with women's subordination to men "become one of the causes and consequences of gender-based violence against women."[115].

121. The information the Commission received also describes the discrimination that children suffer by virtue of their sexual orientation. In some States of the region, children face the juvenile justice system for engaging in certain sexual behavior, especially having sexual relations with members of the same sex. Worse still, in some States like Guyana[116] and Jamaica, there are specific laws criminalizing homosexual activity and sodomy. Then, too, in some States children become special targets of police brutality and violence by detention facility personnel because of their sexual orientation and gender identity.[117] In the Commission's view, while criminalization of sexual orientation is discriminatory for anyone, it can involve a more severe violation of rights in the case of children and adolescents because of the particularly harmful psychological effects it has on youngsters whose sexual identity is still in the process of maturing and who are extremely vulnerable as a result.

122. The juvenile justice systems in the Americas have also traditionally discriminated against children with disabilities, especially those with mental disabilities. The Commission is concerned by the fact that children with developmental disorders or who have mental health disabilities sufficiently severe to limit their ability to perform basic functions, are over-represented in the juvenile justice systems in the region. While

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[114] For the I/A Court H.R., "gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women." *See* I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 401.

[115] I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 401.

[116] In the Government of Guyana response to the questionnaire on juvenile justice systems, it was noted that one minor was at the New Opportunities Corp facility for the crime of sodomy.

[117] On this subject, see, for example: Human Rights Watch, *Not Worth a Penny: Human Rights Abuses against Transgender People in Honduras.* May 29, 2009, available at http://www.hrw.org/node/83452. See also: Human Rights Watch, *Jamaica: Condemn Homophobic Remarks. Letter to Prime Minister Golding.* February 19, 2009. Available at http://www.hrw.org/en/news/2009/02/19/letter-prime-minister-golding.

developmental disorders and a limited cognitive capacity can sometimes cause children to violate the law, their mental capacity should be one factor considered when deciding whether to enforce punishment or refer them to specialized mental health systems. The Commission points out that custodial sentences take a particularly heavy toll on children with mental disabilities, and their vulnerability frequently makes them the target of violence and exploitation by personnel of the juvenile criminal justice systems.

123. The Commission has followed up on the discrimination that children suffer as a result of the "mara" or "gang" phenomenon.[118] The Commission is aware that the 'mara' phenomenon is a particularly complex one that is rooted in, and developed out of, an environment of social exclusion and inequality, characterized by a lack of opportunities for the majority of the population.

124. Following the visit that the Commission and UNICEF made to El Salvador, Guatemala and Honduras in 2004, the two organizations expressed concern at the discrimination in the conditions of detention of children and adolescents belonging to 'maras' or 'gangs':

> Many boys and girls from the poorest sectors of the population lack access to education, food, housing, health care, personal safety, family protection, and employment opportunities. Faced with that situation, many choose to join the maras or pandillas in search of support, protection, and respect. After joining, they usually live together in their urban communities, for the avowed purpose of mutual care and defense, and of defending the neighborhood in which they live against rival maras or pandillas. Many carry weapons and engage in criminal activities, including homicide, robbery, theft, and armed confrontations with other gangs—often with fatal results. … Our greatest concerns about the human rights situation of members or former members of maras or pandillas have to do with the extreme poverty, murders, violations of personal well-being, arbitrary arrests, mistreatment, stigmatization, and discrimination to which they are subjected[119].

125. The Commission considers that while there may be multiple strategies for dealing with this phenomenon, the only way to ensure their effective implementation is to include the human rights perspective provided by the international standards on this subject.

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[118] Wim Savenije describes the gang phenomenon as follows: "These groups are largely composed of youth who have a common social identity, reflected principally in their name; they frequently interact and are quite often engaged in illegal activities. They express their social identity through symbols or gestures (tattooing, graffiti, signs, etc.), and claim control over certain things, often territory or economic markets." Savenije, Wim, "Transnational Gangs or "Maras": Urban Violence in Central America" in *Foro Internacional,* Vol. XLVII, No. 3, July-September 2007, Colegio de México, Mexico, p. 638.

[119] IACHR, Press release No. 26/04, December 4, 2004, available at: http://www.IACHR.oas.org/Comunicados/Spanish/2004/26.04.htm

> The fact that the region is reacting to the problem as a human rights issue says a great deal about how far the democratization process has gone. Unfortunately, the measures taken against *maras,* which are steeped in very repressive rhetoric (which includes special anti-mara groups and "*mara* hunts") does not suggest any promising progress in this regard, and may even have exacerbated the situation to the point that the root-causes of the *mara* phenomenon are being ignored.[120]

126. The United Nations Human Rights Council observed the following situation in Honduras in 2006, which demonstrates that subsequent to the IACHR/UNICEF joint visit to that country, discriminatory conditions of detention of 'maras' persist:

> In prison mara members, whether on pre-trial detention or upon conviction, are segregated from the general population. The police guarding the prison only ensure from outside that the prisoners do not escape, while inside the wing the mara leadership rules the life of the detainees without any interference by the authorities. Rehabilitation and the preparation for a life outside the "illicit association" upon release thereby become all but impossible. On the contrary, membership and hierarchical structures within the mara are cemented under the Government's authority[121].

127. In 2002, Honduras approved the Police and Social Co-existence Act,[122] which allowed large-scale arrests of children and adolescents "suspected of belonging to 'maras'" (because they had tattoos or other means of identification). Enforcement of this law frequently triggered a discriminatory and disproportionate response on the part of police. The law also ushered in age-based stigmatization in the belief that gangs were composed exclusively of children over the age of 12 but under 18.[123]

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[120] Pinheiro, Paulo Sérgio and Daher, Marcelo, Youth violence and democracy in Central America, s/f. See also: Pinheiro, Paulo Sérgio, Remarks by the Independent Expert, Mr. Paulo Sérgio Pinheiro, for the meeting: "Voices from the Field: Local Initiatives and New Research on Central American Youth Gang Violence," February 22, 2005.

[121] Human Rights Council, "*Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council. Report of the Working Group on Arbitrary Detention. Mission to Honduras (May 23 to 31, 2006)*, A/HRC/4/40/Add.4, December 1, 2006, para. 90.

[122] An Alternate Deputy to the Honduran National Congress observed that "the article is unconstitutional inasmuch as no one may be deprived of his or her liberty without full proof that a crime has been committed and without a reasonable suspicion that the person to be arrested is the author of the crime" (Article 92). It is also in violation of the principles of presumption of innocence (Article 89 of the Constitution), the principle of equality before the law (Article 60 of the Constitution), the principle of proportionality (Article 2-D of the Penal Code), and the requirement that some legal right has been harmed (Article 2-C of the Penal Code), not to speak of the very right of association." Mencia, Tomás Andino, Conference "Soft Touch and Hard Hand in Honduras" , First Central American Congress on Youth, Security and Justice, Guatemala, March 15 and 26, 2008, p. 30.

[123] See OAS, Department of Public Security, *Definition and Classification of Gangs,* Honduras Report, Annex VI, June 2007, p. 16. Available in Spanish at: http://www.oas.org/dsp/documentos/pandillas/AnexoVI.Honduras.pdf

128. Article 332 of the Honduran Penal Code (known as the "Anti-Gang Law") was amended again in 2005.[124] The United Nations Human Rights Committee recognized the far-reaching language of the article and recommended that it be amended.[125] Discussing that same article, in 2009, the Committee against Torture was also concerned "that a suspected member of an 'unlawful association' can be arrested without an arrest warrant and that his/her detention on remand is mandatory. It is further concerned at the repressive social policy in combating 'unlawful associations', or 'maras' or 'pandillas', which does not adequately consider the root causes of the phenomenon and may criminalize children and young people on the sole ground of their appearance."[126]

129. In the Report of the Working Group on Arbitrary Detention, the United Nations Human Rights Council acknowledged that Article 332 does not appear, in principle, to be incompatible with human rights norms. It did, however, question whether a term of imprisonment of 12 to 20 years is necessary in a democratic society for simple membership of a "mara". It also observed that in practice police use this article to arrest children and adolescents at any time, without a court order. These children and adolescents can be taken back into custody immediately upon their release. The Human Rights Council was of the view that the preventive detention that is mandatory for persons detained on charges under Article 332 of the Criminal Code, might well be a violation of the International Covenant on Civil and Political Rights, which provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody."[127]

130. The Committee on the Rights of the Child stated that the offense of 'unlawful association' criminalized in Article 332 of the Honduran Penal Code had been interpreted too broadly, which in some instances could amount to a violation of Article 15 of the CRC. It also expressed concern that many children were being arrested and detained merely because of their appearance; in other words, their mode of dressing or the tattoo or other symbol they wore meant that they were suspected of belonging to a *mara*.[128]

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[124] In January 2005, Article 332 of the Penal Code, which concerns the crime of "unlawful association", was amended. The article now states that leaders (chiefs or heads) of youth gangs (*maras* or gangs) and other groups formed for the consistent purpose of committing crime, shall face punishment of 20 to 30 years in prison; mere membership in the group will carry two-thirds that prison time, or between 13 and 20 years. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council. Report of the Working Group on Arbitrary Detention. Mission to Honduras (May 23 to 31, 2006)*, A/HRC/4/40/Add.4, December 1, 2006, para. 47. The Penal Code is available in Spanish: www.poderjudicial.gob.hn

[125] Human Rights Committee*, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee: Honduras*, CCPR/C/HND/CO/1, December 13, 2006, para. 13.

[126] Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Concluding Observations of the Committee against Torture: Honduras,* CAT/C/HND/CO/1, June 23, 2009, para. 19.

[127] Human Rights Council, *Implementation of General Assembly Resolution 60/251 of March 15, 2006 entitled "Human Rights Council." Mission a Honduras (23 to 31 May 2006)*, Report of the Working Group on Arbitrary Detention, A/HRC/4/40/Add.4, December 1, 2006, paras. 87 and 88.

[128] Committee on The Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Honduras*, CRC/C/HND/CO/3, May 2, 2007, paras. 41 and 80.

131. Based on the foregoing considerations, the Commission concurs that Article 332 of the Honduran Penal Code allows such a wide degree of discretion that it could lead to the arbitrary detention of many children and adolescents based merely on the perception of membership of a '*mara*'.

132. Information the Commission has received suggests that the police abuses being committed under the tough-on-crime *mano dura* policies have not come to an end.[129] With specific reference to the situation in Honduras, the Court has recognized the stigmatization of these groups and has stated that:

> ... in attention to the principle of equality and nondiscrimination, the State cannot allow that its agents, nor can it promote in the society practices that reproduce the stigma that poor children and youngsters are conditioned to delinquency, or necessarily related to the increase in public insecurity. That stigmatization creates a climate propitious so that those minors in risky situations are constantly facing the threat that their lives and freedom be illegally restrained[130].

133. A similar situation occurred in El Salvador when, in July 2003, a police operation called the "*Plan Mano Dura*" Tough-On-Crime Plan was introduced. Special legislation was enacted that made it a crime for children to belong to a *mara.*[131] Under this law, many children were held in preventive custody only to have the charges against them dismissed or were acquitted in court for lack of evidence. According to the information the Commission has received, children were detained merely on the appearance of gang membership.[132] In 2005, this law was replaced through an amendment to Article 345 of the Penal Code, which criminalized membership of a group "when the group engages in violent acts or uses violent means to induct members or keep them in the gang, or when members leave the gang." The offense of gang membership carried a penalty of 3 to 5 years in prison; the penalty for gang organizers or gang leaders was 6 to 9 years in prison.[133] In 2010, the Law Banning *Maras,* Gangs, and Criminal Groups, Associations and

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[129] Center for the Prevention, Treatment and Rehabilitation of Victims of Torture and their Families (CPTRT/HND), NGO's Interim Report on Arbitrary Detentions in Police Stations and the Unconstitutionality of the Police and Social Comity Act*,* Honduras, October 2008.

[130] I/A Court H.R., *Case of Servellón-García et al. v. Honduras.* Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, paras. 110 and 112.

[131] Coinciding with the launch of the *Plan Mano Dura,* a bill was sent to the Legislative Assembly called the "Anti-gang Act." Passed in October 2003, the law was subsequently declared unconstitutional. After that, the so-called "Law for Combating the Criminal Activities of Special Illicit Groups or Associations" was passed; then, in August 2004, the so-called "*Plan Super Mano Dura"* was launched. *Fundación de Estudios para la Aplicación del Derecho (FESPAD) – Centro de Estudios Penales de El Salvador (CEPES)*, *Informe Anual Sobre Justicia Penal Juvenil* Annual Report on Juvenile Criminal Justice, El Salvador 2004.

[132] DNI (Costa Rica) and FESPAD, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, September 2004. Available at http://www.dnicostarica.org/wordpress/wp-content/uploads/pdf/violencia_juvenil/Carceles.pdf.

[133] See OAS, Department of Public Security, *Definition and classification of gangs,* Report on El Salvador, Annex IV, June 2007, pp. 1 and 11. Available in Spanish at:

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Organizations was enacted. It continues to stigmatize children and adolescents who belong to *maras* and makes reference to a vague regime that could be applied in a discriminatory manner.[134]

134. Based on information on Guatemala acquired in 2010, the Commission has learned that programs have been launched that distinguish children as the most vulnerable persons within the *maras* and gangs. The general purpose of these programs is to motivate young people to engage in activities that will help them realize their full emotional and social development as individuals. The hope is that this will separate them from the groups engaged in criminal activity within their communities.[135] The Commission observes, however, that in 2004, a series of bills were introduced in the Guatemalan Congress with the intention of criminalizing membership in maras and gangs, and all the symbolic expressions of membership in gangs, especially tattooing alluding to the groups.[136] However, according to the information available, these bills have not been passed, although presently there are proposals similar to those of El Salvador and Honduras.[137] Both the Commission and the Committee on the Rights of the Child are concerned that Guatemala is not paying sufficient attention to the root causes of the mara phenomenon, which thus far have been dealt with primarily as a criminal justice problem.[138]

135. The Commission also learned that the Mexican media estimate that approximately 3,000 children and adolescents have been detained since 2006 for allegedly

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http://www.oas.org/dsp/documentos/pandillas/AnexoIV.El%20Salvador.pdf. In 2010, Article 347-A was added to the Penal Code, which sets the punishment for those who supply illict groups with arms at 5 to 16 years in prison.

[134] Article 9 of this law expressly provides that "in the case of children and adolescents identified as members of *maras* or gangs and criminal groups, associations or organizations, whose age is such that they cannot be criminally prosecuted but who are at risk by virtue of their situation, the action taken shall be that prescribed by the laws on the subject and the Office of the Attorney General of the Republic shall be advised so that any necessary protection proceedings may be pursued." This article makes a vague reference to "protection proceedings" for children and adolescents whose age is such that they cannot be criminally prosecuted; however, it does not specify, for purpose of this law, the age at which individuals come under this protection system, taking into account the differentiated system of criminal responsibility under that country's Juvenile Offender's Act.

[135] See OAS Permanent Council, Committee on Hemispheric Security, Working Group to Prepare a Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs (Guatemala), CSH/GT/PD-31/10, March 5, 2010. Document available at: http://www.oas.org/csh/spanish/GTPD.asp#OD2010.

[136] *See* Cruz, Hum Lourdes, Ramos Leslie and Monzón, Ivan, "*Respuestas de la sociedad civil al fenómeno de las maras y pandilas juveniles en Guatemala*" Civil society's reactions to the phenomenon of *maras* and gangs in Guatemala, in Cruz, José Miguel (editor), *Maras y pandillas en Centroamérica Maras* and gangs in Central America, UCA Editores, Vol. IV, San Salvador, 2006, p. 167.

[137] *See* USAID, Central America and Mexico Gang Assessment: Annex 2: Guatemala Profile, April 2006. Document available at: http://www.usaid.gov/gt/docs/guatemala_profile.pdf; and *see* http://www.prensalibre.com.gt/noticias/comunitario/Jovenes-oponen-ley-antimaras_0_371962931.html, internet page featuring the press release titled "*Jóvenes cuestionan inciaitiva de una ley antimaras*" Youth question anti-mara bill, PrensaLibre.com, November 14, 2010.

[138] Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: *Guatemala*, CRC/C/GTM/CO/3-4, October 25, 2010, para. 92.

participating in activities associated with organized crime, all against the backdrop of the violence that Mexico is currently enduring.[139] UNICEF observed in this regard that "accurate statistics are needed on the number of adolescents in conflict with the law, disaggregated into categories for both the federal and local levels". It also recommended that "circumstantial responses that serve to reinforce the stigmatization and criminalization should be avoided."[140]

136. In order to address, in part, the problem being raised, the Commission must point out that the States themselves have to take measures to prevent the stigmatization of children and adolescents involved in gangs. The Commission believes that the States have to shift from the trend in current public policy of dealing with children and adolescents involved with gangs solely from a public safety perspective, through state law-enforcement and criminal justice institutions. Instead, they need to develop public policies on children's human rights, taking an approach that emphasizes observance of the general principles of "comprehensive protection" and the "best interests of the child." These must be the principles behind all programs and services in education, health, protection, nutrition, and child welfare, both within the family and within the community. State policies on this subject must strive to satisfy basic needs, create opportunities and respect for civil and political rights, including the right to a fair trial, the right to a proper legal defense for the duration of the proceedings, and use of incarceration only as a last resort and only for the most serious offences.[141]

137. The States have an obligation to eliminate all norms and practices that imply some arbitrary difference in treatment or that discriminate against children and adolescents of the region. They also need to take special measures targeting those groups of children and adolescents that are disproportionately represented in the juvenile justice system where they experience discrimination.

138. Finally, the member States are reminded that the rights of children under the juvenile justice system and the corollary obligations of protection to which Article 19 of the American Convention and Article VII of the American Declaration refer, are to be observed throughout their national territories. Based on the principles of equality and non-discrimination, provisions that treat children and adolescents differently, depending on where the offense is alleged to have occurred, are unacceptable. As the Inter-American

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[139] In different articles, the press speaks of at least 3,000 children and adolescents detained for crimes associated with drug trafficking, according to the data supplied by Mexico's *Red por los Derechos de la Infancia* Children's Rights System. The articles are available in Spanish at: http://www.univision.com/contentroot/wirefeeds/noticias/8334078.shtml and http://www.excelsior.com.mx/index.php?m=nota&id_nota=686479

[140] Commission Translation, UNICEF Mexico, Pronunciamiento del 7 de diciembre de 2010. December 7, 2010 Statement, available in Spanish at http://www.unicef.org/mexico/spanish/mx_PRONUNCIAMIENTO_UNICEFNOV_7_2010.pdf.

[141] IACHR, Press release No. 26/04, December 4, 2004, available at: http://www.cidh.oas.org/Comunicados/English/2004/26.04.htm.

Court has held, those States organized under the federal structure cannot invoke that structure as an excuse for failing to comply with an international obligation.[142]

5. The Principle of Non-Regressivity

139. When States ratify international human rights treaties and incorporate them into their domestic laws, they undertake to protect and guarantee the exercise of those rights, which includes the obligation to introduce any amendments necessary in their domestic laws to ensure compliance with the provisions of those treaties.

140. The progress made in the protection of human rights is irreversible. It will always be possible to amplify the protection that the rights afford, but never to narrow it. Also, under Article 27(2) of the American Convention, the obligations that States have with respect to children cannot be suspended under any circumstances.

141. Having said this, from the responses it received to the questionnaire, the Commission has learned of a number of legislative initiatives in the region that would constitute a regression away from the standards achieved in the process of adapting domestic laws to the principles of the Convention on the Rights of the Child. The Commission has been informed, *inter alia*, of bills that seek to suspend the minimum guarantees in proceedings in juvenile courts, bills whose purpose is to lower the minimum age at which children would be subject to ordinary criminal sanctions, and others that seek to lower the upper age-limit at which children would come under the jurisdiction of the juvenile justice system, bills to toughen penalties, bills to criminalize mere membership in a gang, and other regressive measures.

142. A case in point is related to Ecuador, where in July 2010, a bill on Criminal Responsibility for Juvenile Offenders was introduced. Under that bill, the criminal laws would apply to anyone who, at the moment when perpetration of the crime began, was over sixteen and under eighteen years of age. According to the bill, if the crime began when the alleged perpetrator was between 16 and 18 years of age and if, by the time the crime was consummated, the alleged perpetrator was over 18 years of age, the applicable law would be the one applied to adults. Under this bill, 16-year-olds accused of violating criminal laws would be prosecuted in the regular criminal justice system; under the system currently in effect in Ecuador, persons who have not yet turned 18 are subject to a Special Statute on Children and Adolescents and cannot be charged with the offenses criminalized under the Penal Code in force for adults.[143] At the same time, the Ministry of Justice sent a bill intended not to punish minors, but to increase the penalty for adults who use children for the commission of crimes. However, the bill includes regressive provisions, as it seeks to raise the maximum socio-educational measure (penalty) from 4 to 6 years in the case of

[142] Cf. I/A Court H.R., *Case of Garrido and Baigorria Vs. Argentina*. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 46; I/A Court H.R., *Case of Escher et al. v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July, 6 2009. Series C No. 200, para. 219.

[143] National Assembly (Ecuador). Bill on the Criminal Responsibility of Juvenile Offenders. Available in Spanish at: http://documentacion.asambleanacional.gov.ec.

children who commit offenses that, under the Penal Code, carry sentences of incarceration.[144]

143. Another case is that of Panama, where in late 2010, the State approved a legal overhaul of its juvenile justice system which, *inter alia,* lowered the minimum age at which children and adolescents are held responsible by the juvenile justice system from 14 to 12 years of age.

144. The Commission observes that the adoption of regressive measures that curtail children exercising their rights is a violation of the standards established by the Inter-American human rights system. It therefore urges the States to refrain from passing laws that are contrary to the current standards on the subject.

F. Guarantees in the Juvenile Justice System

145. As the Inter-American Court has held:

> The guarantees set forth in Articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.[145]

146. The Court has stated in this regard that while procedural rights and their corollary guarantees apply to all persons, the exercise of those rights in the case of children requires, because of their special condition, that certain specific measures be adopted in order to enable them to effectively enjoy those rights and guarantees.[146]

147. Furthermore, the Commission has stated that the child must enjoy certain specific guarantees "in any proceeding where his or her liberty or any other right is at stake. This includes any administrative proceedings."[147] The Court has held that the rules of due process and judicial guarantees must be applied not only in all judicial proceedings but also in all other proceedings that the State pursues[148] or that are under its

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[144] National Assembly (Ecuador). Bill to Overhaul the Penal Code, Code of Criminal Procedure and Related Laws, Article 49. Available in Spanish at: http://documentacion.asambleanacional.gov.ec.

[145] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 95.

[146] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 98.

[147] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 22.

[148] I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, paras. 102-104; *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations, and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 124-126; *Case of the Constitutional Court*, Judgment of January 31, 2001. Merits, Reparations, Costs. Series C No. 71, paras. 69-71; and *Exceptions of Exhaustion of Domestic Remedies* (Articles 46.1, 46.2.a and 46.2.b, American Convention on Human Rights).

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supervision. According to the IACHR, particular care must be taken to observe those guarantees when what is at stake is the possibility that a child might be deprived of his or her liberty, which includes the so-called deprivation of liberty measures or protective measures.[149]

148. The rules of due process are set forth not only in Articles 8 and 25 of the American Convention, but also in Articles 37 and 40 of the Convention on the Rights of the Child. The Beijing Rules, the Havana Rules, the Tokyo Rules and the Riyadh Guidelines also make specific reference to the obligation to guarantee the rights of children subjected to various State proceedings.

149. The Court has clearly stated that the obligation to observe the standards and principles of due process of law in judicial or administrative proceedings at which children's rights are being decided includes:

> ... rules regarding competent, independent, and impartial courts previously established by law, courts of review, presumption of innocence, the presence of both parties to an action, the right to a hearing and to defense, taking into account the particularities derived from the specific situation of children and those that are reasonably projected, among other matters, on personal intervention in said proceedings and protective measures indispensable during such proceedings[150]

150. Nevertheless, from the information it has received, the Commission has established that the procedural guarantees are not properly and uniformly observed by the States of the region when the juvenile justice systems are put into practice.

151. For example, in the case of the right of defense, the Commission is concerned that most member States do not have provisions to provide *pro bono* legal services to children facing the juvenile justice system. At the same time, the Commission recognizes that some member States have already introduced legal provisions to that effect. For example, in Suriname and Jamaica, the law provides that the services of a *pro bono* attorney are to be provided to every child accused of violating criminal laws. In Nicaragua, Article 18 of the Child and Adolescent Statute requires that every adolescent accused of committing, or being an accessory to, a crime or misdemeanor shall have the right to be represented from the moment of his or her arrest and investigation, under pain of nullity. In other States, although no such legislation exists, significant activities have

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Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 28.

[149] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 22.

[150] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, opinion N° 10.

been undertaken to ensure that children accused of violating criminal laws are represented by counsel. In Guyana, for example, the Children's Legal Aid Project, supported by UNICEF, provides free legal services to those juvenile offenders who request them.[151] In Haiti, too, a UNICEF-supported project provides the services of an attorney to children free of charge.[152]

152. Nevertheless, during its *in loco* visit to Jamaica from December 1 through 5, 2008, the Inter-American Commission interviewed children deprived of their liberty in detention centers and was very troubled by the fact that few of them even knew who their attorney was. This suggests that prior to trial, there was little interaction between attorney and client. The Commission also sensed that the children had very little understanding of the legal process in which they were involved or of how their cases were proceeding. During its visit to the Wagner Boys Facility in Belize in May 2009, the Commission learned that children had been held in preventive detention on charges of murder for as much as a year, waiting to be assigned an attorney.

153. Similarly, in some States like Brazil, the information compiled shows that even though the law states that children are to be guaranteed ample, independent, and expert defense, the state public defender's offices are either not present in a district or are not there in sufficient numbers, with the result that, at times, proceedings are conducted without defense counsel being present.[153] Furthermore, even though Brazilian law provides that defense counsel is to participate in the preliminary police stage of the inquiry, the IACHR has received information indicating that children are interrogated by the prosecutor without the presence of a defense attorney.[154] The Commission was troubled to receive information on a 2006 study concerning Montevideo, Uruguay, which found that in 73% of the cases, statements were taken from the children prior to the court proceedings, without observing the guarantees of due process, especially those pertaining to the right of defense.[155]

154. During the regional consultations and consultations with experts in the course of preparing this report, the Commission heard comments expressing concern over the fact that the defense attorneys assigned to children accused of violating the law are not specialists in juvenile criminal justice. According to what the Commission was told, in a

[151] Information obtained in interviews with staff of the Legal Clinic, during the working visit to Guyana in April 2009.

[152] Information obtained in interviews with UNICEF personnel and government officials in Haiti in May 2009.

[153] Information supplied by ILANUD Brazil, in answer to the questionnaire submitted as part of the Commission's study on Juvenile Criminal Justice and Human Rights, 2008.

[154] ANCED – Associação Nacional dos Centros de Defesa da Criança e do Adolescente National Association of Juvenile Protection Centers, *Análise sobre os directos da criança e do adolescente no Brasil: relatório preliminar da ANCED* Analysis of the rights of children and adolescents in Brazil, ANCED's preliminary report, San Paulo, 2009.

[155] Observatorio del Sistema Judicial, *Discurso y realidad: La aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo y Salto* Discourse and reality: Application of the Child and Adolescent Statute in Maldonado, Montevideo and Salto, UNICEF, Movimiento Nacional Gustavo Volpe, Montevideo, 2009.

number of States the defense attorneys in the juvenile justice system are also working in the civil courts, family courts and even regular criminal courts for adults. The lack of specialization is even more acute once outside the main cities.

155. As for the children's right to participate in the proceedings, the Commission observes that many of the laws in the hemisphere have adopted mechanisms to ensure this right, although not always with the safeguards necessary to guarantee that children are kept well informed and in a position to exercise that right in keeping with their abilities. The Commission is pleased that some States, like Barbados and others in the Caribbean, have changed their laws to require courts to explain to the children, in simple language and as early as possible, basic information regarding the violation they are alleged to have committed and for which they are charged. In some States, like Argentina, the courts have issued important judgments on the effectiveness of the right to be heard and to participate in the process. The Supreme Court of Buenos Aires Province, for example, has ruled that convictions are to be automatically overturned if the courts failed to respect the child's right to be heard, whatever the child's age.

156. As for the principle of rebuttal, experts on the subject have told the Commission that guaranteeing equality of arms in proceedings and the opportunity to rebut testimony and disprove evidence pose enormous challenges in the region. The Commission has received information suggesting that in a number of States the financial and human resources are not distributed equitably between the Public Prosecutor's Office and the Public Defender's Office, which distorts the balance that must be struck between the two sides in a proceeding and violates the principle of equality of arms.

157. As for the confidentiality of proceedings in the juvenile justice system, the information the Commission has received indicates that while a number of laws provide that juvenile proceedings shall be conducted in courts closed to the public, it often happens that magistrates have the discretion to decide who can be admitted to the hearing chamber; even the media are often allowed into the chamber. In other States, like Suriname, there is no guarantee of the confidentiality of juvenile court proceedings, except in the case of proceedings in which sexual crimes are charged.

158. Furthermore, the information the Commission has received reveals the absence of clear standards and policies regarding the elimination of children's personal particulars on record in the juvenile justice system. In some States, information about children in the juvenile justice system is published. In Colombia, law enforcement authorities routinely publish photographs of arrested children in the media, thereby violating their right to privacy and their right to the presumption of innocence.[156] Also, the Commission is troubled by cases in Mexico, where children and adolescents have been stigmatized in the media and publicly accused of allegedly committing various crimes,

[156] See in this regard: Committee on the Rights of the Child. Consideration of the Reports Submitted by States Parties under Article 44 of the Convention. Final Observations: Colombia, CRC/C/COL/CO/3, June 8, 2006, paras. 92 and 93.

without ever being tried, all of which violates the principle of the presumption of innocence.[157]

159. The information the Commission has received concerning the duration of cases in the juvenile justice systems in the region is discouraging. Although swift proceedings in the court of first instance are guaranteed in many States, appeals can drag on for much longer, which has the effect of discouraging an appeal or rendering the right of appeal ineffective. In most States, there is no limit on the period that may elapse between the time the child is actually charged and the time a definitive decision in the case is handed down. As a result, proceedings can drag on for years before the case is decided. The Commission was extremely disturbed by reports that some children in Trinidad and Tobago are held in custody for as long as four and a half years without a trial.[158]

160. At the same time, the Commission is gratified to see a number of best practices, as in Belize, where cases are dismissed if there has been an unwarranted delay. The Commission has also been informed that in Chile, most of the cases (55.5%) instituted in the juvenile justice system are resolved within less than a month.[159]

161. To provide the States with guidance concerning their obligations with respect to the guarantees that the juvenile justice system must ensure, the IACHR will now describe the procedural guarantees that apply to proceedings in the juvenile justice system and will explain how, in some cases, those guarantees take on special characteristics and importance since the persons accused are children still in the process of maturing.

1. A Competent Judge

162. Under the principle of specialization in the juvenile justice system, all proceedings that involve children under the age of 18 must be heard by a judge who specializes in juvenile justice, in keeping with every person's right to be heard by a competent, independent, and impartial tribunal, previously established by law.

163. Article 40 of the Convention on the Rights of the Child extends the guarantee of a competent, independent and impartial judge to situations involving State authorities other than jurisdictional bodies, or alternative, non-judicial mechanisms for conflict resolution.

164. As part of the child's right to a competent judge, States must ensure that cases involving children under the age of 18, but over the minimum age of criminal

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[157] See, in this connection, the statement by Mexico's Red por los Derechos de la Infancia de México Children's Rights System: http://www.derechosinfancia.org.mx/Especiales/pronunciamiento031210.htm.

[158] Information the Commission obtained during its visit to Trinidad and Tobago in conversations with government officials and staff of NGO's.

[159] Public Criminal Defender's Office (Chile), *Informe Estadístico Primer año de vigencia Ley de Responsabilidad Penal Adolescente* Statistical Report: the Juvenile Criminal Responsibility Act's First Year (June 8, 2007 to June 7, 2008).

responsibility, will be heard only by judges who are specialists in the area and not by the regular criminal court judges.

2. The Presumption of Innocence

165. Article 8 of the American Convention applies with equal force to proceedings in the juvenile justice system. This provision reads as follows:

> … Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: … g. the right not to be compelled to be a witness against himself or to plead guilty.

166. On this same subject, Articles 40(2)(b) and 40(2)(i) of the Convention on the Rights of the Child provide that:

> …States Parties shall, in particular, ensure that: … b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: i) To be presumed innocent until proven guilty according to law.

167. Likewise, Rule 17 of the Havana Rules states that:

> Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. … Untried detainees should be separated from convicted juveniles.

168. The Inter-American Court, for its part, has held that the principle of the presumption of innocence "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted"[160].

169. The IACHR has observed that before the Convention on the Rights of the Child entered into force, judges played the role of "protector" which, when the child was at risk or in a vulnerable situation, gave them the authority to bypass the child's rights and guarantees. The mere fact of being charged with a crime would suffice to assume that the child was at risk, which gave rise to measures such as internment. However, with the adoption of the Convention on the Rights of the Child, judges now have the obligation to respect children's rights. They must take into account investigation of and possible sanctions applicable to the child, based on the act committed and not on personal

[160] I/A Court H.R., *Case of Cantoral-Benavides*, Merits. Judgment of August 18, 2000. Series C No. 69, para. 120.

circumstances. Thus whenever a child accused of violating criminal law is brought before a judge, the child must be treated as innocent without considering his personal situation.[161]

170. The IACHR urges the States to guarantee that children accused of violating a criminal law shall be presumed innocent and not be subjected to measures of "protection" unless their responsibility has been established in a proceeding in which the rules of the juvenile justice system are observed.

3. The Right of Defense

171. The right of defense for children in the juvenile justice system is guaranteed under Article 40 of the Convention on the Rights of the Child. The notion that children did not need legal counsel to prepare their defense because the judge was there to protect the child's interests, was abandoned with the adoption of the Convention on the Rights of the Child. Under the previous system, a child's defense counsel was there only to assist or cooperate with the judge.

172. Article 8, paragraphs (d) and (e) of the American Convention establish certain minimum guarantees for the right of defense, such as the inalienable right to be assisted by counsel provided by the State, if the accused does not defend himself personally or engage his own counsel within the time period established by law, and the right to examine witnesses present in the court and to summon witnesses, experts or other persons who can shed light on the facts.

173. The Inter-American Commission has observed that the right of defense "includes several rights: to have the time and means to prepare their defense, to have an interpreter or translator, to be heard, to be informed of the charges and to examine and offer witnesses."[162] It also pointed out that "in all proceedings and from the time he or she is charged the … State has the legal duty to provide a child with a court-appointed attorney if he or she has not engaged private representation."[163]

174. The principle of specialization must also be observed with respect to the child's right of defense, which means that the attorneys or social workers appointed to defend the child must be trained in children's rights and specialize in juvenile justice.

175. States must ensure that children facing juvenile court proceedings are assisted by counsel, which means, *inter alia,* providing for his or her participation in the proceedings, ensuring that the services of a specialized public defender are available

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[161] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 23.

[162] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R. *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 24.

[163] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in detention*, March 10, 1999, para. 152.

anywhere in the national territory, and establishing service quality standards. To ensure a proper defense, models must be adopted for supervising attorney practices, and the children and their parents or representatives must be able to file complaints regarding the legal assistance received.

4. The Principle of Rebuttal

176. Article 8 of the American Convention provides for the principle of rebuttal, where it states that during the proceedings, every person is entitled, with full equality, to certain minimum guarantees. Full equality means that true procedural equality of arms must be established between the parties and must be guaranteed if the accused is to be able to properly defend his or her interests and rights.

177. Article 7(1) of the Beijing Rules provides that basic procedural safeguards shall be guaranteed at all stages of proceedings, which includes the right to confront and cross-examine witnesses.

178. In order to guarantee this principle, States must ensure that their juvenile justice systems allow accused children to intervene either personally or via their representative, introduce evidence, examine the evidence, make allegations, and so on.

5. The Right to be Heard and to Participate in the Proceedings

179. The IACHR has stated that "the right of children to be heard addresses the opportunity to express their opinion in any proceedings where their rights are discussed, insofar as they are able to form their own judgment on the matter."[164] In the Commission's view, the Convention on the Rights of the Child "demands recognition of the child's autonomy and subjectivity and determines the weight that his or her opinion can and should have in the decisions of adults."[165]

180. As for the child's intervention in the proceedings, Article 12 of the Convention on the Rights of the Child provides that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings

[164] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 24.

[165] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 25.

> affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law [166].

181. The right to participate in the proceedings thus enriches the right of defense if it means that the child has the right to have witnesses called and examined, the right not to testify against oneself and the right not to be forced to incriminate oneself.

182. This report has already observed that juvenile justice applies only in the case of children who have reached the minimum age at which they are deemed to have the capacity to violate the law, and up to the age of 18. The fact that these children are deemed old enough to face the juvenile justice system means that their standing as subjects of the proceedings has been acknowledged and their right to participate in the proceedings must be recognized and their opinions taken into account.

183. However, even within this age bracket, the system must assume that the capacity of a 12-year-old is not the same as that of a 17-year-old. Hence, some provision has to be made for the extent of a child's participation in the proceedings, in order to effectively protect his or her rights in a manner that is in the best interests of the child.

184. The Commission shares the Inter-American Court's position that judges in the juvenile justice system must:

> take into account the specific conditions of the minor and his or her best interests to decide on the child's participation, as appropriate, in establishing his or her rights. This consideration will seek as much access as possible by the minor to examination of his or her own case[167].

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[166] The possibility of strengthening a child's right to express his or her opinions was examined in the following reports of the Committee on the Rights of the Child: Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations Report of the Committee on the Rights of the Child on Paraguay CRC/C/15/Add.166, November 6, 2001 paras. 25 and 26; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Dominican Republic CRC/C/15/Add.150, February 21, 2001, paras. 24 and 25; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Surinam, CRC/C/15/Add.130, June 28, 2000, paras. 29 and 30; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Granada, CRC/C/15/Add.121, February 28, 2000, para. 15; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Nicaragua, CRC/C/15/Add.108, August 24, 1999, para. 25; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Belize, CRC/C/15/Add.99, May 10, 1999, para. 17; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Ecuador, CRC/C/15/Add.93, October 26, 1998, para. 19; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Bolivia, CRC/C/15/Add.95, October 26, 1998, para. 18.

[167] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 102.

185. Here, the Court has observed that the child, because of his or her age or other circumstance, may not be able to critically judge or to reproduce the facts on which he or she is rendering testimony and the consequences of his or her statement, in which case the judge can and must be especially careful when assessing the statement. Obviously, such a statement cannot be regarded as dispositive when made by a person whose age is such that he or she lacks the civil capacity to act, to make a will, or to exercise rights on his or her own.[168]

186. The Court has also held that "any statement by a minor, if it were indispensable, must be subject to the procedural protection measures that apply to minors, including the possibility of remaining silent, the assistance of legal counsel, and the statement being made before the authority legally empowered to receive it".[169]

187. With respect to children facing the juvenile justice system, States must ensure that all procedural measures of protection for children are guaranteed, including the possibility of not testifying or remaining silent, until the person charged with the child's defense is assigned to the case. Any possibility that children give declarations tantamount to a confession must be eliminated.[170]

188. States must also prohibit any evidentiary activity on the part of the police or any other authority that fails to respect the guarantees of due process. Special care must be taken to respect a child's right to remain silent and not to testify against himself or herself.

189. The Commission also concurs with the Committee on the Rights of the Child in the sense that proper exercise of the right to participate in the process means that the child must be informed of the charges and of the process within the juvenile justice system. In the words of the Committee,

> ... in order to effectively participate in the proceedings, must be informed not only of the charges ..., but also of the juvenile justice process as such and of the possible measures. Besides, the child needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed[171].

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[168] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 130.

[169] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 129.

[170] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 129 and 131.

[171] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 44 and 46.

190. Rule 14(2) of the Beijing Rules provides that the proceedings shall be conducted in an atmosphere of understanding, which allows the child to participate therein and to express himself or herself freely. In the Commission's view, the authorities have an obligation to ensure that the child understands each of the charges being brought against him or her; but it also means that children facing proceedings in the juvenile justice system must be assisted by counsel from the outset in order to be well informed.

191. This means explaining to the child the consequences of being brought before the juvenile justice system, and doing so in linguistic register appropriate to his or her age. It also means that States have an obligation to provide personnel fluent in the child's own language, particularly in the case of indigenous children and children of other cultures. The child therefore has the right to be assisted by an interpreter, at no cost to the child, and persons trained to work with children with special needs.

6. The Participation of Parents or Guardians in the Process

192. The Inter-American Court has held that members of the child's family or the child's guardian must be notified when children are facing the juvenile justice system. It observed that:

> ... the authority carrying out the detention and in charge of the detention place for the minor must immediately notify the next of kin or, otherwise, their representatives for the minor to receive timely assistance from the person notified.[172]

193. In addition to notification, the Commission considers that every effort must be made to enlist the participation of a child's parents or guardians in the proceedings in the juvenile justice system, except in those cases where such participation could be prejudicial to the child's best interests and an adequate defense.

194. Rule 15(2) of the Beijing Rules is very clear in this regard and reads as follows:

> The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

195. The Committee on the Rights of the Child has stated that:

> parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance

[172] I/A Court H.R., *Case of Bulacio v Argentina.* Merits, Reparations, Costs. Judgment of September 18, 2003. Series C No. 100, para. 130. In the same sense: *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 93.

> to the child. The presence of parents does not mean that parents can act in defense of the child or be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.[173]

196. As with the child facing the juvenile justice system, his or her parents or guardians need to be properly notified and, from the very outset, need to be informed of the charges against the child and how the juvenile justice system will proceed.

197. Finally, it should be pointed out that while the participation of the parents or guardians is important, the courts must ensure that they will not be criminalized for their children's conduct. States must also ensure that the children whose parents are not present for the proceedings are not treated more harshly.

7. The Public Nature of the Proceedings and Respect for Privacy

198. The principle of the public nature of the proceedings, set forth in Article 8(5) of the American Convention, has unique limitations in the case of juvenile justice, where the offender's criminal record must be kept confidential and any information that could be used to identify the child accused of violating the law is not to be made public. In juvenile criminal proceedings, the child's right to privacy must be respected at all times, as provided in Rules 8(1) and 21(1) of the Beijing Rules and Rule 3(12) of the Tokyo Rules.

199. The Inter-American Court has held that whenever the state deems it necessary to institute judicial proceedings against a minor, the public nature of the proceedings must be strictly regulated.[174] As the Court established,

> ... When the proceedings address issues pertaining to minors, which affect their lives, it is appropriate to set certain limits to the broad principle of the public nature of the proceedings that applies to other cases, not regarding access by the parties to evidence and decisions, but rather regarding public observation of the procedural acts. These limits take into account the best interests of the child, insofar as they protect him or her from opinions, judgments or stigmatization that may have a substantial bearing on his or her future life[175].

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[173] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 53.

[174] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 211.

[175] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 134.

200. Similarly, and based on the right to privacy established in Article 16 of the CRC, the Committee on the Rights of the Child has recommended:

> ... that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy … requires all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts[176].

201. Also, Rule 8(1) of the Beijing Rules provides that the child's right to privacy shall be respected at all stages in order to avoid harm being caused by undue publicity or by the process of labeling.

202. The Committee on the Rights of the Child observed the following in this regard:

> ... No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe. It means that a public authority should be very reluctant with press releases related to offences allegedly committed by children and limit them to very exceptional cases. They must take measures to guarantee that children are not identifiable via these press releases. Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and when necessary (e.g. in case of recidivism) with penal law sanctions.[177]

203. The Commission, for its part, must once again make the point that a child's privacy must be taken into account, without adversely affecting the parties' right of defense or detracting from the transparency of the judicial proceedings, all in order to "avoid absolute secrecy of what occurs during the proceedings, especially with respect to the parties."[178]

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[176] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 66.

[177] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 64.

[178] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 25.

8. Duration of the Process

204. The specialization of the juvenile justice system also extends to the length of the proceedings. Because of the age of the children facing the specialized system of justice, decisions must be delivered swiftly, but without denying anyone their due process guarantees. The importance of a reasonable length of proceedings in juvenile justice is not limited to cases where children are deprived of their liberty, because independently of any measures of preventive detention, the duration of the proceedings has an impact on the rights of children.

205. The Committee on the Rights of the Child has observed that:

> ... the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized[179].

206. Accordingly, the Court has held that an unjustified delay in deciding cases against children is contrary to the international norms that protect them.[180]

207. The Commission encourages the States to ensure that juvenile court proceedings are conducted within a brief and reasonable duration. It also urges them to set a time limit by which the court of first instance must issue its ruling, and special time periods for processing appeals and motions in cases involving children accused of violating the law.

9. Double Instance and the Right of Appeal

208. The right of appeal is one of the fundamental rights protecting children facing the juvenile justice system. This right allows the accused to turn to a higher judicial authority to appeal any decision that affects his or her interests, so that the higher court may review the lower court's proceedings.

209. The right to a simple and rapid appeal is guaranteed in Articles 8(2)(h) and 25 of the American Convention and Article 40(2)(b)(v) of the Convention on the Rights of the Child, which provide that if a child is deemed to have violated a criminal law, that decision and any measure imposed as a consequence thereof, shall be reviewed by a higher, competent, independent and impartial authority or judicial body, according to law. The right to appeal a decision to a higher authority is also guaranteed in Rule 7(1) of the Beijing Rules.

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[179] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 51.

[180] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, paras. 215 and 226.

210. The IACHR reiterates that under Article 8(2)(h) of the American Convention and Article 40(2)(b)(v) of the Convention on the Rights of the Child:

> The child has the right for a court to review the measure imposed upon him or her, so as to control the punitive power of the authorities. Said guarantee must be in force in any proceedings where the rights of the child are established, and especially when measures that deprive the child of liberty are applied[181].

211. In any event, the right of appeal must guarantee a fresh and thorough examination of any decision being appealed, which means that this recourse must include the possibility of challenging any precautionary measures and penalties, as well as any relevant court ruling.

10. *Non bis in idem* and *Res Judicata*

212. Finally, although the Convention on the Rights of the Child does not contain a *non bis in idem* or *res judicata* clause, the Commission recalls that children accused of violating the law are also protected under Article 8(4) of the American Convention, which provides that an accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

213. Where this principle is concerned, the Court stated that "the elements that compose the situation regulated by Article 8(4) of the Convention include 'a first trial culminating in an acquittal by a non-appealable judgment'."[182] For the Inter-American Commission, the purpose of the principle of *non bis in idem* is "to establish a safeguard for persons acquitted in a non-appealable decision so that they may not be tried in new proceedings for the same offense for which they were tried during the first proceeding."[183]

214. The principle of *non bis in idem* also means that a person convicted in a final judgment cannot be convicted again if the facts are the same and if the laws criminalizing the behavior have not changed. For example, if the conduct punishable under one criminal law is the same conduct punishable under a different law, on occasions even an administrative one, and the facts for which the child was convicted in a final verdict are the same in both cases, then that child cannot be tried and convicted again because this would be a violation of the principle of *non bis in idem.* This is not to ignore, however, the possibility of concurrent crimes or the possibility that, although a final verdict has been delivered, the juridical review bodies may choose to downgrade the original crime charged to a lesser one, to the offender's advantage.

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[181] IACHR, Written and oral interventions related to Advisory Opinion OC-17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 24.

[182] I/A Court H.R.. *Case of Lori Berenson-Mejía v. Peru*, Judgment of November 25, 2004. Series C No. 119, para. 202.

[183] IACHR, Report No. 66/01, Case 11.992, *Dayra María Levoyer Jiménez* (Ecuador), Merits, June 14, 2001, para. 109.

215. The principle of *non bis in idem* takes on added importance in the juvenile justice system where juvenile justice offers alternatives to adjudication or deprivation of liberty which, once applied, would, as the Committee on the Rights of the Child has observed, result in definitive and final closure of the case without a court conviction.[184] In the Commission's view, if a case is definitively closed through alternatives to adjudication and deprivation of liberty, States must retain the administrative records, in the first hypothesis or criminal records in the second hypothesis containing confidential information on the children or adolescents who are the beneficiaries of those alternative measures, so that authorities in the juvenile criminal justice system do not re-litigate the same case against the child or adolescent and even convict him or her, in violation of the principle of *non bis in idem.*

216. As for continuing crimes committed by minors, the Commission is recommending to the States that they take the principle of *non bis in idem* into account when assessing facts punishable under the juvenile justice system when the person was a minor, so that the regular criminal justice system does not hold the same person criminally responsible for the same set of facts.

11. Recidivism within the Juvenile Criminal Justice System and for Purposes of the Regular Criminal Justice System

217. The Commission considers that the institution of recidivism as a ground for giving tougher sentences is exceptional within the juvenile justice system. This means that if the judge opts in favor of one of the alternatives to adjudication of a case, the child in question cannot be regarded as a repeat offender if he or she again violates the law. Nor can conduct by children below the minimum age of criminal responsibility or the minimum age at which a child can be charged with a crime in the juvenile justice system be taken into account for the purposes of determining recidivism.

218. The Commission also considers that criminal offenses adjudicated within the juvenile criminal justice system cannot be taken into account for the purposes of determining the question of repeat offending in the regular criminal justice system.

12. Criminal Records within the Juvenile Criminal Justice System

219. The Commission believes that in order to prevent stigmatization of children and adolescents, personal details registered in criminal records must be automatically expunged once they attain adulthood, unless a competent authority, in response to a request filed by an interested party within a reasonable period of time, deems that information to be exceptionally relevant to the preservation of the rights of the child (now an adult) or the rights of third parties, provided that retention of that information serves a legitimate, objective and reasonable end The same would apply to the administrative records of children subject to alternatives to adjudication.

[184] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 27.

220. The IACHR concurs with the Beijing Rules in the sense that States must ensure the confidentiality of information contained in the records of children and adolescents in the juvenile justice system who have been accused, prosecuted or convicted of violating a criminal law, and that access to such records should be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons. In keeping with the Beijing Rules, the Commission reaffirms that the information contained in the records of juvenile offenders should not be used in adult proceedings in subsequent cases involving the same offender.[185] For the Commission, that person's criminal record within the juvenile criminal justice system should not be taken into account when determining whether the offense being prosecuted is a repeat offense as an adult.

G. Alternatives to Adjudication of Cases of Children and Adolescents who Violate Criminal Laws

221. Article 40(3)(b) of the Convention on the Rights of the Child provides that whenever appropriate and desirable, measures will be adopted to deal with children accused of, or recognized as having violated, criminal law without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected.

222. In keeping with that article, in application of the principle of last resort within the juvenile justice system, and in observance of the special obligations of protection that flow from Article 19 of the American Convention and Article VII of the American Declaration, States must limit the use of the juvenile justice system and offer alternatives to adjudication.

223. The Inter-American Court has pointed out that according to the relevant international standards on the subject, the special jurisdiction for children in conflict with the law and its related laws and procedures should provide, *inter alia,* for a system for dealing with such children without resorting to judicial proceedings. The Court explained that the purpose of such a system is to recognize the child's general vulnerability vis-à-vis judicial proceedings and the greater impact that the experience of standing trial has on a child.[186]

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[185] Beijing Rules, Rules 21.1 and 21.2:

> 21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.
>
> 22.1 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

[186] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, paras. 211 and 212.

224. In its comment on this article of the Convention on the Rights of the Child, the Committee on the Rights of the Child observed that:

> given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases[187].

225. The alternatives existing within the various States of the region vary, are not applied uniformly and are not always the preferred course of action. As a rule, those alternatives include diversion programs, alternative means of settling disputes and the application of the principle of opportunity, even though these programs may be identified by different names in the domestic law of each state. However, there is little information available concerning the frequency with which these alternatives are used in the various States of the region.[188]

226. While a number of States have procedures in place that establish alternatives to adjudication for settling disputes, these procedures do not always observe the safeguards necessary to properly protect children's rights. The Commission is particularly troubled by the latitude that various authorities have to allow these alternative practices to be implemented in a discriminatory manner or in such a way that arbitrary distinctions are made that are disadvantageous to children belonging to minorities.

227. In all alternatives to juvenile justice, the guarantees of due process must be strictly observed. To limit the degree of discretion exercised by the authorities, the child must be given the opportunity to express his or her opinion on the matter of dismissal, or must give his or her free and voluntary consent to alternative means of resolving a controversy or diversion measures. The child must be assisted and advised by defense counsel.[189] The use of these measures with respect to a child cannot be perceived as establishing a precedent for the purposes of future cases before the juvenile courts in which the same child is accused of an alleged violation of criminal law. In any subsequent cases, the records will be used for information purposes only, and only the competent authorities of the juvenile justice system will have access to them. The Commission emphasizes the importance of a review or a judicial remedy to challenge the adoption of these alternative, non-custodial measures. If the child or adolescent's opinion has not been taken into account or his free and voluntary consent obtained, depending on the measures in question, then the proper remedy should be filed with a judicial authority specialized in this matter. In all these cases, the best interests of the child and other principles of juvenile justice shall be considered.

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[187] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 24.

[188] In fact, of those States that answered the questionnaire the Commission sent out to compile information for this report, very few even touched upon this point.

[189] Committee on the Rights of the Child, General Comment No. No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 59.

228. The Commission urges the States to adopt laws allowing alternatives to adjudication in cases that would otherwise go to court where the child would stand trial to establish his or her criminal responsibility. Were such laws to be adopted, adequate funding would then have to be provided for community programs to ensure their availability nationwide. They would also necessitate continuing training programs emphasizing the harmful effects that the punitive system can have on children and dispelling the notion that misconduct on the part of children requires a tough response through the juvenile justice system.

229. At the same time, the IACHR urges the States to consider the concerns the Commission expressed in this section of the report, and to adopt all necessary measures so that these alternatives can be put into practice in order to respect and guarantee the rights of children and their best interests, especially in the case of crimes not regarded as serious. The Commission will now describe the alternatives to adjudication that have been implemented in the region.

1. Dismissal of the Case

230. Under the laws of a number of States, dismissal of a case is one means of exiting the judicial process in the early stages and has been referred to as the principle or criterion of opportunity. Dismissal of a case means that when a case reaches the court, a decision is made not to pursue court proceedings where certain violations of criminal law are concerned. The case is dismissed and, as a rule, the State takes no further action.

231. This alternative to going to trial in the juvenile justice system is formulated in different ways in the laws in the hemisphere. In Costa Rica, for example, the judge can only apply the criterion of opportunity with the consent of the public prosecutor's office, whereas in Uruguay, the judge can invoke this principle at any point in the process and in any type of proceeding. In El Salvador, this alternative is reserved for crimes that carry a sentence of no more than three years in prison. Under Canadian law, the police have a discretionary power to dismiss a case and decide whether a warning, admonition or diversion to a community-based program will suffice, provided the youth acknowledges responsibility for the crime.

232. The IACHR appreciates that the States of the region are enacting into law procedures that allow the authorities not to take a child accused of violating the law through the entire trial and sentencing process, thereby minimizing the negative impact of the criminal justice system on the child. However, the Commission believes that other mechanisms need to be introduced to ensure that cases are not dismissed on a selective basis, which might constitute discrimination. The Commission also urges the States to clear away any obstacles preventing them from using this alternative to prosecution in the juvenile justice system, and to make certain that it can be applied to all children, even those with records in the juvenile justice system, and to a wide range of crimes and offenses, thereby increasing the opportunities for dismissal of cases involving children to the maximum extent possible, provided due process through the courts is guaranteed and the rights of the victims are protected.

2. Alternative Means of Resolving Controversies

233. The Inter-American Court has held that, rather than prosecuting children, "alternative means to solve controversies are fully admissible, insofar as they allow equitable decisions to be reached without detriment to individuals' rights. Therefore, it is necessary to regulate use of alternative means in an especially careful manner in those cases where the interests of minors are at stake." [190]

234. The Commission would like to add that the alternative methods of justice can facilitate reconciliation between the victim and the offender, and can help the child rejoin the community. These mechanisms can be particularly effective in dealing with juvenile offenders in indigenous communities.

235. The laws in some States of the region provide for reconciliation agreements between the victim and the offender as well as the possibility of mediation and other ways of settling disputes, all in an attempt to deal with an offense presumably committed by a minor, without having to go through the established judicial process.

236. These alternatives typically include restorative justice processes. The United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters define restorative justice as any program that uses restorative processes or aims to achieve restorative outcomes; it defines the restorative process as any process in which the victim, the offender and any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party or "facilitator".

237. The experiences within the region in the use of alternative means to resolve conflicts involving child offenders vary. Generally speaking, the States that do offer alternative ways of resolving conflicts relating to the alleged violation of criminal law by a child, allow such alternatives to be explored only in the case of a non-violent crime. According to the information received by the Commission, some States, like Costa Rica and Nicaragua, have made these alternatives the rule rather than the exception, whereas in other States, like Uruguay, these alternatives are used in less than 1% of the cases, even though rules allowing their application exist.

238. The Commission was favorably impressed by the information it received concerning a program in the municipality of São Caetano do Sul, in São Paulo, which is the Brazilian state with the highest number of children who are deprived of their liberty. The project has yielded positive results, but has been developed on the initiative of the specialized judge in that municipality. The Commission has no information about the use of restorative justice elsewhere in Brazil. It also appreciates the reports received with respect to Canada, where the Youth Criminal Justice Act provides for the establishment of Youth Justice Committees, composed of members of the community interested in youth issues, among them volunteers, professionals, teachers and the police. According to the

[190] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 135.

information the Commission has received, these committees admit diversions from police and prosecutors and then organize meetings between the victim and the offender for purposes of mediation and reconciliation.[191] Canadian law also provides for youth justice conferences. The conference concept was inspired by traditional mechanisms employed by many indigenous communities to address conflicts. A conference consists of a group of people who assemble to advise on how to deal with a youth in conflict with the law. Conference participants may include the offender, the victim, and members of the community. The focus is frequently on achieving the goals of restorative justice.[192]

239. The Commission urges the States to expand the use of alternative means of resolving matters when addressing the problems created by possible violations of the law committed by children. Alternative means can have a positive effect on the child by facilitating his or her reconciliation with the victim and the community. The Commission would also underline the importance of ensuring that all the child's rights are protected when these alternative methods are used, and to limit their use to those cases in which they are needed to ensure the best interests of the child. Specifically, the mechanisms of restorative justice must respect judicial guarantees and not become an alternative to regular justice.

240. Processes of this type could also be used as a means for the victim and the accused to reach agreement as to various crimes, and should be limited to those situations in which sufficient proof to hold the child responsible exists. Furthermore, they should only be used with the free and informed consent of the victim and the child offender involved in the process. The accused child offender must be assisted by counsel. The child's participation in these processes ought not to be construed as proof or used as background information in subsequent proceedings. The Commission also believes that these processes must be conducted under court supervision, so that the judge can approve, modify or set aside any agreement reached and ensure that the rights of the child have been guaranteed in a manner befitting his or her best interests and that the necessary information and advice has been provided when securing the consent of the presumed author of the offense and the consent of the victim.[193]

3. Participation in Diversion Programs or Services

241. Rule 11(1) of the Beijing Rules provides that whenever appropriate, consideration shall be given to dealing with child offenders without resorting to formal trial by the competent authority. It adds that any diversion involving referral to appropriate community or other services shall require the consent of the child, the parents or guardian, provided that such a decision to refer a case shall be subject to review by a competent authority, upon application.

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[191] N. Bala and S. Anand, *Youth Criminal Justice Law*. Toronto: Irwin Law, 2009, Chapter 5. (Diversion, Extrajudicial Measures, and Conferences).

[192] N. Bala and S. Anand, *Youth Criminal Justice Law*. Toronto: Irwin Law, 2009, Chapter 8. *(Sentencing Under the Youth Criminal Justice Act).*

[193] *See* United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Sections 1-4.

242. The Committee on the Rights of the Child has stressed that the following factors are particularly vital to safeguarding the child's rights in diversion programs:

> Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
>
> The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
>
> The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
>
> The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
>
> The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.[194]

243. A number of States in the region have launched programs under which children are diverted to various types of services or programs. In the English-speaking countries of the region, these programs and services are often run by the police, as in the case of Belize and Barbados. In Latin America, these programs are frequently offered by NGOs or social services institutions. Then, too, judges will frequently divert children to

[194] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 27.

services available for the general public, such as psychological counseling or anti-drug programs. Under the laws of some States, like El Salvador, diversion requires an agreement between the child and the presumed victim, as well as reparations. Guatemalan law also provides that if a judge believes that no purpose would be served by continuing the proceedings, he or she will summon the parties to a hearing and, with their agreement, will divert the child to community programs, where the child will have the support of his or her family and be under the control of the institution that runs the program.

244. As a general rule, it is the judicial authority that orders alternatives of this type; in some cases, however, it is the public prosecutor's office that decides this matter, as in the case of Peru. The Commission observes that police officials may also have discretionary authority to divert a child to some program or service. When this kind of discretionary authority is exercised by the police, the diversion alternative may end up being selectively applied within the juvenile justice process, which in turn paves the way for discrimination. Furthermore, the more authority the police exercise, the more likely it is that children who "voluntarily" participate in a police program will feel that they have been pressured or coerced into doing so. In the Commission's view, children are less likely to feel coerced into participating when the diversion and prevention programs are run by social services that have no ties to the police.

245. For the IACHR, diversion means that the proceedings in the juvenile justice system are definitively closed and the child has been redirected into community-supported programs. Hence, these cases should not count when determining whether a child is a repeat offender. Whenever possible, this alternative should seek to avert the institution of proceedings in the formal criminal justice system by redirecting the matter to community-supported services. Programs that work toward settlement by indemnifying the victim, and those that strive to avoid future violations of the law through supervision and temporary counseling, are considered particularly advisable. As happens in the case of mediation programs, diversion to a service can mean that charges are either not brought or dropped. Another option is to require the child to complete a program or satisfactorily work for some service for a specific time period before the decision is made either not to bring charges, or to drop charges that have already been brought.

246. In all decisions pertaining to diversion programs or services, the authorities charged with investigating the case and the judges should take rapid and immediate action on a case and should heed the recommendations of experts or social workers who will also be involved in monitoring the results. All the authorities in these cases should have instruction in the *corpus juris* of the rights of children; experts and social workers should have a multidisciplinary preparation and approach, especially in areas like psychology. Parents should be involved when these programs are implemented, and monitor school attendance, provided their involvement is in the best interests of the child.

III. PRECAUTIONARY MEASURES FOR CHILDREN AND ADOLESCENTS ACCUSED OF VIOLATING CRIMINAL LAW

247. This chapter will deal with the issues that arise in the period between a child's first contact with the juvenile justice system, and the point at which he or she is charged with violating criminal law. Naturally, a child's first contact with the state's punitive system is generally by way of the police. The Commission will discuss some of the limits that the police must observe when dealing with a minor accused of violating a criminal law.

248. The Commission will also discuss the measures that tend to be used to ensure the accused child's presence for the duration of the process, also known as precautionary measures, or detention pending trial. These measures may or may not deprive the accused child of his or her liberty. In either case, the measures must respect, *inter alia,* the principle of the presumption of innocence, the guarantees of due process, and the best interests of the child. Furthermore, as will be discussed in this chapter, the use of deprivation of liberty as a precautionary measure at the start of the juvenile justice process must be a last resort, which means that States have an obligation to have alternatives to preventive detention available.

249. The following are among the problems that the Commission will address in this chapter: the arbitrary detention of children; the violence perpetrated against them while in police custody; the excessive reliance on preventive detention in the case of children; the disproportionate duration of preventive detention in the case of children, the lack of judicial oversight, and the failure to separate children in preventive detention from those who have been convicted in the juvenile justice system. The IACHR will examine the standards that apply to these and other situations, and will offer its recommendations on how the member States can comply with their human rights obligations in this area.

A. Limits that the Police Must Observe When Dealing With Children and Adolescents Accused of Violating Criminal Law

250. A child's first contact with the juvenile justice system is generally by way of the police authorities. Therefore, it is important to list some of the principles and standards that establish limits and obligations with respect to how the police must treat accused and/or convicted child offenders.

251. The information the Commission has received reveals a number of problems that present themselves when the police have contact with an alleged child offender. First, as previously noted, the lack of specialization among police personnel often means that the child's rights are not properly respected. Second, as the Commission observed, police activity can reveal a pattern of discrimination which often results in arbitrary arrests of children, with no regard for the principle of legality and the principle of non-discrimination. Third, in juvenile justice systems, detention is often the rule rather than the exception, in violation of the principle of last resort; in some cases, detentions are carried out without any immediate judicial oversight. Fourth, parents or guardians frequently are not notified promptly of a child's detention; children are even held in

solitary confinement in police stations. Fifth, the facilities in which children are incarcerated are frequently not appropriate to their needs. All this is compounded by police violence and abuse to which children are often subjected, and the impunity which surrounds such acts by the police.

252. When a child is taken into custody, the police have an obligation to guarantee the child's right to be brought immediately before a competent judge, to notify the parents or guardians as soon as possible, to allow the child to have contact with his or her family, and to confer with his or her defense attorney as soon as possible.

253. Where children are involved, international law reinforces the standard of being brought promptly before a judge, as it stipulates that the child shall be brought before the specialized jurisdiction as quickly as possible. Immediate judicial oversight is essential to avoid arbitrary or unlawful detentions.[195] As the Court stated:

> Prompt judicial intervention allows the detection and prevention of threats against life or serious ill treatment ... The protection of both the physical liberty of the individual and his personal safety are in play, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those arrested of the minimum legal protection[196].

254. In accordance with the international obligations on the subject, the competent judges are to be immediately notified of the apprehension of a child and shall hear the matter and rule on the question of the child's release without delay. The Committee on the Rights of the Child has stated that:

> Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours [197].

255. In the Commission's view, and in observance of the obligation of special protection contained in Article 19 of the American Convention and Article VII of the

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[195] I/A Court H.R., *Case of Bulacio v Argentina*, Merits, Reparations, and Costs. Judgment of September18, 2003. Series C No. 100, para. 129. In the same sense: *Case of Maritza Urrutia v Guatemala,* Merits, Reparations, Costs. Judgment of November 27, 2003. Series C No. 103 para. 73; I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations, Costs. Judgment of June 7, 2003. Series C No. 99, para. 84; *Case of Bámaca-Velásquez v. Guatemala*, Merits. Judgment of November 25, 2000. Series C No. 70, para. 140; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 135; and *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 95.

[196] I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 135.

[197] Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice,* CRC/C/GC/10, 25 April 2007, para. 83. The European Court of Human Rights has stated that the term "immediately" and the expression "without delay" must be interpreted in the light of the particular circumstances of each case.

American Declaration, States should establish an even shorter period of time for judicial oversight in a case in which a child has been taken into custody. When one considers that children are still in the process of development, detention has a more harmful effect on them than on adults, and children are particularly vulnerable.

256. Nevertheless, the Commission observes that within region, children are routinely held for prolonged periods in court holding areas. For example, Jamaica's Office of the Children's Advocate told the IACHR that "reports coming to the Office indicate that children who are perpetrators of crime and violence sometimes spend prolonged periods in detention awaiting an identification parade as legislation with respect to the time children spend in detention is non-specific."[198] The Peruvian Ombudsman's Office told the Commission that under Peruvian law, preventive detention for police investigations in cases involving illegal drug trafficking can last as long as 15 days, in accordance with a clause in the Constitution. This is a constitutional exception to the 24-hour limit on police detention where certain other crimes are involved, among them juvenile offenses.[199]

257. The Commission takes a favorable view of Uruguay's implementation of a law setting the maximum period that a child can be held in a police facility at 12 hours, and that gives the police a maximum of two hours to inform the court of the detention. However, the Commission has received information to the effect that meeting these deadlines can pose a number of problems. The Commission has also received information to the effect that on numerous occasions, given the failure of detention centers, police premises were used to sanction children who had been convicted of violating the law.[200]

258. Likewise, Article 127 of Nicaragua's Child and Adolescent Statute provides that adolescents whom the police take into custody should be referred to the competent authority within 24 hours. However, the 2007 Annual Report of the Technical Office for Monitoring the Juvenile Criminal Justice System states that: "The preventive detention facilities are in such disrepair that the authorities of the juvenile criminal justice system have agreed that 48 hours should be the maximum time period within which a child must be brought before the judicial authority."[201]

259. The Commission would like to point out that detained persons, no matter what their age, have a right to communicate with, and request the assistance of, third

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[198] Office of the Children's Advocate (Jamaica), *Annual Report, 2007/0*8, p. 17.

[199] Defensoría del Pueblo (Perú) Ombudsman's Office, Peru, *La situación de los adolescentes infractores de la ley penal privados de libertad (supervisión de los centros juveniles-2007)* Juvenile Offenders Deprived of Liberty (Supervision at Juvenile Facilities-2007), Informe Defensorial Nº 123 Ombudsman's Report No. 123, Lima, 2007, pp. 86 and 96.

[200] Observatorio del Sistema Judicial, *Discurso y realidad: La aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo y Salto* Discourse and reality: Application of the Child and Adolescent Statute in Maldonado, Montevideo and Salto, UNICEF, Movimiento Nacional Gustavo Volpe, Montevideo, 2006.

[201] Oficina Técnica para el Seguimiento del Sistema Penal de Adolescentes, *informe anual 2007* Technical Office for Monitoring the Juvenile Criminal Justice System, *Annual Report 2007*, p 3. *Cited in*: Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil* Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009, p. 52.

parties. But when the person taken into custody is a child, the law recognizes his or her particular vulnerability, and that contact with family members is especially vital to mitigate the harmful effects of the deprivation of liberty and in ensuring that the child is able to receive the assistance that he or she requires.[202] The Court has been clear on this point:

> The right to contact a relative becomes especially important when detainees are minors. ... the authority carrying out the detention and in charge of the detention place for the minor must immediately notify the next of kin or, otherwise, their representatives for the minor to receive timely assistance from the person notified[203].

260. While most States in the hemisphere have laws stipulating that these notifications must be made upon the child's detention, in its Concluding Observations, the Committee on the Rights of the Child observed that this law is not, as a rule, respected. Thus, in the case of Brazil,[204] Chile,[205] Colombia,[206] Ecuador,[207] Nicaragua,[208] Panama,[209] Peru,[210] Uruguay,[211] and other States, the Committee recommended that particular care be taken to ensure that the children remain in contact with their families while in the juvenile justice system.

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[202] *Cf*. I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, Costs Judgment of September 18, 2003. Series C No. 100, paras. 126 *et seq.* Beijing Rules, Rule 10.1. *See also*: Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 54.

[203] I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, Costs. Judgment of September 18, 2003. Series C No. 100, para. 130.

[204] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Brazil, CRC/C/15/Add.241, November 3, 2004, para. 70, subsection g).

[205] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Chile, CRC/C/CHL/CO/3, April 23, 2007, para. 72, subsection f).

[206] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Colombia, CRC/C/COL/CO/3, June 8, 2006, para. 91 subsection e).

[207] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Ecuador, CRC/C/15/Add.262, September 13, 2005, para. 72, subsection d).

[208] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Nicaragua, CRC/C/15/Add.265, September 21, 2005, para. 74, subsection e).

[209] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Panama, CRC/C/15/Add.233, June 30, 2004, para. 62, subsection c).

[210] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Peru, CRC/C/PER/CO/3, March 14, 2006, para. 72, subsection e).

[211] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Uruguay, CRC/C/URY/CO/2, July 5, 2007, para. 68, subsection d).

261. The available information indicates that notification of family members is critical to protecting the rights of a child being held in police facilities, and to ensuring observance of the guarantees of due process. However, the presence of parents or guardians in the proceedings can also affect the decision taken in the judicial system. For example, the Commission was told that in Uruguay, when parents or guardians are present at the preliminary hearing, preventive detention was ordered in half as many cases. On the other hand, when the children did not have a parent or guardian present for the proceedings, preventive detention was ordered in 87% of the cases.[212] The sub-regional consultations and consultations with experts conducted in preparing this report found that the situation is similar in the majority of countries of the region.

262. In addition to notification of parents or guardians, children in custody should have some way to communicate with the outside world,[213] as part of their right to communicate with third parties, to receive assistance, and of their right not to be held *incommunicado.* Isolation from the outside world causes moral suffering and emotional trauma in anyone, makes them particularly vulnerable and increases the risk that they will be mistreated and abused in jail. The IACHR has therefore held that no matter what the circumstances, the law must prohibit *incommunicado* detention of persons deprived of liberty.[214] These principles apply with equal force to detained children. Therefore, the Commission rejects any state practice that involves solitary confinement of children held in police premises.

263. The Commission considers that arrest proceedings, questioning and subsequent detention by police constitute a risk scenario to the rights of children. The Court has made reference to the minimum standards that police detention facilities must observe when the person being held in custody is a child:

> ... As this Court has recognized in previous cases, there must be a record of detainees to enable control of legality of detentions. This requires entry, among other data, of: identification of the detainees, cause for detention, notification to the competent authority, and to those representing them, exercising custody or acting as defense counsel, if applicable, and the visits they have paid to the detainee, the date and time of entry and release, information given to the minor and to other persons regarding the rights and guarantees of the detainee, record of signs of beating or mental illness, transfers of the detainee, and meal

[212] Observatorio del Sistema Judicial, *Discurso y realidad: La aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo y Salto* Discourse and reality: Application of the Child and Adolescent Statute in Maldonado, Montevideo and Salto, UNICEF, Movimiento Nacional Gustavo Volpe, Montevideo, 2009.

[213] I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, Costs. Judgment of September 18, 2003. Series C No. 100, para. 127. I/A Court H.R., *Case of Suárez-Rosero v. Ecuador.* Merits. Judgment of November 12, 1997. Series C No 35, para. 90. I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Merits. Judgment of November 19, 1999. Series C No. 63, para. 164.

[214] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle III.1.

> schedule. The detainee must also sign and, if he or she does not, there must be an explanation of the reason. The defense counsel must have access to this file and, in general, to actions pertaining to the charges and the detention[215].

264. The information available indicates that throughout the hemisphere, the conditions under which children are held in police facilities are unsuitable. One of the most frequent violations is that children are not separated from adults in facilities of this type. Even more disturbing are the reports indicating that police abuse and violence are a widespread problem in the hemisphere. In many cases, the violence involves the police's use of physical force, mistreatment and sexual abuse of the detained children. The Commission observes that in many cases, police violence is discriminatory and selective in nature. The situation is especially serious in the hemisphere due to the fact that complaints involving torture and extrajudicial execution of detained children in a number of States have been denounced and proven.[216]

265. Despite the countless complaints of police violence against detained children, there are very few cases in which the police officers responsible for the violent acts have been identified and criminally prosecuted and punished. According to information received by the Commission, in most States, the chief mechanism for monitoring police conduct is an internal unit that investigates the activities of its fellow police officers. In other cases, there are centralized or specialized mechanisms that answer to the police authorities themselves. In the Commission's opinion, mechanisms of this type, although necessary, are not independent monitoring and investigative bodies, especially inasmuch as they are run by persons subordinate to the command structure, and who can be appointed or removed by that structure, which affects their independence and impartiality.[217]

266. A serious, effective, independent and impartial investigation is needed of all acts of police abuse and violence. Accordingly, there must be mechanisms that allow children to file complaints in a safe environment, and even anonymously. The Commission would remind the States of their obligation to prevent police abuse and violence through regular medical check-ups and examinations of detained children held in police custody, undertaken by independent medical personnel qualified to be able to identify possible cases of mistreatment or torture.

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[215] I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, Costs Judgment of September 18, 2003. Series C No. 100, para. 132.

[216] I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63; *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110; See IACHR, *Report on the Situation of Human Rights in Brazil 1997*, OEA/Ser.L/V/II.97, Doc.29 rev.1, September 29, 1997, Chapter V; Report Nº 1/98, case 11.543, *Rolando Hernández-Hernández (*Mexico), Admissibility and Merits, 5 May 1998; Report N° 33/04, Case 11.634, *Jailton Neri Da Fonseca* (Brazil), Merits, 11 March 2004; Report No. 43/06, Cases 12.426 and 12.427, *Castrated Boys of Maranhão* (Brazil), Friendly Settlement, 15 March 2006.

[217] I/A Court H.R., *Case of Palamara-Iribarne v. Chile*, Merits, Reparations, Costs. Judgment of November 22, 2005. Series C No. 135, paras. 155, 156 and 247.

B. Non-Custodial Precautionary Measures

267. The principle that holds that children should be deprived of their liberty only as a last resort is especially important during the preliminary stages leading up to the juvenile justice process, since they are to be presumed innocent until proven otherwise.

268. Article 7(5) of the American Convention provides that the release of a person in custody may be subject to guarantees to ensure his appearance at trial. With any case, but especially where children are involved, preventive detention should be used only as a last resort.

269. Under Article 13(2) of the Beijing Rules, detention pending trial shall be used only as a last resort and then for as short a period as possible:

> Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

270. The Commission is encouraged by the fact that almost all the relevant laws of the countries of the hemisphere have made provision for precautionary measures in lieu of the deprivation of liberty in the phase leading up to juvenile court proceedings. The wide variety of measures that States have established to ensure the presence of accused children for the duration of the proceedings suggest that they have ample opportunity to avoid ordering preventive detention of children accused of violating the law.

271. For example, Canada has established bail programs under which the child remains at home with his or her family, but meets regularly with a professional from the community who monitors his or her conduct and helps the child rejoin community support systems. In the Dominican Republic, the judge who examines cases of violations of criminal law committed by children may, upon a duly grounded request from the Public Prosecutor's Office, order one of the following non-custodial precautionary measures: a) a change of residence; b) periodic appearance in court or before the court-appointed authority; c) a prohibition banning the child from leaving the country, community or territory; d) a ban on visits or contact with certain persons; and e) placement in the custody of a particular person or institution. In Bolivia, there are two non-custodial precautionary measures: guidance and supervision orders, and a summons under penalty of law.

272. The precautionary measures regulated under Honduran law include guidance and community-family support; rules of conduct; and assisted release *libertad asistida*. In Venezuela, the law provides that whenever the circumstances are such that preventive detention can be reasonably avoided in favor of other measures that are less onerous for the accused, the competent court shall, on its own or at the request of the interested party, order other measures in lieu of preventive detention, among them the following: the obligation to submit oneself to the care or supervision of a certain person or institution, which shall file regular reports with the court; the obligation to appear in court on a regular basis, or to present oneself to the authority that the court designates; a ban on leaving the country, the community in which he or she lives, or the area specified by the

court without authorization; a ban on attending certain meetings or frequenting certain places; and a ban on communicating with certain persons, provided one's right of defense is not thereby affected.

273. However, the Commission observes that this catalogue of non-custodial, precautionary measures as established in the legislation are not always effectively applied in practice; and that frequently the very first measure that the authorities resort to in the case of children accused of violating the law is preventive detention. The IACHR urges the States to ensure strict observance of the principle of last resort, whereby preventive detention from the start of the juvenile justice process is used only in exceptional cases. It would also urge the States to step up their efforts to put into practice non-custodial precautionary measures that observe the principle of innocent until proven guilty.

C. Custodial Precautionary Measures

274. As stated in the preceding paragraphs, deprivation of liberty is widely used as a measure to ensure that a child accused of violating criminal law is present for the duration of the juvenile justice process. Preventive detention is the precautionary measure most often used, but all forms of detention, institutionalization or custody whereby children accused of violating criminal laws are confined in public or private institutions for the duration of the process against them, are considered measures for their deprivation of liberty.

275. Irrespective of how the various States label custodial precautionary measures imposed on children accused of violating criminal laws, in order to be considered legitimate, such measures must observe certain basic principles that apply to all non-convicted persons deprived of their liberty. In addition to these general basic principles, the preventive detention of children under the age of 18 must meet special requirements to safeguard their right to special protection by reason of their age, as provided in Article 19 of the American Convention and Article VII of the American Declaration.

276. Therefore, in order to be legitimate, any custodial precautionary measure applied to a child accused of violating criminal law must be in accordance with the principle of last resort; in other words, it must be applied only if the child poses an immediate and real threat to others;[218] as a last resort, when no other alternative is available; for as brief a time as possible, and subject to periodic review; finally, children in preventive detention must enjoy all the rights and protections that their age, gender and individual characteristics dictate and, most especially, their right to be separated from adults and from children who have already been convicted.

277. The Commission is recommending to the States that they make certain that their juvenile justice systems observe the principle of last resort where the deprivation of liberty is concerned, and that parameters be established both with respect to the decision to order preventive detention in the case of a child, and with respect to the

[218] Report of the Independent Expert for the United Nations Study on Violence against Children, August 29, 2006, A/61/299, para. 112.

duration of that detention. Accordingly, the IACHR is recommending to the States that they arrange precautionary measures that are alternatives to the deprivation of liberty but that still ensure the child's appearance for trial and that, as warranted, they honor their obligation to replace these measures with less onerous ones. The Commission observes that, in practice, preventive detention must conform to the minimum standards for all persons deprived of their liberty on preventive or precautionary grounds and must also take care to guarantee a child's right to measures of special protection.

278. In order to provide guidance to the States on how best to comply with this recommendation, the Commission will now examine each of the requirements that preventive detention must meet when the person being confined is a child accused of violating criminal law.

1. Preventive Detention as a Last Resort

279. Multiple international standards –among them Article 37(b) of the CRC, Rule 13 of the Beijing Rules, Rule 6(1) of the Tokyo Rules and Rule 17 of the Havana Rules- provide that in the case of children, preventive detention must be a measure of last resort. Rule 13 of the Beijing Rules provides that, in the case of children:

> 13.1 Detention pending trial shall be used only as a measure of last resort ....
>
> 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

280. The Inter-American Court has also clearly held that the use of preventive detention must be reserved for the most exceptional cases, given the limits imposed by the presumption of innocence and the principles of appropriateness, necessity and proportionality.[219]

281. The IACHR has observed that:

> with respect to preventive detention, the Commission notes that international jurisprudence is consistent in holding it as an exceptional measure that must respond exclusively to procedural purposes, and this interpretation takes on special importance for children who, by their condition, are at greater risk[220].

[219] Cf. I/A Court H.R., *Case of Suárez-Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 77; and *Case of the Juvenile Re-education Institute v. Paraguay*. Judgment of September 2, 2004, Series C No. 112, para. 228.

[220] IACHR, *Access to Justice and Social Inclusion: the road towards strengthening democracy in Bolivia*, OEA/Ser.L/V/II., Doc. 34, June 28, 2007, para. 393.

282. The Court was emphatic in stating that:

> When preventive detention is ordered for children, the rule must be applied with even greater rigor, since the norm should be measures that are alternatives to preventive imprisonment. Those measures might include the following: strict supervision; permanent custody; foster care; removal to a home or educational institution; care, guidance and supervision orders; counseling; probation; education and vocational training programmes and other alternatives to institutional care ...[221].

283. To be warranted, custodial precautionary measures should aim to ensure certain legitimate procedural ends. Under Article 7(5) of the American Convention, the only legitimate ground for preventive detention is the danger that the accused might attempt to elude justice or obstruct the judicial investigation. Furthermore, flight risk or the risk of obstructing the investigation must be based on objective circumstances. Thus, merely alleging this risk will not suffice to meet this requirement.

284. When considering a preventive detention measure, the principle of proportionality must be considered; thus, the precautionary measure cannot be used when the offense with which the accused is charged does not carry a penalty of imprisonment. However, the Court has been categorical in asserting that under no circumstances shall a precautionary or preventive measure be determined on the basis of the offense with which the individual is charged.[222] Excluding certain violations of criminal law from the scope of preventive detention would distort the precautionary nature of this measure and transform it into punishment imposed in advance.

285. The Commission notes that the applicable international standards provide that children ordered into preventive detention must have the opportunity to question the grounds for preventive detention with the assistance of their defense counsel.[223] The time taken to decide the appeal must be less than the maximum period of the preventive detention. The guarantees of due process must be assured, the child's right of defense must be respect, and he or she must be permitted to participate in the hearing proceedings.

286. Even though these norms and standards are very clear, the information the Commission has received indicates that the use of preventive detention of children accused of violating criminal law is widespread within the hemisphere. For example, the IACHR was told that in Peru in 2005, 33% of the adolescents deprived of their liberty in juvenile facilities were awaiting sentence; three years later, in 2008, 70% of the children

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[221] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 130.

[222] I/A Court H.R., *Case of López-Álvarez v. Honduras.* Merits, Reparations, Costs. Judgment of February 1, 2006. Series C No. 141, para. 81.

[223] Convention on the Rights of the Child, article 37(d); Havana Rules, Rule 18; Tokyo Rules, Rule 6.3.

deprived of their liberty in juvenile facilities had not yet been sentenced.[224] According to another source of information, in 2008, a total of 2,628 children were deprived of their liberty; of these, 1,238 –slightly fewer than half- were still awaiting sentencing.[225]

287. The Commission was also told that in Chile in 2006, preventive detention represented 15.6% of precautionary measures imposed on adolescents.[226] The Commission was also informed that in Uruguay, preventive detention (called provisional holding) has increased. According to the information received, in Montevideo, during the 2004-2005 period, preventive detention was ordered in 59% of the cases, whereas in 2006, it was ordered in 66% of the cases.[227] The Commission also received information to the effect that in 2007, 371 children had allegedly been ordered into preventive detention in Guatemala, and only 29 had been ordered to be incarcerated after sentencing. Thus, out of a total of 400 detentions, 92.75% were preventive detentions.[228]

288. The Commission therefore recommends to the States that they enact laws establishing clear limits on the use of preventive detention as described in the preceding paragraph, so that the issue is not left to the discretion of the judges or administrative authorities in charge of cases of violations of criminal laws alleged to have been committed by children under 18 years of age.

2. The Duration of Preventive Detention

289. Article 7(5) of the American Convention provides that any person detained shall be entitled o trial within a reasonable time or to be released, without prejudice to the continuation of the proceedings. The Court has warned that protracted preventive detention runs the risk of turning the presumption of innocence on its head, converting a precautionary measure into punishment imposed in advance.[229]

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[224] Justicia Juvenil en Cifras, in: *Justicia para Crecer, Revista sobre Justicia Juvenil Restaurativa, Nº1*, Terre des hommes Lausanne y Encuentros, Casa de la Juventud, December 2005-February 2006, Source: Judicial Branch, Office of the Manager of Juvenile Correctional Facilities.

[225] Rodríguez Dueñas, Juan José, *Indicadores de Justicia de Menores 2008, De 11 a 17 años, Población de los Centros Juveniles 2008,* 24/02/2009 Indicators of Juvenile Justice 2008, From ages 11 to 17, Population in Juvenile Facilities 2008, 02/24/2009. Document sent to the IACHR on March 4, 2009.

[226] Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile 2007*. Hechos 2006 2007 Annual Report on Human Rights in Chile. 2006 Facts, p. 218.

[227] Observatorio del Sistema Judicial, *Discurso y realidad: La aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo y Salto* Discourse and reality: Application of the Child and Adolescent Statute in Maldonado, Montevideo and Salto, UNICEF, Movimiento Nacional Gustavo Volpe, Montevideo, 2009.

[228] Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil* Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009, p. 68

[229] *See* I/A Court H.R., *Case of López Álvarez v. Honduras. Merits, Reparations, Costs.* Judgment of February 1, 2006, Series C No. 141, para. 69; *Case of García Asto and Ramírez Rojas v. Peru. Preliminary Objections, Merits, Reparations, Costs*. Judgment of November 25, 2005. Series C No. 137, para. 106; *Case of Acosta Calderón v. Ecuador. Merits, Reparations, Costs.* Judgment of June 24, 2005. Series C No. 129, para. 75; *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations, Costs.* Judgment of September 7, 2004. Series C No. 114, para. 180; and *Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35.

290. The organs of the Inter-American system have vigorously condemned disproportionate preventive detention. The Court has addressed the use of preventive detention in the case of minors, and ruled that:

> ... preventive detention must strictly conform to the provisions of Article 7(5) of the American Convention: it cannot be for longer than a reasonable time and cannot endure for longer than the grounds invoked to justify it. Failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognized general principles of law[230].

291. The Court went on to say that:

> … when, however, preventive detention is deemed necessary in the case of a child, it must be for the shortest period possible, as provided in Article 37.b) of the Convention on the Rights of the Child ...[231].

292. Rule 13(1) of the Beijing Rules also provides that detention pending trial shall be used only as a measure of last resort and for the shortest possible time in the case of minors.

293. The Commission is concerned that in a number of countries of the Americas, detention pending trial or preventive detention as a precautionary measure is used too often and for too long. The Commission said as much, for example, in its report on the situation of human rights in Bolivia in 2007.[232]

294. Little was learned from the information provided by the States in response to the Commission's question about how long children remain under custodial precautionary measures before being sentenced. For example, in answer to the questionnaire the Commission sent out in the process of preparing this report, El Salvador stated that children remain detained for between one and three months; Uruguay said that preventive detention lasted between 30 and 60 days; Guatemala said that preventive detention lasted anywhere from 24 hours to 12 months; Costa Rica gave assurances that preventive detention never lasted more than 6 months; the Dominican Republic explained that 23 adolescents were held in preventive detention for less than a month, and 238 were held for one to three months, 177 for three to six months, 21 for six to twelve months, and 3 were in preventive detention for twelve to twenty-four months. In the Caribbean countries, the average duration of preventive detention was 28 days in Guyana and one to three months in Saint Lucia.

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[230] I/A Court H.R., *Case of the "Juvenile Re-education Institute",* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004,. Series C No. 112, para. 229.

[231] *Case of the "Juvenile Re-education Institute v. Paraguay,"* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004,. Series C No. 112, para. 231.

[232] IACHR, *Access to Justice and Social Inclusion: the road towards strengthening democracy in Bolivia*, 2007, para. 392.

295. The Commission received alarming information on the duration of preventive detention during the visits it made to prepare this report. In Trinidad and Tobago, for example, the IACHR found that 18 children were being held in the Youth Training Center on charges of murder. The Commission was able to speak to half these children, not one of whom had been there for less than one year; indeed, one had been at the facility for four and a half years. In Belize, the Commission found that the children being held on murder charges had been in preventive detention for over a year. In Saint Lucia, employees of the Boy's Training Center stated that sometime in the past, three children had spent four years at the Center awaiting trial on charges of homicide. In Haiti, the employees at Delmas 33 said the average period of preventive detention was 22 months.[233]

296. At the same time, the Commission appreciates the fact that a number of States have set upper limits on the duration of preventive detention. In Brazil, for example, the maximum period of preventive detention is set at 45 days[234].

297. The Commission observes that setting a legal limit on preventive detention is a positive step, provided the permitted period of is reasonably short. At the end of that time period, extensions should not be allowed and the child should be released immediately.[235] The Commission would also suggest that the law should establish penalties and consequences for those officers of the court that do not comply with these deadlines.

298. The Commission observes that the deprivation of liberty as a preventive measure in these cases ought to be as brief as possible.

3. The Periodic Review of Preventive Detention

299. Article 7(5) the American Convention clearly provides that States have an obligation to observe the right of any detained person to be brought promptly before a judge or other officer authorized by law to exercise judicial power. If preventive detention is ordered, States also have an obligation to ensure that the measure is temporary and to establish a periodic review mechanism to decide whether preventive detention should be terminated or replaced with another measure, if there has been a change in circumstances justifying the reasons why preventive detention was ordered in the first place.

300. The Committee on the Rights of the Child has also recommended that the States Parties adopt strict legal provisions to ensure that the legality of a preventive detention is reviewed on a regular basis, preferably every two weeks. It observes that when the conditional release of a child –by alternative measures, for example- is not

[233] Information obtained by the IACHR during visits to preventive detention centers in Belize, Saint Lucia and Haiti, in May and June 2009.

[234] Article 108 of the Statute of the Child and Adolescent.

[235] Rule 17 of the Havana Rules states that "when preventive detention is used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases".

possible, the child should be formally charged with the alleged offences and brought before a court or other competent, independent and impartial authority within no more than 30 days after his or her preventive detention begins.[236]

301. The Commission reiterates the point that when children accused of violating the law are deprived of their liberty, the judge must periodically review the grounds to determine whether the reasons for ordering preventive detention still persist.[237] In its decision, the authority should clearly set out the circumstances of the case that allow one to reasonably presume that the flight risk is still present, or set out the evidentiary tests that still have to be conducted, and why they cannot be done if the accused child is released.

4. The Rights of Children and Adolescents in Preventive Detention

302. Any minor subjected to preventive detention shall enjoy the same rights that apply to persons deprived of their liberty, as well as all the specific guarantees and protections to which he or she is entitled by reason of his or her age. Article 13 of the Beijing Rules provides that:

> 13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.
>
> 13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.
>
> 13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality.

303. Even so, the IACHR has received information indicating that many States of the region do not have separate institutions to house children in preventive detention, with the result that they are routinely placed in institutions that house children who have already been convicted or, even worse, in adult facilities. From the information it has received, the Commission has learned that in some States, the detention conditions to which children who have not yet been convicted and sentenced are subjected may be even worse than conditions at facilities housing those already found guilty of violating the law, which is a violation of the principle of the presumption of innocence.

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[236] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 83.

[237] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 77. In the same sense: Havana Rules, Rule 79.

304. By way of example, the Commission received disturbing information to the effect that children in preventive detention in Honduras are not separated from those who have been convicted by the juvenile justice system.[238] In Venezuela, the Ombudsman's Office has revealed that in most juvenile facilities, the separation rule is not rigorously applied and that in many facilities, the convicted and sentenced children are intermingled with convicted adults. The Ombudsman's Office found that the law requiring segregation of convicted children from those not convicted was observed only in the States of Barinas, Mérida and Anzoátegui.[239]

305. A number of international instruments on the subject uphold the right of children in preventive detention to maintain contact with their families, to be separated from the adult population and from children who have already been convicted. These include Article 5 of the American Convention, and Articles 10 and 37 of the Convention on the Rights of the Child. The Court has specifically addressed this right, and observed that the lack of separation contributes to the climate of insecurity, tension and violence in facilities where juveniles are held.[240]

306. The Commission reiterates that facilities housing children preventive detention must ensure that their human rights are respected and conduct programs that respect the principle of the presumption of innocence.[241] They must also guarantee all the rights to which children deprived of their liberty are entitled, such as contact with family, access to the right to education, recreation, health, religious practices and others.

IV. CUSTODIAL AND NON-CUSTODIAL MEASURES IN THE CASE OF CHILDREN AND ADOLESCENTS HELD RESPONSIBLE FOR VIOLATING CRIMINAL LAWS

307. A state's response when its juvenile justice system holds a child responsible for a violation of the law must be respectful of the child's specific rights and the specific protections to which the child is entitled by virtue of his or her age.

308. The international standards on the subject provide that States should order confinement only as a last resort and have alternatives to confinement available. The juvenile justice system must also give special consideration to the proportionality and duration of a sentence, whether or not it involves confinement. Furthermore, sentences that constitute cruel and inhuman treatment, particularly those involving corporal punishment, are inadmissible under international human rights law.

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[238] Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil* Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009, p. 68.

[239] Ombudsman's Office (Venezuela), *Annual Report 2008,* Caracas, 2009.

[240] 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, para. 169.

[241] *See in this regard,* Convention on the Rights of the Child, Arts. 37.3 *et seq.;* Havana Rules, Rules 12, 28, 29, 31, 32 and 65.

309. In this chapter of the report, the Commission will examine the measures that States can, without violating international law, apply to children who have been found responsible for violating criminal laws. The Commission will begin with those measures that States can order in lieu of custodial measures, and then examine the deprivation of liberty of children who violate the law.

A. Alternatives to the Deprivation of Liberty

310. The right to personal liberty involves certain important qualifiers in the case of children under the age of 18. As the Inter-American Court has held, the content of the right to personal liberty in the case of children cannot be separated from the best interests of the child, which is why special measures must be taken to protect them, given their vulnerability.[242] The measures that replace, or are alternatives to, the deprivation of liberty are a means to safeguard the rights of children who have violated criminal law.

311. Thus, in order to be in compliance with the principle of last resort, which imposes a restriction of liberty on children as an exception, States have an obligation to establish alternatives to custodial measures as penalties for children found guilty of violating criminal laws. That obligation is clearly set out in Article 40(4) of the Convention on the Rights of the Child, which provides that:

> A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

312. The Committee on the Rights of the Child has observed that:

> An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under Article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort[243].

313. Furthermore, the use of alternatives to the deprivation of liberty, in the case of juvenile offenders not only adequately ensures their right to personal liberty, but also serves to protect the children's rights to life, to physical integrity, to development, to family life and others. The Commission highlights that in order to avoid the negative consequences of the deprivation of liberty, alternatives to it must endeavor to make it easier for juvenile offenders to continue their education, maintain and even strengthen their family ties, while supporting those consigned to the state's care and connecting the

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[242] 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, para. 225.

[243] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 80.

juvenile offender to community resources to facilitate his or her re-assimilation into community life.

314. At the same time, the Commission observes that some alternative measures could lead to violations of the principles of legality, proportionality of the sentence and minimum intervention, as well as jeopardize the child's right to due process. Therefore, the way in which these measures are applied in the region needs to be examined carefully. Such measures must meet the same general requirements that apply to alternatives to adjudication in juvenile court, such as the child's right to be heard, adequate judicial oversight of the measures, and limits on judicial discretion.

315. From the information compiled for this report, the Commission observes that there are alternatives to the deprivation of liberty everywhere in the region, although the means and manner by which they are applied vary significantly from one country to the next. The non-custodial measures most often used include the following: (a) probation programs; (b) warnings and reprimands; (c) rules of conduct; (d) community programs; (e) individualized diversion programs, and (f) penalties aimed at restorative justice.

316. The probation or assisted release programs tend to be those most often used in the Latin American countries. Generally, the assisted release programs require the child to attend a socio-educational program; while the probation programs tend to require that a professional social worker has regular contact with the child, and with his or her family and community. The non-custodial measures also tend to include warnings by the judge as to the harm done and the consequences to be faced face if the child does not improve his or her behavior, to reprimands to warn the child not to repeat the unlawful conduct. Other types of penalties tend to involve rules of conduct or behavior, such as prohibiting the child from going to certain places or events, prohibiting the child from driving motor vehicles, and others. Non-custodial measures also include punishments such as requiring the child to attend counseling and to join socio-educational programs. The laws also routinely provide for penalties aimed at restorative justice, such as providing community services, the obligation to repair the damage done or harm caused, or the obligation to provide the victim with some form of satisfaction.

317. In some English-speaking countries of the hemisphere, non-custodial measures tend to be of five types. The first is that before the child can be exonerated -- the child must stay clear of any criminal activities during a certain period. The second is that the child must pay a fine to the court as a result of the violations of the law committed. A third type of non-custodial measure is to send the child to live with a "fit person", which may be an individual or an institution. The fourth is to require that the child participate in some type of program to redress the wrong that the violation of the law has caused. The fifth is to require that the child participate in educational or vocational programs or attend therapy.

318. Although these non-custodial measures are available, the Commission is troubled by the fact that the measure most often used in the case of juvenile offenders continues to be incarceration. Non-custodial measures are not used more often because the community programs needed for the children to perform the non-custodial sentences

are not available, particularly in rural areas; the funding for the non-custodial programs is not adequate; the authorities responsible for children in conflict with the law do not coordinate with each other; and the mechanisms for supervising compliance with these measures are few.

319. The Commission also observes that judges sometimes feel they have the authority to exercise greater discretion when ordering non-custodial measures. In such cases, the alternative, non-custodial measures can end up becoming a form of social control over the juvenile offender, without respecting his or her right to due process. To avoid this situation, the Tokyo Rules establish certain legal safeguards that are to be observed when selecting and implementing non-custodial measures in the case of juvenile offenders. Those rules provide that the non-custodial measures must be proportionate to the seriousness of the offence and the offender's history, and reflect the principles established for sentencing. Any form of medical or psychological experimentation on juvenile offenders is prohibited, as are measures that pose some unnecessary risk of physical or mental harm. According to these rules, the decision as to whether to order a non-custodial measure must be subject to review by a judicial or other competent, independent authority, at the offender's request, and his or her dignity is to be respected at all times.[244]

320. In the Commission's view, some non-custodial measures may be inappropriate, given the States' obligations under international human rights law. For example, a fine would not be an appropriate sentence for children and adolescents below the minimum compulsory education age under international standards. The Commission considers that ordering fines may have the effect of forcing children to engage in work that, by international standards, is inappropriate for their age. The Commission considers that ordering fines may also have the effect of forcing children to engage in work that, despite their youth, exposes them to the risk of violence and exploitation. Furthermore, the fines are generally paid by the parents, which is a violation of Article 5(3) of the American Convention, according to which punishment shall not be extended to any person other than the criminal.

321. The Commission also points out that particular care must be taken when applying measures that involve some form of restorative justice, or a measure requiring the child to compensate the victims for the damages that his or her violation of the law caused. Requiring children to return stolen property to its owners might be one non-custodial measure; however, requiring that the child financially compensate the victims, even if only a token amount, could have the effect of forcing the child to seek work in order to earn the money. This could end up being a violation of the prohibition of child labor and expose the child to needless risk.

322. As for the non-custodial measures that require the child to live with a "fit person," the Commission believes that a distinction must be made between the child's obligation to live with a responsible relative or adult, and the practice of referring to institutions as "fit persons". The Commission has learned that this non-custodial measure

[244] The Tokyo Rules, Rule 3.

has sometimes been implemented in practice by sending the juvenile offender to a correctional facility, which is a form of deprivation of liberty and hence cannot be regarded as an alternative, non-custodial measure.

323. The Commission is also concerned by the fact that the non-custodial measure ordered for the child may involve a broad spectrum of conditions and obligations, to the point that many children end up facing measures that are much more intrusive than the severity of their offense warrants, in violation of the principle of the proportionality of the sentence and the principle of minimum intervention. The Commission agrees with the Committee on the Rights of the Child, which has observed that States can take measures to suspend the proceedings in the juvenile justice system, which would be deemed terminated if the measure intended to suspend the process is carried out in a satisfactory manner.[245] However, it is troubled by cases in which the non-custodial measure was ordered in a final judgment but the cases are nonetheless not definitively closed and the child has to appear in court again and is charged with failure to comply with a valid court order, which in many cases would mean much more severe sentences, possibly even incarceration. The Commission points out that failure to comply with conditions attached to measures that, if satisfied, could demonstrate rehabilitation and thus suspend juvenile justice proceedings, ought not to result in more severe penalties than those that the original violation carries. They should never be equivalent to the penalties imposed on adult offenders.

324. As for orders to perform community service in lieu of incarceration of juvenile offenders, the Commission considers that these might well be a suitable non-custodial measure, provided certain requirements are met.

325. First, regardless of whether these programs are designed for the general population or are specifically designed for children given non-custodial sentences, and whether or not these programs are run by government or civil society organizations, they must be strictly supervised to prevent any exploitation of the child. Second, the IACHR emphasizes that a child's participation in community service programs must, under no circumstances, affect his or her schooling, health or physical or psychological well-being. The educational or therapeutic programs sometimes require the family's participation. Third, it should be made very clear that the actions or omissions of third parties ought not to affect the determination as to whether or not the child has complied with the non-custodial measures. In other words, the parents' participation in family therapy must be voluntary and their non-participation ought not to influence the evaluation of the child's fulfillment of the non-custodial measure ordered.

326. If the orders to participate in community service programs are properly supervised, do not infringe upon the child's rights and do not require third-party involvement, the Commission believes that they are a positive and viable alternative to the deprivation of liberty, especially when the orders to attend educational, vocational or specific therapeutic programs are intended to effect positive changes in the juvenile

[245] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 68.

offender's conduct. The Commission also believes that these programs can be an effective way to reduce the stigmatization that juvenile offenders suffer, thereby facilitating their re-assimilation into the community.

327. The Commission therefore takes a positive view regarding the laws in many countries of the region, particularly in Latin America, providing for community service orders. For example, according to the information received, Article 11 of Chile's Juvenile Criminal Responsibility Act provides that "a sentence of community service consists of performance of unremunerated activities for the sake of the community to benefit the needy." Guatemala's Comprehensive Child and Adolescent Protection Act provides for a sentence of community service, which shall consist of unremunerated services for the general welfare in public and private assistance agencies, such as hospitals, schools, national parks and other similar establishments. Peru's Child and Adolescent Code provides for a sentence of community service, which means performing tasks appropriate to an adolescent's aptitude, without harming his or her health, schooling or work, and under the supervision of the technical staff of the Office of the Operations Manager of the Judiciary's Juvenile Facilities, and in coordination with local governments. In the Dominican Republic, one finds the same kind of regulation of community service, where the Code for the System of Protection and Fundamental Rights of Children and Adolescents expressly states that these measures are not to affect the child's health or physical and psychological well-being.

328. While the Commission has expressed serious reservations regarding some non-custodial measures, measures of this type are nonetheless an integral part of a juvenile justice system that is consistent with the principles and obligations established in international human rights law. The Commission is recommending that the States amend their laws to make it mandatory to apply, as a first option, a wide range of non-custodial measures as alternatives to custodial measures. The Commission is urging the States to enforce in practice those provisions that allow non-custodial measures to be used in place of the sanction of imprisonment. The Commission also recalls that the adoption of laws incorporating alternative non-custodial measures must be coupled with adequate funding for programs in which children can participate as an alternative to imprisonment. Furthermore, the guarantees of due process must be observed in all cases in which alternative measures are used, especially those that are restorative in nature.

329. States are also encouraged to enlist members of the community to help design, support and monitor the non-custodial sentencing, as this can improve the chances that the conditions are met, which in turn will encourage the courts to rely more heavily on non-custodial measures. Having members of the community participate in devising non-custodial measures and then supervising them, combined with the introduction of restorative justice processes, can help bring about a reconciliation between victims, offenders and members of the community and hasten the child's re-assimilation into the community.

330. The Commission recommends that States ensure the programs that make non-custodial sentences possible are available in the communities in which the sentenced children live, and are not confined only to the major cities. The Commission appreciates a

number of positive experiences in this regard. In Costa Rica, for example, a high percentage of the penalties imposed are non-custodial measures;[246] in Brazil, a policy guideline has been adopted to the effect that children's needs are best addressed at the municipal level, and a new management model has been introduced that coordinates nongovernmental organizations and public authorities.[247]

331. Finally, although implementation of non-custodial measures as an alternative to incarceration is an obligation incumbent upon the States under international law, the Commission must also point out that it has received reports to the effect that the non-custodial alternatives to the deprivation of liberty are less costly than incarceration, and more effective in accomplishing the ultimate goal of a juvenile justice system, which is to integrate the children into society as constructive members, and in the process improve public safety by reducing the incidence of repeat offending.[248]

B. Custodial Measures

332. Custodial measures should be used once it has been shown and proven that non-custodial measures are inadvisable in a given case and after a careful review, taking into account the principles of legality, last resort and proportionality of the sentence, as well as other relevant considerations.[249]

333. The IACHR has defined deprivation of liberty as:

> Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain

[246] In Costa Rica, a total of 231 sentences were handed out in 2007; 194 of the sentences were non-custodial measures and 37 involved the deprivation of liberty (DNI, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2009). Available at: http://viasalternas.dnicostarica.org/v2/documentos/633893876330375000.pdf.

[247] UNICEF, *Juvenile criminal justice. Good Practices in Latin America,* Panama, 2003, pp. 39 et seq.

[248] James Austin et al, 2005, "Alternatives to the Secure Detention and Confinement of Juvenile Offenders", Office of Juvenile Justice and Delinquency Prevention, Washington, D.C, 2005, cited in: Justice Policy Institute, *The Costs of Confinement Why Good Juvenile Justice Policies make Good Fiscal Sense,* May 2009, p. 16; and Michael Fendrich and Melanie Archer, *Long-term Re-arrest Rates in a Sample of Adjudicated Delinquents: Evaluating the Impact of Alternative Programs*, The Prison Journal 78, No. 4 (1998), pp. 360-389, cited in: Justice Policy Institute, *The Costs of Confinement Why Good Juvenile Justice Policies make Good Fiscal Sense*, May 2009, p. 16. Available at: http://www.justicepolicy.org/images/upload/09_05_REP_CostsofConfinement_JJ_PS.pdf.

[249] The Beijing Rules, Rule 17.1.b) states that "Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum".

> institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty[250].

334. Similarly, Rule 11(b) of the Havana Rules has defined deprivation of liberty as any form of detention or imprisonment, or the placement of a person in a public or private custodial setting from which the child is not permitted to leave at will, by order of any judicial, administrative or other public authority.

335. The definitions are important to bear in mind since, where children are concerned, the member States and their laws frequently avoid the use of words like jails, deprivation of liberty, confinement or cells, and replace these words with euphemisms like homes, comprehensive treatment centers, internments, dormitories, shelters, and others. The principles and standards discussed in this report apply to all institutions, both public and private, that are used to house children under the age of 18 who have violated a criminal law.

336. In this chapter, the Commission will examine the principles that must guide and delimit the use of penalties of incarceration, which, in the case of children, should be used only as a last resort, and must be proportional to the crime, last as short a time as possible and be subject to periodic review. Care must also be taken to ensure that the children deprived of their liberty are allowed contact with their families and communities.

337. The Commission will carefully examine the classification criteria that apply to children who are deprived of their liberty and will analyze the States' obligation to guarantee that children who are subject to these types of sanctions are able to exercise their rights. The Commission will make specific reference to the detention conditions and the need to prevent, investigate and punish any form of institutional violence. Finally, the Commission will look at some of the measures that States must take once children have been deprived of their liberty in order to ensure that their rights are protected and that they are able to rejoin their community.

1. Limits on the Deprivation of Liberty

338. The criteria that the Commission explained in the preceding paragraphs concerning the principles that must be observed when applying custodial precautionary measures also apply to the custodial measures ordered when a child is sentenced for violating the law.

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[250] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008.

339. Thus, in order to be legitimate, any sentence involving deprivation of liberty must, when applied to a child held responsible for violating the law, comply with the principles of last resort and the proportionality of the sentence; it must be for the shortest time possible; furthermore, children sentenced to deprivation of liberty must enjoy all the rights and protections that their age, gender and individual characteristics dictate. The Commission urges the States to unreservedly respect these principles and the rights of the child when he or she is incarcerated for violating the law, as every system of justice must be comprehensive, restorative and centered on the rehabilitation of the child or adolescent offender and their reintegration into the community.[251]

a. Custodial Measures as a Last Resort

340. Article 37(b) of the Convention on the Rights of the Child reads as follows:

> The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

341. The principle of last resort is also guaranteed by other international norms on the subject, particularly Rule 19 of the Beijing Rules, and Rule 2 of the Havana Rules.

342. The Commission, for its part, has observed that when applying measures that deprive the child of liberty, one consideration has to be that deprivation of liberty is the *ultima ratio*, and therefore other types of measures must be preferred, without resorting to the judiciary system, whenever this is adequate.[252]

343. The IACHR has also indicated that:

> ... international human rights law favors reserving those penalties that most severely restrict a minor's fundamental rights for only the severest of crimes. Hence, even in the case of criminalized offenses, laws protecting the child must advocate some form of punishment other than imprisonment or deprivation of liberty[253].

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[251] Report of the independent expert for the United Nations study on violence against children, August 29, 2006, A/61/299, para. 112.

[252] IACHR, Written and oral comments concerning Advisory Opinion OC 17/02. In I/A Court H.R., *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 22.

[253] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention,* March 10, 1999, para. 117.

344. Observance of the principle of last resort requires prioritization and the availability of non-custodial sentences.[254]

345. Furthermore, the principle of last resort serves not only to protect children's right to liberty, but also their rights to life, their right to survival and development, and their right to a family life. In reference to Article 6 of the Convention on the Rights of the Child, which protects the right to life and the right to survival and development, the Committee on the Rights of the Child has observed that "the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society."[255]

346. As mentioned in the chapter on non-custodial alternatives to the deprivation of liberty, almost everywhere in the region there are provisions allowing judges to apply non-custodial measures in lieu of a sentence that would deprive the child of his or her liberty. Nevertheless, those measures are not uniformly applied, and judges continue to opt in favor of sentences of incarceration as the preferred sentence for juvenile offenders, in violation of the standards of international law. Furthermore, due process and other children's rights are often violated when the non-custodial measures are ordered. The States of the hemisphere do not have the funds to finance programs that allow implementation of non-custodial measures; that lack of funding is one of the principal obstacles to guaranteeing the right of juvenile offenders that prison will be used only as a last resort.

347. The Commission observes that a number of States have established minimum ages at which the juvenile justice system can deprive children of their liberty. For example, Mexico's Constitution provides that at both the federal and state level, incarceration will be used only as an extreme measure and for the shortest appropriate period of time, and can only be used in the case of adolescents over the age of 14 convicted of very serious, antisocial behavior. In Nicaragua, children and adolescents between the ages of 13 and 15 cannot be sentenced to imprisonment.

348. Some States have established age brackets, such that the maximum custodial sentence that can be administered in the case of children and adolescents subject to the juvenile justice system is age-based. For example, in Venezuela, the maximum custodial sentence that children over the age of 12 but under 14 can receive is two years; whereas children of 14 but under 18 can be deprived of their liberty for up to 5 years. In Guatemala, children between 13 and 15 years of age can be deprived of their liberty for up to two years, while those between 15 and 18 can be deprived of liberty for up to six years. In Nicaragua, only those over 15 but under 18 can be deprived of their liberty for up to 6 years.

349. The Commission reiterates the recommendations made in the chapter on non-custodial measures, and urge the States to spare no effort to make the principle of last

[254] Convention on the Rights of the Child, Article 37(b) and Article 40(4); Beijing Rules, Rules 5, 17(a) and 19; Havana Rules, Rules 1 and 2, and the Tokyo Rules, Rule 3(2).

[255] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 11.

resort a reality, as it must be one of the underlying principles of every juvenile justice system and should be administered as well in the case of children found responsible for violating criminal laws. The Commission is also recommending that regulations be adopted to limit the degree of discretion that judges can exercise in administering criminal punishments and custodial sentences, based on the principle of last resort. This can be accomplished either by regulating the minimum ages at which children can be deprived of their liberty or establishing age brackets that distinguish the maximum custodial sentence a child can receive according to his or her age, provided the maximum custodial terms are very short.

b. The Proportionality of Custodial Measures

350. Under international rules and standards, the response to children found responsible for violating criminal laws must respect the principle of proportionality of the sentence.[256] This means that the punitive reaction must be in proportion to the seriousness of the offense; in other words, the lesser the offense, the lesser the penalty should be; the lesser the role that the person played in the commission of the offense, the lesser the sentence that he or she should receive. Under Article 40(4) of the Convention on the Rights of the Child, the proportionality of the sentence is related to the child's circumstances and the offense; but not to the educational needs.

351. Thus, the penalty for a juvenile offender must consider the proportionality between the conduct and the degree of harm that the offense caused with respect to protected legal rights. Furthermore, the measure must be selected in accordance with the principle of minimum intervention.[257] Rule 5(1) of the Beijing Rules provides that:

> The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

352. Both the Inter-American Court[258] and the Committee on the Rights of the Child have addressed this principle. The Committee has observed that:

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[256] There is a difference between the "proportionality of the sentence" and the "proportionality principles" within the test to control arbitrary restrictions referred to by the I/A Court H.R. While the first principle justifies the rationality of the sentence in relation with the severity of the conduct that is penalized, for the I/A Court H.R., the principle of proportionality as a control on arbitrary restrictions constitutes a three-stage test to determine if the restriction could be considered as "necessary in a democratic society". See the *Case of Tristan Donoso v. Panama*. Judgment of January 27, 2009, Series C. No.193, para. 56. After examining the appropriateness and the necessity of the measure, at the proportionality phase, there must be a check as to whether "the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought." *Case of Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador*, Judgment of November 21, 2007, Series C, No. 170, para. 93.

[257] The Tokyo Rules, Rule 2.6.

[258] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110.

> ...the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in Article 40 (1) of CRC ...[259].

353. Many countries of the hemisphere have laws upholding the principle of the proportionality of the sentence. By way of example, Article 26 of Costa Rica's Juvenile Criminal Justice Act clearly states that the sentences imposed in the proceedings shall be reasonable and proportional to the offense or crime committed. Article 27 of that law prohibits open-ended sentencing.

354. Nevertheless, even though such provisions are common in the hemisphere, the Commission has received information to the effect that, in practice, States do not observe this principle when sentencing juvenile offenders. In fact, open-ended sentences are still being handed out in some places in the hemisphere. The Commission was informed, for example, that in Suriname, the courts do not necessarily specify how long the child is to remain in custodial care; generally, children remain in prison until they turn 21.[260]

355. The juvenile justice system's response is often based on a juvenile offender's personal or family circumstances rather than the offense itself. For example, the Commission was told that in Brazil, a considerable amount of discretion is exercised in proceedings conducted against juvenile offenders, such that the sentences seem to be the result of a friendly conversation between judges, advocates and defense attorneys. The system produces entirely different outcomes for similar offenses.[261]

356. Contrary to the principle of proportionality of the sentence and the principle of equality and non-discrimination, there are too many cases in which the punitive response to the conduct of juvenile offenders is harsher than it is in the case of adults who have committed a crime. For example, the Commission has received information indicating that in the United States, children are prosecuted with adults for the same crime, and yet the children can receive tougher sentences than their adult co-defendants.[262]

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[259] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 71.

[260] Information the Commission obtained during interviews with government officials and NGO's in Suriname.

[261] ANCED – Associação Nacional dos Centros de Defesa da Criança e do Adolescente National Association of Juvenile Protection Centers, *Análise sobre os directos da criança e do adolescente no Brasil: relatório preliminar da ANCED* Analysis of the rights of children and adolescents in Brazil, ANCED's preliminary report, San Paulo, 2009.

[262] The report of the Michigan American Civil Liberties Union, titled "Second Chances: Juveniles Serving Life without Parole in Michigan Prisons", published in 2004, cites a number of cases of children who received sentences equal to or longer than their adult co-defendants.

357. The Commission was disturbed to learn that in many States in the United States in which children can be tried in adult court, judges are not allowed to consider the child's age when deciding the length of his or her sentence. The mandatory sentencing guidelines are particularly problematic in the case of children. According to the information concerning the United States, a homicide conviction in South Carolina carries a mandatory minimum sentence of 30 years without the possibility of parole.[263] In California, murder with special circumstances carries a presumptive sentence of life in prison, with no possibility of parole, except where there is good reason to replace the life sentence with a sentence of 25 years.[264] In some States, gang murder is a circumstance that creates a presumptive sentence of life in prison without the possibility of parole.[265] In addition, in some States within the United States, children who do not commit the murder themselves but are instigators or accomplices –for example, if they drive the car in which the escape was made- can also face life sentences without the possibility of parole.[266]

358. The Commission was also struck by information it received to the effect that in some countries of the Caribbean, children are sentenced to deprivation of liberty in an institution for a specific period of time, irrespective of what law they have violated. The idea is that they are participating in a rehabilitation program and must spend a certain amount of time in the program if it is to have any effect. According to the information that the Commission obtained during its visits, in Guyana, children are sentenced to time in the New Opportunities Corps, for not less than one year and no more than three; in Belize, children are sentenced to the Juvenile Hostel and to the National Youth Cadets to serve for two years; in Trinidad and Tobago, children are sentenced to the Youth Training Center for three years if the sentence is imposed by a magistrates' court, and four years if sentenced is imposed by a superior court.

359. The IACHR encourages States to enforce laws allowing the state's response to offenses by children to be in proportion to the circumstances under which the offense was committed, the seriousness of the offense, the child's age and needs and other considerations.

c. The Duration of Custodial Measures

[263] Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System,* Austin Texas: University of Texas at Austin, LBJ School of Public Affairs, p. 38. Available at: http://www.utexas.edu/lbj/news/story/856/.

[264] Section 190.5(b) of the California Penal Code states that the penalty for murder with special circumstances committed by a minor of 16 to 17 is life in prison without the possibility of parole.

[265] Under Section 190.2(a)(22) of the California Penal Code, a gang murder can be construed as a murder with special circumstances, which carries a presumptive punishment of life without parole. Cited in: Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life Without Parole in California,* January 2008, p. 33. Available at: http://www.hrw.org/en/reports/2008/01/13/when-i-die-they-ll-send-me-home.

[266] Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life Without Parole in California*, January 2008, p. 22. Available at: http://www.hrw.org/en/reports/2008/01/13/when-i-die-they-ll-send-me-home.

360. When, in observance of the principles of last resort and the proportionality of the sentence, a State decides to sentence a child to some form of deprivation of liberty for violation of a criminal law, it must also make certain that the measure has an upper limit, which should be reasonably short.

361. Article 37 of the Convention on the Rights of the Child expressly prohibits capital punishment and life imprisonment without parole:

> ...Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

362. The CRC thus prohibits capital punishment. The same is not true of life imprisonment, which is not prohibited outright, but can be used provided the possibility of release exists. As for the scope of the possibility of release, the Committee on the Rights of the Child has interpreted this provision as follows: "the possibility of release should be realistic and regularly considered"[267].

363. The foregoing notwithstanding, the IACHR observes that the trend today is to eliminate the possibility of life sentences for children and adolescents who infringe the law. In the Commission's view, that trend is very much in keeping with the States' obligation under the American Convention and the American Declaration, which is to afford children special protection. In its General Comment on children's rights in juvenile justice, when interpreting the CRC, the Committee on the Rights of the Child recommends that all forms of life imprisonment be abolished inasmuch as "life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release."[268] For the Commission, children and adolescents must be treated in a manner that serves to preserve and cultivate their dignity, the objectives of juvenile justice and the State's special obligations to respect and guarantee their rights, so that all forms of corporal punishment, or any punishment that violates their personal integrity and thwarts their reintegration as constructive members of society, are to be eliminated**.**

364. The IACHR concurs that a sentence of life imprisonment for children under the age of 18 makes it impossible to achieve the purposes that punishment under the juvenile justice system is intended to serve, such as the child's rehabilitation and his or her reintegration into society. It echoes the Committee on the Rights of the Child when it recommended to the States parties that they eliminate all forms of life imprisonment in the case of offenders under the age of 18. In the Commission's view, the possibility, in law, of release is not *per se* sufficient to make a sentence of life imprisonment compatible with the international obligations the States have undertaken to afford children special protection, nor does it serve the purpose of punishment under the American Convention. Either way, the question of whether there are opportunities for periodic review, and whether the

[267] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 77.

[268] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 77.

principles governing the state's punitive authority vis-à-vis children are being observed, must be evaluated.

365. Even so, the Commission has received information indicating that in some States of the Americas, children can still be sentenced to death. From what the Commission has been told, a law is still in force in Saint Vincent and the Grenadines that prohibits capital punishment in the case of minors under the age of 16; in other words, capital punishment is a possibility in the case of minors between the ages of 16 and 18.[269]

366. Indeed, the sentence of life imprisonment is common in some States of the hemisphere. Through its system of cases and petitions, the Commission has learned of the situation in Argentina,[270] where Decree-Law 22,278 sets up a system in which the rules that apply to adults also apply to juvenile offenders for purposes of sentencing and the possibility of release. Under that law, children can face the maximum sentences allowed under Article 80 of the Argentine Penal Code, specifically, life imprisonment and confinement. The Commission observes that while Decree-Law 22,278 provides that juvenile offenders are to begin to serve their sentence once they turn 18 years of age, the States' obligation to afford special measures where juvenile justice is concerned is not based on the age at which the sentence will be served, but rather on the age at which the crime was committed. Therefore, based on the objectives and principles of juvenile justice, the state's response to such violations must be different from its response to violations committed by adults. The Commission is concerned that under these provisions, children who were found guilty of violating criminal laws before attaining adulthood are treated as adults and sentenced to life in prison, which is incompatible with the purposes that penalties under the juvenile justice system are intended to serve.

367. Similarly, according to the information the Commission has received, more than 2,500 persons are serving life sentences in the United States for crimes committed when they were still under 18 years of age. Also, the laws in Belize permit a sentence of life in prison without the possibility of parole, for crimes committed by persons under the age of 18.[271] In Saint Lucia,[272] Saint Vincent and the Grenadines[273] and

[269] Criminal Code of Saint Vincent and the Grenadines, Chapter 124, Section 24, cited in the report from the State to the Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Saint Vincent and the Grenadines, October 10, 2002, Document CRC/C/28/Add.18.

[270] IACHR. Report No. 26/08. Petition 270-02 (Argentina). Admissibility. *César Alberto Mendoza et al*. 14 March 2008.

[271] "The Committee on the Rights of the Child is deeply concerned about the fact that children as young as 9 years of age can be sentenced to life imprisonment without provision for parole". Also, the Committee noted that "As regards life imprisonment of children without provision for parole, to urgently review its domestic legislation, particularly the provisions of the Indictable Procedures Act (chapter 96 of the Laws of Belize) and the Court of Appeal Act (chapter 90 of the Laws of Belize), in order to bring its domestic laws into full conformity with the provisions and principles of the Convention" Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Belize, CRC/C/15/Add/252, 31 March 2005, paras. 70. and 71(c).

[272] The Committee was deeply concerned that "the sentence of life imprisonment is not excluded for persons below the age of 18 years as stated in the State party report" Committee on The Rights of the Child, Continues…

Jamaica,[274] a person who has committed a crime while still a minor can be sentenced to life imprisonment. In Antigua and Barbuda,[275] the law does not specify how long a person who has committed murder as a minor can be held, which means that confinement for life is possible.

368. The Commission was concerned at reports it received to the effect that in a number of Caribbean countries, children can be held for an indefinite period, and that review is not required. This can amount to a sentence of life imprisonment without the possibility of parole. For example, the Commission was told that in Barbados[276] and Dominica,[277] a child can be locked up for an indefinite period of time, at the discretion of the Governor-General and President, respectively.

369. The Commission also notes that while a number of States in the hemisphere prohibit life imprisonment, a number of States also have laws that prescribe very long maximum sentences. For example, according to the information the Commission received, the maximum sentence in Costa Rica is 15 years; in Chile 10 years; 8 years in Honduras, Paraguay and Colombia; and 7 years in El Salvador. However, according to information the Commission has obtained, under El Salvador's 'Anti-Mara' Law, the maximum sentence could be extended for up to 20 years.[278] Similarly, under Peru's Law to Counter Aggravated Terrorism, children between 16 and 18 years of age can be sentenced to no less than 25 years. In the Commission's view, this type of legal solution is

…continuation
Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Saint Lucia, CRC/C/15/Add.258, 21 September 2005, para. 72.

[273] Information supplied by the Commission by the Global Initiative to End All Corporal Punishment of Children.

[274] Jamaica's Child Care and Protection Act, Article 78(1).

[275] In para. 68 of its 2004 Concluding Observations regarding Antigua and Barbuda, the Committee on the Rights of the Child expressed concern over "the possibility that a person under 18 years can be sentenced to life imprisonment for murder." The Committee also observed that "Persons under 18 years of age can be sent to prison, possibly for life, for murder or treason, since, by the State party's own admission, the law does not stipulate the length of such incarceration." Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Antigua and Barbuda, CRC/C/15/Add.247, November 3, 2004, para. 68.

[276] Section 14 of Chapter 138 of Barbados' Juvenile Offenders Act provides that "The sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years; but in lieu thereof the court shall, notwithstanding anything in this or in any other Act, sentence him to be detained during Her Majesty's pleasure, and if so sentenced, he shall be liable to be detained in such place and under such conditions as the Governor-General may direct and whilst so detained shall be deemed to be in legal custody".

[277] Section 3(1)(b) of Chapter 10:31 of Dominica's Offences against the Person Act states that a person convicted of murder when he was under the age of 18 years shall not have the sentence of death pronounced or recorded against him. The individual would instead be detained in such a place and under such conditions as the President may direct.

[278] Solana Río, Emilio, *Estadísticas de administración de justicia en Centroamérica* Statistics on the administration of justice in Central America, San José, Costa Rica, December 13, 2007.

incompatible with the principle of the brevity of the deprivation of liberty applicable to minors.

370. In the case of minors, prison sentences that are excessively long violate the provision of the Convention on the Rights of the Child under which imprisonment is to be for the shortest appropriate period possible. They also violate the States' obligations under Article 19 of the American Convention and Article VII of the American Declaration, which recognize children's rights to measures of special protection. Such sentences also defeat the purpose of penalties in juvenile justice.

371. The Commission urges the States to establish, by law, the maximum duration of the sentences that minors held responsible for violating the law can receive, and to ensure that the length of the sentence is suited to a child's age and development, recognizing that the adverse effects of incarceration are even more pronounced in children. The Commission also recommends that the States abolish the death penalty and life sentences for minors.

d. The Periodic Review of Custodial Measures

372. The principle requiring that deprivation of liberty be a measure of last resort and for the shortest period of time possible requires that States introduce mechanisms to make periodic review of custodial sentences possible in the case of juvenile offenders. If circumstances have changed and the child's confinement is no longer necessary, States have a duty to release them, even when they have not served out the full term of the custodial measure ordered in each case. States must therefore ensure that their laws provide for early release programs.

373. Interpreting Article 25 of the CRC, which provides for periodic review of the child's treatment and other circumstances related to his or her deprivation of liberty, the Committee on the Rights of the Child has emphatically stated that "the possibility of release should be realistic and regularly considered."[279]

374. Rule 28(1) of the Beijing Rules provides that:

> Conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.

375. Some States in the region have made provision for early release programs. From the information it obtained, the Commission has learned that these programs are of various types, which include: permits that allow the child to return to his or her family and community on certain days; regular time-off regimes (every weekend, for example); replacement of the custodial measure with other measures, such as semi-release or non-custodial measures.

[279] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 77. See also Havana Rules, Rule 79.

376. In Uruguay, for example, the periodic review involves an assessment of whether the goals of the custodial measure or any other penalty have been accomplished. Article 94 of Uruguay's Child and Adolescent Statute provides that an order is to be issued as soon as it is established that the socio-educational purpose has been accomplished. The applications to replace, modify or terminate the measures will give rise to a hearing at which the child, his or her legal representatives, defense counsel and the Public Prosecutor's Office will participate.

377. In the case of Brazil, where a child can be deprived of his or her liberty for no more than three years –doubtless one of best pieces of legislation in terms of compliance with the brevity principle-, Article 121 of the Child and Adolescent Statute also requires that the custodial measure be reviewed every six months until the child reaches the age at which he or she must be released, which is 21.

378. Article 371 of Ecuador's Child and Adolescent Statute provides that the judge can modify or replace the sentence imposed, if the report prepared by the team of experts from the institution in which the child is serving his or her sentence is favorable, and any of the following circumstances is present: a) the child has, by the time he or she turns 18, served half his or her sentence; b) the Director of the custodial facility for juvenile offenders requests it; and c) every six months, if the child or his or her representative so request.

379. All the Central American countries allow a custodial measure to be replaced by a non-custodial measure; a number of States allow conditional execution of a custodial sentence, as in the case of Costa Rica,[280] Guatemala,[281] and Panama.[282]

380. In Canada, a child's custodial sentence is periodically reviewed to determine whether he or she should be released earlier than stipulated in the sentence. Under Canadian law, a portion of a child's sentence, normally one third, must be served in the community. The objective of this law is to ensure a period of transition between the time the child leaves the institution and is sent back to his or her community, which also gives the parole department at least one third the time of the sentence to assist the child in rejoining his or her community. Planning for the child's release begins once the child is subject to the custodial measure, and plans for his or her re-assimilation are tailored to the specific child's needs, with a social worker who specializes in juvenile parole and who will also be responsible for following up on the plan's implementation.[283]

381. Belize, too, has an early release program. Children incarcerated in Belize's central prison, run by the Kolbe Foundation, can be paroled once they have served

[280] Juvenile Criminal Justice Act, Article 132.

[281] Comprehensive Child and Adolescent Protection Act, Article 254.

[282] Law 40, Article 143.

[283] Youth Criminal Justice Act, Section 94(3). See also, N. Bala and Anand, *Criminal Justice Law*, Toronto: Irwin Law, 2009. Ch. VIII (Sentencing Under the Youth Criminal Justice Act).

one third of their sentence. They are required to appear before a Parole Board, which will decide whether they should be granted parole. Once they have served two thirds of their sentence, they can apply for release.

382. Other types of early release programs in the English-speaking countries of the region include parole, which means that the children must meet certain conditions if they want to be released early. As a rule, parole officers oversee compliance with the parole conditions. Nevertheless, from the information the Commission has obtained, it appears that not many children are benefitting from the parole programs. In Suriname, for example, officials at the Santo Boma prison told the Commission during its visit that, in 2007, 11 children were released on parole; in 2008 that figure was 8.

383. The IACHR observes with concern that the periodic review of the custodial measure does not occur in all States of the region; in some States, there is no possibility of early release. The Commission observes that in those States that do allow early release, the conditions for it are often too severe. These conditions are set by the court that orders early release, without regard for the principles of the proportionality of the sentence and the principle of minimum intervention.

384. As happens in the case of the diversion programs and the alternative, non-custodial measures, when conditions are imposed for a child's early release, they must not be overly intrusive; instead they must be in proportion to the offense for which the child was found guilty. The alternative, non-custodial measure ought not to represent a temporary extension of the socio-punitive control over the child. It is therefore unacceptable for the non-custodial measure that replaces the custodial measure to effectively prolong the time of the sentence the child was originally given for an offense.

385. The Commission also observes that in States where early release is allowed, the latter is often contingent upon an application from the parents of the child being held. For example, during the visits the Commission made in preparation for this report, it learned that in Guyana, parents can apply to the Minister of the Interior for their child's early release, but few parents know this and no efforts are made to inform them of this rule.

386. In the Commission's view, early release must be based on a procedure established in the respective law and ought not to depend on a specific request, whether from the child or his or her parents or representatives, or defense counsel. All children subject to custodial measures must have representation to ensure that they are kept fully informed of the opportunities for early release and that those opportunities are used to good effect.

387. The Commission emphasizes how vital it is that States establish mechanisms through which children who apply for early release, and even parole, are able to receive assistance from an officer who specializes in facilitating the child's re-entry into

the community.[284] The Commission will discuss this point at greater length in the section devoted to the measures subsequent to confinement.

388. The IACHR again points out that it is the obligation of the States to set up mechanisms by which the custodial measures that children under the age of 18 are serving can be reviewed, so that they can apply for early release programs when there is no reason why their incarceration should continue.

e. Contact with Family and Community

389. In application of the principle of last resort, States must ensure that children will not be separated from their families except in exceptional circumstances. As the Inter-American Court has held:

> The child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary…The State, given its responsibility for the common weal, must likewise safeguard the prevailing role of the family in protection of the child; and it must also provide assistance to the family by public authorities, by adopting measures that promote family unity [285].

390. For a child, contact with family and community is especially important when the time comes to ensure that a child, who has been subjected to some custodial measure, will be successfully re-assimilated into society. Therefore, when incarcerating or otherwise confining a child, every effort must be made to ensure respect for his or her right to contact with family, community and friends.[286] This contact can be by allowing correspondence, authorized time outside the facility, or frequent and regular visits.[287]

391. The responses received to the questionnaire the Commission sent to the States in preparing for this report, make reference to rules recognizing visitation rights but not to the actual exercise of that right. The Commission has been told that this may be because there are no records showing the frequency of the visits that each child deprived of their liberty receives, which suggests that the States are not diligently monitoring to ensure that this right is exercised.

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[284] The Beijing Rules, Rule 28.2.

[285] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002**.** Series A No. 17, paras. 77 and 88.

[286] IACHR, Report No. 38/96, Case 10.506 (Argentina), Admissibility and Merits, X v. Y, 15 October 1996.

[287] *See*, Convention on the Rights of the Child, Article 37(c); The Havana Rules, Rules 32 and 60; The Beijing Rules, Rule 26.5; Economic and Social Council, Resolution 1997/30, 36th plenary meeting, Administration of juvenile justice, Annex Guidelines for action on children in the criminal justice system, of July 21, 1997, Guideline 20.

392. Some States in the Caribbean answered the Commission's request for information and from their responses one can infer that the exercise of this right varies greatly from one country to the next. For example, Saint Lucia reported that 100% of the children incarcerated or otherwise confined had been visited by family members, friends or members of the community within the last 3 months; in Suriname this figure is 40%, while in Guyana the figure is between 5% and 10%.

393. The right to receive visits and have contact with family means that the detention facilities must be geographically accessible to the family and must have facilities that allow for some degree of privacy in contacts with the family.[288] States must have decentralized centers, preferably small in size, located near the children's hometowns. The Committee on the Rights of the Child has observed that "in order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family".[289]

394. Rule 61 of the Havana Rules provides that:

> Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted, and should be assisted as necessary in order effectively to enjoy this right. Every juvenile should have the right to receive correspondence.

395. Contact with the community must ensure, within reasonable limits, access to education and vocational training within the community. Centers in which juvenile offenders are held must be set up and form part of the community's social, economic and cultural environment.[290] When children who are subject to custodial measures participate in community activities, they ought not to be required to use clothing that identifies them as institutionalized children.

396. Nevertheless, the Commission has received information in the process of preparing this report to the effect that programs for serving sentences tend to be located in capital cities or in departmental capitals or major cities, which makes life even more difficult for children who are sent there from remote areas, and who virtually lose contact with their families, with the result that re-assimilation into the family and the community never really happens

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[288] The Havana Rules, Rules 30 and 60.

[289] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 87 and 90.

[290] The Beijing Rules, Rule 25.1. *See also* European Rules for juvenile offenders subject to sanctions or measures, para. 53.5:

> Juvenile institutions shall be located in places that are easy to access and facilitate contact between the juveniles and their families. They should be established and integrated into the social, economic and cultural environment of the community.

397. By way of example, a study conducted of juvenile detention facilities in Uruguay found that 86% of the children said they had visitors, and 14% said they did not. But the experience of incarcerated children from Montevideo was quite different from that of their counterparts in the country's interior, where only 76% of those interviewed said that they had had visitors.[291] Likewise, officials from the Commission's Executive Secretariat who visited Guyana in preparation for this report were told that the one juvenile detention center in Guyana was a 30-minute drive from the capital, Georgetown, followed by a 30-minute boat ride, and then a 30-minute drive by car.[292]

398. The Office of Peru's Ombudsman said the following about this problem:

> The fact that juvenile detention facilities are located in certain cities in the country means that there are areas where, if the court orders that a child be confined to such a facility, the child will be a considerable distance away from family with the result that he or she will receive few if any visits from family members. This will cause the family bonds to weaken or even break. When that happens, the child's right to family unity will have been seriously restricted.[293]

399. Similar information was reported to the Commission in connection with Chile:

> One practical problem that occurs mainly in the Metropolitan Region is the remote location of a number of juvenile facilities … Elsewhere, the children and adolescents are confined to centers that are too far removed from their communities or are difficult to reach. This makes communication with family members difficult; the latter cannot afford the outlay of time and money that visiting those centers on a regular basis would mean.[294]

400. Cases like Uruguay are the exception, as it provides resources to parents, guardians and other family members who otherwise would not be able to afford to visit the centers for financial reasons. When this kind of help is provided, it is not because the law so stipulates, but rather because the juvenile detention facilities have made it their

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[291] Observatorio del Sistema Judicial Observatory of the Judicial System, Privados de libertad Incarcerated (Uruguay). *La voz de los adolescentes* The Voice of Adolescents, Movimiento Nacional Gustavo Volpe – United Nations Children's Fund, UNICEF, Montevideo, 2008.

[292] Information obtained by Commission staff that traveled to the New Opportunities Corps in Georgetown, Guyana.

[293] Office of the Ombudsman (Peru), *La situación de los adolescentes infractores de la ley penal privados de libertad (supervisión de los centros juveniles-2007)* The situation of juvenile offenders supervisión at juvenile detention facilities-2007, Ombudsman's Report No. 123, Lima, 2007, p. 72.

[294] OMCT – OPCION, *Derechos de los niños en Chile* Children's rights in Chile, Informe Alternativo al Comité de los Derechos del Niño de las Naciones Unidas sobre la aplicación de la Convención sobre los Derechos del Niño en Chile Alternative Report to the United Nations Committee on the Rights of the Child on the application of the Convention of the Rights of the Child in Chile, 2007.

administrative policy. According to the reports the Commission received during its visits in preparation for this report, this kind of financial assistance that enables family members to visit children deprived of their liberty is available in some Caribbean countries if the family applies to the pertinent ministry. However, the vast majority of the families are not aware of this.

401. States have an obligation to ensure that visits by family members are comfortable and enable them to bond. During the course of the visits made in preparation for this report, the Commission learned of some of the best practices in the region. For example, the Youth Training Center in Trinidad and Tobago has family days, when families can visit their children and take part in recreational activities or meals to celebrate holidays. Visits of this kind enable families to spend several hours together and to interact in a more natural setting, quite different from visits in an office.

402. Conversely, according to the information received, in other States, needless restrictions are imposed on the visits that children deprived of their liberty can receive. According to the information supplied to the Commission, in Venezuela, for example, the visiting schedule is twice weekly; although special visits and family gatherings are allowed, they will depend on the good behavior of the child deprived of his or her liberty. In Guyana, families can only visit their children at the New Opportunities Corps every two months, half as often as inmates at the adult prisons. At the Wagner Center in Belize, families can visit their children every day, but can stay for 15 or 20 minutes.

403. Another concern is that normally, only members of the immediate family can visit. The Commission observes that it is important for children to receive visits from the extended family, as well as friends and members of the community. Children will be able to return to their communities when they leave the institution, and the more ties they maintain with the community, the easier their reintegration will be.

404. Both the IACHR and the United Nations have observed that a child's right to access to information by way of the media,[295] his or her privacy, private life and the confidentiality of his or her correspondence[296] must be respected. Nevertheless, the Commission has received information to the effect that books, magazines and newspapers are not allowed at some juvenile facilities in Peru, where correspondence is restricted to family members, and any incoming document must be checked first by the head of the facility, in the child's presence.[297] This is the practice in other States of the region as well.

405. The Commission must again observe that the child's contact with family and community is essential to his or her social reintegration, and is the only means to

[295] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st session, held March 3 to 14, 2008, Principle XVIII *in fine*; Havana Rules, Rule 62.

[296] Convention on the Rights of the Child, Article 16.

[297] Ombudsman's Office (Peru), *La situación de los adolescentes infractores de la ley penal privados de libertad (supervisión de los centros juveniles-2007)* The situation of incarcerated juvenile offenders supervision of juvenile facilities-2007), Informe Defensorial Nº 123 Report No. 123 of the Ombudsman's Office, Lima, 2007, p. 86.

offset –at least in part- the breakdown and harm that deprivation of liberty causes to the child and to his or her family ties.

2. The Criteria for Classifying Children and Adolescents Deprived of Their Liberty

406. In this report, the Commission has made reference to the States' obligation to separate children in whose lives it has intervened for the sake of assistance and protection from those that are under the juvenile justice system; it has also emphasized the obligation that States have to separate children being held in preventive detention from those already found responsible for violating criminal laws; it has emphasized the requirement that children deprived of liberty –whether in preventive detention or serving their sentence- must be segregated from the adult inmate population. But there are other criteria that States must also consider when classifying and segregating children deprived of liberty in order to protect their rights and prevent any possible harm or violence.[298] States must also take into account a child's age, personality and the seriousness of the offense that the child is alleged to have committed, or has been found to have committed. The Commission will now discuss some of these criteria.

a. Separation from Adults

407. Article 37(c) of the Convention on the Rights of the Child provides that "... every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so ...".

408. The need to house children deprived of their liberty in places separate from adults has repeatedly been emphasized by the Commission in the following terms:

> In the Commission's view, Article 5(5), taken in combination with Article 19 of the Convention, make clear the State's duty to house detained minors in facilities separate from those housing adults. It is obvious that the obligation that follows from Article 19, namely, to grant a child special protection, cannot be interpreted solely as requiring the creation of juvenile courts; instead, "the protection required by his status as a minor" also means that minors shall be housed separately from adults, in other words, in special juvenile facilities ...Under Article 5(6) of the Convention, "Punishment consisting of deprivation of liberty shall have as an essential aim the reform and social rehabilitation of prisoners". The Commission believes that, in the case of children, this aim is absolutely impossible to achieve in penal institutions in which children are forced to live alongside adult criminals.[299]

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[298] *See*, IACHR, *Report on the situation of Human Rights in Brazil*, 1997, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Chapter V, para. 32.

[299] IACHR, Report N° 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention*, 10 March 1999, paras. 125 and 126.

409. In the Commission's view:

> A child deprived of liberty must not be held incommunicado or in an institution for adults. The prison system is today a basic factor in embarcation on a career of crime because, just as the prison applies programs for the correction of offenders, so does it use mechanisms that consolidate delinquency[300].

410. The Court, too, has stated its opinion on this subject:

> To safeguard the rights of children detainees, and especially their right to physical integrity, it is indispensable for them to be separated from adult detainees [301].

411. The Inter-American Court has warned that failure to separate children exposes them:

> ... to conditions highly prejudicial to their development and makes them vulnerable to others who, as adults, could prey upon them[302].

412. According to information supplied by some States, detained children are generally segregated from adults. For example, in response to the Commission's questionnaire, Argentina reported that the institutions under the closed system -- which come under the authority of the National Secretariat for the Child, Adolescent and the Family and located in the city of Buenos Aires -- only house persons who are minors. However, it observed that in some provinces, children in conflict with criminal law are housed in provincial prisons.

413. At the same time, the Commission has received disturbing information on the situation in other States of the region. As a rule, the failure to segregate children from adults is because a number of States in the region do not include all children under the age of 18 under the umbrella of the special system of juvenile justice; instead, children aged 15, 16 and 17 are prosecuted in the regular criminal justice system and, if convicted, will be incarcerated in adult facilities.

414. But there are other cases, too. The Commission has learned, for example, that in Honduras, when it was discovered that over 800 children were being held in adult prisons, a nongovernmental organization filed 300 petitions of *habeas corpus* asking the court either to order the children released or to send them to facilities for children. All the petitions but one were allegedly denied. The Commission also learned

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[300] IACHR, *Annual Report 1991*, OEA/Ser.L/V/II.81, Doc.6, rev.1, 14 February 1992, p. 326.

[301] I/A Court H.R., *Case of Bulacio v. Argentina***.** Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 136.

[302] 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, para. 175.

that in Nicaragua, 28 convicted children were serving their sentence in the adult prison system.[303]

415. The Commission has also received disturbing information that concerns the situation of children detained or incarcerated in the United States. Under federal law, children are not to be housed in adult facilities, except for a narrow period before and after trial, or when they are in rural areas that have no access to juvenile facilities, or when the conditions for transporting them to juvenile facilities are not safe; even then, the law provides that they are to be separated from the adults, and not be visible to the adult inmate population, or within hearing distance of it. Nevertheless federal law does not require the same special segregation when a child is being tried in adult court. According to reports the Commission has received, children can be tried in adult court and can also be ordered to serve their entire sentence in an adult prison. The Commission learned that in just one day in 2008, there were 7,703 children under the age of 18 in local adult jails, and 3,650 in federal prisons.[304]

416. The information the Commission has received concerning certain Caribbean countries indicates that children tried in adult court serve adult sentences in adult prisons. In some Caribbean countries, even children tried in the juvenile justice system can be ordered to serve their sentences in adult prisons.

417. The situation is even worse elsewhere in some parts of the region. Some States do not have facilities for girls. In the Caribbean, for example, the available information suggests that only Jamaica, Guyana, Belize and Barbados have correctional facilities for girls, which means that in the other Caribbean States, if a female minor is convicted of violating the law, she is sent to the prison for adult women.

418. The Commission has also learned that in some countries of the region, boys are incarcerated in adult facilities because there is no space available in the centers for juvenile offenders. During its visit to Belize, for example, the Commission was told that while there are centers for juvenile offenders, 4 children were being held in the maximum security section of the Kolbe adult prison.

419. The Commission was also disturbed to learn that in some Caribbean countries, children can be transferred to adult prisons by law on the grounds that a child is deemed to be "of such an unruly character or so depraved a character" that he may be confined in an adult prison.[305]

420. The Commission observes that in some States, the juvenile detention facilities are housed inside the adult facilities, although an effort is made to keep children

[303] Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil*, Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009.

[304] Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System,* University of Texas at Austin, LBJ School of Public Affairs, Austin, 2009, p. xiv. Available at: http://www.utexas.edu/lbj/news/story/856/.

[305] *See, for example,* Section 7 of Antigua and Barbuda's Juvenile Court Act.

physically separated from the adult inmate population. According to information the Commission has received, the segregation is not always properly handled. For example, the Commission learned that in Chile, children come into contact with the adult inmate population in various ways: in the yard or inside the buildings, making the arrangement one of segregation in name only. The Commission was told that one of the principal causes of the problem is the poor prison infrastructure, which makes segregation impossible.[306] The Commission also learned that in Nicaragua, the children were separated from the adults by a wall, but they had to go through the adult quarters in order access the bathroom.[307]

421. The Commission must remind the States that the failure to segregate children and adults deprived of liberty is a violation of international human rights law. Accordingly, it is recommending that the States take measures to ensure that persons deprived of liberty are properly segregated by age and maturity, in order to prevent possible violence and abuse inside the prisons.

b. Segregation by Sex

422. The Commission again points out that male children and female children must be housed in separate facilities. The facilities that house girls must be staffed with personnel especially trained to address their particular needs.

423. The Commission was gratified to learn that all those States that answered the questionnaire sent out to compile information for this report have taken measures so that girls are held separately by reason of their sex. In most cases, the facilities for girls are completely separate; in a few cases, while the cells for women are separate from those for men, the facilities nonetheless house both sexes. For example, in its answer to the questionnaire, Ecuador reported that it has eight facilities for boys, two for girls and two facilities that house both boys and girls, where they have common recreational, eating and laundry areas, but where living quarters are separate. Costa Rica reported that the Zurqui Center houses children of both sexes but keeps boys separate from girls. Colombia reported that it has only one facility that houses both sexes, which is the In-Transit Facility, where the only common space is the recreation area.

424. Nevertheless, the Commission has learned that in some States, detained children are not separated by sex. At a number of institutions in the Caribbean, boys are not separated from girls. Guyana and Suriname, for example, have confinement centers that accommodate children of both sexes.

425. Most of the States that answered the questionnaire said that specialized services were available for health, pregnancy and nursing. Argentina, for example, reported that while the one closed-system institution that is exclusively for girls, the

[306] See also Universidad Diego Portales, *Informe de Derechos Humanos 2006 (hechos de 2005)* 2006 Report on Human Rights, (2005 facts).

[307] Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil* Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009.

Inchausti Institute, does not offer special services for girls who are mothers or pregnant, there are four juvenile detention centers that have agreements with the government of the city of Buenos Aires to house pregnant girls or girls with small children. In its answer to the questionnaire, Colombia also reported that pregnant girls ordered to serve custodial sentences are guaranteed health services, prenatal check-ups and psycho-prophylactic courses as well as counseling to help them deal with motherhood, and specialized medical care. Costa Rica, for its part, informed the Commission that girls housed in the one juvenile facility have access to the very same educational, cultural, recreational and other activities that the boys have; but girls also receive gynecological care and other specialized services. Costa Rica also reported that any pregnant girl receives the care that her condition requires. Arrangements are made with the judicial authorities so that the girl leaves the center prior to giving birth, generally by replacing the custodial sentence with non-custodial measures.

426. The Commission urges States to adopt the measures necessary to ensure that children deprived of their liberty are segregated by sex in such a way that children of both sexes have access to the same programs and services, and the facilities are able to offer girls all the specialized services they need, particularly regarding sexual and maternal health.

c. The Situation of Those Who Attain their Majority

427. It sometimes happens that a child serving a custodial sentence after being convicted of violating the law when he or she was not yet 18, turns 18 while serving his or her sentence. The Committee has specifically addressed this situation and has interpreted the rule of separation by age based on the best interests of the child. As the Committee observed:

> This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility[308].

428. The Commission fully concurs with the Committee's interpretation. The member States, for their part, gave different answers to the question concerning juvenile offenders who turn 18 while still in prison or confinement. A number of States do not have provisions stating that persons in a juvenile facility, when they turn 18, are to be transferred out of that facility. For example, Colombia's response to the questionnaire sent out to compile data for this report was that the institutions do not formally separate juvenile offenders from those who have attained their majority. From the information received, the Commission also observes that juvenile detention facilities in Central America

[308] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 86.

are still housing persons who have already turned 18; they represent 18.8% of the population in the juvenile justice system.[309]

429. Other States have set up a separate system specifically for those who attain their majority while serving their custodial sentence. In Costa Rica, for example, persons who attain their majority while serving a custodial sentence do not continue to be held alongside minors, but are not taken to adult facilities either; instead, they are transferred to a special system. According to what Costa Rica reported in answer to the Commission's questionnaire, persons who attain their majority are transferred to the Zurquí Juvenile Training Center and the Young Adult Center. Some girls who attain their majority are transferred to the Centro Buen Pastor, which shelters the older adult female population, but also has separate facilities for "young adults" sentenced under the Juvenile Criminal Justice Act.

430. The Commission has learned that in Argentina, Article 6 of the law provides that "custodial sentences that judges order in the case of minors are to be served in specialized institutions. If a minor attains his or her majority while in a special institution for minors, he or she shall serve the rest of his or her sentence in establishments for adults."[310] Despite this legislation, the Commission learned that in practice, juvenile offenders between 16 and 18 years of age who are serving a sentence of two years or longer are transferred to an institution for these specific age groups. If the child is deemed not to have been rehabilitated in the time spent at that institution, he or she will then go back to juvenile court where he or she will be prosecuted for the same violation of criminal law that he or she committed as a minor; this time the sentence imposed will be the sentence that an adult convicted of the same crime would receive. As a result, although Argentina does not transfer the person to adult court, the impact can be the same as if he or she were an adult.

431. Furthermore, in some States, provision is made for the possibility that children might be sent to adult prisons. According to the information the Commission received, in Canada, children who were sentenced as adults serve their sentences in juvenile institutions until they turn 18, at which point they are transferred to adult institutions; furthermore, the sentencing court may, under certain circumstances, order that they be sent to an adult facility even before they turn 18.[311] The situation is particularly serious in those States that have very high maximum periods of incarceration, or that allow sentences of life imprisonment; in those States, children who attain their majority while serving a custodial sentence in a juvenile facility are transferred to adult institutions.

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[309] DNI Costa Rica, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2004, p. 79. Available at http://www.dnicostarica.org/wordpress/wp-content/uploads/pdf/violencia_juvenil/Carceles.pdf.

[310] Decree-Law 22,278 of August 25, 1980, amended by Law 22,803 (Argentina), Article 6.

[311] Bala, Carrington and Roberts, *Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success*, *Revue Canadienne de Criminologie et de Justice Pénale*, April 2009, p. 158.

432. In the Commission's view, sentences punish minors as if they were adults, even when the sentence is ordered by the juvenile court; constitute violations of the minors' rights and of the principles of the juvenile justice system. The Commission censures the practice of sending minors to adult detention facilities, regardless of the circumstances, as doing so puts the minors in serious peril and at grave risk of subsequent violations of their rights.

433. The Commission considers that when persons incarcerated as children turn 18 while serving their sentence, a review hearing must be held to determine whether the person in question should remain incarcerated or be released, or whether the remaining portion of the custodial sentence can be commuted and replaced with a non-custodial measure. The Commission is recommending that the hearing evaluate the possibility of putting a young person who has attained his or her majority in a special program, to ensure that his or her rights are not violated by transferring him or her to an adult facility, and also to ensure that the rights of the other children are not imperiled by leaving the young adult in the juvenile facility.

d. The Situation of Children and Adolescents with Ties to *Maras* and Gangs

434. The Commission has learned that in some States where *maras* or gangs are a problem, the juvenile detention centers classify these children not on the basis of either age or sex, but on the basis of whether they belong to gangs active in their territory. In other words, children deprived of liberty are housed in separate facilities or cellblocks, according to the gang to which they belong, or with which they are alleged to be affiliated. According to what the Commission has been told, while this segregation has not eliminated violence in the detention facilities, it has succeeded in reducing the violence considerably.

435. Regarding these practices, the Commission believes that the States must strike a proper balance between protecting the welfare of children deprived of their liberty and developing a classification system that meets the standards addressed in this section. The fact that gangs or *maras* may have an impact on how a juvenile detention facility is run, should not mean that classification standards should be ignored. Furthermore, the state's protection of the welfare of children in its custody must extend to all children, irrespective of whether or not they belong to a certain group.

436. The Commission is troubled by the fact that the detention conditions of children who belong to gangs or *maras*, tend to be worse than those of the other inmates. For example, in its report on its visit to Honduras, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment found that "in general, certain groups of individuals were segregated from others, such as the members of the *maras* and those considered to be '"extremely dangerous"'. Many get no direct sun in their living area, which amounts to discrimination against them in relation to other

prisoners, and are denied the conditions for a decent life, without any legal basis for such treatment."[312]

3. The Human Rights of Children and Adolescents Deprived of Their Liberty

437. Depriving a child of his or her liberty for a violation of the law does not give the state the authority to curtail other rights of that child. Furthermore, when States order custodial measures for children, they become the guarantors of those children's rights, and accordingly must take positive measures to ensure that the children in their custody effectively enjoy all their rights. The Commission has received information concerning violations of the human rights of children deprived of liberty. In this section, the Commission will address the specific obligations incumbent upon the States to guarantee the human rights of children and adolescents deprived of their liberty.

438. The Commission must emphasize that any deprivation of liberty must be done in such a way as to guarantee physical integrity and unconditional respect for the human rights of the detained children.[313] The Inter-American Court has held that deprivation of liberty sometimes invariably leads to the infringement of human rights other than the right to personal liberty.[314] The right to personal privacy and the right to family privacy may be restricted, for example. However, the Court has held that this restriction of rights, which is a consequence or collateral effect of the deprivation of liberty, must be strictly limited,[315] as any restriction of a human right is justifiable under international law only when it pursues a legitimate purpose and is adequate, necessary and proportionate, i.e. necessary in a democratic society.[316]

439. At the same time, the Court has been clear in emphasizing that other rights –such as the right to life, the right to physical integrity, freedom of religion and the right to due process- cannot be restricted under any circumstances during the deprivation of liberty, and any such restriction is prohibited by international law. According to the

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[312] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras*, CAT/OP/HND/1, February 10, 2010, para. 239.

[313] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st session, held March 3 to 14, 2008, Principle I.

[314] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru***.** Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 108; *Case of Maritza Urrutia v. Guatemala*. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103, para. 87, and *Case of Juan Humberto Sánchez v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 96.

[315] *Cf.* 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 13 May 1977, para. 57.

[316] I/A Court H.R., *Case of Tristán-Donoso v. Panama*. Judgment of January 27, 2009. Series C No. 193, para. 56.

Court, persons deprived of their liberty are entitled to have those rights respected and ensured just as those who are not so deprived.[317]

440. Furthermore, the Court has consistently stated that the State is the guarantor of the rights of persons held in its custody inasmuch as prison authorities exercise full control over those in their custody.[318] This role of the State as guarantor is all the more important when the person in its custody is a minor. As the Court held, this means that the State must perform its role as guarantor by taking all the precautions in view of the natural vulnerability, lack of knowledge and defenseless naturally exhibited by minors in such circumstances.[319]

441. When the person deprived of liberty is a minor under the age of 18, the Inter-American Court has held that the State has an added obligation to provide the special protection to which minors are entitled by virtue of their age:

> ... to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty, as the child's detention or imprisonment does not deny the child his or her right to life or restrict that right[320].
>
> ... when the person the State deprives of his or her liberty is a child ... it has the same obligations it has regarding to any person, yet compounded by the added obligation established in Article 19 of the American Convention. On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child[321].

442. Concerning the State's role as guarantor, the Commission has observed that:

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[317] 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, para. 155.

[318] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru***.** Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 98; *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 111, and *Case of Bulacio v. Argentina***.** Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 138.

[319] I/A Court H.R., *Case of Bulacio v. Argentina***.** Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 126.

[320] I/A Court H.R., *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 3, 2007, *point. 8*; *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 4, 2006, *point* ten; *Case of the "Juvenile Re-education Institute".* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 160.

[321] I/A Court H.R., *Case of the "Juvenile Re-education* Institute. Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004,. Series C No. 112, para. 160.

> ... the State, by depriving a person of his liberty, places itself in the unique position of guarantor of his right to life and to physical integrity. When it detains an individual, the State introduces that individual into a "total institution"--such as a prison--where the various aspects of his life are subject to an established regimen; where the prisoner is removed from his natural and social milieu; where the established regimen is one of absolute control, a loss of privacy, limitation of living space and, above all, a radical decline in the individual's means of defending himself. All this means that the act of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.[322]

443. In the particular case of children subjected to custodial measures, the IACHR has also indicated that when the time comes to apply these measures, the best interests of the child have to be considered, which means affording children deprived of their liberty the special measures required by the added rights that they, as children, enjoy that others do not.[323]

444. Article 37(c) of the Convention on the Rights of the Child provides that States shall ensure that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age ....

445. The Tokyo Rules provide that in the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.[324]

446. Rule 26(2) of the Beijing Rules provides that:

> Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development.

447. The Inter-American Court has interpreted the obligations that the States have by virtue of Articles 6 and 27 of the Convention on the Rights of the Child, under which the right to life includes the State's obligation to ensure "to the maximum extent

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[322] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention,* March 10, 1999, para. 135.

[323] IACHR, Written and oral comments concerning Advisory Opinion OC 17/02. *In* I/A Court H.R., *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, p. 22.

[324] Tokyo Rules, Rule 3.10.

possible the survival and development of the child." The Committee on the Rights of the Child has interpreted the word "development" in its broadest sense, as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development.[325] The Court therefore held that in the case of children deprived of liberty, States have an obligation to, *inter alia,* provide them with health care and education, so as to ensure that their detention will not destroy their life plans.[326]

448. Rule 13 of the Havana Rules provides that:

> Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

449. The Commission again asserts that States must ensure the human rights of all children deprived of their liberty. States also have a duty to conduct activities that serve to neutralize or reduce the de-socializing effects of the deprivation of liberty. Any punitive measures must, to the greatest extent possible, avert violations of rights other than the right to freedom of movement, such as the right to education and health, and serve to strengthen family bonds and community ties.[327]

450. One important preventive measure is to ensure that, when they enter a detention facility, children are informed of their rights and receive all information concerning the rules and regulations at the facility.[328] The Commission commends the practice in Venezuela where the internal rules of detention facilities even make provision for assemblies, held to give the juvenile inmates an opportunity to express their opinion concerning the operation of the centers. The State informed the Commission that these

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[325] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 12.

[326] 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, para. 161. In the same sense, I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 80-81, 84 and 86-88; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 32, para. 196; and Beijing Rules, Rule 13.5.

[327] Havana Rules, Rules 12 and 87(f).

[328] Havana Rules, Rule 24.

> On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full comprehension.

See also IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st regular session, held March 3 to 14, 2008, Principle IX.1 European Rules for juvenile offenders subject to sanctions or measures, paras. 62.3 and 62.4.

assemblies are attended by the juvenile inmates, the technical and executive staff, a sentence enforcement officer, a public defender, a representative of the State Council on the Rights of Children and Adolescents, and a representative of the Ombudsman's Office, to guarantee and restore any violated rights. In Brazil, too, the State reported that each center is to draw up its own internal rules, with staff and children alike involved in the process.

451. In the final analysis, States must ensure that the law does not needlessly restrict the rights of children deprived of their liberty; but they must also ensure that the law is properly enforced, to which end they are to establish programs to make certain that the children are able to effectively exercise their rights while being subject to some custodial measure. Furthermore, States must ensure that the resources needed for those rights to be exercised in practice are available. Lack of resources is no excuse for violation of children's human rights in the juvenile justice system.

452. Nevertheless, the information the Commission has received indicates that children deprived of liberty in the Americas have been, and continue to be, the victims of torture, sexual abuse, humiliation and unacceptable disciplinary measures such as solitary confinement, corporal punishment and other forms of violence. Children deprived of liberty have great difficulty exercising their rights, especially their rights to an education, training, recreation and health. The Commission will now examine some of the rights that are most frequently violated when children are deprived of their liberty.

a. The Right to Life and the Right to Physical Integrity

453. In those cases where States find it necessary, as a last resort, to subject a child to a sentence of incarceration or other custodial measure, they have an obligation to guarantee that child's right to live in conditions that are compatible with his or her dignity, and to fulfill its obligation to guarantee the child's right to life and right to physical integrity.[329]

454. The Court has consistently held that the right to life is a fundamental right within the American Convention, as it is the condition *sine qua non* for the enjoyment of all other rights.[330] For its part, the right to physical integrity is so important that the American Convention protects it specifically by, *inter alia,* the prohibition of torture and

[329] See I/A Court H.R., *Case of Bulacio v. Argentina***.** Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 126 and 138; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, para. 165; and I/A Court H.R., *Case of Cantoral-Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 87.

[330] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 128; I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. 152; and I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 110.

cruel, inhuman and degrading treatment, and by stipulating that it cannot be suspended in states of emergency.[331]

455. The Court has also clarified that the right to life and the right to physical integrity require not only that the State respect them (a negative obligation), but also that the State adopt all appropriate measures to ensure their enjoyment (a positive obligation), in furtherance of the general obligation that the State undertook in Article 1(1) of the Convention.[332]

456. In the case of children deprived of their liberty, States also undertake the same obligations they have with respect to any person; they also have the added obligation established in Article 19 of the American Convention and Article VII of the American Declaration. Where children are involved, therefore, the State must undertake its role as guarantor with greater care and responsibility, and must undertake special measures in the light of the principle of the child's best interests.[333]

457. Thus, to protect a child's life, the State must be particularly attentive to that child's circumstances while deprived of his or her liberty, so that the child's detention or imprisonment does not deny the child his or her right to life, or in any way restrict that right.[334] As for the right to physical integrity, because the prohibition of torture and cruel, inhuman or degrading treatment or punishment is now part of the international *jus cogens,*[335] States must take into account a child's status as such and apply the highest standard when determining whether the treatment to which a detained child has been subjected constitutes cruel, inhuman or degrading treatment or punishment.[336]

458. The Commission has observed the following in this regard:

> ... in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as

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[331] American Convention on Human Rights, Articles 5 and 27.

[332] 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, para. 158.

[333] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 124, 163-164, and 171; *Case of Bulacio v. Argentina***.** Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 126 and 134; and *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 32, paras. 146 and 191. In the same sense, cf. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

[334] 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, para. 160.

[335] *Cf*. Convention on the Rights of the Child, Article 37,b), and *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 112.

[336] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 170.

> age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity, for instance[337].

459. The Court, too, has held that:

> ... the fact that the alleged victims were children requires applying the highest standard in determining the seriousness of actions that violate their right to physical integrity.[338]

460. Respect for the rights to life and to physical integrity in the case of children means that all forms of violence within the juvenile justice system must be prohibited. This applies to all phases of the process, from the first contact with the police authorities to the carrying out of the sentence.

461. Here, the Court has held that:

> ... the States Party to the American Convention are under the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities[339].

462. Furthermore, as the Commission has observed on previous occasions, the State's duty to protect is not fulfilled merely by preventing violence on the part of its agents; instead, it must also prevent any form of violence from third parties. As the IACHR stated:

> The obligation that follows from being the guarantor of these rights means that agents of the State must not only refrain from engaging in acts that could harm the life and physical integrity of the prisoner, but must also endeavor, by all means at their disposal, to ensure that the prisoner is maintained in such a way that he continues to enjoy his fundamental rights, especially his right to life and to physical integrity. Thus, the State has a specific obligation to protect prisoners from attacks by third parties, including other inmates[340].

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[337] IACHR, Report N° 33/04, Case 11.634, *Jailton Neri Da Fonseca* (Brazil), Merits, 11 March 2004, para. 64.

[338] I/A Court H.R., *Case of the Gómez-Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 170.

[339] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 87 and operative para. number 9.

[340] IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits*, Minors in Detention,* March 10, 1999, para. 136.

463. The Court, too, has held that:

> ... the State's obligation to protect all persons subject to its jurisdiction includes the duty to control the action of private third parties, an obligation enforceable as against all[341].

464. On many occasions, the Commission and the Court have been called upon to examine situations involving the mistreatment of children deprived of their liberty and the deplorable conditions to which they were subjected.[342] No state in the hemisphere is immune to the problem. And in spite of repeated recommendations from the Commission and the Court, the information on the situation within the region is not encouraging.

465. By way of example, the IACHR observes that in Guatemala, the United Nations Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions documented a situation in which the authorities had allegedly failed to intervene to prevent acts of violence, and reportedly never properly investigated what had happened:

> On 22 June 2006, it was again the turn of the Mara 18 detainees to kill detainees of the rival gang the Mara Salvatrucha held at Etapa II…The report found that some wardens contributed to arming the killers and enabling them to enter the cells of the victims, while the prison authorities and the police failed to intervene to stop the killing…The report of the Policía Nacional Civil notes that it appears from the video that a warden had unlocked the doors to the Mara Salvatrucha section…the gang members shot and attacked their victims with stones, severing limbs and crushing skulls. Forces of the Policía Nacional Civil entered the detention facility when the violence started, but inexplicably

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[341] I/A Court H.R., *Matter of Yare I and Yare II Capital Region Penitentiary Center regarding Venezuela*, Provisional Measures, Order of the Inter-American Court of Human Rights of 30 March 2006, *point* fourteen; I/A Court H.R., *In the Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela*, Provisional Measures, Order of the Inter-American Court of Human Rights of 9 February 2006, *point* sixteen; *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 4, 2006, *point* nine and Order of the Inter-American Court of Human Rights of July, 3 2007, *point* seventeen. In the same sense, 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, para. 184.

[342] IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev.1, 1997, Chapter 6; *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29 rev. 1, 1997; Chapter V (especially para. 32 *et seq.); Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24,1998; and *Third Report on the Situations of Human Rights in Colombia,* OEA/Ser.L/V/II.102, Doc. 9, rev. 1, February 26, 1999; I/A Court H.R., *Case of Cantoral-Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 87; I/A Court H.R., *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 78; I/A Court H.R., *Case of Castillo-Petruzzi et al. v. Peru*. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 195; I/A Court H.R., *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 126; 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, para. 151.

> withdrew after 2 minutes and returned only 41 minutes later. When investigators of the Ministerio Público recorded the crime scene, they did not inspect the dormitories in which the attack had obviously been prepared. They also left behind skull fragments, stones used as weapons and ammunition shells.[343].

466. In Honduras, incarcerated children and adolescents who are members of *maras* also endure deplorable conditions, as the expert in the case of *Servellón García et al. v. Honduras* testified before the Inter-American Court of Human Rights:

> Conditions at the juvenile detention centers are no better than the conditions described in the adult prisons. The children and adolescents, presumed members of *maras,* live in cells with no ventilation, no bathrooms and tied by the feet and hands, forced to relieve themselves in the cells. These and other factors indicate that members of *maras* or gangs continue to be segregated from the rest of the population in adult prisons and in juvenile detention centers.
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> A palpable example of the situation prevailing in the detention centers is the "Renaciendo" Center. In late 2005, the Office of the Special Prosecutor for Human Rights brought three charges against eleven administrative officials and police personnel, accusing them of criminal abuse and torture of juvenile inmates; on November 4, 2005, the Secretariat of Public Health, through the Metropolitan Sanitation Region, issued an opinion in which it recommended that the facility be shut down immediately because of the unhealthy conditions in the units housing convicted inmates, those housing children in preventive detention and those housing the inmates belonging to *maras* 18 and 13 were unsanitary.[344]

467. Finally, the Commission takes note of the concern expressed by the United Nations Committee on the Rights of the Child in 2010, in connection with allegations of torture and abuse of children by law enforcement officers, in the context of the fight against "maras".[345] According to the information supplied to the Committee on the Rights of the Child in 2010, in El Salvador, *maras* appeared to have over 10,000

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[343] Human Rights Council, *Civil and Political Rights, including the Questions of Disappearances and Summary Executions*, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/4/20/Add.2, 19 February 2007, paras. 38 and 39.

[344] Rivera Joya, Reina Auxiliadora, *Dictamen pericial sobre la situación de violencia contra los niños y jóvenes en situación de calle, en conflicto con la Ley y miembros de maras en Honduras y la cuestión de impunidad que existe en el país con relación a estos crímenes* Expert opinion on the violence against children and adolescents who live on the street, are in conflict with the law or are members of *maras* in Honduras and the impunity in Honduras with respect to these crimes, pp. 41 and 42. The document is available in Spanish in the Inter-American Court's file on the *Case of Servellón García et al.,* available at: http://www.corteidh.or.cr/expediente_caso.cfm?id_caso=250.

[345] Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention. Concluding Observations: El Salvador*, CRC/C/SLV/CO/3-4, 17 February 2010, para. 43.

members, mainly children between the ages of 16 and 18. The Committee expressed concern at the lack of a juvenile justice system that met the standards of the Convention; the repressive approach that the State had used thus far to deal with juvenile delinquency, notably against "maras", and the resulting increase in the recourse to incarceration in the case of children; the serious lack of alternatives to incarceration; the fact that law enforcement officials, judges and prosecutors were not receiving systematic training about the Convention and juvenile justice standards; the limited access that children deprived of their liberty had to education; and the information reporting that at least five adolescents had died in 2009 in rehabilitation centers where children were deprived of their liberty.[346]

468. In this report, the Commission is again urging the most scrupulous respect for the rights to life and to physical integrity in the case of children deprived of liberty, in keeping with the principles and standards set forth in this chapter.

[346] Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention. Concluding Observations: El Salvador*, CRC/C/SLV/CO/3-4, 17 February 2010, para. 87.

b. The Right to Food

469. Because children are still growing, the right to food that is adequate for health and sufficient for strength is of fundamental importance, and States that have juvenile offenders in their custody have an obligation to guarantee this right.

470. Rule 20 of the United Nations Standard Minimum Rules for the Treatment of Prisoners provides the following with respect to the right to adequate and sufficient food:

> ... Every prisoner shall be provided by the administration…with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

471. In the particular case of children deprived of their liberty and their right to adequate and sufficient food, Rule 37 of the Havana Rules provides the following:

> Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time.

472. Even so, the information the Commission received indicates that the States in the region are not adequately ensuring this right. By way of example, reports on prison conditions in Brazil say that the food is neither adequate nor sufficient, and prisoners do not eat on a regular basis.[347] The Commission has also received information that the quality of the food at the juvenile detention facilities in Nicaragua is poor.[348] The Commission has been told that children incarcerated in Uruguay are fed spoiled food as a form of punishment.[349] A recent report on the situation in Central America states that some juvenile detention facilities have no drinking water.[350] UNICEF reported that one facility in Panama had no drinking water; instead, an improvised system was used to bring water from the river so that the children could bathe and clean their cells; staff at the center brought in barrels of drinking water every two days, which was the only source of drinking water for general use there.[351]

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[347] Human Rights Watch, *"Real dungeons", Juvenile Detention in the State of Rio de Janeiro*, December 2004, p. 49.

[348] Gómez Gómez, Darío, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil*, Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009, p. 80.

[349] Committee on the Rights of the Child – Uruguay – OMCT, I*nforme 2008, Adolescentes privados de libertad, Condiciones actuales, problemas estructurales y recomendaciones* 2008 Report, Juveniles deprived of liberty, current conditions, structural problems and recommendations, p. 26.

[350] Gómez Gómez, *Diagnóstico Centroamericano, Estándares Justicia Penal Juvenil* Central American Study: Standards of Juvenile Criminal Justice, DNI Costa Rica – Central America, 2009.

[351] UNICEF, *Monitoreo de Violencia en Centros de Custodia y de Cumplimiento*, *2008*, p. 12.

473. The Commission is urging States to ensure that children deprived of their liberty receive a nutritious diet that takes into account their age, health, physical condition, religion and culture. The meals must be prepared and served in a hygienic way; at least three meals a day should be provided; the intervals between meals should be reasonable.[352]

c. The Right to Physical and Mental Health

474. The provisions contained in the international instruments on medical treatment for physical and mental health for adult prisoners undoubtedly also apply to children deprived of their liberty. On the subject of the right of detained persons to the highest possible level of physical and social well-being, the Commission has observed that:

> Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices.
>
> The provision of health services shall, in all circumstances, respect the following principles: medical confidentiality; patient autonomy; and informed consent to medical treatment in the physician-patient relationship[353].

475. Rule 49 of the Havana Rules provides that:

> Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.

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[352] See, European Rules for juvenile offenders subject to sanctions or measures, paras. 68.1 and 68.2.

[353] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st regular session, held March 3 to 14, 2008, Principle X.

476. Rule 51 of the Havana Rules provides that:

> The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.

477. Rule 54 of the Havana Rules is also of the utmost importance, and reads as follows:

> Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programs administered by qualified personnel. These programs should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles

478. As the Inter-American Court has held, States must:

> ... pay special attention to the needs and the rights of the alleged victims owing to their condition as girls, as females belonging to a vulnerable group.[354]

479. The Commission has been very clear in this regard and has observed that girls deprived of their liberty must receive specialized medical care that adequately addresses their needs in the area of reproductive health:

> In particular, they shall have access to gynecological and pediatric care, before, during, and after giving birth, which shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospitals or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate.
>
> In women's or girls' institutions there shall be special accommodation, as well as adequate personnel and resources for pre-natal and post-natal care and treatment of women and girls.

[354] I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs, Judgment of September 8, 2005. Series C No. 130, para. 134. See also: Cf. United Nations, Committee on the Elimination of Discrimination against Women, General Recommendations No. 24, approved in the 20th Period of Sessions, 1999, on the application of Article 12 of the Convention on the Elimination of Discrimination Against Women, A/54/38/Rev.1 (SUPP), February, 5, 1999.

> Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child[355].

480. The Commission must emphasize the standards cited above and remind the States that they have an obligation to ensure that children deprived of their liberty have access to health programs –including programs in preventive health and hygiene as well as special programs in sexual and reproductive health, oral health, prevention of HIV-AIDS, mental health, treatment for drug dependent children, special programs to prevent suicide, and others.

481. The Court, for its part, has also stated that health care must be the proper health care that every person deprived of their liberty requires; there should be regular medical supervision to ensure the children's normal growth and development that is so essential to their future.[356] The Court has also held that "assistance by a physician not related to prison or detention center authorities is an important safeguard against torture and physical or mental ill-treatment of inmates"[357].

482. In their responses to the questionnaire that the Commission sent to the States, the latter mentioned a number of means by which children in the juvenile justice system have access to health services. In most cases, they said there were no specialized health care or infirmary services, and that they had to rely on the government agencies that provide those services. In a number of cases, however, States answering the questionnaire did say that medical or nursing staff visited the juvenile facilities on a regular basis, in some cases every week. Little information is available about conditions of detention of juvenile offenders housed in mental health institutions. In any case, the available information reveals coverage problems, as well as the lack of specific procedures to provide treatment for those who require it.

483. Argentina, for example, reported that all closed-system institutions have an infirmary –most of which have a section with beds for those who have to spend the night there - dental services and medical consulting rooms; children requiring specialized health care services are treated at the appropriate public hospital, away from the juvenile facility. Honduras reported that in some institutions like the Renaciendo Complex, a doctor and nurse are on duty and psychological counseling is available. There are monthly medical examinations.

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[355] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st regular session, held March 3 to 14, 2008, Principle X.

[356] 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, para. 157.

[357] I/A Court H.R., *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 102.

484. From the information it received, the Commission observes that while in the majority of the States in the region, there is officially an infirmary at every juvenile detention facility, as a general rule, however, these infirmaries are able to provide basic, out-patient services, but not the more complex procedures. The infirmaries also have little in the way of medications and specialized personnel.

485. Some States, like Venezuela, expressly mentioned the fact that they do not have sufficient medical personnel or the equipment and materials needed to meet the demand. Most juvenile detention facilities in Venezuela do not have on-site medical staff, so that if children need medical care they are taken to hospitals, to establishments run by the *Misión Barrio Adentro* and/or to comprehensive care facilities. Similarly, in Bolivia, the Ombudsman mentioned how difficult it is to guarantee this right, due to a lack of, *inter alia*, human resources, equipment, medications. According to the information received, sufficient qualified medical personnel able to work either permanently at the institutions for juvenile offenders or to visit them on a reasonably regular basis are simply not available.[358] The IACHR was told that at some centers in El Salvador, Guatemala, Nicaragua and Honduras, the children are not given medications even when they have prescriptions from doctors; as a result, family members are asked to provide the medications.[359]

486. The Commission is concerned by the fact that based on the reports received, the right to heath of children deprived of their liberty is a critical state in some countries of the region. During the visits made in preparation for this report, the Commission learned of very disturbing situations. For example, during the visit to Guyana, the Commission was told that children are often admitted to the juvenile facilities with scabies or fungal infections, caught during the time spent in police holding facilities. They are also frequently suffering from anemia when they arrive. During its visit to Suriname, the Commission was told that boys put pellets in their penises using any sharp item they could get their hands on, all in order to bring on an infection. According to reports, this is a common practice in adult prisons, which illustrates to the Commission how incarcerating children alongside adults can have harmful effects.

487. The Commission has also received information to the effect that not every State has a strategy for preventing or controlling sexually transmitted diseases. For example, at the Antuhué center in Chile, an unconscious child was urgently transported to the hospital in Rancagua on May 14, 2005; he had been complaining of abdominal pains for a week and staff at the facility had diagnosed him as having an inguinal hernia, and did not consider it was important. After being operated on at the hospital, it was discovered that the child had a "virulent infection" caused by gonorrhea, a venereal disease.[360] At the

[358] Ombudsman (Bolivia). *IX Informe del Defensor del Pueblo al Congreso Nacional, 2007* IX Report of the Ombudsman to the National Congress, 2007, p. 143.

[359] DNI, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2004, p. 81. Available at http://www.dnicostarica.org/wordpress/wp-content/uploads/pdf/violencia_juvenil/Carceles.pdf.

[360] OMCT – OPCION, *Derechos de los niños en Chile Informe Alternativo al Comité de los Derechos del Niño de las Naciones Unidas sobre la aplicación de la Convención sobre los Derechos del Niño en Chile*, 2007 *The*

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same time, the Commission takes a favorable view of the information that Guyana supplied on the questionnaire to the effect that children deprived of their liberty are tested for HIV and tuberculosis. According to what the State reported, if a child is HIV positive, he or she is provided with antiretroviral drugs at no cost and given counseling in a community hospital.

488. The Commission observes that in most States, access to health services depends on the coordination between the juvenile detention facilities and the public health services. In Colombia, for example, the national health agencies are tasked with providing medical and hospital care at the levels of promotion, prevention, intervention and rehabilitation of adolescents in conflict with the law. This includes the mental health units that conduct programs to treat and rehabilitate children addicted to narcotic drugs, and to handle problems such as physical, mental and sensory disabilities.

489. The question of special programs for addicted children varies from one State to the next. In some cases programs of this kind do exist. However the information compiled suggests problems in terms of the accessibility and availability of places to treat addicted children. In some countries, like Venezuela, the information made available to the Commission in response to the questionnaire indicates that there are no permanent programs for drug abuse prevention and treatment of children deprived of their liberty. In the Eastern Caribbean, the jail in Saint Vincent and the Grenadines is the only one that has a drug treatment program. Elsewhere, the information the Commission received suggests that drug treatment programs are not available for children deprived of their liberty[361] (although there are services outside the institutions, such as the detoxification center in Antigua and the Turning Point Rehabilitation Center in Saint Lucia). In the Western Caribbean, the prison run by the Kolbe Foundation in Belize is the only one in the country that has an in-house drug treatment program.

490. In the Commission's view, the lack of an adequate service to provide drug treatment constitutes a failure to comply with the State's obligation to protect the rights of all children within its jurisdiction and, in this case, in its custody as well.

491. In order to guarantee the right to health in the case of detained children, the facilities in which they are housed must ensure access to properly equipped medical and health facilities, staffed with properly trained and independent medical personnel. The juvenile institutions must keep records of all medical treatment and medications administered to children deprived of their liberty.[362] Institutions for juvenile offenders must have mental health services so that they can properly address the children's needs, especially given the fact that the inhumane and degrading detention conditions, compounded by the violence typical of such facilities, will invariably take a toll on a child's

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Rights of Children in Chile, Alternative Report to the United Nations Committee on the Rights of the Child concerning Application of the Convention on the Rights of the Child in Chile, 2007.

[361] Wendy Singh, *A Review of Assessments Carried Out in the Eastern Caribbean on Juvenile Justice and Recommendations for Action*, December 29, 2008, p. 44.

[362] Concerning the use of medications, see: Havana Rules, Rule 55.

mental health and adversely affect his or her mental growth and development and physical and mental well-being.[363] States must pay particular attention to the sexual and reproductive health of juvenile offenders deprived of their liberty, and to the specific needs of those who require drug treatment programs.

d. The Right to Education

492. The objectives of juvenile justice necessitate educational programs, including formal schooling, vocational and job training, recreational activities and sports.[364] The Court has elaborated upon this point where it stated that:

> ... Regarding to children deprived of their liberty and thus in the custody of the State, the latter's obligations include that of providing them with health care and education, so as to ensure to them that their detention will not destroy their life plans[365].

493. All children deprived of their liberty, without distinction, must have access to educational programs. Within the juvenile justice system, the treatment and education of children must be geared toward promoting respect for human rights[366] and take cultural diversity into account.[367] Furthermore, the education and vocational training provided at institutions for juvenile offenders must be recognized by the broader educational system and operate in close coordination with it.

494. The Court has addressed the issue of children's right to education in the following way:

> It should be highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the

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[363] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 168. See also: IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle III.3.

[364] Havana Rules, Rules 34, 35, 36, 37, 38, 39, 42, 43, 45, 46, 47 and 48. See: *European Rules for juvenile offenders subject to sanctions or measures*, para. 28:

> The rights of juveniles to benefits in respect of education, vocational training, physical and mental health care, safety and social security shall not be limited by the imposition or implementation of community sanctions or measures.

[365] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 161.

[366] Convention on the Rights of the Children, article 29.1 b); Committee on the Rights of the Child, General Comment Nº 1, *The aims of education,* CRC/GC/2001/1, 17 April 2001; and General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 13.

[367] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle XIII.

> special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention[368].

495. The Court also held that the State's failure to fulfill its obligation to provide programs of this type has all the more serious consequences when the children deprived of their liberty are from marginal sectors of society, because the failure to provide an adequate education limits their chances of actually rejoining society and carrying forward their life plans.[369]

496. However, the United Nations Special Rapporteur on the Right to Education has observed that:

> The juvenile justice system has been unable to provide sufficient quantity and quality of training and education to the children detained. Even though there have been improvements in some countries, for the most part they received inadequate education, ill-suited to their needs[370].

497. The Commission concurs with the UN Rapporteur that guaranteeing access to various types of educational and training programs also means addressing the particular needs of specific population groups, while respecting ethnic, racial and linguistic diversity. For example, in the case of indigenous children, educational programs must respect their cultural uses, practices and customs. Programs must also be respectful of these children's language, which means having special staff or competent interpreters on hand and providing them with adequate written materials. Nevertheless, in answering the questionnaire, only one Member State reported that specific programs are in place for indigenous children deprived of their liberty.

498. Education and professional training programs must also respect the equality of men and women. Nevertheless, the United Nations Special Rapporteur on the right to education observed that:

> ... in Latin America, recent research showed quite clearly that, in many States in the region, courses that are offered to women in detention are mostly related to issues traditionally linked to women, such as sewing, kitchen duties, beauty and handicrafts[371].

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[368] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 84.

[369] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 174.

[370] Report of the Special Rapporteur on the right to education, Vernor Muñoz, *The right to education of persons in detention*, A/HRC/11/8, 2 April 2009, para. 42.

[371] Report of the Special Rapporteur on the right to education, Vernor Muñoz, *The right to education of persons in detention*, A/HRC/11/8, 2 April 2009, para. 51.

499. That information illustrates the discrimination that attends some programs conducted within the juvenile justice system.

500. The Commission appreciates the information concerning educational best practices within the region. Costa Rica, for example, told the Commission that a formal education is mandatory for children deprived of their liberty; thus, juvenile offenders receive the same programs that the rest of the country's student population receives. Under an agreement with the Ministry of Public Education, a school exists inside the walls of the detention center and offers all grades up to the secondary level.

501. The information received in connection with other States is less encouraging. For example, while education is mandatory in Guyana up to 16 years of age, children over the age of 14 in a juvenile detention facility attend only one day of school a week; on the other days of the week they are in vocational training. This is a pattern that repeats itself in most States of the region, where vocational training for children deprived of their liberty takes precedence over an academic education.

502. Overall, the answers that the States gave to the questionnaire the Commission sent out to compile information for this report gave little information about detained children's access to the right to education. The United Nations Rapporteur on the right to education has observed the following about the dearth of available information:

> If evidence of participation rates of detained children in education is rare, evidence of the quality of educational provision is even scarcer. However, there are welcome signs that some States are addressing the issue. Chile, for instance, has recently introduced reforms to its juvenile justice system with the aim of complying more fully with international and domestic legal standards relevant to children's education. Similarly, Colombia and Argentina are modernizing their juvenile systems with that aim[372].

503. During the Commission's visits to compile information for this report, it observed that in the Caribbean, training schools have been set up for children that generally involve some corrective element. However, the classrooms are generally a combination of children of various ages and various levels of schooling, which makes it difficult for teachers to plan and give classes. According to what the Commission was told, some teachers are not trained educators and some are or have been inmates. At some centers, the children are allowed to sit for the Caribbean elementary and secondary tests, but, in most cases, the programs are not recognized by the respective Ministry of Education.

504. The Commission also noted that at Guyana's New Opportunities Corp., Belize's Wagner Boys Facility and Suriname's Santo Boma Prison, a very small percentage of the children attend school in the community. Although this is a good practice, it is

[372] Report of the Special Rapporteur on the right to education, Vernor Muñoz, *The right to education of persons in detention*, A/HRC/11/8, 2 April 2009, para. 40.

unfortunately not widespread. During its visit, the Commission was told that out of a total of 195 children in Guyana's prison, only eight attend community schools.

505. The situation is even more acute in the case of children incarcerated in adult prisons, where educational and vocational training opportunities are more limited. From the information the Commission compiled, while at some adult prisons, like the one in Guyana, children have the opportunity to participate in educational and training programs with young adults under the age of 25, the number of prisoners is so high that not all children have access to these programs and not all prisons have programs specifically for young adults. In most of the Caribbean countries, adult prisons do not offer educational and training programs for the children deprived of their liberty there. Generally, these children are not accepted at the community schools because of the stigma of being deprived of their liberty. As a result, these children are being denied their right to an education.[373]

506. The rights of children alleged to be members of *maras* or gangs also suffer when such children are deprived of their liberty. The Commission has also received information to the effect that the rights of children presumed to be members of a gang are more severely restricted. For example, the Commission was informed that in Honduras, these children are only allowed into the prison yard once a week and their visits are restricted. Children alleged to be gang members are not permitted to attend classes in juvenile detention facilities, which means they are being denied their right to an education.[374]

507. The information compiled by the Commission during its hearings also reveals that in States like Argentina, Brazil, Paraguay and Uruguay, the failure to put into practice educational and vocational training programs means that the children remain idle in the detention facilities, with no educational activities, either formal or informal.

508. In some States like Chile, the information compiled shows that although training activities do exist, they are basic and mainly a distraction, and do little to prepare the child for a job or to continue his or her studies.[375]

509. Based on the answers to the Commission's questionnaire, in a significant number of countries the training programs are provided by subcontractors retained by the authorities in charge. As for supervision of the subcontracts, generally speaking the States have administrative-financial controls, but rarely check the quality of the services, or whether the persons who participate in these services are actually performing. In Colombia, for example, the State reported that the Colombian Family Welfare Institute has

[373] Wendy Singh, *A Review of Assessments Carried Out in the Eastern Caribbean on Juvenile Justice and Recommendations for Action,* December 29, 2008, p. 43.

[374] OMCT, Human Rights Violations in Honduras, Alternative Report Submitted to the United Nations Human Rights Committee, including the Committee's Concluding Observations, October 2006, p. 96.

[375] UNICEF – Chile "Principales nudos problemáticos de los centros privativos de libertad para adolescentes y secciones juveniles" in: Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile, 2008*, pp. 124 *et seq*.

an oversight system to ensure that the services retained by the Institute are being provided by social organizations whose procedures are geared toward guaranteeing and/or restoring children's rights. The Commission was also told that in Venezuela, for example, the State does not subcontract any type of services; however, in the case of some centers it enters into agreements with other governmental and nongovernmental organizations to have socio-productive, cultural, sports-related and educational activities conducted.

510. The Commission recalls that one characteristic of a State's intervention is the socio-educational content of the custodial measures. This means the obligation of States to take a holistic approach to the problem of juvenile offenders, which should combine the punitive function (holding the child accountable for his or her conduct) and the socio-educational function (aimed at reintegrating the child into his or her family and community). In the Commission's view, the role of the family, nongovernmental organizations and private educational institutions in conducting educational and vocational training programs for children deprived of their liberty should be strengthened. At the same time, however, States cannot neglect the formal education that all children deprived of their liberty must receive to ensure that their studies are not abandoned as a result of the penalty they are expected to pay.

e. The Right to Recreation

511. The right to education is closely related to detained children's right to recreation. Because they are still growing and maturing, children deprived of their liberty must have access to recreation programs. By the same token, these programs must be designed to ensure contact between the children deprived of their liberty and their families and communities. Juvenile detention facilities should arrange programs with the community so that the children subject to the sanction of imprisonment are able to socialize, engage in play, relax, play sports and participate in health and education programs, including beyond the walls of the juvenile facility. Participation in these programs should increase as the child gets closer to his or her release date, as a way of facilitating his or her re-assimilation into the family and community.

512. The information the Commission received indicates that the vast majority of juvenile detention centers in the member States have space for open-air recreation, even though that space is sometimes limited and not designed in a manner that would encourage the children to make use of it. At the same time, however, in many countries of the region there are no programs that enable children deprived of their liberty to associate with their families and communities. In some cases, these programs do not even exist inside the walls of the institution, because the necessary infrastructure is lacking.

513. The information received by the Commission indicates that some facilities, such as Costa Rica's Zurquí Juvenile Criminal Center and the New Opportunities Corp. in Guyana have a soccer field and a covered arena for cultural and sports-related activities. The Guyana facility also allows children to join sports teams and musical groups in the community and even allows them to travel with their team and music group to participate in sporting events and shows.

514. However, many other facilities across the hemisphere view their role as strictly custodial in nature. At such facilities, no space is allotted for recreational activities. In fact, the Commission found that some authorities even believe that recreational activities pose a safety and security risk, and therefore prohibit them. For example, during its visits, the Commission learned that the Stoney Hill Remand Center in Jamaica has no recreation space outdoors; only those children who exhibit good behavior are allowed to occasionally go outside for some activity. The other children are inside all the time; they eat and engage in activities in a large room that at one time was open to the air but that now has a roof. The staff at the institution told the IACHR that they are hoping that the children will be able to play cricket in that room once the lights have been secured. During the Commission's visit, however, it observed that no sports activities could be played there except for morning exercises and table tennis.

515. During another visit, the Commission learned that the children deprived of their liberty at the Youth Training Center in Trinidad and Tobago take active part in sports for an hour and a half each day. The children found guilty of violating criminal laws have additional sports, educational and recreational activities; however, those in preventive detention are not allowed to participate in these additional activities. The Commission is concerned by the perception in the region that children in preventive detention pose an even greater flight risk, with the result that their right to recreation tends to be restricted. For example, during its visits, the Commission learned that at Trinidad and Tobago's Youth Training Center, children in preventive detention have to be handcuffed when they leave the locked areas, even though the external perimeter of the facility is fortified; while children who have been convicted are able to go anywhere in the center with their hands free.

516. The Commission has also received information to the effect that the rights of children presumed to be members of a gang are even more severely restricted. For example, the Commission learned that in Honduras, suspected gang members can go outside only once a week, and have their visits restricted.[376]

517. Under a juvenile justice system that is respectful of human rights, the purposes that penalties are to serve require that there be programs to enable children deprived of their liberty to exercise their right to recreation. These programs are to facilitate their re-assimilation into the community.

4. The Detention Conditions of Children and Adolescents Deprived of their Liberty

518. In order to protect and ensure the right to life and the right to physical integrity of children deprived of their liberty, and in its role as guarantor of those rights, the State has an absolute obligation to provide children deprived of their liberty with the minimum conditions befitting their dignity as human beings, for as long as they are

[376] OMCT, Human Rights Violations in Honduras, Alternative Report Submitted to the United Nations Human Rights Committee, including the Committee's Concluding Observations, October 2006, p. 96.

deprived of their liberty in a detention facility.[377] This obligation is not limited to those situations related to violence inside the detention facilities; it also includes all the conditions under which the deprivation of liberty takes place.

519. Under international human rights law, every person deprived of his or her liberty has the right to live in detention conditions compatible with his or her personal dignity, and the State must guarantee to that person the rights to life and to physical integrity.[378] This obligation applies equally with respect to children deprived of their liberty, whom States must provide with the minimum conditions befitting their dignity so long as they remain in the States' custody.[379] Given the special measures of protection to which children are entitled under Article 19 of the American Convention and Article VII of the American Declaration, those minimum conditions must offer special care that enables the child to develop his or her life plan.

520. One of the States' principal obligations with respect to the detention conditions concerns the physical space of the facilities that house juvenile offenders. The physical space of juvenile detention facilities must ensure respect for the dignity and health of the children deprived of their liberty,[380] and must allow development of intervention proposals for assisting those children, and the formulation and execution of individualized teaching plans.

521. The Committee on the Rights of the Child has observed the following on this subject:

> Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities[381].

522. Specifically, the facility in which the child is deprived of his or her liberty must have the proper infrastructure in terms of surface area, ventilation, natural and artificial lighting, drinking water and hygienic facilities and supplies. The children must have easy access to sanitary facilities that are hygienic and private; they must be permitted

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[377] I/A Court H.R., *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 159.

[378] I/A Court H.R., *Case of Neira Alegría et al. v. Peru*, Merits. Judgment of January 19, 1995, Series C No. 20, para. 60.

[379] I/A Court H.R., *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, paras. 159 and 164.

[380] Havana Rules, Rules 12, 13 and 87(f); Beijing Rules, Rule 27.

[381] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 89.

to bathe or shower daily, at a temperature suited to the climate.[382] Furthermore, the architecture of the detention centers must be suited to the socio-educational goal. It is essential that there be proper space for individual and group work, for study, recreation and sports, adequate conditions for relaxation and family visits, and other conditions. As the Inter-American Commission has observed, States must also make public and periodically update the number of places available in each institution and its real occupancy rate; overcrowding must be prohibited by law.[383]

523. As guarantors, States must also "design and apply a prison policy to prevent crises."[384] Juvenile detention centers must take all security, evacuation and emergency measures necessary to safeguard the rights of the children deprived of their liberty. For example, these centers have to be outfitted with fire alarms and fire extinguishers in the event of an emergency, and guards must be properly instructed in how to react in situations that could pose a threat to the fundamental rights of the persons in their custody.[385]

524. The foregoing notwithstanding, the information the Commission has received indicates that many juvenile detention facilities are not adequately ventilated, do not have proper lighting, the floors and walls are in a poor condition, the facilities are unhygienic, the food and water is poor, and the necessities for personal hygiene and cleaning are not provided. The Commission has also been told that in some facilities the basic furnishings like beds and mattresses are lacking, children have difficulty making contact with the outside, or getting medical attention or legal advice.

525. For example, a report done by Venezuela's Ombudsman's Office indicates that health, hygiene and infrastructure conditions at most socio-educational institutions for children were extremely poor in general.[386] According to the information the State supplied in response to the Commission's questionnaire, in 2007, that Ombudsman's Office recorded 4 complaints involving human rights violations at socio-educational centers, 3 related to the condition of the infrastructure, and one alleging mistreatment by a "teacher counselor".

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[382] European Rules for juvenile offenders subject to sanctions or measures, paras. 65.2 and 65.3.

[383] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, Principle XVII.

[384] I/A Court H.R., *Matter of Urso Branco Prison regarding Brazil,* Provisional Measures. Order of the Inter-American Court of Human Rights of July 7, 2004, *point number* thirteen.

[385] I/A Court H.R.. *Case of the Juvenile Re-education Institute v. Paraguay,* Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 178.

[386] Ombudsman's Office (Venezuela). *Informe anual 2008* Annual Report, 2008, Caracas, 2009, pp. 96 et seq.

526. UNICEF has observed that in Chile:

> ... the infrastructure problems would basically be a lack or inadequate supply of drinking water or hot water and, in general, problems in the wet and dry systems. Cleaning supplies are needed, particularly for the bathrooms and the children's personal hygiene (Clorox, detergent, toothpaste, soap and shampoo). A number of the bathrooms and dormitories inspected are not in compliance with legal and regulatory standards, either because of structural problems, a lack of space, a lack of hygiene or a lack of even a modicum of privacy.[387]

527. The information the Commission received indicates that in Central America, the jails have children crowded into areas that constitute a clear violation of privacy; at the juvenile detention facilities in El Salvador, Guatemala, Honduras and Nicaragua, anywhere from 10 to 30 children can be found in the same cell. The situation is somewhat better in Costa Rica and Panama where, according to reports received, cells house between two and five children.[388] At the same time, other sources of information, including Panama's Ombudsman's Office, have stated that the system is on the verge of collapse, since the overcrowding and deplorable conditions at six of Panama's centers invite conflict and violence among the children deprived of their liberty there.[389]

528. It is worth noting that in the 2010 recommendations of the Committee on the Rights of the Child in connection with the administration of juvenile justice, the Committee welcomed the fact that in Guatemala, the Comprehensive Child and Adolescent Protection Act (known as the PINA Act) establishes special courts for children in conflict with the law. It was nonetheless concerned at, *inter alia,* the large number of adolescents in detention centers, and at the information received to the effect that offences against property are the main reason for detention; the serious overcrowding and the lack of care and reintegration programs in the detention centers; the insufficient and undertrained staff in detention centers; and the absence of internal and external controls on the detention centers.[390]

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[387] UNICEF – Chile, "Principales nudos problemáticos de los centros privativos de libertad para adolescentes y secciones juveniles" The Principal Problems at Adolescent Detention Centers and Juvenile Sections, in: Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile, 2008* Annual Report on Human Rights in Chile, 2008, pp. 124 et seq.

[388] DNI, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2004. Available at http://www.dnicostarica.org/wordpress/wp-content/uploads/pdf/violencia_juvenil/Carceles.pdf.

[389] Ombudsman's Office-UNICEF (Panama), *Monitoreo de Violencia en Centros de Custodia y de Cumplimiento*, 2008, p. 10.

[390] Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: *Guatemala,* CRC/C/GTM/CO/3-4, October 25, 2010, para. 98.

529. In the case of Nicaragua, the Commission has learned that:

> Even though almost 10 years have passed since the Child and Adolescent Statute entered into force, the physical conditions of the cells in all prisons nationwide are still such that children deprived of their liberty are not being guaranteed proper conditions of space, ventilation, lighting and hygiene, befitting their dignity as human beings. The visits made by the Special Prosecutor for Jails and the Office of the Special Prosecutor for Children and Adolescents found overcrowding due to lack of space; constant dampness; a foul odor; darkness; a lack of ventilation and a lack of natural and artificial light; a lack of supplies for daily cleaning and disinfection of the area; and a lack of hygienic services that guarantee privacy.[391]

530. The information the Commission has received suggests that because of the overcrowding and deplorable conditions at the juvenile detention facilities, the risks of fire and other catastrophes are much higher. For example, in Armadale, Jamaica, the Girls' Correctional Center had a fire in May 2009 that claimed the lives of seven girls. That same year, a boy died in a fire at Saint Lucia's Boys' Training Center.

531. The information the Commission has received indicates that the unhealthy detention conditions are even worse for some children deprived of their liberty, such as children alleged to be members of, or affiliated with, *maras* or gangs. For example, the Commission learned that:

> ... the youth continue to face serious problems. For example, the MS gang does not have access to sanitary installations, forcing them to take care of their bodily functions using plastic bags. The water is not drinkable and has a dark yellow color.[392]

532. During the visits the Commission made to prepare for this report, it learned that overcrowding exists at most of the juvenile detention centers in the region. In Haiti, for example, the Delmas 33 juvenile detention center has a capacity for 72 children, but was housing 174. According to what the Commission was told, the excessive overcrowding also brings added pressure to bear on the staff of the institutions and forces them to resort to more repressive measures in order to maintain control. Moreover, because of the concern over concealed weapons and contraband substances, the doors to the bathrooms have been removed and the shower curtains have been taken down, which means that the children have no privacy.

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[391] OMCT, CENIDH, Alianza de Centros de Mujeres, Red de Mujeres contra la violencia and CODENI, *Violations of Human Rights in Nicaragua, Shadow Report to the Human Rights Committee* in Spanish only, October 2008, p. 45.

[392] OMCT, Human Rights Violations in Honduras, Alternative Report Submitted to the United Nations Human Rights Committee, including the Committee's Concluding Observations, October 2006, p. 96.

533. The situation is even worse for children incarcerated in adult prisons. According to the information it gathered during its visits, the prison at Gonaïves, which is an adult facility, has a capacity for 75 inmates, but is currently housing 306, 33 of whom are minors. According to what the Commission was told, these children have to sleep between the adults' legs because there are not enough mattresses. Some adult prisons where children are being held do not have bathrooms; buckets are used instead.

534. Another issue that must be addressed is that juvenile detention facilities have to be outfitted to accommodate children with special physical needs. The information the Commission received indicates that most juvenile detention centers do not have proper facilities to accommodate children with physical disabilities. In a few rare cases, like Argentina, the Commission was told that special treatment is provided to children with physical disabilities who are deprived of their liberty. However, the IACHR observed that as a rule, these institutions are not prepared to adequately cope with these special needs children, which often means that they are sent elsewhere. The Commission feels strongly that disabled children who are deprived of their liberty must all be housed in the same institutions, ones adapted to their special needs; only when this cannot be done, should they be sent to specialized institutions.

535. The Commission observes that a close corollary of the State's obligation to provide adequate physical space for children in detention is its obligation to prevent acts of violence. Here, it is worth recalling that:

> Overcrowding and squalid conditions, societal stigmatization and discrimination, and poorly trained staff heighten the risk of violence. Effective complaints, monitoring and inspection mechanisms, and adequate government regulation and oversight are frequently absent. Not all perpetrators are held accountable, creating a culture of impunity and tolerance of violence against children. The impact of institutionalization goes beyond the experience by children of violence. Long-term effects can include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism.[393]

536. The Commission observes that beyond the actual violence and excessive force inflicted by personnel, the environment in which the child is detained is a form of structural violence, as it goes against the system's very purpose, breeds further deterioration and seriously jeopardizes the child's chances of social reintegration upon release. The State's efforts must target the eradication of violence, both in terms of avoiding situations that directly involve a violation of a detained child's physical integrity, regardless of the perpetrator, and in terms of eliminating the structural violence that is a product of the conditions in which the child is being held.[394]

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[393] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 54.

[394] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, paras. 180 *et seq.*

537. Transferring sick children in handcuffs, mock executions, constant night visits to terrify and humiliate the child, threats, physical and mental mistreatment, and various forms of torture or cruel, inhuman and degrading treatment are just some of the forms of violence denounced in multiple reports that recount violations of the rights of children deprived of their liberty in the hemisphere. The episodes of torture are of various kinds: using hoods, forcing a child's head underwater, electric shocks, sexual abuse and rape, and others.

538. For example, in some States like Costa Rica, the information received indicates that 41.5% of children deprived of their liberty say they have been mistreated; of these, 44.4% blame the guards, 5.5% blame the administrative personnel, and 27.7% blame other detained children.[395] In the case of Brazil, the IACHR received information indicating that it identified 5,400 children as individual victims of torture, involving bodily injuries and death.[396] When answering the questionnaire, a number of States even admitted that conflicts between staff and the detained children resulted in physical injuries, not just to the children but to staff as well.

539. The risk of violence is obvious, given the conditions under which children and adolescents are deprived of their liberty in the hemisphere. The situation is even worse in the case of girls, which means that the gender dimension of violence in the juvenile justice system has to be considered.[397] Thus, for example, the information the Commission received concerning the United States indicates that one of the most disturbing abuses is the use of inappropriate or excessive force against girls by staff of the detention centers. The reports make reference to one of the most troubling abuses, described as

> ... the excessive use of a forcible face-down "restraint" procedure intended for emergencies but in fact used far more often. In a restraint, staff seize a girl from behind and, in a face-down posture, push her head and entire body to the floor. They then pull her arms up behind her and hold or handcuff them. We found that the procedure is used against girls as young as 12 and that it frequently results in facial abrasions and other injuries, and even broken limbs ..., all girls are bound in some combination of handcuffs, leg shackles, and leather restraint belts any time they leave the facility. Girls are also subject to frequent strip-

[395] DNI, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2004, p. 73. Available at http://www.dnicostarica.org/wordpress/wp-content/uploads/pdf/violencia_juvenil/Carceles.pdf.

[396] ANCED – Associação Nacional dos Centros de Defesa da Criança e do Adolescente National Association of Juvenile Protection Centers, *Análise sobre os directos da criança e do adolescente no Brasil: relatório preliminar da ANCED* Analysis of the rights of children and adolescents in Brazil, ANCED's preliminary report, San Paulo, 2009, p. 277.

[397] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 106.

searches in which they must undress in front of a staff person and submit to a thorough visual inspection including their genitals.[398]

540. The Commission has already learned of the peer violence that occurs inside the juvenile facilities. This happens in almost every country of the region and has become particularly pronounced in some Central American countries because some juvenile offenders belong to gangs. For example, in its response to the question about how many children deprived of liberty had, over a 12-month period, sustained injuries caused by third parties, Guatemala answered that, in 2007, 15 children had sustained (light and serious) injuries in gang fights. As for the situation in Honduras, there are reports that in the juvenile detention facilities "there are often conflicts between children and adolescents who have no gang affiliation and gang members, provoking intense aggression between these groups."[399]

541. The information that the Commission has available indicates that sometimes there are no contingency plans or preventive mechanisms in place to deal with violence, with the result that when fighting or prison riots break out, the police or specialized or militarized law enforcement bodies are brought in, and launch extremely violent operations. The IACHR would again point out that interventions of this type are not a proper response, because law enforcement bodies are not trained to deal with incarcerated children.[400]

542. The IACHR observes that violence prevention plans must feature systematic and continual training of the staff assigned to the juvenile justice system, especially those who have direct contact with children.[401] The rule that expressly prohibits the carrying and use of weapons[402] by personnel in any facility where children are detained, is an obligation requiring unqualified compliance on the States' part. States also have an obligation to take measures to ensure that no type of weapon is inside the detention center, including knives fashioned by the detained children themselves; such weapons have to be confiscated. Accordingly, the States must employ such methods as metal detectors to prevent knives, firearms and home-made weapons from getting into the

[398] Human Rights Watch - American Civil Liberties Union, *Custody and Control, Conditions of Confinement in New York's Juvenile Prisons for Girls*, September 2006.

[399] OMCT, Human Rights Violations in Honduras, Alternative Report Submitted to the United Nations Human Rights Committee, including the Committee's Concluding Observations, October 2006, p. 95.

[400] DNI, *Diagnóstico regional sobre las condiciones de detención de las personas adolescentes en las cárceles de Centroamérica* Regional study on detention conditions for adolescents in Central American prisons, 2009, p. 79.

[401] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 40.

[402] Havana Rules, Rule 65; IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, Principle XXIII.2; United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; and Code of Conduct for Law Enforcement Officials, Article 3.

facility, as these can add to the incidence of violence in juvenile detention facilities.[403] The staff of the facilities must respect the children's dignity in all search and seizure procedures.

543. Another measure to prevent violence is to require the detained children to undergo a medical check-up upon arrival. Rule 50 of the Havana Rules reads as follows:

> Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention[404].

544. From the information the Commission has obtained, upon arrival, regular medical examinations of children deprived of their liberty do not appear to be routine.[405] The Committee on the Rights of the Child has specifically recommended to certain States like Nicaragua to "introduce regular medical examination of children by independent medical staff."[406] Most countries in the Eastern Caribbean do not have medical personnel present to check a child's health when admitted to the institution. In the countries of the Western Caribbean, children are generally seen by a nurse or the medical staff at the facilities at the time the child is admitted; however this tends to make the child even more vulnerable to mistreatment and abuse by facility personnel, since in such cases they are not likely to receive immediate medical attention.[407]

545. The IACHR shares the concern expressed by the Committee on the Rights of the Child regarding the administration of juvenile justice in Honduras, especially given the poor detention conditions, which persist despite recent improvements in juvenile detention centers. These poor conditions in juvenile facilities include: overcrowding; a lack of medical and psychological services; a lack of sanitation; reports of consistent violations of the right to life of children deprived of their liberty; decisions depriving children of their liberty which are neither periodically nor consistently reviewed; a lack of access to reintegration programs during or after the period of deprivation of liberty for the majority

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[403] I/A Court H.R., *Matter of Monagas Judicial Confinement Center ("La Pica").* Provisional Measures. Order of the Inter-American Court of Human Rights of July 3, 2007.

[404] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle IX.3.

[405] UNICEF – Chile, "Principales nudos problemáticos de los centros privativos de libertad para adolescentes y secciones juveniles" The Principal Problems at Adolescent Detention Centers and Juvenile Sections, in: Universidad Diego Portales, *Informe anual sobre derechos humanos en Chile, 2008* Annual Report on Human Rights in Chile, 2008," p. 24 et seq.

[406] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Nicaragua, CRC/C/15/Add.265, 21 September 2005, para. 62, d).

[407] I/A Court H.R., *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 4, 2006.

of children; cases of a lack of segregation of accused children awaiting trial from persons already convicted.[408]

546. In the final analysis, overcrowding and the deplorable conditions under which the deprivation of liberty takes place and the inadequate staff training increase the risk of violence and human rights violations against children deprived of their liberty. In some cases, the violence is perpetrated by the staff and the authorities at the juvenile detention facility. But it may also be perpetrated by other children deprived of their liberty there. The Commission reiterates that the State is responsible for preventing, investigating, punishing and redressing this violence, irrespective of whether it was caused by its own personnel or by third parties.

5. Disciplinary Sanctions in the Case of Children and Adolescents Deprived of Their Liberty

547. One issue that the Commission must address, because it is so common within the juvenile justice system, is the disciplinary sanctions imposed on children deprived of their liberty. The Commission observes that, under certain circumstances, and within specific limits, the use of disciplinary sanctions may be permissible and even necessary, especially in order to prevent something worse.

548. At the same time, the Commission must again point out that any measures that involve cruel, inhuman or degrading treatment and corporal punishment[409] are prohibited, as are confinement in a dark, closed or solitary cell, the reduction of food, a restriction or denial of the detained child's contact with family members, or any measure that jeopardizes his or her physical or mental health.[410] Any collective sanctions and multiple sanctions for the same offense must be strictly prohibited.[411]

549. Concerning the disciplinary sanctions, Rules 67 and 68 of the Havana Rules provide that:

> All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment,

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[408] Committee on The Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: *Honduras*, CRC/C/HND/CO/3, May 2, 2007, para. 80.

[409] General Comment No. 8 of the el Committee on the Rights of the Children defines corporal punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment,* (*inter alia*, Article 19, Article 28.2 and Article 37) CRC/C/GC/8, 2 March 2007, para. 11.

[410] Convention on the Rights of the Children, Articles 19 and 37; Havana Rules, Rules 66 and 67; Beijing Rules, Rule 17.3; Riyadh Guidelines, guideline 54; and Guidelines for action on children in the criminal justice system, guideline 18.

[411] Havana Rules, Rule 67. In relation to the prohibition of collective punishments: IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle XXII.4.

> placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited.
>
> Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles: (a) Conduct constituting a disciplinary offence; (b) Type and duration of disciplinary sanctions that may be inflicted; (c) The authority competent to impose such sanctions; (d) The authority competent to consider appeals.

550. Disciplinary measures must also observe the principles of strict legality, legal definition or criminalization of the offense (*tipicidad*), due process,[412] unbiased enforcement, use of objective criteria and the possibility of judicial review.[413] These principles and guarantees must also be observed in that phase of the process in which disciplinary sanctions are enforced. Children accused of disciplinary infractions must be informed of the nature of the charge against them without delay and in a manner they can understand. They are also entitled to the time and conditions necessary to articulate their defense, and may resort to the assistance of an attorney or their family, whichever is appropriate.[414]

551. Corporal punishment is not only prohibited as a form of punishment for children who violate criminal laws; it is also prohibited as a disciplinary measure applied to children serving custodial sentences. The IACHR has established that corporal punishment is an inhuman and degrading punishment that violates Article 5 of the American Convention. In its report on corporal punishment and human rights of children and adolescents, the IACHR addressed the matter of corporal punishment at length and unreservedly stated that:

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[412] 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 13 May 1977, Rule 30.2.

> No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defense. The competent authority shall conduct a thorough examination of the case.

[413] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, Principle II, *in fine* and XXII.

[414] *Cf.* European Rules for juvenile offenders subject to sanctions or measures, Rule 94.1 et seq.

> States are obliged to eradicate the use of corporal punishment as a way of disciplining children and adolescents in all areas of their lives [415].

552. The IACHR also emphasized that:

> … in accordance with the established doctrine as applicable to children, which is based on their needs and the principle of their best interests, States are obliged to "adopt all positive measures required to ensure the protection of children against mistreatment corporal punishment and other forms of violence, whether in their relations with public authorities or in relations among individuals or with non-governmental entities" in order to ensure them the full exercise and enjoyment of their rights[416].

553. For its part, the Committee on the Rights of the Child has observed that corporal punishment:

> … directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity[417].

554. As for solitary confinement as a disciplinary sanction, the Commission was very clear when it stated that States have an obligation to prohibit, by express legal provisions:

> It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty [418].

555. The Committee on the Rights of the Child has also addressed the matter of disciplinary proceedings by establishing that:

> Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark

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[415] IACHR. *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, para. 65. In the same sense: European Rules for juvenile offenders subject to sanctions of measures, para. 7: "Sanctions or measures shall not humiliate or degrade the juveniles subject to them."

[416] IACHR. *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, para. 31.

[417] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment,* (*inter alia*, Article 19, Article 28.2 and Article 37), CRC/C/GC/8, 2 March 2007, para. 21.

[418] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle XXII.3.

> cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned[419].

556. Although these prohibitions and the limits on the disciplinary sanctions that can be imposed on children deprived of their liberty are clear, the Commission has received information to the effect that solitary confinement and corporal punishment continue to be used within the region. The Commission is very troubled by the fact that such practices still exist, as they violate the child's human rights. It is surprised by the fact that these measures are explicitly contemplated in some legislation of certain countries of the region.

557. By way of example, Section 34 of Barbados' Reformatory and Industrial Schools Act provides that:

> 34. (1) Any boy sentenced or ordered to be detained in a School who escapes therefrom may at any time before the expiration of his period of detention be apprehended without warrant, and if the Principal of the School think fit, but not otherwise, may, any other Act to the contrary notwithstanding, be then brought before a magistrate of the district in which he is found or in which the School is situated.
>
> (2) The boy shall thereupon be liable on summary conviction to be whipped, not exceeding twelve stripes in the case of a boy whose age does not exceed sixteen and twenty-four stripes in the case of a boy whose age exceeds sixteen, with a rod, and he shall be brought back to the School there to be detained during a period equal to so much of his period of detention as remained unexpired at the time of his escaping.

558. Rule 52 of Belize's prison regulations authorizes visiting judges to order confinement in a cell, on a restricted diet for a period of no more than 28 days, as a disciplinary punishment for certain types of behavior. This period of confinement does not count toward the child's sentence of incarceration.

559. The Commission observes that corporal punishment and disciplinary measures involving confinement have not been abolished in the vast majority of the member States. Even in those places where they are prohibited, they continue to be practiced. For example, although Article 45 of Chile's Law 20,084 prohibits "disciplinary measures involving corporal punishment, confinement to a dark or closed cell, or solitary confinement, as well as any other measure that can endanger the child's physical or mental health or that is cruel, degrading or inhuman,"[420] civil society organizations have said that

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[419] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 89.

[420] At the same time, a disciplinary measure consisting of up to five days in "solitary confinement" is allowed under some rules such as Decree 553 of 2001, which contains the Regulations for the Juvenile Sections of the Civil Police and Regulations on Juvenile Cases and Care Facilities, contained in Decree 730 of 1996.

one form of cruel, inhuman and degrading treatment that has been a source of constant concern in the country is the use of "isolation cells".[421] In general, confinement in isolation is used as a disciplinary measure against those who violate the disciplinary rules of the facility.

560. According to information reported to the IACHR, at one of Chile's juvenile detention facilities, the *Comunidad Tiempo Joven*¸ an entire house –number five- has long been used to place children in solitary confinement. It reportedly consists of two separate concrete cells, two meters by two meters in size, with an iron door and a window measuring twenty centimeters by twenty centimeters; the cells are dark and the window is covered with cardboard from the outside; it has a unpleasant odor; neither cell has a bathroom and the bed is small and pressed against the wall.[422]

561. Something similar happens in the case of Colombia. In its response to the Commission's questionnaire, Colombia identified the following as the prohibited disciplinary measures: isolation in dark cells, *incommunicado* detention, withholding of food, denial of sleep at night, physical punishment, collective punishments and working for the establishment. Nevertheless, the Office of the Colombian Ombudsman has confirmed that one of the disciplinary measures used on children is isolation in what are called the "reflection rooms". According to the description supplied by the Ombudman's Office, these are small, dark and damp rooms with no bathroom; girls and boys alike have to sleep on the floor.[423] Despite being called "reflection rooms", it is obvious to the Commission that these are solitary confinement cells used for disciplinary reasons, in violation of the domestic and international laws prohibiting this disciplinary measure in the case of children.

562. During the Commission's visits to prepare this report, officials at the Wagner Boys Facility in Belize said that children could be kept in the isolation cell for a week, during which time they were not allowed any physical activity. They stressed, however, that during that time they were removed from the cell for 30 to 45 minutes a day for psychological counseling. At the Opa Doeli facility in Suriname, the isolation cell was used to confine a child having suicidal thoughts, so that staff could keep the child under surveillance. The Commission must emphasize that problems of this kind need to be addressed through proper psychological treatment, but never by compounding the

[421] OMCT – OPCION, *Derechos de los niños en Chile Informe Alternativo al Comité de los Derechos del Niño de las Naciones Unidas sobre la aplicación de la Convención sobre los Derechos del Niño en Chile*, 2007 *The Rights of Children in Chile, Alternative Report to the United Nations Committee on the Rights of the Child concerning Application of the Convention on the Rights of the Child in Chile,* 2007, p. 74.

[422] Universidad Diego Portales, *Informe de Derechos Humanos 2006*, 2006 Human Rights Report and OMCT – OPCION, *Derechos de los niños en Chile Informe Alternativo al Comité de los Derechos del Niño de las Naciones Unidas sobre la aplicación de la Convención sobre los Derechos del Niño en Chile The Rights of Children in Chile, Alternative Report to the United Nations Committee on the Rights of the Child concerning application of the Convention on the Rights of the Child in Chile,* 2007, 2007.

[423] OMCT, *Apoyo a víctimas pro recuperación emocional, Comisión Colombiana de Juristas,* and the *Fundación Comité de Solidaridad con Presos Políticos,* State Violence in Colombia, An Alternative Report submitted to the United Nations Committee against Torture, 2003, citing the Ombudsman's Office, Children and Their Rights, Bulletin No. 6, Bogotá, June 2000, p. 9.

punishment through added sanctions that are, moreover, prohibited under international human rights law.

563. The information the Commission received suggests that in a number of countries, the rules regulating discipline in juvenile detention facilities allow restriction of freedom of movement in punishment cells; there are cases where isolation is permitted for between eight and 15 days. States routinely use euphemisms to refer to the punishment of isolation. As already examined, in Colombia the isolations cells are referred to as "reflection rooms"; in the Dominican Republic, reference is made to "temporary transfer to a reflection room;" in Chile, the expression is "separation from the group", whereas in Mexico the expression used is "referral to retreat areas". Only in Ecuador do the existing regulations dispense with euphemisms and refer to the practice as "isolation punishment". But no matter what the practice is called, the Commission must once again assert that the rules of international human rights law absolutely prohibit punishments of this kind.

564. As the Commission previously observed, corporal punishment is another disciplinary measure commonly used to punish children deprived of their liberty in the region, despite the fact that it is prohibited under international law.

565. By way of example, the Bolivian Ombudsman's Office observed that on April 22, 2009, three children were placed in the Juvenile Offenders Center at Av. Cap. Ustariz Km at Quillacollo. According to this report, as soon as the boys were admitted, they were subjected to unwarranted punishments that could only be classified as torture. To begin with, the boys' heads were shaved and they were forced to endure corporal punishment that violated their physical integrity, such as running an obstacle course for approximately an hour, repeated spinning and jumping on the ground, while being beaten with a stick on the abdomen and elsewhere on the body. Thanks to the intervention of the Ombudsman's Office, the boys who had been subjected to torture and physical mistreatment were released. Forensic medical certificates were issued, and the civil servants charged with security at the center and the other authorities involved were replaced.[424]

566. Something similar happens in Jamaica, where the Office of the Children's Advocate has said that the most common complaints against correctional institutions involve physical abuse.[425] According to the information the Commission received, in Jamaica, corporal punishment normally implies flogging, although other forms of cruel and inhuman punishment are also used, such as *incommunicado* detention, diet restrictions and the use of restraints. The Commission has also learned that at Trinidad and Tobago's Youth Training Center, guards may, with a physician's approval, put children deprived of their liberty on a diet of bread and water for three days, followed by a normal diet for three days, and then the bread-and-water diet for three more days.

[424] The details can be accessed in the following site http://www.crin.org/resources/infoDetail.asp?ID=20232&flag=news.

[425] Office of the Children's Advocate (Jamaica), *Annual Report 2007/2008*, p. 28.

567. During the Commission's visits to a number of Caribbean countries to compile information for this report, officials at the juvenile detention facilities admitted that from time to time they resorted to corporal punishment because they had no information about any other forms of discipline. This, despite the fact that all the facilities use a disciplinary system that involves withdrawing privileges, including family visits.

568. In addition to solitary confinement and corporal punishment, from the information it compiled, the Commission learned that the disciplinary regimes in force in the member States allow for a wide range of punishments, many of which are impermissible in the case of children. The punishments contained in these rules include verbal and written reprimands and admonitions, increasing a child's work by as many as 15 days, reducing the time for recreational activities (also for up to 15 days), suspending family visits four or five times, cancelling leave granted to visit one's family and being in contact with one's community, and others.

569. The Commission is struck by the fact that precise descriptions of the misconduct that will warrant disciplinary measures are uncommon. Indeed, the information available suggests that in most States, the disciplinary measures are imposed on the basis of broad categories, allowing the authorities to exercise a very large degree of discretion. Such examples are: failing to comply with the rules or to perform one's duties, violating prohibitions, disrupting order, failure to respect authority, upsetting the normal routine at the institution, failing to respect the order of activities, and others. The Commission considers that such generic descriptions make it difficult for the children to know and comprehend the prohibited types of behavior and the possible penalties they may face, paving the way for violations of the juvenile offenders' right to due process.

570. In this sense, in addition to an express prohibition on corporal punishment, solitary confinement, restriction of family visits, measures calculated to humiliate the child, and any type of punishment that violates the rights of the detained children, the Commission is also recommending that the States establish laws guaranteeing due process when applying disciplinary measures while a child is serving a custodial sentence. Furthermore, in the Commission's opinion, these legislative measures must be coupled with preventive policies, such as staffing centers with technical and security personnel specialized in, and trained to work with, children. It also recommends that they prepare handbooks and protocols for security personnel to ensure that the facilities are properly controlled and that the life and physical integrity of the children are not in jeopardy. In general, for the Commission, disciplinary measures will be justified so long as they are established by law, pursue a legitimate end that serves the best interests of the child and the objectives of the juvenile justice system, and are appropriate, necessary and proportional.

C. Post-Confinement Measures

571. Inasmuch as the ultimate goal of the juvenile justice system is to enable the child in conflict with the law to return to his or her family and community, States must

establish programs and services to achieve that end. Rule 79 of the Havana Rules provides that:

> All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.

572. Rule 80 of that same instrument provides that:

> Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles. These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community.

573. As part of their juvenile justice systems, States have an obligation to establish services to make it easier for children deprived of their liberty to rejoin their community. These services must be available to all children who are regaining their freedom, whether through early release programs, parole, or upon completion of their sentence. States must provide adequate funding for those services so that they can be effective.

574. These services and programs must be tailored to the age and particular needs of each child, and must plan ways to include the family and the community to which the child belongs. For children who have no family, or whose family is unable to support them, child protection services should be ready to step in to offer the support that will enable these children to provide for their social and economic needs. Children who are on the verge of attaining their adulthood, or who have already attained it, may require guidance to enroll in educational or vocational training programs, and support to obtain housing, a job and connect with other resources in the community. During the visits that the Commission made in preparation for this report, it learned of some best practices, as in the case of Jamaica, where children are provided with subsidies for their rehabilitation, to enable them to attend school once they leave the institution, pay rent or undertake a small revenue-producing project.

575. While these support programs should be available to all children who have been released, it is important to point out that reintegration into the community ought not to begin when the child is released; instead, as this report has repeatedly stated, reintegration is a process that should begin as soon as the child is sentenced and continue to be implemented the entire time that the child is serving his or her sentence.

576. The Commission observes that some programs in the region are conducted while the child is serving his or her custodial sentence, and are designed to ensure that the child has an opportunity to return to his or her community. For example, re-integration permits are a common practice allowing the child to leave the institution to participate in educational, rehabilitative or job opportunity activities in the community. Children are also permitted to spend holidays or time at home for humanitarian considerations. These re-integration permits can be for several days or several hours per day. Programs of this type facilitate the children's reintegration by allowing them to have extended contract with the family and community by means of prolonged visits.

577. The Commission notes that, save in the case of parole, participation in community re-assimilation programs must be on a voluntary basis, and a child's non-participation in these programs must not have punitive consequences.

578. The IACHR also believes it best that these programs be conducted by State agencies in charge of social policy, but not agencies associated with the juvenile justice system.

579. Any program or service whose purpose is to assist children deprived of their liberty with their re-assimilation into the community must make every effort to fight the discrimination and stigmatization that these children tend to suffer for having been offenders. Therefore, it is imperative that States adopt and effectively enforce and comply with laws ensuring the confidentiality of the records of children either accused or convicted of violating criminal law, and must also prohibit these records from being used in future proceedings against that person, even when he or she is an adult.[426] The Commission is troubled by the fact that in most States in the region, a child's personal data on record in the juvenile justice system are not automatically expunged once that child turns 18, and the discrimination against the child follows the child into adult life.

580. Here, the Committee on the Rights of the Child has recommended that the States Parties:

> ... introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction)[427].

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[426] Beijing Rules, Rules 21.1 and 21.2:

> 21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.
>
> 21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

[427] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 67.

581. The information that the Commission obtained concerning implementation of post-release services and programs for juvenile offenders, suggests that few such services are available in the region. Many of the States that answered the Commission's questionnaire stated that they had no data or information on this point. Some, like the Dominican Republic, Chile or Costa Rica, expressly acknowledged that at that time there were no programs of this type. Costa Rica explained that even though there are no such programs, the children do receive support when they apply for it. The lack of post-release follow-up programs is a matter of great concern to the Commission.

582. One exception is Jamaica, where 100% of the children released are automatically enrolled in post-release programs to track their reintegration into the community. This is in large part due to the fact that Jamaica has a law under which children who complete their correctional order before turning 18 years of age must undergo a period of supervision.

583. In its answer to the questionnaire, Colombia asserted that post-release services are offered, such as arrangement of identification papers, civil registration, assistance in enrolling in the formal educational system, or joining the job market, the search for fellowships for technical careers, and others. In its reply to the questionnaire, Mexico observed that 1,087 children out of the total released in the last 12 months (3,437) had received the benefit of technical follow-up, but did not explain the make-up of that program. In its response to the questionnaire, Venezuela observed that no figures were available, but that the method used to prepare children for release had succeeded in establishing associations with community organizations to help in the children's re-socialization.

584. The Commission must emphasize that the States' juvenile justice systems need to establish post-release follow-up and support mechanisms as part of their obligation to ensure that the sentences imposed on children accomplish the purposes they were intended to serve.

V. SUPERVISION, MONITORING, INVESTIGATION AND SANCTION MECHANISMS

585. One of the main weaknesses of juvenile justice systems in the hemisphere is that they do not offer effective means of filing complaints of violations alleged to have occurred at the various stages of juvenile justice, from the time the police intervene up through execution of sentence. Furthermore, in those States that have ways to file complaints, they are frequently not subject to the kind of rapid, serious and effective investigation that the situation requires; as a result, those responsible for violating the rights of accused or convicted children do not face criminal, civil or administrative sanctions. Experts have observed that this creates "a culture of impunity and tolerance of violence against children."[428]

[428] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 54.

586. But apart from systems for filing complaints, the Commission believes that independent mechanisms to oversee and monitor the juvenile justice systems are needed. Oversight and monitoring systems, coupled with record systems that organize the data available on juvenile justice, will enable periodic evaluation of how the juvenile justice system is operating; make it possible to correct those areas that open the door to violations of children's rights, and to craft public policy on the subject.

587. The Commission will now examine these points as a function of the States' obligation to prevent, investigate, punish and redress any violations of children's human rights that occur within their jurisdiction.

A. Systems for Compiling Information and for Crafting Juvenile Justice Policy

588. It is vital that States prepare information and indicators concerning their juvenile justice systems, with a view to improving their operation and management and allowing adequate supervision. Systematic compilation of data on the juvenile justice system is an essential tool for planning, formulating and evaluating public policy on the subject. It is therefore advisable that States make use of the documents developed by United Nations bodies, so that the criteria and indicators therein established can be used to properly examine the information compiled in connection with juvenile justice. The United Nations Economic and Social Council has recommended that systems be established to compile data and information on juvenile justice with respect to children in conflict with the law, using the Manual for the Measurement of Juvenile Justice Indicators.[429]

589. This Manual features quantitative indicators and indicators on public policy. The former include indicators as to the number of children arrested, detained, detained pre-sentence and then sentenced; the length of the pre-sentence detention, and the duration of the custodial sentences; the use of alternative, non-custodial sentences; the number of children who died while in the State's custody; the percentage of children not separated from the adult population when in detention; the frequency of family contact; post-release assistance, and other indicators. The public policy indicators refer to the existence of a system that guarantees regular inspection of places of detention; the frequency of those inspections; the existence of systems enabling custodial children to file complaints; the existence of a specialized juvenile justice system and the existence of a national plan to prevent violation of the rights of children in the juvenile justice system.

590. The questionnaire that the States were asked to answer in preparation for this report focused heavily on these indicators. However, the information received in response to a number of questions was scant or nonexistent. This would suggest that much of the region still does not have effective systems for compiling data on the juvenile justice system based on those indicators.

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[429] United Nations Commission on Crime Prevention and Criminal Justice, Economic and Social Council, Use and Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice E/CN.15/2009/L.13/Rev.1, April 24, 2009, p. 7 (in reference to the "*Manual for the Measurement of Juvenile Justice Indicators"* (2006), available at http://www.unodc.org/pdf/criminal_justice/06-55616_ebook.pdf).

591. Civil society organizations that answered the questionnaire, and the experts invited to the meetings the Commission held in preparation for this report, told the Commission how very difficult it is to find this information; the main problem is that the State services are not centralized under one umbrella. As dispersed as these services are, it is difficult for any one of them to evaluate the system's efficacy and come up with ideas on how to improve it. In this regard, the Committee on the Rights of the Child has recommended periodic evaluation, by independent academic institutions, of the workings of the juvenile justice system in practice.[430] The Court, too, has held that:

> ... the State must protect and respect the functions that can be exercised by non-governmental organizations and other groups or individuals defending the human rights and fundamental liberties of the people deprived of liberty, as these constitute a positive and supplementary contribution to the efforts made by the State[431].

592. When compiling this information and evaluating their juvenile justice systems, States must bear in mind Article 12 of the CRC, from which one can infer that children who have had or are having contact with the juvenile justice system are key actors when the time comes to evaluate and investigate the workings of the system. Therefore, their right to be heard and to express their opinions freely must be preserved.[432] Any investigation must respect the privacy of information pertaining to the children and comply with domestic and international norms on confidentiality of information.

593. From the information compiled in preparing this report, the Commission observes that in general, the juvenile justice systems in the region are separate and apart from the rest of the body of public policy where children and adolescents are concerned. One also finds that a variety of institutions –both public and private and answerable to various authorities and ministries- are entrusted with the care of children consigned to the juvenile justice system, which complicates centralized data gathering. The Commission is also concerned by the fact that only four States were able to provided information on the budget of the specialized juvenile justice system,[433] which suggests a lack of transparency regarding the funds earmarked for juvenile justice.

594. The Commission would urge the States to strengthen their systems for producing information and indicators on the juvenile justice system, with a view to improving its operation, allowing adequate oversight of it, and developing public policies that protect the rights of children in the juvenile justice system. The Commission is urging

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[430] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 98 and 99.

[431] I/A Court H.R., *Matter of the Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM.* Provisional Measures. Order of the Inter-American Court of Human Rights of July 4, 2006, *point* seventeen.

[432] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, paras. 12 and 99.

[433] Colombia, Costa Rica, the Dominican Republic and El Salvador.

the States to set up ways in which children can participate in crafting the public policies that affect them.

B. Mechanisms for Supervising and Monitoring the Juvenile Justice System

595. As regards information gathering and indicators on the juvenile justice system, States have a duty to establish the supervision and monitoring mechanisms necessary to evaluate the system periodically. The evaluation must look at every aspect of the juvenile justice system, including: the intervention of the police; the conduct of judges; the performance of those officials charged with carrying out the custodial and non-custodial measures and those tasked with tracking the children subsequent to their release; the efficacy of programs established to ensure that the children have contact with their families and community, and to ease the reintegration of children deprived of their liberty into their communities, the operation of the centers in which custodial sentences are served, and other matters.

596. One of the most important mechanisms is a regular system of visits to, and inspections of, those centers in which children deprived of their liberty are serving their sentences. These inspections should be done by independent institutions. Such visits and inspections should be in addition to the evaluation that the State's administrative and judicial authorities carry out. The inspections should serve as an opportunity to periodically check detention conditions and the physical and emotional condition of the children deprived of their liberty.

597. Rule 14 of the Havana Rules provides the following in this regard:

> The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international standards, national laws and regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility.

598. For its part, the Committee on the Rights of the Child has observed that:

> Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting[434].

[434] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 89; General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment,* CRC/C/GC/8, 2 March 2007, para. 43; IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Document Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, principle XXIV.

599. The visits made by the independent supervision and monitoring agencies should be done on a regular basis and without prior notification. States must make certain that these agencies are able, *inter alia,* to conduct confidential interviews with the children deprived of their liberty, or with officials and staff of the custodial institution; have access to all the center's facilities; and review all existing documentation. The teams should be composed of professionals from various disciplines and should always include a qualified physician capable of evaluating the physical environment, the medical services and all other aspects that affect the children's physical and mental health.[435] The findings of the supervision and monitoring by independent agencies should be made public, and some procedure should be in place to follow up on the recommendations. The visiting team should be able, *inter alia,* to conduct confidential interviews with the children, speak with prison personnel, and have access to all existing documents and all the facilities at the center. Rule 72 of the Havana Rules states that:

> Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities[436].

600. From the member States' answers to the Commission's questionnaire, it is obvious that mechanisms for periodic and independent supervision of the juvenile detention facilities do not exist in the region. While the majority of States answered that they do have such mechanisms, what they describe does not in fact fit the minimum standards that the Commission has described in these paragraphs. Furthermore, the information received by the IACHR concerning the countries that claim to have independent oversight mechanisms raises real doubts about how really independent these agencies or oversight committees are. Furthermore, the information received suggests that this type of independent mechanism is not adequately funded or staffed to perform the difficult function with which it is tasked.

601. Another essential tool to be able to evaluate and monitor a juvenile justice system is a procedure by which to file complaints about the way the system functions. As previously observed, these complaint procedures must be there for all phases of the system, from the time the alleged offender is in conflict with criminal law and is tried, to the time he or she serves his or her sentence and returns to his or her community. Procedures for investigating unlawful or arbitrary detentions, where the child is in even greater peril, are particularly important.

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[435] Havana Rules, Rules 14, 72 and 73; Guidelines for Action on Children in the Criminal Justice System, recommended by Resolution 1997/30 of the Economic and Social Council on July 21, 1997, Guideline 21.

[436] See also, Guidelines for Action on Children in the Criminal Justice System, recommended in Economic and Social Council Resolution 1997/30, July 21, 1997, para. 21.

602. The Court has observed that children and their parents or guardians must have effective resources to challenge arbitrary detentions.[437] The Commission, for its part, has held that every detained person has a right to file a complaint alleging acts of torture, prison violence, corporal punishment, cruel, inhuman or degrading treatment or punishment, and to protest the detention or incarceration conditions, the lack of medical or psychological attention, and a lack of adequate food.[438] The Committee on the Rights of the Child has observed that:

> Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms[439].

603. The independent expert for the United Nations study on violence against children also brought up the need to establish:

> ... well-publicized, confidential and accessible mechanisms for children, their representatives and others to report violence against children.
>
> All children, including those in care and justice institutions, should be aware of the existence of mechanisms of complaint. Mechanisms such as telephone help lines, through which children can report abuse, speak to a trained counselor in confidence and ask for support and advice should be established and the creation of other ways of reporting violence through new technologies should be considered[440].

604. States must establish simple, effective procedures through which children and their parents or guardians can file complaints with the authorities in charge of the juvenile justice system concerning any aspect of the system's intervention in the child's life, particularly with regard to the measures ordered as sanctions. States must take steps to ensure that these complaint systems are in place, and that children facing the criminal justice system and their parents or representatives are advised of these procedures. Any decision taken on a complaint must be reasoned and well-founded. Complainants must have the chance to appeal that decision to an independent and impartial authority. The receiving institutions and other authorities must keep a record of the complaints and requests filed, and the corresponding decisions. The complaint proceedings are to

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[437] I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, Costs Judgment of September 18, 2003. Series C No. 100, para. 127.

[438] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* document approved by the Commission at its 131st session, March 3 to 14, 2008, Principle V.

[439] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 89. In the same sense: Havana Rules, Rules 75 and 76.

[440] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 104.

guarantee the child's right to be heard, and to be assisted by counsel.[441] To ensure a complainant's safety, provision must be made for measures to protect him or her against possible reprisals; mechanisms should be in place to enable complaints and requests to be filed anonymously. Furthermore, in order for these procedures to be considered effective, they must also involve a serious investigation into the complaint; where appropriate, criminal, civil or administrative responsibilities should be established.

605. From the information received in the process of preparing this report, including the States' answers to the Commission's questionnaire, one can safely say that in most States of the region, no complaint and petition systems are in place that meet the standards described in this section. Furthermore, the information received indicates that very few complaints are filed when one considers the incidence of abuse and violations within the juvenile justice systems. This is likely due to the fact that people are unaware of the resources available, or to the fear that sets in when the time comes to file a complaint. The information also shows that sanctions are rarely ordered when complaints are filed, which suggests that the way in which these systems have been implemented has made them relatively ineffective.

606. Judicial oversight of the juvenile justice system is also essential, especially in the case of children deprived of their liberty or subject to sanctions or measures. Establishing sentence-enforcement courts or assigning oversight functions to the case judges is vital. The creation of these jurisdictional bodies is advisable, which should have the authority to control and monitor sentence enforcement and resolve any type of complaint or claim filed by the sanctioned juvenile, his or her attorney, family members, or any other person.

607. In addition to the mechanisms, systems and procedures described above, the Commission is urging the member States to ratify the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under this instrument, States Parties are required to establish a national preventive mechanism; the Protocol also provides for the establishment of a Subcommittee for Prevention at the international level. Both the national preventive mechanism and the Subcommittee for Prevention will visit prisons and detention facilities in the State in order to better protect persons deprived of their liberty.

C. Prevention, Investigation, Prosecution, Punishment and Reparations in cases of Violations of the Rights of Children and Adolescents Accused of Violating the Law

608. Apart from the investigations and punishment that follow as a result of the independent oversight mechanisms, or complaint mechanisms to which the Commission alluded in this section of the report, the member States should be reminded of their obligation to act, on their own initiative, to prevent, investigate, prosecute, punish and redress any violation of the human rights of children facing the juvenile justice system. Thus, for example, in those facilities in which sentences are served, records must be kept of

[441] Havana Rules, Rules 25 and 78.

incidents of violence, the use of force, injuries, deaths and any other presumed violation of the children's rights that occurs while they are serving their custodial sentence,[442] and all these cases should be prosecuted, and the proper sanctions enforced.

609. In keeping with the jurisprudence of the Inter-American Court and the Inter-American Commission, States must guarantee a serious, impartial and effective investigation, conducted without delay and at the States' initiative, into alleged violations of human rights. The Commission believes it is important that these investigations actually uncover possible discrimination in violations of children's rights.

610. As for sanctions, the Commission concurs with the report of the independent expert for the United Nations study on violence against children, on the need to establish appropriate sanctions for persons convicted of violating the rights of children, which should include: criminal sanctions, civil sanctions, including pecuniary and non-pecuniary damages, and other measures that help effect change in the institutions; administrative sanctions (such as revoking licenses, imposing fines or closing the institution); professional sanctions (such as a notation in the staff member's file, his or her dismissal or a ban preventing that person from working with children).[443]

611. States must change the way things are done so as to avoid a repetition of the conduct that elicited the complaint. Children who have been victims of violence or violations of their rights must receive the proper care, support and appropriate compensation. In the case of minority children, whose rights have been systematically denied, collective forms of redress may be necessary, particularly when the violation was the result of government policy.

612. In the final analysis, the States must act in accordance with the *jurisprudence constante* of the Inter-American Court and the Inter-American Commission with respect to Article 1(1) of the American Convention, which establishes their duty to prevent, investigate and punish any violation of the rights recognized in the Convention, and, if possible, attempt to restore the right violated and provide compensation, as warranted, for damages resulting from the violation.[444] States must not only refrain from engaging in practices that violate human rights, but must also demand that all positive measures be taken to protect and preserve those rights. This duty includes the adoption of the legislative, administrative and judicial measures necessary to protect human rights.

613. The Commission would therefore remind the States of their obligation to prevent, investigate, punish and redress violations of the rights of children that occur at any stage in the juvenile criminal justice process. They are also reminded that those rights include those pertaining to the special protection to which children are entitled under

[442] *Cf*. Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 107.

[443] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, p. 213.

[444] I/A Court H.R., *Case of Velásquez Rodríguez,* Merits. Judgment of July 29, 1988, Series C No. 4, para. 166.

Article 19 of the American Convention and Article VII of the American Declaration, as well as all those contained in the international *corpus juris*.

VI. RECOMMENDATIONS

614. In addition to the recommendations detailed in the body of the report, the Inter-American Commission on Human Rights, according to its mandate, is making the following recommendations to the member States:

A. General Recommendations

1. Undertake to comply with their international obligations to protect and ensure the human rights of children, while guaranteeing the special standards of protection that children facing the juvenile justice system require and the obligations to protect and guarantee that the States must ensure to all persons subject to their jurisdiction.

2. Adopt the legislative, administrative and other measures necessary to incorporate the standards and principles of the international *corpus juris* on children's human rights into their domestic legal systems and, most especially, their juvenile justice systems

3. Adapt their domestic laws to bring them into compliance with the international obligations to protect and guarantee the human rights of children facing the juvenile justice system and put into practice procedures that ensure compliance with those standards.

4. Guarantee that the standards and principles of the juvenile justice system are applied evenly with respect to all children under the age of 18, and preclude from this specialized system of justice only those children who have not attained the minimum age of criminal responsibility. States should also gradually increase the minimum age of criminal responsibility.

5. Establish alternatives to adjudication in cases involving children accused of violating criminal law, so that their cases can be resolved by means of measures that help their personalities develop and ensure their constructive reintegration into society.

6. Make available specialized juvenile courts, in all regions of the territory, staffed with judges and other officers of the court specializing in juvenile justice and children's rights.

7. Ensure that any custodial measures ordered where children are concerned, whether for preventive detention or as a sentence for violating the law, are used only as a last resort and for the shortest period of time possible, in full observance of the children's rights to due process and judicial guarantees.

8. Guarantee that the other rights of children deprived of their liberty are not violated and that they are able to enjoy them in an effective manner.

9. Adopt the measures necessary to combat impunity, while ensuring the State's capacity to prevent, investigate and punish any violation of human rights resulting from the action or omission of State agents within the juvenile justice system, and from the violence that occurs inside facilities in which children are deprived of their liberty.

10. Make every effort to restore to children in the juvenile justice system any rights that may have been violated; when this is not possible, provide full compensation to those children in the juvenile justice system who have been victims of violence and human rights violations.

11. Incorporate into their domestic laws and put into practice the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the IACHR.

B. Specific Recommendations

12. Ensure that the juvenile justice system is applied to all persons between the minimum age of criminal responsibility and 18 years of age. To this end, the Commission is recommending the following to the States:

a) Increase progressively closer toward 18 the age at which children could be responsible under the juvenile justice system. Once that minimum age is established, ensure that it never goes lower, in keeping with the principle of non-regressivity.

b) Adopt laws that prohibit children below the minimum age of criminal responsibility from being prosecuted and punished by the juvenile justice system, and prohibit the use of age brackets or "two minimum ages" based on the seriousness of the offense or the personal circumstances of the supposed offender.

c) Adopt laws that prohibit children under the age of 18 from being prosecuted by adult courts, sentenced by the same guidelines that would apply in the case of adults, or required to serve their custodial sentences in adult facilities.

d) Make available the human and material resources needed for the administration of specialized juvenile justice to function properly and in a timely manner.

13. Establish juvenile justice systems that respect the specific legal principles that apply to minors and the special procedures through which the general principles of law are applied to persons who have not yet attained their adulthood. Accordingly, the Commission urges the States to:

a) Ensure that the general principles of comprehensive protection and the best interests of the child inspire any legislation and policy, program or practice that concerns children accused of violating criminal law.

b) Make certain that the juvenile justice system and the sanctions it imposes serve the objectives of this specialized system of justice, which is the rehabilitation of the child and his or her reintegration into society.

c) Observe the principle of legality, introducing any legislative reforms necessary to ensure that the justice system is applied only in the case of conduct that has already been classified as a crime. Furthermore, the States are to abolish any law that criminalizes "status offenses", i.e., types of behavior that are offenses only when committed by a child but not when committed by an adult, and any norms that allow the juvenile justice system to be applied based on a child's socio-economic circumstance, such as indigence.

d) Observe the principle of last resort, limiting the juvenile justice system's intervention and the use of sanctions against minors to exceptional cases and after weighing other available options, and establish rules stipulating when the juvenile justice system shall intervene.

e) Ensure that the principle of specialization is observed, giving the specialized jurisdictional bodies exclusive competence for the prosecution of children charged with criminal offenses; provide continuing training in the rights of children to all those officials and personnel directly involved in juvenile justice proceedings (which includes police, judges, prosecutors, defense attorneys and technical teams of psychiatrists, psychologists and social workers or, in the case of parole or probation, to the personnel in charge of enforcing the sentences, among others); and design procedures and infrastructures that are accessible to and appropriate for children.

f) Respect the principles of equality and non-discrimination, which means ensuring that the norms of the juvenile justice system are not applied with greater frequency or with greater severity in the case of minority children; develop strategies for combating discrimination on the part of the police and court authorities and others who intervene in the juvenile justice system, so as to prevent the stigmatization and criminalization of children from minority communities in the Americas, such as Afro-descendants, indigenous children, Latinos in the United States,

disadvantaged children, children with some mental disability, children who belong to *maras* or gangs, and others.

g) Observe the principle of non-regressivity, by not adopting any legislative or administrative measures that would imply any restriction or regression in the rights that children facing the juvenile justice system enjoy. States should prevent the entry into force of any norm whose purpose is to suspend certain guarantees in proceedings against children accused of violating criminal law, laws that would lower the minimum age of criminal responsibility or the age at which a child would face the regular court system, or any other regressive measures.

14. Make certain that the juvenile justice systems effectively ensure children's rights to procedural guarantees and judicial protection. The IACHR would especially remind the States of their obligation to:

a) Respect the basic, internationally recognized principles of criminal law, such as: the presumption of innocence, the proportionality of the sentence; *nullum crimen sine lege, nulla poena sine lege* and *non bis in idem*.

b) Make notification of the parents or guardians concerning the situation of children facing the juvenile justice system mandatory by law.

c) Ensure that the services of public defenders specializing in juvenile justice are available throughout the national territory, and enable the defense counsel, the child and the parents to confer in private.

d) Ensure observance of the principle of rebuttal, clearly defining the roles that the prosecution and the defense have in the proceedings so as to ensure equality of arms between the two sides.

e) Guarantee the rights of children facing the juvenile justice system to express their opinions, to be heard and to participate in all stages of the proceedings, creating court environments that are child-friendly and ensuring that the children have sufficient, easy-to-comprehend information with respect to the proceedings being conducted against them.

f) Enable parents or guardians to participate in the proceedings in all cases, except when their participation is prejudicial to the best interests of the child. Non-participation by parents or guardians shall not have legal consequences in determining what the applicable penalties are.

g) Ensure that children facing the juvenile justice system have the possibility of appealing to a higher jurisdictional authority to seek a full review of the matter.

h) Establish reasonable maximum time periods within which a child must be sentenced, as well as short time limits for the consideration of motions in the juvenile justice proceedings.

i) Observe the principle of proportionality, limiting the degree of discretion that judges or other officers of the court can exercise when the time comes to determine the type and quantum of the measures ordered as sentences for children found guilty of violating criminal law.

j) Enact laws to the effect that cases involving children are to be private and confidential, and to the effect that no information that could identify a child accused of violating criminal law may be made public.

k) Observe the principle of *non bis in idem* and *res judicata,* ensure proper application of the rules governing repeat offense, and establish rules for juvenile records that serve the objectives of the juvenile justice system and the best interests of the child

15. Establish, by law, that alternatives to adjudication must be considered with respect to issues that arise out of a child's violation of criminal law; order adequate and sufficient programs to implement those alternatives, and encourage judges and the other officers of the juvenile justice system to use those alternatives. To this end, the Commission is recommending the following to the States:

a) Ensure that the special laws and procedures in the juvenile justice system allow sufficient latitude to exercise discretionary authority at the various stages of the proceedings and in the various phases of the administration of juvenile justice, with a view to allowing alternatives to adjudication in cases of violations of criminal law committed by children; that discretionary authority must be regulated in such a way as to prevent discrimination in the exercise of those authorities and protect the accused child's right to due process and to judicial guarantees.

b) Enact laws stipulating that alternative measures must be considered in all cases involving juvenile offenders, including the possibility of dismissing the case or referring the matter to community-supported services.

c) Ensure that the budgetary appropriation assigned is sufficient to put into practice community-referral (diversion) programs that can provide an adequate response to cases involving juvenile offenders and perform periodic checks to ensure the quality of those programs and their staff.

d) Conduct information campaigns so that those working in the juvenile justice system, especially judges, fully comprehend the advantages that are to be gained by not requiring children to undergo proceedings that will result in punishment, and to focus instead on the children and adolescents and their social reintegration.

e) Enact laws to prohibit the practice of automatically incarcerating children who fail to comply with the obligations imposed as an alternative to adjudication. Furthermore, failure to comply with alternative measures must not constitute a violation of criminal law.

16. Ensure the existence of a range of alternatives to the deprivation of liberty, and make certain that such measures are the first option in the case of minors, both in the preventive phase and in the post-conviction phase. Specifically, the IACHR is recommending the following to the States:

a) Enact and enforce laws that establish various non-custodial alternatives to the deprivation of liberty in the case of minors, with special emphasis on community programs.

b) Ensure that the non-custodial alternatives to the deprivation of liberty are implemented in such a way that the right to due process and the principles of the presumption of innocence and the proportionality of the sentence are observed.

c) Adopt the measures, including budgetary measures, necessary to ensure that the various programs offering alternatives to juvenile detention function properly and are available nationwide.

d) Encourage community members and victims to participate in the design of the non-custodial measures that are tailored to the child's individual characteristics, as well as the monitoring of the measures.

e) Strengthen the mechanisms to support and monitor children participating in programs offered as alternatives to custodial measures, making it easier for children to fulfill the conditions imposed.

f) Avoid the preventive detention of children before judicial proceedings begin; preventive detention must be reserved for the most exceptional circumstances.

g) Enact laws that prohibit penalties for failure to comply with the conditions of the non-custodial measures ordered, and that stipulate that noncompliance cannot result in stiffer or tougher sentences than the original violation of criminal law would carry.

17. Establish mechanisms to ensure that children are especially protected from unlawful and arbitrary detentions, and to guarantee the rights of children subject to preventive detention. To this end, the IACHR recommends that the States:

a) Enact and enforce laws prohibiting mass arrests of children.

b) Respect children's right to be separated from the adults even in transfers, to be informed of the charges against them and be advised of their rights, especially with respect to the right to remain silent and not to testify against oneself, to be in communication with third parties, to have contact with one's family, and to speak with one's defense counsel as soon as possible.

c) Prohibit the holding of children in either common or special police detention cells.

d) Prevent any form of violence against children during detention and while in police custody.

e) Ensure that the parents or guardians of children who are deprived of their liberty are immediately notified and, in those cases in which the accused child does not have his or her own defense attorney, that the children are assigned *pro bono* defense counsel specializing in juvenile justice.

f) Guarantee that detained children have the advice of an attorney from the time they are detained. Defense attorneys are to be professionals who specialize in juvenile justice and their services shall be at no cost to the client and paid by the State.

g) Make medical examinations mandatory to attest to the health condition of the child at the time of his or her detention.

h) Establish a system for judicial oversight of detentions of children under the age of 18 which functions effectively and in a timely manner. Detention prior to the court hearing cannot be for more than 24 hours. If States provide a 24-hour period for judicial review of the arrests of adults, the duty of special protection undertaken in Article 19 of the American Convention and Article VII of the American Declaration requires that the review of juvenile arrests be done within an even shorter time frame.

i) Limit the use of preventive detention to those cases in which it serves a legitimate procedural end, established by pre-existing law.

j) Ensure that the court decision to order preventive detention is based on the case at hand, and that it explicitly state the reasons why other alternative non-custodial measures cannot be applied. Furthermore, in order for preventive detention to be warranted, the case must be about an offense or crime that would carry a sentence of the deprivation of liberty.

k) Establish reasonably brief maximum time periods for children's preventive detention, which, once expired without a conviction will result in the children's immediate release.

l) Establish the opportunity to appeal any order that imposes preventive detention, and set the time period within which the appeal must be decided. Ensure that preventive detention is temporary in nature, by establishing a system of periodic review that can decide to terminate the preventive detention or replace it when a change of circumstance occurs that goes to the reasons why preventive detention was ordered in the first place.

m) Ensure that the infrastructure of the facilities in which children are held in preventive detention are suitable to house children, and that their staff is properly trained to deal with minors. States that have not yet done so must take urgent measures to segregate children in preventive detention from those who have already been convicted and sentenced.

18. Establish specific limits for the enforcement of custodial sentences in the case of children. To this end, the Commission is recommending the following to the States:

a) Guarantee that the custodial sentences for children are used only by way of exception, and as a last resort.

b) Limit the degree of discretion that judges and other authorities can exercise when ordering custodial sentences by establishing minimum ages at which custodial sentences can be given, or age brackets with age-based maximum sentences for children facing the juvenile justice system.

c) Set a maximum length for custodial sentences for children, taking into account the purposes that sentences in the juvenile justice system are intended to serve.

d) Abolish the death penalty and life imprisonment for children under the age of 18, with or without parole.

e) Eliminate sentences for indefinite periods and sentences that are determined by the duration of the rehabilitation program and not by the principle of the proportionality of the sentence.

f) Reduce the excessively long sentences for the commission of certain crimes and abolish the penalty of life imprisonment in the case of children.

g) Establish systems for periodic review of custodial measures that would allow children to be released in those cases in which their continued deprivation of liberty is no longer warranted.

h) Determine that the child's personal circumstances can only be used to diminish or attenuate the State's punitive response, and that any consideration of the child's needs is to be precluded as a sentencing guideline.

i) Adopt the measures necessary to neutralize or diminish the de-socializing effects of the deprivation of liberty, ensuring that any form of intervention will be geared toward strengthening family bonds and community ties.

j) Enact and enforce legislation whereby a custodial sentence can be replaced by a non-custodial sentence while the child is serving his or her sentence, based on periodic evaluations of his or her situation.

k) Develop early release programs, while ensuring that all children serving custodial sentences have access to adequate legal representation so that they may be advised of the opportunities to secure early release.

l) Grant permits to assist the child's reintegration while he or she is still serving his or her sentence, so that the child is able to spend increasingly longer periods with his or her family, or in the community to which he or she will return.

m) Make review hearings mandatory when the children deprived of their liberty turn 18 and have still not completed their sentence, in order to determine whether they should continue to serve a custodial sentence, whether the custodial sentence might be replaced with a non-custodial measure, or whether they can be released.

19. Ensure that those children deprived of their liberty by a sentence imposed by the juvenile justice system are able to exercise all those rights whose limitation is not warranted on the grounds of their deprivation of liberty. Specifically, the IACHR is recommending the following to the States:

a) Guarantee that those civil, economic, social or cultural rights that children deprived of their liberty can exercise while subject to a custodial measure are not restricted; to that end, specific legislation must be enacted and programs established to allow adequate implementation of that legislation.

b) Ensure that children deprived of their liberty enjoy their rights to life and physical integrity by making certain that independent, qualified medical personnel are assigned to examine such children to check for possible cases of physical torture, abuse, corporal punishment and potential psychological traumas.

c) Restrict the measures that can be used to discipline children subject to custodial measures. In particular, States must respect the principle of legality and the guarantees of due process in disciplinary proceedings. They must also expressly prohibit corporal punishment, solitary confinement and any form of cruel, inhuman or degrading treatment, including the restriction of diet, restriction or denial of the child's contract with his or her family, collective sanctions and multiple sanctions for the same offense, and any measure that jeopardizes the custodial child's physical or mental health.

d) Guarantee decent treatment to all children in the custody of State authorities and endeavor to provide to children deprived of their liberty the same access to programs in education, vocational training and recreation. The educational programs must meet the same content requirements and the same requirements in terms of hours of attendance that the educational authorities require of children who are not deprived of their liberty.

e) Guarantee a diet for children deprived of their liberty that is adequate for their health and sufficient for strength, one that takes account of the fact that these children are still growing and developing.

f) Guarantee to children deprived of their liberty the highest possible standard of physical and mental health, by making available adequate medical services and treatment and giving special consideration to their specific needs, particularly in the case of girls, pregnant girls, children with HIV-AIDS, addicts, and others.

g) Ensure that children deprived of their liberty are properly segregated by sex, age, personality and type of offense, and that they are segregated from adults. Children who attain their majority while serving a sentence in the juvenile justice system may not be transferred to adult prisons; instead they should be placed in specific centers within the juvenile justice system, separated from children, or under a special regime.

h) Ensure that the architecture of the juvenile facilities is consistent with the socio-educational objective of the juvenile justice system and that the number of children in any given facility does not exceed its installed capacity. The physical space must also ensure the safety of the children deprived of their liberty, with emergency exits and safety measures to anticipate any type of emergency.

i) Permit and encourage a child's contact with his or her family and community, decentralizing the juvenile custodial facilities so that children serving custodial sentences are either in or near the community where they or their parents, guardians and friends live.

j) Encourage visits by family members, friends and members of the community by establishing flexible visiting hours and setting up comfortable areas so that the visits serve to strengthen the family bond and ties to members of the community.

k) Provide financial assistance whenever necessary to enable family members to visit the children deprived of liberty and enable the latter to return to their homes at the holidays, so that they can begin to be reintegrated into their communities.

l) Set up a system of records on children deprived of their liberty, being careful to ensure their privacy and not to reveal their names to the public. The records system should be used to monitor the status of every child deprived of his or her liberty. At a minimum, the information should be broken down by gender, age, special skills and reasons for the intervention; the records should also reflect the frequency with which family members visit.

20. Establish programs to assist children after their release, thereby ensuring that the goals of the juvenile justice system are accomplished and that the children are successfully reintegrated into their communities. To that end, the Commission is making the following recommendations to the States:

a) Establish programs to facilitate the children's return to their communities once they have been in a custodial facility and provide sufficient financial and human resources to enable those programs to function. Encourage the family and the community to participate in these programs' design and implementation. Ensure also that these services are entirely voluntary and, insofar as possible, are available to all children everywhere, so as to prevent the stigmatization and alienation of the juvenile offenders.

b) Provide subsidies to children upon their release, to better enable them to rejoin their communities, particularly when these subsidies are needed in order to enable the children to attend educational or vocational training programs or to undertake small revenue-producing projects. Establish social reintegration centers for those children who are released but are unable to return to their families.

c) Enact and enforce laws that ensure the confidentiality of the information on record in the juvenile justice system concerning children who have been in conflict with the law and prohibit their use as criminal records in future proceedings when the individual in question is an adult. Those laws should also stipulate that the personal particulars of a juvenile offender are to be automatically expunged from the juvenile justice system's records when the juvenile offender turns 18 years of age.

21. Establish mechanisms to supervise and monitor the situation of children that have had contact with the juvenile justice system, and mechanisms to investigate, prevent, punish and redress any violation of human rights that occurred within the juvenile justice system. To this end, the Commission is recommending the following to the States:

a) Establish a system of indicators on juvenile justice, based on internationally agreed norms, and ensure that the information is accessible to the public.

b) Ensure the informed participation of children in crafting juvenile justice policy.

c) Through independent institutions, periodically evaluate the workings of the juvenile justice system at all stages, from police intervention to serving of sentence, with a view to gauging the efficacy of the measures taken and identifying areas where violations of the children's rights might be happening.

d) Establish a regular system for monitoring inspections and visits by independent institutions, and facilitate the effective development of their functions.

e) Also establish a confidential complaint system that is accessible, independent and effective, so that the children and their families can file complaints of alleged violations of the children's rights in any part of the juvenile justice system, especially inside the facilities in which children are deprived of their liberty.

f) Record all complaints received concerning the workings of the juvenile justice system, conduct a serious, impartial, effective and swift investigation of those complaints and answer all complaints received.

g) In those cases in which it is established that the rights of children in the juvenile justice system have been violated, take steps to impose administrative, civil and/or criminal sanctions against the responsible parties, to avoid a repetition of such events.

h) Compensate the victims for the violations of their rights and provide them with support and services to reverse the effects of the harm caused.

i) Approve codes of conduct for the personnel of the juvenile justice system and establish sanctions and procedures whereby any staff member being investigated for possible violations of children's rights can be immediately removed from his or her post.