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Child-Friendly Justice Behind Bars: A Comparative Analysis of the Protection Mechanisms of the Rights of Arrested Children in the Practice of the Working Group on Arbitrary Detention and of the European and Inter-American Courts of Human Rights

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**CHILD-FRIENDLY JUSTICE BEHIND BARS:
A COMPARATIVE ANALYSIS OF THE
PROTECTION MECHANISMS OF THE RIGHTS
OF ARRESTED CHILDREN IN THE PRACTICE
OF THE WORKING GROUP ON ARBITRARY
DETENTION AND OF THE EUROPEAN AND
INTER-AMERICAN COURTS OF HUMAN RIGHTS**

ÁQUILA MAZZINGHY*

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I. INTRODUCTION.

Justice must be always friendly with children, irrespective of whether they are victims or witnesses of violations of rights, or allegedly, the violators of the law. However, every year an abundant number of children involved in judicial matters are victims of the arbitrariness of States worldwide. There are many reported cases in which authorities involved with the administration of justice subject children under the State's custody to extreme abuses of power and to disproportionate uses of force.¹ Children that allegedly break the law are in a position even more vulnerable as State authorities tend to disrespect several of their procedural rights.

Under such conditions of States' arbitrariness, minors are arrested without an arrest warrant and/or held in indefinite pretrial detention. When detained, they are sometimes held in a prison cell with adult detainees. Some children are interrogated without the assistance of a lawyer. Many are not brought timely before a judge. In addition, intelligence-gathering agents use indefinite administrative detention in military facilities with the purpose of obtaining information from the minors. In most cases, no evidence is ever presented to support their detention.

1. See Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fourth Session, ¶ 33, U.N. Doc. A/HRC/WGAD/2015/53 (Apr. 6, 2016) [hereinafter Human Rights Council, Op. No. 53/2015] (describing a child's months-long preventative detention in violation of Egyptian Child Law's one-week limit); see also Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eight Session, ¶¶ 5, 8, U.N. Doc. A/HRC/WGAD/2017/3 (June 16, 2017) [hereinafter Human Rights Council, Op. No. 3/2017] (recounting a minor who was immobilized with an electric taser, stripped naked, and splashed with cold water prior to eight-month pretrial detention).

Such abuse of power and misuse of force often escalates to the use of torture and other cruel, inhuman, and degrading treatments. Under extreme violence and duress, numerous minors are forced to sign false confessions across the globe, which constitutes a grave miscarriage of justice. Such conduct of States' public officials brings distress and inflicts additional pain and hardship on the child offender.²

One concern that motivated the research for this paper was how the States of the Organization of American States (O.A.S.), and the States of the Council of Europe (C.E.) treat child offenders domestically under the doctrine of *child-friendly justice*.³ To observe this judicial/administrative treatment, one can either compare state-by-state practices, through the lens of their supreme courts, or analyze their domestic breaches of the international human rights law through the lens of the regional human rights courts of which they are part.⁴ It was decided later to perform the latter type of analysis, considering the difficulty of obtaining a substantial number of supreme court domestic decisions within the limited timeframe of this research. Therefore, a comparative analysis was conducted with 80 cases from the Inter- American Court of Human Rights (I.A.C.H.R.) and 60 cases from the European Court of Human Rights (E.Ct.H.R.), all of them constituting direct violations to the concept of child-friendly justice.

While performing this comparative analysis, it was observed that the notion of child-friendly justice existed, as a concept, only in the E.Ct.H.R.⁵ There was no mention of such concept *verbatim* in the extensive jurisprudence of the I.A.C.H.R.⁶ The work done for this paper therefore demanded great analytical skills because the concept

2. See Council of Europe [COE], *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice*, 7, 8 (Nov. 17, 2010), <https://rm.coe.int/16804b2cf3> [hereinafter COE Guidelines] (suggesting that certain procedures intensify trauma for vulnerable children).

3. See *id.* at 7 (explaining the Council of Europe's adopted child-friendly justice guidelines).

4. See *id.* (suggesting that justice is not always child-friendly despite established principles at European and international levels).

5. See *id.* at 8 (acknowledging miscarriages of justice concerning children's best interests).

6. See generally *Jurisprudence*, INTER-AMERICAN COURT OF HUMAN RIGHTS, http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en (last visited Oct. 8, 2019) (making no explicit use of the term "child-friendly justice" within the database).

of child-friendly justice, as applied/employed in the jurisprudence of the E.Ct.H.R. case-law, was not specifically labeled as such in the jurisprudence of the I.A.C.H.R.⁷

In the course of researching this paper, there was a great interest on how – or whether – the international human rights system utilized the concept of child-friendly justice in matters related to children in violation of the law. Then, the scope of this research was widened. In a first moment, this paper compared the explicit and the tacit jurisprudence of the I.A.C.H.R. with the jurisprudence of the E.Ct.H.R., one by one, case by case. In a second moment, the jurisprudence of both courts was compared, in tandem, with the practice of the Human Rights Council Working Group on Arbitrary Detention (W.G.A.D.).

The W.G.A.D.'s main mandate was established to receive and investigate information and communications from individuals, including children, arbitrarily deprived of their liberty by State agents, judicially or administratively, in flagrant violation of certain international human rights standards. In cases concerning minors, the foundational law of the W.G.A.D. is established upon the Convention on the Rights of the Child (C.R.C.), on the International Covenant on Civil and Political Rights (I.C.C.P.R.), as well as on principles, guidelines, and directives pertaining its work.

More than 100 opinions of the W.G.A.D. were scrutinized in an attempt to find those that specifically and exclusively concerned children. Nevertheless, very few were found. Among these, the express mention to the child-friendly justice concept was not found although, every aspect of it was tacitly employed in the W.G.A.D.'s opinions.

It could be observed that the legislation of many States reflects international human rights norms relative to child-friendly justice.⁸ Nevertheless, the implementation and practical aspects of these international norms lacks effectivity.⁹ Consequentially, a grave

7. See Pacheco Tineo Family v. Plurinational State of Bolivia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶218 (Nov. 25, 2013) (discussing the best interests of the child as opposed to using the term “child-friendly justice”).

8. See COE Guidelines, *supra* note 2, at 9 (explaining that policy makers and legal professionals have enhanced their practices to reflect the best interests of the child).

9. See *id.* (suggesting that guidelines for child-friendly justice be promoted,

miscarriage of justice is constantly perpetrated against the child offender.¹⁰ The reader will find in this paper best practices through which States can advance child-friendly judicial practices to protect children's right to a fair trial.

The following caveats need to be made before the reader proceeds. In this paper:

1. The term "child" refers to a human being under the age of 18 years-old;
2. The terms "detained" and "arrested" child are used interchangeably to mean a child deprived of his or her liberty;
3. While all the cases from both the I.A.C.H.R. and the E.Ct.H.R. concern the situation of children, not all the cases from the W.G.A.D. concern children. This is because the interest of the paper in this very particular point was the pure concept of "arbitrary detention" internationally, regardless of who was deprived of liberty, either adults or children. Most of the W.G.A.D. opinions concerning particularly children are found in the section "the Child-friendly justice behind bars."

It is the hope of this paper to advance the understanding of those responsible for the administration of justice on how important it is to protect children from hardship in judicial matters through a well-anchored defense of children's right to a fair trial.

II. CHILD-FRIENDLY JUSTICE – TREATING ARRESTED CHILDREN WITH DIGNITY AND COMPASSION: CONTENT AND SCOPE.

Child-friendly justice constitutes a judicial/administrative umbrella that protects various children's rights.¹¹ It ensures that, in matters related to the law, the interest of every child is always protected, no matter who

disseminated, and monitored to shape national-level policy).

10. See U.N. Department on Economic and Social Affairs, United Nations Fact Sheet on Youth, at 3, <http://bit.ly/1K9Lhvi> (last visited Oct. 8, 2019) (using "punitive" prevention programs employed by many countries as an example of a strategy that is too narrowly focused).

11. See COE Guidelines, *supra* note 2, at 17, 19 (asserting that all children deserve to be informed of their rights, have access to justice, and be heard in their proceedings).

the children are or what criminal conduct they have allegedly done.¹² It encompasses material rights, such as the right to life and physical integrity, and the right not to be discriminated, as well as procedural rights, such as the right to legal assistance, the right to a reasonable duration of the judicial proceedings, the right to actively participate in all matters that affect them, and the right to legal remedies.¹³

Conceptually,

child-friendly justice refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding, and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life, and to integrity and dignity.¹⁴

Such a concept can be expressed in State practices in a myriad of ways. Taking into account the jurisprudence of both the I.A.C.H.R. and the E.Ct.H.R., as well as the practice of the C.E., O.A.S., and the United Nations (U.N.) monitoring bodies of the I.C.C.P.R. and the United Nations Economic and Social Council (E.C.O.S.O.C.), a non-exhaustive list of twenty best practices on child-friendly actions during judicial proceedings can be deduced. These practices are divided below into 9 categories:

CATEGORY 1 – TAKING THE BEST INTEREST OF THE CHILD INTO CONSIDERATION:

1. Justice must always treat children with dignity, respect, care and fairness;¹⁵
2. The best interest of the child shall be a primary consideration in all judicial and/or non-judicial proceedings involving children.¹⁶ The best

12. See *id.* at 18–19 (“Children should be treated with care, sensitivity, fairness and respect throughout any procedure of case.”).

13. See *id.* (maintaining that children “as full bearers of rights” are entitled to fairness, due process, and responsive complaint mechanisms).

14. *Id.* at 17.

15. *Id.* at 8, 18.

16. Convention on the Rights of the Child art. 3.1, Nov. 20, 1989, 1577 U.N.T.S.

interest of the child should work as an interpretative principle of superior judicial consideration of children's rights¹⁷ and aim at ensuring the "maximum satisfaction of their rights" at the domestic level.¹⁸ Consequently, courts should ensure children's progressive participation and autonomy in all proceedings in which children are involved;¹⁹

CATEGORY 2– THE RIGHT TO BE INFORMED, THE RIGHT TO BE HEARD AND EXPRESS VIEWS AND CONCERNS:

3. Children have the right to be heard by the judges in all matters that affect them, either directly or through a representative.²⁰ Courts should

3; *accord* Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse art. 36(2)(a), Oct. 25, 2007, C.E.T.S. No.201; COE Guidelines, *supra* note 2, at 18; *see also* Ahrens v. Germany, Judgement, App. No. 45071/09, Eur. Ct. H. R. 1, 63 (2012), <http://hudoc.echr.coe.int/eng?i=001-109815> (claiming that the child's best interests are of "paramount importance"); Lobben and Others v. Norway, Judgement, App. No. 37283/13, Eur. Ct. H. R., 1, 108 (2017), <http://hudoc.echr.coe.int/eng?i=001-195909> (clarifying that adoption against the will of the biological parent requires "a high degree of certainty that adoption [is in] the child's best interests"); Saviny v. Ukraine, App. No. 39948/06, Eur. Ct. H. R. 1, 49 (2008), <http://hudoc.echr.coe.int/eng?i=001-90360> (severing family ties requires "weighty considerations in the interests of the child"); Diamante and Pelliccioni v. San Marino, Application No. 32250/08, Eur. Ct. H. R. 1, 176 (2011), <http://hudoc.echr.coe.int/eng?i=001-106441> ("Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance.").

17. *See* "Las Dos Erres" Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 211, ¶ 184 (Nov. 24, 2009) (suggesting the interpretation of a child's best interests affects the totality of the rights afforded to the child).

18. *See* Mendoza et al. v Argentina, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 143, 163 (May 14, 2013) (describing sentences of life imprisonment as patently violative of a child's best interests).

19. *See id.* ¶ 143 (explaining children should exercise more rights as their autonomy increases); *see also* Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 30.3 (suggesting child-victims participate in sex abuse cases according to their developing capacity).

20. *See* COE Guidelines, *supra* note 2, at 8, 28 (noting that judges should respect children's rights in all matters; a child's right to be heard is "a right . . . not a duty"); *see also* Rosendo Cantú et al v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201 (Aug. 31, 2010) (discussing that children are owed trained representatives and safe, appropriate interview rooms); Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.1c (clarifying that children elect means of how views, needs, and concerns are presented); Sahin v. Germany, 2003-XIII Eur. Ct. H.R. 63, 73 (asserting that judges must consider the means used to ascertain relevant facts in child hearings).

always consult children, so they can freely express their own views and opinions about the legal issue that concerns them.²¹ Judges should take such views seriously and assess them with due weight,²² considering the child's age, maturity, gender, and social and economic background;²³

CATEGORY 3 – THE RIGHT TO LEGAL ASSISTANCE OF HIS OR HER OWN CHOOSING:

4. In full equality, every arrested child is entitled to the minimum procedural guarantee to challenge the lawfulness of his or her detention, in person or through the prompt and effective assistance of a counsel of his or her own choosing,²⁴ in adequate facilities, where child and counsel can meet frequently, at any time;²⁵

CATEGORY 4 – THE RIGHT NOT TO BE DISCRIMINATED IN REASON OF HIS OR HER AGE:

5. A child's statements and evidence provided before police personnel and/or during court proceedings should never be presumed invalid or untrustworthy by reason only of the child's age;²⁶

21. COE Guidelines, *supra* note 2, at 25, 28; *accord* Economic and Social Council Res. 2005/20, at 21 (July 22, 2005); *see also* Kovač v. Croatia, Application No. 503/05, Eur. Ct. H.R. 1, 27 (July 12, 2007), <http://hudoc.echr.coe.int/eng?i=001-81645> (explaining that children are entitled to thorough considerations concerning testimony in sexual abuse cases); European Convention on the Exercise of Children's Rights art. 3, 6, Jan. 25, 1996, E.T.S. No. 160 (stating that children are authorized to receive relevant information and express their views); Convention on the Rights of the Child, *supra* note 16, at art. 12 (allowing capable children to express views freely either directly or through a representative).

22. *See* COE Guidelines, *supra* note 2, at 8 (suggesting a child-friendly system affords due consideration of a child's interests and words).

23. *See* Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.1d (maintaining children's interests are "duly represented and taken into account"); *see also* European Convention on the Exercise of Children's Rights, *supra* note 21, art. 6 (suggesting a judicial authority consult a child and allow him or her to express views after receiving all relevant information); Convention on the Rights of the Child, *supra* note 16, art. 12 (adding that age and maturity informs weight afforded to child's views).

24. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

25. Rep. of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, ¶¶ 9, 47, 77, U.N. Doc. A/HRC/30/37, annex (July 6, 2015) [hereinafter Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court].

26. *See* COE Guidelines, *supra* note 2, at 31.

6. Justice must always be accessible, understandable, and reliable for children;²⁷

7. Arrested children must be given the opportunity, insofar as possible, to participate effectively in the proceedings related to their own arrest, from questionings by the police to further investigations and during criminal trial;²⁸

CATEGORY 5 – THE RIGHT TO BE TREATED ACCORDING TO HIS OR HER SPECIFIC DEMANDS:

8. Under the principle of specialization, States should establish specialized juvenile tribunals to try criminal charges brought against a child.²⁹ Such courts should treat minors in accordance with their status as minors,³⁰ taking into consideration physical elements such as age, psychological elements such as development and maturity, as well as other elements, such as intellectual, emotional, and cognitive capacities;³¹

9. Under domestic legal systems, the standards for assessment of evidence concerning children should be simplified, safeguarding the defense rights of the accused and the right to the equality of arms;³²

CATEGORY 6 – PROTECTION OF CHILDREN'S PRIVACY:

27. *See id.* at 8.

28. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. 1, 67 (2008), <http://hudoc.echr.coe.int/eng?i=001-90244> (“The right of an accused minor to effective participation in his or her criminal trial requires that he be [treated] with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police.”); *see Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 143 (noting that in addition to maximizing the satisfaction of rights of children, the justice system should ensure minimal restriction of those rights).

29. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. ¶ 67; Organization of American States [OAS], American Convention on Human Rights, “Pact of San Jose”, art. 5.5, Nov. 22, 1969 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; [hereinafter American Convention on Human Rights].

30. American Convention on Human Rights, *supra* note 29, art. 5.5.

31. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. ¶ 67; *see* Convention on the Rights of the Child, *supra* note 16, art. 40(2)(b)(iii) (stating that in determining a matter involving an accused child, the child’s age and situation should be taken into account).

32. *Veliz Franco et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 277, ¶ 179 (May 19, 2014) (applying a simplified evidentiary standard).

10. In the best interest of the child, judges may order *in camera* hearings;³³

11. The privacy of judicial and/or non-judicial proceedings involving children should be protected by domestic law to avoid sensitive personal data being disseminated and children possibly being identified;³⁴

CATEGORY 7 – THE RIGHT TO SAFETY:

12. In proceedings in which a child's life and safety is at risk, he or she may be heard out of the courtroom, making use of videotaped interviews or any other appropriate communication technologies.³⁵ Authorities should ensure, as much as possible, that the alleged perpetrators have no direct contact with child victims and witnesses during court proceedings.³⁶ Child interviews should preferably be conducted *in camera*³⁷ to ensure the child's full protection by preventing intimidation, retaliation, or recurring victimization;³⁸

CATEGORY 8 – PROTECTION FROM HARDSHIP DURING THE JUSTICE

33. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 36(2)(a) (stating that a judge may order a hearing to take place without the presence of the public).

34. *See id.* at 22 (providing that states should take the necessary legislative or other measures to protect the rights of child victims, including privacy interests); *see also* COE Guidelines, *supra* note 2, at 22 (“The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law.”); Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 28.

35. *See, e.g.*, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, arts. 35.2, 36.2(b) (requiring legislation that allows interviews and proceedings involving children be conducted outside of the courtroom and made available via videotape); *Kovač v. Croatia*, Application No. 503/05, Eur. Ct. H.R. 1, 27.

36. Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 34(a).

37. *See* COE Guidelines, *supra* note 2, at 22 (“Whenever children are being heard or giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, this should preferably take place in camera.”); *see also* Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 31(b).

38. *Rosendo Cantú et al v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201; Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.1(f); Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 38(b) (“In addition to preventative measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.”).

PROCESS—SIMPLIFICATION OF JUDICIAL PROCEDURES:

13. As far as possible, State's authorities should employ special measures when collecting evidence from children that is appropriate to their age and maturity;³⁹

14. During testimony, authorities must ensure that child victims, witnesses, and those who allegedly violated the law, are questioned in a caring, fair, and sensitive manner so that physical, mental, and moral integrity are fully respected;⁴⁰

15. As much as it is possible, judicial authorities should plan far in advance the child's participation in hearings and trials;⁴¹

16. Competent authorities must ensure that interviews with the child are not subject to unjustified delays;⁴²

17. Judicial proceedings concerning children are governed by the urgency principle.⁴³ This means that the length of these proceedings must be adjudicated as speedily as possible,⁴⁴ ensuring that the particular circumstances of the case, the interests of justice, and the child's best interest are respected.⁴⁵ Under such guarantees, prolonged detention of children without a trial constitutes a serious violation of a minimum guarantee that every arrested person shall be tried without

39. Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 31(a).

40. *See, e.g., id.* at ¶¶ 10, 30 (a), 31(c); COE Guidelines, *supra* note 2, at 18.

41. Economic and Social Council Res. 2005/20, *supra* note 21, at ¶ 30(b) (explaining that a child's hearing or trial should be planned ahead of time so that the child is provided certainty regarding the process).

42. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, at art. 31.1(a).

43. COE Guidelines, *supra* note 2, at 28.

44. *Mendoza et al. v Argentina*, Preliminary Objections, Merits, and Reparations, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 143 (holding that minors must have speedy trials and that "pursuant to the principle of specialization, a justice system should be established that is specialized at all stages of the proceedings and during the execution of the measures or punishments that are eventually applied to minors who have committed offenses and who can be held responsible under domestic law."); COE Guidelines, *supra* note 2, at 28; European Convention on the Exercise of Children's Rights, *supra* note 21, at art. 7; American Convention on Human Rights, *supra* note 29, at art. 5.5.

45. *Orsus and Others v. Croatia*, 2010-II Eur. Ct. H.R. 247, ¶¶ 108, 147; *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R. 457, ¶ 132; International Covenant on Civil and Political Rights, *supra* note 24, at arts. 9.3, 10.2(b), 14.3(c) (outlining the timeliness principles that secure the best interests of the accused); Economic and Social Council Res. 2005/20, *supra* note 21, at ¶ 30(c); G.A. Res. 40/33, at ¶ 10.2 (Nov. 29, 1985).

undue delay.⁴⁶

18. Competent authorities must ensure that children's interviews are carried out preferably by the same personnel and taking place in a safe, adapted, sensitive, and encouraging environment;⁴⁷

19. Competent authorities should make sure not to subject the child to "excessive interventions"⁴⁸ so that the number of interviews "is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings."⁴⁹

CATEGORY 9 – THE RIGHT TO COMMUNICATE WITH FAMILY AND FRIENDS:

20. Judges must make sure that during testimony, the child is assisted by social workers, parents, family, and/or close friends whom he or she trusts, in addition to the mandatory and indispensable presence of the lawyer.⁵⁰

III. CONSTITUTIVE ATTRIBUTES OF A CHILD-FRIENDLY JUSTICE.

A child-friendly justice is established in three foundational pillars: 1)

46. International Covenant on Civil and Political Rights, *supra* note 24, at art. 14.3(c); Working Group on Arbitrary Detention [WGAD] Res. 5/2015, U.N. Doc. A/HRC/WGAD/2015/5, at ¶ 23 (Apr. 21, 2015).

47. *See* Rosendo Cantú et al v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201 (holding that in order to prevent trauma, children should not be questioned more than necessary); Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, at art. 1(b), 35.1(b)-(d); Economic and Social Council Res. 2005/20, *supra* note 21, at ¶ 30(d).

48. Economic and Social Council Res. 2005/20, *supra* note 21, at ¶ 23 ("In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.")

49. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, at art. 35.1(e); *Accord* Rosendo Cantú et al v. Mexico, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201; *accord* Economic and Social Council Res. 2005/20, *supra* note 21, at ¶ 31(a).

50. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. at ¶ 67; *see* *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 140 (stating that next of kin must be involved); Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 25(b) (calling for the establishment of "support persons" as a measure); COE Guidelines, *supra* note 2, at 26 (stating that a child in police custody has the right to legal counsel and to contact the child's parents or a person the child trusts); G.A. Res. 40/33, *supra* note 45, at 4–6.

children's inherent characteristics; 2) children's vulnerability; and 3) children's inherent dignity.⁵¹ This means, in practice, that children possess a special status before the law.⁵² This special status is manifested through the distinctive material and procedural right to be treated with humanity everywhere and with compassion in all judicial matters and circumstances that children are involved in.⁵³

51. See *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 218 (“[R]ights of the child is based on the dignity of the human being.”); *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 55 (Nov. 24, 2011) (asserting that States “must pay special attention to the needs and rights of children, based on their especially vulnerable situation” and that the condition of the child demands special protection from the State); *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 131, ¶ 54 (Feb. 23, 2001); *Rio Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 120, 142 (Sept. 4, 2012) (claiming that children have special rights “that entail corresponding and specific obligations for the family, society and the State”); *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 245 (July 1, 2006) (illustrating that a child's age is a vulnerability); *Expelled Dominican and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 86 (Aug. 28, 2014); *Rosendo Cantú et al v. Mexico*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201 (holding that the indigenous identity of children is a condition of vulnerability); *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 152 (Sept. 15, 2005) (asserting that children's physical and emotional development is an inherent characteristic that requires special protection measures); *Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 146 (asserting that the judicial system must include “the application of special legal rights and principles that protect the rights of children accused or convicted of an offense”); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 257 (Aug. 24, 2010) (charging that States “must pay special attention to the needs and the rights of children, owing to their special situation of vulnerability”); “Las Dos Erres” Massacre v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 184 (claiming that children's “condition demands special protection . . . which must be understood as an additional right and complementary to the other rights recognized to all persons under the Convention”).

52. *E.g.*, *Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 144, 146; *see, e.g.*, *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 152 (“The Court deems that cases in which the victims of human rights violations are children are especially grave.”).

53. Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 10; International Covenant on Civil and Political Rights, *supra* note 24, art. 10.1; Convention on the Rights of the Child, *supra* note 16, art. 37(c); *see Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 142, 144

The first foundational pillar is built upon the recognition that children possess distinct characteristics from adults.⁵⁴ Their physical body is less prepared to face and oppose trauma.⁵⁵ Their emotional needs and psychological demands vary frequently and substantially as they achieve different developmental milestone stages.⁵⁶ Their educational process is not yet completed. As to the law, children are less equipped to stand before judicial and administrative systems, be as victim, witness, or the accused.⁵⁷ Reality and fantasy are commonly interchanged in their thinking. Because of their poor judgement, the very concept of lawfulness of a conduct and the character of wrongdoings are handicapped. A child-friendly justice approach takes into account all of these special conditions and characteristics.⁵⁸

As to the second pillar, in the E.Ct.H.R. cases of *M. G. C. v. Romania* and *Siliadin v. France*, as well as in the I.A.C.H.R. cases of “*Las Dos Erres*” *Massacre v. Guatemala*, *Mapiripán Massacre*” *v. Colombia*, and *Ituango Massacres v. Colombia*, both courts agreed that, because of children’s level of development, immaturity, and accentuated state of defenseless, they are individuals particularly vulnerable to human rights violations.⁵⁹ When

(reiterating that the “regulating principle of the laws on children is based on the dignity of the human being”); Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 56 (Aug. 28, 2002) [hereinafter Advisory Opinion OC-17/2002] (stating that children’s rights are based on dignity of the human being). *Cf.* American Convention on Human Rights, *supra* note 29, arts. 3, 5.2, 11.1 (establishing a prohibition against torture and other inhumane treatment).

54. *See, e.g.*, Convention on the Rights of the Child, *supra* note 16, art. 37(c) (asserting that age must be considered).

55. *See* Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 8 (affirming that every child must have the chance to receive the benefit of harmonious development and be shielded from physical hardship, abuse, or neglect).

56. *See* Advisory Opinion OC-17/2002, *supra* note 53, at 45 (noting that the physical and mental maturation of children occurs at the age of eighteen).

57. *See* Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 30.1, 3.1 (listing legislative and other measures that must be used to protect children during all stages of investigation and criminal proceedings).

58. *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 152; Advisory Opinion OC-17/2002, *supra* note 53, ¶¶ 56, 61.

59. “*Las Dos Erres*” *Massacre v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 184; *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333, ¶ 143; *M.G.C. v. Romania*, App. No. 61495/11, Eur. Ct. H.R. 1, ¶ 56 (2016), <http://hudoc.echr.coe.int/eng?i=001-161380>; *see also* *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 30

such human rights violations occur, they suffer disproportionately.⁶⁰ Due to the nature and seriousness of these particular circumstances of vulnerability, children's rights call for States' special measures of protection.⁶¹ Thus, States must adopt certain special judicial/administrative proceedings and special/differentiated measures concerning the protection of children⁶² so that they may fully exercise their material and procedural rights and guarantees.⁶³

(asserting that friendly settlement by a defendant must be examined so as to relate to the nature and seriousness of the child's allegations); *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 156 (emphasizing that international mechanisms and programs need to be strengthened to better protect female, child refugees, and children in armed conflict); *Mendoza et al. v. Argentina*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 144, 145 (asserting that the differences that exist between children and adults necessitates the existence of a separate juvenile criminal justice system); Advisory Opinion OC-17/2002, *supra* note 53, ¶ 93; *Ituango Massacres v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 246; *Serrano Cruz Sisters v. El Salvador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 131, ¶ 35 (calling for heightened protections for the right to life).

60. *Ituango Massacres v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 246, 258.

61. Advisory Opinion OC-17/2002, *supra* note 53, ¶ 93.

62. *Mendoza et al. v. Argentina*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 141–42, 145.

63. See “Las Dos Erres” *Massacre v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 184 (asserting that a child's vulnerable condition demands special protection); *Rosendo Cantú et al. v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 197, 201 (implying that impunity and poor investigative work is a violation of the State's obligation to grant special protection to children); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 173 (July 8, 2004) (holding that special protection obligation includes preventing situations that might negatively affect children); *Expelled Dominican and Haitians v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 269 (stating that failure to register a child can negatively affect the child); *Vélez Restrepo and Family v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶ 226 (holding that “[t]he State also has the obligation to adopt all positive measures to ensure the full exercise of the rights of the child”); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 150 (Oct. 25, 2012) (arguing that measures enacted to protect children must include efforts “relating to non-discrimination, the prohibition of torture, and the conditions that must be observed in cases in which children are deprived of liberty”); *Ituango Massacres v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 245 (scrutinizing the lack of special protection the children received due to their age); *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 228 (stating that special protection applies through immigration proceedings through the principle of non-refoulement and family unification); *Furlan and Family v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct.

The third foundational aspect informs that children's dignity constitutes an interpretative canon that demands respect for every aspect of children's existence. This means that children's entire "life project" must be "decent" and "dignified."⁶⁴ More protection, in this case, means that in an international human rights court, the "conviction about the truth of the alleged facts," as well as the necessary standards to assess evidence, are less rigorous compared to domestic legal systems.⁶⁵ In practice, the principle of the child-friendly justice in judicial or administrative proceedings has to "entail a more rigorous protection"⁶⁶ in decisions taken on a child's rights.⁶⁷ This means that the necessary procedural requirements to determine whether any of the child's rights have been violated are more flexible⁶⁸ and has to take into close consideration children's specific age and special needs.⁶⁹

In *Bosico v. Dominican Republic, Massacres of El Mozote and Nearby Places v. El Salvador, Mapiripán Massacre v. Colombia* and *Las Dos Erres Massacre v. Guatemala*, the I.A.C.H.R. pointed to the fact that the inherent dignity of children constitutes them as persons before the law and subjects of special material and procedural rights.⁷⁰ These rights occupy a central

H.R. (ser. C) No. 246, ¶ 335.2 (Aug. 31, 2012) (asserting that the State is responsible for violation of the special measures); *Mendoza et al. v. Argentina*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 150 (holding that the States must have an "appropriate legal framework and public policies that are adapted to the international standards"); American Convention on Human Rights, *supra* note 29, art. 19; Advisory Opinion OC-17/2002, *supra* note 53, ¶¶ 61, 98 (explaining that special measures must be weighed against specific characteristics of the situation of the child); *Barrios Family v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶¶ 55, 61.

64. "Street Children" (Villagran-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 4, 7, 9, 33, 144 (Nov. 19, 1999); *Furlan and Family v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 285.

65. *Veliz Franco et al. v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 277, ¶ 179.

66. *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 220.

67. *Id.* ¶¶ 220, 228; Advisory Opinion OC-17/2002, *supra* note 53, ¶ 115.

68. See "*Las Dos Erres*" Massacre v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 197 (stating that it is not necessary to determine, as it is in domestic criminal law, the identity, guilt, and premeditation of the perpetrator).

69. Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 11; International Covenant on Civil and Political Rights, *supra* note 24, art. 14.4; Convention on the Rights of the Child, *supra* note 16, art. 37(c); COE Guidelines, *supra* note 2, at 25.

70. *Accord* International Covenant on Civil and Political Rights, *supra* note 24,

position in the International Law on Human Rights.⁷¹ They are interdependent as well as indivisible.⁷² In *Rosendo Cantú et al v. Mexico*, the I.A.C.H.R. discussed the content and scope of these special procedural rights during the proceedings in which children participate as victim, witness, or accused.⁷³ For the Court, these safeguards may imply, *inter alia*, the following:

- i) Providing information and implementing the appropriate procedures, adapting these to each child's particular needs and guaranteeing that children have legal and other assistance at all times;
- ii) in cases where children have been victims of crimes such as sexual abuse or other forms of mistreatment, guaranteeing their right to be heard, ensuring their full protection, ensuring that personnel are trained to work with children, and that the interview rooms are safe and not intimidating, hostile, insensitive, or inappropriate; and
- iii) to the extent possible, ensuring that children are not questioned more often than necessary in order to avoid re-victimization or a traumatic impact on the child.⁷⁴

The Council of Europe regards *special procedural rights* as complementary measures of protection, meaning that States must adapt

art. 16; *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 128 (Sept. 8, 2005); *Mendoza et al. v. Argentina*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 141; *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge A. A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 5, 9 (Sept. 2, 2004); *Expelled Dominican and Haitians v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 269; *Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 150; *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 152; *see Xákmok Kásek Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 257 (holding that children have the same rights as all humans and special rights); *“Las Dos Erres” Massacre v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 184.

71. *Servellón-García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge A. A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 19 (Sept. 21, 2006).

72. Economic and Social Council Res. 1997/30, ¶ 10 (July 21, 1997).

73. *See Rosendo Cantú et al v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 201, ¶ 201 (Aug. 31, 2010).

74. *Id.*

their internal public policies to the international human rights standards, which regards the judicial protection of minors as well as judicial cases involving minors.⁷⁵ The specific special rights and guarantees granted for children must be truly effective, that is, the enjoyment and exercise is granted by the States in all circumstances.⁷⁶

75. See *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 55 (holding that the State must take special and positive measures to ensure the best interests and full exercise of the rights of the child); Advisory Opinion OC-17/2002, *supra* note 53, ¶ 98 (stating that certain specific measures must be adopted in order for minors to enjoy their rights and guarantees).

76. See *Mendoza et al. v Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 141, 146, 150 (holding that a justice system should be established with necessary legislation specialized in juvenile criminal justice to ensure the protection of the child's interest and guarantees); Advisory Opinion OC-17/2002, *supra* note 53, at ¶ 98; “Las Dos Erres” Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 211, ¶ 184 (explaining that children have special rights that demand protection and special attention by the State); *Rosendo Cantú et al v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶¶ 120, 197 (holding that the rape of Mrs. Rosendo and subsequent actions of military investigators constitute a clear violation of State's obligation to special protection); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 173 (concluding that the State violated the right to special protection for minors under Article 19 of the American Convention); *Expelled Dominican and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 269 (reaffirming the State's obligation to special protection under the American Convention and the exercise of any of these rights must be in the best interests of the child); *Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶ 226 (explaining that the State's obligation to protect the special interests of a child under Article 19 extends to Mateo Velez Roman and Juliana Velez Roman); *Rio Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 120, 142 (holding that the State has the obligation to protect the interest of a child and assume the position of a guarantor with responsibility due its vulnerability); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 150 (reiterating that children are afforded special measures of protections when they are subject to violations of human rights); *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 245 (stating that the victims in this case did not receive any special measure they required); *Pacheco Tineo Family v. Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶¶ 217, 228 (holding that the children in this case should have been given special protection by the State and no record shows that any interest of

In *Expelled Dominicans and Haitians v. Dominican Republic*, *Servellón-García et al. v. Honduras*, and *Mendoza et al. v. Argentina*, the I.A.C.H.R. widely recognized that when violations of children's human rights occur, children possess the "autonomous right" to the "very realization of justice."⁷⁷ When they are victims of human rights violations,⁷⁸ a differentiated judicial and administrative treatment must be adopted⁷⁹ due to the children's special status before international bodies of law that are protective of their rights.⁸⁰ Important documents from the U.N. as well from the O.A.S. and the C.E. assures that every State's judicial and administrative decisions must approach children's rights holistically. Consequentially, States shall take all appropriate measures to ensure that the rights of children within their effective jurisdiction are accessible to every child impartially and without discrimination on any grounds.⁸¹

the child was taken in account); *Furlan and Family v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶¶ 126, 335.2 (declaring that the State was responsible for violation of victim's protection and right to property); COE Guidelines, *supra* note 2, at 18-19 (stating that member states should implement rights of children and their best interest through multidisciplinary approaches).

77. See *Servellón-García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge A. A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶¶ 3, 34, 76 (requesting that the Commission adopt certain measures of reparation and pay the costs of processing the case).

78. See *Expelled Dominican and Haitians v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 269 (emphasizing the State's obligation to special protection under the American Convention and that the exercise of any of these rights must be in the best interests of the child); *Servellón-García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge A. A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 19 (listing the victims of the case); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 173 (recounting that the victims of the human rights violations were detained, tortured, and executed by the Peruvian National Police).

79. See *Mendoza et al. v. Argentina*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 144, 145 (explaining that the existence of a separate criminal juvenile system is needed to implement the regulation of juvenile proceedings).

80. See *id.* ¶146 (emphasizing the need for adoption of measures and regulations for the implementation of a specialized juvenile criminal justice system); *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 177 (March 29, 2006) ("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.").

81. See COE Guidelines, *supra* note 2, at 18-19; G.A. Res. 45/113, Rules for the Protection of Juveniles Deprived of their Liberty, ¶ 4 (Dec. 14, 1990) (codifying that the Rules should be applied impartially regardless of race, color, sex, age, language,

IV. CHILD-FRIENDLY JUSTICE BEHIND BARS: STATES AS GUARDIANS OF ARRESTED CHILDREN'S MATERIAL AND PROCEDURAL RIGHTS.

A. THE RIGHTS TO LIFE, LIBERTY, AND FAIR TRIAL: CHALLENGING AN UNLAWFUL ARREST/DETENTION.

It is broadly accepted that the State is the principal guarantor of the rights of the child.⁸² In *Gómez- Paquiyauri Brothers v. Peru*, the I.A.C.H.R. held that States have to ensure respect for children's material and procedural rights and guarantees so as to firmly fulfill the observance of the right to a fair trial.⁸³ Therefore, States must bear an increased care and responsibility in circumstances that regard children under their jurisdiction.⁸⁴ Violations against children's rights are always of a

religion, nationality, political opinion, cultural beliefs or practices, property, birth or family status, ethnic origin, or disability); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 222 U.N.T.S. 1955 [hereinafter European Convention on Human Rights] (codifying the principle that the rights set forth cannot be discriminated against); Convention on the Rights of the Child, *supra* note 16, arts. 2.1, 2.2 (stating that state parties shall protect the rights of the child without any discrimination); International Covenant on Civil and Political Rights, *supra* note 24, art. 2.1 (codifying that state parties shall ensure the rights of this convention without any distinction); American Convention on Human Rights, *supra* note 29, art. 1.1 (explaining that state parties undertake the freedoms expressed in this convention without any discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition).

82. See *Rosendo Cantú et al v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 216, ¶ 201 (holding that the State assumes special position as a guarantor with greater care and responsibility and must take steps to protect the child's interests); *Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶ 226 (holding that both victims were subject to special protections under Article 19 and that the State has an obligation to adopt all measures to protect the rights of the child).

83. See *Gómez-Paquiyauri Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 4 (concluding that the State violated the Right to Fair Trial and Judicial Protection codified in Articles 8 and 25).

84. See *id.* ¶ 162 (explaining that the brothers in this case, who were the victims of these human rights violations, are children); *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 55 (discussing that the State assumes special position as guarantor and must take special measures to guarantee the best interests of the child); *Rosendo Cantú et al v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 201 (explaining that the Court has

serious nature.⁸⁵ When children are the alleged victims under the jurisdiction of a given State, this constitutes a form of an “aggravated international responsibility.”⁸⁶ Therefore, States shall adopt a comprehensive and consistent national approach in the area of protection and promotion of children’s rights.⁸⁷

In fostering such positive obligations towards the child’s best interest, State agents are also entitled “to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”⁸⁸ In leading cases, such as *Sanhoyamaxa Indigenous Community v. Paraguay*, *Gómez-Paquiyaury Brothers v. Peru*, *Barrios Family v. Venezuela* and *Furlan and Family v. Argentina*, the I.A.C.H.R. held that States must create an administrative, statutory, and/or practical framework to prevent and/or to “discourage

previously ruled that the State assumes a special position as guarantor and should adopt special measures in favor of Rosendo Cantu); *Rio Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶142 (holding that the State must assume special protection of these children due to their special condition of vulnerability based on their physical and emotional development); *Vélez Restrepo and Family v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶226; *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 257 (holding that children possess all the same human rights as all human beings but children’s vulnerability requires that special attention be given to the best interests of the child).

85. See *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 134 (stating that this Court has held that human rights violations of children are particularly serious); *Pacheco Tineo Family v. Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 220 (explaining that separation of children from their families endangers the development and survival of children because families play a crucial role in the development of children); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 150.

86. *Gómez-Paquiyaury Brothers v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 39, 76 (asserting that human rights violations committed against children under the jurisdiction of the State constitute violations of international *jus cogens*). See generally G.A. Res. 45/113, *supra* note 81; Economic and Social Council Res. 1997/30, *supra* note 72.

87. See Economic and Social Council Res. 1997/30, *supra* note 72, ¶ 10 (“The importance of a comprehensive and consistent national approach in the area of juvenile justice should be recognized, with respect for the interdependence and indivisibility of all rights of the child.”).

88. Convention on the Rights of the Child, *supra* note 16, art. 19.1.

any threat or risk to the right to life.”⁸⁹ In *Siliadin v. France*, *Godelli v. Italy* and *M. G. C. v. Romania*, the E.Ct.H.R. held that in the aspects of the civil and social justice, State authorities have an effective duty to promote and to protect the children’s inherent right to life, their human dignity, and their physical and psychological integrity in a form of vertical and horizontal deterrence.⁹⁰ Any negligent or omissive practice of the State organs and its agents is deemed as completely “incompatible with the obligations arising from [international human rights] Convention[s].”⁹¹

States obligations towards children under their jurisdiction must be effective regardless of the children’s condition/status, including those children in alleged violation of the law. Every year, however, an abundant number of children are victims of arbitrary detention worldwide. Their procedural rights, arising from Article 14 of the

89. *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 153; see *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 234 (declaring that the State failed to take required positive measures to prevent risk of right to life); *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 403 (Nov. 16, 2009) (alleging that the State had a duty to enhance protection of two victims in this case because of their minor status); “*Street Children*” (*Villagran-Morales et al.*) v. *Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 4, 7, 144 (explaining that States have an obligation to guarantee conditions to prevent violations of children’s basic rights and from its agent violating those rights); *Gómez-Paquiyaury Brothers v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 129 (discussing that the obligation of the State to protect the right to life of children does not just extend to legislators but to all State institutions).

90. See *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333, 337 (emphasizing that the increasingly high standard for the protection of human rights and fundamental liberties requires greater firmness); *Godelli v. Italy*, App. No. 33783/09, Eur. Ct. H.R. 1,9(2012), <http://hudoc.echr.coe.int/eng?i=001-113460> (arguing that the State may have positive obligations to respect the private life of individuals under Article 8); *M.G.C. v. Romania*, App. No. 61495/11, Eur. Ct. H.R. 1, ¶ 56 (arguing that effective deterrence methods against serious breaches of personal integrity should be implemented along with safeguards); Advisory Opinion OC-17/2002, *supra* note 53, ¶ 62 (stating the protection of children is the responsibility of the State, family, community, and society); G.A. Res. 45/112, Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), ¶ 52 (Dec. 14, 1990) (stating that governments should enact and enforce laws to promote and protect the well-being of young people).

91. *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 55; see *Furlan and Family v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 126, 335.2.

I.C.C.P.R., are frontally disregarded.⁹² All parameters of a child-friendly justice are then violated. First, children are taken without warrants to secret interrogation/detention facilities.⁹³ Then, authorities clearly subject these children to extreme abuses of power and to disproportionate uses of force.⁹⁴ In some cases, they are subjected to prolonged administrative detention and/or held in prison/labor camps.⁹⁵ While in detention, officers make use of torture and other

92. See Juvenile Justice Advocates, *Fact Sheet No.1: Harms of Extended Pretrial Detention on Children*, ¶ 1 (2018), <https://jjimexico.org/ptd-report/> (showing that Article 14 is not enforced due to the evidence of child detention shown in this article); see generally International Covenant on Civil and Political Rights, *supra* note 24, art. 14 (codifying the rights of every human being that cannot be taken away or discriminated against).

93. See Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Seventh Session, U.N. Doc. A/HRC/WGAD/2013/35, ¶ 23 (Jan. 15, 2014) [hereinafter Human Rights Council, Opinion No. 35/2013] (stating that the allegations in this case involve arrests without warrants and other violations of proceedings).

94. See Human Rights Council, Op. No. 3/2017, *supra* note 1, at ¶ 30 (explaining that the use of a taser on an unarmed, non-violent individual, let alone a child, constituted an abuse of power and disproportionate use of force).

95. See Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Fifth Session, ¶ 12, U.N. Doc. A/HRC/WGAD/2012/45, (Sept. 6, 2013) (discussing the administrative detention of a 15-year-old student for more than 9 months without judicial order); Human Rights Council, Opinion No. 35/2013, *supra* note 93, ¶ 30 (reporting that multiple detainees, many who are children, have been subjected to harsh conditions and forced labor in the camps and even torture and public executions); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventieth Session, ¶ 8 U.N. Doc. A/HRC/WGAD/2014/25 (Nov. 19, 2014) (detailing that eight months after his arrest, the minor was sentenced to 10 years for setting an armored vehicle on fire on a false confession, which he is currently serving); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, ¶¶ 5–7, U.N. Doc. A/HRC/WGAD/2015/17 (Aug. 7, 2015) (stating that the minor in this case was detained incommunicado since his arrest was without any visitation arrests and had not appeared before a judge at any point nor had any hearings); Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶ 4 (describing that the minor in this case was arrested without a warrant and was blindfolded, handcuffed, and tortured to try and elicit a confession out of the minor); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, ¶¶ 4–6, U.N. Doc. A/HRC/WGAD/2016/24 (Oct. 20, 2016) (detailing that a minor in this case was arrested in his home without a search warrant by armed Israeli security forces and was alleged to be involved in illegal activities due to his father's involvement resulting in a 6-month administrative detention order) [hereinafter Human Rights Council, Opinion No. 24/2016]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session,

cruel, inhuman, and degrading treatments against minors.⁹⁶ Frequently, these victims are severely tortured during indefinite interrogation periods – both psychologically and physically – until a confession is obtained. Many of them are forced to sign false confessions.⁹⁷

It is also reported that children have their arms and legs beat with truncheons.⁹⁸ They are kicked and tasered to the point of causing bleedings in their bodies.⁹⁹ Their feet, hands, chest, back, and genitals are electrocuted for consecutive days by the prison guards.¹⁰⁰ It is also reported that some children are burned to the point of causing them severe abrasions.¹⁰¹ Many of them are denied access to medical care.¹⁰² When detained, they are often held in prison cells with adult detainees.¹⁰³ Most children are interrogated without the assistance of a lawyer.¹⁰⁴ Many are rarely brought before a judge.¹⁰⁵ Intelligence-gathering agents use indefinite administrative detention in military facilities with the purpose of obtaining information from the minors.¹⁰⁶ In most cases, no evidence is presented to support their detention.¹⁰⁷

Such conduct violates, at once, international guidelines on the rights of persons deprived of their liberty before a State,¹⁰⁸ the right to a

¶ 19 U.N. Doc. A/HRC/WGAD/2016/35 (Oct. 20, 2016) (explaining that the minor's imprisonment next to an ill inmate constituted a deprivation of liberty); Human Rights Council, Op. No. 3/2017, *supra* note 1, ¶ 29 (arguing that the child's arrest and torture violated Conventions of the Right of the child and that the arrest of a child is only a last resort).

96. *See* Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶¶ 4–7 (demonstrating an example when a minor was electrocuted and burned while in State custody).

97. *See id.* ¶ 5 (explaining that the minor was tortured “to make him confess to crimes he had not committed”); Human Rights Council, Op. No. 3/2017, *supra* note 1, ¶ 29.

98. Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶ 9.

99. *Id.* ¶¶ 4, 9; Human Rights Council, Op. No. 3/2017, *supra* note 1, ¶ 29.

100. Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶¶ 5, 9.

101. *Id.* ¶ 5.

102. *Id.* ¶¶ 7, 9.

103. *Id.*

104. Human Rights Council, Op. No. 3/2017, *supra* note 1, ¶ 29.

105. Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶ 7.

106. *Id.* ¶ 9; Human Rights Council, Opinion No. 24/2016, *supra* note 95, ¶ 23.

107. Human Rights Council, Op. No. 53/2015, *supra* note 1, ¶ 7.

108. *See, e.g., id.* ¶¶ 4, 8, 17 (highlighting examples of minors detained without an arrest warrant); Human Rights Council, Op. No. 3/2017, *supra* note 1, ¶ 34 (noting minor held in pretrial detention for eight months); *see also* G.A. Res. 70/175,

fair trial,¹⁰⁹ as well as foundational human rights documents particular to unlawful or arbitrary detention of children.¹¹⁰ In particular, this conduct violates several commands of the 1) Convention on the Rights of the Child – articles 37 (a), (b), (c), (d), and 40 (2), (b) (i), (ii), (iii), (iv);¹¹¹ of 2) Rule 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”);¹¹² of 3) Principles 4, 6, 10, 18, 19, and 21;¹¹³ as well as Guideline 18 of United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹¹⁴ Altogether, and schematically, these norms and instructions detail 10 imperative

United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), at ¶ 8 (Dec. 17, 2015) (“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.”); Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶¶ 9, 47, 77 (highlighting the admissibility of evidence and the role of the court).

109. See *Zherdev v. Ukraine*, App. No. 34015/07, Eur. Ct. H.R. 27–28 (2017), <http://hudoc.echr.coe.int/eng?i=001-173088> (“When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following . . . should, where appropriate, be taken into account: [w]hether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.”).

110. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); European Convention on Human Rights, *supra* note 81; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 13; G.A. Res. 70/175, *supra* note 108; International Covenant on Civil and Political Rights, *supra* note 24; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 1 U.S.C. 113, 660 U.N.T.S. 195; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268; Inter-Am. Comm’n H.R., *American Declaration of the Rights and Duties of Man*, (1948), <http://www.oas.org/en/iachr/mandate/basic/declaration.asp>; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 8 U.S.C. 1231; 1465 U.N.T.S. 85; G.A. Res. 40/33, *supra* note 45; G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988); Convention on the Rights of the Child, *supra* note 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; G.A. Res. 45/113, *supra* note 81; G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006); Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25.

111. Convention on the Rights of the Child, *supra* note 16, arts. 37, 40, ¶¶ 2(b)(i)-(iv).

112. G.A. Res. 40/33, *supra* note 45, ¶ 13.

113. Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶¶ 4–7, 9, 16–17, 34–37, 42–46, 97–100.

114. G.A. Res. 43/173, *supra* note 110, ¶¶ 4, 6, 10, 18, 19, 21.

guarantees that must be observed in situations concerning arrested/detained children:

1. No child shall be unlawfully deprived of his or her liberty, in peace times or in situations of armed conflict;
2. Children have the right to presumption of innocence until proven guilty, according to law. If convicted, detention shall be a measure of last resort for the shortest time possible;
3. When a child is arrested in State custody, his or her humanity and dignity shall be respected at all times;
4. State authorities shall take all effective measures to respect the human rights of detained children;
5. A detained child shall never be subjected to torture or to cruel, inhuman, or degrading treatment or punishment;
6. Under no circumstance or any form of justification should a detained/imprisoned child shall be subjected to violent methods of interrogation and/or compelled to confess guilt or to testify against any other person;
7. Every arrested child has the right to be promptly informed of the charges against him or her;
8. Children have the right to communicate confidentially with their legal counsel to challenge these charges before a competent, independent, and impartial judge without delay; Children have the right to communicate with their relatives, guardians, and/or friends;
9. Children deprived of liberty shall be placed in a child-sensitive environment. Children shall not share the same prison cell or same detention facilities with adults except when the child's best interest guides contrariwise;
10. Children held in pre-trial detention have the right to be tried in the shortest possible period of time. Whenever possible, alternative measures shall replace children's detention pending trial.

Therefore, States must recognize the child's inherent right to be promptly brought before a competent, independent, and impartial

judge to challenge the lawfulness of his or her detention.¹¹⁵ Likewise, States must provide the instruments to challenge such arbitrariness accordingly at any time. The absence of the right to challenge the lawfulness/arbitrariness of detention before a court constitutes a violation of a self-standing human right, which is indispensable to safeguard the core foundations of legality.¹¹⁶ As a direct consequence, any detained child has the right to claim an order of release if the State is not able to prove guilt, according to the law, through credible pieces of evidence.¹¹⁷ With the mandatory assistance of a counsel, a child must have the opportunity to rebut accusations, to produce evidence, to make claims, to file writs of *habeas corpus* and, ultimately, to file petitions for sentence review. As an expression of such right, the arrested child has also the judicial guarantees of cross-examining witnesses and all evidence brought to the process.¹¹⁸

The prohibition of arbitrary detention is also part of customary international law; it is a reflection of both State practice and *opinio juris*.¹¹⁹ Furthermore, the prohibition of arbitrary detention is equally

115. Convention on the Rights of the Child, *supra* note 16, art. 37(d); American Declaration of the Rights and Duties of Man, *supra* note 110, arts. XXIV, XXV; American Convention on Human Rights, *supra* note 29, arts. 7.5, 25.1; International Covenant on Civil and Political Rights, *supra* note 24, arts. 7, 8, ¶¶ 1, 3–4, 9.

116. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Doc. A/HRC/WGAD/2017/6, ¶ 41 (June 16, 2017) [hereinafter Human Rights Council, Opinion No. 6/2017]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Doc. A/HRC/WGAD/2017/8, ¶ 33 (June 2, 2017); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, U.N. Doc. A/HRC/WGAD/2017/44, ¶ 33 (Oct. 2, 2017) [hereinafter Human Rights Council, Opinion No. 44/2017]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-First Session, U.N. Doc. A/HRC/WGAD/2018/4, ¶ 53 (May 23, 2018); Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 2.

117. International Covenant on Civil and Political Rights, *supra* note 24, art. 9, ¶¶ 2–4.

118. *Id.* art. 14, ¶ 3(e); G.A. Res. 40/33, *supra* note 45, ¶ 7; American Convention on Human Rights, *supra* note 29, art. 8, ¶ 2(f); Convention on the Rights of the Child, *supra* note 16, art. 40, ¶ 2(b)(iv); European Convention on Human Rights, *supra* note 81, art. 6, ¶ 3(d).

119. Human Rights Council A/HRC/WGAD/2012/53, Opinion No. 53/2012, ¶ 20 (Aug. 9, 2013); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Ninth Session, U.N. Doc. A/HRC/WGAD/2014/3, ¶ 23 (July 21, 2014) [hereinafter Human Rights Council,

recognized as a *jus cogens* norm; it is an authoritative, absolute, and peremptory norm of international law.¹²⁰ Importantly, the States' obligation not to arbitrarily detain children apply not only within their territorial boundaries but equally on every territory where they have effective power and control- inclusive in abroad territories.¹²¹ Therefore, no category of detainees, including children, shall be denied

Opinion No. 3/2014]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Ninth Session, U.N. Doc. A/HRC/WGAD/2014/12, ¶ 19 (July 23, 2014); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Ninth Session, U.N. Doc. A/HRC/WGAD/2014/14, ¶ 18 (July 23, 2014); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventieth Session, U.N. Doc. A/HRC/WGAD/2014/22, ¶ 25 (Nov. 20, 2014) [hereinafter Human Rights Council, Opinion No. 22/2014]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, U.N. Doc. A/HRC/WGAD/2015/4, ¶ 41 (July 22, 2015) [hereinafter Human Rights Council, Opinion No. 4/2015]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, U.N. Doc. A/HRC/WGAD/2015/16, ¶ 22 (June 19, 2015) [hereinafter Human Rights Council, Opinion No. 16/2015]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, U.N. Doc. A/HRC/WGAD/2017/63, ¶ 51 (Oct. 13, 2017) [hereinafter Human Rights Council, Opinion No. 63/2017]; *see also* G.A. Res. 43/173, *supra* note 110, ¶ 26 (“The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded.”).

120. Human Rights Council, Opinion No. 53/2012, *supra* note 119, ¶ 20; Human Rights Council, Opinion No. 3/2014, *supra* note 119, ¶ 23; Human Rights Council, Opinion No. 22/2014, *supra* note 119, ¶ 25; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-First Session, U.N. Doc. A/HRC/WGAD/2014/50, ¶ 66 (Feb. 13, 2015) [hereinafter Human Rights Council, Opinion No. 50/2014]; Human Rights Council, Opinion No. 4/2015, *supra* note 119, ¶ 41; Human Rights Council, Opinion No. 16/2015, *supra* note 119, ¶ 22; Human Rights Council, Opinion No. 63/2017, *supra* note 119, ¶ 51; G.A. Res. 43/173, *supra* note 110, ¶ 26; *see also* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

121. International Covenant on Civil and Political Rights, *supra* note 24, art. 2; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Sixth Session, U.N. Doc. A/HRC/WGAD/2013/10, ¶ 30 (July 25, 2013) [hereinafter Human Rights Council, Opinion No. 10/2013]; Human Rights Council, Opinion No. 50/2014, *supra* note 120, ¶¶ 63, 64; Human Rights Council, Opinion No. 44/2017, *supra* note 116, ¶ 33; Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 2.

the right to challenge the lawfulness of detention before court.¹²² This right cannot be derogated, suspended, restricted, or abolished, under any circumstance.¹²³ It must be guaranteed to every child without any discrimination in any ground.¹²⁴

Applying such rationale, the E.Ct.H.R., in *Korneykova v. Ukraine*, and the I.A.C.H.R., in *Mendoza et al. v Argentina*, held that if children imprisonment is configured as manifestly necessary, that is, the State demonstrates that it cannot resort in any other alternative measure to confront a child infringement of the penal law,¹²⁵ so then detention should be applied for the shortest possible period in full conformity with the law.¹²⁶ While in custody, children should be placed in premises that are suitable to their special needs¹²⁷ and to their inherent dignity.¹²⁸ In addition, the C.E.'s directive, "Building a Europe for and with children," and the U.N.'s "Rules for the Protection of Juveniles Deprived of their Liberty," guide that unless exceptional reasons related to the child's best interest advise contrariwise, the child offender shall be segregated from adults while subject to criminal proceedings and/or when deprived of his or her liberty after a conviction sentence imposed by a competent judge, according to the law.¹²⁹ In addition, States shall separate convicted juveniles from untried ones.¹³⁰

122. See G.A. Res. 43/173, *supra* note 110, ¶¶ 15, 16.

123. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 50; Human Rights Council, Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/27/47, ¶¶ 3, 22, 24 (June 30, 2014).

124. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶¶ 19-20, 76; Universal Declaration of Human Rights, *supra* note 110, art. 10; International Covenant on Civil and Political Rights, *supra* note 24, art. 14.

125. See G.A. Res. 45/113, *supra* note 81, ¶ 17; Economic and Social Council Res. 1997/30, *supra* note 72, ¶ 15.

126. See *Korneykova v. Ukraine*, App. No. 39884/05, Eur. Ct. H. R. 1, 5 (2012), <http://hudoc.echr.coe.int/eng?i=001-108654>; G.A. Res. 45/113, *supra* note 81, ¶ 17; Convention on the Rights of the Child, *supra* note 16, art. 37(b).

127. See *Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 189.

128. See Convention on the Rights of the Child, *supra* note 16, art. 40.1; COE Guidelines, *supra* note 2, at 24.

129. See American Convention on Human Rights, *supra* note 29, art. 5.5; COE Guidelines, *supra* note 2, at 24; Convention on the Rights of the Child, *supra* note 16, art. 37(c); International Covenant on Civil and Political Rights, *supra* note 24, art. 2(b), 10.3.

130. See G.A. Res. 45/113, *supra* note 81, ¶ 17.

A child-friendly justice demands that States establish special child-centered juvenile courts with qualified judiciary personnel in matters related to children in the criminal justice system.¹³¹ These juvenile courts should have “primary jurisdiction over juveniles who commit criminal acts and special procedures should be designed to take into account the specific needs of children.”¹³² While exercising their judicial power over juveniles, States should make, ultimately, all efforts to prevent recidivism and victimization,¹³³ to promote the social rehabilitation, recovery, and reintegration of the child offender, and to establish judicial mechanisms and legislative/administrative procedures to enforce child-sensitive reparations.¹³⁴

Ultimately, a child-friendly justice behind bars gives raise to the right of shifting the burden of proof. This means that when dealing with evidentiary issues, the State shall bear the burden of proof when the *source* demonstrates a *prima facie case* for violations of international norms.¹³⁵ By *prima facie case*, the sum of the credible material requirements constitutes arbitrary detention.¹³⁶ This means, in

131. See Economic and Social Council Res. 1997/30, *supra* note 72, ¶ 14(a).

132. *Id.* ¶ 14(d).

133. *Id.* ¶ 15; G.A. Res. 45/112, *supra* note 90, ¶ 53.

134. See Economic and Social Council Res. 1997/30, *supra* note 72, ¶ 15; Convention on the Rights of the Child, *supra* note 16, art. 40.1; Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 35.

135. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, U.N. Doc. A/HRC/WGAD/2016/42, ¶ 21 (Dec. 6, 2016) [hereinafter Human Rights Council, Opinion No. 42/2016]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Seventh Session, U.N. Docs. A/HRC/WGAD/2016/47, ¶ 80 (Nov. 22, 2016); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Seventh Session, U.N. Docs. A/HRC/WGAD/2016/48, ¶ 37 (Nov. 22, 2016); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Seventh Session, U.N. Docs. A/HRC/WGAD/2016/51, ¶ 18 (Nov. 23, 2016) [hereinafter Human Rights Council, Opinion No. 51/2016]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Docs. A/HRC/WGAD/2017/25, ¶ 29 (Apr. 25, 2017); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Docs. A/HRC/WGAD/2017/30, ¶ 56 (Apr. 26, 2016).

136. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fifth Session, U.N. Docs. A/HRC/WGAD/2016/10, ¶ 43 (Apr. 20, 2016); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fifth Session, U.N. Docs. A/HRC/WGAD/2016/18, ¶ 17 (Apr. 27, 2016); Human Rights Council,

practice, that when States choose not to challenge credible allegations made by the children victims of arbitrary detention, or by their representative, the burden of proof is shifted.¹³⁷ In this circumstance, “it would be disproportionate to place on the [children] victims the burden of proving positively.”¹³⁸ As a consequence, the information submitted by the victims should be considered reliable.¹³⁹

Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fifth Session, U.N. Docs. A/HRC/WGAD/2016/20, ¶ 22 (Apr. 27, 2015); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, U.N. Docs. A/HRC/WGAD/2016/39, ¶ 26 (Aug. 26, 2017); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Eightieth Session, U.N. Docs. A/HRC/WGAD/2017/83, ¶ 58 (Nov. 22, 2016).

137. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Eighth Session, U.N. Docs. A/HRC/WGAD/2013/53, ¶ 26 (Nov. 21, 2013) [hereinafter Human Rights Council, Opinion No. 53/2013]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, U.N. Docs. A/HRC/WGAD/2015/2, ¶ 15 (Apr. 20, 2015) [hereinafter Human Rights Council, Opinion No. 2/2015]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy Eighth Session, U.N. Docs. A/HRC/WGAD/2017/27, ¶ 3 (Apr. 25, 2017); *see* Mapiripán Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser C) No. 134, ¶ 190.o.

138. *See* Expelled Dominican and Haitians v. Dominican Republic, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 196.

139. Human Rights Council, Opinion No. 53/2013, *supra* note 137, ¶ 26; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fifth Session, U.N. Docs. A/HRC/WGAD/2016/2, ¶ 34 (Apr. 19, 2016); *see* Human Rights Council, Opinion No. 24/2016, *supra* note 95, ¶¶ 4-6; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, U.N. Docs. A/HRC/WGAD/2016/29, ¶ 19 (Aug. 23, 2016); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, U.N. Docs. A/HRC/WGAD/2016/34, ¶ 26 (Aug. 25, 2016); Human Rights Council, Opinion No. 42/2016, *supra* note 135, ¶ 23; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Seventh Session, U.N. Docs. A/HRC/WGAD/2016/50, ¶ 17 (Nov. 23, 2016); *see* Human Rights Council, Op. No. 3/2017, *supra* note 1, at ¶¶ 5, 8; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Docs. A/HRC/WGAD/2017/31, ¶ 24 (Apr. 26, 2017) [hereinafter Human Rights Council, Opinion No. 31/2017]; Human Rights Council, Opinion No. 44/2017, *supra* note 116, ¶ 33; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, U.N. Docs. A/HRC/WGAD/2017/49, ¶ 40 (Aug. 22, 2017); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Eightieth Session, U.N. Docs. A/HRC/WGAD/2017/90, ¶ 3 (Nov. 24, 2017).

According to the I.A.C.H.R. cases of *Servellón-García et al. v. Honduras, Ituango Massacres v. Colombia*, and *Sawboyamaxa Indigenous Community v. Paraguay*, the rationale for reversing the burden of proof resides in three assumptions, one of which being that States have the primary obligation of actively protecting children from a context of violence against them.¹⁴⁰ In such scenarios, the Court considers (1) that the State's international responsibility is aggravated;¹⁴¹ (2) the fact that the procedural human rights system is "a means to achieve justice," which means that "justice cannot be sacrificed to propitiate mere formalities, as long as legal certainty and the procedural equality among the parties is not affected";¹⁴² and (3) that to ostensibly place on the weaker party the burden of bringing to the process a higher standard of evidence would amount to "incurring in the unfortunate mistake of requiring a *probatio diabolica*."¹⁴³ This means that the burden of negatively proving the facts alleged in the initial application will rest on the public authority and not on the children victims.¹⁴⁴ Consequentially, when States remain silent in a judicial procedure pertaining a child, this State's "silence" procedurally will be interpreted as an "agreement with the statement of facts provided in the child's application."¹⁴⁵

B. INVESTIGATING CRIMINAL CONDUCTS INVOLVING MINORS: SAFEGUARDING THE RIGHT TO PRESUMPTION OF INNOCENCE AND

140. *The Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 259, ¶ 143 (Nov. 30, 2012); see *Ituango Massacres v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 245; *Servellón-García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge A. A. Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 19.

141. *Id.*

142. See *Sawboyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 177.

143. *Id.*

144. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Eighth Session, U.N. Docs. A/HRC/WGAD/2013/48, ¶ 12 (Nov. 19, 2013); Human Rights Council, Opinion No. 53/2013, *supra* note 137, ¶ 26; Human Rights Council, Opinion No. 2/2015, *supra* note 137, ¶ 15; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, U.N. Docs. A/HRC/WGAD/2017/46, ¶ 17 (Aug. 22, 2017) [hereinafter Human Rights Council, Opinion No. 46/2017]; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Fifth Session, U.N. Docs. A/HRC/WGAD/2017/85, ¶ 41 (Nov. 23, 2017).

145. Human Rights Council, Opinion No. 2/2015, *supra* note 137, ¶ 15.

THE RIGHT TO PHYSICAL INTEGRITY.

In the E.Ct.H.R. cases *Anguelova v. Bulgaria* and *Bouyid v. Belgium*, as well as in the I.A.C.H.R. cases of *Rosendo Cantú et al v. Mexico*, “*Las Dos Erres*” *Massacre v. Guatemala*, *Veliz Franco et al v. Guatemala*, *Río Negro Massacres v. Guatemala*, *Massacres of El Mozote and Nearby Place Places v. El Salvador*, and “*Mapiripán Massacre*” *v. Colombia*, the courts held that in cases of criminal proceedings involving children, State authorities must launch an *ex officio*, child-friendly, prompt, serious, impartial, and effective investigation of the facts.¹⁴⁶ Such effectiveness is measured by a series of procedural requirements. This means that an investigation in which a child is involved must: 1) maintain due diligence;¹⁴⁷ 2) prevent child hardship; 3) ensure that the best interests and dignity of child victims are respected;¹⁴⁸ 4) be capable “of leading to the identification and punishment of those responsible;”¹⁴⁹ 5) take “the reasonable steps available to secure the evidence;”¹⁵⁰ 6) secure accountability;¹⁵¹ 7) uphold public trust in the State authorities;¹⁵² 8) ensure the “adherence to the

146. See *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 139; *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., 457 ¶ 133; *Rosendo Cantú et al v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 201; “*Las Dos Erres*” *Massacre v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶¶ 141, 240; *Veliz Franco et al. v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 277, ¶ 183; *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 2; *Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 3; *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 190.o.

147. See *Tiu Tojín v. Guatemala*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 190, ¶77 (reasoning that for a child’s rights to be maintained during judicial proceedings, the State must ensure that authorities handling the case have access to the resources necessary to carry out their investigation and proceedings); see also Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 30.c.

148. See Economic and Social Council Res. 2005/20, *supra* note 21, ¶¶ 13, 29, 30 (asserting that investigatory procedures should be carried out by professionals who approach child victims with sensitivity to ensure that child victims and witnesses feel protected and supported).

149. *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 139.

150. *Id.*

151. See *id.* ¶ 140 (requiring public scrutiny throughout investigations to prevent unlawful state actions); see also *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., 457 ¶133 (arguing that authorities must maintain transparency throughout an investigation, even when difficulties arise, to maintain public trust).

152. *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 140 (reasoning that public trust may be maintained through public scrutiny).

rule of law;¹⁵³ and 9) prevent collusion and/or tolerance with unlawful acts.¹⁵⁴

When investigated, every arrested/detained child shall be granted the guarantee to be presumed innocent until proven guilty according to law.¹⁵⁵ While pending a final decision, State agents should treat children according to their non-convicted status.¹⁵⁶ In *Panovits v. Cyprus*, the E.Ct.H.R. held that along with the innocence presumption, the arrested child has also the judicial guarantee of remaining silent during pre-trial and trial procedures.¹⁵⁷ It also belongs to the domain of customary international law that no person can be compelled or tortured to testify against himself – or against oneself¹⁵⁸ – or to plead guilty in police facilities and/or court proceedings.¹⁵⁹ This means that to extract a confession, it is unacceptable to treat an accused person in a manner contrary to the best interest of the child and/or against the foundational values of the child-friendly justice.¹⁶⁰ In addition, it is

153. *See id.*; *see also* *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., 457 ¶ 133 (reasoning that state transparency and public scrutiny are essential to preventing corruption).

154. *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 140; *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., 457 ¶ 133.

155. European Convention on Human Rights, *supra* note 81, art. 6.2; Convention on the Rights of the Child, *supra* note 16, at 40.2.b.i; International Covenant on Civil and Political Rights, *supra* note 24, art. 2.b, 10.3; G.A. Res. 40/33, *supra* note 45, ¶ 17; American Declaration of the Rights and Duties of Man, *supra* note 110; G.A. Res. 45/113, *supra* note 81, ¶ 17.

156. *See* International Covenant on Civil and Political Rights, *supra* note 24, art. 10.2.a (mandating that the State must distinguish convicted and non-convicted persons in its treatment and detention of those persons).

157. *See Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H.R., ¶¶ 65, 67 (holding that authorities must take special care in considering a juvenile's vulnerability and exercise due diligence in ensuring that he or she understands her rights); *see also* G.A. Res. 40/33, *supra* note 45, ¶ 7.1 (describing the right to remain silent as one of the "basic procedural safeguards" to ensuring the rights of juveniles are maintained).

158. *See* American Convention on Human Rights, *supra* note 29, art. 8.2.g (asserting that in criminal proceedings, no one may be compelled to testify against oneself).

159. International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3.g; Convention on the Rights of the Child, *supra* note 16, art. 40.2.b.iv; Human Rights Council, Opinion No. 35/2013, *supra* note 93, ¶ 30.

160. *See* International Covenant on Civil and Political Rights, *supra* note 24, art. 7 (outlining the prohibition against cruel, inhuman, or degrading treatment); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Ninth Session, U.N. Doc. A/HRC/WGAD/2014/1, ¶ 18 (July 21, 2014) [hereinafter Human Rights Council, Opinion No. 1/2014]; Human Rights Council,

also inadmissible in a court to introduce any evidence obtained in an unofficial place, be either testimonies or secret documents.¹⁶¹

The right to physical and psychological integrity of an arrested/detained person is thoroughly established in International Human Rights law.¹⁶² An extensive number of international legal instruments rule on the absolute prohibition of torture.¹⁶³ Such

Opinion No. 3/2017, *supra* note 1, ¶ 33; *see also* American Convention on Human Rights, *supra* note 29, art. 8.3 (invalidating confessions made under coercion).

161. *See* Human Rights Council, Opinion No. 1/2014, *supra* note 160, ¶ 21 (citing a report of Special Rapporteurs, which recommends that any interrogations take place at an official location); *see also* Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-First Session, U.N. Doc. A/HRC/WGAD/2014/56, ¶ 35 (July 21, 2014) (condemning a situation where detainees were coerced into signing false statements while held in incommunicado detention); Aquila Mazzinghy, *Please, Set Me Free! The Right to Challenge an Unlawful Detention: Scrutinizing the Practice of the United Nations Working Group on Arbitrary Detention* (forthcoming) (on-file with author) (written and presented by author on September 7, 2019, at The Human Rights Centre of the University of Potsdam in Potsdam, Germany during the Association of Human Rights Institutes Conference).

162. *See* American Declaration of the Rights and Duties of Man, *supra* note 110, art. XXV (establishing the right of persons to be free from arbitrary detention and the right to human treatment while in custody); *see also* American Convention on Human Rights, *supra* note 29, art. 5.1 (outlining the right to human treatment, which includes, in part, the right to physical and mental integrity).

163. *See* Universal Declaration of Human Rights, *supra* note 110, art. 5 (containing the right to be free from torture); Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135 (setting forth the prohibition against torture in all situations); U.N. Econ. Soc. Council Res. 663 C (XXIV), Standard Minimum Rules for the Treatment of Prisoners, (July 31, 1957) (outlining rights of prisoners, the deprivation of which would amount to torture or other inhumane treatment); International Covenant on Civil and Political Rights, *supra* note 24, art. 7 (mandating that “no one shall be subjected to torture . . .”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 110 (containing general principles against torture); G.A. Res. 43/173, *supra* note 110 (discussing principles of the prohibition against torture as it applies to all detained or imprisoned persons); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Seventh Session, U.N. Doc. A/HRC/WGAD/2013/27, ¶ 33 (Jan. 14, 2014) [hereinafter Human Rights Council, Opinion No. 27/2013] (discussing acts of torture as regularly denounced in the international community and prohibited on the *opinion juris* of states); Human Rights Council, Opinion No. 6/2017, *supra* note 116, ¶ 43 (denouncing specific instances of torture against detainees as against peremptory norms of international law); *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., ¶ 50 (encouraging authorities to be vigilant of physical acts by police against individuals being questioned, particularly where juveniles are concerned); *Mendoza et al. v. Argentina*, Jugement, Inter-Am.

prohibition is vastly recognized and documented as a part of customary international law.¹⁶⁴ The prohibition of torture is also grounded in a solid, constant, and widespread recognition that it has become a peremptory international norm – *jus cogens* norm, against which no derogation can subsist – see for example the I.A.C.H.R. case, *Mendoza et al. v. Argentina* and the E.Ct.H.R. case, *Bouyid v. Belgium*.¹⁶⁵ The detainee's peremptory right not to be subjected to torture comprehends a minimum expectation of a fair trial.¹⁶⁶ Therefore, no category of detainees, which includes children, shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.¹⁶⁷

C. PRESERVING LEGALITY: CHILDREN'S RIGHTS TO BE FULLY INFORMED, TO LEGAL ASSISTANCE, AND TO SEEK JUDICIAL

Ct. H.R. (ser. C) No. 260, ¶ 199 (reaffirming established case law which has recognized a general prohibition against torture).

164. See Human Rights Council, Opinion No. 27/2013, *supra* note 163, ¶¶ 31–33 (citing the judgment of the International Court of Justice which states that the prohibition against torture is an essential aspect of customary international law); Human Rights Council, Opinion No. 1/2014, *supra* note 160, ¶ 19 (describing the prohibition against torture as stemming from customary international legal ideals);

165. See Human Rights Council, Opinion No. 27/2013, *supra* note 163, ¶¶ 31–32, 34 (discussing the duty to prevent torture); Human Rights Council, Opinion No. 1/2014, *supra* note 160, at ¶ 19 (discussing the prohibition against torture as being a *jus cogens* norm); Human Rights Council, Opinion No. 42/2016, *supra* note 135, ¶ 23 (classifying a forced confession as contrary to *jus cogens* norms); Human Rights Council, Opinion No. 6/2017, *supra* note 116, ¶ 43 (describing confessions extracted through methods of torture as a violation of customary international law); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, U.N. Doc. A/HRC/WGAD/2017/10, ¶ 27 (June 1, 2017) (discussing the State's failure to challenge the use of torture methods to extract confessions as against the prohibition against torture); *Mendoza et al. v. Argentina*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 199 (reiterating the prohibition against torture as part of international *jus cogens*); *Bouyid v. Belgium*, 2015-V Eur. Ct. H.R., ¶ 50 (discussing physical violence by police officers as against the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

166. Human Rights Council, Opinion No. 42/2016, *supra* note 135, ¶ 23 (stating that the use of confessions obtained through methods of torture are inadmissible as key evidence at trial).

167. See, e.g. Convention on the Rights of the Child, *supra* note 16, art. 37(a) (prohibiting the use of torture against all children); International Covenant on Civil and Political Rights, *supra* note 24, art. 7; G.A. Res. 45/113, *supra* note 81, ¶ 54; American Convention on Human Rights, *supra* note 29, art. 5.2; European Convention on Human Rights, *supra* note 81, art. 3; Mazinghy, *supra* note 161.

REMEDIES.

Upon arrest, any child shall promptly receive all relevant information concerning the charges against him or her through the judicial authority and or through his or her legal assistant, parents, or legal guardians.¹⁶⁸ State agents must ensure that the child fully comprehends the nature and the cause of the charges against him or her.¹⁶⁹ This must be done in the children's language, in a manner adapted to their age and maturity, and must also be gender and culturally sensitive.¹⁷⁰ The Convention on the Rights of the Child (C.R.C.) prescribes that if the child cannot understand or speak the language used, he or she shall receive free assistance of an interpreter.¹⁷¹

Some aspects enlighten the content and scope of the right to be "fully informed." Upon arrest, a child should be promptly and adequately informed of: 1) the reasons for his or her detention and charges or charges against him or her,¹⁷² meaning that he or she should be able to "understand the general thrust of what is said by the arresting officer and during questioning by the police;"¹⁷³ 2) all the supporting mechanisms available for him or her;¹⁷⁴ 3) the existence of protective procedural

168. European Convention on the Exercise of Children's Rights, *supra* note 21, arts. 3(a), 6(a)-(b); Convention on the Rights of the Child, *supra* note 16, art. 40.2.b.ii; Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 9(e); International Covenant on Civil and Political Rights, *supra* note 24, arts. 9.1, 14.3(a)-(d), 14.3(f); COE Guidelines, *supra* note 2, at 1; European Convention on Human Rights, *supra* note 81, art. 3; Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 11.

169. International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(a).

170. See Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 15 (providing that children should be assigned a support person to ensure their specific needs are met, taking into consideration the child's age and background, among other factors); COE Guidelines, *supra* note 2, at 1; Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.6; International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3.a; Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 7.

171. Convention on the Rights of the Child, *supra* note 16, 40.2.b.vi; International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3.f; Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.6; European Convention on Human Rights, *supra* note 81, art. 6.3.e; *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. at 67.

172. American Convention on Human Rights, *supra* note 29, art. 7.4.

173. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R. at 67.

174. See Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 19(c).

measures;¹⁷⁵ 4) all judicial/administrative information concerning any current proceeding involving the minor;¹⁷⁶ 5) the specific dates, times, and venues of all hearings and procedures involving the child;¹⁷⁷ and 6) the possible consequences of non-compliance with the judicial decisions concerning his or her case.¹⁷⁸

Different aspects inform the foundations of the interest of justice in children's judicial proceedings. Every arrested child is entitled the minimum procedural guarantee, in full equality, to challenge the lawfulness of his or her detention, in person or through the prompt assistance of a counsel of his or her own choosing.¹⁷⁹ According to the Principle of Equality of Arms, the child's access to a defense counsel must be effective in every proceeding.¹⁸⁰ The *effectiveness* is measured

175. *Id.* ¶ 19(e).

176. See Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.6.

177. Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 19(d).

178. European Convention on the Exercise of Children's Rights, *supra* note 21, art. 3(c).

179. See *Zherdev v. Ukraine*, App. No. 34015/07, Eur. Ct. H.R., ¶ 138 (“Where the applicant was afforded access to a lawyer from his first interrogation, but not — according to his complaint — a lawyer of his own choosing, the first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation.”); see also G.A. Res. 40/33, *supra* note 45, at 7 (listing the basic procedural safeguards, including the right to counsel); Convention on the Rights of the Child, *supra* note 16, art. 37(d) (indicating that every child deprived of liberty should have the right to prompt access to legal assistance); European Convention on Human Rights, *supra* note 81, art. 6(3)(c) (noting that legal council is a “minimum right” for anyone charged with a criminal offense); COE Guidelines, *supra* note 2, at 27 (“Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.”); Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31(3) (providing that victims have the right to access free legal counsel); International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(b)-(d) (noting that everyone shall be entitled to the minimum guarantee of communicating with counsel and to be tried in the presence of counsel); American Convention on Human Rights, *supra* note 29, art. 8.2(d)-(e) (indicating that every person has the right to a fair trial, including right to counsel); European Convention on the Exercise of Children's Rights, *supra* note 21, arts. 4(1), 5(b) (noting the right to apply for the appointment of a special representative); G.A. Res. 45/113, *supra* note 81, art. 18(a) (indicating that juveniles “should have the right of legal counsel and be enabled to apply for free legal aid”).

180. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before

according to the interests of justice so required.¹⁸¹ Lawyers must have adequate facilities where child and counsel can meet frequently and/or at any time.¹⁸² Every child has the right to be publicly tried in their presence.¹⁸³ In addition, as a core guarantee of due process and fair trial, all communications between the arrested child and his or her counsel must be confidential and out of the presence of security guards.¹⁸⁴ In cases where the child has not sufficient means to pay for legal assistance, the State must provide him or her a counsel without charge.¹⁸⁵

According to the E.Ct.H.R. case *Panovits v. Cyprus*, in conducting the child's defense, lawyers must be free from any State interference in their freedom of expression.¹⁸⁶ In respect of the adversarial principle, children's access to a lawyer must be operative at all times,¹⁸⁷ which,

a Court, *supra* note 25, ¶ 11; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Fifth Session, ¶ 21, U.N. Doc. A/HRC/WGAD/2012/48 (Aug. 27, 2013); Human Rights Council, Opinion No. 10/2013, *supra* note 121, ¶ 35.

181. See International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(b); Human Rights Council, Report of the Working Grp. on Arbitrary Det. on Its Visit to the U.S., ¶ 78, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017).

182. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 9; International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(d); American Convention on Human Rights, *supra* note 29, art. 8.2(c); European Convention on Human Rights, *supra* note 81, art. 6.3(b).

183. International Covenant on Civil and Political Rights, *supra* note 24, art. 1 (indicating that this guarantee is mandatory, "except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children"); International Covenant on Civil and Political Rights, *supra* note 24, art. 3(b), 14(3)(d) (noting that everyone shall be entitled "to be tried in [counsel's] presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it").

184. See G.A. Res. 45/113, *supra* note 81, ¶ 18(a); International Covenant on Civil and Political Rights, *supra* note 24, art. 14; Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 9; American Convention on Human Rights, *supra* note 29, art. 8.2(d).

185. See International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(d); G.A. Res. 45/113, *supra* note 81, ¶ 18(a); European Convention on Human Rights, *supra* note 81, art. 6.3(c); Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, *supra* note 16, art. 31.3; American Convention on Human Rights, *supra* note 29, arts. 8.2(d)-(e).

186. *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R., ¶ 99.

187. *Zherdev v. Ukraine*, App. No. 34015/07, Eur. Ct. H.R., ¶ 136.

according to the E.Ct.H.R. cases *Zherdev v. Ukraine*, *Panovits v. Cyprus*, and *Kuptsov v. Russia*, includes the pre-trial stage of proceedings, such as the moment of apprehension, during their detention and the first interrogations by police authorities, upon conviction, and also for later trial procedures such as trial hearings, appearance before the prosecutor, as well as appealing and seeking remedies and reparations.¹⁸⁸ In performing these duties, lawyers shall be guaranteed with all the necessary and adequate actions related to their mister.

An effective legal assistance equally leans on two foundational adversarial proceedings: first, children's lawyers must have full and wide access to all evidence and witnesses of the case;¹⁸⁹ and second, lawyers cannot be forced into rushed trials with unreasonably unlawful time constraints.¹⁹⁰ The counsel shall have sufficient time to communicate with the arrested child. The counsel shall have sufficient time to cross examine evidence and witnesses and to prepare and present the necessary defense, according to the law.¹⁹¹

188. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶¶ 8–10; *Zherdev v. Ukraine*, App. No. 34015/07, Eur. Ct. H.R., ¶ 136 (“Unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.”); *Panovits v. Cyprus*, App. No. 4268/04, Eur. Ct. H. R., ¶¶ 66, 70, 75; *Kuptsov and Kuptsov v. Russia*, App. No. 6110/03, Eur. Ct. H.R., ¶¶ 101–02.

189. Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Fourth Session, ¶ 71, U.N. Doc. A/HRC/WGAD/2018/2 (May 17, 2018); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Sixth Session, ¶ 20, U.N. Doc. A/HRC/WGAD/2016/29 (Nov. 2, 2016).

190. See International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(b); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, ¶ 57, U.N. Doc. A/HRC/WGAD/2017/1 (June 8, 2017); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, ¶ 21, U.N. Doc. A/HRC/WGAD/2015/1 (July 6, 2015); Human Rights Council, Opinion No. 10/2013, *supra* note 121, ¶ 16; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Fifth Session, ¶ 53, U.N. Doc. A/HRC/WGAD/2012/69 (Feb. 19, 2013) (“The short duration of the trial . . . does not constitute a human rights violation per se, unless during this time the accused was denied the possibility of presenting evidence or having it examined, or denied access to evidence for the prosecution, or if there was malicious intent, but there were no complaints of such things in the communication from the source. The concept of what constitutes a reasonable time for bringing a case to trial always depends on whether there is a real possibility of investigating the acts considered as a crime.”).

191. See Right of Anyone Deprived of Their Liberty to Bring Proceedings Before

According to the Working Group Opinion No. 30/2014 and the E.Ct.H.R. case of *W. v. Finland*, lawyers need adequate time to present claims and to rebut arguments at hearings.¹⁹² In other non-criminal proceedings before a judicial authority that affects children, they are also entitled to legal assistance to express their views and concerns in court and/or to mediate conflicts of interest between them and their parents/legal guardians.¹⁹³

Every child convicted of a crime has the due process guarantee to have his or her conviction and sentence reviewed by a higher, competent, independent, and impartial tribunal, according to law.¹⁹⁴ Important documents safeguard this guarantee, such as the I.C.C.P.R., the E.C.O.S.O.C. Resolution 2005/20, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.¹⁹⁵ The upper court shall be entitled the power to review the elements of arbitrariness and lawfulness of the sentence of conviction from the lower court.¹⁹⁶ When executing such review, the upper court must be empowered to:

a Court, *supra* note 25, ¶ 9; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Second Session, ¶ 21, U.N. Doc. A/HRC/WGAD/2015/1 (July 6, 2015); Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventieth Session, ¶ 45, U.N. Doc. A/HRC/WGAD/2014/30 (Nov. 3, 2014).

192. Human Rights Council A/HRC/WGAD/2014/30, Opinion No. 30/2014, ¶ 45 (Nov. 3, 2014); *W. v. Finland*, App. No. 14151/02, Eur. Ct. H. R., ¶ 43 (2007).

193. See COE Guidelines, *supra* note 2, at 27; Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, ¶ 11; European Convention on the Exercise of Children's Rights, *supra* note 21, art. 4.1, 5(b); Human Rights Council, Opinion No. 10/2013, *supra* note 121, ¶ 32; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Fifth Session, ¶ 22, U.N. Doc. A/HRC/WGAD/2012/48 (Aug. 27, 2012).

194. See Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 19(b); Convention on the Rights of the Child, *supra* note 16, art. 40.2(b)(v); G.A. Res. 40/33, *supra* note 45, ¶ 7; American Convention on Human Rights, *supra* note 29, art. 8.2(h); International Covenant on Civil and Political Rights, *supra* note 24, art. 14.3(b); American Declaration of the Rights and Duties of Man, *supra* note 110, art. XVIII; *Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶¶ 242, 243, 245, 247.

195. See Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 19(b); American Convention on Human Rights, *supra* note 29, art. 8.2(h); International Covenant on Civil and Political Rights, *supra* note 24, art. 14.5; European Convention on Human Rights, *supra* note 81, art. 13.

196. Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, *supra* note 25, annex., Principles 1, 2, 15, Guideline 16.

- a. Examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, and on basic principles of reasonableness, proportionality, and necessity. Such an examination will take into account details such as age, gender, and marginalized groups;
- b. Consider whether the detention remains justified or whether release is warranted in the light of all the changing circumstances of the detained individual's case, including health, family life, protection claims, or other attempts to regularize one's status.¹⁹⁷

The right to judicial remedies is essential to preserve legality.¹⁹⁸ As a bearer of rights, any child arbitrarily deprived of his or her liberty should be able to receive, "upon a successful challenge" and without delay, appropriate judicial remedies and reparations for the overall miscarriage of justice and for the arbitrariness and physical/moral hardship he or she suffered, according to the law.¹⁹⁹ Every State administrative and/or judicial proceeding involving children shall respect the Principle of Legality (*nullum crimen sine lege* and *nulla poena sine lege*)²⁰⁰ and prohibition of expedient of *ex post facto* laws,²⁰¹ (*lex praevia*; *lex scripta*; *lex stricta/lex certa*).²⁰² This means that no child bearing criminal age shall be convicted on account of any act or omission imprecise and vague and/or which, at the time it was committed, did not constitute a criminal offense under the municipal and/or international laws.²⁰³

197. *Id.* at annex., Principles 1, 2, 15, Guideline 15.

198. *See id.*

199. *See* European Convention on Human Rights, *supra* note 81, art. 13; American Convention on Human Rights, *supra* note 29, arts. 10, 25.2; International Covenant on Civil and Political Rights, *supra* note 24, arts. 2.3(a), 2.3(c), 9.5, 14.6; Human Rights Council, Opinion No. 50/2014, *supra* note 120, ¶ 85; Human Rights Council A/HRC/WGAD/2012/62, Opinion No. 62/2012, ¶ 42 (Aug. 9, 2012); *Mendoza et al. v Argentina*, Judgement, Inter-Am. Ct. H. R. (ser. C) No. 260, ¶ 260; *Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, *supra* note 25, annex. Principles 1, 2, 3, 15, Guideline 16; Economic and Social Council Res. 2005/20, *supra* note 21, ¶ 20(b); G.A. Res. 43/173, *supra* note 110, ¶¶ 1, 10; COE Guidelines, *supra* note 2, at 26.

200. *See* Human Rights Council A/HRC/WGAD/2012/56, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Five Session No. 56/2012, ¶ 12 (May 26, 2014).

201. *See* Human Rights Council, Opinion No. 10/2013, *supra* note 121, ¶ 20.

202. *See* Human Rights Council, Opinion No. 56/2012, *supra* note 200, ¶ 13.

203. *See* Convention on the Rights of the Child, *supra* note 16, art. 40.2(a); American Convention on Human Rights, *supra* note 29, art. 9; *see also*, European Convention on Human Rights, *supra* note 81, art. 7.1 ("No one shall be held guilty

Ultimately, no child shall receive a heavier penalty than the one previously typified at the time the criminal conduct was committed.²⁰⁴

D. CHILDREN'S RIGHT NOT TO BE HELD IN INCOMMUNICADO DETENTION NOR TO BE PROSECUTED IN MILITARY JUSTICE.

Holding children in incommunicado detention – unacknowledged detention²⁰⁵ – is categorically prohibited under international law, international human rights law, international humanitarian law, and under international customary law.²⁰⁶ It aggravates the existing suffering of the separation of persons from the outside world. In *Anguelova v. Bulgaria*, the E.Ct.H.R. held that:

The absence of a record of such matters as the date, time, and location of detention, the name of the detainee, the reasons for the detention, and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness.²⁰⁷

Moreover, incommunicado detention violates several provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular: Rules 1, 3, 43, paragraph 3, 58, paragraphs 58.1 (a), 58.1 (b), and 58.2, 59, 60,

of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”).

204. *Id.*

205. *Cf. Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 154 (adding that “[t]he unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision”).

206. International Covenant on Civil and Political Rights, *supra* note 24, arts. 9, 14.3(b)-(d); Human Rights Council A/HRC/WGAD/2018/35, Opinion No. 35/2018, ¶ 38 (May 17, 2018); Human Rights Council, Opinion No. 63/2017, *supra* note 119, ¶ 69; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 22; Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Eighth Session, U.N. Doc. A/HRC/WGAD/2017/17, ¶ 40 (July 6, 2017) [hereinafter Human Rights Council, Opinion No. 17/2017]; Human Rights Council A/HRC/WGAD/2015/51, Opinion No. 51/2015, ¶ 60 (Mar. 29, 2016); Human Rights Council A/HRC/WGAD/2015/50, Opinion No. 50/2015, ¶ 25 (Mar. 23, 2016); Human Rights Council A/HRC/WGAD/2015/49, Opinion No. 49/2015, ¶ 44 (Mar. 29, 2016); Human Rights Council A/HRC/WGAD/2014/48, Opinion No. 48/2014, ¶ 25 (Feb. 11, 2015); G.A. Res. 70/175, *supra* note 108, at 1, 3, 42, 60–62; G.A. Res. 43/173, *supra* note 110.

207. *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, ¶ 154.

paragraphs 60.1 and 60.2, 61, paragraphs 61.1, 61.2 and 61.3, 62, paragraphs 62.1, 62.2, 63, and Rule 111.2.²⁰⁸ The combination of such rules with the commands of the Universal Declaration of Human Rights,²⁰⁹ the I.C.C.P.R.,²¹⁰ and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, point to the indisputable assumption that prolonged incommunicado detention creates all the conditions that may amount to torture.²¹¹

Domestic law, statutes of limitations, jurisdictional limitations, amnesties, immunities, act of “State doctrine,” or any other State defense measure cannot limit the enforceability of the right to challenge the lawfulness of a detention by placing a child in an unacknowledged place.²¹² Such rights cannot be suspended, rendered impracticable, nor restricted under any circumstances, not even when a state of emergency or siege is declared, nor in states of “accommodation of practical constraints,” nor in counter-terrorism measures.²¹³

208. G.A. Res. 70/175, *supra* note 108, Rules 1, 3, 43, 111.2; ¶¶ 3, 58, 58.1(a), 58.1(b), 58.2, 59, 60, 60.1, 60.2, 61.1, 61.2 and 61.3, 62, 62.1, 62.2, 63 (establishing the right of all prisoners to be free from torture and be treated with dignity); Universal Declaration of Human Rights, *supra* note 110, art. 5; Human Rights Council, Opinion No. 35/2018, *supra* note 206, ¶ 38; Human Rights Council, Opinion No. 63/2017, *supra* note 119, ¶ 69; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 22; Human Rights Council, Opinion No. 17/2017, *supra* note 206, ¶ 40; Human Rights Council, Opinion No. 53/2012, *supra* note 119, ¶ 15.

209. See Universal Declaration of Human Rights, *supra* note 110.

210. See International Covenant on Civil and Political Rights, *supra* note 24, arts. 9, 14.3(b)-(d).

211. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 110, art. 1 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for intimidation or punishment, among other reasons); Universal Declaration of Human Rights, *supra* note 110, art. 5; Human Rights Council Opinion No. 35/2018, *supra* note 206, ¶ 38; Human Rights Council, Opinion No. 63/2017, *supra* note 119, ¶ 69; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 22; Human Rights Council, Opinion No. 17/2017, *supra* note 206, ¶ 40; Human Rights Council Opinion No. 53/2012, *supra* note 119, ¶ 15.

212. See American Convention on Human Rights, *supra* note 29, art. 2; *Gelman v. Uruguay*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221, ¶¶ 196, 212, 229; *Gómez-Paquiyaui Brothers v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 21; *Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, *supra* note 25, annex., Principle 15; Human Rights Council, Opinion No. 50/2014, *supra* note 120, ¶ 85.

213. G.A. Res. 43/173, *supra* note 110, Principle 6 (“No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading

Similarly, it is well established under international human rights law, international humanitarian law, and customary international law that the prosecution/judgement of civilians by military courts violates the due guarantees to a fair trial.²¹⁴ In fact, there is a comprehensive understanding that military justice is incompetent, as a judicial authority, to try civilians as well as to review the arbitrariness and lawfulness of their detention.²¹⁵ It is so because military judges and military prosecutors do not possess some imperative due process guarantees such as independence, impartiality, and absence of hierarchical superior command.²¹⁶ Applying the general commands of above mentioned bodies of law to the juvenile criminal justice system, it is reliable to state that the trial of children before military courts is a source of direct injustice²¹⁷ and an explicit violation of the child's best interest principle as well as a rupture of the foundational elements of the child-friendly justice. States must ensure that children are never tried by military courts, in any circumstance, irrespective of the

treatment or punishment.”).

214. See Convention on the Rights of the Child, *supra* note 16, art. 38 (“States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.”); *Mapiripán Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser C) No. 134, ¶ 190.g; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 26; Human Rights Council A/HRC/WGAD/2014/35, Opinion No. 35/2014, ¶¶ 17, 19 (Nov. 21, 2014); Human Rights Council A/HRC/WGAD/2014/24, Opinion No. 24/2014, ¶ 20 (Nov. 21, 2014); Human Rights Council, Opinion No. 22/2014, *supra* note 119, ¶ 25; Human Rights Council A/HRC/WGAD/2014/10, Opinion No. 10/2014, ¶¶ 18, 23 (July 23, 2014); Human Rights Council, Opinion No. 10/2013, *supra* note 121, ¶ 20; Human Rights Council A/HRC/WGAD/2012/60, Opinion No. 60/2012, ¶ 21 (Aug. 16, 2013); Human Rights Council, Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48, ¶ 66 (June 30, 2014) [hereinafter *Arbitrary Detention*].

215. See, e.g., Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 26 (“The trial of a civilian by a military or quasi-military court violates the International Covenant on Civil and Political Rights and customary international law, given that it is not consistent with the right to fair trial with due guarantees.”); see also Human Rights Council, Opinion No. 51/2016, *supra* note 135, ¶ 26; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 26.

216. See *Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, *supra* note 25, annex, Guideline 4; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 20; Human Rights Council Opinion No. 31/2017, *supra* note 139, ¶ 27; Human Rights Council, Opinion No. 51/2016, *supra* note 135, ¶ 26; Human Rights Council Opinion No. 35/2014, *supra* note 214, ¶ 17; Human Rights Council Opinion No. 10/2014, *supra* note 214, ¶ 18.

217. *Arbitrary Detention*, *supra* note 214, ¶ 67.

criminal nature of the charges brought against them.²¹⁸

V. CONCLUSION

The backbone of a democratic society is deeply rooted in the form that States observe the rights of the children under their jurisdiction with special attention to those involved in judicial matters and/or who allegedly infringe the law. States are the principal guarantor of children's material and procedural rights within their effective control. Ultimately, justice served by States must always be friendly with children without discrimination on any grounds.

In this paper, a comparative analysis was performed on how the concept of child-friendly justice and its application is employed in cases of a child offender in different international jurisdictions. The analysis of how the I.A.C.H.R. and the E.Ct.H.R. jurisprudence consider the concept of child-friendly justice regarded 140 cases involving children. The study assessed the jurisprudence of both courts in tandem and compared it with the practice of the W.G.A.D. Not all the opinions from the W.G.A.D. concerned children, but since the rights discussed in this body encompass every human being, irrespective of age, it was fruitful to analyze them from a children's rights perspective. It has been found, despite the fact that these States' constitutional legislation reflect to an extent the international human rights norms protective of child's rights, the implementation and practical aspects of these laws lacked effectiveness. Therefore, a grave miscarriage of justice is constantly perpetrated against the child offender.

The main findings to emerge from this study concerning States' best practices towards child-friendly justice and the children's right to a fair trial are the following:

1. States should adopt a comprehensive and consistent national approach in the area of protection and promotion

218. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 110, art. 1; Universal Declaration of Human Rights, *supra* note 110, art. 5; Human Rights Council Opinion No. 35/2018, *supra* note 206, ¶ 38; Human Rights Council, Opinion No. 63/2017, *supra* note 119, ¶ 69; Human Rights Council Opinion No. 46/2017, *supra* note 144, ¶ 22; *see* Human Rights Council Opinion No. 31/2017, *supra* note 139, ¶¶ 27, 28; Human Rights Council Opinion No. 17/2017, *supra* note 206, ¶ 40; *see also* Human Rights Council Opinion No. 10/2014, *supra* note 214, ¶¶ 18, 23; Human Rights Council Opinion No. 53/2012, *supra* note 119, ¶ 15.

of children's material and procedural rights. Children's dignity and their physical and psychological integrity must be protected in all circumstances;

2. States should create an administrative, statutory, or practical framework to prevent any discrimination against a child due to his or her criminal records. As a best practice of child-friendly justice, States must create programs to foster rehabilitation in order to facilitate children's reintegration in the society;

3. A child offender must be treated humanely and compassionately. States should undertake all appropriate legislative, administrative, and other measures to foster this positive obligation;

4. Provided that full respect to the equality of arms principle is ensured, the determination of whether any of the child's rights have been violated should be less strict;

5. States should provide to every child the instruments to challenge an arbitrary arrest or detention at any time. The absence of the right to challenge the lawfulness/arbitrariness of detention before a court constitutes a violation of a self-standing human right, which is indispensable to safeguard the core foundations of legality;

6. A child-friendly justice demands that States establish special child-centered juvenile courts with qualified judiciary personnel in matters related to children in the criminal justice system;

7. Domestic law cannot institute statutes of limitations, jurisdictional limitations, amnesties, immunities, or any other State defense measures, or an "act of State doctrine" cannot limit the enforceability of the child's right to challenge the lawfulness of a detention.

The author hopes that this present study makes noteworthy contributions to the development of human rights norms that protects the rights of children involved with penal law. The author also hopes that the findings of this study may advance the understanding and the discussion of child-friendly justice as well as effect change in real situations of States' miscarriage of justice worldwide. Protecting the lives and physical integrity of children is ultimately the greatest benefit sought in this paper.