



Organización de los
Estados Americanos



Adolescent Criminal Liability Systems in the Americas

Inter-American Children's Institute (IIN), a
specialized agency of the Organization of American
States

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INTRODUCTION

1. The Inter-American Children's Institute (IIN) is the Specialized Organization of the Organization of American States (OAS) responsible for promoting and contributing to the protection of the rights of children in the Americas, and for generating technical instruments which will strengthen the States' capacity to design and implement public policy in these areas¹. Two international instruments constitute the principal reference points for its activities: the Inter-American Democratic Charter² and the Convention on the Rights of the Child (CRC)³.

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2. The IIN, composed by the OAS Member States represented on the Directing Council make this Institute a dynamic organism that can translate the needs and interests of the States into solutions for children and adolescents of the region.

3. As the body responsible for coordinating and generating input for the States, the IIN's Secretariat is a technical reference point in matters involving human rights and public policy for children in the hemisphere. By virtue of its direct contact with the governing bodies for children in OAS Member States, it has become the coordinating body of the principal regional efforts for the fulfillment of rights of children and adolescents. The IIN is, therefore, an institution that contributes technically to creating awareness regarding the problems affecting children, as well as to generating a sense of social responsibility in this respect.

4. Within the context of the Inter-American system, in addition to cooperating with the human rights agencies in disseminating and promoting these rights, the IIN fosters the design of comprehensive public policies that promote the best interest of children.

¹Statutes of the Inter-American Children's Institute, adopted by the Directing Council of the IIN during its 79th Regular Meeting, held on 25 and 26 October 2004 in Mexico, D.F., CD/RES. 06 (79-04). Available at: http://www.iin.oea.org/2004/Estatuto_2004_ingles.htm

²Charter adopted by means of OAS General Assembly resolution on 11 September 2001, during the 28th Special General Assembly Session.

³Adopted and opened to signature and ratification by the General Assembly in its resolution 44/25, of 20 November 1989.

5. It is from this perspective and this standpoint that the Directing Council of the IIN, as the principal mechanism of consensus and coordination, together with its Secretariat, has decided to publish this Position Paper on the subject of adolescent criminal liability systems⁴, a topic that has received significance attention mainly in the media and national politics of many of the Member States, with the purpose of creating common points and agreement to ensure respect for and observance of human rights of children in conflict with criminal laws.

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6. Although, this paper does not address all of the aspects of this topic because of its complexity and the plurality of legal systems of the States the American continent. However, it does develop some fundamental aspects regarding the protection and fulfillment of human rights of adolescents in conflict with the law, focusing on the perspective of rights and principles enshrined in the Convention on the Rights of the Child (hereinafter: The Convention or CRC) and other instruments of International Humans Rights Law. Similarly, as indicated in the title, the main focus will be on adolescent criminal liability systems, but the paper will also address some elements of what a general and comprehensive policy for the protection of child rights should include in connection with the subject of adolescents in conflict with criminal law.

7. The need for a joint public statement is proof of the significance of consensus, particularly with regard to these matters, which are so wide-ranging that it becomes indispensable to devise minimum standards jointly so that these systems can operate in accordance with international commitments. At the same time, it is also essential in this area to systematize experiences and generate opportunities for exchange and cooperation between the States.

8. This position paper, therefore, will attempt to provide a starting point and common ground, on the basis of which to intensify the process of integration of perspectives regarding the most effective solutions for the problems surrounding the topic of the participation of adolescents in acts that are deemed to be criminal activities. This process demands the intensive exchange of information and national experiences leading to joint lessons on this subject, in which even the most highly developed States encounter challenges.

⁴Resolution of the Directing Council of the IIN CD/Res. 07 (86R/11), "Work Mandate Regarding the Criminal Liability of Young People", adopted during the 84th Meeting of the Council held in Montevideo, Uruguay in September, 2011.

9. A fundamental premise in this update is that the basic objective that should guide State action in this area is protecting and safeguarding the rights of adolescents, which have been enshrined in the international legal framework of human rights. It should also be said that these safeguards and protection do not imply the neglect of the criminal features inherent to the subject of adolescents in conflict with criminal law, although the States' response with regard to adolescents should differ from the response afforded in the case of adults, in view of the special stage of development of this population group and the greater opportunities for re-education and re-socialization. This different treatment is directly related to the principle of best interest stipulated in Article 3 of the Convention on the Rights of the Child (CRC). The Committee on the Rights of the Child⁵ in its General Comment Nº 10⁶, explains the reasoning behind the need for a specialized judicial administration in the case of adolescents in conflict with criminal law in these terms: *"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. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders."*⁷ As the Committee states, in view of the specific intrinsic nature of the participation of adolescents in acts that are deemed to be criminal activities, the establishment of specialized systems to address adolescent criminal liability is justified.

10. It is important to reiterate that although the nature of these matters is criminal, it does not mean that the response should be punitive or involve retribution in the traditional sense. Without going into the theoretical details and difficulties of the theories of punishment, it is fairly evident that in the case of crimes committed by adolescents, societies should make a

⁵The United Nations Committee on the Rights of the Child is the body established in Article 43 of the Convention on the Rights of the Child with the purpose of examining progress made by States Parties in achieving the realization of the obligations undertaken with regard to the CRC.

⁶As other committees concerned with United Nations treaties and other human rights bodies also do, the Committee on the Rights of the Child produces General Comments in which the content of the CRC's articles is interpreted. It also performs a doctrinal development of different subjects that the members of the Committee consider to be significant and necessary in view of the regular reports submitted by the states regarding the fulfilment of the CRC.

⁷"Children's rights in Juvenile Justice". CRC/C/GC/10. Observation adopted at the forty-fourth session, Geneva, 15 January-2 February 2007. Available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>

much greater effort to seek socio-educational aims leading towards resettlement in the social and family network.

11. This is technical document that accounts for the position of States on the subject, while attempting to call attention to the need for all sectors and stakeholders to contribute to the implementation of international standards created regarding this matter.

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CHAPTER I

I.1 BACKGROUND

12. The topic of the adolescent criminal liability has a long history as a subject of debate. In the past, control and social repression were exerted without any special consideration for this population; however, more recently, there has been a trend that places adolescents at the centre of concern. Despite significant efforts in the region to put into practice in different areas (legislative, public and functional policy) the specific implications of this new outlook – more in keeping with human rights – the previous approach still carries a great deal of weight, mainly in the social imaginary, as well as among a considerable number of operators involved in the systems of adolescent criminal liability. It is difficult to change the habit of addressing these subjects as it has been done for over two centuries; nevertheless, making a new rights-based perspective a reality is related to political decisions and the capacity to implement this new vision of children and their rights⁸.

13. The change in the vision regarding childhood has passed through three stages: a) when children were seen as objects (the conception of children as possessions), b) as objects of protection and c) up to the current view of children as rights-holders, which has caused

⁸ A detailed analysis of the doctrine of comprehensive protection and the contents of this paragraph is provided in the presentation on “The Doctrine of Comprehensive Protection and Current Family Law”, by Dr. Daniel O’Donnell, published in the report on the 19th Pan American Child Congress, to which it was presented in October 2004. Available at: <http://portal.sre.gob.mx/pcdh/libreria/libro7/04%20F.pdf>

considerable progress in the definition of State intervention regarding the “anti-social” conducts of children and adolescents. For many years, societies criminalized poverty, orphanhood and exclusion, conditions that became root causes of confinement and punishment for the children and adolescents that suffered from them. In short, the same repressive response that was applied to common criminals was also applied to children under the pretence of removing them from the dangers of their “irregular situations”⁹. This reaction from the State was usually also burdened with social stigma and interventions were based on no clear-cut objectives. Thus, conduct such as “vagrancy” was the grounds for judicial decisions that led to the confinement of children, often until they reached adulthood¹⁰.

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14. It is interesting to analyse how these measures were in practice a violation of constitutional principles and declarations, such as the principle of equality before law and non-discrimination, as well as the content of international human rights treaties. The existence of these practices even in the early years of the 21st century made it necessary to request that the Inter-American Court of Human Rights issue an advisory opinion, which resulted in *Advisory Opinion OC-17/2002*¹¹.

15. This Advisory Opinion is a fundamental legal landmark (albeit somewhat overdue, as it was published thirteen years after the approval of the Convention on the Rights of the Child¹²). The Advisory Opinion 17 of 2002 is important whenever the highest tribunal in human rights matters in the region specifies and reiterates various aspects related to addressing the situations mentioned above. Considering the remarks made, efforts made by the Inter-American Court that reaffirm the status of subjects of rights for children and adolescents and

⁹This thesis is shared by Emilio García Méndez in his article *Las garantías constitucionales de los jóvenes en conflicto con la ley penal y el problema de los criterios de eficacia de la defensa jurídica: un nudo gordiano* [Constitutional guarantees for youth in conflict with criminal law and the problem of the criteria of effectiveness in legal defence: a Gordian knot]. Published in the compilation on [Childhood and the Administration of Justice; the Importance of a Legal Defence] UNICEF Uruguay, 2009. Although this author is quoted in relation to the paragraph’s main point, the IIN does not share all of the viewpoints stated in this article.

¹⁰The essay on [Origins of the judicial protection of children in the Republican era], by Jorge Giannareas. Available at: <http://www.organojudicial.gob.pa/cendoj/wp-content/blogs.dir/cendoj/2-proteccionjudicialdelaninez.pdf>

¹¹Inter-American Court on Human Rights. Juridical Condition and Human Rights of the Child, Advisory Opinion OC17/02 of 28 August 2002. Series A. Number 17. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf

¹²Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

therefore that all human rights are inalienable are particularly significant¹³ and the principle of legality in State interventions concerning children¹⁴. Although this advisory opinion failed to establish the sufficiently clear standards that the subject demands¹⁵, it had a significant impact in States Party to the American Convention on Human Rights.

16. It is useful to quote the thirteen conclusive points established by the advisory opinion of the Inter-American Court of Human Rights, which are deemed to be fundamental to this position paper [emphasis added]:

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"AND IS OF THE OPINION

1. *That pursuant to contemporary provisions set forth in International Human Rights Law, including Article 19 of the American Convention on Human Rights, **children are subjects entitled to rights**, not only objects of protection.*
2. *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.*
3. *That **the principle of equality** reflected in Article 24 of the American Convention on Human Rights does not impede adopting specific regulations and measures regarding children, who require different treatment due to their special conditions. This treatment should be geared toward protection of children's rights and interests.*

¹³ An interesting development regarding the principle of due process in relation with human rights is performed by the author Cipriano Gómez Lara in his article: "El debido proceso como Derecho Humano" (The Due Process as a Human Right). Available at: <http://www.bibliojuridica.org/libros/4/1968/17.pdf>

¹⁴ The principle of Legality is established in the American Convention on Human Rights in its article 9: *Freedom from Ex Post Facto Laws. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.*

¹⁵ A detailed analysis of Advisory Opinion OC-17/02 that refers to this position was made by Mary Beloff in her article on *Luces y sombras de la Opinión Consultiva 17 de la Corte Interamericana de Derechos Humanos: "Condición jurídica y derechos humanos del niño"* [Light and Shadow in Advisory Opinion OC-17/02 of the Inter-American Court of Human Rights: 'Legal Condition and Human Rights of the Child'] (Chapter 4 of the book on: *Los derechos del niño en el sistema interamericano* [Child Rights in the Inter-American System], Buenos Aires, del Puerto, 2004). Available at: http://www.escri-net.org/usr_doc/CapIV.pdf

4. That **the family is the primary context for children's development** and exercise of their rights. Therefore, the State must support and strengthen the family through the various measures it requires to best fulfill its natural function in this field.
5. That **children's remaining within their household should be maintained and fostered**, unless there are decisive reasons to separate them from their families, based on their best interests. Separation should be exceptional and, preferably, temporary.
6. That **to care for children, the State must resort to institutions with adequate staff, appropriate facilities, suitable means, and proven experience** in such tasks.
7. That respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, **but also the obligation to adopt the measures required for children's existence to develop under decent conditions.**
8. That true and **full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments.** The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.
9. That the States Party to the American Convention have the duty, pursuant to Articles 19 and 17, in combination with Article 1(1) of that Convention, **to take positive steps to ensure protection of children against mistreatment**, whether in their relations with public officials, or in relations among individuals or with non-State entities.
10. That **in judicial or administrative procedures where decisions are adopted on the rights of children, the principles and rules of due legal process must be respected.** This 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.
11. That **children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults.** Characteristics of State intervention in the case of

minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.

12. ***That behavior giving rise to State intervention in the cases to which the previous paragraph refers must be described in criminal law. Other cases, such as abandonment, destitution, risk or disease, must be dealt with in a different manner from procedures applicable to those who commit criminal offenses. Nevertheless, principles and provisions pertaining to due legal process must also be respected in such cases, both regarding minors and with respect to those who have rights in connection with them, derived from family statute, also taking into account the specific conditions of the children.***

13. ***That it is possible to resort to alternative paths to solve controversies regarding children, but it is necessary to regulate application of such alternative measures in an especially careful manner to ensure that they do not alter or diminish their rights.***

17. In synthesis, the advisory opinion reinforces the imperative of defining the bounds, in matters related to children and adolescents, between criminal situations and the protection measures for children. Thus, for the IIN, genuine specialized judicial systems for adolescents in conflict with criminal law will be those that carefully analyze the constitutive elements of a crime¹⁶ during the process of determining whether a crime has been committed, bearing in mind the special features of adolescents and at the same time, the principles stipulated by the Convention on the Rights of the Child¹⁷ and the specific principles of specialized justice for adolescents in conflict with the law, to which this paper will refer in greater detail below¹⁸. Therefore, the outlook has been gaining ground in the States that adolescents should be held responsible for their criminal conduct, but that in the process of determining responsibility, the same level of reproach applied when punishing adults cannot and should not be assigned to them. Specifically, the determination of guilt, acquires a special dimension when regarding

¹⁶ The constitutive elements of a crime as part of the study of Substantive Criminal Law, is what in Spanish, according to the theoretical view of criminal law of the Continental European Law System has been called *Teoría del Delito* (Translation: Theory of Crime), but in English, Theory of Crime refers to the criminological explanations on crime. The author Raúl Plascencia Villanueva provides valuable insights on the constitutive elements of crime in his book on: *Teoría del Delito* [The Theory of Crime]. 3rd printing. ISBN 968-36-6604-3. Series G. Doctrinal Studies. Number 192. Institute of Legal Investigation, National Autonomous University of Mexico, 2004. Available on the website of the online law library: <http://biblio.juridicas.unam.mx/libros/libro.htm?l=44>

¹⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

¹⁸ Regarding the application of the guiding principles of the international law of human rights in this area, is recommendable the analysis of the document: "Guía práctica sobre principios aplicables a la administración de justicia penal juvenil y a la privación de libertad de adolescentes en conflicto con la ley penal" (Handbook on principles applicable to the administration of juvenile justice and detention of juveniles in conflict with the law penal). Developed by the Office of the High Commissioner for Human Rights of the United Nations and UNICEF Guatemala.

adolescents due to the particular characteristics that distinguish this group from the adult population.

18. An essential step that led to the beginning of the paradigm shift was the understanding that it was necessary to establish clear boundaries between criminal law and the true protection of children. However, it is still necessary to clearly define the boundary of this separation. The matter of adolescent criminal liability has been one of the principal issues in the wide range of subjects related to recognizing the human rights of children. As such, it has involved an ideological evolution that has been reflected in both international and national¹⁹ regulatory changes.

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19. Regulatory developments in this matter also constitute significant precedents to the objectives of the IIN's position paper. It should be noted that internationally, one of the first specific regulatory precedents in the evolution of the conception we have alluded to above is contained in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, also known as *The Beijing Rules*, adopted by the General Assembly²⁰ in 1985.

20. Later, in 1989, the adoption of the Convention on the Rights of the Child marked the most significant point of this evolutionary process. However, the new specialized systems are included in two articles of the Convention that are dedicated specifically to adolescents alleged to have violated a criminal law or who are accused or declared guilty of doing so. The Convention provides guiding principles and a catalogue of rights, of which a significant number accompany the specific articles regarding this topic²¹.

¹⁹ Dr. Sergio García Ramírez refers to this indirectly in his lecture on *Derechos humanos de los niños y adolescentes* [The Human Rights of Children]. His presentation was edited for publication in the volume that compiles the conferences of the Third Congress of the Inter-American Association of Public Defenders (AIDEF for its acronym in Spanish): *Defensa Pública: Garantía de Acceso a la Justicia*. The Public Defence Office, National Defender General. Buenos Aires, La Ley, 2008. Available at: http://www.aidef.org/wtksite/cms/conteudo/179/Libro_Defensa_Publica-Garantia_de_acceso_a_la_justicia.pdf

The IIN quotes this lecture solely with regard to the principal point in this paragraph; however, it does not necessarily share all of the opinions expressed by Dr. García Ramírez.

²⁰ Resolution 40/33 of 28 November 1985. Available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

²¹ A paper that provides an excellent linkage between the principal articles of the Convention on this subject and its remaining articles is General Comment Nº 10 of the Committee on the Rights of the Child. "Children's rights in Juvenile Justice". CRC/C/GC/10. Adopted at the forty-fourth session, Geneva, 15 January-2 February 2007. Available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10_sp.pdf

21. It is, in fact, after the Convention that significant and tangible changes began to take place in the region, initiated, naturally, as a result of regulatory amendments carried out in order to adapt national laws to the precepts of the then new Convention. Many of these legislative changes even constituted genuine specialized systems of justice for adolescents in conflict with the law, although significant challenges later arose with regard to their implementation²².

22. After the Convention on the Rights of the Child, other regulations specifically addressing this subject were approved within the United Nations system and represent significant standards for the application of specialized systems. To mention only some of them: the *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines²³)*, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules²⁴)* and the *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules²⁵)*.

I.II THE RELEVANCE OF A POSITION PAPER ON THE SUBJECT OF ADOLESCENT CRIMINAL LIABILITY SYSTEMS

23. The above background shows, in part, the relevance of this paper, which is also an attempt to highlight the need to reaffirm the principles underlying these matters and establish a

²² Author Mary Beloff gives an account of some of the challenges of adolescent criminal liability systems in her article on: *Responsabilidad penal juvenil y derechos humanos* [Juvenile Criminal Liability and Human Rights], published in *Justicia y Derechos del Niño* [Justice and Child Rights], number 2. UNICEF, Area Office for Argentina, Chile and Uruguay. Buenos Aires, November, 2008. Page 77. Available at: http://www.unicef.org/argentina/spanish/ar_insumos_PEJusticiayderechos2.pdf/

Similarly, and only by way of an example: a lecture by Dr. Juan Carlos Arias López, magistrate of the Criminal Court of the Higher Tribunal of Ibagué: *Fortalezas y debilidades del sistema de responsabilidad penal en Colombia* [Strengths and Weaknesses of the Criminal Liability System in Colombia]. A presentation during the International Seminar on Adolescent Criminal Liability organized by the Colombian Institute of Family Welfare in Bogotá, D.C., 23 and 24 November 2009. Minutes available at: <https://www.icbf.gov.co/icbf/directorio/portel/libreria/pdf/DOCUMENTOMEMORIASSEMINARIOSRPNANOV23-24DE200906-05-10.pdf>

²³ Adopted and proclaimed by the General Assembly in its resolution 45/112, of 14 December 1990.

²⁴ Adopted by the General Assembly in its resolution 45/113, of 14 December 1990.

²⁵ Adopted by the General Assembly in its resolution 45/110, of 14 December 1990.


common position for the region's governmental institutions, which have been enjoined to protect child rights by constitutional or legal mandate.

24. As previously indicated, the subject has been of particular concern to society in recent years, partly due to the influence of the media and of some of the political sectors in certain States. This interest has led to heated debates extensively reported in the media, even leading to headlines appearing repeatedly. This, in principle, could constitute a significant window of opportunity in order to disseminate relevant information contributing to the resolution of challenges in the subject matter. However, in general terms, this opportunity has not been used in this sense and has on the whole not contributed to devising solutions in keeping with the best interest of the adolescents involved²⁶.

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25. Addressing issues related to criminality is always a complex matter, and even more so when the crimes have been committed by adolescents, especially when considering the special features of this particular age group at this stage of development. This inherent difficulty makes it highly dangerous to hold debates without a sound grounding or use of existing information for political ends or in favour of an ideological vision of the subject. Any solution arising from this kind of discussion, without a technical and scientific background, can be extremely deleterious to the adolescents involved and instead of implementing genuine solutions, can lead to measures being taken that can only increase the problem.

26. The solutions must be generated from the policy area, allocating the necessary financial and technical resources. Since the subject has any involvement in the discussion on citizen security and by been included as a matter of public safety, it also becomes one of the major concerns of contemporary societies, and that as long in this area, it seems likely that the conditions and results may not vary to a greater extent.

²⁶See: *Los jóvenes y el nuevo sistema de responsabilidad penal adolescente a un año de su implementación* [Youth and the new Adolescent Criminal Liability System one year after its Installation]. *Serie Reflexiones Infancia y Adolescencia* [Reflections on Childhood and Adolescence Series] Nº 10, UNICEF Chile, December 2008. Chapter III, *Los jóvenes y el discurso de la sociedad* [Youth and the Discourse of Society], pages 15 and 16. Available at: http://www.unicef.cl/unicef/public/archivos_documento/283/WD_10.pdf/ Similarly, on this point it is worth mentioning chapter 5, *Influencia de los Medios de Comunicación* [The Influence of the Media] from the work on *Delincuencia Juvenil* [Juvenile Delinquency], by Carmen Defez Cerezo. Pages 40 and 41. Available from the website of the  Gutiérrez Mellado General University Institute, at: http://iugm.es/uploads/tx_iugm/TRABAJO_CURSO_IUGM.pdf

27. Therefore, this document is important in that it seeks to call attention to the fact that decisions in this area should be taken on the basis of parameters, research and analyses carried out by recognized bodies, such as academic institutions and technical authorities that utilize measures of scientific rigour, that a study of this complexity demands. In addition, such investigations should be multidisciplinary, with a focus on the best interest of adolescents. .

28. While it is not easy to determine with any certainty what circumstances led to this subject being incorporated into the media's agenda – and therefore, in that of public opinion – it is clear that a subject so broadly discussed would not be long in reaching the political agenda. This is not, however, a statement of cause and effect, inasmuch as these processes between social stakeholders (for example: the media – public opinion – political classes) may be cyclical or multi-directional.

29. Several bills on the subject of adolescent criminal liability are under discussion in the parliaments of some of the States in the region. Without going into detail with regard to which these States are or the specific content of their initiatives, as this exceeds the purpose of this paper, it should, however, be noted as a general conclusion that these initiatives represent progress or setbacks for these States in relation to the rights and safeguards established by international standards.

30. It is relevant to the purpose of this paper to provide a general analysis of the situation, inasmuch as it may imply a major risk of regression in relation to international standards which had already been included in national legislations.

I.III DESCRIPTION OF THE TOPIC

31. It is also important to outline some very general aspects and considerations related to the participation of adolescents in acts that are deemed to be criminal activities.

32. While it is a basic concept and of the greatest importance to the issue that is the subject of this document, the definition of criminality is the first hurdle to be overcome when attempting to understand the topic. One of the principal difficulties in defining criminality is related to the variables that determine the concept; that is, whether criminality depends on endogenous (for example, qualities) or exogenous (such as circumstances) factors, as well as a third element connected to the definition of the legal assets that every society seeks to protect, inasmuch as it is on the basis of these that it is determined what actions are considered criminal. In sum, it is possible to find as many definitions of criminality as the number of interconnections and combinations that can be made with these three variables.

33. Following from this explanation, it is fairly clear that when we refer to adolescent criminality we shall inevitably be venturing into very muddy waters and those who wish to approach the subject from this perspective will have to take an ideological stance in keeping with whichever of the above variables they favour²⁷.

34. Another controversial concept regarding its definition and features is “delinquency”. Part of the debate surrounding this concept is related to which element or variable should weigh more heavily in its definition. The definitions that stress the personal element, that is, that define delinquency as the quality of a person we call “delinquent” or “offender” (or collectively, delinquents or offenders). Another tendency is to provide a more restricted definition, based on the legal concept of crime. This allows us to refer to delinquency as the action (or omission) which constitutes a crime or offence (according to the criminal law), or as the set of crimes committed at a given time and place.

35. As can be seen, all the theoretical discussion surrounding these two concepts, which are fundamental for any subsequent discussion of the topic, outlines the difficulty of achieving an adequate way to address the subject. It is because of this difficulty that this paper insists upon the need to exercise the utmost care in dealing with the subject of adolescent criminal liability and its systems, seriously and responsibly. This position paper revolves around the concept of

²⁷On the difficulties of the definitions in the subject: “Juvenile Delinquency: Mainstream and Crosscurrents” by the author John Randolph Fuller. University of West Georgia. New Jersey, USA, Pearson- Prentice Hall, 2008.

adolescent criminal liability and the specialized liability systems that have been created under this concept. Has been avoided in this paper using the concept of chargeability or incompetent, in both concepts are understood to be evaluative in nature and must be analyzed in each specific case, so only in some cases, in this document, the concept of reproach is used, which if possible use in general.

36. From the perspective of social impact, it is striking and interesting to note the existence of the sense of menace that underlies adolescent criminality. Social reactions emerging at present in the societies of the region suggests that this is a topic that carries with it the feeling that it implies a threat, particularly for social coexistence.

37. This discomfiture unavoidably gives rise to questions as to why these feelings seem to intensify when referring to the participation of adolescents in acts deemed to be criminal. What additional feelings, emotions, fears or frustrations does this provoke in society compared to when the offenders are adults? This perception sometimes leads to overlooking the need to approach this topic from a different viewpoint; not repressive, but socio-educational.

38. On the study of criminality and delinquency there are two main conceptual and ideological positions on those concepts and representing situations. The first view is, for example, that of modern criminology, which holds that crime is the result of a social construction of dominant groups who have made a selection of interests and rights to be legally protected and behaviors injurious of those interests and rights. The second view is the "causal", having a biopsychological perspective and traditionally etiological. Although there are a number of etiological studies on the possible causes that give rise to conduct considered to be anti-social, an issue that is even more significant is related to the aims pursued in determining these causes and how this information is used.

39. In the event that research is deepened about the possible causes of antisocial behaviour, is important to think about the role that to date these studies have served to generate public policies that help prevent the elements that can generate the unlawful conducts. Policies in

this subject should be designed according to the best interests of adolescents and to integrate their families and communities.

40. None of these considerations should be interpreted as a deterrent to the generation of knowledge on adolescent participation in acts deemed to be criminal and criminal liability systems; on the contrary, the IIN welcomes and encourages the production of the greatest possible amount of knowledge in the area, as long as it is obtained through rigorous and serious means and can be applied to public policy.

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41. In this respect, it is necessary to continue a methodical analysis of the relationship between adolescent participation in acts deemed to be criminal with factors such as poverty, socialization, building a life project, differences caused by generational gaps, addictions (particularly to psychoactive substances), the use of children by criminal organizations, psychological or psychiatric problems and others.

42. There are a number of studies that attempt to identify the causal factors of adolescent participation in acts deemed to be criminal from the point of view of positivist criminology. In addition, it is essential to continue to make progress in the analysis of the outcome of experiences implemented on the basis of these studies, in order to establish minimum standards and increase the chances of intervention with adolescents leading to positive results, bearing in mind the appropriate participation of families and communities.

43. The factors mentioned above do not constitute an exhaustive list and are only some of the causes that specialized literature has referred to. It is therefore essential to understand that there is not necessarily a single cause, but rather a sum of factors with varying degrees of impact.

44. There is a further aspect which should be considered carefully in analysing factors related to adolescent participation in acts deemed to be criminal: that statistics should be produced and analysed very meticulously, particularly, for example, when making correlations or generalizations that are not fully grounded on comprehensive analysis. Correlations between

two variables do not necessarily imply causation; this is known as the “*cum hoc ergo propter hoc*” fallacy. With regard to generalizations, it is essential to assess whether the sample is truly representative of the population under analysis, whether it is large enough and whether the proportion is suitable before extrapolating the results of the analysis.

45. Examples of the dangers of the faulty interpretation of statistics might be: when analysing the relationship between poverty and adolescent participation in acts deemed to be criminal, if it is concluded that most adolescents declared to be offenders (declared guilty of a criminal violation) are poor, does this mean that there is a greater chance that poor adolescents will be criminals? If, in addition, the analysis concludes that out of the total population of persons below the age of 18 in Latin America and the Caribbean, 17.9% live in extreme poverty (ECLAC and UNICEF, Child Poverty in Latin America and the Caribbean, December 2010), could we say that there are potentially about 32 million criminals in the region? While this example may seem simplistic and clumsy, it gives an idea of the risk of making an inadequate reading of causal relationships and statistics.

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46. A further example that has appeared in articles that attempt to explain the causes and/or increase of adolescent participation in acts deemed to be criminal is that it is concluded that this kind of crime has increased because one of the variables that come into play in the analysis of the criminal liability system (that is, arrests), has increased²⁸. The number of arrests in itself is not a variable that can explain the full implications of adolescent participation in acts deemed to be criminal, although it is a variable which should be considered, together with other factors, when analysing the full circuit of criminal liability. For example, if examining the reasons for the increase in arrests, it might be found that the police assumed a more repressive role, or that reports increased, or that police resources increased (human, transport, equipment, technology), or any other reason. The variation over time of the quantity and percentage of adolescents with final judgements (with the effect of *res iudicata*) is information which is more to the purpose, and even this should be appropriately contextualized.

²⁸ One example is the error made by José Miguel de la Rosa Cortina, in his article on *El fenómeno de la delincuencia juvenil: causas y tratamientos* [The Juvenile Delinquency Phenomenon: Causes and Treatment]. Available at: <http://www.encuentros-multidisciplinares.org/Revistan%C2%BA13/Jos%C3%A9%20Miguel%20de%20la%20Rosa%20Cortina.pdf>

47. It should be recognized that the vision and approach of delinquency in childhood and adolescence is a subject that has evolved positively. Although there have been significant developments in the social perception of the subject, it should be underscored that these developments go hand-in-hand with the evolution of human rights, and that there are still many challenges to be overcome.

48. At present, debates on maintaining some of the international standards on adolescent criminal liability in national legislations are proof of the intrinsic “weakness” of human rights and a reflection of their philosophical grounding, their evolution and the socio-political aspect they are endowed with. In other words, the fact that debates in a society focus on rights – whether they have been previously granted or not – and on guarantees to make them effective, particularly with regard to a specific population is an indication that there are other aspects underlying these debates. These other factors are related to the imminent danger that any setbacks regarding international human rights standards will lead to a regression for the whole human rights protection system.

49. This process of regression in legislation and public policy, which even obtains grassroots support expressed by means of formal consultation mechanisms, is an indication of the hazard of allowing the majority to decide on rights that are important for minorities. The danger is even greater when, as we have said, the majority may have a view of certain phenomena which is not always in keeping with reality, owing to the process of collective communication taking place with regard to a specific subject, which, in short, has a direct impact on the process of forming public opinion.

I.IV The international legal framework in relation to adolescent criminal liability systems

50. This section presents a list which sets international standards both directly binding and non-binding. International instruments that are not directly binding in legal terms are also included due to the fact that in several of the States in the region these rules (not originally

legally binding) have been included in the body of constitutional law. This is a desirable practice as it strengthens the regulatory body of human rights law for the inhabitants of States that have assimilated these regulations in this manner. In the case of the more general international instruments, it should be noted that these instruments are quoted in relation to their articles on criminal matters, or their articles related to children. However, because of the interdependence and indivisibility of human rights²⁹, it is a given that as all rights are equally important, all human rights should be complied with in the case of adolescents, particularly those in conflict with criminal law.

51. Similarly, there are documents on the list which are not actually international regulations, but in view of the international organizations which have published them are understood to form part of international standards. The list is chronological, from the oldest to the most recent instrument and does not attempt to be exhaustive³⁰. Similarly, the list includes documents that are not strictly speaking international instruments, but are considered relevant inasmuch as they set legal and technical standards on the subject addressed in this document.

- American Declaration of the Rights and Duties of Man (May, 1948)³¹.
- Universal Declaration of Human Rights (December, 1948)³².
- Declaration of the Rights of the Child (November, 1959)³³.

²⁹ On the interdependence of human rights, see an article by Antônio A. Cançado Trindade, entitled, *La interdependencia de todos los derechos humanos. Obstáculos y desafíos en la implementación de los derechos humanos* [The interdependence of all human rights. Obstacles and challenges in the implementation of human rights]. Available at:

<http://www.iidh.ed.cr/BibliotecaWeb/Varios/DocumentosHtml/Interdepe.htm?Comunidad=205&Tipo=1137&URL=%2FBibliotecaWeb%2FVarios%2FDocumentosHtml%2FInterdepe.htm&Barra=1&DocID=5787>

³⁰ This paper provides a full compendium of the standards and norms of the United Nations system: "United Nations standards and norms in crime prevention and criminal justice" United Nations Office on Drugs and Crime (UNDOC), New York, 2007. Available at:

http://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf

³¹ Available at: <http://www.oas.org/en/iachr/mandate/Basics/2.AMERICAN%20DECLARATION.pdf>

³² Available at: <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>

³³ Available at: [http://www.un.org/es/comun/docs/index.asp?symbol=A/RES/1386\(XIV\)&referer=http://es.wikipedia.org/wiki/Declaraci%C3%B3n_de_los_Derechos_del_Ni%C3%B1o&Lang=E](http://www.un.org/es/comun/docs/index.asp?symbol=A/RES/1386(XIV)&referer=http://es.wikipedia.org/wiki/Declaraci%C3%B3n_de_los_Derechos_del_Ni%C3%B1o&Lang=E)

- International Covenant on Civil and Political Rights (December, 1966)³⁴.
- American Convention on Human Rights – Pact of San José (November 1969)³⁵.
- United Nations Standard Minimum Rules for the Treatment of Prisoners (May, 1977)³⁶.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December, 1984)³⁷.
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Beijing Rules (November, 1985)³⁸.
- Convention on the Rights of the Child (November 1989)³⁹.
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the Havana Rules (December, 1990)⁴⁰.
- United Nations Guidelines for the Prevention of Juvenile Delinquency, the Riyadh Guidelines (December, 1990)⁴¹.
- United Nations Standard Minimum Rules for Non-Custodial Measures, the Tokyo Rules (December 1990)⁴².
- United Nations Guidelines on the Administration of Juvenile Justice, the Vienna Guidelines. ECOSOC Resolution 1997/30 (July 1997)
- Basic principles on the use of restorative justice programmes in criminal matters. ECOSOC Resolution 2002/12 (July 2002).

³⁴ Available at: <http://www2.ohchr.org/english/law/ccpr.htm>

³⁵ Available at: <http://www.oas.org/juridico/english/treaties/b-32.html>

³⁶ Available at: <http://www2.ohchr.org/english/law/treatmentprisoners.htm>

³⁷ Available at: <http://www2.ohchr.org/english/law/cat.htm>

³⁸ Available at: <http://www2.ohchr.org/english/law/beijingrules.htm>

³⁹ Available at: <http://www2.ohchr.org/english/law/crc.htm>

⁴⁰ Available at: http://www2.ohchr.org/english/law/res45_113.htm

⁴¹ Available at: <http://www2.ohchr.org/english/law/juvenile.htm>

⁴² Available at: <http://www2.ohchr.org/english/law/tokyorules.htm>

- Advisory Opinion OC-17/2002 of the Inter-American Court of Human Rights (August, 2002).
- Children's rights in Juvenile Justice. General Comment Nº 10 of the Committee on the Rights of the Child (February, 2007).
- ECOSOC resolution 2009/26: Supporting national and international efforts for child justice reform, in particular through improved coordination in technical assistance (July, 2009).
- United Nations General Assembly resolution 65/213: Human rights in the administration of justice (April, 2011).
- Report of the Inter-American Commission on Human Rights. Juvenile Justice and Human Rights in the Americas (July, 2011).
- Human Rights Council resolution 18/12: Human rights in the administration of justice, in particular juvenile justice (October, 2011).

52. The American Declaration of the Rights and Duties of Man (ADRDM), which was announced at the 9th International Conference of American States held in Bogotá, Colombia in May 1948, established the foundations – in Inter-American terms – of a body of human rights that are fundamental for the subject addressed by this Political Position Paper. Particularly significant articles in this Declaration are: the second related to equality before the law, the seventh on the protection of children, the eighteenth on the right to a fair trial, the twenty-fifth on the right to protection from arbitrary arrest and the twenty-sixth on the right to due process of law.

53. The Universal Declaration of Human Rights (UDHR) represented a further landmark for human rights and recognized rights that are also basic in the subject we are addressing. Articles 1, 2, 5, 7, 9, 10, 11, 25 and 26 of this Declaration are directly related to justice for adolescents in conflict with criminal law. It should be particularly noted that the UDHR is

considered as customary international law⁴³ and that it has been included among the constitutional rights in some of the States of the region.

54. The Declaration of the Rights of the Child of 1959, even though neither became a legally binding normative, is relevant as it was adopted by the General Assembly of the United Nations and constitutes one of the first United Nations resolutions on the rights of children. It should be noted that this Declaration establishes the principle of equality and non-discrimination for children and their families and that the principle of the best interest of the child appears for the first time in an international official document as a primary consideration in all matters concerning children. It is of the first importance that this principle must be applied in the subject we are addressing in this paper.

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55. The International Covenant on Civil and Political Rights is the first human rights treaty to be conceived as a legally binding document for States Party. A number of articles in the Covenant are fundamental in the subject of adolescents in conflict with criminal law: Articles 2, 4, 6 (paragraph 5), 7, 8, 9, 10, 14, 15, 24 (especially paragraph 1) and 26.

56. The American Convention on Human Rights, also known as the Pact of San José, is the key human rights document in the Inter-American system and is binding for States Party. The most relevant articles that should be applied to the subject we are addressing are: 1, 4 (paragraph 5), 5 (especially paragraph 5), 7, 8, 9, 19, 24 and 27 (paragraph 2).

57. The United Nations Standard Minimum Rules for the Treatment of Prisoners is highly significant as it represents international consensus on the principles that guide the appropriate organization of prisons and the treatment of persons deprived of their liberty. We should note the inclusion of the principle of exceptionality in deprivation of liberty penalties for

⁴³In this respect, we could quote, for example, Miguel Ángel de los Santos in his article on *Derechos Humanos: Compromisos Internacionales, Obligaciones Nacionales* [Human Rights: International Commitments, National Obligations], available on the website of the online library of the National Autonomous University of Mexico, at: <http://www.juridicas.unam.mx/publica/rev/refjud/cont/12/cle/cle13.htm>. In this article, the following works are quoted in this regard: *Manual Internacional de Derechos Humanos* [International Human Rights Handbook] by Pedro Nikken, Claudio Grossman and Thomas Buergenthal; Caracas/ San José, Inter-American Institute of Human Rights, 1990, and *Derechos Humanos Internacionales* [International Human Rights] by Thomas Buergenthal, Mexico, Ediciones Gernika, 1996.

adolescents in conflict with criminal law. The principle of non-discrimination in custodial penalties is also a primary consideration in the sense that they must be executed impartially. These rules establish standards that must unavoidably be applied with regard to registration, the separation of categories, accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint and other aspects concerning persons deprived of liberty.

58. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is one of the nine universal human rights instruments and is fundamental in justice for adolescents in conflict with criminal law, as it underscores the fact that all States should systematically review their interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, with a view to preventing any cases of torture, which is particularly important in the case of adolescents.

59. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules, are extremely significant as they constitute the first United Nations document which specifically and comprehensively addresses the issue of the administration of justice for adolescents in conflict with the law. The Beijing Rules establish the first international consensus in this regard, leading to minimum rules that the States must observe and comply with when dealing with a highly vulnerable population. They express the objectives and essence of justice for adolescents in conflict with criminal law and explain useful principles and practices for the administration of justice for adolescents. The Beijing Rules constitute the minimum conditions – recognized internationally – for the treatment of adolescents who enter into conflict with criminal law. The Rules show that the purpose of justice for adolescents is to foster their well-being and ensure that all solutions to their delinquency are commensurate with the circumstances of the adolescent and the specific offence. They include specific rules for the various stages of justice for adolescents and stress the fact that admitting them to deprivation of liberty centres should be used only as a last resort and for the shortest possible period.

60. The adoption of the Convention on the Rights of the Child (CRC) led to far-reaching changes when it became directly legally binding for the ratifying States. The mandatory nature of the CRC gave rise to extensive legislative reforms, which in compliance with its Articles 37 and 40 could not ignore the matter of adolescent criminal liability and systems for the administration of this specialized justice in order to verify the extent of responsibility. Legislative production on criminal matters regarding adolescents in conflict with the law was extremely varied. Some States included the subject in their legislation on the protection of child rights; others enacted specific laws on the subject. Establishing regulatory bodies for internal laws was essential for the installation of adolescent criminal liability systems which included international standards, at least in part. Regarding the subject of this position paper, the CRC stipulates that when persons below the age of 18 are deemed to have infringed criminal law, their responsibility should be decided through justice systems that respect their dignity and fundamental rights, without prejudicing the rights of their victims. The purpose of this stipulation is to enable, at every opportunity, the social resettlement and re-education of adolescents who infringe criminal laws.

61. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, also known as the Havana Rules, develop the propositions of Article 40.1 of the CRC with regard to the purpose of penalties and highlight the importance of promoting the social reintegration of adolescents, of the possibility of them becoming useful members of society and of strengthening respect for human rights and fundamental freedoms. They also stipulate that the objective of deprivation of liberty should be the social resettlement of adolescents and their reinsertion in the community. The Havana Rules also establish that deprivation of liberty should strive to minimize any harmful effects and encourage family and community resettlement.

62. The United Nations Guidelines for the Prevention of Juvenile Delinquency, also known as the Riyadh Guidelines, adopt a proactive and positive approach to prevention, which is doubtless the reason for their exhaustive nature. The Guidelines show the increasing awareness of the fact that children are human beings fully entitled to rights, a point of view which was far from being general in western countries during the 20th century, but which emerged in other more recent rules such as the CRC. The Guidelines refer to a wide range of

social settings: the three principal socialization settings (family, school, and community), the media, social policy, legislation and the administration of justice for adolescents. Under the heading of General Prevention (Article 9), “comprehensive prevention plans should be instituted at every level of government” and include “mechanisms for the appropriate coordination of prevention efforts between governmental and non-governmental agencies”, continuous supervision and evaluation, “community involvement through a wide range of services and programmes; close interdisciplinary cooperation...”, “youth participation in delinquency prevention policies and processes”.

63. Prevention – the Guidelines say – should focus on improving quality of life and general well-being and not merely on well-defined, but partial problems. This is not about preventing “negative” situations (a defensive approach), but, rather, about fostering social potential (an offensive approach). Particularly relevant to this position paper is Guideline number 10, on socialization processes, which establishes that: *“Emphasis should be placed on preventive policies facilitating the successful socialization and integration of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. Due respect should be given to the proper personal development of children and young persons, and they should be accepted as full and equal partners in socialization and integration processes.”*

64. The United Nations Standard Minimum Rules for Non-Custodial Measures, also known as the Tokyo Rules, is another of the international human rights “soft law” instruments addressing the subject of this political position paper. The Tokyo Rules represent the States’ commitment with regard to international law and the implementation of alternative measures to deprivation of liberty. Evidence indicates that custodial penalties are a greater burden than alternative measures, which are, in addition, more efficient in achieving the objectives of adolescent criminal liability systems, such as the involvement of adolescents in their social settings. Alternative measures also help to reduce recidivism rates and, therefore, increase the perception of public security⁴⁴. Through the establishment of certain standards, these Rules

⁴⁴FENDRICH, Michael and ARCHER, Melanie, Long-term Re-arrest Rates in a Sample of Adjudicated Delinquents: Evaluating the Impact of Alternative Programs, *The Prison Journal* 78, Nº 4 (1998), mentioned in Justice Policy Institute, *The Costs of Confinement Why Good Juvenile Justice Policies make Good Fiscal Sense*, May 2009. Available at: Also: AUSTIN, James, et al, “Alternatives to the Secure Detention and Confinement of Juvenile

attempt to enable and promote the application of non-custodial penalties, as well as establish minimum guarantees for their application, seeking a balance between the rights of the individuals involved in every crime: victims, perpetrators and society as a whole.

65. With regard to the subject addressed in this technical position paper, the IIN believes it necessary to call attention to certain mainly legal matters further to the comments made regarding some of the international treaties listed in this heading which, in view of their significance, it deems appropriate to consider with care.

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66. A first consideration is related to the fact that societies and States should not neglect the legal commitments they assumed when they ratified the international human rights treaties. International treaties which have not been ratified, but are included in the human rights international legal framework should also be borne in mind, as they express significant international consensus on the approach to the subjects regarding which it has been considered necessary to produce international tools with a transnational scope in order to set minimum standards. These instruments, therefore, lead to minimum ethical standards which societies in general and the States in particular have the moral duty to fulfil for everyone, and particularly in the case of children and adolescents. Thus, it is essential to renew the commitment expressed in the Vienna Declaration and Programme of Action, which was the outcome of the World Conference on Human Rights of 1993 and was ratified by the United Nations General Assembly⁴⁵.

67. From this it emerges that the States have a duty not only to fulfil the commitments they have already undertaken, but also to ensure by any means necessary that these rights and guarantees will not be subject to any kind of backsliding, in application of the principle of non-regression, which is based on International Human Rights Law. Specifically, Article 27, paragraph 2 of the American Convention on Human Rights lists a number of rights that cannot be suspended, not even in the exceptional cases described in paragraph 1. The Inter-American

Offenders", Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., 2005, quoted in Justice Policy Institute, The Costs of Confinement Why Good Juvenile Justice Policies make Good Fiscal Sense, May 2009.

⁴⁵A/CONF.157/23 of 12 July 1993. Available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

Commission on Human Rights has pointed this out in its report on the matter of this policy paper. Moreover, Article 29 of this Convention, particularly paragraphs a) and b), stipulate the impossibility of suppressing the enjoyment or exercise of the rights and freedoms recognized in this Convention. Likewise, the principle of non-regression is directly related to the principle of progression, which has been developed and recognized in the constitutional law of several States in the region, both directly in their political constitutions and through their means of controlling and interpreting constitutionality.

68. Likewise, it is essential to reiterate that these constitute *peremptory norms (jus cogens)*⁴⁶, as reasserted by the United Nations Commission on Human Rights, in its General Comment Nº 24⁴⁷ regarding the interpretation of Article 4 of the International Covenant on Civil and Political Rights (ICCPR), related to the following rights, which are particularly important for this position paper:

- a) The prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR); a matter of particular concern, inasmuch as there are precedents in the region regarding cases which have been reported to the Inter-American Commission on Human Rights, some of which have been the object of sentences issued by the Inter-American Court on Human Rights, which confirmed this to be a peremptory norm.
- b) The right to life; specifically mentioned in Article 6, paragraph 5 of the International Covenant on Civil and Political Rights: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."
- c) Freedom from the imposition of collective punishment.
- d) Freedom from the arbitrary deprivation of liberty.
- e) Compliance with the guiding principles of impartial judgement, particularly the presumption of innocence.

⁴⁶ An imperative or peremptory norm is a fundamental principle regarding which no derogation or amendment is ever permitted.

⁴⁷ United Nations, "General Comment Nº 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant" HRI/GEN/1/Rev.7, page 161 and following. Adopted at the 72nd Session (2001), at session 1950 on 24 July 2001. Available at: [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf)

f) Separation between underage persons and adults, as established by Article 10, paragraph 2 of the ICCPR: “Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”, as well as the third paragraph: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

69. Thus, it becomes essential to respect rights internationally acknowledged to be imperative and comply with obligations *erga omnes*⁴⁸.

70. It has become particularly important to analyse and understand that human rights are the unavoidable minimum basis for optimum coexistence in society. Human beings are above all, social beings and this compels us to an absolute respect for the inherent dignity of all persons. The evolution of human rights over the ages is a sufficiently eloquent account of the violations, abuse and exploitation to which millions of persons were subjected in the past (and which continue to happen at present) and confirms the urgent need to maintain and consolidate, strengthen, safeguard and implement any successes we have achieved in this matter. It should be understood that positive discrimination and affirmative action carried out with the purpose of protecting certain populations historically understood to be vulnerable, are no more than the fulfilment of the principle of equality and non-discrimination, a principle that cross-cuts all international human rights law and its corresponding doctrine. This principle was already established in the United Nations Charter, the Universal Declaration of Human Rights, the fundamental human rights treaties and other international treaties that include human rights charters. It is therefore necessary to reflect on the importance of dealing with adolescents in conflict with criminal law from the perspective of human rights.

⁴⁸Applied to all.

I.V The principles of specialized justice for adolescents in conflict with criminal law

71. An essential component of children's rights is related to the principles that should pervade any regulations, public policy and in general any approach to this population. These principles were established as guidelines by the Committee on the Rights of the Child in its General Comment Nº 5 of 2003⁴⁹: the principle of non-discrimination, the principle of best interest of the child, the right to life, development and survival and the principle of participation. The principle of participation as a cross-cutting guideline to fulfill all the rights enshrined in the Convention on the Rights of the Child is particularly important for the Adolescent Criminal Liability Systems. Concerning the procedural stage of the Adolescent Criminal Liability Systems it is essential to comply with the standards of the principle and right of adolescent participation, which have been delineated and developed by the Committee on the Rights of the Child in its General Comment number twelve. It is essential that States apply with the greatest rigor possible the recommendations made by the Committee on the Rights of the Child in regards to General Comment number twelve for a full and effective implementation of the principle of adolescent participation.

72. As well, in the implementation and development of socio-criminal sanctions it is essential also the performance of the principle of participation. It is essential that the adolescent acquires a leading role in the implementation process of the socio-criminal sanction. It is necessary to motivate and involve their consent and participation from the configuration of the individual sanction fulfillment plan (also called educational plan) and all subsequent proceeding pursuant to that plan. The execution of an individual plan of compliance that does not have the commitment and participation of adolescent significantly reduces the chances of success in meeting the purposes of re-socialization of the specialized systems. Moreover, the participation of adolescents realizes processes with restorative features as the sentenced adolescent actively participates in the resolution of issues arising from their offense. Noteworthy are the laws of some Member States that set an essential requirement the active participation of the adolescent in the procedural stage as well as for the determination of certain issues related to the implementation of the socio-criminal sanctions.

⁴⁹United Nations, Committee on the Rights of the Child, RC/GC/2003/5, 3 October 2003. General Measures of Implementation of the Convention on the Rights of the Child (Articles 4 and 42, and Article 44, paragraph 6). Available in Spanish, English and French at: <http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/5>

73. Similarly, specialized justice systems for adolescents in conflict with criminal law advocate some additional basic principles. The fulfilment of these, together with the general principles, give shape to and determine the existence of a genuine system of specialized responsibility for adolescents. Although there are references to a variety of principles in specialized literature, the IIN fully shares and adopts the principles developed by the IACHR in its report on the subject. That is, the IIN considers that complying in full and at every level with the following principles is essential in order to establish a specialized system: 1) The principle of legality, with reference to its specific and additional implications in the field of adolescent criminal liability systems; 2) the principle of exceptionality; 3) the principle of specialization; 4) the principle of equality and non-discrimination, and 5) the principle of non-regression.

74. It should also be pointed out that the same human rights principles applied in criminal matters to adults should also be applied in the case of adolescents, and with even more reason, for example, the safeguards and principles developed by the Inter-American Court of Human Rights in its jurisprudence.

75. **The principle of legality** in connection with adolescents in conflict with criminal law has a special meaning inasmuch as it is one of the principles – if not the foremost – underlying the evolution from the irregular situation model to the doctrine of comprehensive protection. As we said in section I.I regarding the background to specialized justice, the failure to apply the principle of legality in both administrative and judicial interventions has led to confusing the application of criminal law with the application of protective measures for children. Therefore, the unlimited application of the principle of legality in the case of adolescents alleged to have committed a criminal act as previously defined in criminal law contributes to ensuring that all general procedural guarantees are applied, as well as the special safeguards provided for in national legislation when ascertaining criminal liability regarding an act a person is accused of committing.

76. In general terms, the principle of legality in criminal law is enshrined in the Latin phrase *nullum crimen, nulla poena, sine praevia lege* (no crime, no punishment without a previous

law). This phrase embraces a principle that has been included in a significant number of political constitutions and criminal codes in the States of the region and has very considerable implications in relation to the rights of all persons subjected to criminal procedures; mainly, the avoidance of the risk of procedural arbitrariness, which is particularly important in the case of adolescents. This has been specifically established in Article 40 of the CRC and Guideline 56 of The Riyadh Guidelines, and long before in the American Convention on Human Rights, in the Article 9, although it has been very recent the understanding of the imperative need to also apply this principle in all matters involving children and adolescents.

77. Thus only justified punitive State action when it has as its foundation rules as punishable under the laws of criminal nature, which should apply to adults as to adolescents. The development of democratic criminal law, in conjunction with the consolidation of the rule of law and the international legal realization of the rights of children and adolescents allowed to settled the real differentiation between what should be the actual application of criminal law to young people and the protection measures and protection of rights of children themselves. In addition, the combination of the three mentioned theoretical bodies allowed to realize that the protection measured that were supposed to look after for the children, were in essence, a type of sanction or at least had the same effects thereof and in these measures were not seen as sanctions until the understanding of child's rights. With the measures applied the appropriate due process of law was not applied. Thus, the rule of law stands as the main benchmark for the distinction between the treatment of children facing certain economic and social problems and adolescents who participated in an act considered criminal. Since in the case of the first group, is a population that has to be addressed through programs of social policy and if the second group must be enrolled in special justice systems for adolescents. The IIN urges the States to respect and enforce this principle in all interventions involving children, and particularly in the field of criminal liability.

78. The principle of exceptionality in the adjudication of cases of adolescents and in the use of the deprivation of liberty represents the need to provide different treatment for adolescents. Although it is also sought to re-socialize adults, in the case of adolescents, this objective is more urgent and necessary and, in addition, has a greater chance of success, in view of the adolescent's special stage of development. Beside a principle, the exceptionality

becomes the main feature of the specialized systems for adolescents. This principle mainly stipulates that deprivation of liberty in any of its stages (initial detention, preventive imprisonment or punishment) should always be a measure of last resort used for the shortest possible period and only as an extraordinary measure. This is stipulated in Article 37, paragraph b) of the Convention on the Rights of the Child. The principle of exceptionality is of particular importance in the case of the initial arrests and detention, since it is essential that such deprivation of liberty are made by very short periods in response to the correlative principle of presumption of innocence. It is not justifiable prolonged deprivations of liberty if not have been legally determined, according to the procedures established, the criminal liability for the act or acts that led to the intervention of the justice system. The principle of exceptionality is established in Article 37 paragraph b) of the Convention on the Rights of the Child.

79. Similarly, the principle of exceptionality is applied in adolescent criminal liability systems as a whole; that is, subjecting adolescents to these systems should be the exception and not the rule and alternative measures should be preferred to submitting adolescents' conflicts with criminal law to judicial proceedings. The proceedings provided for in specialized justice should only be used in extremely serious cases. Inasmuch, as the principle of exceptionality implies the exceptionality of the adjudication of cases, the period when it is possible to take legal action as a result of a crime should be as brief as possible in specialized justice. The application of the principle of exceptionality, as in the case of the principle of legality, represents a genuine disconnection from the tutelage model, in which any situation involving children was adjudicated and deprivation of liberty for children and adolescents was the preferred response (although usually such deprivation was not seen as a penalty but it was in practical terms). So the principle implies exceptional guidance on the need for the use of specialized judicial system as well as deprivation of liberty only as a last resort. The principle of exceptionality is linked with the notions of minimum criminal law, and is a principle that seeks to limit or reduce the use of punitive State function.

80. The IIN is very concerned to note that this principle is not being complied with in many States in the region, inasmuch as deprivation of liberty is not being used as a last resort, but

rather as the norm. This exceptionality, which is so necessary in relation to adolescents, is also grounded on Article 19 of the American Convention on Human Rights.

81. **The principle of specialization** alludes to the need to create a special system, distinct from the adult system, in order to address the participation of adolescents in crimes and their specific needs and features. It reflects the need for laws, institutions and procedures specific to adolescents. This principle is enshrined in Article 40.3 of the CRC, which establishes the obligation of States Party to: “seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged to, accused of, or recognized as having infringed the penal law...” Thus, the specialty involves two primary elements and fully complementary: a) the creation of specialized courts for determining criminal responsibility of adolescents who are alleged to have committed offenses, and b) the establishment of a procedure with particular characteristics, different from that used for adults while retaining all the guarantees of due process. Although it is clearly stated in the Convention, we must reiterate that it is evident that the States’ obligation to establish a special approach, should encompass the whole of the system or circuit; that is, that the specialization referred to by the Convention should be provided for from the first moment of contact (arrest) and include procedures subsequent to the sentence served: the State should make provision for a support process following the deprivation of liberty. In this respect, it is essential to note that the American Convention on Human Rights had acknowledged this need many years before the CRC, in its Article 5, paragraph 5⁵⁰.

82. A fundamental aspect that genuinely leads to the specialization of a specific system for adolescent criminal liability is that all operators and personnel involved directly and indirectly in justice systems for adolescents should receive training and education. This training should be comprehensive, permanent and designed to achieve the ends pursued with regard to specialized systems; that is, it should be results-oriented. Training should be part of a programme that provides a process of continuous and permanent updating. It should also contemplate the most basic aspects of human rights in general, as well as the specific rights of children and adolescents, in addition to operational components in keeping with the needs of procedural functions or the implementation of socio-educational measures. It should also

⁵⁰ “5 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”.

make it possible to develop and reinforce the supervision and evaluation of the competencies of the professionals involved in specialized justice systems; while contribute meeting the requirements of proportionality, necessity, reasonableness and adequacy, characteristics that must be met in any action or measure taken for the adolescents.

83. The principle of equality and non-discrimination in the field of adolescent criminal liability acquires a special significance in view of the fact that it is related to the affirmative action which is sometimes necessary and to the existence of structural discrimination to which adolescents are sometimes subjected. It is of prime importance to identify and eradicate the causes of this discrimination. In addition to Article 2 of the CRC, Articles 1.1 and 24 of the American Convention on Human Rights are also key. The essences of this principle means necessary prohibit any differentiation in treatment involving arbitrary traits. As stated earlier in this paper, the principle of equality is an internationally recognized standard as peremptory implying that should be reviewed every rule or procedure to ensure freedom from discriminatory elements.

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84. An essential aspect of the principle of equality and non-discrimination is the equal treatment which all adolescents should receive, without distinction of geographic place of residence. Therefore, the existence of enormous differences between the adolescent criminal liability systems of urban centres and rural areas, where the postulates of the principle of specialization for the justice system for adolescents are not fulfilled, is not in keeping with the principle of equality and non-discrimination and discriminates against the adolescents of rural areas, who in many cases are forced to face justice systems which lack the specific guarantees and safeguards that specialized proceedings should provide for. In addition, the lack of special means of protection in specialized justice for adolescents implies a failure to comply with Article 19 of the American Convention on Human Rights. While these differences between urban and rural areas are often caused by a lack of resources, this cannot be used as a valid justification, in view of the stipulations of Article 4 of the Convention on the Rights of the Child.

85. In addition, it is essential for States to ensure that no part of their legislation is contrary to this principle and they should also review the practices of adolescent criminal liability systems

in order to prevent inequitable administrative conduct. Particular care should be taken not to favour the application of the specialized criminal liability system only in one specific sector of adolescents, which could give rise to underlying discrimination. The prohibition of discrimination is a direct result of the principle of equality, it is essential that States take additional measures to avoid possible discrimination of which may be subject for adolescents as a result of its relationship with adolescent criminal responsibility systems. In this way, as an example, the confidentiality of criminal records to third parties and therefore they are strictly used for judicial purposes it is essential to avoid discriminatory practices. In short, it is essential to ensure the elimination of any policy or procedure which might lead to differential treatment discriminatory or arbitrary justice specialized systems for adolescents in conflict with criminal law.

86. **The principle of non-regression** is highly important and there are many significant references in academic doctrine and jurisprudence to the fact that ordinary laws are not able to backslide or regress regarding the status of recognition of human and/or fundamental rights enshrined in international treaties and, of course, in political constitutions. This principle implies the irreversibility, which is already one of the essential characteristics of human rights in general and more so, those who have been incorporated into national legal frameworks through the ratification of international instruments. This principle of non-regression means the inability to abandon or ignore human rights (which are inherent in the human condition) even less those that have been recognized as such in international law of human rights. Therefore, this principle implies not only no to ignore rights, but also has to do with the obligations assumed by States by incorporating international human rights instruments in its internal rules, both for the recognition of the rights contained in them and to establish mechanisms to ensure implementation of those rights. States should not restrict the scope of protection of rights, but rather should analyze the possibility of extending.

87. The IIN urges the States most particularly to respect this basic principle and continue to safeguard and guarantee the enjoyment of rights already provided for in the regulatory frameworks of each State and to enact legislation increasing the rights acknowledged for adolescents in relation to criminal liability systems. The adoption of regressive provisions that restrict the enjoyment of the rights of adolescents fails to comply with the standards

established within the Inter-American human rights system regarding this principle. The States are therefore invited to abstain from enacting new legislation that is in contravention of international regulations related to the human rights of adolescents in connection with specialized criminal liability systems.

88. The progress achieved in the safeguard of human rights is unshakeable – it is possible to extend the area of protection of rights, but not to restrict it. In this regard, it is essential to bear in mind the stipulations of Article 27.2 of the American Convention on Human Rights, which establish that it is the obligation of the States to refrain from suspending the rights of children under any circumstances. In short, the principle of non-regression implies that no regulatory or administrative State measure should cause detriment to the regulatory status of current legislation in terms of the significance and scope of the satisfaction of human rights.

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Chapter II

Regional progress regarding adolescent criminal liability systems and the areas of opportunity for improvement

89. As mentioned above, major advances have been made in the region, both in identifying the scope of the new concept of criminal responsibility and establishing specialized adolescent criminal liability systems for adolescents, in accordance with this conception.

90. The concept of adolescent criminal liability represents the cornerstone of the specialized criminal liability systems, and it is important to consider each one of those two aspects – and in certain cases, analyse them separately, even though the concept of adolescent criminal responsibility is the basic assumption of specialized systems.

91. Regarding the issue of **adolescent criminal liability**, it should be noted that this concept is based upon a theoretical and conceptual analysis which, albeit essential for the purpose of

defining a specialized criminal justice system, by no means represents the criminal responsibility system as a whole. A critical element for defining such a concept is the age criterion, that is, what exactly is an adolescent in the eyes of the law. The Convention on the Rights of the Child (CRC), Article 1, defines a *child* as any person under the age of 18 (unless otherwise established under national legislation). Such a definition is aimed at identifying the age group to be protected under the CRC. The only exception to the above age limit in the CRC has to do with the recruitment of 15- to 18-year-olds by the Armed Forces. Thus, criminal courts should not fail to adhere to the principles, rights and safeguards set forth in the Convention on the Rights of the Child for individuals under 18. This has been asserted again and again by the Committee on the Rights of the Child⁵¹, the Inter-American Commission on Human Rights⁵² and the Inter-American Court on Human Rights⁵³. Likewise, it is important to note that the Inter-American Children's Institute privileges the use of the term *adolescent*, as this is precisely the age range (12- to 18-year-olds) covered by the specialized criminal justice systems under the Convention.

92. In the IIN's opinion, it is not recommendable to use the terms *youth* or *juvenile* – both covering a wider age range – nor is it proper to refer to *child/children*, as no child under 12 should face criminal liability. Thus, any person under 18 who has allegedly committed a crime should be referred to a specialized court for adolescents – and under no circumstances to an ordinary criminal court for adults.

93. For the purpose of defining adolescent criminal responsibility in the eyes of the law, States should further identify a lower age limit. Such a limit has been termed *Minimum Age of Criminal Responsibility* (MACR) by the Committee on the Rights of the Child⁵⁴ (on the understanding that such criminal responsibility should be considered within the framework of a specialized court, as mentioned in the General Comments) and, more accurately, *Minimum Age at which Children and Adolescents are Held Criminally Responsible under the Juvenile*

⁵¹In its General Comment Nº 10 cited above, page 12.

⁵²Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001. Paragraph 2. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

⁵³Inter-American Court on Human Rights. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of 28 August 2002. Series A. Number 17. Pages 57, 75, 77, 86 and 87. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf

⁵⁴General Comment Nº 10 cited above. Paragraphs 30 to 35.

Justice System by the Inter-American Court on Human Rights (hereinafter IACHR) in its recent report *Juvenile Justice and Human Rights in the Americas*⁵⁵. This apparently minor issue regarding the choice of terms has significant implications when it comes to establishing the system of specialized criminal justice, as the adherence of national legislation to international minimum and maximum age standards will give many children and adolescents access to a judicial system in which their specific needs and stage of life are duly considered.

94. The Committee on the Rights of the Child, for its part, suggests 14 to 16⁵⁶ as the minimum age for the purpose of criminal responsibility within the framework of the specialized justice system. On the other hand, in the report cited above, the IACHR prompts Member States to gradually increase the minimum age for criminal responsibility under the specialized justice system, so as to bring it as near as possible to 18⁵⁷ – again, within the framework of the specialized justice system.

95. As mentioned above, considering only the concept of adolescent criminal responsibility, the IIN finds there have been significant advances in the region. It notes that a number of social and State stakeholders have duly incorporated this new conception and are actively helping to establish a specialized justice system.

96. As regards rules and regulations, there have been significant advances, including early post-CRC approval legislative reforms that have led to the creation of full, well-structured specialized courts systems; in addition to some less ambitious reforms, which, though not as effective, have played a role in the creation of a specialized judicial system. A number of States have even granted constitutional status to the specialized judicial system, either because this was required under their legislations or because politicians understood the importance of strengthening and “armouring” the rights and safeguards of a specialized system. This is indeed a most significant achievement.

⁵⁵ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001. Page 11. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

⁵⁶ General Comment Nº 10 cited above. Paragraph 33.

⁵⁷ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001, Paragraph 59. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

97. In addition to enacting laws aimed at establishing a specialized justice system, several States in the region have further created a regulatory framework for enforcing such laws and the penalties provided for therein. This is of critical importance as the enforcement of penalties – both without and, exceptionally, with deprivation of liberty – is the most challenging stage of the process, bearing in mind the objectives sought for those adolescents who have infringed criminal laws. Thus, the fact that clear, detailed and specific rules and regulations have been established represents a significant step forward

98. The IIN is pleased to acknowledge the situation of those States that have chosen to adhere to human rights treaties, granting them constitutional or even higher status, insofar as such treaties safeguard people's rights. This is a critical achievement, as it directly relates to children's rights and adolescent criminal liability.

99. While the States' specific advances will be addressed in Chapter IV, it should be pointed out that a number of States have advanced significantly in terms of establishing sufficiently complete intervention models based on methodological approaches with great chances of success, inasmuch as they include comprehensive perspectives and work directly with adolescents, their families and their communities.

100. However, there are still areas of opportunity for both regulatory and institutional improvements in the region. Nearly twenty three years after the Convention on the Rights of the Child was approved, it is a matter of concern for the IIN that legislative reforms for establishing a specialized justice system in line with CRC principles and the standards in the *corpus iuris* of the Inter-American Human Rights System, which would enable moving away from the "irregular situation" model, have not been implemented throughout the region.

101. There are two distinct groups of States that have not implemented such reforms. The first group of States have not changed their regulatory framework and continue to rely on a perspective and a legal framework that fails to safeguard children's rights. The second group of

States have made partial legislative reforms, which in some cases fail to observe the principle of specialization or merely include certain aspects of this principle.

102. Another particularly important area of opportunity has to do with the legislative reform projects mentioned above. The IIN calls upon all those sectors and stakeholders involved in such reform processes, to avoid backsliding with regard to existing rules and regulations which, at present, fully or at least partially follow international human rights standards. Any effort made to change the rules and regulations in force should be viewed as an opportunity to further advance in the development of existing international human rights standards and commitments, whether undertaken by the State through the ratification of international instruments, thus making them binding, or at least approved on ethical grounds, though not legally binding⁵⁸.

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103. States should not pass any bills of law that contradict international human rights standards, as by doing so they would be failing to fulfil an obligation assumed by ratifying the Convention on the Rights of the Child, and in particular Article 4 therein, under which States are responsible for taking any administrative, legal and any other kind of actions aimed at enforcing the rights enshrined in the CRC.

104. The regulatory changes made in a number of States in the American continent are a matter of great concern, as they go against international human rights standards.

105. Regarding the regulatory reforms made so far, there are two major trends: on the one hand, those that tend to go back to the “tutelage model”, and on the other, those intended to eliminate the specialized justice system, so that adolescents can be judged as adults. In either case, such trends suggest a repressive, authoritarian perspective.

106. The changes made to date relate to the following aspects :a) extending deprivation of liberty, on occasions significantly, to the point that, in some cases it has been set at up to 15

⁵⁸This is, for example, the case of the resolutions of the General Assembly and other United Nations bodies.

years – following a highly negative example in one of the states – though the average for the region is 6 years for the most serious crimes; b) decreasing significantly the age boundary at which adolescents can be referred to specialized criminal courts; c) in a number of cases, adolescents were granted a longer period of time for choosing to have their behaviour in prison reviewed, thus postponing the possibility of accessing other less aggressive forms of punishment; d) restricting the authority of judges to review the penalties imposed, according to the progress displayed by the adolescent in his/her resettlement into society; e) making it possible for a judge to authorize the publication of the photograph and identity of an adolescent accused of an alleged crime; f) the application of alternative measures to complete criminal proceedings involving adolescents has been limited; measures which would effectively dejudicialize proceedings.

107. While the next paragraph will address each one of the principles that should inexorably govern a system of adolescent criminal liability, it is worth mentioning at this point those principles and rights enshrined in the Convention, which have been infringed or would be infringed by the amendments made so far. As regards maximum punishment (also called higher penalty limit) it entails infringing the principle of exceptionality, as it privileges the application of custodial measures, which is in turn incompatible with Article 37 paragraph b) of the Convention on the Rights of the Child (CRC).

108. As for the lowering of the minimum age of responsibility for adolescents to be judged by specialized courts, it should be noted that such a practice is incompatible with the principle of non-regression. Moreover, the IIN agrees with the IACHR and the Committee on the Rights of the Child in that exceptions to the minimum age must not be admitted in cases of serious crimes.

109. Regarding the extension of the term during which adolescents can choose to have their behaviour while deprived of their liberty reviewed, such a modification hinders specialized justice from achieving its objectives, inasmuch as it forces adolescents to remain in confinement even after having either partially or totally fulfilled their personal plan or log; that is, having fully or almost fully achieved the socio-educational purpose of the penalty.

110. It is advisable that judges (be they the judges specifically responsible for supervising the enforcement of penalties, which is preferable, or in their absence, any specialized court judges) should have the authority to control and supervise the fulfilment of penalties as part of a systematized process involving monitoring and evaluation of the penalties imposed, so that, as social resettlement progresses, the judges themselves are entitled to establish alternative penalties that may not entail deprivation of liberty.

111. The publication of photographs and the identity of underage persons represents a serious regression. Its stigmatizing effects will no doubt hinder the adolescents' subsequent social resettlement, particularly in the case of crimes that have not been proved. Furthermore, such legislative reform is in contravention of Article 8 of the CRC, as it violates the right to the preservation of identity.

112. Any restriction on the application of alternative measures for completing criminal proceedings involving adolescents is extremely harmful. Such reforms relate to out-of-court alternatives in cases of alleged participation in crimes by adolescents. According to Article 40, paragraph 3 of the Convention on the Rights of the Child (CRC), out-of-court alternatives should be sought whenever appropriate; accordingly, a generic restriction does not help achieve the objective that adolescents should not go through a tortuous judicial procedure, and further violates the principle of exceptionality.

Chapter III

The specialized Adolescent Criminal Liability Systems and their relation with Public Policies

113. Underlying the region's ongoing debate on adolescent criminal liability systems is an even more significant matter with even greater implications. It involves addressing adolescent criminal liability systems within the context of public policy; it is a question of whether these

issues should be framed within comprehensive public policy for the protection of children, or be included in policies regarding citizen security.

114. The IIN is concerned that a view of this subject as one of the principal problems affecting citizen security should prevail in the region and that attempts are made to include it as one of the main focal points of public security, particularly by means of bills or reforms.

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115. Although adolescent participation in acts deemed to be criminal is acknowledged to exist and such participation is assumed to have an impact on the whole body of crime, data provided by the states in the region with statistics that make it possible to analyse the situation show that juvenile delinquency is marginal when compared to the total. With respect to this situation, which is based on statistics and is therefore empirical, it is highly dangerous to plan changes to adolescent criminal liability systems based on inadequate information, as we pointed out above.

116. Therefore, the IIN urges the states to ensure that any measure taken or decision made in relation to adolescent criminal liability systems should be based on a perspective of providing protection for the rights of adolescents involved in them, in keeping with the very nature of this type of system; that is, to implement a suitable and age-appropriate process of social resettlement through special opportunities.

117. The Committee on the Rights of the Child, in its General Comment Nº 10⁵⁹ recommends that the States Party to the Convention on the Rights of the Child should adopt a general judicial policy in relation to “minors” who are criminal offenders, inasmuch as a review of country reports shows that the existence of this type of general policy is not clear. In addition, the Inter-American Commission on Human Rights has expressed itself in a similar vein in its report on “Juvenile Justice and Human Rights in the Americas”⁶⁰. The IIN therefore considers

⁵⁹ United Nations, CRC/C/GC/10.44th session, Geneva, Switzerland. Adopted on 25 April 2007.

⁶⁰ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001. Page 159. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

that policies on adolescent criminal liability should be included within the framework of general policy for the comprehensive protection of the human rights of children.

118 The function and necessity of a comprehensive protection policy of the rights of children and adolescents is clearly observable for the prevention of the participation of children and adolescents in offensive acts and more for the participation in socio – educative processes as an outcome of a penal sanction. Now, its important to analyze on this regard, that from the board concept of what public policies are, the comprehensiveness of the state policies implies participation and implication of the three powers of the State, according to the traditional conception of Modern States, of course, from the constitutional functions that every power has. The previous is indicated due to, what may be considered as the processed stage as itself, if well is a strictly jurisdictional function, is not absolutely unrelated to the public policy, since the justice systems of the States respond to their criminal policy, being this rationally constructed and structured or being this implicit through its instrumentalization. This is why from the design environment and planning of the public policies that laws are elaborated and with them the jurisdictional procedures for, in the topic of this document, the determination of the correspondent criminal responsibility. The specialized juvenile responsibility systems are activated before the actions considered criminal and in the procedural stage action takes part in accordance with the pre-established, which have to respond to the criminal policy adopted by each State and in the case of adolescent persons, to the specialized public policies of protection of the rights of childhood and adolescence, which at the same time most include all the rights and procedural guarantees recognized internationally, and most assure the effective accomplishment of the mentioned safeguards.

119 With regard to the subject of adolescent criminal liability systems, this general policy on the comprehensive protection of child rights should be designed in such a way that it includes at all levels (regulatory and operational) and at all stages (design, implementation and evaluation) the general principles established in the Convention on the Rights of the Child, as well as the specific principles related to this subject which were described above. Similarly, it is essential for the states to consider prevention in connection with this comprehensive policy, as well as procedural aspects, the enforcement of penalties and, ultimately, the provision of support through public policy programmes focusing on adolescents who emerge from the judicial system. It should be pointed out that all matters related to prevention and possible follow-up support after the sentence is served should occur in the context of social and intersectoral policy itself, whereas aspects related to procedural matters and the enforcement

of penalties should be included within the framework of the specialized adolescent criminal liability system. The prevention of adolescent participation in criminal acts entails the existence, as state policy, of a sound structure of timely public policies which should begin by addressing early childhood and include more specific prevention among the adolescent population and in a context of intersectoral policy with a focus on the best interest of children and adolescents and their families, including community integration and involvement. Similarly, when designing policies specifically for adolescents, it is essential to contemplate special policies and programmes for adolescents who have served sentences in compliance with specialized justice, in order to guide them towards the universal policies for the satisfaction of rights with some degree of personalized support, which should be aimed at ensuring the well-being of these adolescents.

120. The subject of prevention will be discussed in detail under the next heading and issues related to the enforcement of socio-educational penalties will be addressed in Chapter IV. The following paragraphs, therefore, will refer to certain procedural aspects and, to use the words of the Inter-American Commission on Human Rights (IACHR), *Post-Confinement Measures*⁶¹, although the IIN considers that such measures, inasmuch as they provide support through targeted social policy programmes, should not be applied exclusively to adolescents who have served custodial sentences, but also to all adolescents who have completed non-custodial programmes. Regarding the procedural stage, we should first point out that this is a simplified way of referring to the whole circuit an adolescent may go through from his or her first contact with officials (that is, detention) up to, eventually, a final ruling. We maintain that this term is very simplistic because it fails to include the complexity of the process and the alternatives that should be considered in order to determine responsibility or the solutions available in situations in which an adolescent is accused of being a criminal offender. Because of the commitments undertaken by the states when they ratified the Convention on the Rights of the Child, the procedural stage is endowed with a number of special features that distinguish it from criminal proceedings for adults. Although there are certain rights and safeguards in common, we assume that adolescents should be the object of a greater number of safeguards in view of their stage of development and bearing in mind that this type of process is usually particularly dramatic.

⁶¹Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001. Page 155. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

121. It is essential to bear permanently in mind not only the specific principles related to criminal liability systems, but also the four cross-cutting principles contained in the Convention on the Rights of the Child. The application of these principles is particularly important in the procedural stage initiated at the moment of detention. Upon an adolescent's first contact with the police, it is indispensable that detentions should be the result of prior investigation and be backed by reasonable and sufficient proof, unless it is a case of *in flagrante delicto*. Arrests should be carried out with consideration for the principle of non-discrimination, avoiding selective arrests aimed at specific populations. Similarly, it is essential that when an arrest is made, the family should be informed immediately, as should the authorities who are legally responsible for the defence and supervision of the rights of adolescents. A further key aspect in relation to detention is that adolescents should always be separated from adults who may also be detained. Failure to do so carries very significant risks; among them, that adolescents may become victims of different forms of violence, including sexual violence. In addition, adolescents should be detained in appropriate premises that comply with appropriate building, health and habitation standards. Arrests should take place without the use of violence and it should be ensured that adolescents are not subjected to any form of violence by the officials in charge of surveillance during the temporary deprivation of liberty following arrest. A further critical issue is that confinement should be for the briefest possible period and that judicial authorities should be informed immediately of the fact so that they can determine what appropriate action to take.

122. Other fundamental aspect that must be considered in relation to the detentions is that results essential the absolute separation of the adolescents persons of the adult persons that are also detained. The no separation between adolescents and adults brings an important risk including the risk that the adolescents may be victims of different manifestations of violence, including sexual violence. Alike, the detentions must take part in adequate places, that meet the building, sanitary and habitation conditions, in correspondence with the dignity of every person. Detentions must be carried out, as principle, without violence, except special cases⁶², in the same way that it must be guaranteed that adolescent persons are not objects of any

⁶² In those situations where the adolescent persons may be armed, police protocols that police protocols that regulate the legitimate use of force until gaining reduction must be applied, from which every violent manifestation must be detained.

type of violence from the authorities in charge of looking the temporary privation of liberty after the detention. Other fundamental aspect of the detention must be the shortest term possible⁶³ and must be informed immediately to the judicial authority to determine the correspondent posterior actions.

123 Once an arrest has been made, it is usually necessary to decide whether judicial proceedings should be initiated regarding the adolescent or whether an alternative to judicial proceedings will be adopted. In this respect, the IIN recommends choosing out-of-court alternatives whenever appropriate and desirable, in keeping with the best interest of the adolescent, as established in Article 40, paragraph 3.b) of the Convention on the Rights of the Child: *“...measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”* These alternative measures should be applied principally to less serious offences. Examples are: a) participation in diversion programmes or services; b) case dismissal, and c) alternative methods of dispute resolution.

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124. Diversion services or programmes, as established in The Beijing Rules, number 11, imply redirecting cases that could be dealt with through formal judicial proceedings to community support services, so that these programmes can address the assumption of criminal liability on the part of adolescents without recourse to formal hearings, which can be very lengthy, despite the fact that the principle of procedural celerity has been specifically included in specialized procedural legislation for adolescents in conflict with criminal law. Thus, adolescents are dissociated from conventional criminal justice processes and after having secured their consent, they are assigned to certain measures, such as: a) community services; b) supervision by a social worker or probation officer; c) offering compensation to the victim; d) offering an apology (publicly or privately), and others. This kind of measure should be validated by the competent state authorities – usually the judges or prosecutors – who must decide whether the measure strikes a balance between protecting the rights of the individuals involved and the achievement of justice. The use of diversion programmes is justified when they fulfil the principle of procedural economy and at the same time remove adolescents from

⁶³ In attention to the principle of the last ratio or exceptionality, in this case the privation of liberty, as was developed at chapter I.

the often harmful effects of criminal proceedings, without neglecting the acceptance of criminal liability on their part.

125. Case dismissal, also known in some states as the principle or criterion of discretionary prosecution, involves a decision, when a conflict comes before the court, not to initiate legal proceedings in connection with an alleged infringement of criminal law, particularly when the offence is not serious. The principle of discretionary prosecution in criminal law is essential, as it entails a means to make effective the principle of procedural economy, inasmuch as it considers that it is inefficient for the state to expend its resources on full court proceedings for alleged crimes deemed to be minor or involving assets of little value.

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126. Alternative methods of dispute resolution that involve the adoption of equitable provisions are also important, without prejudice to the rights of the persons involved. It is therefore necessary to regulate the execution of these alternative mechanisms most carefully when the interests of children are at stake. It is observed that the use of alternative methods of justice can lead to arriving at an understanding between victims and perpetrators, as well as helping to reincorporate adolescents into the community. In some of the states in the region, an opportunity for conciliatory undertakings between offenders and victims is provided for, in addition to the alternative of undergoing arbitration and mediation processes and other means of alternative resolution of conflict as a form of confronting alleged offences committed by adolescents without resorting to judicial proceedings. These methods of alternative resolution generally imply the involvement of restorative justice. In this respect, we should mention the *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, which describe restorative justice as a progressive solution to an offence that fosters social agreements for coexistence through the reparation of the damage inflicted on victims and the recovery of the offender. The document adds that restorative justice occurs when victims, the alleged offenders and, when appropriate, any other individuals or community members who are affected by an offence, actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.

127. In those cases submitted to a court of justice, the IIN urges that special care be taken to ensure that all the appropriate procedural guarantees are in place, including the right to defence; natural judge; the right to a fair hearing and to contest the evidence; the presumption of innocence; the right to be heard and participate in the process; the participation of parents or persons legally responsible in the process; minimum duration of the proceedings; publicity in keeping with the right to respect for the privacy of adolescents; the right to a second hearing and to an appeal; *ne bis in idem*⁶⁴ and *res judicata*.

128. In connection with post-punishment measures; that is, post-release follow-up and support mechanisms, there is considerable debate – particularly in legal terms – regarding the relevance of this type of measures. The IIN believes that the states should establish certain methods in order to watch over the evolution of adolescents after they have served their sentences; particularly in view of the fact that there is often a serious risk that once adolescents have been released, their leaving will imply a “leap in the dark”. From the perspective of minimum criminal law, this follow-up stage may be regarded as unjustified interference in the lives of adolescents or youth, and could be viewed as an extension of the punishment. However, these support mechanisms should not be understood or intended as an extension of punishment but should simply involve establishing means to support adolescents in the process of social resettlement, particularly for those who were deprived of their liberty, on the basis of whatever they were able to learn during the enforcement stage and to help them reduce the probability of recidivism. This recommendation was included in the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, in Chapter IV (*The Management of Juvenile Facilities*), section N, paragraph 80, on assisting juveniles to re-establish themselves in the community. This rule was also considered by the Inter-American Commission on Human Rights in its report on the subject, in its paragraph 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.*”

⁶⁴A principle that States that nobody can be tried twice for the same act.

III.I The importance of prevention

129. The subject of crime prevention, and particularly the participation of adolescents in acts deemed to be criminal, has been a constant concern for contemporary societies. The first manifestation of this concern was expressed in actions taken to arrive at significant international consensus in the approval of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). The IIN considers it essential that officials with decision-making capacity in the design of public policy should be familiar with the contents of these guidelines in order to include them as appropriate in the policies they produce.

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130. With regard to prevention, it is possible to establish long and mid-term policies that are fundamental in terms of the considerable effect they can have in reducing juvenile delinquency. These policies are usually closely linked to universal policies for early childhood, health care, education, culture, sports and recreation, the family and the community, and other areas. However, short-term prevention is also very important and should target the population already in adolescence and who exhibit certain features that are common to adolescents found guilty of criminal offences, as determined by existing experience of adolescents. Producing this type of study is necessary, not, as we have stated, with the purpose of generating selective and discriminatory practices, but with a positive approach involving preventive intervention through specific policies or programmes with unrestricted respect for the principle of legality and the right to privacy of adolescents, focusing on working with adolescents, their families, communities and peer groups.

131. The prevention of adolescent participation in acts deemed to be criminal is a fundamental element that shows the existence or lack of genuine, general and comprehensive policy for child rights. That is, for public policy for the rights of children to be considered comprehensive and general, it should include the prevention of crimes committed by adolescents, as established by international standards. A policy that does not contemplate this aspect sufficiently, not only fails to comply with international standards, but also has a high likelihood of failing to reduce or at least stabilize specific statistics regarding adolescent participation in acts deemed to be criminal.

132. States should guarantee and ensure access to education; which should be of the quality and on the terms indicated by the Committee on the Rights of the Child in its General Comment Nº 1⁶⁵. It should be free to the highest possible level, so that adolescents can benefit from real opportunities for study, both academic and vocational – technical and even professional education. It should also promote access to sources of work for adolescents who require it and are of an age to do so, according to domestic legislation or the international standards on adolescent labour⁶⁶. This age, in agreement with the state, should be such that adolescents can fulfil their school duties. At the same time, work opportunities should comply with the conditions required for their comprehensive development⁶⁷. However, the sole existence of real opportunities is not sufficient; it is also necessary to disseminate these possibilities and provide suitable conditions for easy access.

133. A fundamental aspect in connection with the prevention of adolescent participation in criminal acts is training all state operators with direct or indirect links to adolescents. This education should include subjects such as child rights and significant aspects related to the development of this population and their special needs, as well as knowledge of such key aspects of adolescent life as their families and communities.

134. A further element of prevention is to ensure that programmes implemented with the aim of prevention should not use coercion or intimidation in their recruiting procedures. It is also desirable that they should be placed under the influence of social institutions – governmental or not – and that they should have no connection with police or military institutions. They should, on the contrary, be seen to have links to family and community organizations.

135. A key aspect in the prevention of adolescent participation in criminal acts, and one on which the IIN places a particular emphasis, is the need to establish a rigorous implementation

⁶⁵ "The Aims of Education". CRC/GC//2001/1. Approved on 17 April 2001. Geneva. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument)

⁶⁶ In this regard, *Convention No. 138 of the International Labour Organization on the minimum age for admission to employment and work* recommends the age of 15 as the minimum age to enter the labour market, under certain specific conditions.

⁶⁷ The States have the obligation, in accordance with Article 32 of the Convention on the Rights of the Child to ensure the regulation of appropriate hours and conditions of employment for adolescents

process as from the early school years. In secondary school, children should be made aware of the importance of establishing a life project, the construction of which should be facilitated through the visualization of targets and of a beneficial future for their lives. Family members should also be encouraged to take part in this process, as far as possible.

III.II Specialized policy regarding adolescents in conflict with criminal law

136. As we mentioned above, caring for adolescents in conflict with criminal law should be part of a general public policy for the comprehensive protection of children's rights. The existence of a specific policy for this population within the framework of general public policy is justified in view of the need for a specialized care strategy whose purpose is the social resettlement of adolescents who have been found to be offenders. This strategy should be based on education as one of its basic elements. It should be one of the principal focal points in caring for adolescents who have been sentenced either to deprivation of liberty (which, we insist, should be the exception) or to socio-educational or non-custodial penalties.

137. This distinction is also indicative of the stance the IIN has adopted on this matter, in considering that socio-educational penalties are those that are enforced in non-custodial settings. Whereas both deprivation of liberty and non-custodial measures should have a socio-educational purpose, the IIN believes that the probability of achieving this purpose is significantly reduced with the deprivation of liberty, due to a very simple fact, which is related to the following question: how can an adolescent successfully resettle into his or her family, community and social environment if he or she is excluded from these settings? We believe that a penalty that allows adolescents to reconcile their infringement of rules directly with their families and communities will genuinely allow them to adopt new conduct parameters and establish reference points for a life in society.

138. However, as in some cases deprivation of liberty is the legally stipulated penalty for certain acts deemed to be criminal, it is essential to underscore the need to guarantee that all adolescents deprived of their liberty should be involved in an educational process. In this

respect, it is particularly important that education offered to persons deprived of liberty should comply with the elements established by the Committee on the Rights of the Child in its General Comment Nº 1, “The aims of education”⁶⁸ (although this General Comment should be adopted in the case of all education for children). This General Comment contains a particularly appropriate statement in its second paragraph, when it says that education “goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society”.

139. Education for adolescents should promote their full development and comprehensive training. Therefore, educational modalities for penalized adolescents should offer a broad educational and cultural choice and ensure that adolescents are aware of this choice; respond to the need to fulfil the compulsory school cycle in each state; provide technical training, as well as professional training in its different forms; facilitate access to distance and/or online education if it is not possible for each system to offer every possibility or even if adolescents prefer such a method of education; offer additional alternatives to formal education; consult adolescents about their concerns and aspirations in education; encourage them to express their initiative in relation to education and support the implementation of educational processes in which their participation is predominant and include cultural and artistic areas, as well as physical education and sports as part of the educational choice.

140. The IIN therefore considers that strategies that increase the chance of achieving the social inclusion of adolescents in conflict with criminal law should be strongly based on access to education and a cultural life.

⁶⁸United Nations, CRC/GC/2001/1, Geneva, Switzerland, adopted on 17 April 2001. Available in Spanish and in English at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/412/56/PDF/G0141256.pdf?OpenElement>

Chapter IV

Managing Specialized Justice Systems

141. The management of specialized justice systems is a broad topic. In this chapter we will concentrate on the management of the enforcement of penalties imposed on adolescents, for which it is essential to ensure an adequate application and constant attention to the desired goals.

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142. Management by results is an approach used in corporate administration but which can also be applied to the management of social issues. One of its main assumptions is the need for clearly defined goals and the planning of steps and activities for achieving those goals. Adolescent criminal liability systems were created precisely to achieve the social reintegration of adolescents and to lead them to assume a constructive role in society, as stated in Article 40, paragraph 1, of the Convention on the Rights of the Child, so this approach seems particularly appropriate.

143. Thus, although the guiding purpose of enforcement procedures is clearly defined, we need to bear in mind some considerations. The first refers to the fact that penalties for adolescents differ radically from those for adults. General theories on penalties for adult offenders recognize the states' right to punish⁶⁹, but in the case of adolescents and in view of the aims pursued, all the usual retributive features must be eliminated.

144. Another important aspect is the fact that the rehabilitation of adolescents also refers to their social reinsertion. The term "rehabilitation" has traditionally been used with reference to health care, particularly psychiatry, and to a lesser degree in social sciences such as psychology. In law, sociology and criminology, the term rehabilitation has been borrowed to speak of "social rehabilitation". Nonetheless, the term does not adequately illustrate the aims

⁶⁹In texts in Spanish frequently referred to as *ius puniendi*.

of the penalties imposed on children in conflict with the law, since it does not describe the process for teaching them how to fulfil a role which is productive and constructive for them, their families and the whole of society. In other words, it does not seem appropriate to refer to the problems of adolescents who infringe criminal laws and their process of social adaptation with terms that allude to any kind of psychiatric or psychological illness, trauma, disorders or disabilities. Nevertheless, the term “rehabilitation” does seem appropriate for adolescents who have been sentenced and who face some type of addiction, particularly to psychoactive drugs, and to that (usually small) percentage who have mental health problems.

145. Another important consideration regarding the management of this process is that the achievement of results can only be assessed when the adolescents are released from institutions or have completed the penalties imposed, although their attitudes throughout those periods are also decisive. Therefore, an additional reason to establish follow-up and support for adolescents in the post-release stage in social policy programmes lies in the importance of achieving a life plan, which should be crafted as a final outcome of the penalties imposed. However, particularly in the case of non-custodial measures (in which it is more feasible to do this), it is essential to design individual plans for fulfilling the punishment imposed on adolescents with a view to achieving a transition process at the conclusion of the penalties, which could lead to connecting adolescents with formal education and health systems, the labour market, financial benefits such as study grants, technical training programmes and others. The educational component of those measures must be realistically suited to the opportunities for employment of these youths in their local context. This means that management of penalties must have broader aims than the mere application of the measures imposed on each adolescent.

146. A fundamental aspect directly related to managing adolescent criminal liability systems involves infrastructure and the facilities in which adolescents must be held at specific stages, as determined by the criminal liability system. This becomes critical in deprivation of liberty, in which appropriate conditions must be guaranteed regarding hygiene, health, security, emergency provisions, recreation, living conditions, and in the case of female adolescents, the special needs related to their sex.

147. In relation with the gender focus, is relevant to highlight the way that different States of the region have initiated the incorporation of this perspective in their national legislations referred to childhood and adolescence, which is particularly important in the case of the female adolescents that is said that have infringed one penal law and for those that are being met socio-educative penal sanctions. If the measures that are taken with the adolescent persons must have always as basic premise the respect to the ethnic, linguistic, cultural differences and gender consideration is fundamental to respond to the particular necessities of adolescents in conflict with the law. For the adolescents it turns fundamental that the mechanisms of execution of the sanctions consider particularities of gender such as the reproductive health services that require especially the female adolescents, the sufficiency and training of the feminine personal to attend the open media programs and close media for female adolescents, the prevention of violence situations against the female adolescents, who are generally more vulnerable of being victims that the masculine adolescents⁷⁰.

IV.I Inter-institutional and intersectoral coordination

148. One of the main challenges for these enforcement systems that deal with adolescent offenders is the need for accountability in all the sectors and institutions of the state directly or indirectly involved in the issue. Intersectoral coordination is basic for all matters relating to children and adolescents, from the problems of early childhood to topics such as sexual exploitation and human trafficking. The systems which handle adolescent criminal liability are not an exception; on the contrary, coordination is essential for them.

149. The insufficiency or absence of coordination is largely due to the lack of a much-needed public policy for the comprehensive protection of children's rights, as we have already mentioned. Within the state's institutional framework, a set of specific and shared duties must be established in order to attain objectives which concern the state as a whole. Therefore, intersectoral and inter-institutional coordination refers to the need for joint efforts and the

⁷⁰ Inter American Commission of Human Rights, Report: "Juvenile Justice and Human Rights in the Americas" OEA/Ser. L/V/II. Doc. 78. 2001. Page 145. Available at the electronic address: <http://www.oas.org/es/cidh/infancia/docs/pdf/JusticiaJuvenil.pdf> .
English Version: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

generation of synergies. The term synergy comes from Greek, and its meaning “cooperation” has been developed in biological and physical sciences to allude to the conjunction of different forces and interactions that produces positive effects for achieving desired outcomes.

150. Coordination is negative when other state entities fail to provide any support to the institution legally in charge of enforcing those penalties imposed on adolescents. For example, these institutions are frequently forced to provide programmes and projects to satisfy those adolescents’ needs, while in fact the state’s legal structure has other institutions designed to provide the same public goods and services, including: health; education; recreation and sports; and culture. It is inefficient and ineffective for the institutions in charge of enforcing sentences to have the duty to create special departments and sections devoted to providing those services, which also require the management and specific training of more human resources to render them capable of treating an adolescent population. In fact the state already has other institutions which are highly specialized in offering those services and which, after the corresponding coordination, would only require some specific training.

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151. The above-mentioned coordination must extend throughout the whole state and not only to specific government institutions. Likewise, it should include civil society organizations and community associations, since these organizations are usually able to provide significant support for the social reinsertion of adolescents and even lead the way in contributing to the positive effects of the penalties imposed on them.

152. Furthermore, intersectoral and inter-institutional coordination could ensure a larger proportion of multidisciplinary approaches; indispensable in caring for adolescents.

IV.II Approaches for the system

153. There are a large variety of approaches for the adjudication of adolescent offenders; this section describes only the most important ones.

154. We have already described the educational approach, which should be one of the main ones; nonetheless, this political position paper must include considerations on other additional and supplementary alternatives.

155. In order to try to provide adequate solutions or achieve the desired results, these approaches focus on the underlying assumptions of the corresponding problem or aim.

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156. Specifically, we have mentioned but not fully explained the need for an approach that confers particular importance to family and community participation in the process of enforcing penalties. This aspect is often forgotten or only marginally included in the treatment of adolescent offenders. Active participation by civil society organizations and community groups is decisive in order to achieve the social reinsertion of these adolescents. It would not make sense for a process seeking social reinsertion to separate adolescents from their social environment; such measures would only be justified if the objective were to be merely retribution and punishment. Ongoing interactions with family or community members are decisive to allow adolescent offenders to restore any relationships that might have deteriorated (not only due to the young persons' infringing behaviour) or to generate bonds of affection or reference. In addition, the inclusion of family, community and society at large in these processes involves the shared responsibility which lies at the root of all matters relating to children and adolescents and which becomes especially relevant in the context of adolescent criminal liability. Although the relevant state institutions have a mandate to ensure the resettlement of these adolescents into society, the task does not only pertain to them.

157. Another extremely important approach is the one which focuses on safeguarding full respect for adolescents' rights. In those enforcement processes, the adolescents should not be deprived of enjoying all their rights (except the right to freedom of movement in the case of penalties which deprive them of their liberty). On the contrary, special emphasis must be placed on fulfilling all the child's rights.

158. These two approaches are in consonance with Article 19 of the American Convention on Human Rights, which states 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 is a basic provision, particularly if read together with Article 4 of the Convention on the Rights of the Child. Since 1969 (the year in which the American Convention was adopted) and particularly 1978 (when the Convention entered into force) it is part of the regional body of law on child rights.

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159. Another approach we should mention is restorative justice, on which the Committee on the Rights of the Child has expressed its opinion in General Comment Nº 10, particularly paragraphs 3, 10 and 27. Likewise, the Inter-American Commission on Human Rights referred to it in the above-mentioned report on the subject⁷¹. Restorative justice seeks to repair in the greatest degree possible the damage suffered by individuals or the whole of society as a consequence of criminal offences perpetrated by adolescents⁷².

160. We also underscore the importance of a multidisciplinary approach. It is just as important to remember that none of the stages of an adolescent criminal liability system should adopt a repressive approach.

IV.III Monitoring and evaluation of the system

161. The operation of adolescent criminal liability systems must be monitored and evaluated; this is a fundamental aspect that must cross-cut the whole system, although it is particularly important in the enforcement of penalties imposed on adolescents. Monitoring is essential in that it measures the progress achieved by a set of actions. Monitoring can be defined as: “a systematic process employed to verify the effectiveness and efficiency of the execution process of a project in order to: a) identify its weaknesses and b) recommend corrective

⁷¹ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas* (July, 2011).

⁷² For further information on restorative justice, we recommend the content developed by the United Nations Office on Drugs and Crime, available at: <http://www.unodc.org/unodc/en/justice-and-prison-reform/criminaljusticereform.html#restorative>

measures to optimize desired results”⁷³. On the other hand, evaluation may be understood as: “an assessment and a systematic reflection on the design, execution, efficiency and effectiveness of an ongoing or completed process and its results (or impact). It takes place during the whole project cycle and normally involves persons who are not directly linked to the operation of the project”⁷⁴.

162. Based on these definitions, it has been observed that few states in the region have established mechanisms for monitoring and evaluating their systems for handling adolescent criminal liability, and even fewer states, despite having set up such mechanisms, carry out this task in a satisfactory way.

163. First it must be noted that although monitoring and evaluation are essential, particularly with relation to the enforcement of penalties imposed on adolescents, they are also indispensable for the alternatives to judicial proceedings, particularly diversion programmes. Another key recommendation is to include as many actors as possible and relevant in the process of analysing the operation of these systems; particularly sentence enforcement judges, in the states which have created this type of authority to supervise the observance of adolescents' rights during the application of the penalties imposed on them. Again, it must be underlined that monitoring and evaluation are best carried out by interdisciplinary teams that are able to analyse the processes from different technical perspectives.

164. Although in a slightly different role and focused on supervising the respect and fulfilment of human rights, the contribution of National Human Rights Institutions (NHRIs), in the states which have them, is extremely valuable. Many of these have departments which are specialized in safeguarding the rights of persons deprived of liberty or in child rights. The oversight performed by these NHRIs is not a mechanism for monitoring and evaluation which operates within the system itself; nonetheless, their role in supervising the observance of human rights is important and necessary: it supplements internal mechanisms. Just as essential are the contributions by any National Preventive Mechanisms set up in the states

⁷³ Workshop on Project Management (Design, Monitoring and Evaluation). Department of Planning and Evaluation, Secretariat for Administration and Finance. Organization of American States. Montevideo, Uruguay, from 5 to 8 April 2011.

⁷⁴ *Id.*

under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984. This treaty has decisive effects on the system that enforces penalties on adolescents.

165. Adolescent girls and boys who are subject to state interventions because they are alleged or recognized as having infringed the criminal law should also be able to participate in this monitoring and evaluation process. In fact, an assessment of the adolescent criminal liability system cannot be complete if the minors themselves are not included in this process. Since they are the main object of these systems, there are sound reasons for hearing their opinions. In this respect, a useful feature is the setting up of a simple and agile mechanism that allows adolescents to submit claims, suggestions or comments regarding situations which appear to violate their rights. Where adolescents may be exposed to violence it is particularly important for them to be aware of the existence of such a mechanism and, needless to say, these situations increase the need for permanent monitoring by multiple actors.

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IV.IV Adolescents and specialized justice systems

166. This section has the purpose of underscoring the importance of adolescent participation in all the stages of a system focused on their criminal liability. It is based on the principle of participation enshrined in the Convention on the Rights of the Child, particularly its Article 12 and related articles. In fact, this right or principle has cross-cutting effects. It has been greatly developed in recent years and the states in the region have achieved important accomplishments. With regard to adolescent boys and girls in conflict with criminal law, it has special connotations.

167. The principle of participation was first developed by the Committee on the Rights of the Child in its General Comment N° 5, specifically in paragraphs 1, 12, 49, 56 and 69. The principle was further reasserted and developed in detail by the Committee in its General Comment N°

12, “The right of the child to be heard”⁷⁵. In this General Comment Nº 12, the CRC devotes several sections to the general consequences of incorporating the rights to express themselves freely and to form and express their views. Special attention is given to these rights in relation to judicial and administrative proceedings which involve children and adolescents. The IIN considers that it is essential for states to continue observing and developing this principle, especially with relation to the adolescent criminal liability systems, and based on the above-mentioned General Comments.

168. We also highlight an opinion issued by the Inter-American Court of Human Rights which was repeated by the Inter-American Commission on Human Rights in its report on the subject: “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’*.”^{76,77}

169. For these reasons the IIN considers that it is essential to establish mechanisms to facilitate participation of adolescents in all the stages of the criminal liability system that applies to them. These mechanisms must be adapted to their evolving capacities and adequate in terms of stimulating and facilitating their engagement.

170. In some states of the region there is a debate as to whether adolescent offenders should have a criminal record or not. The IIN does not favour the keeping of criminal records for adolescents because these would be counterproductive for their resettlement into society inasmuch as these records would become obstacles for getting employment (which in turn reinforces social and educational processes) and contribute to stigmatize the children involved. They are incompatible with modern offence-based criminal law and constitute an unpleasant memory of the former actor-based system of criminal law.

⁷⁵ United Nations, CRC/C/GC/12, Geneva, Switzerland, adopted on 20 July 2009

⁷⁶ The passage in italics is a direct quotation from advisory opinion OC-17/2002 of the Inter-American Court of Human Rights.

⁷⁷ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*. Washington D.C. 2011. Page 4, paragraph 13.

171. A theme that results of mayor transcendence and that should not be left aside in the present Position document for its systematic implications in relation with the Procedural Penal Right in the Member States of the OAS, is the relative to the transformation that is being produced, in many of these, of the penal systems that have gone from inquisitive systems to accusatory guarantee systems. These changes toward accusatory guarantee systems are a convenient practice at the time of desirable in so far as this kind of adversarial penal configured systems where mayor guarantees to the development of impartial trials since they are carried out in a rigid separated of the functions of investigation, accusation and decision, where the judges construct in passive subjects strictly separated from the parts; besides in this systems is pretended an equilibrium between the parts where each part is given the recourses that to their position in the process correspond (“arms equality”) and is significantly incremented the weight of the proof towards the accusatory part. The adversarial accusatory systems offer major guarantees for the persons that face penal processes, which is especially important for the adolescent persons, reason why it is viewed as positive the instauration of this kind of systems. Now, it’s being observed how in some States have changed from inquisitive accusatory systems to accusatory guarantee systems for adult persons, but not yet for adolescents persons, which is a discriminatory practice once that all adolescents have the same rights to exercise their defense in process that offer then more procedural guard, for example, the existence of a major objectivity in the decision through the existence of different types of judges according to the procedural stage, as is established in the accusatory systems.

IV.V The Challenges Faced by the States in this Area

172. Certain general challenges are described below, which arise from the information analysed⁷⁸. This does not imply that all of the OAS Member States are facing the same challenges.

- The progressive redesign of government policies and programmes in order to bring them further into line with international standards, as well as strengthening those which already fulfil these standards.

⁷⁸ Questionnaires answered by 14 States. Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, national legislations.

- Establish a National Plan for institutional care which will standardize procedures in deprivation of liberty centres and include technical guidelines for each socio-educational penalty, with differentiated intervention programmes. Design, strengthen and provide technical support for open programmes.
- Design an administrative model (providing a technical basis) for the administration of confinement centres for adolescents, defining the functions, roles and activities of officials.
- Consolidate and implement a national statistics and information system for the whole of the specialized adolescent criminal liability system (SERPA, in Spanish).
- Strengthen and consolidate intersectoral coordination and the joint responsibility of the different government sectors in caring for adolescent offenders, in order to enable comprehensive intervention aiming at social resettlement.
- Enact and amend fundamental, procedural and organizational law for the enforcement of penalties, in keeping with constitutional and international human rights standards.
- Build a greater variety of programmes for non-custodial penalties and improve the choice of services for adolescents in confinement centres.

Chapter V

Final Considerations

V.I The position of the Directing Council of the IIN

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173. The unanimous consensus of the States through their governing bodies for children and the support of the executive secretariat of the Directing Council have made it possible to identify the following positions in relation to the object of this position paper:

- 1) All the States in the region should continue to work to improve their adolescent criminal liability systems, guided by human rights, educational and protective approach.
- 2) The IIN considers that any measures, especially when they are legislative, should reinforce existing content and as far as possible broaden the enjoyment of rights and guarantees.
- 3) The IIN reasserts the need for the inclusion in general public policies for the comprehensive protection of the human rights of children of the subject of adolescents in conflict with criminal law. If necessary, a general policy should be designed in this regard, which should be comprehensive and ensure that the content of principles reaches operational levels. Likewise, it should include actions and objectives in connection with prevention, the procedural stage, the enforcement of penalties and follow-up post-release support, through targeted social policy programmes, making the general policy as comprehensive as necessary.
- 4) The IIN insists on the need for mechanisms to harmonize the actions of all sectors and institutions which may be involved in these matters to be included under the umbrella of these general comprehensive protection public policies. This should be done under the leadership of a specialized agency to act as enabler in order to ensure a multidisciplinary and not predominantly legal approach in caring for adolescents, which should lead to the

effective restitution of their rights, in keeping with their age, family and social circumstances and their best interest.

5) It is not deemed appropriate to include the subject of adolescents in conflict with criminal law within policy for public security, at least not with the purpose of retribution and repression of adolescents – this is not the best way to achieve real, long-term solutions to these problems. The inclusion of this subject in such policies can lead to the labelling and discrimination of a significant number of our adolescents, who begin to be viewed as “public enemies” only because of how they look, or their dress or social class.

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6) The IIN urges the States to increase public spending on this subject, and allocate more resources to the crafting and execution of programmes mainly focused on prevention, so that adolescents refrain from engaging in criminal activities, and to the enforcement of the socio-educational penalties imposed, with an approach that involves adolescents’ families and communities.

7) Likewise, the IIN urges the media to reflect upon the importance of their role as shapers of public opinion and to assess their impact on the adolescent population when they assume certain standpoints and approaches and invites the States to, jointly with the media, raise awareness on child right’s, especially in topics related to adolescent penal liability.

8) It is hoped that on the basis of this paper, which expresses the position they hold in common on this subject, the States of the region will initiate more dynamic international cooperation based on their consensus regarding the best principles and approaches with which to address the field of adolescent criminal liability systems.

9) The IIN is concerned to note the nature of the concepts that have emerged in several of the ongoing debates in many of the States and reiterates the need for further scientific research to provide sound solutions to the problems being discussed.

10) In this regard, the IIN calls attention to the IACHR’s recommendation that the States should only subject adolescents to criminal justice if there is a specialized system that complies with international human rights regulations.

11) Likewise, the IIN underscores the concern expressed by the IACHR regarding the fact that in the vast majority of States *“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”*⁷⁹.

12) Both general and comprehensive policy for the protection of child rights with regard to the subject of this position paper, as well as criminal liability systems themselves should consider the special features of every adolescent and respect differences, such as gender, ethnicity, culture and language, in keeping with the principle of non-discrimination. In addition to this, the States should ensure that their officials do not act in response to stereotypes or preconceived ideas and guarantee freedom from discrimination in keeping with the aspects mentioned above or any others.

13) It is essential that if taken into account the research on the causes of the participation of adolescents in criminal acts, to avoid the use of these studies as a basis for social stigmatization processes, generating “labels” and stereotypes about certain groups social situation on which contemporary criminology has stressed the dangers of criminal profiling. So the IIN invites to use this type of research strictly for seeking solutions and preventive purposes.

14) All States in the region should put in place a monitoring and evaluation framework and agreed system of indicators to measure the performance of the adolescent penal liability systems.

⁷⁹ Inter-American Commission on Human Rights, report on *Juvenile Justice and Human Rights in the Americas*, OAS/Ser. L/V/II. Doc. 78. 2001. Page 159. Paragraph 8. Available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>

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