IACHR Inter-American Commission on Human Rights

# Children and Adolescents in the United States' Adult Criminal Justice System

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## Cover Art Concept

Many children are treated as adults in the United States' criminal justice system, in violation of their fundamental rights to special protection and to be tried by a specialized juvenile justice system. The cover art shows a poem written by a boy who is deprived of his liberty inside an adult jail in the United States in the inside pages of a notebook. The notebook symbolizes education, which should play a part in the rehabilitation of convicted children and adolescents. The situation shown in this report on the United States—where hundreds of thousands of children and adolescents are prosecuted by the adult justice system and deprived of their liberty in adult penitentiaries rather than being tried by the juvenile justice system—runs against the aim of rehabilitation.

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# The Situation of Children in the Adult Criminal Justice System in the United States

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Approved by the Inter-American Commission on Human Rights on March 1, 2018.

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# EXECUTIVE SUMMARY

# EXECUTIVE SUMMARY

1. As a result of its visits and of the information it received, the IACHR observes that a significant number of children are being consistently treated as adults in the U.S. criminal justice system, in violation of their basic right to special protection and to be tried in a specialized juvenile system[1]. This issue is the main focus of this report. The IACHR has also observed that this phenomenon of child criminal defendants being treated as adults is part of a broader nationwide pattern in the United States of failure to protect and promote the rights of children, and failure to uniformly define "child" under the law in order to protect the fundamental human rights persons under the age of 18.

2. The United States has played an important role in promoting and establishing a specialized approach to youth within the criminal justice system, with the aim of rehabilitating, rather than simply punishing, youth who are convicted of a crime. The world's first juvenile court division was created in the U.S. state of Illinois in 1899, and within 25 years all but two of the states had followed suit and established similar juvenile court systems.[2] However, the Commission notes with grave concern that in the 1980s, this began to change. By the year 1990, many states across the U.S. had passed highly regressive changes to their legislation and policy with regard to youth involved in the justice system. The changes varied in the details of their implementation, but the broad theme was the denial of access to rehabilitative juvenile justice systems, and consequent mandatory processing of juveniles in the more punitive adult systems.

3. The Commission notes with grave concern that according to the information it received, as a result of state laws requiring or allowing youth in conflict with the law to be tried as adults, an estimated 200,000 children and adolescents in conflict with the law are tried in adult criminal courts each year in the United States.[3] The IACHR is aware that the majority of U.S. states still have laws, policies, and practices in place that enable them to

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1 IACHR, Juvenile Justice and Human Rights in the Americas, OEA/Ser.L/V/II., Doc. 78, July 13, 2011,

2 Second Chances: Juvenile Court Centennial Initiative (1999). Chicago, Illinois: the Children and Family Justice Center. See also American Bar Association, Division of Public Education, "The History of Juvenile Justice", 2012.

3 48.Colum.Hum.Rts. L. Rev. 1 2016-2017 page 2.

incarcerate children in adult facilities.[4] The Commission is also gravely concerned about the lack of data available regarding children in contact with the adult criminal system.

4. According to information received by the Commission, there are three main ways in which children and adolescents enter the adult criminal justice system in the United States, based on the particular legislation of each state. First, by way of laws that grant jurisdiction to the adult criminal courts for persons under 18 years of age. Second, through laws that allow for a child's case to be transferred from the juvenile system to the adult system. Third, as a result of hybrid sentencing laws that operate between the jurisdictions of the adult and juvenile systems, as well as other provisions with similar effect, such as "once an adult, always an adult" laws.[5]

5. According to the information received by the Commission, the rights of children and adolescents who are charged with committing crimes in the U.S. are not duly protected at each stage of the proceedings, which in turn, has further negative consequences for those who are transferred and sentenced in the adult system. In particular, the IACHR has received information regarding: the absence of quality legal counsel; the possibility that youth can waive their right to legal representation; the fact that youth undergo long periods of time awaiting the disposition of their cases; and the possibility that many youth end up in the adult system as a result of plea agreements, without fully comprehending the consequences of such agreements.[6]

6. In light of the information it received and examined, the IACHR finds that under the current state of the law in the U.S. related to children in contact with the criminal justice system, certain laws, policies, and practices have a disproportionate and discriminatory impact on certain groups, resulting in the over-representation of members of such groups in the criminal justice system. This is the case for children who are tried in the adult criminal justice system and confined in adult detention facilities.[7] According to information received by the Commission, these disparities increase with each step further into the criminal justice system, beginning with arrest and

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4 "You're an Adult Now: Youth in the Adult Criminal Justice Systems," Washington D.C.: U.S. Department of Justice, National Institute of Corrections, December 2011.

5 "You're an Adult Now: Youth in the Adult Criminal Justice Systems". Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011. See also U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011

6 "Trends in Juvenile Justice State Legislation: 2001-2011." Washington D.C.: National Conference of State Leglatures, June 2012. See also "You're an Adult Now: Youth in the Adult Criminal Justice Systems". Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011.

7 "Trends in Juvenile Justice State Legislation: 2001-2011." Washington D.C., National Conference of State Leglatures, June 2012.

referral to the juvenile system, through transfer to adult courts, to sentencing and confinement in adult correctional facilities.

7. States are not legally required to separate youth from adults in adult facilities.[8] While the federal law for juvenile justice, i.e., the Juvenile Justice and Delinquency Prevention Act (JJDPA) as reauthorized in 2002, does establish the separation of youth from adults as one of its core custody-related requirements, its provisions do not apply to children and adolescents in the adult system.[9] This has very detrimental and grave impacts on children and adolescents, among them, according to information reported by several large jails and prisons systems, more than 10% of the children housed there are subjected to solitary confinement, while smaller facilities have reported that 100% of the children they hold are in isolation.[10] Furthermore, no federal or state legislation in the United States prohibits solitary confinement of youth held in adult facilities; only a few states expressly refer to the use of isolation in their statutes.

8. Multiple studies in the United States have shown that adult jails and prisons are detrimental for children, as these facilities are designed for adults and are not equipped to keep children safe from the elevated risks of abuse and harm that they face inside them.[11] Some of these include: youth are five times more likely to suffer sexual abuse or rape in an adult facility as compared to those held in juvenile facilities.[12] Youth incarcerated in adult facilities are also twice as likely to be physically abused by correctional staff, have a 50% higher chance of being attacked with a weapon,[13] and have a

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8 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

9 Available at http://www.ojjdp.gov/about/legislation.html: The four basic requirements of the JJDPA are as follows: 1) "de-institutionalization of status offenders and non offenders," which involves prohibiting secure confinement of youth charged with acts that are not considered crimes when committed by adults, except in cases of violation of a valid court order or possession of a firearm; 2) "sight and sound separation," which bars the placement of youth, whether during the pretrial or post-conviction phase, in confinement facilities where they have contact with adult inmates, and mandates that youth and adults may not see one another nor may conversation between them be possible; 3) "jail and lockup removal," which forbids the holding of adolescents in adult jails and lockups anywhere in the country, with several exceptions, including limited "grace periods" while awaiting transfer, children who are tried or convicted as adults, and former children who have reached the state's minimum age of adult criminal responsibility; and 4) "disproportionate minority contact," which mandates the elimination of undue overrepresentation of minority youth, as compared to their representation in the population, in all stages of the juvenile justice process.

10 ACLU and Human Rights Watch, "Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States", 2012.

11 Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Juvenile Justice Reform Initiatives, 1994-1996; see also: Campaign for an Effective Crime Policy, Public Policy Reports: A Series of Reports on Major Issues in Criminal Justice: The Violent Juvenile Offender: Policy Perspective 5, July 1996.

12 Prison Rape Elimination Act of 2003 (2003, September 4), PL 108-79, 117 Stat. 972–973.

13 Fagan, J., M. Frost, and T.S. Vivona, "Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy," Juvenile and Family Court Journal, No. 2, 1989.

high probability of witnessing or being the target of violence committed by other prisoners.[14]

9. This report will examine the situations in which U.S. law fails to protect the rights of children in the criminal justice system. In this context, the IACHR will analyze provisions in U.S. legislation that apply to children, in light of the State's international obligations to protect and guarantee the human rights of children and adolescents before the criminal law, particularly the right to be treated as children.

[14] U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence," December 12, 2012, p.190. See also: Campaign for Youth Justice, Jailing juveniles: The dangers of incarcerating youth in adult jails in America, November 2007, p.14.

# CHAPTER 1
# INTRODUCTION

**Tears of Sorrow**

Steel bars, young and afraid
I'm just 17 years old
But it doesn't matter what I say
5 years is what I was told

Important years of my life
Will now be sadly replaced
With hopeless tears of sorrow
And memories of when I got raped.

Its now me against the world
In this brick painted room
Where hearts turn to dust
And hope turns to doom

For what I did I truly regret
Breaking hearts and shedding tears
And now being locked up in prison
Is one of many things I now fear

Name Concealed
2014

# INTRODUCTION

## *A. Background and Methodology*

10. In this report, the Inter-American Commission on Human Rights ("IACHR", or "Commission") analyzes and addresses the situation in the United States in which children and adolescents are accused, prosecuted, and sentenced in the adult criminal justice system, and are incarcerated in adult correctional facilities. This exposes children and adolescents to serious violations of their rights to life, personal integrity and due process, among others, because once they have been determined to be an adult, they cease to have the special protections children and adolescents should have in the criminal system. The Commission will review the relevant principles and guarantees of international human rights law that specifically govern the treatment of children in the criminal justice system, as well as applicable overarching principles of children's internationally recognized human rights. The report will conclude with recommendations geared toward assisting States in strengthening their efforts to respect and ensure the rights of all children who come into contact with the criminal justice system.

11. This report and the working visits and expert meeting that preceded it were prompted by information received by the Commission regarding the situation of children who are treated as adults in the U.S. criminal justice system. In a March 2013 hearing before the IACHR, during its 147th Period of Sessions, civil society organizations addressed the impact of the practice, prevalent in some U.S. states, of incarcerating persons younger than 18 years of age in adult prisons.[15]

12. The IACHR notes that there is both national and international concern over the situation of children and youth facing the adult criminal justice system in the United States, as well as over the laws and policies in place in some US states that fail to protect the rights of children in conflict with the law. The United States federal government has acknowledged on different occasions during the preparation of this report that its official data collection systems do not provide reliable information regarding the number of children

[15] IACHR Press Release 23/13, Annex to the Press Release Issued at the Close of the 147th Session, April 5, 2013.

nationwide who enter the adult criminal justice system as a result of state laws.

13. Pursuant to its mandate to monitor and report on the human rights situation in Organization of American States (OAS) Member States, the IACHR carried out various visits to the United States in light of the troubling information it received regarding children being treated as adults in the U.S. criminal justice system. The Commission visited the state of New York in April 2014, the state of Colorado in October 2014, and the District of Columbia in February 2015. In each of these working visits, the IACHR delegation was received by state authorities and civil society representatives, and visited jail and prison facilities in both the adult and juvenile systems. These facilities included Rikers Island in New York, the Youthful Offender System and the Lookout Mountain Youth Services Center in Colorado, and the New Beginnings Youth Development Center in D.C. The Rapporteurship on the Rights of the Child also met with youth who had formerly been incarcerated in adult correctional facilities, as well as their families and with other civil society representatives. The Commission regrets that the Governor of the State of Michigan declined the meetings that the Commission requested, including visits to the correctional facilities, and therefore the Rapporteur decided not to visit the State. Therefore, the IACHR will use the information it has gathered through multiple sources, including hearings before the Commission.[16] The Commission was also planning to visit Florida, and was granted access to all the facilities and meetings with authorities of that State. Unfortunately, the Commission could not travel, but will use all of the information it gathered from that State also.

14. The Commission called for an expert meeting on February 2 and 3, 2015 in Washington D.C. The meeting was organized by the Rapporteurship on the rights of the child to receive inputs for the Report, and nine experts participated.

## *B. Who is a Child or Adolescent in International Law*

15. The Commission acknowledges the efforts made by the United States to establish international standards of human rights for the protection and promotion of children's rights worldwide, through its significant participation in the drafting of the United Nations Convention on the Rights of the Child (CRC), which was adopted in 1989. The Commission notes with concern, however, that although the United States has signed the CRC, it

[16] IACHR, Hearings on *Human Rights Situation of Children Deprived of Liberty with Adults in the United States, 147 Period of Sessions* and Case 12.866- Henry Hill et al., 150 Period of Sessions.

remains one of only two countries worldwide that have not yet ratified this important instrument for the protection of the fundamental rights of children.

16. In a hearing before the IACHR, United States Government representatives stated that, while the federal government is aware of the heightened risk of harm to which children are subjected when incarcerated in adult correctional facilities, it lacks accurate data on the number of persons under the age of 18 who are affected. This is because, under the federal system of the U.S., each state determines which persons qualify for the status of "child" in the criminal justice system of that state.[17] Once a person is deemed to be an adult by the court or the law, he or she is not acknowledged as a child, regardless of age.

17. In international law, a child is unambiguously defined as any person below 18 years of age. In this respect, both the IACHR[18] and the Inter-American Court of Human Rights[19] (hereinafter the "Inter-American Court") have established that, in the Inter-American system, the definition of who is a child follows the principles of Article 1 of the CRC as well as a range of other international norms, guidelines and standards. Article 1 defines children solely on the basis of age; the protections of the CRC are extended to "every human being below the age of eighteen years."[20] Likewise, the European System for the Protection of Human Rights[21] and the African Human Rights System[22] apply the same objective age-based criterion to define children as persons under the age of 18.

18. Article VII of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration") requires that States guarantee to children the special protection, care, and aid that they require[23]. Likewise,

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17 IACHR Press Release, Annex to the Press Release Issued at the Close of the 147th Session, April 5, 2013. According to further information received by the Commission, the only U.S. federal law that defines adulthood as beginning at age 18 is the law concerning "emancipation to adulthood," which includes the right to vote.

18 IACHR, Annual Report 1991: Chapter VI: Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights: Strengthening of the OAS in the area of Human Rights: Respect for the Rights of Minors, Section VI Recommendations. OEA/Ser.L/V/II.81, Doc. 6 rev. 1, 14 February 1992.

19 I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, Chapter V.

20 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and Entry into force 2 September 1990, in accordance with Article 49).

21 European Convention on the Exercise of Children's Rights, Article 1 – Scope and object of the Convention "1. This Convention shall apply to children who have not reached the age of 18 years."

22 African Charter on the Rights and Well-being of Children, Article II – Definition of a child for the purposes of this Charter, a child means every human being below the age of 18 years.

23 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 42.

the American Convention provides special protection for the human rights of children, and characterizes the obligation of the State in the following terms: "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."[24] In addition, the Inter-American Commission has stated that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration, which constitutes a source of legal obligation for all Member States of the OAS, may be drawn from the provisions of other prevailing international and regional human rights instruments, such as the American Convention.[25]

> Under international law concerning the interpretation of treaties, the American Declaration, the American Convention, and the CRC form part of a comprehensive body of related international norms, or *corpus juris*, for the protection of the rights of children and adolescents. Both the Commission and the Inter-American Court have determined that the *corpus juris* must be taken into account when interpreting Article VII of the American Declaration, which guarantees children's rights to special measures of protection on the part of the children's family, society, and State.[26] Furthermore, the IACHR has found that those OAS member States that have not yet ratified the American Convention are nevertheless bound by the *corpus juris* regarding children's rights, pursuant to the obligation of those States to comply with the rights of children as mandated in Article VII of the American Declaration.[27]

19. In this context, the Commission urges the United States to fully recognize in its domestic legislation the special status of children under the law, including a clear and nationwide definition of children as being all persons under the age of 18, pursuant to its obligations under international human rights law. This is necessary in order to adequately afford children the special measures of protection they require, in all laws, policies, and proceedings that involve them.

20. It is likewise critically important for the United States to incorporate in its domestic legislation and policies the fundamental principles that have been

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24 American Convention on Human Rights, Article 19.

25 See e.g., Advisory Opinion OC-10/89, para. 37; Advisory Opinion OC-16/99, para. 115; IACHR, Report No. 12/14, Case 12.231, Merits (Publication). Peter Cash. Commonwealth of The Bahamas, April 2, 2014, paras. 58, 60."

26 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 15. See also, IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits, Minors in Detention, March, 10 1999, para. 72.

27 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 20.

established in the *corpus juris* regarding the rights of children, including: non-discrimination; the child's right to be heard in decisions that affect him or her and to have these views taken into account; the right to life, survival, and development; and most importantly, the primacy of the best interests of the child.[28] These principles have been integrated into the Inter-American system of human rights and are reflected in the decisions adopted by the Commission.

21. The Commission will use the terms "child", "children", "adolescents" and "youth" to refer to persons under the age of 18.

## *C. The IACHR´s Mandate*

22. The United States has been a member of the Organization of American States since 1951, when it deposited the instrument of ratification of the OAS Charter.[29] The United States is therefore subject to the obligations derived from the OAS Charter, Article 20 of the Statute of the IACHR, the American Declaration of the Rights and Duties of Man, and Article 51 of its Rules of Procedure.

23. The Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the universal and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to Member States.[30]

24. According to the well-established and long standing practice of the inter-American system, the American Declaration is recognized as constituting a source of legal obligation for OAS Member States, including in particular those States that are not parties to the American Convention on Human

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[28] The Committee on the Rights of the Child has understood that the so-called "principle of the best interests of the child," recognized in Article 3 of the CRC, is one of the four basic principles that underpin and inform the entire Convention on the Rights of the Child and its implementation. Committee on the Rights of the Child, General Comment number 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, November 27, 2003, thirty-fourth session, para. 12.

[29] Organization of American States, Department of International Law, Charter of the Organization of American States, Signatories and Ratifications.

[30] See, generally, IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al., United States, July 21, 2011, para. 118; IACHR, Report No 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz, et al.*, United States, July 12, 2010; IACHR, Report No 63/08, Case 12.534, *Andrea Mortlock, United States,* July 25, 2008; IACHR, Report No 40/04, Case 12.053, Maya Indigenous Community, Belize, October 12, 2004; IACHR, Report No 75/02, Case 11.140, *Mary and Carrie Dann*, United States, December 27, 2002; IACHR, Report No 62/02, Case 12.285, *Michael Domingues*, United States, October 22, 2002.

Rights. [31] These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter. [32]Articles 106 and 150 of the Charter authorize the Inter-American Commission to protect those human rights enunciated and defined in the American Declaration. This competence is expressly set forth in Article 1 of the Commission's Statute, approved in 1979 by OAS General Assembly Resolution No.447. [33]

25. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined in the American Declaration,[34] and have also recognized the customary legal status of the rights protected under many of the Declaration's core provisions. Therefore, as a source of legal obligation, the United States is obligated to implement the rights established in the American Declaration in practice within its jurisdiction. [35]

26. In this regard, according to the mandate given by the States to the IACHR under Article 20 of its Statute, the Commission has the power, in relation to Member States that are nor parties to the American Convention on Human Rights, to examine communications submitted to it, and to make recommendations to the States in order to bring about more effective observance of fundamental human rights.[36] Further, given the basic human rights obligations set forth in the OAS Charter, and the Commission's mandate to monitor compliance with Member State obligations in the area of human rights which is also reflected in the Charter, OAS Member States must comply in good faith with Commission's recommendations.

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31 *See* I/A Court H.R., *Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights"*, July 14, 1989, Ser. A No 10 (1989), paras. 35-45.

32 Charter of the Organization of American States, Articles 3, 16, 51.

33 I/A Court H.R., *Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights"*, July 14, 1989, Ser. A No 10 (1989), para. 41.

34 *See e.g.* OAS General Assembly Resolution 314, AG/RES. 314 (VII-O/77), June 22, 1977 (entrusting the Inter-American Commission with the preparation of a study to "set forth their obligations to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 371, AG/RES (VIII-O/78), July 1, 1978 (reaffirming its commitment to "promote the observance of the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 370, AG/RES. 370 (VIII-O/78), July 1, 1978 (referring to the "international commitments" of OAS member states to respect the rights recognized in the American Declaration of the Rights and Duties of Man).

35 *See* IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al., United States, July 21, 2011, paras. 115 and 117.

36 Statue of the Inter-American Commission on Human Rights, Article 20(b).

## *D. Preparation and Approval of the Report*

27. The IACHR considered and approved the draft version of this report on September 5, 2017. Pursuant to Article 60(a) of its Rules of Procedure, the Commission forwarded the draft report to the Government of the United States on September 22, 2017, and requested it to present its observations within 30 days. On November 27, 2017, the United States requested an extension until January 15, 2018. By letter dated December 12, 2017, the IACHR informed the State that the requested extension had been granted. The United States sent a communication on January 25th, 2018, informing that it did not have any comments to submit. The Commission approved the final version on March 1, 2018.

CHAPTER 2

# CHILDREN IN THE U.S. ADULT CRIMINAL JUSTICE SYSTEM

***HAVE I SURVIVED?***

A wounded solder only survives,
If he can ignore his wounds,
While the enemy is in pursuit.
I've survived,
Because I've ignored the pain inside,
Most of the time able to dismiss it from my mind,
A pain that makes me want to die,
Want to cry,
Want to disappear from this,
Cease to exist,
I've survived.
Feeling the dull agony that is my comfort,
I search for relief,
A dream I can lay down somewhere and feel peace,
A safe harbor, a home port,
Somewhere I can weather the storm.
I try to stay busy, I fil my platter,
But in my downtime, it doesn't matter
I've survived
But the pain has never left my side.
A wounded solder only survives
If he can ignore his wounds
While the enemy is in pursuit,
But when they're no longer there
He must take time to dress those wounds,
Hela them, give them proper care,
Or those wounds will fester and be his doom,
And that soldier will no longer be there.

# CHILDREN IN THE U.S. ADULT CRIMINAL JUSTICE SYSTEM

## *A. The Right of Children to a Juvenile Justice System and a Brief Background of these Systems in the United States*

28. The United States has played an important role in promoting and establishing a specialized approach to youth within the criminal justice system, with the aim of rehabilitating, rather than simply punishing, youth who are convicted of a crime. The world's first juvenile court division was created in the U.S state of Illinois in 1899, and within 25 years all but two of the states had followed suit and established similar juvenile court systems.[37]

29. In this regard, it has long been acknowledged in the various criminal justice systems of the U.S. that children are different from adults and require special treatment with regard to their criminal responsibility for crimes committed, and in particular, that it is necessary to prioritize the rehabilitation of child offenders over the goals of retribution and incarceration (i.e., prevention of further harm to the general population) that are more central to the adult criminal justice systems in the U.S.[38] As established by the Supreme Court in 1966, "[t]he Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[39]

30. Juvenile justice systems in U.S. states were further developed between 1970 and 1980, with the implementation of community-based programs, diversion, and de-institutionalization. Almost every juvenile justice system included a mechanism through which judges could relinquish their

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37 Second Chances: Juvenile Court Centennial Initiative (1999). Chicago, Illinois: the Children and Family Justice Center. See also American Bar Association, Division of Public Education, "The History of Juvenile Justice", 2012.

38 Human Rights Watch, Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute, April 2014. See also, David Tannenbaum, "The Evolution of Transfer out of the Juvenile Court," in The Changing Borders of Juvenile Justice, ed. Jeffrey Fagan and Franklin Zimring (University of Chicago Press, 2000), p.17.

39 Kent v. United States, 383 U.S. 541, 554 (1966).

jurisdiction of cases involving the most serious offenders, sending such cases to adult court, but the use of such judicial waivers was rare during that time period.[40] Most adolescents accused of a crime in the United States were handled in a separate justice system largely consistent with the primary objective of rehabilitation.[41]

31. However, the Commission notes with grave concern that in the 1980s, this began to change. By the year 1990, many states across the U.S. had passed highly regressive changes to their legislation and policy with regard to youth involved in the justice system. The changes varied in the details of their implementation, but the broad theme was the denial of access to rehabilitative juvenile justice systems, and consequent mandatory processing of juveniles in the more punitive adult systems. This denial was based on automatic and fixed criteria, such as the age of the accused and/or the seriousness of the offense, without regard to the case-specific considerations that can normally be taken into account by juvenile courts in the exercise of their discretion over sentencing. These changes that took place across the U.S. were largely in response to public concern over high crime rates and the supposed involvement of youth in violent crimes.

32. In particular, a series of highly publicized violent incidents created an unfounded hostility in the general public toward, and fear of, what have been referred to as "juvenile super-predators." As a result, across the United States, laws were changed in order to move the youth justice system away from a primarily rehabilitative aim and toward a punitive, "tough-on-crime" response. As a result of this change, youth were increasingly being tried as adults in criminal courts, reflecting a disregard for children's vulnerable status, their need for protection, and the primacy of their best interests.[42]

33. The Commission has further observed that, in addition to regressive changes in laws and policies specifically concerning youth in the criminal justice system, other measures taken by different levels of government in the U.S. during that same period of time resulted in harsher treatment of youth in general. This harsher treatment was characterized by the excessive criminalization of adolescent behavior in school and community settings. This had the result of diverting an undue number of cases involving youth

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40 According to data from the National Center for Juvenile Justice (OJJDP), the percentage of cases in which a judicial waiver was granted to allow processing of youth in the adult criminal justice system remained under 2% even in the early 1990s when the youth crime rate was at its highest. United States General Accounting Office, "Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions," August 1995, p.7.

41 Reforming Juvenile Justice: A developmental Approach. National Research Council of the National Academies, p.37. See also, Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," September 2011, p.1.

42 D.C. Lawyers for Youth and Campaign For Youth Justice, Capital City Correction, May 2014.

into the juvenile justice system, which compounded the concurrent changes in the criminal justice system, against the interests of children.

34. The IACHR notes that in recent years, legislative reforms in many U.S. states have begun to restore children and adolescents' rights to a specialized justice system aimed at their effective rehabilitation. The U.S. Supreme Court has affirmed in four recent decisions[43] that children under the age of 18 are still in the developmental stage of their lives and are therefore less culpable than adults. This jurisprudence from the nation's highest court has necessitated legislative change in almost all states. The IACHR takes an extremely positive view of these reforms, which have greatly improved the situation of many children who are involved in the criminal justice system nationwide.

35. However, based on information received and analyzed by the IACHR, the fact remains that many U.S. states have not yet implemented legislative changes in order to ensure the right of all children accused of committing a crime to be tried and sentenced in a juvenile justice system.[44] Furthermore, the Commission has observed that adolescents accused of committing violent offenses are generally excluded from the reforms, in contrast to adolescents accused of committing non-violent offenses, who are more likely to benefit from the reforms.[45]

36. The IACHR reminds the United States that, pursuant to international human rights law, a specialized system of juvenile justice must be in place for youth accused of committing crimes, and the rules and regulations of such juvenile justice system must be fully applied, without discrimination, to all persons under the age of 18 years.[46] All adolescents who stand accused of a crime are entitled to be tried in a special juvenile justice system, separate from the criminal justice system in which adults are tried, in order to ensure that their fundamental rights are afforded due protection and respect, in accordance with their age and developmental needs.[47]

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43 Roper v. Simmons, J.D.B. v. North Carolina, Miller v. Alabama, and Graham v. Florida.

44 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014. See also, Charles Puzzanchera, "Juvenile Arrests 2010" (Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, December 2013).

45 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

46 Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice,CRC/C/GC/10, 25 April 2007, paras. 36-38. IACHR, Juvenile Justice and Human Rights in the Americas, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 38.

47 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/SER.L/V/II, (July 13, 2011), para.57. The Committee on the Rights of the Child made express reference to the criminalization of child offenders, as follows: "This negative presentation or criminalization of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g.

37. The specialized juvenile justice system must take a holistic approach that is based on the two main objectives of the system: to hold the adolescent accountable for his or her criminal conduct, if found guilty; and to rehabilitate and reintegrate the adolescent into his or her family and community by means of specialized State assistance that draws on the support and involvement of that family and community.[48]

38. The Commission notes that most countries in the region have established that any person under the age of 18 who is accused of committing a crime can only be tried under a specialized juvenile justice system, pursuant to international standards. In fact, as international human rights bodies have noted with appreciation, some States in the Americas allow for juvenile justice rules to be extended to young persons over the age of 18, usually up to 21 years of age.[49] While the IACHR observes that some U.S. jurisdictions have implemented such laws allowing juvenile justice to be applied to young persons over the age of 18, this is not the case across the country, and as noted above, not all youth below the age of 18 are included.

39. The IACHR emphasizes that an effective juvenile justice system begins with the prevention of youth involvement in criminal activity. To that end, prevention must not only be the central focus of a specialized justice system for youth, but also a critical component of the overarching comprehensive system of protection of children and adolescents, in order to identify and address the main problems that lead adolescents to commit crime.

40. In its report on Juvenile Justice and Human Rights in the Americas, the IACHR clearly established that criminal justice policy must therefore have a

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zero-tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures)." See, Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10, April 25, 2007, para. 96.

48 The IACHR has recognized that: "[t]he juridical framework for the protection of children's human rights is not confined to Article 19 of the American Convention or Article VII of the American Declaration. Instead, for the purposes of interpretation, it also includes, inter alia, the 1989 Convention on the Rights of the Child (hereinafter "the CRC"), the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter "the Beijing Rules"), the 1990 United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter "the Tokyo Rules"), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (hereinafter "the Havana Rules"), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (hereinafter "the Riyadh Guidelines"), as well as international human rights instruments that are general in scope. For the purposes of interpretation, that corpus juris also includes the decisions adopted by the United Nations Committee on the Rights of the Child (hereinafter, the "Committee on the Rights of the Child") in furtherance of its mandate, such as General Comment No. 10 on children's rights in juvenile justice. That perspective represents a significant step forward that reveals the existence of a common framework of international human rights laws on the subject of children, as well as the interdependence, at the international level, of the various international systems for the protection of children's human rights." See IACHR, Juvenile Justice and Human Rights in the Americas OEA/SER.L/V/II, (July 13, 2011), paras. 18-19; 510.

49 Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras. 38.

preventive approach, rather than being geared merely toward retribution. OAS Member States must emphasize the fundamental goals of prevention and rehabilitation, the latter of which implies the fostering of opportunities for successful reintegration of youthful offenders into society.[50] To that end, States, including the US must redouble their efforts to analyze and take action against the social, economic, and cultural causes of crime and youth involvement in crime, and implement comprehensive policies to prevent youth from committing criminal offenses.

41. Moreover, the Commission has highlighted that OAS Member States' policies on juvenile justice must fully ensure respect for the civil and political rights of youth who are charged with committing a criminal offense. These include the right to a fair trial, the right to effective counsel throughout any judicial proceedings, and the right to personal liberty, with incarceration used only as a last resort and only for the most serious offenses.[51]

42. In the following analysis, the Commission will examine the available data and information regarding the situation of children who are excluded from specialized juvenile justice systems and who are therefore treated as adults in the criminal justice system of the United States.

## *B. Background of Children and Adolescents Excluded from Juvenile Justice Systems*

43. The Commission has observed that by 1954, as a result of the leading role played by the United States in establishing separate court divisions for youth in conflict with the criminal law, almost every U.S. state implemented a specialized justice system with more or less exclusive jurisdiction over youth.[52] These juvenile justice systems were designed to provide prevention, protection, and rehabilitation to persons under the age of 18.

44. In the early years these juvenile justice systems had few formal rules, which resulted in frequent unjust treatment of youth. In response to this, in 1967 the U.S. Supreme Court extended many, but not all, of the due process

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50 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 31.

51 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 136. IACHR, Press release No. 26/04, Joint Press Release, Inter-American Commission on Human Rights and UNICEF Express Concern over Situation of Boys, Girls, and Adolescents Involved with Gangs in El Salvador, Guatemala, and Honduras, December 4, 2004.

52 Judicial procedures that could be used to transfer the most serious offenders from juvenile courts to adult courts have existed since the establishment of the juvenile system. Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120.

guarantees present in adult criminal trials to adolescents involved in juvenile court proceedings. This initiated a nationwide juvenile justice reform movement aimed at ensuring procedural protections to children and adolescents accused of crimes.[53]

45. Moreover, significant progress at the national level was achieved in 1974, with the enactment of the Juvenile Justice and Delinquency Prevention Act. This federal legislation governs the U.S. juvenile justice system, and among other things, requires the separation of youth from adults in custody, and the deinstitutionalization of "status offenders." The Act provides funding to those states that comply with federal protections for youth accused of committing crimes, in order to ensure appropriate care for such youth and ensure that they are treated as youth in the justice system. The Act defines a juvenile as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under [the Act] for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday."[54] However, state law does not necessarily follow the same criteria. The Act has been reauthorized over the years and amended.

46. Notwithstanding the progress that was made in this earlier era, the IACHR observes with concern that these advances were followed by a national movement toward increasingly harsh and punitive responses to an increase in crime rates at the time, including violent crimes allegedly committed by adolescents. This resulted in the enactment of regressive federal and state-level measures between 1980 and 2000 that allowed children to be treated as adults and excluded them from the rehabilitative juvenile justice system.[55]

47. During this period, policymakers and media in the United States issued warnings about the rise of alleged adolescent "super-predators," [56] instigating fear across the country that adolescents bearing arms were committing violent crimes without suffering real consequences, due to the more lenient treatment of youth in the juvenile justice systems.

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53 As of the Supreme Court ruling in 1971, adolescents are not entitled to all of the procedural guarantees that are provided to adults under domestic law, such as the right to trial by jury.

54 United States Code, Title 18 - Crimes and Criminal Procedure, Part IV - Correction Of Youthful Offenders, Chapter 403 – Juvenile Delinquency, § 5031. Definitions.

55 Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," September 2011, p. 8. See also Office of Juvenile Justice and Delinquency Prevention, National Center for Juvenile Justice, "Juvenile Arrest Rates by Offense, Sex, and Race (1980-2010),"2010.

56 This was a term created by a professor in an article published in 1995, entitled "The Coming of the Super-predators," in which the author expressed the view that "the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even the (gang) leaders of the Bloods and the Crips . . . look tame by comparison." Knight-Ridder Newspapers, "Super-Predator' - Or Just A Kid With A Gun? - Skyrocketing Number Of Teen Killers Brings Debate On Causes".

48. In 1994, a new federal law, the Violent Crime Control and Law Enforcement Act that included some provisions on youth involvement in crime, was passed. The impetus for this was a perceived increase in both gang violence and violent crime committed by juveniles. The law allowed children as young as 13 years of age to be tried as adults in federal courts when they were accused of committing certain serious felonies, such as murder, attempted murder, and bank robbery.[57]

49. Subsequently, many U.S. states have followed the punitive approach of this federal law in their handling of criminal justice, enacting or expanding transfer provisions in their criminal justice legislation that allow youth to be tried as adults.[58] Between 1992 and 1995, laws that expanded such transfer provisions were passed in 40 states and the District of Columbia.[59] By the year 2000, a child as young as 10 years old could be tried and sentenced as an adult in most states when charged with a serious crime such as murder. Some states went beyond this and did not establish a minimum age at which children could be transferred to the adult criminal justice system.[60]

50. The Commission notes the importance of the fact that, according to statistics reported by the U.S. Department of Justice, rates of arrest of youths for violent crimes had already peaked in 1994, and consistently declined in subsequent years.[61] In fact, in 2012, the juvenile violent crime arrest rate was the lowest it had been in over three decades. Predictions of increased and excessive involvement of youth in violent crime in the U.S. have proven to be erroneous.[62]

51. Notwithstanding this overall decrease in violent crime committed by youthful offenders, as a result of an increasingly harsh national response toward adolescents over the past three decades, it became increasingly common for youth to receive severe punishments designed for adults. The number of youth placed in adult prisons and jails more than tripled in the

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57 H. R. 3355, "Violent Crime Control and Law Enforcement Act of 1994," enacted at the Second Session of the One Hundred Third Congress of the United States of America, January 25, 1994. See also, U.S. Department of Justice Fact Sheet, Violent Crime Control and Law Enforcement Act of 1994.

58 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp 93–120.

59 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp 93–120.

60 Reforming Juvenile Justice: A developmental Approach. National Academies Press, 2013, p. 40.

61 Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, "Statistical Briefing Book," December 17, 2012.

62 Petitioner's statements at para.18-19, Miller v. Alabama, 2012, makes reference to the author of the term "super-predator" acknowledging his mistake and advocating for preventative measures as opposed to deprivation of liberty. See also, See Elizabeth Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," New York Times, February 9, 2001.

short span of 15 years.[63] Data collected from 1985 to 2011 on the number of youth held in adult prisons and jails demonstrated the dramatic increase in the number of youth who were being excluded from the juvenile justice system and sentenced instead to imprisonment in the adult correctional system.[64] In 2010, an estimated 139,000 children were housed in adult prisons and jails across the country.[65]

52. Although the regressive reforms of juvenile justice systems were enacted in response to a supposed increase in violent crimes committed by juveniles, they also facilitated the prosecution as adults of children charged with non-violent crimes. The implementation of severe sentencing policies for drug offenses that was carried out during the same time period, known as the "War on Drugs", caused the rate of incarceration in the United States to increase tenfold, with a particularly concerning impact on youth.[66] Over half of all youth held in prison in the decade beginning in 1990 were sentenced for property or drug offenses.[67]

53. This widespread State response to crime, of treating children as adults, is of even greater concern when it is observed that the overall criminal justice system in the United States features a highly punitive response to crime.[68]

54. Within this broader pattern in the United States of an increasingly harsh response to crime and an elevated incarceration rate, children are

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63 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, Juveniles in Adult Prisons And Jails : A National Assessment , P. 5 (2000). See also, The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also Human Rights Watch & The American Civil Liberties Union, Growing Up Locked Down : Youth in Solitary Confinement in Jails and Prisons Across the United States 106 (2012).

64 Austin, J. Johnson, K.D. & Gregoriou, M. (2000) Juveniles in Adult Prisons and Jails: A National Assessment. Washington, D.C.: Bureau of Justice Assistance; Bureau of Justice Statistics "Prison and Jail Inmates at Midyear Series"; Bureau of Justice Statistics "Prisoner Series" Strom, K.J. (2000). Profile of State Prisoners under Age 18, 1985-1997. Washington, D.C.: Bureau of Justice Statistics.

65 The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also Human Rights Watch & The American Civil Liberties Union, Growing Up Locked Down : Youth in Solitary Confinement in Jails and Prisons Across the United States 106 (2012).

66 Sourcebook of Criminal Justice Statistics Online; Carson. E.A/ and Golinelli, D. (2013). Prisoners in 2012. Washington, D.C.: Bureau of Justice Statistics.

67 Reforming Juvenile Justice: A developmental Approach, National Research Council of the National Academies, p.40.

68 According to data provided by the United States Bureau of Justice Statistics, this has occasioned an alarming 500% increase in the incarceration rate over the past 40 years, which is a very high rate of imprisonment. See Walmsley, R. (2013), World Population List, 10th Edition, Essex: International Centre for Prison Studies. The United States, with only 5% of the world's population, has almost 25% of the world's incarcerated population, representing a nationwide rate of imprisonment of approximately 1 out of every 100 persons. See The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also, "The Pew Center On The States , One in 100: Behind Bars in America" (2008); International Centre For Prison Studies, World Prison Population List (10th Ed. 2011).

particularly vulnerable when subjected to proceedings designed for adults, without having attained the necessary personal development to effectively participate in their own defense.

55. The Commission recognizes that over the past 10 years, legislative reforms passed in many U.S. states have begun to restore a separate juvenile justice systems for adolescents. This has come in response to a national movement advocating for children's right to access a justice system that is designed for their effective rehabilitation. According to statistics published by the United States Department of Justice, the number of youth each year that are excluded by court order from the juvenile justice system, which reached its peak of 13,100 cases in 1994, has been reduced by 35% since then.[69] However, this decline may be misleading because in the 1990s, states adopted other ways in which youth could be tried as adults. For instance, under prosecutorial discretion and statutory exclusion laws, cases involving juveniles can originate in adult criminal court bypassing the need for judicial waivers.[70]

56. Juvenile justice codes nationwide have been amended in recent years to reflect a more balanced approach between youth offender accountability and community protection, on the one hand, and prevention and treatment of adolescents in the justice system, on the other hand. The IACHR welcomes this shift away from an over-emphasis on punishment in the legislative provisions that describe the purpose of the juvenile justice system.[71] In this way, juvenile justice systems in the U.S. have begun to align more with international standards, by avoiding the undue criminalization of youth who are involved in less serious crimes.

57. Notwithstanding the progress, the IACHR notes with particular concern that the boundaries that distinguish children from adults with respect to criminal responsibility have shifted over time, based largely on public perception of youth involvement in crime. The Commission is further troubled by the failure of the United States to adopt appropriate mechanisms on a national scale to ensure that states do not pass and enforce laws that violate the rights of children and adolescents who are accused of committing a crime. Moreover, the processing of criminal cases involving children may vary even

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69 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

U.S. Department of Justice, OJJDP Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011, p. 10. Also see para. 84 of this report.

71 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

within an individual state, depending on the practices of each local community, regardless of children's need for age appropriate treatment.[72]

## *C. Ways in which Children Enter the Adult Criminal System*

58. According to information received by the Commission, there are three main ways in which children and adolescents enter the adult criminal justice system in the United States, based on the particular legislation of each state. First, by way of laws that grant jurisdiction to the adult criminal courts for persons under 18 years of age. Second, through laws that allow for a child's case to be transferred from the juvenile system to the adult system. Third, as a result of hybrid sentencing laws that operate between the jurisdictions of the adult and juvenile systems, as well as other provisions with similar effect, such as "once an adult, always an adult" laws.[73]

### 1. Laws that Provide an Automatic Entry into the Adult Criminal System for Children and Adolescents under the Age of 18

59. One of the main bases for children to enter the adult criminal justice system in the United States is legislation that limits the jurisdiction of juvenile courts to exclude all 17 year olds and in some cases 16 year olds. This results in such children automatically being tried as adults in all circumstances, while international law sets the age of adulthood at least at 18 years.[74] According to information received by the Commission, the U.S. does not track the number of youth who are tried as adults as a result of these jurisdiction restrictions. The Commission considers that it is very important for the State to track such data; the lack thereof is addressed in more detail later in this report[75]. According to information published by the Department of Justice, it is estimated that in 2007 alone, as many as 175,000 youth under the age of

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72 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120.

73 "You're an Adult Now: Youth in the Adult Criminal Justice Systems". Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011. See also U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011

74 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 38.

75 The available approximate number of youth in the adult system because they are excluded from juvenile court jurisdiction is solely based on population data and offense rates in the states that exclude 16 and 17 year olds from juvenile court jurisdiction.

18 were automatically tried in adult criminal courts in the United States as a result of such laws, even in cases of minor offenses.[76]

60. According to the information published by the Department of Justice, in 2011, juvenile jurisdiction ended at age 16 in ten states (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin), and at 15 years of age in three states (New York, Connecticut, and North Carolina), while in all other states and in the District of Columbia, juvenile court eligibility extended to 17 years of age or above.[77]

61. The Commission recognizes that recent nationwide advocacy and reform efforts have raised the upper age of juvenile jurisdiction in several states. These reform efforts are ongoing, as are efforts to expand the eligibility of young adults to be tried and sentenced in a youthful offender system, as opposed to the adult correctional system.[78] Since 2011, Illinois, Louisiana, Massachusetts, South Carolina,[79] NY and Connecticut have changed their laws.[80]

62. Nevertheless, the IACHR is concerned that most reforms to raise the upper age of juvenile jurisdiction are restricted to certain offenses, such as misdemeanors and the majority of felonies, which are less serious, and do not apply to more serious crimes. As a result, adolescents charged with the most serious criminal offenses, including many violent offenses, continue to be automatically excluded from the juvenile courts in many U.S. states. This is the situation in the states of Massachusetts and Illinois, for example, where although the minimum age of criminal court jurisdiction was raised to 18 for

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76 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

77 As of the end of the 2004 legislative session, statutes in 34 states extended juvenile court jurisdiction in delinquency cases until the 21st birthday. See Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120.

78 National Conference of State Legislatures, "Trends in Juvenile Justice State Legislation: 2001-2011", June 2012. See also National Center on Juvenile Justice (2009). See also U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

79 http://www.campaignforyouthjustice.org/news/cfyj-news-press-releases/item/cfyj-applauds-south-carolina-and-louisiana-for-raising-the-age

80 "Gov. Cuomo Seeks to Raise the Age of Criminal Responsibility". See also Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

most offenses in 2013 and 2014, youth charged with more serious crimes are excluded from juvenile court jurisdiction.[81]

63. Starting in October 2017, North Carolina will be the only state that by law, automatically treats all adolescent defendants aged 16 or 17 as adults in the criminal justice system without allowing any possibility of transfer back to the juvenile system.[82] During its visit to the state of New York, the IACHR observed that high numbers of youth are being held in adult prisons, because they were automatically by law tried and sentenced as adults in adult criminal courts, regardless of the seriousness of the offense of which they were accused. The IACHR is therefore pleased that since then, NY has passed legislation that will move 16-17 year olds accused of misdemeanors to juvenile court. The law also creates a presumption of transfer from adult court to juvenile court for 16- and 17-year olds accused of non-violent felonies.[83] This means that some 16-17 year olds who are charged with felonies will still be tried in adult court. The law phases in the changes for 16-year olds on October 1, 2018 and 17-year olds a year later.

64. The Commission takes note of the positive changes made in the state of Illinois toward raising the minimum age of adult criminal responsibility to 18. Following an initial shift in policy in which access to the juvenile system was granted to only those adolescents of 17 years of age who were charged with lesser crimes, the state conducted studies that revealed that rates of juvenile crimes decreased (not increased by the raise), and the inclusion of these youth did not overwhelm the juvenile justice system nor result in increased costs. As a result of these findings, Illinois has subsequently extended access to almost all adolescents of 17 years of age.[84] The state also implements significant diversion programs, and overall has reduced the number of incarcerated youth by more than 50%.

65. The Commission is deeply concerned that children under the age of 18 continue to automatically face the adult criminal justice system in many parts of the U.S., as a result of the jurisdictional laws in place in a number of its states. Despite measures undertaken by the government of the United States to support changes in state laws that exclude youth under the age of 18 from state juvenile justice systems, such measures have so far been

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81 Research & Evaluation Center, John Jay College of Criminal Justice, "Line Drawing: Raising the Minimum Age of Criminal Court. Jurisdiction in New York". February 2014.

82 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

83 See http://raisetheageny.com/wp-content/uploads/2017/05/rta.billsummary.finalMay-2017.pdf https://www.nytimes.com/2017/04/10/nyregion/raise-the-age-new-york.html?mcubz=1

84 The Youth Project, "New Juvenile Laws Take Hold in Illinois; Raising Age for Felony Jurisdiction Leads Way", January 2014.

insufficient to ensure the necessary protection of the rights of children. Consequently it is essential that the State take prompt action by adopting, without delay, the necessary measures to guarantee juvenile justice jurisdiction for all persons under the age of 18 in the United States.

## 2. Waiver Laws and the Transfer of Children and Adolescents to Adult Courts

66. Another set of legislative provisions that causes a significant number of children and adolescents to be tried in the adult criminal justice system is transfer laws, which consist of a) judicial discretionary waivers, b) prosecutorial discretion or concurrent jurisdiction, and c) statutory or legislative exclusion provisions.[85] Most states have multiple transfer mechanisms for persons below 18 years of age, based on these three main categories.

67. The IACHR observes that, in accordance to available data, in 21 U.S. states and in the District of Columbia there is no specified minimum age of eligibility for the transfer of children to adult courts, and in 26 other states, children as young as 10 to 14 years of age are considered eligible to be transferred to the adult criminal justice system.[86]

68. The Commission is particularly concerned about the absence of national data on the number and characteristics of youth who are transferred to adult courts as a consequence of these state transfer laws. This absence of data is especially a problem in those states that allow transfers without a formal court proceeding that would create a reliable record. The lack of systematic data collection is also due to the fact that the U.S. states are not mandated to consistently report the number of children and adolescents who have been transferred to adult courts, and only a small number of states do so voluntarily.

69. Data reported by a small number of states in 2007 indicates that nearly 14,000 youth were transferred to adult courts in that year through judicial and non-judicial transfer mechanisms.[87] This number is likely an undercount

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85 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010," February 2014.

86 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, Juvenile Justice System Structure & Process, Minimum transfer age specified in statute, 2011.

87 U.S. Department of Justice, OJJDP, "Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court" by Edward P. Mulvey and Carol A. Schubert, December 2012 (Pathways to Desistance study). See also U.S.

due to the lack of a uniform definition on what constitutes a child, in terms of age, and because it does not include non-judicial transfers in 29 states that have statutory exclusion or prosecutorial discretion laws that do not publish or provide data on those transfers.

70. The Commission is aware that, according to national statistics, the number of children who end up in the adult system as a result of judicial waiver provisions alone has been greatly reduced over the past 15 years.[88] However, the Commission notes with concern that this decline does not imply an overall reduction of youth who come into contact with the adult system, but can instead be largely attributed to the use of other non-judicial transfer laws which states have enacted or expanded during that same period of time, which have reduced the need for prosecutors to make use of the judicial waiver provisions. According to data provided by juvenile courts interviewed during the IACHR´s visits, these other transfer laws that can have the same effect as judicial waiver laws include: statutory exclusion laws, which have been enacted in 22 states; prosecutorial discretion provisions, in 11 states; and other forms of transfer such as presumptive waiver laws, in 13 states.[89]

71. Legislative reforms are changing state laws that allow for automatic as well as prosecutorial and judicial discretionary transfers of adolescents' cases to adult courts, making it more likely for youth to remain in the specialized juvenile justice system. In this regard, the Commission is pleased to note that in the past ten years at least 14 states[90] have passed such reforms. According to the received information, California and Vermont have recently changed their laws.[91]

72. Nonetheless, the IACHR is deeply concerned that these changes are modest with regard to the size of the population affected, and have diminished only to a limited extent the number of adolescents who are moved to the adult criminal justice system. The Commission reiterates its call to the State to take concrete and immediate measures to support the prohibition of laws or

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Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

88 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010, February 2014.

89 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010," February 2014; see also National Center for Juvenile Justice and U.S. Department of Justice, OJJDP, "Juvenile Court Statistics 2011 Report"; Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013," 2013;" also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

90 Arizona, Colorado, Connecticut, Delaware, Illinois, Nevada, Indiana, Utah, Virginia, Washington, Ohio, Maryland, Nebraska, and New York.

91 https://www.campaignforyouthjustice.org/news/blog/tag/Direct%20File

policies that infringe children's rights by transferring their trial from the juvenile to the adult system.

### a. Judicial Waivers of Children's Protection under the Juvenile System

73. The most common and oldest form of transfer laws in the United States are those that allow juvenile courts to relinquish their jurisdiction over cases of children accused of committing crimes, and thereby send those cases to the adult courts. These judicial acts are referred to as waivers, because through them the judge is waiving the protections of the juvenile justice system. Waivers are based on varying criteria that are established by law or formal guidelines. Such decisions are ultimately made by juvenile court judges, based largely on a determination of whether or not the child accused of a crime is considered to be "receptive" to treatment offered in the juvenile justice system.[92]

74. Judicial waiver laws either authorize or require juvenile court authorities to transfer youth from the juvenile system to the adult system, on a case-by-case basis, with different jurisdictions offering varying degrees of flexibility to the courts. There are three main forms of judicial waiver provisions: i) discretionary waiver, which gives full authority to judges to use their own discretion in deciding whether or not to waive the case to adult courts; ii) presumptive, in which case the adult system is presumed to be the appropriate venue, unless otherwise proven by the adolescent accused of crime; and iii) mandatory, in which waiver is required if certain statutory requirements are met.

75. Between 1992 and 1999, 27 U.S. states expanded their judicial waiver laws by lowering the minimum age and broadening eligibility for judicial transfer. As a result, 45 states now allow youth to be transferred from the juvenile system to the adult system by way of judicial discretion, 14 States and the District of Columbia [93] have included presumptive waiver in their legislation, and 15 states[94] provide for transfer of adolescents' cases to adult courts through mandatory waiver provisions.[95] According to data reported by the

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92 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

93 Alaska, California, Colorado, D.C., Illinois, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, Utah.

94 Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, West Virginia.

95 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010", February 2014

United States Government, as many as 6,000 youth have been transferred to adult courts by means of juvenile court discretion in a single year.[96]

76. Several states enable juvenile courts to use their discretion even in cases involving very young children. Delaware has a mandatory waiver for children of any age who are charged with murder. The states of Hawaii, Idaho, Maine, Oregon, South Carolina, Tennessee, and West Virginia provide for judicial discretionary waiver, with no minimum age specified, in the case of murder.[97] This issue is even more serious in states where judicial discretionary waiver laws are so broad that they apply to any offence and any age, such as in Alaska, Delaware, and Washington State.[98]

77. During its visit to Colorado, the IACHR observed that children as young as 12 years old are eligible to be excluded from the juvenile justice system and transferred by court order to adult criminal courts when they are charged with more serious crimes, including violent sexual offenses. Adolescents aged 14-15 years may likewise be removed from juvenile jurisdiction and sent to adult courts when charged with a wider range of offenses.

78. In Colorado the juvenile court is empowered to make such waiver decisions if certain criteria are met, namely, if, "after investigation and a hearing, the juvenile court finds it would be contrary to the best interests of the child or of the public" for the court to retain its juvenile jurisdiction.[99] The juvenile court judge is required to consider a set of 24 factors when making the decision of whether or not to waive jurisdiction, and is allowed to use discretion with regard to the amount of weight given to each factor.[100] The IACHR notes with particular concern that this decision is adopted by adult courts that are not specialized in juvenile justice.[101]

79. The Commission was informed that the state of Colorado does not report data on the number of children that are treated as adults as a result of its transfer laws, including judicial and non-judicial waiver provisions.

80. Even the federal criminal justice system in the United States allows for judicial waiver of children to adult courts. Whereas each U.S. state

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96 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010", February 2014.

97 Juvenile Justice GPS (Geography, Policy, Practice, Statistics), "Jurisdictional boundaries".

98 Juvenile Justice GPS (Geography, Policy, Practice, Statistics), "Jurisdictional boundaries".

99 Colorado Revised Statute § 19-2-518 (1) (a) (II).

100 Colo. Rev. Stat. tit. 19 (2012) § 19-2-518 (4)(b)(I)-(XIV), (c). See also, National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

101 See U.S. State of Colorado, Judicial Department.

implements its own juvenile and adult justice systems, adolescents arrested by federal agencies[102] may be tried and sentenced in adult courts for federal crimes, and committed to the Federal Bureau of Prisons if convicted, as there is no separate federal juvenile justice system.[103] Although general federal procedure requires persons under the age of 18 to be tried by state or local authorities, there is allowance for some exceptions when the U.S. Attorney General determines that transfer to adult court is necessitated by "the interest of justice," and thereby requests a judicial waiver.[104] Such transfer cases are then governed by federal criminal law as opposed to the Juvenile Justice and Delinquency Prevention Act. Transfer is mandatory for youth aged 16 or older who were previously convicted of certain types of offenses.[105]

81. The aforementioned situation endangers and violates the rights of children in most U.S. states and at the federal level, where laws permit or obligate courts to transfer children's cases to adult courts. While the Commission observes that the mechanism of judicial waiver has been included in juvenile justice systems since their creation, it reminds the State that, in accordance with international standards that establish that every child is entitled to the juvenile justice system.

### b. Prosecutorial Discretion to Waive Children to the Adult system (or "Direct File")

82. The Commission received information about other transfer laws that allow prosecutors to bring cases involving child defendants as young as 10 years old directly to the adult courts. According to the information it received, under these laws, prosecutors generally have unrestricted discretion to file cases involving children in adult courts, without the requirement of a court hearing in which a determination could be made on the appropriateness of adult versus juvenile court for the particular case. Under such provisions, for a certain category of offenses, prosecutors are authorized to use their sole

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102 Federal law enforcement agencies include the U.S. Border Patrol and the Immigration and Naturalization Service, the U.S. Marshals Service, the Federal Bureau of Investigation (which has federal law enforcement responsibility for over 200 Indian reservations), and the Drug Enforcement Agency.

103 Federal law (Title 18 U.S.C. § 5032).

104 Qualifying cases include those in which a juvenile is charged with: (1) a violent felony, or a drug trafficking or importation offense committed after reaching age 15; (2) murder or aggravated assault committed after reaching age 13; or (3) possession of a firearm during the commission of any offense after reaching age 13.

105 Prior offenses include violent felonies or drug trafficking, when accused of committing a drug trafficking or importation offense or any felony involving the use, attempted use, threat, or substantial risk of force. Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120.

discretion when deciding whether to file in adult or juvenile courts, without being required to base their decision on any established standards.

83. In the United States, 12 states[106] and the District of Columbia have enacted laws sanctioning prosecutorial discretion to transfer children to adult courts at the first instance for certain offenses. Eight jurisdictions[107] allow prosecutors to file charges against adolescents of 14 years of age and above in adult courts for specific offenses, and in the state of Montana the minimum age was lowered to children as young as 12. Two states (Florida and Nebraska) give prosecutors discretion to charge an adolescent of 16 or 17 years of age for any felony, while in Wyoming prosecutors have this discretion in cases involving children as young as 13.[108]

84. Several of these states, such as Florida, Michigan, and Louisiana, as well as the District of Columbia, do not allow for juvenile cases filed directly in the adult courts to be transferred back to the juvenile system by means of a court review, or otherwise place restrictions on the types of offenses for which transfers to the juvenile system are permitted.[109]

85. The Commission is concerned by the significant gaps in available disaggregated data on youth who end up in the adult criminal justice system as a result of these laws. According to information received by the Commission, only the state of Michigan reports the number of cases filed directly as a result of prosecutorial discretion provisions, and only four other states, namely Arkansas, California, Florida, and Montana, provide data on the total number of persons under the age of 18 who are in the adult system.[110] Based on these official reports, Florida and California have the highest number of children and adolescents in the adult criminal justice system, and are still in the process of disaggregating the data in order to identify how many of those youth have their cases filed directly in adult courts as a result of prosecutorial discretion laws.[111]

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106 Arizona, Colorado, Montana, Wyoming, Nebraska, Oklahoma, Arkansas, Louisiana, Florida, Georgia, Virginia, and Michigan.

107 Arkansas, District of Columbia, Florida, Massachusetts, Michigan, Montana, Virginia, and Wyoming.

108 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

109 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011. See also, Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", and "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

110 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

111 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

86. According to the National Survey of Prosecutors that is sponsored by the U.S. federal government's Bureau of Justice Statistics (BJS), prosecutors filed an estimated 23,000 cases involving alleged adolescent offenders directly in adult courts in one year. The Commission notes that although this data is based on a limited sample, more reliable information at the national level is currently being processed through an initiative begun by the BJS in 2010, using data obtained from a Survey of Juveniles Charged in Adult Criminal Courts.[112]

87. The IACHR notes with special concern that of all the state laws that exclude children from their juvenile systems by way of prosecutorial discretion, Florida's original statute of 1978 is both one of the oldest as well as one of the harshest examples in the United States, and is responsible for the transfer of the highest number of children to the adult system of any such law nationwide.[113]

88. According to a recent report by an NGO, between 2009 and 2013, in Florida alone, more than 12,000 children entered the adult system as a result of transfer laws, amounting to nearly 2,500 youth tried as adults on an annual basis.[114] Based on the data available, nearly all of these cases, that is to say, 98% of the adolescent cases that entered the adult criminal justice system, were filed directly in adult courts as a result of prosecutors' sole discretion, without any possibility of being returned to the juvenile system. Reports further indicate that over half of these cases involved youth charged with nonviolent crimes.[115]

89. Moreover, the U.S. government has found that in most cases, prosecutorial waiver provisions do not include suitable standards or written guidelines to be considered by prosecutors when deciding whether to file in juvenile or adult court, nor do they provide a way in which the evidentiary or legal basis of the prosecutor's decisions can be recorded.[116] The Department of Justice

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112 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

113 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120. See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014. "From 2003 to 2008, Florida transferred youth to adult court at 1.7 times the rate of Oregon, the state with the second-highest transfer rate, and 2 times the rate of Arizona, the state with the third-highest transfer rate. During that period, Florida's transfer rate was 8 times the rate of California and 5 times the average transfer rate in 12 other states."

114 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

115 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

116 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

has recognized the devastating effects of these provisions, stating "it is possible that prosecutorial discretion laws in some places operate like statutory exclusions, sweeping whole categories into criminal court with little or no individualized consideration."[117]

90. Notwithstanding the federal government's concerns with regard to prosecutorial discretion, US Courts[118] have taken the position that discretion exercised by prosecutors' offices – which falls under the category of executive function – is not subject to judicial review or to the due process standards that have been established by the Supreme Court of the United States.[119] This stands in stark contrast to judicial waiver provisions, under which, taking Florida as an example, judges are required to consider a list of 8 factors, including "the likelihood of reasonable rehabilitation of the child," before formally granting a transfer of the case to adult court, accompanied by written reasons which may then be appealed.[120]

91. Due to the lack of standards in place, the results of "direct-file" laws are widely inconsistent and arbitrary, as prosecutors are unrestricted in making their own determinations and establishing their own practices and internal standards, if any. For example, a recent report in Florida revealed that between 2008 and 2012, almost 1500 adolescents were transferred by direct filing to the adult system in the 13th Circuit, in contrast with the 27 adolescents who were transferred by direct filing to the adult system in the 16th Circuit. Upon examination of the data across the 20 local jurisdictions covered in the report, there is no clear correlation between the seriousness of the crime alleged to have been committed and the likelihood of a transfer to the adult system. Available information indicates that children consequently receive widely varying sentences, based on the way in which prosecutors in each Circuit exercise their discretion.[121]Moreover, it has been noted by Human Rights Watch in a recent report on this issue that, whatever varying reasons are used to justify filing directly in adult courts, overall,

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117 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011, p. 5.

118 Manduley v. Superior Court, 41 P.3d 3 (Cal. 2002) (distinguishing *Kent* because discretionary direct file provision involved executive charging function and does not implicate procedural due process rights); State v. Cain, 381 So.2d 1361, 1366 (Fla. 1980) (distinguishing due process required for judicial proceedings and the exercise of prosecutorial discretion). People v. Thorpe, 641 P.2d 935, 940 (Colo. 1982).

119 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

120 Florida Statute & 985.556 (4), "Waiver of Juvenile Court Jurisdiction; Hearing". See also Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

121 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

"children's protected status or capacity for rehabilitation is not taken into account."[122]

92. Civil society representatives have indicated to the IACHR that the unrestricted authority granted to state prosecutors to file charges against children as adults results in widely disparate impacts on children accused of crimes across the 20 counties of Florida, evidencing the arbitrary effects of this transfer mechanism. Palm Beach County alone accounts for 10% of all children tried directly as adults in the state of Florida, 70% more than in Miami-Dade County, even though its population of youth is only half that of Miami-Dade. Children charged with felonies in Escambia County are six times more likely to be tried as adults as compared with Miami-Dade.[123]

93. Families of incarcerated youth and civil society organizations promoting the rights of youth in the criminal justice system have provided information to the Commission describing significant abuse of the prosecutors' power to transfer to adult courts. They have indicated that the threat of filing charges directly in adult courts is consistently used by prosecutors to pressure adolescents who are accused of committing crimes to accept plea bargains. Under these agreements, the youth plead guilty in order to ensure that they will serve their custodial sentences in the juvenile system.

94. Moreover, the Commission has received information that indicates that the range of cases that can be filed directly by way of prosecutorial waiver in Florida is extremely broad, and includes cases involving adolescents with no prior criminal record who have not been assessed as posing a serious risk of reoffending. The direct-file statute authorizes local state attorney's offices to charge adolescents as young as 14 for any of a list of 19 felonies. This Florida regime is second only to California in terms of the extensiveness of the eligibility, by category of crime, of adolescent defendants for prosecution in adult courts.[124] According to information provided to the IACHR by families of incarcerated youth in Florida, adolescents as young as 14 and 15 years of age are being sentenced as adults to lengthy imprisonment as a result of the direct-file statutes.

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122 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014, p. 45.

123 Florida Department of Juvenile Justice Delinquency Profile. In 2013-2014, in Miami-Dade County, approximately 4.2% of youth charged with felonies were transferred to adult court (79 of 1,899). That rate was 7% in Hillsborough (99 of 1,488), 7.4% in Duval (70 of 950), 12% in Palm Beach (133 of 1,118), and 16% in Escambia (70 of 438).

124 Florida Statute § 985.557; California Welfare and Institutions Code §§ 707(d)(d)(2). See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

95. With regard to laws that require the filing of charges against children directly in adult courts in certain cases, Florida's statute allows prosecutors to bring such cases under juvenile jurisdiction in exceptional circumstances. The prosecutors must have "good cause to believe that exceptional circumstances exist that preclude the just prosecution of the child in adult court."[125] In this regard, insofar as prosecutors can generally determine the procedural path that such cases will follow, it has been brought to the Commission's attention that the discretion afforded to state attorneys in Florida is so broad that it not only encompasses the questions of whether or not to prosecute and what charges will be filed, in practice, may have a strong influence on the sentence the child will ultimately receive upon a finding or admission of guilt.[126]

96. During its visit to Washington, D.C., the Commission was informed that adolescents of 16 and 17 years of age may be prosecuted directly as adults when charged with more serious crimes. The decision on whether to file charges in the juvenile or adult system is at the sole discretion of prosecutors, with no possibility of a hearing or judicial review in which the accused adolescents could petition to have their case returned to the juvenile justice system. Moreover, D.C. authorities and civil society organizations indicated to the IACHR that in the last 15 years, all youth who have entered the adult justice system in D.C. did so as a result of this mechanism of prosecutorial discretion.

97. The IACHR was also informed that in D.C., the police effectively make an early determination of this issue upon arresting an adolescent for alleged involvement in crime, because at this point in the process, the police refer the case to either the office of the prosecutor or to the family court, based on the criteria of age and type of offense. In this regard, some reports reveal that between 2007 and 2012, 663 adolescents were arrested by the police and identified as being eligible to have charges filed against them directly in adult criminal courts.[127] During the same time period, almost 600 youth were held in confinement in adult correctional facilities in the District of Columbia.[128]

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125 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014, p. 23.

126 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). See also Lanza-Kaduce et al., "Juvenile Transfer to Criminal Court Study: Final Report," p. 70.

127 Source: Juvenile Arrest Data, FY 2007-2012, Metropolitan Police Department, Office of Research and Analytical Services, November 22, 2013. See also: D.C. Lawyers for Youth and Campaign For Youth Justice, "Capital City Correction", May 2014.

128 D.C. Lawyers for Youth and Campaign For Youth Justice, "Capital City Correction", May 2014.

98. Lastly, the Commission was informed during its visit to Colorado that statutes providing for the direct filing of charges against children in adult courts were enacted more than 20 years ago in order to enable a harsher response to the supposed increase of youth involvement in the most serious types of crime, by granting prosecutors the unrestricted ability to transfer cases of children and adolescents to the adult system. However, reports reveal that of the approximately 1,800 cases of adolescents filed directly in adult courts in Colorado between 1999 and 2009, 85% involved less serious crimes, while only 15% involved charges of homicide, and only 5% involved charges of first-degree murder.[129]

99. The Commission notes the positive development that in recent years, several states have introduced legislative reforms restricting prosecutorial discretion, for example by raising the age of eligibility for direct-filing in adult court, increasing the accountability of prosecutors in the exercise of their discretion to file directly, and allowing for reverse-filing via court hearings. Illinois was the first state to introduce legislation completely eliminating all provisions that could be used to transfer a child or youth to the adult system without a court hearing.[130]

100. In particular, during its visit to Colorado, the IACHR observed that important legislative changes in the juvenile justice system have greatly reduced the number of children and adolescents who are being tried in the adult criminal justice system subsequent to the exercise of prosecutorial discretion. Under the reforms, the minimum age of eligibility for charges to be filed directly in adult court was raised to 16 years of age, and eligibility for transfer was limited to the most serious crimes. This resulted in a 78% reduction of cases that were filed directly in the adult system over the last 5 years.

101. Nebraska was another state to enact legislative reform; amendments have been made to the criteria used to determine whether or not youth may be transferred to adult courts when charges are filed against them, and where data on youth in contact with the adult court system is now required to be reported to the state on an annual basis.[131]

102. Nonetheless, the IACHR remains seriously concerned that these adjustments being made to domestic laws to limit the discretion given to prosecutors, while positive steps, are inadequate to address the ongoing violation of

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129 Colorado Juvenile Defender Coalition, "Re-directing Justice. The Consequences of Prosecuting Youth as Adults and the Need to Restore Judicial Oversight", 2012.

130 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

131 Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

children's human rights, as they fall short of restoring the right of all children charged with a criminal offense to a specialized juvenile justice system. Similarly, the Commission notes that the reform process that is underway to undo the regressive measures that were put in place in the past, and that constitute a violation of the standards established by the Inter-American human rights system, has been slow and cumbersome.

103. The IACHR is of the view that under the current state of legislation in the United States, the discretion granted to prosecutors in deciding when to transfer children to adult courts, without judicial oversight or age-appropriate and accessible proceedings, is in direct violation of children's rights. In this regard, the IACHR reiterates its concerns over these practices, which, as expressed in the Commission's thematic report on the subject, "not only deny accused children the protection of a specialized juvenile court, but also subject them to other grave consequences, such as the possibility that they might be sentenced as an adult or receive a tougher sentence than they would have received in a juvenile court."[132]

104. The Commission is especially alarmed by the arbitrary effect that the prosecutorial discretion has on criminal procedures involving children, in view of the fact that its operation does not ensure due consideration of the child's best interests, nor does it satisfy other mandatory standards or provide sufficient accountability or any form of redress for the violations caused by its use. One very important adverse consequence of this arbitrary mechanism is who children from certain racial or ethnic backgrounds, or that live in particular neighborhoods, or that are part of certain socioeconomic groups, are disproportionately affected.

### c. Statutory Exclusion of Children from Juvenile Jurisdiction

105. Statutory or legislative exclusion provisions are transfer laws that automatically exclude children from juvenile jurisdiction due to specific, objective criteria such as age, offense charged, or the presence of a prior criminal record. Such laws are in effect in 29 U.S. states.[133] Under such laws, cases that meet the criteria are automatically filed in adult courts, without the exercise of discretion by prosecutors. However, the Commission notes that police and prosecutors can still decide whether or not to charge an offense that requires statutory exclusion.

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132 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II, Doc. 78, July 13, 2011, para. 88.

133 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

106. The offenses that are typically included in such statutory exclusion provisions are the more serious or violent crimes, such as murder. However, several states have statutory exclusion provisions that provide for the automatic exclusion of adolescents from the juvenile justice system even when they are charged with less serious offenses. This is especially true in states where the law automatically excludes adolescents with any prior criminal record, regardless of the seriousness of the new alleged offense. The Commission is disturbed to note that only two states report the total number of cases that are barred from juvenile justice courts as a result of statutory exclusion laws.[134]

107. The Commission also observes the wide range of minimum ages at which children can be tried as adults in the different U.S. states, as a result of statutory exclusion laws. In the state of Mississippi for example, 13 year-old children are prosecuted as adults when charged with more serious crimes, while in the neighboring state of Alabama, the minimum age for statutory exclusion is 16 years old. In certain states such as Pennsylvania and Wisconsin, children as young as 10 years old are subjected to mandatory prosecution in adult courts when accused of certain offenses, including murder and other crimes of violence against the person.[135] In fact, Nevada and Pennsylvania automatically exclude all children from the juvenile justice system when charged with murder, regardless of their age.[136]

108. The extreme violation of children's rights that results from these laws was revealed in a recent case in Pennsylvania, which concerned a 10-year-old child who was charged with homicide and was subjected to mandatory prosecution as an adult. According to the published facts, state laws mandated that the prosecutor directly file the child's case in adult courts, regardless of his age.[137] These laws also prohibit the placement in juvenile detention facilities of children charged with homicide. Therefore the 10-year old child was reportedly held for several months in pre-trial detention in an adult jail. Similar cases have been identified in other states, such as in Wisconsin and Massachusetts, where adolescents as young as 12 and 14 years of age, respectively, are required by law to be prosecuted in adult courts when charged with more serious crimes.[138]

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134 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

135 U.S. Department of Justice, OJJDP,

136 Juvenile Justice GPS (Geography, Policy, Practice, Statistics), "Jurisdictional boundaries".

137 Published by Fox6 News, "I killed that lady", October 14, 2014.

138 The Christian Science Monitor, "Why a 10-year-old in Pennsylvania can be tried for murder as an adult", Anne Steele, October 14, 2014.

109. During its visit to New York, the Commission observed the impact of statutory exclusion provisions mandating that children as young as 13 years old be prosecuted as adults when charged with more serious crimes, one result being that they may be sentenced to life imprisonment.[139] This exclusion occurs without any consideration in family court of the circumstances of the individual case. In some cases police and prosecutors have a range of possible offenses for which they could bring charges, and in those cases, these authorities effectively exercise discretion over whether a child's case will ultimately fall under this provision. Moreover, the law defines eligibility for automatic transfer solely according to age and offense, without consideration of any other individual factors pertaining to the child. Adolescents tried as adults can only be returned to the juvenile system by order of a superior court if "to do so would be in the interests of justice," based on certain criteria.[140]

110. New York is one of the states that have passed especially broad provisions requiring the transfer or statutorily excluding children from the juvenile justice system who are accused of certain crimes.[141] The Commission observed on its visit that, under the current state of the law in New York, the transfer of children to the adult system has become a consistent practice, resulting in a large number of adolescents who have been sentenced to prolonged imprisonment despite the absence of a prior criminal record. Studies on the initial implementation of the New York statute indicated that there was no deterrent effect on violent juvenile crime, contrary to the objective of the statute as proposed by state legislators during the time of its passage into law.[142]

111. In consideration of the foregoing, the Commission reminds the United States of the Commission's recommendations to States in the region that they orient their approach to children in conflict with the law based on the best interests of the child and a juvenile justice system consistent with respecting and ensuring those interests. In this sense, the Commission has called on States to review and reform approaches based on public safety and punishment that do not take into account the need, characteristics and rights of children, which defer from those of adults. As the IACHR expressed in its report on Juvenile Justice in the Americas, it is necessary for States:

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139 U.S. Department of Justice, OJJDP .

140 Journal Issue: Juvenile Justice, Volume 18 Number 2 Fall 2008, "Juvenile Crime and Criminal Justice: Resolving Border Disputes", by Jeffrey Fagan.

141 Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Juvenile Justice Reform Initiatives, 1994-1996.

142 U.S. Department of Justice, OJJDP, Juvenile Justice Bulletin, "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?", June 2011.

> to develop public policies on children's human rights, taking an approach that emphasizes observance of the general principals of 'comprehensive protection' and the 'best interests of the child'. (…) State policies on this subject must strive to satisfy basic needs, create opportunities and respect for civil and political rights, including the right to a fair trial, the right to a proper legal defense for the duration of the proceedings, and use of incarceration only as a last resort and only for the most serious offences.[143]

112. The Commission highlights that international law mandates a separate juvenile justice system for children, under which the traditional objectives of criminal justice, i.e., deterrence and punishment, must give way to the rehabilitation and social reintegration of children and adolescents.[144] Therefore, treating children as adults, even when they are accused of committing the most serious offenses, is unacceptable. As stated by the Committee on the Rights of the Child:

> Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.[145]

## 3. Other Laws Imposing Adult Treatment on Children

### a. Blended Sentencing Laws

113. Legal provisions providing for blended sentencing are another set of laws that bring children in contact with the adult courts and adult criminal punishments.[146] Blended sentencing provisions allow a child to be sanctioned as an adult in the event that he or she violates conditions imposed in the juvenile system. Under such laws, courts are authorized to determine both a juvenile and an adult sentence when a child is convicted of

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143 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II, Doc. 78, July 13, 2011, para.136. See also IACHR, Press release No. 26/04, December 4, 2004.

144 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II, Doc. 78, July 13, 2011, para.26.

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

146 Some laws allow for juvenile courts to impose blended sentences.

a crime, with the adult sentence being suspended under the condition that the youth comply with the juvenile sentence. If the child or adolescent complies with the conditions of the juvenile sentence, without committing any further violation of the law, the adult sentence is revoked.

114. The Commission notes that 14 states in the U.S. authorize juvenile courts to give suspended adult criminal sentences, and 17 states allow criminal courts to give hybrid sentences for children or adolescents.[147] Of the latter, 10 states provide for exclusive blended sentencing, where the adult court must choose either a criminal or juvenile sanction for convicted children.[148]

115. The asserted purpose of these laws is to "encourage compliance" and deter possible misconduct by adolescents who are convicted under juvenile sanctions, through imposing a suspended, harsher adult sentence as a threat, as well as to offer a less severe alternative to youth tried in adult courts..[149] Experts in juvenile justice consistently affirm that threats, regardless of how serious they are, do not change adolescent behavior, due to the still-developing adolescent brain, with its limited abilities of foresight and reduced comprehension of consequences.

116. The Commission is concerned that blended sentencing laws expose adolescents to being sentenced as adults, contrary to the aim of the juvenile system to rehabilitate and reintegrate adolescent offenders into society, as established in international law. Blended sentencing provisions lead to a series of negative consequences that result in the violation of children's rights, often transferring youth to the adult criminal system and thereby denying them access to specialized rehabilitation programs, subsequently making them more likely to reoffend.

117. Blended sentencing laws are intended to lessen the effects of transfer laws in specific cases – in this sense, they are similar to reverse waiver laws – by offering a juvenile sentence to children who have been convicted in adult court.[150] Through this mechanism, courts review individual cases in order to determine whether to treat the offender as a youth or an adult. While this opportunity for judicial consideration of the individual circumstances of a child's case is a positive aspect of these laws, the Commission continues to be

147 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

148 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

149 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

150 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

concerned with the fundamental lack of recognition of the status of children that is inherent in such provisions. It is particularly troubling that children bear the burden of demonstrating that they "belong" in the juvenile justice system, whereas according to international legal standards, their access to the juvenile system should be ensured by virtue of their age.

118. Harmful consequences of these provisions were revealed through research conducted by the National Center for Juvenile Justice, which in summarizing its findings stated "[b]lended sentencing creates confusing options for all system actors … especially with respect to the juvenile's status during case processing and subsequent placement. This has repercussions on the definition of a juvenile with regard to compliance with the Juvenile Justice and Delinquency Prevention Act mandates."[151]

119. A common form of imposing juvenile sanctions on children in the adult criminal justice system is the youthful offender system (YOS), a mechanism otherwise known as "intermediate" or "third tier", which allows adult courts to set harsher, suspended adult sentences for adolescents and young adults convicted of more serious crimes. The system places the young offender in a youth-focused program that exists within the adult correctional system, in cases in which the youth in question are considered to be particularly responsive to rehabilitation. The initial YOS was created in Colorado in 1993, and was then quickly introduced in numerous other states.[152]

120. In Colorado, when sentencing a youth or young adult to YOS, adult criminal courts also levy lengthy suspended adult sentences. The adult sentences are revoked upon successful completion of the YOS sentence, i.e., provided that the young offender does not commit further crimes or contravene the regulations of the program.[153] A standard YOS sentence may involve anywhere between 2 to 6 years in the program, and is designed to socially reintegrate the youth or young adult in the last phase of the sentence.

121. Similarly, in Florida, adult courts can use their discretion to sentence youth and young adults (up to 21 years of age) under the "Youthful Offender" statute. Sentences under this statute are limited to a maximum of 6-years, including probation, parole, and incarceration in an adult facility, or a combination of these. While sentencing under the Youthful Offender statute

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151 Patricia Torbet et al., National Center for Juvenile Justice, State Responses to Violent Juvenile Crime 49 (July 1996).

152 Neal Miller, Institute for Law and Justice, Judicial Waiver and its Alternatives: A Legal Fact Sheet (Draft Report) 2 (Oct. 18, 1996).

153 Colorado Revised Statues, Title 18. Criminal Code, Article 1.3. Sentencing in Criminal Cases, Part. 4. Sentences to Imprisonment (C.R.S. 18-1.3-407, 2014). See also: Juvenile Crime, Grown Up Time, State Legislatures (National Conference of State Legislatures, Denver, Colorado), May 1995.

permits a shorter sentence than would result from an adult sentencing process, youth are nonetheless left with a felony conviction on their record.[154] In order for adult courts to exercise discretion so as to impose juvenile sanctions or sentence youth under the Youthful Offender statute in Florida, the adolescent charged must enter an "open plea". When entering an open plea, the adolescent pleads guilty to the most serious charge, and in doing so takes the risk of receiving a long adult sentence. For that reason, the only way that an adolescent may be certain of the eventual sentence is if an agreement with the prosecutor is reached; only prosecutors are able to decide not to pursue the more serious charges.[155]

122. During the Commission's visit to Colorado, formerly incarcerated youth and their families described to the Commission the negative effect of having adult sentences of excessive confinement "hang over their heads", and of the collateral consequences of being convicted in the adult system even when the result was an obligation to serve a reduced juvenile sanction. They also recounted the situations the youth faced as a result of being forced to serve their shortened sentences under the adult system. In spite of young offenders being sentenced under the youthful offender system and confined in a facility separated from adults and structured for adolescents and young persons, the IACHR observed that the overarching design and operation of the adult correctional system impedes adequate specialized treatment of youth that is necessary for their effective rehabilitation.

123. The Commission highlights that sentencing for youth must serve the primary aim of rehabilitation, and not retribution, as will be further analyzed below.

### b. "Once an Adult, Always an Adult" Laws

124. Other legislative provisions known as "once an adult/always an adult" laws have been enacted by 34 states, under which any child or youth with a prior record in the adult system is automatically transferred to adult courts when charged with committing another offense. In some states this operates for all subsequent charges, and in other states applies only for subsequent felony charges. These laws present another form of automatic exclusion of children from the juvenile justice system, in this case based on whether they have been previously tried in the adult system, and in some cases regardless of

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154 Florida Statute § 958.04. See also Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

155 Topher Sanders, "Angela Corey's Office Threatens Jacksonville Area Juveniles with Adult Charges, Matt Shirk and Private Attorneys Say," Florida Times-Union, February 1, 2014. See also Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

whether they were convicted or not in the previous instance. This is done with no individualized consideration by a judge, and means the legal situation of the child is determined by past proceedings.

125. The Commission became aware of the existence of this type of provision in the District of Columbia during its visit to the U.S. capital. On the positive side, current laws in D.C. ensure the rights of children under age 18 who are in conflict with the criminal law, and even extend such rights to young persons under 21 years of age, by way of a juvenile justice system that includes specialized courts as well as detention facilities geared specifically towards the rehabilitation of youth. Nonetheless, several exceptions to the legal protection of children exist, including once an adult/always an adult laws mandating that any person previously convicted in the adult system be excluded from provisions applying to youth, and be tried automatically in adult courts, regardless of the seriousness of the offense.

126. The IACHR notes that the Comprehensive Youth Justice Amendment Act of 2016 passed and was finalized after the Congressional review period ended, DC Act 21-566. This bill transfers oversight of youth who have been transferred to adult court from DOC to DYS in October 2018. According to the information the IACHR received, youth will not be immediately removed from the adult jail, but DYS will have oversight of their unit and youth will get to move back into the juvenile detention facility once there is evidence of capacity.[156]

### c. Reverse Transfer Laws

127. The laws that allow youth being tried in the adult system to have their cases returned to the juvenile courts are known as "reverse waiver" provisions. The IACHR observes with concern that these laws exist in only 25 states. Six U.S. states do not provide for reverse transfer laws, because in those states youth can only be tried in the adult system by a court order, i.e., judicial waiver; these are Hawaii, Kansas, Maine, Missouri, New Hampshire, and Texas.[157]

128. Under reverse transfer provisions, adolescents are granted a court hearing at some point during the proceeding, in order to request a return to the juvenile system. In such hearings, the adolescent presents evidence to the judge to demonstrate that he or she does not belong in the adult system. In

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156 http://jjie.org/2016/11/08/daniel-okonkwo-talks-about-the-comprehensive-youth-justice-amendment-act/

157 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

this hearing, an adult court decides whether or not the youth should be moved back to the jurisdiction of a juvenile court, a decision that can be appealed. The criteria to be considered by the court for the reverse transfer are usually similar to the criteria for the discretionary waiver.[158] Such is the case for example in Colorado, where adult courts are required by the state's reverse waiver law to consider a series of factors when deciding whether or not a direct-filed youth can be returned to the juvenile system.[159]

129. During its visit to Washington, D.C., the Commission was informed of the unavailability of a reverse waiver for children charged in adult criminal courts as a result of the exercise of prosecutorial discretion. As mentioned above, the new law passed in 2016, transfers oversight of youth who have been transferred to adult court from DOC to DYS in October 2018. Youth will not be immediately removed from the adult jail, but DYS will have oversight of their unit and youth will get to move back into the juvenile detention facility once there is evidence of capacity.[160]

130. These reverse transfer mechanisms exist to restore children's cases to juvenile jurisdiction, and many U.S. states are now adopting such provisions in their legal reforms. The Commission is troubled to note that, at present the decision on whether or not to return an adolescent's case to juvenile court is made by an adult criminal court that is not specially trained to deal with children, and that the adolescent bears the burden of establishing that he or she should be treated according to his or her status as a child.

### d. Children Excluded from the Juvenile Justice System for a Variety of Acts Including Non-Violent Offenses

131. Authorities in the different states visited repeatedly argued that children and adolescents are typically charged as adults for more serious crimes and that youth who are deemed to be particularly high risk for society must be treated as adults. However, the information available indicates that children are frequently criminalized as adults for a variety of acts including nonviolent offenses.

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158 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

159 Colo. Rev. Stat. tit. 19 (2012) § 19-2-517(3)(c). See also, National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

160 http://jjie.org/2016/11/08/daniel-okonkwo-talks-about-the-comprehensive-youth-justice-amendment-act/

132. The Commission notes with particular concern the increasing number of adolescents that are waived by a juvenile court order to the adult system as a result of charges for nonviolent crimes. According to the information reviewed, 50% of the cases transferred to adult court by judicial discretion in 2010 were as a result of property, drug, and public order offenses, demonstrating an increase since 1993 in transfers to the adult system based on these offenses, rather than an increase in transfers for more serious or violent offenses.[161]

133. As early as 1992, studies showed that the majority of youth tried in the adult criminal system were not transferred as a result of the most serious crimes. These studies revealed that approximately two thirds of the transferred youth were nonviolent offenders,[162] while only 34% were cases involving offenses against persons.[163]

134. Contrary to public fears that recent reforms to restore juvenile justice represent a "soft on crime" policy in the face of significant violence being committed by adolescents, the rate of arrests of adolescents under the age of 18 for the alleged commission of violent crimes has significantly decreased since 2002, by 28.5%.[164] Studies conducted by the U.S. Department of Justice have revealed that a minority of juvenile offenders commits serious crimes.[165] Various reports concerning 75 of the largest counties in the U.S. further indicate that two thirds of the adolescents prosecuted for more serious crimes had no prior arrests.[166]

135. In the federal sphere, an average of 400 adolescents were arrested annually by federal agencies[167] between 1994 and 2001, a number that is likely greater considering the high arrest rates of 18-year-olds who were younger at the time that the offense was allegedly committed.[168] Data from the same time period shows that federal arrests of persons aged 18 and younger for

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161 http://jjie.org/2016/11/08/daniel-okonkwo-talks-about-the-comprehensive-youth-justice-amendment-act/

162 Of the nonviolent crimes, 45% were property offenses, 12% were drug offenses, and 9% were other offenses.

163 U.S. General Accounting Office, Report to Congressional Requesters, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 1 (Aug. 1995).

164 Polaris Project, *p.* 34.

165 Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Fact Sheet No. 35 Serious Habitual Offender Comprehensive Action Program (August 1996).

166 National Council on Crime and Delinquency, "Youth Under Age 18 in the Adult Criminal Justice System", June 2006, available at. See also DeFrances, C. (2002). Felony Defendants in Large Urban Counties, 2002. US DOJ OJP Bureau of Justice Statistics. Accessed 04/09/2006 at http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm.

167 Federal law enforcement agencies include the U.S. Border Patrol and the Immigration and Naturalization Service, the U.S. Marshals Service, the Federal Bureau of Investigation (which has federal law enforcement responsibility on over 200 Indian reservations), and the Drug Enforcement Agency.

168 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

immigration-related offenses increased 145%. Moreover, drug offenses were the category of crime for which the largest number of arrests was made during those years.[169]

136. In the state of Michigan, the Council on Crime and Delinquency reported that of the 19,000 cases of adolescents of 17 years of age who were prosecuted as adults over the most recent 10 year period, almost 60% were considered to have committed nonviolent crimes, such as property and drug offenses, according to the classification of the Federal Bureau of Investigation.[170]

137. A 2012 report in Colorado states "a common assumption during the height of the 1993 special session was that there had emerged a new kind of juvenile offender who was beyond the control and rehabilitation of the juvenile justice system. Today, some 85% of youth prosecuted in the adult system are not accused of killing another person, and only 5% of all direct file cases are filed for first-degree murder."[171]

138. A recent report in Florida also indicates that prosecution of children as adults is not limited to the most severe crimes. From 2009 to 2013 in Florida, less than 40% of the charges for which youth were transferred to the adult criminal system were for violent felonies. Similar data reveals that children are transferred to adult court for property crimes at nearly equal rates as for violent felonies.[172]

139. In Florida, the list of crimes specified in transfer statutes was expanded to include all felonies for children aged 16 and older. According to information made available by the Florida Department of Justice to Human Rights Watch, half of the adolescents in the adult system are sent there for the commission of property crimes, such as house break-ins or vehicle theft.[173]

140. Moreover, many of the children in Florida's adult criminal justice system are not deemed to pose a high risk of re-offending, according to the Department

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169 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

170 Michigan Council on Crime and Delinquency, "Youth Behind Bars – Examining the impact of prosecuting and incarcerating kids in Michigan's criminal justice system", May 2014.

171 Colorado Juvenile Defender Coalition, "Re-Directing Justice: the Consequences of Prosecuting Youth as Adults and the Need to Restore the Judicial Reviews", 2012.

172 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014, pp. 24-27.

173 Human Rights Watch, "Branded for Life", 2014. See also, Florida Department of Juvenile Justice uses the "Positive Achievement Change Tool," to assess a juvenile's risk to reoffend. See also, Human Rights Watch, "Branded for Life", *supra*, 2014.

of Juvenile Justice's risk assessment tool.[174] Reports indicate that out of 363,000 youth arrested between 2007 and 2012, only 8.9% were adolescents with prior records as chronic offenders who had been charged with serious and violent crimes. Moreover, 44% of the youth arrested were neither classified as chronic offenders nor considered to have a serious history of offenses committed, and had not committed an offense against the person; only 29% were classified as violent, for having committed an offense against the person.[175]

141. According to information received by the IACHR, as a consequence of the extended list of offenses that are viable for transfer to adult courts in Florida, prosecutors frequently use their authority to file in adult courts as a way to obtain a guilty plea for acts that should not be criminalized. This has been observed for example in cases of minor theft within the school environment, where adolescents faced adult charges.

142. The IACHR reiterates that this shift toward more punitive treatment of youth is contrary to the nature and status of children, who differ from adults in significant ways, such as not having a fully developed ability to understand the consequences of their actions, a critical element when determining their culpability.[176] Giving primary consideration to the best interests of the child who is being held responsible for his or her criminal acts does not imply neglect for public safety. While children should be held accountable as appropriate for their criminal behavior, interventions that focus on their best interests, and that are therefore geared toward their rehabilitation, are also better for the society and public safety as a whole.[177]

143. In that regard, the Commission agrees with the Committee on the Rights of the Child when emphasizing that: "[a] strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC. ... In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public

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174 Human Rights Watch, report "Branded for Life", 2014. See also, Florida Department of Juvenile Justice uses the "Positive Achievement Change Tool to assess a juvenile's risk to reoffend. See also, Human Rights Watch, report "Branded for Life", *supra*, 2014.

175 Florida Dept. of Juvenile Justice, Juvenile Offender Seriousness: Myths v. Facts. Bureau of Research and Planning (Aug. 2013) Florida Department of Juvenile Justice (2013) Serious, Violent, Chronic Analysis, Briefing Report. See also Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

176 Publication of the Office of Child Development, "Special Report—Juvenile Justice: Rethinking Punitive Approaches To Addressing Juvenile Crime", *Developments,* January 2009, Volume 23, No.1.

177 Corriero, Michael A., Judging Children As Children – A Restorative Juvenile Justice System, Big Brothers Big Sisters Of New York City. Judge Corriero's ideas come from his lengthy experience presiding over a special session of a criminal court in New York City where children are tried as adults.

safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration."[178]

### e. Conclusion

144. International human rights standards have clearly set forth that the rules of juvenile justice must apply to all persons under the age of 18 years, and such persons must be under the competence of a separate juvenile jurisdiction when charged with a crime.[179] According to these standards, juvenile courts with primary jurisdiction over youth who commit criminal acts should be specially designed to take into account the specific needs of children, in keeping with the rehabilitative aims of juvenile justice.[180]

145. Moreover, as expressed by the Committee on the Rights of the Child, for a child accused of having infringed the criminal law, the right to be heard is a fundamental component of a fair trial and must be fully observed at all stages of the process.[181] The IACHR therefore urges the United States to restore the full jurisdiction of the juvenile system and its authority to review every stage of the judicial proceedings that involve youth accused of crime, and ensure the effective participation of youth in their trials. The Commission remains concerned with regard to reverse waiver provisions, as they do not fully ensure the right of children to a specialized system.

146. In summary, the various aforementioned forms of legislation that exclude children from the juvenile justice system, including jurisdictional age limits, transfer laws, and other mechanisms that bring children in contact with the adult criminal justice system, together constitute a stark regression away from the standards that have been otherwise achieved by the United States in adapting its domestic laws to the principles of the international *corpus juris* concerning the rights of children. While national justice reform efforts in recent years have worked to modify transfer laws and similar legislative provisions across the U.S., the Commission is of the view that it is necessary

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

179 UN Convention on the Rights of the Child, Art. 40. See also, Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para.48.

180 Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para.92. See also United Nations Economic and Social Council, Guidelines in the implementation of the Convention on the Rights of the Child with regard to juvenile justice, resolution 1997/30, July 21, 1997.

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

for the United States to adopt significant measures, at the national and state level, in order to prohibit all children under the age of 18 from being prosecuted and sentenced in adult courts.

147. The Commission further reiterates that the rights of children in conflict with the law, in conjunction with the obligations of child protection as stipulated in Article VII of the American Declaration and Article 19 of the American Convention, are to be observed and adhered to throughout the national territories of the States in the region. Laws that differentiate between and exclude certain children and adolescents, based on the type of offense or the local jurisdiction where it is alleged to have occurred, are unacceptable. The Commission has emphasized that States organized under a federal structure cannot invoke such a structure as an excuse for their failure to comply with international obligations.[182]

148. International law mandates that any State response to children found responsible for violating criminal laws must respect the principle of proportionality. This means that the punishment imposed by the State must be in proportion to the seriousness of the offense. Judicial proceedings should only take place when diversion through community-based programs is not possible. Moreover, measures of confinement may only be used as a last resort, and only for the most serious offenses. Alternatives to confinement must be readily available throughout the juvenile system, to be used in response to less serious offenses.

149. However, during the Commission's visits to the United States, it was able to confirm that the response is, overall, a punitive one. When consulting experts in the course of preparing this report, the IACHR was informed that youth consistently enter the justice system for behavioral problems or other acts that would not constitute violations of the criminal law if committed by adults (referred to as status offenses), or that should in any event be dealt with through a comprehensive system of prevention and protection, rather than criminal proceedings. This widespread practice further results in the inappropriate detention of status offenders and non-offenders in juvenile detention facilities, contributing to the overpopulation of such facilities and depletion of resources.

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182 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II, Doc. 78, July 13, 2011, para.138.

## *D. Impact on Children of the Adult Criminal Procedure: Failure to Ensure Due Process Guarantees*

150. According to the information received by the Commission, the rights of children and adolescents who are charged with committing crimes in the U.S. are not duly protected at each stage of the proceedings, which in turn, has further negative consequences for those who are transferred and sentenced in the adult system. In particular, the IACHR has received information regarding: the absence of quality legal counsel; the possibility that youth can waive their right to legal representation; the fact that youth undergo long periods of time awaiting the disposition of their cases; and the possibility that many youth end up in the adult system as a result of plea agreements, without fully comprehending the consequences of such agreements.[183]

151. The Commission reiterates that youth are entitled to the full range of due process guarantees that apply to adults, such as the presumption of innocence, the right to a defense, and the right of appeal, among others, when prosecuted for a criminal act that gives rise to a possible custodial sentence. In its report on Juvenile Justice in the Americas, the Commission explained the special ways in which these guarantees should be observed in cases involving children under the age of 18, who require specific protections.

152. Through a series of decisions of the Supreme Court of the United States, juvenile justice proceedings in the U.S. have been granted critical procedural protections, while maintaining several significant differences from adult proceedings.[184] In 1966, courts were mandated to provide the "essentials of due process" when transferring youth to the adult system by judicial waiver. In 1967, youth were afforded four basic constitutional rights in hearings that could impose deprivation of liberty, making them participants rather than bystanders in their proceedings.[185] Further decisions made juvenile trials equal to criminal trials, while making jury trial an exception in juvenile proceedings. Finally, more recent Supreme Court rulings, that will be discussed further in this report, recognized the fundamental difference between children and adults, limiting the imposition of the death penalty and

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183 "Trends in Juvenile Justice State Legislation: 2001-2011." Washington D.C.: National Conference of State Leglatures, June 2012. See also "You're an Adult Now: Youth in the Adult Criminal Justice Systems". Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011.

184 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

185 *Gault*, 387 U.S. at 18. The four basic rights include the right to counsel, the right to be notified of the charges, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.

life sentences without parole for persons under the age of 18 at the time of the acts.

153. In essence, the U.S. Supreme Court has recognized what separates children from adults, by acknowledging their lesser responsibility by virtue of their immaturity, even though they are able to commit acts as serious as those committed by adults. Accordingly, any proceeding that involves them, as well as the sanction imposed on children found guilty of crime, should respect these differences.

154. Despite this understanding at the highest level of the U.S. court system of children's level of development and lesser culpability, hundreds of thousands of children in the United States are denied their essential guarantees in adult criminal proceedings that do not respect or acknowledge their status as children, with what can be a devastating impact on their lives. These youth face adult treatment and punishment which all too ofter includes a confusing proceeding neither they nor their family understand, much less participate in, lengthy adult sentences, incarceration in adult prisons, and a lifetime criminal record, instead of facing an age-appropriate trial in the juvenile system, being sentenced to treatment for a limited time for their rehabilitation, and being granted a cleared record upon satisfactory completion of the sentence.[186]

155. In its report on Juvenile Justice, the Commission explained the standards of due process that must be applied in the Americas to court proceedings involving youth charged with committing a crime, as established in international law. These are reflected in the rights to special protection for children set forth in the American Declaration. Moreover, other instruments such as the Beijing Rules, the Havana Rules, the Tokyo Rules, and the Riyadh Guidelines, make reference to the rights of children that must be safeguarded in proceedings that involve them.[187]

156. The Commission has observed that due process guarantees are not adequately and consistently observed by the different jurisdictions of the United States, when children are prosecuted and sentenced in adult rather than juvenile systems. In the following paragraphs, the Commission will examine several situations of particular vulnerability in this regard.

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186 Patricia Torbet et al., National Center for Juvenile Justice, State Responses to Violent Juvenile Crime 49 (July 1996).

187 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.148.

## 1. Lack of Effective Participation in the Proceedings

157. During its expert consultation in the preparation of this report, the IACHR was informed that the competency of children being charged as adults is not evaluated, especially regarding the psychological consequences of confinement in adult facilities while awaiting trial. This negatively affects children's right to be heard and to participate in the proceedings. Moreover, due to the design of the adult system, which is geared toward persons who have reached the age of majority and from whom a corresponding level of maturity is therefore expected, children and adolescents very often do not comprehend the proceedings that involve them. This is particularly critical, as any procedural protection is futile if the child involved does not understand the criminal proceedings to which such protections apply.

158. A study conducted in the U.S. on the competency of youth to face trial revealed that adolescents are more likely to "make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent or accepting a prosecutor's offer of plea agreement."[188] Other studies have found that youth are also inclined to plead guilty to charges for acts they did not commit, when pressured by authorities.[189]

159. Children who have spent time in both the juvenile and adult systems have explained that the adult systems can be incomprehensible. In its 2014 report, Human Rights Watch reported that in interviews with more than a hundred adolescents whose cases were filed directly in adult courts in Florida, and in interviews with their families, the interview subjects consistently admitted to feelings of incomprehension and confusion in the adult system. Similarly, an analysis of their cases revealed that many youth plead guilty to offenses that are eligible for adult prosecution, without fully comprehending the consequences of such pleas.[190]

160. In reference to the treatment they received from persons in authority in adult criminal proceedings, as opposed to proceedings in juvenile courts, youth perceived an overall push to impose harsher and lengthier punishment on them in the adult system, instead of efforts to focus more on their rehabilitation. One adolescent expressed that "[i]n juvenile court, I felt

188 Thomas Grisso et al., "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," Law and Human Behavior, vol. 27, no. 4 (August 2003), p.357. See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute," April 2014.

189 Cleary, Hayley M. D., Police interviewing and interrogation of juvenile suspects: A descriptive examination of actual cases, Law and Human Behavior, Vol 38(3), Jun 2014, pp.271-282.

190 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

like the judge cared a little more than adult court. In adult court you could tell there were a lot of people coming through so the judge didn't really care about your case other than what the charges are, and the prosecutors were just trying to give you as much time in prison as they can."[191]

161. The Commission is aware of arguments to the effect that the systems for youth must maintain a rehabilitative approach and hence should not be required to ensure all of the due process rights that are granted to adults in the more punitive adult system.[192] In this regard the Commission reiterates that children's fundamental rights must be upheld, and when children are held criminally responsible for their behavior they must be afforded the same instruments of defense as are granted to adults, particularly in a system that is not designed to meet their age-appropriate needs and where the procedures in place do not offer a fair determination as to their competency to stand trial.[193]

162. The IACHR recalls that all juvenile justice procedures and all infrastructure of the juvenile justice system must be tailored to ensure rights of children, and procedures and infrastructure that fall short of this requirement must be progressively brought up to the applicable standard.[194] The IACHR reiterates the State's obligation to observe minimum standards. The Committee on the Rights of the Child, has explained that:

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.[195]

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191 Human Rights Watch interview with incarcerated youth, Sumter Correctional Institution, Sumter, Florida, May 28, 2013. Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

192 U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: 2006 National Report, pp.95-96 (2006). See also, National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

193 WL: Competency to stand trial and criminal responsibility in the juvenile court, in Juvenile Homicide, edited by Benedek EP, Cornell DG, Washington, DC: American Psychiatric Publishing, 1989.

194 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.95

195 Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para.34. See also, IACHR, Juvenile Justice and Human Rights in the Americas, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.95.

163. Moreover, as expressed by the Committee,

> "a fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices."[196]

## 2. Absence of Specialized Defense for Children and Adolescents

164. Information received by the Commission indicates that the right to specialized defense for children and adolescents accused of committing a crime is not uniformly respected in the United States, as there is no constitutional obligation in that regard. In light of the fact that under the current state of the law, children and adolescents are consistently faced with possible transfer to adult court, there is a requirement of a specialized defense to effectively handle all legal matters regarding such complex hearings and procedures, in order to protect the rights of children and adolescents.[197] However, the information received by the Commission has demonstrated that many defense attorneys appointed to represent children accused of crimes are not sufficiently specialized, or often do not employ necessary diligence with respect to their more vulnerable clients, due to lack of training or resources specific to this field. As a result, some attorneys representing children in justice proceedings frequently and wrongly advise their clients to accept plea bargains that allow the children to be transferred to the adult system.

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196 UN Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10 (2007), para.46. Convention on the Rights of the Child, resolution 44/25 of 20 November 1989, art. 40 (2) (b) (iv): "Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (…) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality (…)."

197 National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

165. For example, reports in Colorado have shown that, in 45% of all juvenile cases, and as a result of the absence of legal representation of youth in the early stages of proceedings in which they are charged with crimes, the defendants waive their right to counsel, or choose to enter plea bargains.[198] This is especially troubling when considering the consequences faced by a child who agrees to a plea bargain, which may include proceedings and sentencing in adult courts.[199]

166. Other possible consequences of plea negotiations can arise when the youth or a family member is involved in proceedings with Immigration and Customs Enforcement (ICE) that may result in deportation.[200] The Commission was made aware of such serious consequences during its visit to Colorado, in interviews with youth deprived of liberty. Adequate counsel for children at early stages in the proceedings is therefore vital.

167. Children and adolescents who are convicted and sentenced in the adult system also require legal counsel post-sentencing, to represent them in periodic reviews of their custody and in any matters that require court involvement after they are committed to a correctional facility. During its visit to Colorado, the Commission heard from youth who had been sentenced in adult courts and who were being held in facilities that were administered by the adult correctional system. These youth explained to the Commission that they frequently did not have access to legal representation in matters related to their custodial sentence, and that as a result many protections of their rights that existed in theory were not accessible in practice. The Commission received very similar testimonies from adolescents from New York and Michigan.

168. In consideration of these issues, the IACHR emphasizes that, pursuant to the principle of specialization that underlies the requirement of a separate juvenile justice system, a child's right to defense in court proceedings entails that any lawyer or social worker appointed to defend him or her must be trained in children's rights and specialized in juvenile justice. Public defender services with high quality service standards, specialized in juvenile

198 Colorado Juvenile Defender Coalition (CJDC), "Kids without Counsel: Colorado's Failure to Safeguard Due Process for Children in Juvenile Delinquency Court", October 2013. See also National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings," 2012.

199 Lafler, 132 S.Ct. at 1384; Frye, 132 S.Ct. at 1407-08.

200 National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

justice, must be available throughout the entire U.S. territory, and must enable appropriate participation of the child in the proceedings.[201]

169. The Commission has received information about instances in which the principle of presumption of innocence of youth was not respected, especially youth who were facing trial in the adult system. This is exacerbated in the context of the pressure or even explicit threats that child defendants face when a prosecutor is considering the possibility of filing directly in adult courts. According to the information received by the Commission, Prosecutors threaten to use their discretionary power to file cases directly in adult courts in order to compel youth to enter into plea bargains that ensure a custodial sentence in the juvenile system.

170. The Commission has been informed that youth often admit to having committed the offenses with which they are charged, in order to avoid prosecution, lengthy sentences, and other long-term consequences in the adult system.[202] In fact, a report by the Department of Juvenile Justice in Florida found that it is the adolescents least deserving of punishment by incarceration who are the most inclined to accept such plea bargains.[203] Such adverse effects are observed in counties across the state, where, according to published reports, approximately 80% of youth sentenced to custody in the juvenile system have been threatened with prosecution in the adult system in order to obtain a guilty plea.[204]

171. The Commission has observed that in some cases, a further violation of children's rights is the fact that, as revealed by data referenced earlier in this report, they are held in pre-trial confinement in adult facilities for extended periods of time. One previously incarcerated youth whom the Commission interviewed during its visit to Washington D.C. reported having been deprived of his liberty in an adult jail for approximately 3 years while awaiting trial in the adult court system, before his charges were eventually dismissed. The Commission received the same information in New York during its visit, especially from the adolescents it interviewed at Rikers Island. Multitudes of similar accounts from states across the U.S. have been reported to the IACHR.

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201 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.174-175.

202 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute, April 2014.

203 Florida Department of Juvenile Justice, "Briefing Report: Direct Commitments," June 21, 2013, pp. 2-4. See also Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

204 Florida Times-Union, by Topher Sanders, "Angela Corey's Office Threatens Jacksonville Area Juveniles with Adult Charges, Matt Shirk and Private Attorneys Say," February 1, 2014,. See also Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

### 3. Lack of Parents´ Participation in the Proceedings

172. Through its various visits and its review of information provided, the IACHR has repeatedly observed that parents' active participation of their children is frequently limited or obstructed when children are prosecuted as adults. This occurs mostly as a result of the fast pace and incomprehensibility of adult criminal proceedings. Adult proceedings, having been designed for persons who have reached the age of majority, have nor given consideration to the involvement of a defendant's family. As a consequence of the barriers to parental involvement, children tried as adults are even less able to comprehend the proceedings that affect them.

173. Specifically, during its visit to Washington, D.C., the Commission learned that when youth are charged in adult courts, the courts do not mandate or facilitate the involvement of the children's parents, because the children are treated as adults and are therefore considered to be independent and mature individuals not in need of parental guidance and assistance during the proceedings. This is in stark contrast to the juvenile system, where juvenile courts require the active participation of children's parents and family in every stage, as an essential element of the proceedings.

174. Interviews with families of incarcerated youth in Florida likewise revealed that proceedings in adult courts are fast-paced and complex, impeding family members from participating. They indicated that during their experiences in the juvenile system, the court had taken special measures to guarantee that they were present and involved in any hearing, but once the case was transferred to the adult system, they had been completely disregarded and were not involved in their children's hearings in adult court, a traumatic experience for both the children and their families. Similar information was provided in New York, in interviews with families and adolescents in pre-trial detention.

175. The IACHR emphasizes that in any proceeding involving a child accused of crime, every effort must be made to secure the participation of his or her parents or legal guardians, unless it has been determined that this would be harmful to the child's best interests and contrary to an adequate defense at trial.[205] The American Declaration, the ICCPR and other applicable standards clearly set out the rights of children to special protection, as well as the obligation to respect the role of the family in the life of the child. [206]

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205 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.193.

206 The critical importance of the presence of parents in court hearings of youth charged with crime has likewise been set out in the CRC in Article 40.2(b), and has been underscored by the Committee on the Rights of the Child,

### 4. Absence of or Insufficient Right to Appeal

176. The Commission has observed that the right to appeal has not been observed or fully respected in multiple situations related to the laying of charges and prosecution of children in the adult criminal justice system in the United States. Prosecutors are often empowered to decide whether to file charges against a child in juvenile or adult court, without being required to state their reasons, and in many systems there is no way to challenge the decision.[207] In contrast, judicial waivers guarantee at a minimum that the determination is made by a judge, based on established guidelines and with the obligation of issuing written reasons, allowing for the decision to be appealed.

177. The Commission has been informed that in addition, prosecutors often make this determination absent clear criteria on how the defendants status as a child must be considered, nor are they obligated to follow written guidelines or take particular factors into account in each case. Thus, their ability to make objective decisions in the child's best interests, without being influenced by prejudice or irrelevant or external factors, might be weakened, and in most cases the decision is not subject to judicial review.

178. According to guidance provided by the National District Attorneys Association, prosecutors are responsible for ensuring that "discretionary decisions, such as whether to file a petition, transfer a case to adult court, or offer a plea deal, are not inappropriately influenced by race or any other impermissible factors."[208] Nevertheless, the Commission is concerned that no effective procedural protections are granted that would allow child defendants to challenge and request examination of the significant decisions that are made by prosecutors to exclude child defendants from the juvenile justice system.

## *E. Racial and Ethnic Disparities*

179. In light of the information it received and examined, the IACHR finds that under the current state of the law in the U.S. related to children in contact

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in light of the psychological and emotional assistance that parents generally provide to their children. See also UN Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10 (2007), para.53.

207 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File Statute," April 2014.

208 National District Attorneys Association, Resource Manual and Policy Positions on Juvenile Crime Issues, 8-9 (2002).

with the criminal justice system, certain laws, policies, and practices have a disproportionate and discriminatory impact on certain groups, resulting in the over-representation of members of such groups in the criminal justice system. This is the case for children who are tried in the adult criminal justice system and confined in adult detention facilities.[209] According to information received by the Commission, these disparities increase with each step further into the criminal justice system, beginning with arrest and referral to the juvenile system, through transfer to adult courts, to sentencing and confinement in adult correctional facilities.

180. In this regard, according to the information that the IACHR received, children of African American descent represent 16% of the total youth population in the U.S., 28% of all youth arrested, 35% of youth transferred to adult courts, and 58% of youth sentenced to confinement in adult prisons.[210] As disclosed by the U.S. government, such disparities with regard to race and ethnicity exist even before youth come into contact with the justice system, with racial minorities being over-represented in child welfare and foster care systems, as well as in school suspensions, expulsions, and referrals to law enforcement.[211]

181. Racial and ethnic disparities are observed in the early stages of justice proceedings, where, in some cases, as a result of the application of "zero-tolerance" policies in schools and the use of punitive disciplinary measures, African American adolescents as well as those of Hispanic ethnicity are respectively 3.5 and 1.5 times more likely than Caucasian youth to be expelled from schools.[212] Studies show that 70% of all school referrals or arrests nationally involve children of African American or Hispanic background, even though these students make up only 40% of the total population of school enrollment.[213] According to these studies, states where particularly high disparities are observed in these early stages of juvenile justice are Wisconsin, Minnesota, Nebraska, Iowa, and Pennsylvania.[214] The

209 "Trends in Juvenile Justice State Legislation: 2001-2011." Washington D.C., National Conference of State Leglatures, June 2012.

210 National Council on Crime and Delinquency, "Justice for Some: Differential Treatment of Youth of Color in the Justice System", 2007.

211 U.S. Department of Justice, OJJDP, Disproportionate Minority Contact (DMC).

212 Advancement Project, report "Test, Punish and Push Out: How Zero Tolerance and High-Stakes Testing Funnel Youth into the School", March 2010. Based on data of the U.S. Department of Education, "Civil rights data collection for 2006"; National Center for Education Statistics, "Digest of Education Statistics, Table 95: Public elementary and secondary school students, by racial/ethnic enrollment concentration of school: Fall 1995 and fall 2002", 2004.

213 Office for Civil Rights, the Transformed Civil Rights Data Collection (CRDC), March 2012.

214 Advancement Project, "Test, Punish and Push Out: How Zero Tolerance and High-Stakes Testing Funnel Youth into the School", March 2010. According to this report, in Wisconsin, African American children are 7 times more likely to be suspended, as compared to Caucasian children; in Minnesota, Nebraska, Iowa, and Pennsylvania, African American children are 4.5-6 times more likely to be suspended.

Commission observed during its visit that Hispanic children in Colorado were 50% more likely than Caucasian youth to be referred to police.[215]

182. The Commission finds particularly troubling the fact that children are too often exposed to contact with law enforcement agencies within the school and too often subjected to arrest. Furthermore, police making arrests in schools often target members of racial or ethnic minorities.[216] Civil society representatives have affirmed to the Commission that youth who are members of racial or ethnic minority groups are more likely to be referred to the police for school disciplinary issues, while Caucasian youth are more likely to be dealt with by the schools' internal systems. The disproportionate police contact that is experienced by children of certain racial or ethnic groups, and from lower-income communities, may contribute to an increased risk of such children becoming involved in crime, as this disproportionate impact stigmatizes them and affects their educational outcomes and social involvement.

183. According to the U.S. Department of Justice, African American youth are twice as likely as Caucasian youth to be arrested.[217] Information received by the Commission indicates that law enforcement agencies emphasize policing in disadvantaged communities with concentrations of racial groups in a more aggressive manner than they do in neighborhoods with inhabitants of predominantly Caucasian descent. A Massachusetts study revealed that due to this observed tendency of aggressive police patrols in certain urban neighborhoods, the likelihood of arrest for youth who are members of racial or ethnic minorities is higher than that of white youth.[218]

184. During its visit, the Commission received information that indicated that in the State of New York, more than 70% of youth arrested are of African American or Hispanic background, although only 32% of the population of New York is either African American or Hispanic. Moreover, African Americans and Hispanics account for 90% of the population of youth in adult

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215 Advancement Project, "Test, Punish and Push Out: How Zero Tolerance and High-Stakes Testing Funnel Youth into the School, March 2010." Based on information provided by the Colorado Department of Education, 2006-2007 safety and discipline indicators, and Pupil counts by racial/ethnic group.

216 The American Bar Association, Coalition on Racial and Ethnic Justice, Council for Racial and Ethnic Diversity in the Educational Pipeline, Criminal Justice Section, "School-To-Prison Pipeline: What Are The Problems? What Are The Solutions?"

217 National Center for Juvenile Justice, Juvenile Arrest Rates by Offense, Sex, and Race (1980-2011), February 2014; see also Joshua Rovner, The Sentencing Project, "Disproportionate Minority Contact in the Juvenile Justice System".

218 U.S. Department of Justice, OJJDP, Disproportionate Minority Contact (DMC).

prisons, revealing their increased likelihood of incarceration relative to Caucasian youth. [219]

185. In addition, the IACHR received information indicating that at the same time, 83% of the adolescents who are prosecuted in adult courts are members of racial or ethnic minority groups, 62% of which are African American and 19% of which are of Hispanic background.[220] The likelihood that adolescents who are members of racial or ethnic minorities are transferred to the adult criminal justice system, as opposed to Caucasian youth, has been increasing gradually. According to the National Juvenile Court Data Archive, in 2010 52% of cases that were judicially waived to the adult criminal justice system involved white youth, as opposed to 62% in 1985. There was a corresponding increase in judicial transfers to the adult system of youth who were members of racial or ethnic minority groups, such as African American youth, who accounted for 36% of such transfers in 1985 and 44% in 2010.[221] The overrepresentation of African Americans among youth who are prosecuted in the adult criminal system is observed across various types of offenses. The defendants are African American in 87% of the drug offense cases in which children are prosecuted in the adult system, 48% of the property offense cases, and 63% of the public order offense cases.[222]

186. According to information received by the IACHR, racial and ethnic disparities are also observed with regard to the disproportionate and harsher treatment of children from certain racial or ethnic groups as compared to Caucasian youth, where the data shows that racial or ethnic minority youth are more likely to be sentenced to adult correctional facilities, and for longer periods of time, when charged with the same offense.[223] This was observed in Colorado, where 82% of the youth sentenced to the Adult Department of Corrections' facilities were of African American or Hispanic descent, while 75% of the cases that were dismissed involved Caucasian youth.[224] It was also observed during the visit to Riker's Island Correctional Facility in NY city, where the IACHR observed a disproportionate representation of African American and Latino youth.

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219 New York Division of Criminal Justice Services, Office of Justice Research and Performance, Criminal Justice Case Processing of 16-17 Year Olds, January 2013, p.3.

220 Campaign for Youth Justice, "To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution", 2007.

221 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010", February 2014.

222 Campaign for Youth Justice, "To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution", 2007.

223 Mark Soler, Dana Shoenberg & Marc Schindler, "Juvenile Justice: Lessons for a New Era", 16, Georgetown Journal on Poverty Law & Policy 483, 531–32 (2009).

224 Data from 2009-2010. See Colorado Juvenile Defender Coalition, "Re-Directing Justice: the Consequences of Prosecuting Youth as Adults and the Need to Restore the Judicial Reviews", 2012.

187. The Commission has also been told that in some U.S. states such as California and Pennsylvania, Afro-descendant children are 20 times more likely to receive life sentences without the opportunity of parole. According to the information the IACHR received, in California, Hispanic youth have been sentenced to life imprisonment at a rate 5 times greater than that of white youth.[225] Similarly, in Michigan 73% of youth sentenced to life imprisonment are of a race or ethnicity other than white, even though non-white races and ethnicities only represent 29% of the general population.[226]

188. The Commission has observed that on a national level, of those persons serving life sentences without parole for crimes committed when they were under the age of 18, 77% are African American or Hispanic. In particular, Afro-descendent youth are 10 times more likely to receive such sentences than are white youth.[227]

189. Under the current federal law concerning juvenile justice, states that participate in the federal grant program must report data on youth in contact with the nine specified stages of the criminal justice system, disaggregated by race. The nine stages are: arrest or law enforcement referral; referral to court; diversion; secure detention; filing of charges or petition; adjudication or finding of guilt in the juvenile system; probation supervision; secure confinement; and transfer to adult court. The data must include statewide numbers as well as those of three specified counties in each state.

190. In its examination of the information provided concerning the disproportionate contact with law enforcement of certain races and ethnicities, the IACHR has observed inconsistent data with regard to Hispanic youth, as multiple states do not report disaggregated data with regard to ethnicity. Some jurisdictions treat Hispanic status as an ethnicity, as opposed to a race, and a Hispanic person can be white Hispanic or non-white Hispanic. As the IACHR was informed during the expert consultation that was held in preparation of this report, states such as Michigan treat Hispanic as an ethnicity, and do not include disaggregated numbers for Hispanics, but rather include Hispanics in the "white" population. Thus,

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225 Michele Deitch, et al, *From Time Out to Hard Time: Young Children in the Criminal Justice System.* Austin Texas, University of Texas at Austin, LBJ School of Public Affairs, pp. 32 and 34. See also, Human Rights Watch (HRW) and Amnesty International, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States" (2005), p. 40. Human Rights Watch, "When I Die They'll Send Me Home: Youth Sentenced to Life without Parole in California" (2008).

226 Michigan v. Raymond Curtis Carp, Michigan v. Wolfgang Eliason, and Michigan v. Cortez Roland Davis, Amicus Curiae Brief of the NAACP Legal Defense and Educational Fund, Inc. in Support of Defendant-Appellants, S.C. Michigan No. 146478 (Feb. 20, 2014)

227 The Sentencing Project, "Juvenile Life Without Parole", 2011; Human Rights Watch and Amnesty International, "The Rest of Their Lives: Life without Parole for Child Offenders in the United States", 2005.

nationwide data on Hispanic contact with law enforcement should be considered an underestimate.

191. The IACHR recently held public hearings in light of its growing concern over the treatment of African-Americans in the U.S. criminal justice system. During these hearings the Commission was informed that law enforcement officers at the local, state, and federal levels disproportionately target and arrest persons of certain races under state laws. Authorities representing the U.S. government recognized that the United States disproportionately incarcerates persons of African-American descent, affirming its commitment to addressing disparities in the criminal justice system. In particular, information provided at the hearings revealed that this racial discrimination has an especially high impact on adolescents, with respect to abuse committed against them by police, as well as their prosecution, sentencing, and incarceration in the adult system. Expressing its grave concerns regarding these matters, the Commission highlighted the need to prioritize prevention policies, as well as collect and analyze data to study the causes of youth involvement in crime.[228]

192. The Commission shares the concerns raised by the UN Committee on the Elimination of Racial Discrimination, in its recent concluding observations. It called upon the U.S. to "intensify its efforts to address racial disparities in the application of disciplinary measures, as well as the resulting 'school-to-prison pipeline', throughout the State party, and ensure that juveniles are not transferred to adult courts and are separated from adults during pretrial detention and after sentencing."[229]

## *F. Sentence for Children and Adolescents in Adult Criminal Courts are Likely to be More Severe than those in Juvenile Courts*

193. Of the youth convicted of violent offenses in adult criminal courts nationwide, 79% received sentences of incarceration, compared to only 44% of those found guilty of violent offenses in the juvenile system who were sentenced to confinement.[230] The findings are similar for non-violent

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228 IACHR Press Release 131/14, Report on the 153rd Session of the IACHR, December 29, 2014.

229 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of United States of America, CERD/C/USA/CO/7-9, September 25, 2014.

230 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

offenses, with more severe sanctions being given to youth who are tried as adults as opposed to those tried in age-appropriate juvenile systems.

194. The Supreme Court of the United States acknowledged in 2005 that, due to their stage of development, children are less culpable and "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[231] In consideration of the facts of child development that have been established by research, the Supreme Court ruled that children should receive less harsh sentences, and should not receive the death penalty. Moreover, the Supreme Court recognized that children have a higher likelihood of rehabilitation, and are not as responsive to the deterrence goal of punitive sanctions.[232]

195. According to the American Medical Association, the American Psychiatric Association, other prominent organizations, and research that has been conducted in the United States, it is harder for adolescents to control their behavior, nor do they have the foresight of a mature adult, because of the stage of their brain development.[233] Youth do not take into account future consequences or implications in the same way or as much as adults do. For this reason, adolescents often engage in risky behavior, especially when pressured by peers, and are not deterred from committing crimes by the threat of harsh penalties.[234]

196. Nonetheless, practice across the United States is far from reflecting this basic understanding of how children are different from adults, as courts continue to impose adult sentences on children, disregarding their status and their specific developmental needs for rehabilitation. The Commission is aware that in Florida, for example, children and adolescents may be sentenced in adult court with long-term consequences, as opposed to being considered for a range of age-appropriate sentencing options in the juvenile system. While youth sentenced by juvenile courts face a maximum confinement of 36 months in a secure facility for youth, accompanied by rehabilitative-focused programs, youth who are convicted as adults consistently face extremely

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231 Roper v. Simmons, 543 U.S. 551 (2005).

232 D.C. Lawyers for Youth and Campaign for Youth Justice, Capital City Correction, May 2014.

233 Brief of AMA et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005). See also, e.g., Steinberg et al., "Age Differences in Future Orientation and Delay Discounting", William Gardner and Janna Herman, "Adolescents' AIDS Risk Taking: A Rational Choice Perspective," in Adolescents in the AIDS Epidemic, ed. William Gardner et al. (San Francisco: Jossey Bass, 1990), pp. 17, 25-26; Marty Beyer, "Recognizing the Child in the Delinquent," Kentucky Child Rights Journal, vol. 7 (Summer 1999), pp. 16-17; National Juvenile Justice Network, "Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates," September 2012, pp. 1-2.

234 Chein et al., "Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry," Developmental Science, p.F1.

long sentences, due to mandatory minimum sentences or other mandatory sentencing laws of the adult system.

197. In fact, as stated in Florida's criminal legislation, adult sentences are presumed to be appropriate for youth who are convicted in the adult criminal system, without consideration of the child's needs and capacity for rehabilitation, and adult courts are not required to justify or give reasons for imposing adult sanctions on adolescents.[235] Consequently, the number of children sentenced to incarceration in the adult correctional system, as opposed to probation, varies greatly among the different localities in Florida. According to a recent Human Rights Watch report, 74% of youth tried as adults receive sentences of imprisonment in the 4th Circuit, while only 12% do in the 11th Circuit.[236]

198. The existence of mandatory minimum sentencing in Florida compounds the arbitrary impact of the adult criminal justice system on youth, not only at the sentencing stage, but also regarding the determination of guilt. As prosecutors have been granted discretionary power to directly file charges against youth in the adult system, they frequently use the threat of possible lengthy minimum sentences in the adult courts as a way of obtaining a guilty plea. Because adult sentences include the possibility of probation, youth often plead guilty to charges in the hope of being offered this option.[237]

199. Meanwhile in Michigan, most of the 18 specific offenses for which youth are transferred to adult court mandate adult sentencing. For the other offenses the law allows adult sentencing as an option, while also providing the option of placing the youth under the responsibility of the Department of Human Services.[238] Adult sentencing in these cases may yield extreme results, as those convicted must complete their full minimum sentence without the possibility of alternatives to incarceration for good conduct, and regardless of age.[239] Adolescents aged 14 and older that are tried as adults may even be sentenced to life without parole, although in accordance with the recent Supreme Court ruling,[240] these sentences can no longer be mandatory.[241]

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235 Florida Statute § 985.565(4)(a)(4).

236 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

237 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

238 Michigan Compilation of Laws § 769.1. Michigan Council on Crime and Delinquency, "Youth Behind Bars", Michigan Council on Crime and Delinquency, May 2004.

239 Michigan Compilation of Laws § 791.233. Michigan Council on Crime and Delinquency, "Youth Behind Bars", Michigan Council on Crime and Delinquency, May 2004.

240 Miller v. Alabama, 132 S. Ct. 2455 (2012).

200. According to the information received by the IACHR, the United States continues to be the one of the few countries in the world to sentence children so severely, in some cases incarcerating them for life without the possibility of parole.[242] Although other countries allow a sentence of life without parole for youth offenders, there is no information publicly available regarding any youth currently serving such a sentence outside of the United States. Moreover, all of the thirteen countries that still allow for this possibility in their criminal legislation can trace its origins to the English common law of the United Kingdom, a country that has since abolished life sentences without parole for juveniles, following a groundbreaking decision of the European Court of Human Rights in 1996.[243]

201. Following the recent U.S. Supreme Court rulings that abolished all mandatory sentences of life without parole for children below 18 years of age,[244] several states have consequently enacted legislative reforms that alter their mandatory sentencing regimes. Nevertheless, the Commission notes with concern that such extreme sentencing for youth is still applied in the United States (albeit not mandatorily), contrary to international standards. The Commission is aware that in 2016, the Supreme Court ruled that states and the federal government are required to consider the unique circumstances of each juvenile defendant in determining an individualized sentence.[245] Therefore, the 2,500 persons serving sentences of life without the possibility parole in the United States for acts committed when they were adolescents, now have a chance for resentencing at which time the court will consider whether to reinstate life without parole or sentence for a term of years.[246]

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241 Michigan Compilation of Laws § 769.25, Michigan Council on Crime and Delinquency, "Youth Behind Bars", Michigan Council on Crime and Delinquency, May 2004.

242 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685 March 2015 Human Rights Council, Twenty-eighth session. See also, Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (April 25, 2007), para.78. See also, Connie de la Vega and Michelle Leighton, Sentencing our Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 989-990 (2008). US: End Life Without Parole for Juvenile Offenders, Amicus Curiae brief filed with the Supreme Court, January 26, 2012.

243 Human Rights Watch, United States, 2005. See Hussain and Prem Singh v. United Kingdom, 22 EHRR 1 (1996) (holding that "for the duration of Her Majesty's Pleasure" did not authorize wholly punitive life-long detention, because it invoked the protection of Articles 3 and 5(4) of the European Convention on Human Rights, which required that changes in the character, personality, and mental state of a young offender serving a long sentence be considered during mandatory and repeated parole reviews.).

244 U.S. Supreme Court rulings have prohibited sentences of life imprisonment without parole for children convicted of non-homicide offences (*Graham* v. *Florida*), as well as sentences of mandatory life imprisonment without parole for children convicted of homicide offences (*Miller* v. *Alabama, 2012*).

245 US Supreme Court. Montgomery v. Lousiana. 577 U.S. _2016 (2016).

246 According to Amnesty International USA.

202. As set out by the Committee on the Rights of the Child, sentencing of children should take into account "the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[247] Moreover, pursuant to Article 40(4) of the Convention on the Rights of the Child, and in accordance with the Beijing Rules,[248] the severity and duration of a sentence, custodial or otherwise, must be determined with regard to the child's circumstances and the facts of the offense that was committed.[249]

203. The sentencing of juveniles to life without parole has been found incompatible with the International Covenant on Civil and Political Rights, a human rights treaty ratified by the United States.[250] In its recent review of the United States' compliance under this treaty, the Human Rights Committee stated that the U.S. "should prohibit and abolish the sentence of life imprisonment without parole for juveniles, irrespective of the crime committed, as well as the mandatory and non-homicide-related sentence of life imprisonment without parole."[251]

204. A report by the United Nations' Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also highlighted the United States' breach of international law with regard to the extreme life sentences imposed on children in the United States.[252]

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247 Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 40(1).

248 Rule 5 (1) of the Beijing Rules states: "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."

249 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, paras.308 and 350.

250 Human Rights Committee, Concluding observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006), para.34.

251 Human Rights Committee, Concluding observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/4, 23 April 2014, para.23.

252 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685 March 2015, Human Rights Council, Twenty-eighth session. para.78. "(…) [L]ife sentences without the possibility of release for children are expressly prohibited by international law and treaties, including article 37(a) of the Convention on the Rights of the Child. The Committee on the Rights of the Child, in its general comment No. 10 (CRC/C/GC/10), and the Human Rights Committee, in its general comment No. 21, confirmed that life imprisonment without the possibility of release is never an appropriate punishment for an offence committed by a juvenile offender (…)." See also, Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (April 25, 2007),

## *G. Insufficient Availability of Alternatives to Adult Criminal Convictions and Deprivation of Liberty*

205. An additional area of concern for the Commission is the insufficient availability to youth of alternatives to the adult criminal justice system, such as pre-trial diversion and community-based programs. The Commission also notes the inadequate provision of age-appropriate probation and parole supervision and related services to ensure adequate rehabilitation of youth who commit crimes.

206. As detailed in this report, many youth who are treated as adults in the U.S. criminal justice systems should be eligible for alternatives to a formal adult court proceeding, but are excluded from this possibility pursuant to the current laws and policies in place. In particular, the IACHR notes that, prior to referring cases to the court system, public prosecutors in the United States are authorized to drop the charges, defer prosecution with referral to a diversion program, or initiate the proceeding by filing charges. The option of deferred prosecution and referral to diversion programs would permit community-based services and supervision. These measures, or a reduction or dismissal of the charges, should be seriously considered before a formal proceeding against the youth is initiated.

207. However, in many states, prosecutors depend on the existence of available programming and resources at the county level in order to consider the above alternatives as a viable option for cases of youth charged with committing crimes. Reliable data on this stage of the proceedings is unavailable due to the fact that district attorneys make these determinations on a case-by-case basis.

208. Access to such alternatives is also limited in practice. As reported by the Wisconsin Department of Corrections, prosecutors usually limit their offers of alternative measures to only those youth who have no prior history of offenses and who are charged with non-violent offenses, regardless of the youth's individual circumstances. In such cases they may offer a deferred prosecution agreement, which could include drug and alcohol assessment and treatment, drug testing, participation in therapy, community service, or participation in restorative justice programming. Youth who comply with the requirements may have their charges reduced or dismissed; otherwise, prosecution in court ensues.[253]

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253 Wisconsin Department of Corrections, A Review 17-Year-Old Offenders in the Adult Criminal Justice System, Report 08-3, February 2008.

209. Likewise in Colorado, pre-trial alternatives for youth who are to be prosecuted as adults are generally limited to first-time, non-violent offenders, allowing them to avoid an adult criminal conviction and sentence provided that they comply with their agreement with the prosecutor.[254] In addition, the Commission notes that these programs are specifically designed for adults, hindering age-specific interventions. This lack of a juvenile-specific approach runs contrary to the principles underlying the Colorado Statute for juvenile justice, which establishes that the purpose of a diversion program is to prevent further involvement of the child or adolescent in the formal legal system, by way of providing community-based "individually designed services," including restorative justice.[255]

210. As observed by the Commission during its visit to Colorado, the offering of alternative measures to youth charged with crime depends largely on the availability of county resources and programming in each individual case, and therefore varies considerably. Funding for diversion alternatives is county-based, and individual case arrangements are determined by prosecutors' offices. In many rural counties, no formal diversion program exists due to a lack of resources. Consequently, some youth end up in diversion in the juvenile system while others, for the same offense but in different counties, are transferred to adult courts. Data from other states indicates that there may be a tendency to commit youth to the adult correctional system as opposed to the juvenile system, because while juvenile alternatives may require additional financial resources.[256]

211. Similar disparities and lack of access to specialized age-appropriate alternatives are observed with regard to youth in the post-conviction stages of the adult criminal justice system. First of all, due to the fact that children are sentenced as adults, by default they are often sentenced to secure confinement in the adult correctional system instead of less restrictive placement in residential or community-based settings as appropriate. This is exacerbated by the lack of specialized actors, including defense lawyers, prosecutors, judges and social workers, in the stage of the adult proceedings in which the guilt of a child defendant is determined. Consequently the actors participating in these proceedings are uninformed with respect to the

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254 The Colorado Plea Bargain Of The Deferred Prosecution – Adult Pre-Trial Diversion Program, § 18-1.3-101.

255 Colo. Rev. Stat. tit. 19 (2012) § 19-2-703 (such informal adjustments require the juvenile to waive his or her right to a speedy trial), and § 19-2-704, 19-2-303. See also, National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings," 2012.

256 The University of Michigan Institute for Social Research, "Juveniles Committed to the Michigan Department of Corrections and Department of Human Services 1985 – 2003", May 2006.

special needs of youth and the internationally recognized principle against the arbitrary use of detention for persons under the age of 18.[257]

212. Furthermore, probation in adult correctional systems is supervised by adult-focused probation officers who do not have the training or experience they would need in order to work effectively with adolescents, and operates under rules and conditions that are geared toward adults, making it difficult for children to comply with the conditions of their probation. For example, the Florida statute governing adult probation contains no language regarding rehabilitation, in contrast with the probation provisions in the juvenile justice legislation.[258] As the failure to comply with probation conditions may result in their incarceration, and services designed to assist their reintegration in light of their specific needs and level of development are usually absent, youth have repeatedly reported feeling that they were set up to fail, as was recounted to the IACHR during its visits to U.S. states.

213. Likewise, the conditional release of youth from prison in the adult system, under parole, is affected by a lack of specialized services to oversee and assist the reintegration of youth into the community. As with probation violations, a youth's failure to adhere to rules of conduct of parole that are geared toward adults can result in imprisonment in adult facilities.

214. Violation of the terms of probation is a frequent cause of the transfer of youth to the adult courts. As observed in the state of Michigan, 34% of youth in the adult criminal justice system in its 15 largest counties arrived there upon violating the conditions of their probation.[259] This further highlights the need to ensure effective specialized services directed toward youth under parole supervision, in order to reduce the incidence of parole violations and consequent imprisonment. However, there is very little available data on this matter. Such data should be collected and analyzed in each U.S. jurisdiction in order to adequately design and implement these services.

215. Lack of alternatives to incarceration in the adults system, and lack of sufficient age-appropriate services to accompany such alternatives, leaves many youth who were tried as adults languishing for extended periods of

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257 For example, the practice of probation officers who have the authority to commit youth to detention without any court hearing or judicial determination. See Colo. Rev. Stat. tit. 19 (2012) § 19-2-709(4). See also, National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

258 Florida Statute §. 985.435(4), "Probation and Postcommitment Probation; Community Service". See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

259 Prison Rape Elimination Act (PREA) Resource Center.

time under the jurisdiction of the adult correctional system, contrary to the principle and goal of rehabilitation.

216. The Commission has become aware of additional situations that bring children into the adult system. According to information that the Commission received during its expert consultations, youth who are prosecuted under Michigan's Youthful Trainee Act serve their supervised probation under the jurisdiction of the corrections department in adult prison. Hundreds of persons under 18, who have never been convicted of a crime, are diverted to adult prisons and subject to adult prison conditions, rules and punishments for up to 3 years.

217. The Commission reminds the State that, whenever possible, criminal law procedures concerning children should not result in sentencing in a formal court setting. As expressed by the Committee on the Rights of the Child, "competent authorities – in most States the office of the public prosecutor – should continuously explore the possibilities of alternatives to a court conviction."[260] It is important to note that in the process of offering alternatives to a conviction in adult court, the prosecutor or other State authority must fully respect the human rights and legal safeguards of the child.

218. Deprivation of liberty of children who commit a crime should only be used as a measure of last resort, and for the shortest period of time possible. It is therefore that laws be in place that provide the courts with a wide variety of available alternatives to deprivation of liberty and institutional care.[261] Moreover the Commission highlights that, in order to ensure that a comprehensive system exists for the protection of children's rights, juvenile justice systems should continuously coordinate with community initiatives, in order to enhance the availability of alternative services and diversion programs for youth.

## *H. Lack of Confidentiality of their Files*

219. Many U.S states do not ensure confidentiality of the records of children accused or convicted in the adult system, and likewise do not prohibit their

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260 See also, Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (April 25, 2007), para.68.

261 See also, Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (April 25, 2007), para.70.

use in future proceedings against that person.[262] According to information received by the IACHR, the absence of a policy of automatically sealing the criminal records of all children has multiple and severe consequences for the children in question, such as difficulties in accessing employment, education, and housing. Studies have shown that such consequences impede their rehabilitation and reintegration into society, making them more likely to reoffend.[263]

220. The records of proceedings involving children charged with crime have become more publicly available, contrary to the international standard mandating full respect for privacy of information at all stages of the proceedings.[264] As a result, access to the juvenile records of youth is now granted to certain individuals and agencies, under most states' juvenile codes.

221. This issue has been observed in states such as Florida, where the laws fail to mandate the automatic expunging or sealing of the records of children who are convicted as adults, thus exposing these children and restricting their access rights to employment, student loans, education, housing, public assistance, and even driving privileges. These restrictions continue to impact children long after they have served the entirety of their sentence.[265] Additionally, while juvenile arrest records are sealed, making them unavailable to the public, records of arrests and criminal convictions in the adult system are not.[266] For example, employers are allowed to request information concerning youth arrests on adult charges, even though the youth may not have been convicted or even prosecuted under those charges.

222. Although procedures exist through which youth can request that their records in the adult system be sealed or expunged, these are difficult and costly processes, and the child must bring their request before courts with discretionary powers to grant or deny such petitions. While the majority of U.S. states seal some records of adolescent ex-offenders within several years

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262 "Trends in Juvenile Justice State Legislation: 2001-2011". Washington D.C.: National Conference of State Leglatures, June 2012.

263 Indianapolis-Marion County City-County Council, "Re-Entry Policy Study Commission Report," July 2013 (finding that "Employment was the number one predictor of recidivism."), p.12. See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

264 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

265 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014. See also Legal Action Center, "After Prison: Roadblocks To Reentry: A Report On State Legal Barriers Facing People With Criminal Records," 2004.

266 See for example the case of Veronica Limia, "Crimes come back to haunt young offenders in Florida", April 6, 2012.

of their sentence being completed, there is no such possibility for youth in the adult system in Florida and in most other states.[267]

223. These consequences, which flow from the processing of adolescents in an adult system that is not primarily geared toward their rehabilitation, obstruct adolescents' effective reintegration into society, and thus make them more likely to reoffend. Based on the accounts of youth who are tried and imprisoned as adults, as compared to those who are placed in secure confinement in the juvenile system in response to similar offenses, the experience of youth in the adult system of courts and correctional facilities is generally perceived as much more negative.[268] As expressed by one youth incarcerated in an adult facility: "I don't think kids should be in adult prison, what they need is a deeper route through the juvenile system so that kids can really change."[269]

224. Considering the extreme difficulties faced by youth upon return to society after being subjected to adult treatment and its lifelong consequences, such youth require specially designed services following release in order to successfully manage their reentry. However, due to the nature of the punitive system that treated them as adults, such services generally do not exist, leaving formerly accused, convicted, or incarcerated youth to attempt reentry into society on their own, facing stigmatization and other factors that limit their possibilities and make them prone to failure.

225. In consideration of these daunting effects on the lives of youth, the Commission highlights the obligation of the State to ensure the rights of all children with respect to the confidentiality of information pertaining to any stage of a court proceeding that involves them.

## *I. Lack of or Non Existent Information and Data*

226. The Commission is highly preoccupied by the incomplete or nonexistent data on the situation of children who end up in the adult system, given the lack of a requirement for states to report disaggregated statistics and detailed information on the various stages of criminal proceedings regarding those

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267 Florida Statute § 943.0585, "Court-ordered Expunction of Criminal History Records"; Florida Statute § 943.0515, "Retention of Criminal History Records of Minors". See also, Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

268 Juvenile Transfer To Criminal Court Study: Final Report, A Research Report Submitted to the Florida Department of Juvenile Justice, Jeb Bush, Governor, W.G. "Bill" Bankhead, Secretary, January 8, 2002.

269 HRW interview with Mark V., Sumter Correctional Institution, Sumter, Florida, May 28, 2013. See Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

youth who are transferred to, or whose cases are filed directly in, adult courts.[270]

227. Such data is necessary in order to understand the full scope of the issues and to make visible the large number of youth who are excluded from juvenile justice systems and tried as adults, as well as to implement required reforms pursuant to international human rights standards. Likewise, information on the treatment of youth who are confined in the adult correctional system, the type of offenses for which children and adolescents enter the adult system, characteristics of the youth alleged or accused of committing criminal acts, and the details regarding processing, sentencing, and post-confinement measures are necessary in order to implement effective policies and programs for those youth who are affected.[271]

228. Civil society organizations that met with the IACHR during its visits to the U.S., and the experts whom it consulted during its preparation of this report, told the Commission how difficult it is to access this information. The main problem is that the systems and services of the various states within the United States are not organized under one umbrella.

229. Based on the information reviewed in the preparation of this report, the Commission observes that, in general, the lack of a national system for producing information and indicators regarding the issues affecting children who are in contact with the criminal justice system, the effectiveness of the response that is directed toward them, and the causes of youth involvement in crime, is a fundamental shortcoming in the efforts of the United States to prevent youth crime.[272] Such an information mechanism should form part of the national comprehensive system of protection, contained within, and not separate from, the juvenile justice system. The Commission observes with concern that, in general, juvenile justice systems in the United States operate separately from the rest of the body of public policy concerning children and youth, and moreover, such public policy disregards youth who are in the adult criminal justice system.

230. For this reason, significant gaps exist with regard to statistics and indicators concerning youth who end up in the adult criminal justice system, especially those who enter the adult system by way of non-judicial measures, such as

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270 "You're an Adult Now: Youth in the Adult Criminal Justice Systems", Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011.

271 "You're an Adult Now: Youth in the Adult Criminal Justice Systems," Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011. See also Campaign for Youth Justice, "State Trends: Legislative Victories from 2011 – 2013", 2013; also: "State Trends: Updates from the 2013-2014 Legislative Session", 2014.

272 IACHR Press Release 131/14, Report on the 153rd Session of the IACHR, December 29, 2014.

the use of prosecutorial discretion.[273] The Commission underscores that systematic reporting involving all jurisdictions of the U.S. territory is necessary.

231. Moreover, it is important that the data collected be adequately disaggregated, avoiding any involuntary concealment of information. In that regard, experts consulted in preparation of this report explained that many U.S. states fail to identify youth of Hispanic background in their reporting, as they do not recognize Hispanic status as an ethnicity. As a result, data on the representation of Hispanic youth in the different stages of adult criminal proceedings amounts to an undercount. In the same way, reporting of data at the level of counties and other local jurisdictions, regarding specific areas and themes within the justice system such as community-based services and the number of youth who are imprisoned as a result of probation violations, is not consistently required and is therefore inadequate.

232. The Commission has further observed that data on the treatment of children held in adult facilities and the conditions of their detention is reportedly difficult to obtain. The Federal Prison Rape Elimination Act (PREA) creates some monitoring and oversight procedures. However the monitoring does not cover all conditions of detention. Further, oversight procedures conducted under the federal PREA standards are limited to audits of 2-3 days. Most children held in adult facilities are not interviewed by auditors because they have not reached the age of majority and because their small numbers, as compared to the rest of the prison population, raise statistical and protection issues. Many internal procedures that involve great harm to children are publicly unreported, such as specific information on the use of solitary confinement and other forms of treatment that may amount to abuse or torture (including how many children are placed in solitary, the reasons why, the frequency of use, the length of use, and the gender, race, age, and specific conditions of vulnerability that apply to youth placed in solitary, etc.). Likewise, information should be provided on the extent to which children incarcerated as adults enjoy various rights while in prison, for example information on such issues as food, recreation, education, family contact, physical and mental health services, etc., in order for policymakers or prison authorities to detect any problems and deliver adequate and timely responses.

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[273] Only the state of Michigan reports the number of cases filed directly as a result of prosecutorial discretion laws, and only four other states, namely Arkansas, California, Florida, and Montana, provide data on the total number of persons under the age of 18 in the adult system. See U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," September 2011.

233. The Commission therefore recommends that the United States strengthen its national mechanism for collecting and analyzing data on youth in contact with the criminal justice system, with a view to improving its operation, establishing adequate oversight, and developing public policies that protect the rights of children. In the same way, the United States should explore ways in which children can participate in the formulation of policies that affect them.[274]

234. The IACHR urges the U.S to establish supervision and monitoring mechanism to periodically evaluate its juvenile justice systems, and gather and report on relevant information and indicators.[275] This should involve every aspect of the system, including the following: police intervention and referrals to courts; performance of judges, prosecutors, defenders, and other actors at the pre-trial and trial stages; performance of officials charged with implementing sentences and of those tasked with supervising children after their release; the effectiveness of programs established to ensure that child defendants maintain contact with their families and communities, and to assist with the reintegration of children deprived of their liberty into their communities; the operation of the facilities in which custodial sentences are served; and others.[276]

274 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.594.

275 These indicators include: the number of children who are arrested, detained prior to sentencing and then sentenced; the length of the pre- sentence detention, and the duration of the custodial sentences; the use of alternative, non- custodial sentences; the number of children who died while in the State's custody; the percentage of children not separated from the adult population when in detention; the frequency of family contact; post-release assistance; and others.

276 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.595.

CHAPTER 3

# CHILDREN IN ADULT PRISONS AND JAILS

**NUMB**

I have forgotten a feeling
A girl grew out of her dolls and left
them in the closet
The feeling I've forgotten is just outside
those doors.
I*n*candescent lights hit mesh and shimmer
as mail would against the glass.
And I still haven't let you leave your
salty trails against my cheeks.
To*o* afraid of waking up and wiping
that crust away
the crust that would bring me to
realization
A realization that would let me know
You've conquered me
How can you detest a meal you long for?
I have done it, it is second nature.
I've ran for so long I've forgotten
My mind is crippled.
Yet I still remember how to walk
The XXXX is chiming and wonder
How many faces are behind it.
Green and white doors reflect off
stainless steal
Like the color of cheap nail polish
I'd eat a million sheep
If I could stop counting them and
The bricks on these walls.
I've left my trash can in the hallway
A while ago.
Each piece probly being broken down
as I write. Manufactured to kill
but I don't miss it.
I didn't find solace in its presence
anymore than I did its absence.
I never had anything to throw away
Why the hell was that can always
full.
Plastic cups, plastic trays, plastic sporks
plastic TIRED
The nail polish doors open
It's time to eat

# CHILDREN IN ADULT PRISONS AND JAILS

235. As a result of state laws requiring or allowing youth in conflict with the law to be tried as adults, an estimated 200,000 children and adolescents in conflict with the law are tried in adult criminal courts each year.[277] The IACHR is aware that the majority of U.S. states still have laws, policies, and practices in place that enable them to incarcerate children in adult facilities.[278] The Commission notes that on any given day, according to available data, close to 3,000 adolescents are held in the adult prison systems[279], with an additional 6,000-7,000 youth confined in adult jails[280], most of whom are awaiting trial as a result of being charged with committing crimes such as robbery and assault.[281]

236. Only one fourth of U.S. states have laws that prevent most children from being placed in adult facilities.[282] According to the National Prisoner Statistics Program Report of 2009, more than half of the adolescents held in adult state prisons are there as a result of jurisdiction laws and only 7 states

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277 48.Colum.Hum.Rts. L. Rev. 1 2016-2017 page 2.

278 "You're an Adult Now: Youth in the Adult Criminal Justice Systems," Washington D.C.: U.S. Department of Justice, National Institute of Corrections, December 2011.

279 According to the Bureau of Justice Statistics a prison is: "Compared to jail facilities, prisons are longer-term facilities owned by a state or by the federal government. Prisons typically hold felons and persons with sentences of more than 1 year. However, sentence length may vary by state. Six states (i.e. Connecticut, Rhode Island, Vermont, Delaware, Alaska, and Hawaii) have an integrated correctional system that combines jails and prisons. There are a small number of private prisons, facilities that are run by private prison corporations whose services and beds are contracted out by state or federal governments".

280 Jail inmates: "Offenders confined in short-term facilities that are usually administered by a local law enforcement agency and that are intended for adults but sometimes hold juveniles before or after adjudication. Jail inmates usually have a sentence of less than 1 year or are being held pending a trial, awaiting sentencing, or awaiting transfer to other facilities after a conviction." Bureau of Justice Statistics.

281 These figures are from a mid-year count made by the U.S. government in 2009 and 2011. See, U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011. See also, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prison Inmates at Midyear 2009 - Statistical Tables (June, 2010). Bureau of Justice Statistics, Jail Inmates at Midyear 2009 – Statistical Tables (June, 2010). See also Jail Inmates at Midyear 2011 - Statistical Tables, p.7.

282 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011. Florida had the highest number at 393; Connecticut, 332; North Carolina, 215; Arizona, 157; Texas, 156; Michigan, 132; etc. Only 7 states reported that no youth under the age of 18 was held in state prisons.

did not have any youth under the age of 18 in their adult correctional facilities.[283]

237. Recent legal reforms and the implementation of new policies have had a positive impact on keeping youth out of adult facilities, reducing the number of adolescents held in adult state prisons by almost 69% between 2000 and 2013. Nevertheless, the rate of imprisonment of youth in adult facilities at the state level continues to be of particular concern.[284]

238. The high number and conditions of youth incarcerated in the state of New York was observed by the IACHR during its visit to the adult jail facility known as Rikers Island, in New York City. Youth who were automatically tried as adults under the state's jurisdictional laws were sent there while awaiting trial, a consequence of the fact that New York was one of only two U.S. states that held all youth 16 years of age or older subject to criminal responsibility as adults. According to the Department of Corrections, approximately 500 adolescents were held in Rikers Island at the beginning of 2014.[285] Recent legislation passed in New York will move youth out of adult jails, including Rikers Island effective October 18, 2018. The legislation should also decrease the population of youth in the adult system by moving youth accused of misdemeanors to juvenile court and creating a presumption that youth accused of non-violent felonies be transferred from adult court to juvenile court. [286]

239. Fewer youth are under the custody of the Federal Bureau of Prisons, accounting for 0.04% of the total federal prison population, a number that has decreased by 58% since 2005. The IACHR notes the positive changes that have been made at the federal level, in the sense that any person under the age of 18 who is sentenced in adult federal courts is held in a separate facility for youth, either operated by private agencies under contract with the federal government, or by units of state or local governments, and not in the general adult prison population.[287]

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283 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," September 2011.

284 Bureau of Justice Statistics, National Prisoner Statistics Program, 2000-2013, U.S. Department of Justice, Bureau of Justice Statistics' Bulletin, September 2014, p.19.

285 The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also, Cardozo Law, "Rethinking Rikers: Moving from a Correctional to a Therapeutic Model for Youth, Proposal for Rule-Making Report for the NYC Board of Correction," January 2014.

286 http://raisetheageny.com/wp-content/uploads/2017/05/rta.billsummary.finalMay-2017.pdf

287 U.S. Department of Justice, Bureau of Justice Statistics' Bulletin, September 2014. See also, Juvenile Offenders and Victims: 2006 National Report, Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120. Campaign for Youth Justice, "New Report on U.S.

240. The Commission has further observed an absence of clear standards and policies on a national level that establish mandatory requirements for the treatment of all youth while in the adult correctional system. This results in multiple violations of rules and standards of international law with regard to custodial measures applied to children.[288] The IACHR has observed with great concern that children and adolescents suffer very severe violations of their rights when held in jails and prisons with adults.

241. It has been estimated that over a recent five-year period, 93,000 to 137,000 children under the age of 18 were held in adult jails across the United States.[289] According to information received by the IACHR, less than half of the states that allow pre-trial detention of youth in adult jails specifically require their separation from adults.[290] This creates situations that pose grave risk to their life and personal integrity.

242. In those states with the highest numbers of youth in adult facilities, even though adolescents below the age of 18 represent only 2.5% of the total daily adult facility population, adolescents are overrepresented in categories of special vulnerability, such as victims of abuse and physical injuries, inmates with mental health needs, and those in solitary confinement.[291]

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Prison Populations," September 2014, available at http://www.campaignforyouthjusticeblog.org/2014/09/new-report-us-prison-populations.html

288 U.S. Department of Justice, National Institute of Corrections, "You're an Adult Now: Youth in the Adult Criminal Justice Systems", December 2011, p.16. "The closest thing to a national standard – the American Correctional Associations accreditation and standards process—are a voluntary benchmark that corrections agencies can choose to participate in." See also, New York Times "A bid to keep youths out of adult prisons", October 2013.

289 Human Rights Watch & The American Civil Liberties Union, "Growing Up Locked Down: Youth In Solitary Confinement In Jails And Prisons Across The United States" (2012).

290 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting", September 2011.

291 The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

# *A. Conditions of Detention of Children and Adolescents Who are Incarcerated with Adults*

## 1. Children and Adolescents Incarcerated with Adults

### a. No legal Requirement to Separate Adults from Children and Adolescents

243. States are not legally required to separate youth from adults in adult facilities.[292] There are some non-mandatory standards like the Prison Rape Elimination Act ("PREA") standards that do require that youth be separated from adults but they are only implemented through a funding incentive. While the federal law for juvenile justice, i.e., the Juvenile Justice and Delinquency Prevention Act (JJDPA) as reauthorized in 2002, does establish the separation of youth from adults as one of its core custody-related requirements, its provisions do not apply to children and adolescents in the adult system.[293]

244. The IACHR notes with concern that the JJDPA contains fundamental gaps, and in particular, youth who are charged, tried, or sentenced as adults are excluded from the application of its provisions. Information received by the IACHR during the preparation of this report indicated that a proposed reauthorization of the Juvenile Justice and Delinquency Prevention Act was presented to the U.S. Congress in 2014. This proposal, which is still pending enactment, would extend the application of the requirement of separation from adults to those children in the adult criminal justice system.

245. The Commission therefore urges the State to ensure that legal safeguards and protections are in place for all children who are held responsible for

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292 Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp.93–120.

293 Available at http://www.ojjdp.gov/about/legislation.html: The four basic requirements of the JJDPA are as follows: 1) "de-institutionalization of status offenders and non offenders," which involves prohibiting secure confinement of youth charged with acts that are not considered crimes when committed by adults, except in cases of violation of a valid court order or possession of a firearm; 2) "sight and sound separation," which bars the placement of youth, whether during the pretrial or post-conviction phase, in confinement facilities where they have contact with adult inmates, and mandates that youth and adults may not see one another nor may conversation between them be possible; 3) "jail and lockup removal," which forbids the holding of adolescents in adult jails and lockups anywhere in the country, with several exceptions, including limited "grace periods" while awaiting transfer, children who are tried or convicted as adults, and former children who have reached the state's minimum age of adult criminal responsibility; and 4) "disproportionate minority contact," which mandates the elimination of undue overrepresentation of minority youth, as compared to their representation in the population, in all stages of the juvenile justice process.

offenses. Moreover, the Commission strongly encourages the United States to compel the implementation of a juvenile justice system throughout its entire territory with jurisdiction over all youth below the age of 18.

### b. Practice at the Federal, State, and local Levels

246. The nationwide practice of holding children in adult facilities in the United States has severe consequences for the children in question, primarily as a result of the basic differences in the purpose and governing standards of adult prisons and jails, as opposed to the approach of juvenile detention and residential centers. While treatment of youth in juvenile systems is subject to special standards of protection according to the age and developmental status of the inmate, the overall design, security classification and even the permissible range of physical coercion used against inmates in adult facilities frequently result in excessive use of force, solitary confinement, and many other forms of treatment that are particularly damaging to children.

247. According to the information the IACHR received during the experts' consultations, the hearings and its visits, a large number of children housed in adult jails and prisons in the U.S., at the local, state, and even federal level, are regularly subjected to solitary confinement.[294] State reports also indicate that county jails holding youth under the age of 18 inappropriately apply to those youth a continuum of force that was designed for adults. Likewise many children and adolescents have reported being mistreated or treated with indifference by adult correctional officers.[295]

248. Furthermore, while juvenile systems are required to hold youth in specialized facilities, with an appropriate level of programming and services, adult correctional systems are not obligated to meet these requirements for youth sentenced to their custody. Although laws at the federal level ensure that youth convicted in federal courts are held in separate facilities for youth, children committed to states' adult systems are not provided with the treatment they need in order to effectively rehabilitate. Because many jails and lock-ups are independent entities operating under the authority of local (municipal) government, there are no effective incentives to comply with the national standards of youth incarceration.

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294 New York Times, "Confinement for Teenagers", Ian Kysel, December 2014.

295 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014. See also Report and Recommendation, Hughes v. Judd, No. 8:12-cv-568-T-23MAP, 2013 WL 1810806 (M.D. Fla. Apr. 30, 2013) No. (8:12-cv-568-T-23MAP ) 2013, p.3.

249. The IACHR highlights that, in accordance with the *corpus iuris* on the rights o the child that derive from the American Declaration, and pursuant to Article 37(c) of the Convention on the Rights of the Child, "every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. (…)"

250. The Commission observes that legislative reform has been recently introduced in the U.S. Congress that would extend U.S. federal requirements on "jail removal" and "sight-and-sound" separation of juveniles from adults, to those youth who are tried and convicted in the adult system.[296] The IACHR stresses the importance of applying these requirements to all youth in custody, and recommends that the State swiftly enact the proposed reauthorization of the JJDPA with these standards extended to youth in adult systems as proposed. Moreover, the United States must take the necessary measures in order to accomplish this in the shortest time possible.

## 2. Correctional Discipline and Treatment of Child Inmates

### a. Use of Solitary Confinement

251. Although there is no comprehensive national data on the isolation of incarcerated children in the United States, it has recently been estimated that approximately 35,000 children are being held in solitary confinement in the juvenile system alone.[297] Such treatment is also imposed on children in custody in adult facilities. According to information reported by several large jails and prisons systems, more than 10% of the children housed there are subjected to solitary confinement, while smaller facilities have reported that 100% of the children they hold are in isolation.[298]

252. No federal or state legislation in the United States prohibits solitary confinement of youth held in adult facilities; only a few states expressly refer to the use of isolation in their statutes. PREA standards provide some

296 Act 4 Juvenile Justice, A Campaign of the National Juvenile Justice and Delinquency Prevention Coalition, "Overview of the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2014".

297 U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Conditions of Confinement: Findings From the Survey of Youth In Residential Placement 9 (2010).

298 ACLU and Human Rights Watch, "Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States", 2012.

regulation of its use with respect to children.[299] In January 2016, former President Barack Obama issued an executive order banning the use of solitary confinement for youth in federal prisons, and in June 2016, North Carolina prison officials announced that they would cease placing youth in solitary confinement.[300]

253. Similarly, the U.S. Department of Justice has not expressly prohibited adolescents from being held in isolation, although its Standards for the Administration of Juvenile Justice recommend that adolescents should not be held in isolation for longer than 24 hours.[301] Recent reports and statements made by the U.S. Department of Justice refer to the inappropriateness of solitary confinement when applied to youth.[302] In addition, the Attorney General issued guiding principles that recommended ending the placement of youth in solitary confinement.[303]

254. For example, the Department of Justice found that adolescents in the Rikers Island Jail of New York City were regularly isolated 23 hours a day in small cells for extended periods of weeks and even months, with only one hour daily allowed for recreation and showering as a disciplinary measure.[304] This information is consistent with what the IACHR observed in its visit to the Robert N. Davoren Complex (RNDC) in Rikers Island jail. In this regard, the Commission interviewed boys detained in the facility and met with several officials at the facility, as well as with Commissioner of the New York City

299 PREA provides different protections for youth in the juvenile justice system and youth in the adult system. In juvenile facilities, protective or disciplinary isolation may only be used as a last resort when other less restrictive measures are inadequate to keep the youth and other incarcerated persons safe, and then only until an alternative means of keeping all persons safe can be arranged. PREA 28 C.F.R. § 115.342 (b) (2012). See also 28 C.F.R. § 115.342 (h) (2012). These regulations also require documentation of the basis of the safety concern and the reason for a lack of housing alternatives, when a child is placed in "protective" isolation. When youth are in the adult system, the "Youthful Inmate Standard" only requires that facilities make "best efforts" not to isolate youth. 28 C.F.R. 115.14.

300 https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?utm_term=.2078b9c6d159; http://www.charlotteobserver.com/news/state/north-carolina/article84113402.html

301 Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention: Standards for the Administration of Juvenile Justice, prepared in accordance with the provisions of Section 247 of the Juvenile Justice and Delinquency Prevention Act (Public Law No. 531415, as amended by Public Law No. 95-411), Standard 4.54 "Room confinement", p.496.

302 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. United States Attorney General Eric Holder has stated that in the context of youth with disabilities "[s]olitary confinement can be dangerous, and a serious impediment to the ability of youth to succeed once released."

303 https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing

304 U.S. Department of Justice, United States Attorney Southern District of New York, "Manhattan U.S. Attorney Finds Pattern And Practice Of Excessive Force And Violence At NYC Jails On Rikers Island That Violates The Constitutional Rights Of Adolescent Male Inmates", press release August 4, 2014; see also U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

Department of Corrections, Joseph Ponte. In addition to consistently using solitary confinement as a disciplinary measure (all of those interviewed had at least once been subjected to this practice), the information received indicated that guards had no special training in dealing with adolescents, and that they even felt it was a kind of "punishment" given mostly to the youngest and less experienced officers. The U.S. Department of Justice states that "recreational time is spent in individual chain-link cages, and many inmates choose to remain in their cells due to depression or because they do not want to submit to being searched and shackled just to be outside in a cage. Inmates are denied access to most programming and privileges available to the general adolescent population, and receive meals through slots on the cell doors. They are not allowed to attend school, and are instead given schoolwork on worksheets and are offered educational services telephonically." [305]

255. A large body of national and international research highlights the harmful effect and psychological damage that solitary confinement has on people, and especially children.[306] The U.S. Department of Justice has recognized that "[i]solation is a severe penalty to impose upon a juvenile, especially since this sanction is to assist in rehabilitation as well as punish a child. After a period of time, room confinement begins to damage the juvenile, cause resentment toward the staff, and serves little useful purpose."[307] Similarly, the federal Office of Juvenile Justice and Delinquency Prevention has affirmed the danger of the isolation of children and its inconsistency with juvenile justice standards, finding that excessive isolation may constitute cruel and unusual punishment.[308]

256. Specifically, studies have shown that isolation causes or intensifies mental health problems, producing psychological damage even in adults without any history of mental issues.[309] This raises profound concerns, especially considering the elevated rates of use of isolation as a disciplinary measure in

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305 U.S. Department of Justice, United States Attorney Southern District of New York, "Manhattan U.S. Attorney Finds Pattern And Practice Of Excessive Force And Violence At NYC Jails On Rikers Island That Violates The Constitutional Rights Of Adolescent Male Inmates", press release August 4, 2014; see also U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

306 The American Academy of Child and Adolescent Psychiatry (AACAP) recommends that solitary confinement for youth be completely abolished. See Juvenile Justice Reform Committee, Solitary Confinement of Juvenile Offender, Approved by Council, April 2012.

307 Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Standards of the Administration of Juvenile Justice, 1980.

308 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

309 ACLU and Human Rights Watch, "Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States", 2012.

facilities such as Rikers Island of New York City, where a large part of the adolescent population has mental health problems. During a period of increased use of punitive segregation in Rikers Island between 2007 and 2013, self-harm and suicide attempts almost doubled, to 850 incidents.[310]

257. The Commission observes with alarm that extensive practice of various forms of isolation continues to exist in the United States, especially with regard to children incarcerated in adult facilities. According to the Committee on the Rights of the Child, the Committee against Torture, and the Special Rapporteur on Torture, the use of solitary confinement on children, of any duration, constitutes cruel, inhuman, or degrading treatment or punishment, or even torture.[311]

258. Likewise, the Committee Against Torture, in its concluding recommendations regarding the United States, indicated that it "remains concerned at the notable gaps in the protection of juveniles in the State party's criminal justice system. In particular, the Committee expresses once again its concern at the conditions of detention for juveniles, including their placement in adult jails and prisons, and in solitary confinement."[312]

259. A nationwide study conducted on the use of solitary confinement revealed that children held in isolation are exceedingly restricted in physical exercise and out-of-cell time, as well as with regard to contact with their family, causing detrimental results and even leading to suicide attempts.[313] In interviews held in preparation of a report in Florida, youth held in an adult jail expressed that "in jail, for any little thing they put you in [solitary] confinement" and that they "were locked down most of the time."[314]

260. In Texas, a survey carried out in 2012 brought to light that youth were held in solitary confinement in most jails, for excessive periods of time, often 6 months to over a year. This is particularly harmful when considering that, according to a U.S. government investigation in 2002, youth are especially

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310 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

311 Committee on the Rights of the Child, general comment No. 10 (CRC/C/GC/10), para.89. See also: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685, March 2015, Human Rights Council, Twenty-eighth session, para.44; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, para.67.

312 United Nations Committee against Torture, Concluding observations on the third to fifth periodic reports of United States of America, CAT/C/USA/CO/3-5, para.23.

313 ACLU and Human Rights Watch, "Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States,",2012, p.122.

314 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014. Human Rights Watch interview with Derrick T., Sumter Correctional Institution, Sumter, Florida, May 29, 2013.

affected by the damaging impact of this practice, showing symptoms of anxiety, depression, and paranoia after only a very short period of solitary confinement.[315]

261. While New York is not required to report the number of children held in solitary confinement, other reported data showed that, as of July 2013, 140 adolescents were held in a form of isolation within the state's correctional system.[316] Meanwhile in New York City, almost 15% of the adolescents held in adult facilities experience isolation by way of disciplinary sanctions.[317] Although youth account for less than 5% of the total population in Rikers Island jail, they represented 18% of those held in a form of isolation, and two thirds of the youth being held in isolation reportedly had mental health problems.[318] Moreover, according to information provided to the IACHR during its visit, disciplinary procedures leading to the finding of guilt and the application of punitive sanctions within the adult facility are strictly internal, and feature few guarantees and no legal representation for the youth involved, with extreme and arbitrary results.

262. The Commission observed that most segregated youth in the New York City jail were not completely socially isolated, as they were locked-down in single cells with sight and sound contact to other adjacent cells. However, these youth still suffered from restrictions in programming and reduced recreational opportunities.

263. The most common justification for the use of isolation is the danger caused by the individual offender, who must be isolated for safety reasons. However, data indicates that incarcerated persons are frequently subjected to solitary confinement for non-violent infractions of the correctional disciplinary codes of adult facilities, such as in New York.[319] Moreover, the New York Department of Corrections' rules fail to provide any mechanism for review of the proportionality of disciplinary sanctions of isolation that are imposed on adolescents, and until recently the rules did not limit the duration of such a sanction, regardless of age. Sanctions could last weeks and

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315 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence", December 12, 2012, p.190.

316 Benjamin Weiser, New York State in Deal to Limit Solitary Confinement, New York Times, Feb. 19, 2014.

317 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

318 Cardozo Law, Rethinking Rikers: Moving from a Correctional to a Therapeutic Model for Youth, Proposal for Rule-Making Report for the NYC Board of Correction, January 2014.

319 From 2007 to 2011, of the over 105,500 hearings involving the most serious infractions, nearly 95% resulted in a conviction and approximately 68% of these resulted in extreme punishment in the "segregated housing unit". "Inmate Disciplinary System – Count of Tier 3 Hearings: 2007-2011," obtained through FOIL and on file with the NYCLU. See also, New York Civil Liberties Union, BOXED IN - The True Cost of Extreme Isolation in New York's Prisons.

even months. According to information provided by ACLU in a brief presented during a lawsuit, from 2007 to 2011, New York issued over 68,000 sentences to extreme isolation as punishment for violating prison rules. On any given day, approximately 4,500 people – about 8 percent of the entire New York State prison population – were locked down for 23 hours a day in isolation cells. The lawsuit alleged that New York's lack of adequate guidelines allowed the prison disciplinary process to be inappropriately influenced by discriminatory intent. It argues that afrodescendant New Yorkers are disproportionally represented in the extreme isolation population as compared to the state's general prison population, and blacks are punished more harshly with isolation sentences than prisoners of other racial groups for similar misbehavior. [320]

264. Since the IACHR visit, there have been significant reforms around solitary confinement of youth in New York. Pursuant to settlement agreements resulting from the cases of Peoples v. Fischer[321] and Cookhorne v. Fischer[322], the New York Department of Corrections and Community Supervision has agreed that youth in solitary must be allowed six hours of out of cell time on weekdays and two-hours of out of cell time on weekends. The Cookhorne settlement also required that the age of adolescents be taken into account as a mitigating factor in disciplinary proceedings, a one-time review of all youth

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320 https://www.nyclu.org/en/cases/peoples-v-fischer-challenging-policies-governing-use-solitary-confinement-new-yorks-prisons

321 This lawsuit challenged the system-wide policies and practices governing solitary confinement responsible for the arbitrary and unjustified use of extreme isolation on thousands of individuals incarcerated in New York's prisons every year. The plaintiff, Leroy Peoples, spent 780 days locked in tiny, barren cell the size of an elevator with another prisoner for 24 hours a day as punishment for misbehavior that involved no violence and no threat to the safety or security of others.

322 On November 22, 2011, the New York Department of Corrections and Community Supervision sentenced the plaintiff, a 17-year-old prisoner, to four years in solitary confinement following a disciplinary hearing for allegedly assaulting a correctional officer. In solitary confinement, the prisoner was allegedly deprived of phone calls, packages, commissary, and good time credits for four years, and was confined in a small cell for 23 hours a day. Prisoners' Legal Services of New York subsequently filed a lawsuit on behalf of the prisoner in New York State Supreme Court, alleging that the hearing disposition "shocked the conscience" and "was deliberately indifferent to the medical and mental health needs of 16 and 17 year olds". The plaintiff sought a declaratory judgment stating that (1) solitary confinement of 16 and 17 year olds violates state and federal constitutional prohibitions on cruel and unusual punishment, and (2) the Department's regulations on solitary confinement is unconstitutional because they do not require consideration of a person's age in imposing punishment at disciplinary hearings. On March 15, 2013, the New York State's Appellate Division ruled that although there was substantial evidence that the prisoner violated inmate rules, the solitary confinement sentence was "so disproportionate to the offense as to be shocking to one's sense of fairness." The court sent the declaratory judgment part of the case to the State Supreme Court for adjudication. On October 17, 2014, the parties announced a settlement. Under the terms of the settlement, the state agreed to a number of provisions, including (1) a one-time review of all juveniles in adult prison solitary confinement; (2) establishing a Juvenile Separation Unit with special programming; (3) the hiring of social workers to work with juveniles in new housing units; (4) the enactment of new regulations to consider age as a mitigating factor in disciplinary cases; (5) limiting of disciplinary confinement for juveniles, and (6) training officers in the new procedures. The settlement agreement is scheduled to expire after 24 months.

in solitary confinement, and the creation special programming for youth under the age of 18.[323] [324]

265. The IACHR has received recent information on important reform efforts underway to abolish the punitive segregation of adolescents in the Rikers Island Jail of New York City.[325] In January 2015, the New York City Board of Corrections (BOC) adopted rules that exclude youth under 18 from punitive segregation. The rules also state that young adults aged 18-21 would be excluded from punitive segregation as of January 1, 2016.[326]

266. The conditions experienced by children held in solitary confinement in adult facilities include lengthy isolation in small single cells measuring 6 feet by 8 feet, for between 22 to 24 hours per day. They are deprived of physical exercise, education, and human contact, as well as access to mental health services. Victims of such treatment have also described not being able to access medication, as well as being victims of racial or religious discrimination.[327]

267. Contrary to this inhumane practice, juvenile systems operating under modern research-based policies in line with international standards implement a practice of room confinement only in exceptional circumstances when the child poses a risk to him- or herself or others, for a maximum of 24 hours and with continuous individualized intervention. In this regard, experts in juvenile justice have emphasized that all incarcerated youth who pose a risk to themselves or to those around them should be separated in ordinary units with immediate and full access to mental health services and assessment, as well as to sufficient daily physical exercise and programming.

268. Of further concern to the Commission is that youth are often held in isolated "protective" custody for unlimited periods of time, either voluntarily or mandated, as well as for reasons of administrative segregation in compliance with the "sight and sound" rules separating youth from the general adult population.

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323 See Press Release, Settlement Agreement Cookhorne vs. Fischer, October 17, 2014.

324 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also Press Release from the NYS Department of Corrections and Community Supervision, Settlement Agreement in Cookhorne vs. Fischer, October 21, 2014.

325 Michael Schwirtz, Solitary Confinement to End for Youngest at Rikers Island , New York Times, Sept. 28, 2014.

326 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014. See also, New York City Board of Corrections, Notice of Adoption of Rules approved January 13, 2015.

327 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

269. In this regard, regulations requiring separation of youth from adults under U.S. federal guidelines, such as the PREA standards, inadvertently result in what amounts to isolation of children housed in adult jails or prisons, whereby such children are singled out from the general population and held in segregated cells, causing or worsening mental health problems.[328] Authorities in charge of county jails are forced to choose between the dangers involved in housing children with adults, where they are at a high risk of suffering physical and sexual abuse, or the consequences of virtual solitary confinement.[329]

270. The IACHR reminds the United States that it should expressly prohibit any form of solitary confinement of children under the age of 18, and likewise develop public policies and national guidelines to strictly regulate all forms of isolation or segregation of youth.

### b. Disciplinary Measures Applied to Children and Adolescents in the Adult Correctional System

271. Adolescents held in adult prisons and jails are subjected to disciplinary and other administrative rules and procedures of adult corrections, disregarding their status as children. As has been recognized by the United States Department of Justice, "the traditional classification instruments developed for and used with adult correctional populations do not take into account the special needs or the maturation issues presented by youthful offenders. Prison classification systems have been developed and validated on adult male populations and are not sensitive to the unique attributes and behaviors of youthful populations."[330]

272. The stark contrast in how children are treated was observed by the IACHR during its visits to facilities holding youth in the adult and juvenile systems respectively, of Colorado. Under the Youthful Offender System (YOS) of the adult Department of Corrections, the approach to manage and promote good behavior of those imprisoned is based on a merit system under the correctional code of discipline.[331] Interviews with incarcerated youth revealed that this method generally produced fear of sanctions and loss of

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328 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence", December 12, 2012, p. 190.

329 U.S. Department of Justice, National Institute of Corrections, "You're an Adult Now: Youth in the Adult Criminal Justice Systems", December 2011, p. 12.

330 U.S. Department of Justice, Bureau of Justice Assistance, Juveniles in Adult Prisons and Jails: A National Assessment at 65 (Oct. 2000).

331 Colorado Department of Corrections, Office of Planning & Analysis, "Youthful Offender System: Fiscal Year 2013," June 2014.

privileges, as opposed to building on their individual strengths and needs. Youth are subjected to lock-down, restriction of food quantities or family contact, and even isolation for repeated or more serious infractions. In contrast, the approach of confinement programs under the state's juvenile system is founded on the framework of Positive Behavioral Interventions and Supports (PBIS), in order to effectively intervene in adolescent behavioral problems and strengthen appropriate behavior, as set out in U.S. policies for children and adolescents.[332] In this way, the juvenile system focuses on mentorship and staff guidance in order to bring about improvements in conduct, while the adult system employs retributive treatment of children.

273. The harsh environments of adult correctional facilities, which children endure when imprisoned as adults, have been brought to light through reports and interviews with incarcerated youth and their families in Florida. In spite of the fact that some children receive the option of YOS sentencing under the adult Department of Corrections, which features more educational and vocational programming than other adult facilities, youth still experience consistently punitive treatment in these facilities.[333]

274. Moreover, the inappropriate use of force by staff toward youth in adult prisons and jails creates a general climate of fear and dehumanization for the children who are housed there. During the expert consultation held in preparation of this report, experts relayed to the Commission that children deprived of liberty in adult facilities are routinely subjected to multiple forms of adult punishment, including physical restraints, routine degrading searches such as "pat and frisk", the arbitrary use of pepper spray and other harmful chemical agents, and even militarized cell extractions in which an inmate is physically subdued by a team of guards.

275. During the visit to New York, the IACHR was informed of the general environment of intimidation that exists in the adult facilities where youth are held, in particular in the Greene prison, which is commonly known as a "hands on facility." Although the use of force is of low intensity, it is sufficient to create an environment of intimidation and control. For example, youth are frequently subjected to practices such as "pat and frisk", in which they are forced to face the wall and be physically "checked" by a correctional officer.

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332 PBIS is an intervention model involving the development and improvement of behavior that implements teaching and reinforcing of appropriate behaviors in a continuum of evidence- and research-based practices. See U.S. Department of Education, Office of Special Education Programs, Technical Assistance Center on Positive Behavioral Interventions and Supports.

333 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute," April 2014.

276. The Commission further observed during its visit to Rikers Island the climate of fear, degradation, and lack of basic human respect that is created by the excessive use of force toward adolescents. Reports indicate that correctional officers there regularly employ force in order to control or punish the adolescent prisoners, frequently out of proportion to the risk involved, and often seriously injuring them.[334] As was described by the U.S. Attorney for the Southern District of New York: "Simply put, Rikers is a dangerous place for adolescents and a pervasive climate of fear exists. For years, DOC officials have been well aware of the frequency and severity of staff use of force against adolescents, the high incidence of inmate-on-inmate fights, and the number of serious injuries sustained by adolescents, but have failed to take reasonable steps to ensure adolescents' safety."[335]

277. During its visits to U.S. correctional facilities the Commission also noticed the consistent use of full restraints, including handcuffs and belly- and ankle-shackles on youth. This practice, known as "shackling," is uniformly applied to all youth in the justice system, regardless of whether they represent a risk of danger or escape. Its use is mandated for all courtroom appearances, where youth are especially affected in their ability to participate in the hearing that involves them. Moreover, its use is not limited to these occasions. Youth interviewed by the IACHR affirmed being subjected to such degrading treatment even for dental care visits outside of the secure adult facilities, discouraging their access to these necessary services.[336]

278. The information available further suggests that disciplinary sanctions are imposed by way of arbitrary procedures, allowing correctional officers to exercise excessive authority, often targeting adolescents. Experts and local authorities relayed to the Commission that disciplinary procedures in adult facilities overwhelmingly deliver guilty verdicts in the cases of internal incidents involving youth deprived of liberty, with no safeguards or oversight mechanisms in place to protect the youth.

279. In accordance with international standards, the IACHR urges the United States to expressly prohibit corporal punishment as well as any disciplinary measure that constitutes a form of cruel, inhuman or degrading treatment,[337]

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334 Letter from the New York Department of Justice, see "The Solitary Confinement of Youth in New York: A Civil Rights Violation. New York Advisory Committee to the U.S. Commission on Civil Rights," December 2014.

335 U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

336 National Juvenile Defender Center and Colorado Juvenile Defender Coalition, "Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings", 2012.

337 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child all feature the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, have expressly condemned torture or other ill-treatment of children deprived of their liberty.

including the restriction of diet, restriction or denial of the child's contact with his or her family, sanctions imposed arbitrarily on groups of inmates, multiple sanctions for the same offense, and any measure that jeopardizes the incarcerated child's physical or mental health. Moreover, the use of force and restraints should be strictly regulated, limited to exceptional situations in which the child poses an imminent threat of injury to himself or herself or others, and take place only for a limited period of time and only when all other means of control have been exhausted.[338]

280. In particular, the U.S. should respect the principle of legality and the guarantees of due process in disciplinary proceedings involving children deprived of liberty, in addition to the principle of specialization that requires the involvement of technical and security staff specialized in, and trained to work with, children. All disciplinary measures applied to children should be established by law, pursue a legitimate aim in the best interests of the child and the objectives of juvenile justice, and be appropriate, necessary, and proportional.[339]

### 3. Abuse by Correctional Staff and by Adult Prisoners

281. Multiple studies in the United States have shown that adult jails and prisons are detrimental for children, as these facilities are designed for adults and are not equipped to keep children safe from the elevated risks of abuse and harm that they face inside them.[340] Some of these include: youth are five times more likely to suffer sexual abuse or rape in an adult facility as compared to those held in juvenile facilities.[341] Youth incarcerated in adult facilities are also twice as likely to be physically abused by correctional staff, have a 50% higher chance of being attacked with a weapon,[342] and have a high probability of witnessing or being the target of violence committed by other prisoners.[343]

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338 IACHR, *Juvenile Justice and Human Rights in the Americas*, p.166, Specific Recommendation made to States, para.19(c).

339 IACHR, *Juvenile Justice and Human Rights in the Americas*, para.570.

340 Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Juvenile Justice Reform Initiatives, 1994-1996; see also: Campaign for an Effective Crime Policy, Public Policy Reports: A Series of Reports on Major Issues in Criminal Justice: The Violent Juvenile Offender: Policy Perspective 5, July 1996.

341 Prison Rape Elimination Act of 2003 (2003, September 4), PL 108-79, 117 Stat. 972–973.

342 Fagan, J., M. Frost, and T.S. Vivona, "Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy," Juvenile and Family Court Journal, No. 2, 1989.

343 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence," December 12, 2012, p.190. See also: Campaign for Youth Justice, Jailing juveniles: The dangers of incarcerating youth in adult jails in America, November 2007, p.14.

282. Specifically, studies conducted by the U.S. Government in 2005 and 2006 with regard to the detention conditions in jails revealed that between 13% and 21% of those who were sexually assaulted by other incarcerated persons were adolescents, a statistic greatly disproportionate to the 1% of the general population that youth accounted for during those years.[344]

283. The Prison Rape Elimination Act (PREA) is a federal law enacted in 2003 that mandates protection against sexual assault of those persons incarcerated in both the juvenile and adult systems.[345] This law authorized the drafting of what are known as PREA standards, which were developed with states' contributions over a period of time following the enactment of the Act, and which have come into effect under the authority of the U.S. Department of Justice as of August 20, 2012. Inter alia, these federal standards require "sight and sound" as well as physical separation of youth from adults in any confinement or correctional facility, for the purpose of preventing sexual assault, especially among the more vulnerable youth population.[346] In this manner, the PREA regulations intentionally attempt to bridge the gap in the Juvenile Justice and Delinquency Prevention Act, by extending the separation requirement to all incarcerated youth, regardless of whether they are tried in the juvenile or adult system.

284. As the Commission was informed during the expert consultations held in preparation of this report, several significant concerns remain with respect to the implementation of the PREA standards. An important element of the oversight of these standards is the PREA auditing, which takes the form of 2-3 day visits or examinations conducted by certified PREA auditors of the states' facilities in order to ensure compliance with the standards. Experts have stated to the IACHR that data on what really occurs within incarceration facilities is difficult to obtain through this oversight process, because the audits are infrequent, and announced in advance. This hinders the collection of factual information.

285. However, as with the JJDPA, U.S. states are not obligated to comply with the PREA standards, which are implemented by way of a funding incentive mechanism, under which 5% of a particular federal funding initiative would be withheld from states that fail to comply. As of 2016, 12 states have

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344 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Beck, A.J., Harrison, P.M., Adams, D.B., Sexual Violence Reported by Correctional Authorities, 2005 and 2006. See also: U.S. Department of Justice, National Institute of Corrections, "You're an Adult Now: Youth in the Adult Criminal Justice Systems," December 2011, p.11.

345 The PREA Act's purpose is to "provide for the analysis of the incidence and effects of prison rape in Federal, State and local institutions and provide information, resources, recommendations and funding to protect individuals from prison rape." See, National PREA Resource Center, 2014.

346 PREA standard 115.14, "Youthful Inmate Standard".

certified that they are in compliance, while 4 states have refused to comply. [347]The majority of states have issued assurances that they are working to come into compliance, which allows them to avoid the funding penalty.

286. The Commission was also informed that additional problems in the implementation of the PREA standards include the fact that, in practice, children are often isolated in order to restrict their contact with imprisoned adults, and states are only required to make best efforts to provide special services and programming for youth. Girls are especially negatively affected and are often held in solitary confinement in order to isolate them from adults. This was observed by the Commission during its visit to Washington D.C., as well as to Colorado, where youth under the age of 18 were practically locked-down without access to recreation and programming, in order to maintain "sight-and-sound" distance from the young adult population. During its visit to Rikers Island, in NY, the Commissioner interviewed some youth who informed her that youth inmates were given sleeping pills and anti-depression pills and kept inside their cells for long periods of time. During the visit to the facilities, the Commission saw youth who reported being kept in their cells during 23 hours each day, and some of the paperwork showed several of them were given medicines. When the guards were asked how often doctors came to prescribe these medicines, the guards informed the Commission that a doctor had not visited the inmates.

287. In this regard, the Commission was informed that while PREA standards represent a significant effort of the U.S. government to separate and protect youth under the age of 18 who are deprived of liberty, its impacts severely limited due to their lack of enforceability. Furthermore, the standards are only a partial remedy that does not address the core problem, namely that children are being held in adult facilities, which should not happen under any circumstances.

288. Further reports have revealed that youth are especially targeted in adult facilities and receive significant levels of abuse from correctional officers, such as physical and verbal mistreatment, racial harassment, threats, and retaliation. Surveys in Greene Prison in New York State report, for example, that 86% of adolescent inmates have suffered some form of abuse by the staff.[348] A U.S. federal report found that children are exposed and subjected to physical abuse and violence that is inflicted on them by the New York

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347 https://www.prearesourcecenter.org/sites/default/files/library/PRC%20Annual%20Report%202016_3.pdf

348 Correctional Association of New York, Prison Visiting Project, report on Greene Correctional Facility: 2012-2014.

correctional officers guarding them and by adult prisoners.[349] Adolescents held in one particular jail suffered 565 incidents of use of force by staff, and many other incidents went unreported due to the lack of accountability of the adult facility.[350]

289. During the expert meeting held on this subject, the IACHR was informed of a form of structured violence in adult prisons and jails, known as the "gladiator mechanism," in which prison staff members facilitate violence among prisoners in order to maintain order and control, inflicting very high levels of abuse on children. Under this practice, adolescents incarcerated in adult settings are forced to become predatory, in order to protect themselves from abuse and attack by adult inmates. Youth are frequently placed with particularly dangerous adult prisoners in order to "teach them a lesson." Officials charged with overseeing the younger prisoners are less experienced and lack the training to work effectively with children, worsening the abusive system. According to experts, youth demonstrated great levels of fear when interviewed, sensing a constant threat to their survival in the abusive conditions of adult facilities.

290. Interviews with families of incarcerated youth revealed that adolescents suffer gruesome and torturous treatment from adult correctional officers. The Commission has also been made aware of multiple cases of youth who have been physically abused, sexually harassed, assaulted, and raped by adult prisoners and even staff, as a result of their increased vulnerability in adult systems. This heightened risk affects all youth who enter adult facilities.

291. The Commission received information about children incarcerated with adults in the State of Michigan in a hearing held during its 147th Period of Sessions[351]. The information stated that there were 2000 children in adult prisons in Michigan. Petitioners stated that they interviewed 69 youth. 79% of them had spent time in solitary confinement; one third of them for more than 30 days. They did not have enough food, and food was taken away as a

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349 U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

350 As expressed in the report, "force is used against adolescents at an alarming rate and violent inmate-on-inmate fights and assaults are commonplace, resulting in a striking number of serious injuries; correction officers resort to "headshots," or blows to an inmate's head or facial area, too frequently; force is used as punishment or retribution; force is used in response to inmates' verbal altercations with officers; use of force by specialized response teams within the jails is particularly brutal; correction officers attempt to justify use of force by yelling "stop resisting" even when the adolescent has been completely subdued or was never resisting in the first place; and use of force is particularly common in areas without video surveillance cameras". U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

351 Available at https://www.youtube.com/watch?v=DtIHjB1m76o&list=PLkh9EPEuEx2st1_l-W6cr0o3oH9DxBSDc

punishment. In Michigan youth have to pay for medical care. 78% of all youth in adult facilities are youth of African American descent.

292. In testimony offered from a young boy in the hearing before the IACHR, he stated that he was beaten, then moved to another cell and attacked again. He stated he was raped two days after arriving and then repeatedly by inmates in the shower. He stated that the guards saw it and laughed. After seven months in the jail, he was taken into an adult prison. He was sexually assaulted by his roommate, who raped him every day for two months and was raped in the shower by others. Other men came into his room without authorization to rape him and he heard a guard (outside the room) say that is what happens to fags. He stated "I wanted to tell the guards but when they laughed I understood that I could get no help." He added in his testimony that "After some time the line of men was so long waiting to rape him, that the guards put him in solitary confinement."[352]

293. The Commission reiterates that children in custody in the United States must be held separately from adults. This is in line with international standards concerning the required conditions for juveniles deprived of liberty.[353] Specifically, every effort must be made by the U.S. to keep children safe from harm when they are placed in the custody of the State. Depriving children of their liberty in adult facilities, which places them at great risk of abuse by adult prisoners and correctional staff, is a direct violation of the United States' duty to protect children. Insufficient resources cannot be offered as an excuse by the State for such detrimental treatment of children.[354]

294. The IACHR reminds the United States that a child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.

### 4. Risk of Suicide and Self-harm by Youth

295. Of grave concern to the Commission is that, according to research conducted in the U.S., children and adolescents confined in adult jails and prisons are at a higher risk of self-harm and have a much greater likelihood of committing

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352 Hearing before the IACHR "The situation of children deprived of liberty with adults in the United States".

353 See Beijing Rules (rules 13.4 and 26.3), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 of 14 December 1990, rules 17, 28 and 29).

354 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.451.

suicide, as opposed to those in juvenile facilities.[355] Statistics on deaths of adolescents confined in adult jails reveal that 75% of such deaths were as a result of suicide.[356] According to data from adult facilities nationwide, over 40 incarcerated adolescents committed suicide between 2000 and 2012, twice the rate of incarcerated adults.[357]

296. The lack of specialized services and the overall punitive treatment and conditions of adult facilities, and especially the use of solitary confinement, lead to detrimental mental and physical consequences for the children held there, such as severe depression and anxiety, incidents of self-harm, and suicide attempts. Furthermore, the various forms of isolation or segregation exacerbate existing mental health problems or other disorders that youth may have, placing them at an even greater risk of suicide.

297. In the New York City adult jail where youth have been especially prone to isolations, rates of self-harm and suicide attempts increased by more than 75% over a period of time during which disciplinary solitary confinement increased by 70%, indicating the damaging effects of punitive segregation on the prison population.[358]

298. In Colorado, the IACHR was informed that two adolescents committed suicide while awaiting trial in adult jails, consequent to being held in isolation cells for 23 hours a day.[359] Even though they did not present any behavioral problems during their initial detention, these youth were transferred from secure juvenile centers to county jails while awaiting trial,

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355 Memory, J. (1989), Juvenile suicides in secure detention facilities: correction of published rates, Death Studies, 13(5), 455–63. "There is a dearth of research on juvenile suicide in adult jails, but newer figures show jail inmates under 18 had the highest suicide rate in local jails, 101 per 100,000. The suicide rate in local jails for all inmates was 47 per 100,000 inmates." Mumola, C. J. (2005, August), Special Report: Suicide and Homicide in State Prisons and Local Jails (Bureau of Justice Statistics, U.S. Department of Justice, 2–5). According to the calculations of the primary author, after comparing Bureau of Justice statistics with those of the Centers for Disease Control. Mumola, C.J., "Suicide and Homicide in State Prisons and Local Jails", Washington D.C.: U.S. Department of Justice. Office of Justice Programs, Bureau of Justice Statistics, August, 2005. According to the calculations of the primary author of the Task Force on Community Preventive Services, "Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review", 2007. See also: Campaign Youth for Justice, Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America, November 2007.

356 Margaret E. Noonan (2010, October), Deaths in Custody: Local Jail Deaths, 2000-2007 – Statistical Tables. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. See also: "You're an Adult Now: Youth in the Adult Criminal Justice Systems", Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011.

357 U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, Mortality in Local Jails and State Prisons, 2000–2012 - Statistical Tables, October 2014.

358 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

359 Colorado Juvenile Defender Coalition, "Re-Directing Justice: the Consequences of Prosecuting Youth as Adults and the Need to Restore the Judicial Reviews", 2012.

under the states' previous law that allowed prosecutors to file their cases directly in adult courts. When they were transferred to the county jail, no attempt was made to consider individual factors such as their criminal history, the seriousness of the offense charged, or the level of risk that they posed. As jails are not designed to hold persons under the age of 18, in both cases these adolescents were forced into isolation in order to separate them from the adult jail population. Even when they showed signs of extreme mental and emotional harm and depression, including signs of suicide risk, they were not provided the age-appropriate interventions and protection that would have been afforded to them in the juvenile facility. Legislative reforms have since been introduced in the state to prevent further deaths such as these from occurring, mandating that no child should be held in adult facilities.[360]

299. During its visit to Washington D.C., the Commission was informed of the dismal effects that segregation and lack of services have had on youth held in adult jails. In the District of Columbia, laws mandate that adolescents awaiting trial in adult courts be held in a separate unit of the adult holding facility until they reach 18 years of age. They are often isolated and left without programming or physical exercise. Numerous incarcerated youth have expressed experiencing severe depression and even attempting suicide as a result, while spending months and even years awaiting trial.[361]

300. Any child deprived of liberty is at an increased risk of suffering depression and anxiety, with a higher tendency for mental and developmental problems. As affirmed by the UN Special Rapporteur on Torture, ill treatment during incarceration may cause greater and more likely irreversible damage for children than it does for adults.[362]

301. Therefore, detention or imprisonment of children must only be used in exceptional circumstances as a measure of last resort, for the shortest possible period of time, in conditions that fully respect the rights of the child to protection of his or her physical, emotional and mental wellbeing and development. The IACHR stresses that holding children in adult facilities is in direct violation of these rights, and places them at significant risk for suicide and self-harm. The U.S. must end such practices occurring in its territory, in the shortest time possible.

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360 New York Times, publication by John Schwartz, "A Bid to Keep Youths Out of Adult Prisons," October 28, 2013.

361 D.C. Lawyers for Youth and Campaign Youth for Justice, Capital City Correction, May 2014.

362 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685, March 2015, Human Rights Council, Twenty-eighth session, para.70. See also: Anthony Lake and Margaret Chan, Putting science into practice for early child development, UNICEF, New York and WHO, Geneva, 20 September 2014; and Michael D. De Bellis et al., "Developmental Traumatology Part II: Brain Development," Biological Psychiatry, vol. 14, No. 10 (15 May 1999), pp.1271-1284.

## *B. Confinement of Youth Awaiting Trial as Adults*

302. In particular, the Commission is alarmed that most states in the U.S. allow adolescents awaiting trial in the adult system to be confined in adult jails, as opposed to juvenile centers or alternatives such as community-based supervision under the juvenile system. It also has been informed that 14 states have laws in place that have made pre-trial detention in adult facilities mandatory for those youth tried in the adult system. In many other states the matter of where youth awaiting trial are held in custody mostly depends on local policies and practices.[363]

303. The situation of children incarcerated in adult facilities during the pre-trial period was observed by the IACHR during a visit to New York, where a large number of youth under the age of 18 are held in adult facilities while awaiting trial as adults, pursuant to the state's low minimum age of adult criminal responsibility for all offenses.[364] State legislation permits some adolescents of 16 and 17 years of age, who are automatically tried as adults regardless of the seriousness of the offense of which they are accused, to receive the option of lesser adult sentencing under a "youthful offender status." However, this is only decided after the youth has been found guilty and convicted of the crime with which they are charged, forcing arrested youth to spend long periods of time in adult jail without the possibility of bail. As was recently reported by the U.S. Attorney for the Southern District of New York, on average, youth are held for more than 2 months in the city jail.[365]

304. An example of this adverse treatment of children was revealed in the case of an adolescent in custody in the children's department of the New York City jail, who was accused of assaulting another youth. While awaiting trial, the adolescent was held in Rikers Island jail for 8 months, where he was frequently held in isolation, until finally the adult court dismissed his case and he was sent back to child services.[366]

305. Florida state laws do not allow judges to use discretion in the case of an adolescent charged as an adult, to keep him or her out of a county jail and in

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363 U.S. Department of Justice, OJJDP, Juvenile Offenders and Victims: National Report Series, "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," September 2011.

364 "You're an Adult Now: Youth in the Adult Criminal Justice Systems." Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011. See also IACHR Press Release, "IACHR Conducted a Visit to New York, United States," April 24, 2014.

365 U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

366 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

custody of the Department of Juvenile Justice while awaiting trial.[367] Whenever a prosecutor chooses to file charges in the adult court, the child accused of a crime is automatically removed from a juvenile center to an adult jail, without a judge in either the juvenile or adult system having the competence to prevent this. A recent report on the effects of these laws has found that children are forced to endure excessive periods of time in pre-trial confinement while prosecutors make the decision as to whether to charge them in the adult or juvenile system.[368]

306. Likewise, laws governing the trial of youth as adults in Washington D.C. allow for the pre-trial incarceration of such youth in adult facilities. Almost 60% of the amount of time that adolescents were confined in D.C. adult jail was spent awaiting trial in adult courts.[369] Specifically, this situation was observed after a change in policy in the jurisdiction mandating that all adolescents below the age of 18 be held under the authority of the D.C. Department of Corrections, and that they no longer be sent to a distant federal prison, as typically occurred prior to the change. According to the Comprehensive Youth Justice Amendment Act of 2016, the oversight of youth who have been transferred to adult court is transferred from DOC to DYS in October 2018. Youth will not be immediately removed from the adult jail, but DYS will have oversight of their unit. Youth will get to move back into the juvenile detention facility once there is evidence of capacity.

307. The Commission reiterates that under its obligation to protect children, the United States must ensure that detention is exceptional and applied for the shortest possible time. All facilities housing children in preventive detention fully respect their human rights; any measure of pretrial detention must be in accordance with the principle of presumption of innocence. The State likewise has a duty to guarantee all the rights to which children deprived of their liberty are entitled, such as contact with family, access to education, recreation, health, religious practices, and others.[370]

308. The United States' obligations toward youth facing trial are also mandated under Article 10 of the International Covenant on Civil and Political Rights,

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367 Florida Statute § 985.265(5)(a), "Detention Transfer and Release; Education; Adult Jails". See also: State v. G.G., 941 So. 2d 484 (Fla. Dist. Ct. App. 2006).

368 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute," April 2014. See: State v. G.G., 941 So. 2d 484 (Fla. Dist. Ct. App. 2006) (quashing juvenile judge's order denying transfer of defendant to the Dade County Jail). See also: State v. Lopez, 748 So. 2d 384 (Fla. Dist. Ct. App. 2000).

369 A total of 541 youth were held in pre-trial detention during this period. See: D.C. Lawyers for Youth and Campaign for Youth Justice, Capital City Correction, May 2014.

370 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.306. See in this regard: Convention on the Rights of the Child, Arts. 37.3 et seq.; Havana Rules, Rules 12, 28, 29, 31, 32 and 65.

ratified by the United States, which requires that any youth accused of committing a crime must be held separate from adults and brought as quickly as possible for adjudication.[371] In its recent concluding observations, the UN Committee on the Elimination of Racial Discrimination reminded the U.S. that it needed to intensify its efforts to ensure that youth are not transferred to adult courts and that they are separated from adults during pretrial detention.[372]

## *C. Family and Community Contact while in Custody*

309. Children incarcerated in adult prisons and jails in the U.S. are not afforded sufficient levels of contact with their families and communities, and in many cases are restricted or discouraged from such contact or are purposefully separated from their families. This is yet another significant difference in the treatment that youth receive when held under the custody of adult correctional systems, in contrast to juvenile systems which cite family and community contact as a crucial element of rehabilitation and social reintegration.

310. Services for facilitating contact with family for incarcerated youth are often non-existent in adult facilities, and thus in some cases this right is denied. During its visit to D.C., previously incarcerated youth and civil society organizations affirmed to the Commission that youth awaiting trial or post-conviction proceedings in the federal court system are not permitted in-person visits. They are restricted to seeing their families through video interviews, and due to these extreme restrictions, most families do not attempt to visit their children. During a hearing, the Commission received information that in Michigan, youth are often placed in jails and prison far away from their families and are charged 4 dollars for a 15 minute call and charged for stamps, envelopes and paper.[373]

311. A similar situation was observed in Colorado's adult correctional system for young adults, to which youth below the age of 18 may be committed. As a rule, immediate-family visits are permitted to take place in a designated public space, under supervision. However, due to the location of the facility, which in some cases is hundreds of miles away from the youth's home, most families refrained from making personal visits. Incarcerated youth also expressed that contact with their families, including visitation rights and

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371 ICCPR, Art. 10(2)(b).

372 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of United States of America, CERD/C/USA/CO/7-9, August 29, 2014.

373 Available at https://www.youtube.com/watch?v=DtIHjB1m76o&list=PLkh9EPEuEx2st1_l-W6cr0o3oH9DxBSDc

phone calls, is difficult to access without achieving a sufficient level of status under the facilities' merit systems.[374] Communication via phone is further restricted, as all calls are monitored and are expensive to access, with inmates having to opt between these and the purchase of personal hygiene items. Moreover, family members of incarcerated youth informed the Commission that they were often unaware of when their children were placed in isolation or "lock-down," and had difficulty finding out where they had been moved, as well as for how long.

312. In contrast to this approach, as observed during the IACHR's visit, secure facilities for youth under the juvenile justice system of Colorado implement programming focused on family involvement, leading to a high success rate of non-recidivism. The juvenile justice system centers on a client-family approach in which 95% of families participate, providing subsidies for the transportation of families as well as a special recreational space for family contact within the facilities. Youth in general affirmed that juvenile facilities are usually helpful in maintaining and improving family contact and relationships.[375]

313. The Commission was also informed about comparable issues of concern regarding family contact in the state of Florida, where county jails prohibit visits to youth who are held there while awaiting trial, while prisons are usually at a far distance from the adolescent's home, hindering the possibility of contact. In fact, many of the adult prisons in which youth are placed only permit video visitation with family members, causing distress for incarcerated adolescents.[376] Under the adult Department of Corrections, family who apply to visit their children may even be disqualified, as a result of an incomplete application or inaccurate information, among other things.[377]

314. The Commission learned that youth convicted in the federal system are transferred to the custody of the Bureau of Prisons, which "attempts to place" all federal juveniles in facilities that are reasonably close to their homes, to facilitate community reintegration and their eventual reuniting with their families.[378] However, the nearest facility may still be as far as 500

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374 Privileges in the Youthful Offender System of Colorado are earned under a merit system, , but can be lost due to problematic behavior or infractions of the adult Correctional Code of Discipline.

375 Richard E. Redding, "The Effects Of Adjudicating And Sentencing Juveniles As Adults: Research and Policy Implications", Youth Violence and Juvenile Justice, Volume 1, Issue 2, April 2003, pp.128-155.

376 Human Rights Watch, "Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute", April 2014.

377 Florida Department of Corrections, "Frequently Asked Questions Regarding Visitation,". See also Human Rights Watch, Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute, April 2014.

378 According to the Bureau of Prisons, available at http://www.bop.gov/inmates/custody_and_care/juveniles.jsp

miles from the adolescent's home.[379] Furthermore, youth who had been formerly convicted under the federal system related to the Commission that they were sent to somewhat distant detention centers until reaching the age of 18, after which they were transferred to prisons on the other side of the country.

315. As explained by the IACHR in its report on Juvenile Justice, children's contact with family and community is essential to their social reintegration; it is a means to counter-balance, at least partially, the negative consequences that incarceration has on the child and on his or her family ties.[380] The United States must protect this fundamental right for all children placed in its custody.

## *D. Programming for the Developmental Needs of Children and Adolescents*

316. The Commission is troubled by the fact that most children and adolescents housed in adult jails and prisons do not receive age-appropriate programming to adequately meet their developmental needs, as these facilities are specifically developed to house an adult population. Adult facilities are usually unable to provide specific services for the physical and mental health needs of youths held there, or ensure sufficient access to educational and vocational training programs, according to their age, gender, and individual characteristics.[381] They are also not properly equipped to offer positive role models as well as social interaction and experiences for developing children.[382]There are no public policies or guidelines in the United States that specify the type of intervention and level of programming that should be guaranteed to youth in adult facilities.

317. Recent reports indicate that the alternative custodial regime operating under the adult correctional system in Colorado, namely the Youthful Offender System (YOS), provides insufficient services for mental-health needs, has a lack of gender appropriate programming for girls, and inadequately trains

379 U.S. Department of Justice, Federal Bureau of Prisons, Program Statement Inmate Security and Custody Classification manual, P5100.08, 2006. According to the BOP, other facilities may be designated for youth due to specific security, programming, or population concerns.

380 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.405.

381 "You're an Adult Now: Youth in the Adult Criminal Justice Systems", Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011.

382 Campaign for Youth Justice, "Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America", November 2007.

staff to work with adolescents and young adults.[383] Moreover, the Commission observed during its visit to the YOS that youth below the age of 18 are particularly affected, held in 23 hour "lock down" in segregation from the young adult population, without access to recreation and other services required for their age and development.

318. Similar "Youthful Offender" adult sentencing options exist in other states, and reports indicate the same limited availability of programming for youth. According to a study conducted by the Department of Justice, adolescents under the age of 18 in these programs are not provided with specific programming for their developmental needs.[384] In North Carolina, the only state in which youth of 16 years and older are automatically tried as adults without the possibility of a court review, the inadequacy of mental health services and vocational programming for youth is noteworthy, and only educational programming that is designed for adults is provided to youth. Some states such as Nebraska face specific challenges in providing programming for youth who are sentenced to the "youthful offender system," because the youth represent such a small population within the overall Department of Corrections. The programs in that system are designed for an adult population with an average age of 33 years old.[385]

319. With regard to the exceptional use of segregation for protective or disciplinary reasons, the federal Prison Rape Elimination Act requires that any child placed in isolation must be ensured access to legally mandated educational programming or special education services, as well as to other programming to the extent possible.[386] In contrast, the Commission has observed that youth held in solitary confinement within adult prisons are not only constrained from participating in educational programming, much less other activities, but are given practically zero in-cell education or activity.[387]

320. Treating children in this manner, as the Commission has observed in the U.S., is contrary to the rehabilitative aim of custodial measures pursuant to the international standards governing treatment of youth in conflict with the law. According to these standards, all actions taken by the State must

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383 Colorado Juvenile Defender Coalition, "Re-Directing Justice: the Consequences of Prosecuting Youth as Adults and the Need to Restore the Judicial Reviews", 2012.

384 Bureau of Justice Assistance, Department of Justice, "Juveniles in Adult Prisons and Jails: A National Assessment," October 2000, p. 55.

385 U.S. Department of Justice National Institute of Corrections, "You're an Adult Now: Youth in the Adult Criminal Justice Systems," December 2011, p. 17.

386 6 28 C.F.R. § 115.342(b) (2012) (protective isolation); 28 C.F.R. § 115.378(b) (2012) (disciplinary isolation).

387 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

support children's progress to becoming full constructive members of their society, thus promoting their reintegration.[388] Rule 26(2) of the Beijing Rules further provides that "[j]uveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and physical - that they may require because of their age, sex, and personality and in the interest of their wholesome development."

321. In that regard, the Commission calls upon the US to act in accordance with its duty to ensure the human rights of all children deprived of liberty, including the obligation to implement activities that serve to counteract or lessen the de-socializing effects of incarceration. As the Commission established in its report on the subject, "[a]ny punitive measures must, to the greatest extent possible, avert violations of rights other than the right to freedom of movement, such as the right to education and health, and serve to strengthen family bonds and community ties."[389] The failure to marshal sufficient resources to the task is not a valid excuse for violating children's human rights in the criminal justice system.[390]

## *E. Particularly Vulnerable Segments of the Population*

322. Within the broader framework of challenging issues that drastically affect youth when they are placed in ill-equipped adult facilities, certain segments of the youth population are especially vulnerable and therefore at a much higher risk of the violation of their rights. Particularly vulnerable sub-groups of adolescents deprived of liberty include girls, whose inmate population is smaller than that of boys, LGBTI youth, victims of trafficking and sexual violence, and youth with mental health problems, among others.

323. Girls have been transferred to the adult criminal justice system in increasing numbers as compared to prior years, accounting for 8% of the total transfers made in 2010.[391] When placed in the custody of adult facilities, they require gender sensitive programming and treatment, a response that is often nonexistent because girls under the age of 18 represent a very small minority of the inmates in adult facilities.[392] Moreover, many of the

388 UN Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10 (2007), para.29.

389 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.449. See also, Havana Rules, Rules 12 and 87(f).

390 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.451.

391 U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Report Series Fact Sheet, "Delinquency Cases Waived to Criminal Court, 2010", February 2014.

392 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence", December 12, 2012, p.182.

incarcerated girls have suffered a history of abuse and neglect as well as other traumatic experiences; reportedly, 90% of the girls who are deprived of liberty are victims of some form of abuse.[393]

324. As observed by the IACHR during its visits to several states, girls are placed in what amounts to solitary confinement or in highly restricted segregation, due to the small size of the female adolescent population in adult facilities. Moreover, they are often denied access to regular programming and services that are appropriate to their level of development. Reportedly, in adult jails such as those in Washington D.C., this has resulted in depression and suicide attempts.[394]

325. During the consultation held in the preparation of this report, experts informed the Commission that in the state of Michigan, prior to recent reforms, male correctional staff had reportedly assaulted every one of the adolescent girls housed in adult facilities. Although all of the male staff members have since been removed, girls are now held segregated in modified "cages" without access to programming.

326. The Commission has also been informed that victims of commercial sexual exploitation and trafficking are most often criminalized under states' laws for prostitution-related offenses. As also highlighted by the U.S. Government in a recent report on violence, these victims require protection, and not prosecution by the authorities, with specially coordinated services, assessments, and safe housing.[395]

327. Lesbian, Gay, Bisexual, Transgender, and Intersex youth are also particularly vulnerable when housed in adult jails and prisons, as they are frequently targets for harassment, bullying, and discriminatory treatment by other incarcerated adults, as well as correctional staff.[396] What is more, they are often victims of discrimination prior to entering the justice system.[397]

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393 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence", December 12, 2012, p.181. See also: Acoca, L., & Dedel, K. (1998), No place to hide: understanding and meeting the needs of girls in the California juvenile justice system (National Council on Crime and Delinquency).

394 Capital City Correction, D.C. Lawyers for Youth and Campaign for Youth Justice, May 2014.

395 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence," December 12, 2012, p.182.

396 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence," December 12, 2012, p.189. As reported, "[t]he same staff charged with monitoring and protecting these youth may exacerbate their trauma by joining in the harassment and assaults as an expression of their own homophobia."

397 Correctional Association of New York, states that LGBTI youth "routinely encounter harassment and discrimination in their homes, schools, and communities. LGBTI youth are also more likely to face rejection by their families, become homeless and encounter child welfare systems, placing them at higher risk for justice system involvement. Once in the system, they too often enter an environment that is unsupportive, alienating, hostile and/or physically dangerous."

Consequently, these youth often suffer abuse, isolation, and assault, while also being placed in unsafe housing or solitary confinement in adult facilities. National reports indicate that incarcerated LGBTI youth are often segregated, "either in a misguided effort to protect them or based on the incorrect assumption that they are more likely to be sexually predatory."[398]

328. Furthermore, children are adversely affected due to insufficient age-appropriate training of staff in the adult system, and the lack of mental health assessment and treatment services. Once children with mental health illnesses enter the adult correctional system, they are not considered children nor provided with required measures of protection or counseling, and are often improperly medicated. During the visits conducted by the IACHR to Colorado, incarcerated youth and their families indicated that they were not able to access mental health services, even though a high number of them would require, at a minimum, counseling services.

329. The IACHR notes with concern the outcome that conditions of adult incarceration have on especially vulnerable groups of children. Girls, LGBTI youth, and children with disabilities or with mental health problems are often easily overlooked in the justice system, as they represent only a small group. For that reason, international standards mandate that special attention be paid to their particular needs, including special health needs, specific services or measures of protection that they might require, and services in relation to abuse they may have previously suffered. However, as observed in this report, the most vulnerable groups of children are being subjected to a high risk of harm when they are deprived of their liberty in adult criminal justice systems in the United States.

330. Pursuant to the principle of non-discrimination, the Committee on the Rights of the Child has underlined States' duty to implement necessary measures ensuring that all children in conflict with the law are treated equally, especially with regard to existing discrimination or disparities faced by more vulnerable groups of children.[399] The Special Rapporteur on Torture further indicates the obligation to respond to the special needs of such children when they are deprived of liberty, in order to prevent ill treatment and torture.[400] As noted previously by the Commission in this report, adult

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398 Equity Project, Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Courts. See also: National Council on Crime and Delinquency, Factsheet: Youth Under Age 18 in the Adult Criminal Justice System (2006). According to these sources, more research is needed to examine the impact of transfer policies on LGBTI youth in particular.

399 UN Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10 (2007), para.6.

400 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685, March 2015, Human Rights Council, Twenty-eighth session, para. 86(g).

incarceration facilities are not suitable for children, much less the particularly vulnerable segments of the youth population.

## *F. Disproportionate Racial and Ethnic Representation and Treatment*

331. A disproportionate representation of non-Caucasian races and ethnic groups, such as African American, Native American, and Hispanic youth, is observed in the rates of transfers to adult correctional facilities, as compared to other youth.[401] As noted earlier in this report, adolescents pertaining to ethnic groups or races other than Caucasian are disproportionately represented in every stage of the criminal justice system, and such discrepancies are likewise observed with regard to the greater representation of such groups in adult prisons and jails and among those who receive the harshest treatment.

332. According to data covering the period 2002-2004, for example, youth of African American descent accounted for 16% of the total youth population in the United States, and yet they represented 58% of those imprisoned in adult prisons.[402] Similar discrepancies and overrepresentation, especially affecting African American and Hispanic youth, were observed in more recent reports on the population of prisons nationwide. Native American youth, predominantly charged under federal jurisdiction, make up the majority of the federal juvenile population, which is held in separate facilities operated by private parties under contract with the government.[403]

333. At the state level, youth of African American and Hispanic descent are held in adult prisons in New York at disproportionate rates. Together they make up 70% of the youth arrested, but 80% of those sent to adult facilities. It has further been noted that most of these youth are members of communities of lower socioeconomic status, and would be unlikely to be able to afford bail. Overrepresentation is similarly observed in the severity of treatment

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401 Campaign for Youth Justice, Critical Condition: African-American Youth in the Justice System (2008, September). Arya, N., & Rolnick, A., A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems (2008, May), Washington, DC: Campaign for Youth Justice. Arya, N., Villarruel, F., Villanueva, C., & Augarten, I., America's Invisible Children: Latino Youth and the Failure of Justice (2009, May), Campaign for Youth Justice.

402 Eileen Poe-Yamagata & Michael A. Jones, Building Blocks for Youth, And Justice for Some: Differential Treatment of Minority Youth in the Justice System 1-3 (2000).

403 http://www.campaignforyouthjusticeblog.org/2014/09/new-report-us-prison-populations.html

received within adult facilities, with regard to the use of solitary confinement.[404]

334. The IACHR was further informed during its visit to New York of the discriminatory treatment toward incarcerated African American youth that is practiced by correctional officials, who are predominantly white. In Washington D.C., the Commission received information that almost the entire population (97%) of the 541 youth incarcerated in adult facilities between 2007 and 2012 were African American, and the remaining 3% were Hispanic. The Commission noted similar trends in the earlier stages of the juvenile system, with these groups also being overrepresented in police arrests.

335. As has been noted earlier in this report and elsewhere regarding the failure of the overall juvenile justice system in the United States to protect children from being treated as adults, the Commission again highlights the absence of national regulations regarding how to treat incarcerated youth, mandatory and enforceable across the entire territory of the State, that are necessary in order to prevent disproportionate contact of certain groups with the justice system.

336. In particular, while the federal Juvenile Justice and Delinquency Prevention Act sets out guidance for the custody and care of youth in the juvenile system, it has been shown to be inadequate in addressing the persistent issue of racial and ethnic disparities in the juvenile systems in the U.S., especially considering the fact that it does not bar youth from being transferred to the adult system and confined in adult prisons and jails. Pending legislative reforms that were presented in 2014 aim to amend the clarity of the language of this federal statute in order to more effectively reduce the observed disparities.[405]

337. The IACHR therefore reiterates that the United States' is obligated to eliminate all laws, policies, and practices that bring about arbitrary differences in the treatment of, or that discriminate against, children of certain races and ethnicities. Moreover, the State must implement special measures directed toward any disproportionately represented group of children in conflict with the law, where they are subjected to discrimination.[406]

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404 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

405 Juvenile Justice Exchange, "Federal Panel Takes Up JJDPA Reauthorization", February 20, 2015.

406 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.137.

## *G. Mechanism for Filing Complaints of Rights Violations*

338. The federal regulations that are geared toward the protection of incarcerated youth from sexual abuse, that were established under the Prison Rape Elimination Act, require that all facilities have mechanisms through which adolescents can submit anonymous complaints to "a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request."[407] In order to address the risk of abuse, further PREA rules require the establishment of a safe environment in which youth are enabled to file complaints against staff or fellow prisoners without fear of retaliation, including special safeguards to prevent any bias in the investigation following a complaint.

339. On a positive note, the Commission has observed that such mechanisms are in place in the different custodial facilities it visited, and that youth were aware of their existence and how they function. Nonetheless, the IACHR noted that these systems are restricted to specific issues of sexual assault, and are usually referred to a supervising entity within the same Department of Corrections without any assurance to youth of confidentiality, instead of allowing access to an independent agency.

340. Experts affirmed the lack of independent mechanisms that could oversee the conditions of youth incarcerated in adult facilities. Even though monitoring processes are in place, youth experience tremendous levels of intimidation and fear of consequences in the punitive environment of the adult system.

341. A recent report by the U.S. Attorney of the Southern District of New York expressed that "[t]he inmate grievance system is deficient, and may discourage adolescent inmates from reporting inappropriate use of force by staff. (...) Although the Department has assured us that inmate allegations of staff use of force are reported and investigated, the process for reporting such incidents, as well as to whom they should be reported, are unclear."[408]

342. The Commission reminds the United States of the need to ensure effective methods to file complaints of violations alleged to have occurred in the various stages of the system for youth accused of crime, i.e., from the initial police intervention to the implementation of the sentence. These must guarantee swift and serious investigation as required by the situation,

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407 PREA Standard, 28 C.F.R. § 115.51(b) (2012).

408 U.S. Department of Justice, United States Attorney Southern District of New York, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014.

ensuring that those responsible for violating the rights of children face appropriate criminal, civil, or administrative sanctions.[409]

343. Finally, the Commission highlights that, as described in its report on Juvenile Justice in the Americas, one important mechanism for overseeing the conditions of the deprivation of liberty of youth is a visitation and monitoring system carried out at facilities where children are held. This oversight by independent agencies should be in addition to the monitoring that the State's administrative and judicial authorities conduct. The purpose of these inspection visits is to regularly review the conditions of incarceration, as well as the physical and emotional wellbeing, of children deprived of their liberty.[410]

344. The United States should ensure that this independent oversight mechanism is allowed to regularly visit facilities where youth are incarcerated, without prior notification, with such visits to include confidential interviews with children who are deprived of liberty, interviews with custodial staff, and access to the entire facility and its documentation. The findings of such oversight should also be made public, with effective procedures in place to follow up on recommendations that are made.

## *H. Rehabilitation vs. Recidivism*

345. The IACHR recognizes that the United States has played an important role in promoting and establishing the need for a specialized mandate and approach within the justice system, with the aim of rehabilitating youth who are convicted of crime, having initiated the first separate court division for juveniles in the late 18th century.[411] Nevertheless, the Commission is struck by the fact that the majority of its states have enacted regressive measures that run contrary to the rehabilitative aims of custodial sentences for persons under the age of 18, and particularly with regard to those children who are sentenced to deprivation of liberty in adult prisons, where they have a 34% higher risk of recidivism than youth in the juvenile system.[412]

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409 Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para.54. See also: IACHR, Juvenile Justice and Human Rights in the Americas, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.585.

410 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.596.

411 U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: 2006 National Report 93-95 (2006).

412 "You're an Adult Now: Youth in the Adult Criminal Justice Systems," Washington D.C.: U.S. Department of Justice National Institute of Corrections, December 2011. See also: Task Force on Community Preventive Services, American Journal of Preventive Medicine, Volume 32, Number 4S, "Recommendation Against Policies Facilitating

346. Contrary to the widely held assumption that is used to justify regressive juvenile justice laws, namely that a more repressive and retributive response would deter youth from committing violent offenses, longstanding research has shown that manipulating punishments has practically no impact on crime rates in the United States.[413] In 2007, a systematic report on the effects of transfer of youth to the adult system in the U.S. showed that the likelihood of youth reoffending increased when they were tried and sentenced as adults, revealing the insufficiency of evidence to conclude that juvenile crime rates decrease as a result of treating youth offenders as adult criminals.[414] State-level studies, such as one conducted in the state of Washington, also revealed that adolescents tried as adults are more likely to recidivate.[415]

347. As concluded by the National Research Council in 2014, "youth prosecuted in the adult criminal justice system fare worse than those who remain in the juvenile justice system."[416] The report stated that youth held in adult correctional facilities are "more likely to experience victimization, isolation, adults who seem unconcerned for their welfare, and insufficient educational and therapeutic programs—none of which is likely to reduce recidivism and may in fact increase re-offending and contribute to additional developmental harm."[417] Instead, studies have demonstrated that therapeutic interventions employed in juvenile systems are much more successful than punitive correctional models in the rehabilitation and social integration of incarcerated youth.[418]

348. The negative and harmful impact that incarceration in adult facilities has on children's development has been recognized by the U.S. Department of

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the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence; and U.S. Department of Justice, OJJDP, Professor Richard Redding, "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?," June 2010.

413 President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society: A Report," Washington, D.C., U.S. Government Printing Office, 1967. See also, Tonry, M., Malign Neglect: Race, Crime, and Punishment in America, New York, Oxford University Press, 1995.

414 Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report 56, "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System", November 30, 2007.

415 Washington State Institute for Public Policy, "The Effectiveness of Declining Juvenile Court Jurisdiction of Youth," December 2013.

416 "Implementing Juvenile Justice Reform: The Federal Role," Committee on a Prioritized Plan to Implement a Developmental Approach in Juvenile Justice Reform; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council, 2014, p.12. See also: "The Growth of Incarceration in the United States: Exploring Causes and Consequences," Washington, DC: National Research Council, Committee on Causes and Consequences of High Rates of Incarceration, 2014.

417 "Implementing Juvenile Justice Reform: The Federal Role", Committee on a Prioritized Plan to Implement a Developmental Approach in Juvenile Justice Reform; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council, 2014, p.12.

418 Dvoskin, Joel A, et. al, Using Social Science to Reduce Violent Offending, 2011.

Justice, which warned that housing particularly vulnerable adolescents in an environment which does not promote their health and development, and even harms their progress, has more dramatic consequences on youth as compared to adults serving the same sentence for the same offense.[419]

349. Moreover, research has shown that trial and incarceration of youth as adults is counter-effective to their rehabilitation, as youth deprived of liberty in adult facilities are more likely to exhibit the learning of criminal behaviors and attitudes from imprisoned adults, and experience stigma, loss of self-respect, weakening of family and community ties, and diminishment of possibilities for employment and education, among others issues.[420] Further hindering the effective rehabilitation of youth and making them more likely to reoffend, is the sense of injustice or unfairness that youth perceive when being treated as adult criminals, which has negative implications for their behavior and their self-perception, leading to a higher tendency of such youth to identify themselves as "criminals."[421]

350. Over the course of its multiple visits to different U.S. states, the IACHR observed the consistent lack of a rehabilitative approach in adult systems with regard to youth who are held there, as the facilities and their programs have been designed for adults. Also, cooperation between the departments of state governments, with the aim of implementing and strengthening age-appropriate interventions for youth in the adult system, proved to be non-existent. For this reason, the special needs of adolescents are systematically overlooked, in systems that are not designed to rehabilitate them or to effectively support efforts to avoid recidivism. Incarcerated youth and their families repeatedly reported having been traumatized during the period of incarceration, with the youth feeling unable to be reintegrated into society.

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419 US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court," December 2012, p.5.

420 Bazemore, G., & Umbreit, M. (1995), Rethinking the sanctioning function in juvenile court: Retributive or restorative responses to youth crime, Crime and Delinquency, pp.296-316. See also: Fagan, J. A., & Freeman, R. B. (1999), Crime and work, in M. Tonry (Ed.), Crime and justice: A review of research (Vol. 25, pp.225-290), Chicago: University of Chicago Press.

421 U.S. Department of Justice, OJJDP, Professor Richard Redding, "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?" June 2010. See also: Bishop, D.M., and Frazier, C.E., "Consequences of transfer", in "The changing borders of juvenile justice: Transfer of adolescents to the criminal court", p.263. The authors' interviews with juvenile offenders in Florida revealed very negative reactions to criminal court processing: "Many experience the court process not so much as a condemnation of their behavior as a condemnation of them. Unlike the juvenile court, the criminal court failed to communicate that young offenders retain some fundamental worth. What the youths generally heard was that they were being punished not only because their behavior was bad but also because they were personifications of their behavior. Far from viewing the criminal court and its officers as legitimate, the juvenile offenders we interviewed saw them more often as duplicitous and manipulative, malevolent in intent, and indifferent to their needs. It was common for them to experience a sense of injustice and, then, to condemn the condemners."

351. International standards, including the International Covenant on Civil and Political Rights has established that the aim of the penitentiary system of persons deprived of liberty must be their social rehabilitation, requiring that children should be held separate from adults and be afforded treatment appropriate to their age and legal status.[422] Likewise, provisions set forth in the Convention on the Rights of the Child, the Havana Rules, the Beijing Rules, and the Riyadh Guidelines among others, emphasize that the primary aim of the deprivation of liberty of youth is their rehabilitation.[423]

352. Having observed the failure to meet the aims of juvenile justice when incarcerating children in adult correctional facilities, the Commission strongly urges the United States to restrict the use of deprivation of liberty of a child as a measure of last resort, limited to exceptional cases, to be used only for the shortest possible period of time. In addition, the child's best interests should be the primary consideration in every decision imposing or continuing a custodial measure with respect to him or her.

422 ICCPR, Art. 10(3).

423 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/685, March 2015, Human Rights Council. Twenty-eighth session, para.25.

CHAPTER 4

# CONCLUSIONS AND RECOMMENDATIONS

**YOUNG, BUT WISE**

As I sit behind
These walls as a young
Fawn I clinch my jaws
And realize the wrong but
don't speak. For I know
not what to say but if
I last this day and
through help I find
My way then I feel
No shame that I did
Not pray because he
Found me in a more
Pleasant way then If I
Had to go to church and
Bore people trying to
Force his grace upon my
Face and get mad when
I say I can't see the
Light that so many claim
paved that way.
But I do love, I do
Cry so how can you make
Such crule rules beneath
This sky? And If I'm
Asking the right questions
Why isn't it wrong that
The only answer you
Can give me is "I don't
Know why?" and no more
Am I shy because
My innocence waved
Goodbye and forced me to
Become grown before my
Time and made me wonder
If the same thing is
True for when I die.
Will it be too young!
Or maybe not quite, cause
If I'm judge by my
Mind and not by flesh
And time then my
Days grow short and
Life ain't fair but then
Again if you're not living
Life then life ain't
There. So I take shelter
In the ones who love
Me, the ones who help
Me and even the ones
Who shun me. Because
Without people showing me
That outward hate I
Would have no map to
Find my way.

# CONCLUSIONS AND RECOMMENDATIONS

## *A. Conclusions: State's Obligation to Respond to Children in Contact with the Criminal Justice System through the Juvenile Justice System*

353. As detailed in this report, international law has clearly distinguished between criminal procedures that apply to persons under the age of 18 and those that apply to adults. When children enter in contact with the criminal system, and due to their stage of development and lesser culpability, criminal procedures involving youth must have as their primary focus the rehabilitation and reintegration of the youth into society, as well as alternatives to deprivation of liberty. This means that all sanctions applied to children under the age of 18 that hold them responsible for acts they committed are required to meet the specific needs of the children as growing individuals. As is internationally recognized, "the earlier the investment in an individual, the greater the chance that violent behaviors can be prevented through adulthood, and the more cost-effective the investment."[424]

354. Within the international juridical framework for the protection of children's human rights (the *corpus juris*), and consistent with the special protection set out in Article VII of the American Declaration, the International Covenant on Civil and Political Rights (ICCPR) specifically acknowledges the need for special treatment of children in the criminal justice system, stressing the importance of their rehabilitation as opposed to punishment.[425] This international treaty, which has been ratified by the United States, requires children accused of crime to be processed in a manner that will "take

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424 United Nations, Office of Drugs and Crime, and World Bank, 2007, p. 61. See also: United Nations, Fact Sheet on Juvenile Justice. World Bank, 2005, "Youth Crime Prevention," LCSFP, Washington, D.C.: World Bank. WHO, 2003, "Youth Violence and Alcohol Fact Sheet,"Geneva: WHO.

425 ICCPR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, Art. 14(4). The ICCPR's provisions on children in conflict with the law have been interpreted to apply to all persons under the age of 18. See, UN Human Rights Committee, General Comment No. 21, Humane Treatment of Persons Deprived of Their Liberty (Article 10), (Forty-fourth Session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/Rev.7 (2004), p.155, para.13.

account of their age and the desirability of promoting their rehabilitation" throughout all stages of the proceedings.[426]

355. The Commission notes that when ratifying the ICCPR in 1992, even though it co-sponsored the provision to treat children separately according to their age and status, the United States maintained a reservation "to treat juveniles as adults" in exceptional circumstances.[427] However, as concluded by the Human Rights Committee in its observations on the United States' compliance with this treaty, the United States does not limit its treatment of children as adults to exceptional circumstances.[428] The Commission observes that the ambiguity of this reservation has been converted into an expansive gap in juvenile justice systems across the U.S., resulting in the violation of children's human rights on federal, state, and local levels.[429]

356. The Commission highlights that, pursuant to the *corpus juris*,[430] the special jurisdiction for children in conflict with the law in the United States should feature the following, inter alia:

> 1) first, the system should be able to provide measures for dealing with such children without resorting to judicial proceedings; 2) should judicial proceedings be necessary, the juvenile court should be able to order a variety of measures, such as psychological counseling for the child while on trial, control over the way the child's testimony is taken, and regulation of the public nature of the proceedings; 3) it should also have a sufficient margin of discretion at all stages of the

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426 The United States co-sponsored this provision together with Great Britain and India, and it was adopted unanimously. See Marc Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (1987), p.307. The ICCPR contains provisions requiring, inter alia, the separation of accused and/or convicted children from adults, the provision of treatment appropriate to their age and legal status, and swift adjudication of their cases; it further prohibits imposing the death penalty on persons who committed crimes while younger than age 18, and prohibits the publication of judgments in cases involving children.

427 U.S. Reservations made upon ratification of the ICCPR: "(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14."

428 Human Rights Committee, Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, Eighty-seventh session, July 2006.

429 Human Rights Watch, Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute, April 2014.

430 In addition to the CRC and other relevant international human rights instruments pertaining to youth in conflict with the law, a series of authoritative international rules have been integrated in the corpus juris of children's human rights and provide guidance and standards for the treatment of children charged with and convicted of crimes. These include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).

> proceedings and at the different levels of juvenile justice administration; and 4) those who exercise discretion should be specially qualified or trained in the human rights of the child and child psychology to avoid any abuse of the discretionary authority and to ensure that the measures ordered in any case are appropriate and proportionate.[431]

357. Further, the Commission strongly reminds the United States that criminal proceedings against a youth accused of crime must be conducive to his or her best interests, and conducted in an atmosphere of understanding, allowing the juvenile to participate and to express him- or herself freely in every stage of the proceedings. As established by the Committee on the Rights of the Child, this has become a powerful force worldwide in improving the outcomes of juvenile justice and enhancing children's rights.[432]

358. International human rights bodies have observed that strategies focused on harsh penalties and law enforcement, as a means of reducing juvenile crime and gang activity are ineffective and in violation of children's rights. Therefore States' responses, when addressing communities targeted by violence and criminal activity, should be based on a holistic approach to law enforcement and justice, which is directed toward identifying delinquency's causes and preventing it through measures that address both individual adolescents' needs and their socio-economic environment These should provide meaningful alternatives aimed at the social integration and success of children, adolescents and young adults.[433]

359. Even though the United States remains one of the only two countries that have not yet ratified the Convention on the Rights of the Child, the Supreme Court of the United States has referred to the CRC's provisions in its rulings

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431 See: Article 40.3(b) and Article 40.4 of the Convention on the Rights of the Child, and Rules 6.1 and 6.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in its resolution 40/33 of 28 November 1985.

432 CRC, Art. 12, "the right to be heard". See also, UN Committee on the Rights of the Child, General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10 (2007), para.12. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted November 29, 1985, G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), rule 14.2.

433 United Nations' Fact Sheet on Juvenile Justice. See also: UN (Committee on Crime Prevention and Control): Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, available at. Guideline 19 states "In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary."

regarding youth in conflict with the law.[434] While it has recognized the lesser culpability of adolescents, and has held that they must be treated differently from adults, the U.S. Supreme Court has failed to ban the transfer of children to adult courts, and has not directly addressed this violation of their rights since its 1966 ruling in Kent v. United States.[435] Moreover, although the U.S. has ratified the Optional Protocols to the CRC on the Sale of Children, Child Prostitution and Child Pornography, and the Involvement of Children in Armed Conflict, its domestic laws do not adequately or consistently reflect the principle of the primacy of the best interests of the child, as has been noted in this report.

360. The Commission is aware that the U.S. has an array of additional domestic mechanisms that can be used to address the violation of the basic rights of youth. For example, under its Violent Crime Control and Law Enforcement Act, passed in 1994, it has given authority to the U.S. Attorney General to take civil actions whenever any authority in federal, state, or local government "in pattern or practice" deprives persons of their rights or legal safeguards under the U.S. Constitution.[436] Likewise the Commission notes that the U.S. Department of Justice, specifically its Office of Juvenile Justice and Delinquency Prevention, is empowered to implement and monitor appropriate standards for all facilities with regard to children deprived of liberty, as well as those subjected to criminal proceedings.[437] While taking note of these authorities that are charged with the oversight of the State's internal obligations to protect children's rights, the IACHR has observed serious shortcomings in the State's efforts, insofar as it has failed to include in its juvenile justice systems all children in conflict with the criminal law, regardless of the seriousness of the crime of which they have been accused.

361. The Commission has further noted that while current legislation contains significant gaps in the protection of children in conflict with the law, the United States Congress is considering significant reforms to federal legislation. Current proposals, such as the REDEEM Act (Record Expungement Designed to Enhance Employment), would further encourage the states to raise the minimum age limit of adult jurisdiction to 18 years, while a proposed reauthorization of the Juvenile Justice and Delinquency Prevention Act would extend its provisions to youth who are tried as

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434 Roper, 543 U.S. at 575.

435 Kent v. United States, 383 U.S. 541 (1966).

436 Violent Crime Control and Law Enforcement Act of 1994 (Section 14141). See also: The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

437 The Solitary Confinement of Youth in New York: A Civil Rights Violation, New York Advisory Committee to the U.S. Commission on Civil Rights, December 2014.

adults.[438] Likewise, as detailed in this report, states across the U.S. are enacting similar reforms to broaden the application of juvenile justice.

362. Nevertheless, in examination of the situation of youth who are tried, sentenced, and incarcerated as adults in the United States, the IACHR observes with particular concern the level of impact that public views and opinions, which are distorted by the overly dramatized reporting of serious crimes in mass media, have on the decisions of U.S. authorities. As has been noted in the discussion of historic events leading up to the current state of the law in the United States, the pressure of public opinion has compelled regressive changes to laws and policies that in turn have led to extreme violations of children's rights. The IACHR notes that this continues to be the case in the U.S., with legislators and policymakers, and even judges and prosecutors, continuing to experience pressure to impose severe and repressive responses to youth who come in conflict with the criminal law.

363. Moreover, under its responsibility pursuant to Article VII of the American Declaration on Human Rights, the United States has a duty to protect children in conflict with the law in accordance with the international standards set forth in the *corpus juris* with regard to juvenile justice. In particular, the IACHR urges the State's federal government to take appropriate measures to ensure that the state or local governments implement measures in fulfillment of the State's obligations. It reiterates that the federal structure of the United States cannot be invoked as an excuse for failing to comply with an international obligation. The most important measure is to take immediate action to establish at a federal level that all personas under the age of 18 are children.

364. Therefore the IACHR calls on the U.S. Government to implement swift and full amendment of those laws and practices that allow youth to be excluded from the juvenile justice system. Experts consulted by the IACHR in the preparation of this report recognized that, regardless of how much better the adult system may be made, it still could never adequately respond to the specific needs of children. As concluded in a U.S. Government report, "we should stop treating juvenile offenders as if they were adults, prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore their capacity to grow."[439]

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438 On July 8, 2014, U.S. Sens. Cory Booker (D-NJ) and Rand Paul (R-KY) introduced the REDEEM Act. On December 11, 2014, Sen. Sheldon Whitehouse (D-RI) and Sen. Chuck Grassley (R-IA) introduced S. 2999, legislation that would reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDPA).

439 U.S. Department of Justice, OJJDP, "Report of the Attorney General's National Task Force on Children Exposed to Violence", December 12, 2012, p.189.

## 1. The Best Interests of the Child

365. The IACHR recognizes that the domestic law of the United States has established the primacy of the best interests of the child in certain cases involving children, thus incorporating this fundamental principle of international human rights law into at least some aspects of the legal system throughout the country. According to information provided to the Commission, statutes in every U.S. state and in the District of Columbia require that the child's best interests be considered in decisions concerning specific issues that are critical to a child's life, such as child custody and care that is provided by the State.[440]

366. However, the Commission notes that the integration of the principle of the best interests of the child is restricted to certain areas of the law that are related to child welfare and the family. The principle has not been made effective in all federal and state legislation and policies involving children in particular with regard to the treatment of persons less than 18 years of age in the criminal justice system. Although a few U.S. jurisdictions do clearly state that the promotion of the welfare and best interests of youth is one of the purposes of their juvenile justice system,[441] in practice the principal of the best interests of the child is not a primary consideration. In addition, many children are excluded from the juvenile justice system and not all youth under age 18 are in the juvenile justice system.

367. As an international standard, and as part of the *corpus iuris* of the rights of the child, Article 3 of the CRC[442] the best interests of the child are to be a primary consideration in all actions concerning children, whether

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440 U.S. Department of Health & Human Services, Children's Bureau / Administration for Children & Families, Child Welfare Information Gateway, "Determining the Best Interests of the Child – State Statutes, Current Through November 2012."

441 These jurisdictions include Colorado, Kentucky, Massachusetts, West Virginia, and the District of Columbia. In Colorado, the law states that the juvenile justice system must take into account "the best interests of the juvenile, the victim, and the community" in providing appropriate treatment to reduce the likelihood of reoffending. The Massachusetts legislation states that youth charged with crimes should be "treated, not as criminals, but as children in need of aid, encouragement and guidance." See, Juvenile Offenders and Victims: 2006 National Report. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, pp. 93–120. Colo. Rev. Stat. tit. 19 (2012) § 19-2-102.

442 Article 3 of the Convention on the Rights of the Child (CRC) states:"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.[443] Likewise, the Optional Protocols of the CRC on the Sale of Children, Child Prostitution and Child Pornography, and the Involvement of Children in Armed Conflict, which the U.S. has ratified, also provide for States' responsibility to give primary consideration to the best interests of the child.[444]

368. Based on the doctrine of comprehensive protection that underlies the Convention on the Rights of the Child and its protocols, the IACHR has held that "in all cases involving decisions that affect the life, liberty, physical or moral integrity, development, education, health, or other rights of minors, these decisions must be made on the basis of what is most advantageous to the child,"[445] and has further determined that State action in the best interests of the child should be understood as that which effectuates enjoyment of each and every one of a child's human rights.[446]

369. As a general matter within the region, the Inter-American Court has described the best interests of the child as a "regulating principle regarding children's rights based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child."[447]

370. Consequently, all children in conflict with the law must be subject to a specialized justice system for youth. The best interests of the child is a guiding principle in the regulation, application, and operation of specialized justice systems for youth who are in conflict with the criminal law, and must therefore be a primary consideration for State institutions and authorities and private entities that are involved. Additionally, the child's best interests must be given special consideration in cases involving children from

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443 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 21.

444 Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 8.3. See also Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

445 IACHR, 1997 Annual Report, Chapter VII. Recommendations to member states in areas where they should adopt measures to ensure full observance of human rights, in accordance with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, preamble.

446 IACHR, *Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, para. 25. See also IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 23.

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

disadvantaged sectors of society or groups that have historically been subjected to discrimination.[448]

371. The principle of the best interests of the child further implies that in juvenile justice proceedings there be individual examination of each case on its merits and in light of its particular context and circumstances, given that every child's needs are different. Likewise, appropriate consideration must be given to each child's opinion and views, in accordance with his or her level of maturity and age, as well as to those of his or her parents, guardians, representatives, or close family members.[449]

372. The Commission therefore urges the United States to establish in its domestic legislation and policies primary consideration be given to the best interests of children who are affected by that legislation and policies, and especially with regard to juvenile justice. In order to be effective, this should involve the establishment of clear federal guidelines to be used in the development and revision of state-level legislation and policies that govern the criminal justice system.

## 2. The Need for a Comprehensive System to Promote the Rights and Protect Children

373. Based on information it received, the IACHR is of the view that the U.S. currently lacks a comprehensive system, required under international law, to protect and promote the rights of children. The IACHR notes that the United States has established government agencies and institutions that address specific issues involving children, such as child welfare, abuse and neglect, and education, as well as juvenile justice. Nevertheless, there is no overall mechanism in place that can serve to coordinate and implement one unified system throughout and across federal, state, and local levels, so as to ensure a consistent and comprehensive approach to policies, strategies, and services aimed at the promotion of children's rights and the prevention of, or response to, rights violations.

374. In particular, the failure to systematically integrate the principle of the child's best interests into federal and state law is of primary concern to the Commission. State authorities and civil society organizations indicated to the

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448 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 24.

449 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para. 27. See Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, 20 July 2009, paras. 29 and 59. See also Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras. 43 to 45.

IACHR during its visits within the United States that there is no formal coordination between the various systems involving children, such as those related to education, child welfare, and juvenile justice. Such coordination is necessary in order to effectively protect children's rights and ensure that the various resources, services, and programming that are pertinent to children operate effectively within a comprehensive framework.

375. During the Commission's visits to the U.S., the absence of a holistic view of children and the protection of their rights was frequently raised as one of the key factors affecting children, especially those in conflict with the law. Such an approach should necessarily engage the full range of actors – including the family, the community, and the State –involved in protecting the rights of children at any stage of their development, as well as children themselves, pursuant to their right to be heard and to participate.

376. According to the information reviewed by the Commission, a systematic approach of this nature has neither been defined nor implemented in the national, state, and local legislation and policies of the United States. Such an approach is needed in order to optimize State efforts and direct the required State resources toward the protection of children and the effective enjoyment of their rights. Ultimately this implies not only the effective prevention of violations of the rights of children, but also prevention of the involvement of children in crime, by addressing the root causes and conditions that lead to such involvement.

### 3. The Need for Data Collection

377. Furthermore, the IACHR notes that the national mechanisms for collecting and analyzing data in the U.S., which is an important component of any comprehensive system of promotion and protection of children's rights, are inadequate to gather information regarding the issues affecting children and the effectiveness of the State response. It is necessary to have reliable data on issues such as: measures to prevent children from committing crimes; the rehabilitation of those children who do commit crimes; and especially youth who are treated as adults in the various criminal justice systems of the United States.

378. The need to establish a comprehensive system for the promotion and protection of the rights of children and adolescents is clearly set forth in international human rights law as deriving from the core requirements to promote the full and harmonious development of every child and ensure the

necessary conditions for the respect and exercise of his or her rights.[450] The Commission has joined the Committee on the Rights of the Child in pointing out that such systems of protection must be designed for and operate on both national and local levels in a wide-ranging and holistic manner, implying adequate coordination and complementarity among the different policies, programs, and services that impact children, in contrast to a set of isolated interventions or solely reactive responses to existing violations of rights.[451]

379. The IACHR emphasizes the importance of early detection of situations in which the lack of protection of a child or adolescent may exist. The main agents of this early detection system should be personnel in the health, education, or police sectors, among others, who are adequately specialized and trained to work with children. The role of these front-line agents is to identify any failure to protect children or adolescents and relate this information to competent authorities.[452] In this way, by means of a coordinated response via community-based programs and services within a comprehensive system, an individual child's or adolescent's needs and exposure to risk may be appropriately addressed in a timely manner, facilitating the successful socialization and integration of all children.[453]

## 4. The Need to Develop Public Policies

380. Effective protection of children requires that the United States develop public policies on children's human rights, and in doing so, take an approach that prioritizes comprehensive protection of the best interests of the child, instead of a punitive approach to public safety that is primarily pursued through law enforcement and criminal justice institutions. All programs and services in the fields of education, health, child welfare and protection, and nutrition, whether directed at individual families or communities more broadly, should be guided by these principles. The public policies should satisfy basic needs, create opportunities, and promote respect for the civil and political rights of all children and adolescents, including those who are

450 IACHR, *The Right of Boys and Girls to a Family*, OEA/Ser.L/V/II., Doc. 54, 17 October 2013, prologue.

451 Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6), CRC/GC/2003/5, 27 November 2003, Thirty-fourth session, paras.53-55.

452 IACHR, *The Right of Boys and Girls to a Family*, OEA/Ser.L/V/II., Doc. 54, 17 October 2013, para.210.

453 Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras.17-18.

held responsible for criminal acts,[454] as well as economic, social and cultural rights.

381. Justice systems that are designed to hold youth accountable for the crimes that they commit should not be viewed by the U.S. federal government as isolated systems that are separate from and uncoordinated with the federal child protection system by virtue of their being under the jurisdiction of the states; instead, juvenile justice should be included within a comprehensive federal system for the protection of children's rights.

## *B. Recommendations*

382. The Commission extends the following recommendations to the State, based on its close analysis of the situation of children in the adult criminal justice and correctional system of the United States. The IACHR recognizes the steps already taken by the State to address some of the particular problems and challenges faced by children and youth in contact with the justice systems of the United States, a number of which have been identified in this report.

1. Nevertheless, the Commission highlights that, in light of its obligations under international human rights law, the United States must provide the special protection for children that their age and stage of development require.

2. First, the Commission strongly recommends that the State adopt, as a basic human right, the fundamental commitment to protect children who are subject to its jurisdiction in accordance with the definition of a child that is set out in international law. This may require the enactment of federal legislation to establish a uniform definition of a child as any person under the age of 18.

3. The fundamental protection of children's status must be extended to all children facing the criminal justice system. Legislative, administrative and other measures must be adopted by the United States to adjust its national legislation in order to apply its juvenile justice system equally to all children under the age of 18. This requires adopting measures to raise the upper age of eligibility for the specialized system of juvenile justice to the age of at least 18 or older,

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[454] IACHR, Press release No. 26/04, Joint Press Release, Inter-American Commission on Human Rights and UNICEF Express Concern over Situation of Boys, Girls, and Adolescents Involved with Gangs in El Salvador, Guatemala, and Honduras, December 4. See also, IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011, para.136.

and the elimination of any provision that allows or mandates youth to be tried or sentenced as adults. The U.S. must ensure that no child is subjected to the adult criminal justice system or sentenced by the same guidelines that would apply to adults, regardless of the offense committed.

4. Second, all measures applied to children in conflict with the criminal law should be in accordance with the main objectives of a juvenile justice system, which is the rehabilitation of children according to the specific needs of their development, and their effective reincorporation into society, enabling them to play a constructive role within it. Federal and state legislation should mandate that depriving a child of liberty must only be done as a last resort and for the shortest period of time possible, in facilities that are operated in keeping with the rehabilitative aim of juvenile justice. Addressing the failure of rehabilitation and social reintegration of youth who are held in adult prisons and jails will not be effective unless the underlying factors of the human rights violations that may lead to or exacerbate recidivism are also directly addressed.

5. The Commission stresses that according to international law; no child shall be incarcerated in adult facilities. Accordingly, the United States must adopt laws which prohibit any child under the age of 18 from serving pre-trial confinement or custodial sentences under the adult correctional system or in any form of adult facility. Moreover, the Commission highlights that any treatment that amounts to torture and other cruel, inhuman, or degrading treatment, such as solitary confinement of children, should be strictly prohibited.

6. Additionally, any custodial measure imposed on children in conflict with the law should ensure full respect for, and guarantee of, all rights of children deprived of liberty. The IACHR urgently recommends that the United States ratify the Convention on the Rights of the Child, and also incorporate into its domestic law and practice relevant international standards on juvenile justice and the conditions of juvenile detention, including the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, which has been adopted by the IACHR.

7. Third, the IACHR is of the view that full observance of children's rights to due process and judicial guarantees must be implemented and incorporated throughout the United States, in particular where custodial measures are ordered. Practices counter to children's due process rights, such as arbitrary non-judicial discretion and pressure on youth to plead guilty, must be expressly prohibited.

8. While all proceedings involving children accused of crime must be separate and specialized according to the international standards governing juvenile justice, the United States should ensure that the procedural rights that are applied to any person are equally observed in juvenile courts. This is in addition to the enhanced rights pertaining to children, including, inter alia, the right to be heard and the right to family involvement, consistent with the rehabilitative aim of juvenile justice. Therefore, the separate courts and other actors involved in juvenile justice proceedings, such as police, prosecutors, and defense attorneys, should receive mandatory and ongoing training in the standards of juvenile justice and the principles of due process, as well as the specific needs of developing youth.

9. Fourth, the Commission recommends the development and implementation of supervision, monitoring, investigation, and enforcement mechanisms to oversee the conditions of children deprived of liberty, in order to prevent and respond to possible human rights violations. A crucial element of this is the development of a national mechanism for consistent data collection and analysis, as well as mechanisms to ensure children's right to be heard.

10. So long as U.S. jurisdictions continue to hold children in adult facilities, the State should enforce special oversight and monitoring of their condition and well-being. Mechanisms to supervise and monitor children deprived of liberty should, as detailed in this report, be enforced by the United States Government through its Department of Justice, as well as by independent agencies.

11. Finally, the IACHR emphasizes that the juvenile justice system for children accused of committing offenses must focus primarily on alternative measures to formal court proceedings, or when court proceedings are initiated, on community-based alternatives to formal convictions and/or custodial sentencing of children. The IACHR strongly recommends that the State implement a comprehensive nationwide policy aimed at ensuring an appropriate response to children accused of crime. In particular, the United States should guarantee children's right to be heard and to participate in the shaping of policies that involve them.