

The Practice of Children's Rights Protection in the Americas

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'A BIG COUNTRY'

*I live in a country so big that everything is far away:
education,
food,
housing.*

*So vast is my country,
that there is not enough justice for everyone.*

(Lina Zerón¹)

ABSTRACT

In the Inter-American Human Rights Protection System, children are entitled to special protection measures guaranteed in the principal human rights instruments adopted under the auspices of the Organization of American States (OAS). These include the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights. State compliance with human rights is overseen by the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR), which are empowered to receive and consider complaints of human rights violations. This chapter presents an overview of the IACmHR's and IACtHR's case law on children's rights, as well as the main conceptual framework relating to children's rights protection in the Americas, such as the right to complementary protection or the best interests of the child. It also addresses the treatment of children in different vulnerable situations (e.g. street children, Indigenous children, children deprived of liberty, and girls) as developed in the jurisprudence of the main Inter-American human rights treaty bodies.

KEYWORDS

children's rights, Inter-American System of Human Rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights

1 Lina Zerón (Mexico) 'UN GRAN PAÍS' from 'Poesia Reunida: 1975-2010'. English translation by the author.

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1. Introduction

The protection of children and adolescents in the Americas falls under the mandate of various institutions operating under the auspices of the Organization of American States (OAS), the regional agency for the Western Hemisphere.² The Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR) are the two bodies with a general mandate to oversee states' compliance with human rights, and they play a primary role in promoting respect for and ensuring the observance of children's rights in the Americas.³ Both bodies are empowered to receive and consider individual complaints of alleged human rights violations. The IACmHR is an autonomous organ of the OAS, responsible for monitoring the implementation of human rights by all member states. Every American state has accepted the IACmHR's competence to consider individual complaints by ratifying the OAS Charter. The IACtHR, as the judicial treaty body of the American Convention on Human Rights (ACHR),⁴ is competent to consider individual cases against OAS members who have ratified the ACHR and accepted the IACtHR's contentious jurisdiction.⁵ Although only the IACtHR is empowered to issue binding judgements, the IACmHR's decisions have considerable moral and legal value, especially when addressing human rights compliance in OAS member states outside the IACtHR's jurisdiction.

The normative contours of children's rights frameworks in the Americas are shaped by the provisions of the 1948 American Declaration on the Rights and Duties of Man (ADRDM)⁶ and the 1969 ACHR, both of which guarantee the right to special protective measures for children. While Article VII of the ADRDM states that 'all women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid', Article 19 of the ACHR guarantees that 'Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. Article 19 of the ACHR, which can be

2 In the Americas, human rights protections are overseen and coordinated by the Organization of American States, which is a regional international organisation of 35 member states. It came into being in 1948 with the signing of the Charter of the OAS, with the view to achieve among its member states 'an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence', as stipulated in Article 1 of the *Charter of the Organization of American States*, adopted at Bogotá on 30 April 1948 by the Ninth International Conference of American States, UN Treaty Series No. 1609 ('Charter of the OAS').

3 For a detailed description of institutional and normative frameworks for children's rights protection in the Americas, as well as for the background information about the situation of children in the Western Hemisphere, please refer to Chapter 10 of this book.

4 American Convention on Human Rights "Pact of San José, Costa Rica", adopted at San José on 22 November 1969, UN Treaty Series vol. 1144, No. 17955 (hereinafter: 'ACHR').

5 Pursuant to Articles 61-62 ACHR. See also Feria-Tinta, 2014, p. 233; Villalta Vizcarra, 2015, p. 676.

6 American Declaration of the Rights and Duties of Man, adopted at Bogotá in 1948 by the Ninth International Conference of American States (hereinafter: 'ADRDM').

asserted and enforced directly before the IACtHR, is the principal normative basis of states' obligations vis-à-vis children in the Inter-American Human Rights System.

This chapter presents an overview of the IACmHR's and IACtHR's case law on children's rights, developed under the ADRDM and ACHR. It discusses the main conceptual framework relating to children's rights protection in the Americas, such as the right to complementary protection and the best interests of the child. It also examines the IACmHR's case law concerning the United States of America's compliance with children's rights, as it cannot otherwise be held accountable for violations of children's human rights, having neither ratified the ACHR nor joined the international framework for children's rights protection under the 1989 UN Convention on the Rights of the Child (UN CRC).⁷

Although modelled on the European system of human rights protection, the Inter-American system has developed its own principles and regulations relevant to human rights litigation. These principles are embedded in the region's social, cultural, and legal traditions, and allow the compliance-monitoring bodies to address the specific human rights issues prevalent in the Western Hemisphere, including gross and systemic violations of children's rights.⁸

2. The IACmHR's practice on children's rights protection

2.1. The development of children's rights protection within the IACmHR

Since its creation in 1959, the IACmHR's approach to protecting children's rights has constantly been evolving towards a more substantial and far-reaching protection that considers the universal standards set out by the UN Convention on the Rights of the Child. The IACmHR has emphasised the welfare of children while drafting country and thematic reports on the situation of human rights in OAS member states, as well as in its decisions on individual cases. During the 1960s and 1970s, the IACmHR issued recommendations regarding general human rights violations and assessed whether the human rights of a child were violated in individual cases, without developing the substantive content of children's rights.⁹ The IACmHR's early country and thematic reports focused on the protection of children concerning their rights to life, personal liberty, and humane treatment in the context of arbitrary detention, state-sponsored murders by private militias, kidnappings of the children of political opponents, and

7 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series vol. 1577, No. 27531 (hereinafter: 'UN CRC').

8 As Rodríguez-Pinzón noted, the Inter-American system was the first system of human rights protection to function in a region where gross and systematic violations of human rights – involving extra-judicial killings, torture, and forced disappearances – were prevalent, Rodríguez-Pinzón, 2013, p. 13. The main challenges faced by OAS state members include social, economic and political oppression, political instability, extremes of wealth and poverty, misery, injustice, violence, and exploitation, Pasqualucci, 2013, pp. 4-6.

9 Inter-American Commission on Human Rights, 2008, para. 63.

the conditions faced by children living with their incarcerated parents.¹⁰ Similarly, most cases involving children heard by the IACmHR during that period concerned violations of the rights to life, personal liberty, or humane treatment. Initially, the IACmHR issued recommendations on general human rights violations and assessed individual complaints using the ADRDM as the sole legal framework and point of reference for states' protective duties vis-à-vis children.¹¹

The ACHR's entry into force in 1978 has brought new avenues for children's rights litigation in the Americas by including specific provisions on children's rights into a binding human rights treaty. This was accompanied by a growing recognition of the legal personality of children and their status as rights holders. In its 1991 Annual Report, the IACmHR explicitly recognised that children should not be viewed merely as objects of the right to special protection but as subjects of all the rights recognised by international law as 'rights of persons'.¹² The IACmHR has recognised that respect for children's rights constitutes a fundamental value for society, which requires not only providing care and protection as basic parameters but also recognising, respecting, and guaranteeing the individual personality of the child as a rights and duty holder.¹³ Concurrently, the IACmHR acknowledges the prevailing role of the principle of the best interest of the child and recommends that OAS member states ensure that children's best interests are considered in all decisions affecting their life, freedom, physical or moral integrity, development, education, health, or other rights.¹⁴

Individual complaints concerning alleged violations of children's rights have been brought before the IACmHR under two frameworks: the ADRDM against OAS member states that have not ratified the ACHR, and the ACHR against OAS member states that are parties to the ACHR.¹⁵ In cases where complaints are submitted against member states that are parties to the ACHR, the procedure before the IACmHR is the first step and a *sine qua non* condition for the case to be decided in a binding manner by the IACtHR. In this context, the role of the IACmHR must not be underestimated;

10 See, for example, IACmHR, Report on the Procedures of the Inter-American Commission on Human Rights in the Dominican Republic, 1965, OEA/Ser.L/V/II.13, doc. 14 Rev; IACmHR, Report on the Human Rights Situation in Haiti, 1969, OEA/Ser.L/V/II.21 doc. 6 Rev. 21; IACHR, Report on the Human Rights Situation in Chile, 1974, OEA/Ser.L/V/II.34, doc. 21; IACmHR, Second IACHR Report on the Situation of Political Prisoners and their Families in Cuba, 1970, OEA/Ser.L/V/II.23, doc. 6; IACmHR, 1978 Annual Report of the Inter-American Commission on Human Rights, Case 2271, 1979, OEA/Ser.L/V/II.47 Doc. 13 rev. 1.

11 Inter-American Commission on Human Rights, 2008, para. 63.

12 IACmHR, Annual Report of the Inter-American Commission on Human Rights 1991, 14 February 1992, OEA/Ser.L/V/II.81 Doc. 6 rev. 1, Part IV. II.

13 See, for example, IACmHR, Report No. 76/04, Case No. 12.300, Gerardo Vargas Areco v. Paraguay, 11 October 2004.

14 IACmHR, Annual Report of the Inter-American Commission on Human Rights 1997, 13 April 1998, OEA/Ser.L/V/II.98 doc. 6 rev., Chapter VII, para. 5.

15 Under Article 20 (b) of the Statute of the Inter-American Commission on Human Rights, Resolution No. 447 of the OAS General Assembly, October 1979 (in relation to those OAS member states who are not parties to the ACHR), and under Article 41 (f) ACHR (in relation to OAS member states who have ratified the ACHR).

the ground-breaking and landmark decisions of the IACtHR on children's rights were made possible by the IACmHR's initial recognition of human rights violations and the submission of cases to the IACtHR.¹⁶

Compliance with children's rights, as outlined in Article 19 of the ACHR, has been an inherent element of the IACmHR's examination of complaints based on the ACHR since the 1990s.¹⁷ However, for OAS member states that have not ratified the ACHR, the normative basis for protecting children's rights relies entirely on the provisions of the ADRDM. Although it was not initially adopted as a legally binding treaty, the ADRDM has nevertheless become a source of legal obligation for all OAS member states.¹⁸ For non-state parties to the ACHR, the IACmHR is the sole body competent to receive and consider individual complaints concerning alleged human rights violations.

The IACmHR's contribution to protecting children's rights extends beyond its mandate to monitor human rights situations and receive individual complaints. The IACmHR has explicit powers to take a proactive role in protecting and promoting respect for children's rights in the Americas, based on its authority to request advisory opinions from the IACtHR (Article 64, para. 1 of the ACHR). The Advisory Opinion OC-17/02, in which the IACtHR elaborated on the legal status of children, was issued at the IACmHR's request.¹⁹

The IACmHR has an important instrument at its disposal to achieve one of the main goals of the Inter-American system of human rights: preventing ongoing human rights violations through the adoption precautionary measures.²⁰ The IACmHR grants precautionary measures in serious and urgent situations to protect individuals from

16 See, for example, IACmHR, Report No. 33/96, Case 11.383, "Street Children" (Villagrán Morales et al.) vs. Guatemala, 16 October 1996; IACmHR, Report No. 72/00, Case No. 11.752, Walter David Bulacio vs. Argentina, 3 October 2000; IACmHR, Report No. 126/01, Case 11.666, Case of the "Juvenile Reeducation Institute" vs. Paraguay, 3 December 2001; IACmHR, Report No. 30/03, Case No. 12.189, Dilcia Yean and Violeta Bosico vs. Dominican Republic, 6 March 2003; IACmHR, Report No. 76/04, Case No. 12.300, Gerardo Vargas Areco vs. Paraguay, 11 October 2004.

17 See, for example, IACmHR, Report No. 33/96, Case 11.383, "Street Children" (Villagrán Morales et al.) vs. Guatemala, 16 October 1996; IACmHR, Report No. 41/99, Case No. 11.491, Detained Minors vs. Honduras, 10 March 1999, both cases concerning the arbitrary conduct of state authorities vis-a-vis children living in the streets; IACmHR, Report No. 72/00, Case No. 11.752, Walter David Bulacio vs. Argentina, 3 October 2000, concerning the arbitrary detention, torture and killing of a 17-year-old boy by police officials; IACmHR, Report No. 30/03, Case No. 12.189, Dilcia Yean and Violeta Bosico vs. Dominican Republic, 6 March 2003, concerning the state's refusal to register the birth of two girls, which placed them under an imminent threat of expulsion from their country of residence, and deprived them of the access to education.

18 Rodríguez-Pinzón, 2013, p. 13. See also IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90 of 14 July 1989, Series A No. 10, paras. 35-45.

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

20 Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009. Precautionary measures are urgent requests, directed to an OAS member state, to take immediate injunctive measures in serious and urgent cases, and whenever necessary to prevent irreparable harm to persons, see Rodríguez-Pinzón, 2013, p. 13.

the grave and imminent danger of injury to rights recognised under the ADRDM or ACHR. The IACmHR's practice demonstrates that it has not hesitated to grant precautionary protective measures in situations that pose a risk to children.²¹

Similarly, the IACmHR can also request the IACtHR to adopt provisional measures to avoid irreparable damage when a situation of extreme gravity and urgency justifies it. An example of such action was the IACmHR's request to adopt provisional measures in the *Case of the children and adolescents deprived of liberty in the 'Tatuapé Complex' in São Paulo*. Following this request, the IACtHR ordered Brazil to immediately implement the necessary measures to protect the life and personal integrity of all the children and adolescents residing in the juvenile detention facility, who were threatened by outbursts of violence.²²

2.2. The IACmHR's case law on the protection of children's rights in the USA

The IACmHR, as the principal organ of the OAS, is competent to be held accountable for violations of children's rights in the USA, the only country that has not committed itself to the international protection of children's rights by ratifying the UN CRC. Over the years, the IACmHR has received and considered several complaints about alleged violations of children's rights brought against the USA under the ADRDM. Their analysis revealed that sentencing young people to capital punishment and insufficiently protecting women and children against domestic violence are the

21 Among many, see, for example IACmHR, Resolution No. 93/20 of 9 December 2020, PM 1100-20. The IACmHR granted precautionary measures in favour of six migrant children at imminent risk of being deported by Trinidad and Tobago to Venezuela, where they faced serious risk to their rights to life and personal integrity. The IACmHR requested the state to adopt the necessary measures to guarantee the rights to life and personal integrity of six migrant children, in particular, by refraining from deporting or expelling them to Venezuela until the domestic authorities had duly assessed the alleged risks faced, in accordance with applicable international standards. In its resolution PM 340-10 of 22 December 2010, the IACmHR granted precautionary measures for displaced women and children living in camps for internally displaced persons in Port-au-Prince, Haiti, in the wake of an earthquake. The request for precautionary measures alleged a pattern of sexual violence and a series of acts of violence against the women and girls residing in the camps. The IACmHR urged the state to ensure the availability of adequate medical and mental health care for the victims of sexual violence; to provide adequate security at the camps for internally displaced persons, including the lighting of public spaces, regular patrols within the camps as well as outlying areas, and to increase the presence of female police officers assigned to patrol details and local police precincts; to ensure that the law enforcement agencies tasked with responding to incidents of sexual violence receive the necessary training to respond appropriately. See also: IACmHR, Resolution No. 35/23 of 21 June 2023; IACmHR Resolution No. 66/16 of 22 December 2016; IACmHR, Resolution No. 34/16 of 23 May 2016; IACmHR, Resolution No. 28/14 of 3 October 2014.

22 IACtHR, *Matter of the children and adolescents deprived of liberty in the "Tatuapé Complex" of the "Fundação Estadual do Bem-Estar do Menor" vs. Brazil*, Order of 17 November 2008 on Provisional Measures with regard to Brazil. The state had not complied with the precautionary measures adopted by the IACmHR, which justified the IACmHR's request on provisional measures submitted to the IACtHR.

two issues of greatest concern from the perspective of children's rights protection in the USA.²³

The United States has faced several complaints under Article I of the ADRDM (the right to life) regarding the capital punishment of young persons for acts committed when they were minors, sometimes followed by their execution.²⁴ By continuing the practice of executing minor offenders, the USA stands alone among traditional developed world nations and countries of the Inter-American system, all of which have rejected the imposition of capital punishment on minors, either through the ratification of the UN CRC or the ACHR.²⁵ Despite the lack of a formally binding international obligation for the USA, the IACmHR has declared that the prohibition of imposing capital punishment on juvenile perpetrators is a *jus cogens* norm and, as such, is binding on the entire international community of states, including the USA.²⁶ Consequently, the IACmHR has held that the United States violated the convicted adolescents' right to life, liberty, and security as outlined in Article I of the ADRDM by sentencing them to death for crimes committed while they were minors, and by executing them pursuant to that sentence.²⁷ In this context, the IACmHR reiterated that there is a broadly recognised international obligation for states to provide enhanced protection to children. This obligation includes ensuring the well-being of juvenile offenders and working towards their rehabilitation. This obligation, reflected *inter alia* in Article 19 of the ACHR and Article VII of the ADRDM, requires that 'when the state apparatus has to intervene in offenses committed by minors, it should make

23 The very first case brought before the IACmHR against the United States – Baby Boy vs. United States – shed light on another symptomatic, yet controversial issue related to children's rights protection in the USA on the protection of unborn children. The case Baby Boy vs. United States was brought under Article I (the right to life), Article II (the right to equality before law) and Article VII (the right to protection for children) and Article XI (the right to the preservation of health) ADRDM by pro-life advocates, on the grounds that the judicial legalisation of abortion in *Roe vs. Wade* and *Doe vs. Bolton* by the U.S. Supreme Court resulted in an alleged violation of the right to life of an aborted unborn child (referred to as Baby Boy) in a trial of a physician indicted for manslaughter in connection with his performance of an abortion. The legal question involved the issue of whether the right of life under Article I of the ADRDM applies from the moment of conception. Not having established the absolute concept of the right to life, the IACmHR declared that the USA did not violate Articles I, II, VII and XI of the ADRDM. See IACmHR, Report No. 23/81, Case 2141, "Baby Boy" vs. United States, 6 March 1981. For more on the Baby Boy vs. United States and the protection of unborn children in the Inter-American system, see De Ligua, 2011.

24 IACmHR, Report No. 62/02, Case 12.285, Michael Domingues vs. United States, October 2002; IACmHR, Report No. 97/03, Case 12. 193, Shaka Sankofa vs. United States, 29 December 2003; IACmHR, Report No. 100/03, Case 12.240, Douglas Christopher Thomas vs. United States, 29 December 2003; IACmHR, Report No. 101/03, Case 12.412, Napoleon Beazley vs. United States, 29 December 2003.

25 Michael Domingues vs. United States, paras. 84-85.

26 Michael Domingues vs. United States, paras. 84-85; Napoleon Beazley vs. United States paras. 48-49.

27 Michael Domingues vs. United States, para. 86; Shaka Sankofa vs. United States, para. 61; Douglas Christopher Thomas v. United States, para. 52; Napoleon Beazley vs. United States, para. 59.

substantial efforts to guarantee their rehabilitation in order to allow them to play a constructive and productive role in society'.²⁸

The IACmHR's decision in *Jessica Lenahan et al. vs. United States*²⁹ (2011) revealed a systemic problem concerning the protection of women and children in the USA against domestic violence. In 1999, Mrs. Lenahan's three daughters, aged 7, 8, and 10, were abducted by her abusive ex-husband in violation of a restraining order. The petitioner, Mrs. Lenahan, repeatedly called the police to report the abduction, but the police failed to respond meaningfully. Ten hours after her first call to law enforcement, her ex-husband drove his pickup truck to the police department and opened fire. The police immediately shot him down and then discovered the bodies of Mrs. Lenahan's three daughters in the pickup truck, who had been shot to death. Mrs. Lenahan filed a federal lawsuit against the police, claiming due process violations on account of the non-enforcement of the restraining order. However, the U.S. Supreme Court decided that she had no personal entitlement to the enforcement of the restraining order by the police.³⁰ In her complaint to the IACmHR, Mrs. Lenahan asserted that the United States violated several provisions of the ADRDM, *inter alia* Article I (the right to life), Article II (the right to equality before law), and Article VII (the right to protection for mothers and children), by failing to exercise due diligence to protect her and her daughters from domestic violence. The IACmHR concluded that the U.S. state apparatus was not duly organised, coordinated, or prepared to protect the victims from domestic violence by effectively implementing the restraining order. These failures constituted a form of discrimination in violation of Article II of the ADRDM.³¹ The United States' failure to adequately protect the petitioner's children from domestic violence was discriminatory and constituted a violation of their right to life under Article I and their right to special protection as children under Article VII of the ADRDM.³² The state had an enhanced duty of due diligence to protect the children from harm and the deprivation of their lives, which required special measures of care, prevention, and guarantee. The United States' recognition of the risk of harm and the need for protection – manifested by the issuance of a restraining order – made the adequate implementation of this protection measure even more critical. Moreover, the police officers who failed to respond adequately to the petitioner's reports of abduction should have been trained regarding the connection between domestic violence and fatal violence against children perpetrated by parents.³³ Based on these considerations, the IACmHR held that the systemic failure of the United States to act with due diligence to protect the petitioner and her daughters from domestic violence violated the state's obligation not to discriminate and to provide equal protection

28 Michael Domingues vs. United States, para. 83.

29 IACmHR, Report No. 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al. vs. United States*, 21 July 2011.

30 *Jessica Lenahan (Gonzales) et al. vs. United States*, paras. 37-39.

31 *Ibid.*, para. 160.

32 *Ibid.*, para. 164.

33 *Ibid.*, para. 165.

before the law, as outlined in Article II of the ADRDM.³⁴ The state also failed to undertake reasonable measures to prevent the deaths of the three children, which constituted a violation of their right to life under Article I of the ADRDM, in conjunction with their right to special protection under Article VII of the ADRDM. In its report, the IACmHR recommended that the United States, *inter alia*, conduct a serious, impartial, and exhaustive investigation into the systemic failures related to the enforcement of the protection order to guarantee their non-repetition. It also recommended the adoption of multifaceted legislation to create effective implementation mechanisms for restraining orders, to protect women from imminent acts of violence, and provide effective protection measures for children in the context of domestic violence, accompanied by adequate resources to support their implementation.³⁵

3. The IACtHR's case law on children's rights

3.1. Conceptual framework for protecting and litigating children's rights

The first contentious case specifically focused on children's rights was brought before the IACtHR in January 1997, after the respondent state failed to comply with the IACmHR's initial recommendations.³⁶ The judgement in '*Street Children*' vs. *Guatemala*,³⁷ referred to by several scholars as historical and paradigmatic,³⁸ marked a significant milestone in the IACtHR's case law on the protection of children's rights under the ACHR. This case addressed the situation of severely underprivileged children in Guatemala, against whom state law enforcement forces carried out systematic acts of aggression, including threats, persecution, torture, forced disappearance, and homicide.³⁹ The IACtHR held that Guatemala had extensively violated children's rights under the ACHR, *inter alia*, by failing to adopt special measures of protection

34 Ibid., paras. 170 and 199.

35 Ibid., para. 201. The IACmHR has adopted several important decisions dealing with human rights issues affecting women and girls in OAS member states, specifically regarding gender-based violence and discrimination. For more on that subject, see Duhaime and Tapias Torrado, 2022, pp. 211–246.

36 IACmHR, Report No. 33/96, Case 11.383, '*Street Children*' (Villagrán Morales et al.) vs. Guatemala, 16 October 1996.

37 IACtHR, '*Street Children*' (Villagran-Morales et al.) vs. Guatemala, Judgment of 19 November 1999 (Merits), Series C No. 63 (hereinafter: '*Street Children*' vs. Guatemala). In June 1990, five adolescents were detained, tortured, and shot to death by police officers in Guatemala City, within the systematic pattern of violence against the street children, as a means for countering juvenile delinquency. Victims' bodies were abandoned, and the police refrained from providing the victims' families with information about the events surrounding their deaths. In the criminal proceedings before the domestic courts, the accused officers, although identified by numerous witnesses, were acquitted for the lack of evidence. The case was brought to the attention of the IACmHR in 1994 by two NGOs representing the victims' next of kin, and subsequently submitted to the IACtHR in 1997 alleging violations of children's rights and the rights to life, physical integrity, personal liberty, a fair trial and judicial protection, guaranteed under the ACHR.

38 Cançado Trindade, 2003, p. 309; Feria-Tinta, 2014, p. 236; Aguilar Cavallo, 2008, p. 237.

39 '*Street Children*' vs. Guatemala (Merits), para. 189.

required under Article 19 of the ACHR and tolerating a systematic practice of violence against at-risk children in its territory.⁴⁰ In a separate judgement, the IACtHR ordered Guatemala to implement extensive reparation measures.⁴¹

The importance of the IACtHR's decision in *'Street Children' vs. Guatemala* lies in two main aspects. First, it broke with the climate of impunity concerning the fundamental rights of underprivileged children.⁴² According to the late Judge Cançado Trindade, former president of the IACtHR, the significance of this landmark decision is that the mothers of the murdered street children – as poor and forsaken as their children had been in life – were able to gain direct access to an international court, allowing them to at least regain faith in justice.⁴³ Second, in *'Street Children' vs. Guatemala*, the IACtHR established fundamental concepts and principles for protecting children's rights under the ACHR, which have been reaffirmed and further developed in its later jurisprudence. The prominent concepts include: (I) the scope of the right to special protective measures and the correlative obligations of states, which encompasses the right to a dignified life; (II) the notion of *corpus juris*, describing the relation between the ACHR and international instruments on children's rights; and (III) the concept of the international legal personality of children.

The IACtHR considers Article 19 of the ACHR as providing an additional right for children, who require special protection due to their ongoing physical and emotional development and specific vulnerabilities.⁴⁴ Consequently, children have the same rights as all human beings, but they also enjoy the right to complementary protection.⁴⁵ These additional rights are correlated with the protective duties of the family, society, and the state.

The IACtHR recognises the prevailing role of the family in safeguarding children. According to the IACtHR, the family is primarily responsible for satisfying a

40 *'Street Children' vs. Guatemala* (Merits), paras. 191-198.

41 IACtHR, Case *'Street Children' (Villagran-Morales et al.) vs. Guatemala*, Judgment of 26 May 2001 (Reparations and Costs), Series C No. 77, paras. 82, 93, 98, 101, 103. The IACtHR ordered the state to pay the victims' families compensation, for both pecuniary and non-pecuniary damage. Aside from compensatory remedies, the IACtHR ordered several other forms of reparations, including building a school in memory of the victims and placing a plaque with their names, investigating the facts that generated the violations of the ACHR, determining the individual responsibilities in the case, and sanctioning the perpetrators, which changed the domestic legislation in accordance with Article 19 ACHR as guarantee of non-repetition.

42 FERIA-TINTA, 2014, p. 236; CANÇADO TRINDADE, 2007, p. 56.

43 CANÇADO TRINDADE, 2007, p. 56.

44 IACtHR, *'Juvenile Reeducation Institute' vs. Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 112, para. 147.

45 According to the IACtHR, '(...) their condition demands special due protection by the State that must be understood as an additional right, complementary to the other rights that the Convention recognizes to every individual', IACtHR, *Carvajal Carvajal et al. vs. Colombia*, Judgment of 13 March 2018 (Merits, reparations, court costs and legal fees), Series C No. 352, para. 193. See also *'Juvenile Reeducation Institute' vs. Paraguay*, para. 147; IACtHR, *Gómez-Paquiyaui Brothers vs. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C No. 110, para. 164; Advisory Opinion OC-17/02, para. 54.

child's material, emotional, and psychological needs.⁴⁶ The importance of the family requires public authorities to implement measures to protect children while simultaneously providing assistance to families by adopting measures that promote family unity.⁴⁷ The IACtHR has inferred the obligation to preserve family unity and prevent separation from Article 17 of the ACHR, which protects family rights, as well as from other international human rights instruments, including the UN CRC.⁴⁸ The IACtHR has emphasised that the child has an inherent right to live with his or her family and has supported children's right to live with their biological and nuclear families, except in exceptional situations. In some child custody cases, the IACtHR found that separating children from their biological families posed such a risk of mental and emotional injury that it justified adopting provisional measures to prevent irreparable damage.⁴⁹

Regarding the state's obligations vis-à-vis children, the right to complementary protection under Article 19 imposes the correlative obligation of states to adopt special measures of protection, in addition to their obligation to respect the rights and freedoms of all individuals. Consequently, the state must both carefully and responsibly assume its special position as guarantor of rights and provide special protection for children.⁵⁰

According to the IACtHR, Article 19 of the ACHR, read in conjunction with Article 1, para. 1 of the ACHR, imposes a positive obligation on states to provide protection against mistreatment, whether in children's interactions with public authorities, private individuals, or non-governmental entities.⁵¹ Article 19 of the ACHR *prima facie* entails the need to protect the child's physical and moral integrity, meaning that state authorities are obligated to protect children against all forms of physical or mental violence, injury, abuse, neglect, maltreatment, or exploitation.⁵² However, since *'Street Children' v. Guatemala*, the IACtHR has required states to provide children

46 Advisory Opinion OC-17/02, para. 71; IACtHR, "Las Dos Erres" Massacre vs. Guatemala, Judgment of 24 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), Series C No. 211, para. 188.

47 Advisory Opinion OC-17/02, para. 66; Carvajal Carvajal et al. vs. Colombia, paras. 191-192.

48 Advisory Opinion OC-17/02 para. 71; Carvajal Carvajal et al. vs. Colombia, para. 192.

49 See, for example, IACtHR, Order on provisional measures with regard to Paraguay in the case L.M., 1 July 2011. The IACtHR ordered Paraguay to protect the rights of the family and the personal integrity of a child who shortly after birth was abandoned by his biological mother, and was cared for by a family who wanted to adopt him, by allowing supervised visits with the child's biological family while the custody decision was in process. See also IACtHR, Order of the President on provisional measures with regard to Argentina in the case Reggiardo Tolosa, 19 November 1993.

50 See, for example, IACtHR, Sawhoyamaya Indigenous Community vs. Paraguay, Judgment of 29 March 2006 (Merits, Reparations and Costs), Series C No. 146, para. 177; 'Juvenile Reeducation Institute' vs. Paraguay, paras. 147 and 160; Carvajal Carvajal et al. vs. Colombia, para. 193; IACtHR, Yakye Axa Indigenous Community vs. Paraguay, Judgment of 17 June 2005 (Merits, Reparations and Costs), Series C No. 125, para. 172; IACtHR, Guzmán Albarracín et al. vs. Ecuador, Judgment of 24 June 2020 (Merits, reparations and costs), Series C No. 405, para. 116.

51 Advisory Opinion OC-17/02, para. 87.

52 Guzmán Albarracín et al. vs. Ecuador, para. 114.

with all the conditions that guarantee a dignified life, in addition to protecting their physical existence. Such a broad understanding of states' obligations towards children is connected with the extensive interpretation of the right to life under Article 4 of the ACHR and reflects the IACtHR's particular concept of *vida digna* (dignified life).⁵³ According to the IACtHR, education and health care are the two main pillars necessary for children to have a decent life, both of which require various protection measures.⁵⁴ The right to education is particularly significant among these protective measures, as it not only enables the possibility of enjoying a dignified life but also prevents unfavourable situations for both the child and society.⁵⁵

Since '*Street Children*' vs. *Guatemala*, Article 19 of the ACHR – which entitles children to specific measures of protection – has been the primary normative basis for the IACtHR to decide on cases involving children's rights. While interpreting the normative content of Article 19 and its resulting scope of protection, as well as the correlative obligations of states, the IACtHR has considered other relevant international instruments, notably the UN CRC, along with Protocol II to the Geneva Conventions and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).⁵⁶ In '*Street Children*' vs. *Guatemala*, the IACtHR definitively declared that the ACHR and the UN CRC form part of a comprehensive international *corpus juris* for the protection of the child, and that both should be used together to establish the content and scope of the general provisions of Article 19 of the ACHR.⁵⁷ Not only is the UN CRC a reference to construe and interpret the provisions of the ACHR, but it has also been used at a procedural level to establish existing patterns of systematic violations of children's rights through the evidentiary use of the UN Committee on the Rights of the Child's monitoring reports in litigation before the IACtHR.⁵⁸ Such far-reaching references to international standards, resulting in a dynamic and evolving interpretation of the ACHR, are possible under

53 '*Street Children*' vs. *Guatemala* (Merits), para. 144. On the concept of *vida digna* see, for example, Pasqualucci, 2008, pp. 1–32; Cançado Trindade, 2009, p. 479.

54 Advisory Opinion OC-17/02, para. 86, IACtHR, *Xákmok Kásek Indigenous Community. vs. Paraguay*, Judgement of 24 August 2010 (Merits, Reparations, and Costs), Series C No. 214, para. 258.

55 Advisory Opinion OC-17/02, para. 84; Guzmán Albarracín et al. vs. Ecuador, para. 117.

56 '*Street Children*' vs. *Guatemala* (Merits), paras. 192-195; IACtHR, '*Mapiripán Massacre*' vs. Colombia, Judgment of 15 September 2005 (Merits, Reparations, and Costs), Series C No. 134, para. 153; IACtHR *Angulo Losada v. Bolivia*, Judgement of 18 November 2022 (Preliminary Objections, Merits and Reparations), Series C No. 475, paras. 127 and 168. See also Inter-American Commission on Human Rights, 2008, para. 53.

57 '*Street Children*' vs. *Guatemala* (Merits), para. 194.

58 Tinta-Feria, 2014, p. 241-242.

the general rules of interpretation derived from international law⁵⁹ and the specific interpretative rules in Article 29 of the ACHR. The specific interpretative rules prohibit any interpretation of the ACHR that would restrict the enjoyment of rights and freedoms recognised by virtue of another international convention to which a state is a party. The application of the international *corpus juris* allowed the IACtHR, *inter alia*, to define the term “child”, as neither the ACHR nor the ADRDM contains relevant definitions. By referencing Article 1 UN CRC, the IACtHR established in ‘*Street Children*’ vs. *Guatemala* that every human being who has not yet attained 18 years of age should be considered a child unless they have reached the age of majority under an applicable law.⁶⁰

The IACtHR has placed significant emphasis on the legal status of children and adolescents as subjects of rights, irrespective of their lack of legal capacity to act autonomously. The IACtHR holds that children’s inability to fully exercise their rights does not detract from their legal personality.⁶¹ This recognition of children as rights holders has developed in parallel with the general paradigm shift in international children’s rights law, marked by the adoption of the UN CRC in 1989.⁶² The IACtHR’s case law on children’s rights clearly demonstrates that it treats child victims as genuine rights holders who, even in the most adverse and underprivileged conditions, are subjects of international human rights law, allowing them to assert their rights before an international court.⁶³

In its contentious and advisory jurisdiction, the IACtHR has developed key principles that should be observed when adopting special protective measures under Article 19 the ACHR. The guiding principles that limit the discretion of state authorities

59 In particular, from the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, UN Treaty Series vol. 1155, No. 18232. According to the IACtHR, the evolutive interpretation of international protection instruments is consequent with the general rules of the interpretation of treaties embodied in the 1969 Vienna Convention, see: ‘*Street Children*’ v. *Guatemala* (Merits), paras. 192-193. According to the IACtHR, the substantial number of countries that have ratified the UN CRC shows a broad international consensus (*opinio iuris communis*) in favour of the principles and institutions set forth in that instrument, which reflects current development of this matter, OC 17-02, para. 29. See also Pasqualucci, 2013, pp. 12-13, Tinta-Feria, 2014, pp. 234-235.

60 ‘*Street Children*’ vs. *Guatemala* (Merits), para. 188. See also Advisory Opinion OC-17/02, paras. 38-42; *Gómez-Paquiyaui Brothers vs. Peru*, para. 162.

61 Advisory Opinion OC-17/02, para. 41: ‘Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations (...). Children do not have this capacity, or lack this capacity to a large extent. (...) But they are all subjects of rights, entitled to inalienable and inherent rights of the human person’. See also the concurring opinion of Judge A.A. Cançado Trindade, paras. 6-8; Aguilar Cavallo, 2008, p. 241.

62 The UN CRC has recognised the child as a subject of rights, which is manifested in that the child holds rights which have an influence on her or his life (participatory rights under Article 12 of the CRC), and not only rights derived from her or his vulnerability or dependency on adults, see: Committee on the Rights of the Child, General comment No. 12 (2009) on the right of the child to be heard, 20 July 2009, CRC/C/GC/12.

63 Aguilar Cavallo, 2008, p. 241. See also ‘*Juvenile Reeducation Institute*’ vs. *Paraguay*, para. 8.

include the principle of the child's best interest and the procedural guarantees derived from the rights to a fair trial and judicial protection (Articles 8 and 25 of the ACHR).⁶⁴ The IACtHR has accepted that the special measures of protection referred to in Article 19 should be defined based on the particular circumstances of each case and the personal condition of the children involved.⁶⁵

Advisory Opinion OC-17/02 on the Juridical Condition and Human Rights of the Child contains important guidelines regarding the adoption of protective measures in favour of children.⁶⁶ As a general principle, the guarantees set forth in Articles 8 (the right to a fair trial) and 25 (the right to judicial protection) of the ACHR should be correlated with the specific rights under Article 19. This correlation should be reflected in any administrative or judicial proceedings where the rights of a child are at stake.⁶⁷ Consequently, the child's participation in proceedings affecting his or her rights should be ensured to a degree reasonably adjusted to the child's capacities, in order to achieve effective protection of his or her best interest.⁶⁸ More specifically, the IACtHR indicates that protective measures should seek the continuation of the child's ties with his or her family, whenever possible and reasonable.⁶⁹ When it is necessary to separate the child from their family, the separation should be for the shortest time possible. Persons participating in decision-making processes should have the necessary personal and professional competence to identify advisable measures in the best interests of the child. Protective measures adopted by the state should aim at the child's reeducation and re-socialisation, while measures involving deprivation of liberty should be applied only as an exception and as a last resort.⁷⁰

64 See, for example, Advisory Opinion OC-17/02, para. 113, which states that '(...) Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.'

65 IACtHR, *Chitay Nech et al. vs. Guatemala*, Judgement of 25 May 2010 (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 212, para. 166.

66 The practice of state authorities brought to the IACtHR's attention by the IACmHR included, for example, reducing or annulling children's participation in civil and in criminal proceeding; using the minor's irregular situation (abandonment, dropping out of school, the family's lack of resources) to justify application of measures usually reserved for punishment of crimes applicable only under due process; considering the child's family milieu (family cohesion, the family's educational and economic background, etc.) as key decision-making factors with respect to minor under criminal or administrative jurisdiction to decide on his or her responsibility, or to determine measures affecting the child's right to a family, right of abode, or right to liberty. See Advisory Opinion OC-17/02, para. 3.

67 *Ibid.*, paras. 95 and 117. See also *Angulo Losada vs. Bolivia*, para. 102.

68 *Ibid.*, paras. 101-102.

69 *Ibid.*, para. 103.

70 *Ibid.* On several occasions, the IACtHR has stressed that the detention of children must be exceptional and for the briefest time possible. See, for example, *'Street Children' vs. Guatemala* (Merits), para. 197; *IACtHR, Bulacio v. Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C No. 100, para. 135; *Gómez-Paquiyaury Brothers vs. Peru*, para. 169.

Preventive detention of children should be reserved for the most exceptional cases, which is a direct consequence of the limits imposed by the right to the presumption of innocence and the principles of necessity and proportionality. Under normal circumstances, the state should seek alternatives to preventive imprisonment, such as strict supervision, permanent custody, foster care, removal to a home or educational institution, care, guidance and supervision orders, counselling, probation, education and vocational training programmes.⁷¹

On numerous occasions, the IACtHR has reiterated that the principle of the best interests of the child takes precedence over any other normative consideration and determines the examination of the facts involving children.⁷² In Advisory Opinion OC-17/02, the IACtHR explained that the principle of the best interests of the child

is 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.⁷³

Following the Advisory Opinion OC-17/02, the prevailing role of the child's best interests has been reaffirmed in several contentious cases.⁷⁴ The prevalence of the child's best interests is understood as the need to satisfy all rights of the child, which binds the state and affects the interpretation of all other rights contained in the ACHR when the case refers to minors.⁷⁵ On several occasions, the IACtHR has referred to the interpretation of the principle of the best interests of the child as adopted by the UN Committee on the Rights of the Child. The Committee considers the best interests of the child, as outlined in Article 3, para. 1 of the UN CRC, as a threefold concept: a substantive right, a fundamental interpretative legal principle, and a rule of procedure.⁷⁶ The IACtHR explicitly stresses the need to consider the best interests of the child in various contexts, including adoption,⁷⁷ detention, and the child's right to

71 'Juvenile Reeducation Institute' vs. Paraguay, para. 230.

72 Aguilar Cavallo, 2008, p. 242; Tinta-Feria, 2014, p. 242.

73 Advisory Opinion OC-17/02, paras. 56-61.

74 Bulacio vs. Argentina, para. 134; 'Mapiripán Massacre' vs. Colombia, para. 152; Gómez-Paquiyaury Brothers vs. Peru, para. 163; Juvenile Reeducation Institute vs. Paraguay, para. 160; Carvajal Carvajal et al. vs. Colombia, para. 193; Guzmán Albarracín et al. vs. Ecuador, para. 116. 75 See, for example, 'Las Dos Erres' Massacre vs. Guatemala, para. 184; Xákmok Kásek Indigenous Community vs. Paraguay, para. 257; IACtHR, Girls Yean and Bosico vs. Dominican Republic, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 130, para. 134.

76 See, for example, IACtHR, Ramírez Escobar et al. vs. Guatemala, Judgement of 9 March 2018 (Merits, reparations and costs), Series C. No. 351, paras. 196, 215 and 226. For more on principle of the best interest of the child in the international human rights law, see Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, see also: Aguilar Cavallo, 2008, pp. 227-231; Zombory, 2023, p. 223-226.

77 Ramírez Escobar et al. vs. Guatemala, para. 216.

personal liberty.⁷⁸ This principle applies to decisions pertaining to the separation of a child from his or her family,⁷⁹ the imposition and implementation of criminal punishment on a parent or adult caregiver,⁸⁰ and the admittance or release of a child whose primary caregiver is in prison.⁸¹ Additionally, it is relevant to any administrative or judicial decision concerning a child's entry into a country, their stay or expulsion, as well as the detention, expulsion, or deportation of her or his parents based on their migratory status.⁸² Moreover, it encompasses any state, social, or household decision that limits the exercise of human rights to the detriment of children.⁸³ Not only should the superior interest of the child be the primary consideration in individual decisions, but it also requires states to take children's best interests into account when designing public policies, drafting laws and regulations concerning childhood, and implementing them in all areas related to children's lives.⁸⁴

3.2. Protecting children in certain specific situations of vulnerability

The IACtHR has interpreted the scope of the protective measures required by Article 19 of the ACHR from various angles, addressing different situations of vulnerability, such as children in migration, children deprived of liberty, at-risk children, girls, and Indigenous children. The IACtHR expects states to implement a range of measures tailored to each category of vulnerability.

Generally, regarding the situation of at-risk children, the IACtHR indicates that special protection measures are needed to guarantee their survival and development, as well as to ensure minimum conditions for a dignified life. Such measures may include special assistance for children deprived of a family environment, social rehabilitation for abandoned or exploited children, and guarantees of non-discrimination or the right to an adequate standard of living.⁸⁵ Impeding children's integral and harmonious development by depriving them of the minimal conditions required for a decent life is a violation of their rights to special protection under Article 19 of the ACHR. This includes the failure of the state to prevent children from living in misery. In cases where states fail to adopt special measures to ensure children's full development and also infringe on the child's physical, or moral integrity, the IACtHR finds the state to be guilty of double aggression (*situación de doble agresión*).⁸⁶ It entails a twofold violation of children's rights: first, when states fail to prevent children from living in misery, thus depriving them of the minimum conditions for a dignified life

78 'Juvenile Reeducation Institute vs. Paraguay', para. 225.

79 Advisory Opinion OC-17/02, para. 73.

80 IACtHR, Differentiated approaches with respect to certain groups of persons in detention, Advisory Opinion OC-29/22 of 30 May 2022, Series A No. 29, para. 181.

81 Ibid., para. 185.

82 IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, Series A No. 21, para. 70.

83 Advisory Opinion OC-17/02, para. 65.

84 Advisory Opinion OC-21/14, para. 70.

85 'Street Children' vs. Guatemala (Merits), para. 196.

86 Ibid., para. 191.

and hindering their full and harmonious development; and second, when they violate children's physical, mental, and moral integrity and even their lives. According to the IACtHR, every child, including underprivileged children, has the right to pursue a project of life that should be supported and encouraged by public authorities, allowing them to develop this project for their personal benefit and that of the society to which they belong.⁸⁷

The general condition of vulnerability shared by all children is significantly exacerbated in the case of girls, who are exposed to multiple vulnerabilities and are more likely to suffer acts of violence, coercion, and discrimination, implying also their vulnerability to sexual abuse.⁸⁸ In *Guzmán Albarracín et al vs. Ecuador*, the IACtHR addressed the issue of sexual violence in schools and declared that states are obliged to prevent and prohibit all forms of violence and abuse by school personnel. Additionally, they must adopt special measures to protect girls against sexual violence in educational facilities.⁸⁹ In the recent landmark case *Angulo Losada vs. Bolivia*, the IACtHR emphasised the importance of protecting girls from sexual violence in the family environment, and supported the access to justice for girls who have been subjected to sexual violence. Special protection measures in this context refer to, *inter alia*, conducting criminal proceedings related to sexual violence perpetrated against girls from a gender-sensitive and child-friendly perspective. This approach must align with the duty of enhanced due diligence and special protection to avoid the risk of revictimisation while respecting all guarantees associated with the right to judicial protection and the right to a fair trial, including the right to a hearing within a reasonable time.⁹⁰ In *Girls Yean and Bosico vs. Dominican Republic*, the IACtHR held that the state should have paid special attention to the needs and rights of the alleged victims – Haitian girls born in the Dominican Republic – who were denied their rights to nationality, legal personality, and education due to the state's refusal to register their births and recognise them as Dominican citizens, due to their condition as girls.⁹¹

On several occasions, the IACtHR has reaffirmed that states have special protective obligations towards children from Indigenous communities, who experience multiple layers of vulnerability – not only as children but also as members of

87 'Street Children' vs. Guatemala (Merits), para. 191.

88 Guzmán Albarracín et al vs. Ecuador, paras. 118-120; Angulo Losada vs. Bolivia, para. 100.

89 Guzmán Albarracín et al vs. Ecuador, paras. 118-120.

90 Angulo Losada vs. Bolivia, paras. 119, 124 and 127. This case concerned Bolivia's alleged responsibility for violating its duty to guarantee, without discrimination based on gender and age, the right of access to justice for a 16-year-old girl who suffered sexual violence from her 26-year-old cousin. The IACtHR found that by failing to prevent and redress repeated sexual assaults against the female victim, Bolivia was responsible for violating the rights to personal integrity, fair trial, judicial protection, private and family life, and children's rights, as guaranteed in Articles 5 para. 1, 8 para. 1, 11 para. 2, 19 and 25 para. 1 of the ACHR, in relation to Article 1 para. 1 ACHR. Bolivia was also found to have failed to comply with the obligations under from Articles 7.b) and 7.f) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará).

91 Girls Yean and Bosico vs. Dominican Republic, para. 134.

Indigenous communities. In the Americas, members of Indigenous communities have historically faced forced assimilation policies, discrimination, violence, and denial of land rights, all of which hamper the effective enjoyment of their human rights.⁹² From the normative content of Article 19 of the ACHR and relevant international standards, the IACtHR has inferred states' obligation to adopt special measures to protect and respect the distinct cultural identity of Indigenous children. In *Xákmok Kásek Indigenous Community vs. Paraguay*, the IACtHR clearly stated that Article 30 of the UN CRC, which guarantees Indigenous children's right to cultural identity, 'gives content to Article 19 ACHR', by establishing an additional and complementary obligation for the states to promote and protect the rights of Indigenous children to live in accordance with their own culture, religion, and language.⁹³ The violation of Indigenous rights may sometimes result in the forced displacement of indigenous communities from their ancestral lands. In such cases, the state has an obligation to provide Indigenous children with the basic conditions necessary to ensure that the vulnerability of their community, due to a lack of territory, will not limit their development or undermine their life aspirations.⁹⁴

Based on Article 19 of the ACHR, special protection measures are required for migrant children. In its Advisory Opinion OC-21/14 on the rights and guarantees of children in the context of migration, the IACtHR emphasised that states must provide migrant children with the necessary, suitable, and individualised attention based on their age. Additionally, if necessary, states must adopt special protective measures in accordance with the best interests of the child.⁹⁵ Special protection measures should be culturally appropriate and gender-sensitive. These may include ensuring access to health care, providing a standard of living adequate for the child's physical, mental, spiritual, and moral development, ensuring full access to education under equal conditions, protecting potential victims of child trafficking from further victimisation, and offering legal and medical assistance.⁹⁶ The special protective obligations under

92 Antkowiak 2013, pp. 115–119; Zombory, 2023a, p. 172.

93 *Xákmok Kásek Indigenous Community. vs. Paraguay*, paras. 261–262. This case relates to the state's international responsibility for failing to ensure the ancestral property rights of an Indigenous community and its members. This situation has led to the violation of several rights guaranteed under the ACHR, as preventing access to land and natural resources for Indigenous peoples is directly linked to situations of poverty, vulnerability and the loss of cultural identity. The circumstances to which the children from the Indigenous community have been exposed, including cultural loss, violated their rights under Article 19 of the ACHR, in relation to Article 1 para. 1 of the ACHR: '(...) the loss of traditional practices, such as male and female initiation rites and the Community's languages, as well as the harm arising from the lack of territory, particularly affect the cultural identity and development of the children of the Community, who will not be able to develop that special relationship with their traditional territory and that particular way of life unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these rights', *Xákmok Kásek Indigenous Community. vs. Paraguay*, paras. 263–264, see also: *Chitay Nech et al. vs. Guatemala*, para. 167.

94 *Yakye Axa Indigenous Community vs. Paraguay*, para. 172.

95 Advisory Opinion OC-21/14, para. 3 of the Opinion part.

96 *Ibid.*, paras. 103–104 and 106.

Article 19 of the ACHR and Article VII of the ADRDM require that border authorities not prevent the entry of foreign children into national territory, even if they are unaccompanied, and that they promptly refer these children to personnel qualified to assess their protection needs based on an approach in which their condition as children prevails.⁹⁷

Children deprived of liberty are another group of minors in vulnerable situations who have received special attention in the IACtHR's case law. In important cases concerning children in detention, such as *Bulacio vs. Argentina*⁹⁸ (where an adolescent died following his arbitrary arrest by police) or *Juvenile Reeducation Institute vs. Paraguay*⁹⁹ (involving death and injuries of child inmates in a juvenile detention centre), the IACtHR interpreted the obligations under Article 19 of the ACHR to include the obligations of states under Article 4 of the ACHR (the right to life) and Article 5 of the ACHR (the right to humane treatment).¹⁰⁰ In light of Article 5, para. 5 of the ACHR, the additional protective obligations of states under Article 19 of the ACHR require that minors subject to criminal proceedings be separated from adults and brought before specialised tribunals. This separation is necessary to safeguard the rights of detained children, especially their right to humane treatment.¹⁰¹ In light of Article 4 of

97 Advisory Opinion OC-21/14, para 83.

98 IACtHR, *Bulacio vs. Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C No. 100. Walter Bulacio (17 years old) was randomly arrested by police officers under a massive detention operation "razzia" on 19 April 1991. He was transferred to a police station, where he was tortured by police agents. The detention was not reported to the competent judge or to his next of kin. Two days later, the Walter Bulacio was transferred to a hospital, where a physician reported the admittance of an adolescent with injuries. On 26 April 1991, Walter Bulacio died. Ten years after his arbitrary arrest and death, the domestic proceedings to punish the perpetrators had still not been concluded. In 2002, the Argentinian Court of Appeals ruled that criminal legal action could not be pursued due to the statute of limitations. The IACtHR found a violation of the right to life (Article 4), right to humane treatment (Article 5), right to personal liberty (Article 7), rights of the child (Article 19), in addition to the right to a fair trial (Article 8) and to judicial protection (Article 25), to the detriment of Walter Bulacio and his next of kin.

99 The inmates at the juvenile facility endured inhuman detention conditions, which included, *inter alia*, overpopulation, violence, crowding, poor diet, lack of proper medical attention, and torture. They were confined in filthy cells, with few sanitary facilities and had little opportunity to engage in recreational activities. It was against this backdrop of inhuman detention conditions at the centre that nine inmates died and 42 were injured as a result of fires; another child died from a bullet wound. Subsequently, two children who had been transferred from the centre to an adult penitentiary died from wounds inflicted by a sharp instrument. See 'Juvenile Reeducation Institute' vs. Paraguay, para. 301. The examination of the case revealed that the state had violated the right to life (Article 4 ACHR), right to humane treatment (Article 5 ACHR), right to personal liberty (Article 7 ACHR), right to a fair trial (Article 8 ACHR), and rights of the child (Article 19 ACHR) to the detriment of the detained children.

100 According to the IACtHR, 'the examination of the state's possible failure to comply with its obligations under Article 19 ACHR should consider that the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights. The measures that the state must undertake (...) encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment'. See 'Juvenile Reeducation Institute vs. Paraguay', para. 149.

101 *Bulacio vs. Argentina*, para. 136.

the ACHR, states are obligated to ensure that children in detention receive conditions necessary for their normal growth and development, such as regular healthcare and education programmes, to prevent detention from jeopardising their future prospects.¹⁰² These measures are crucial because children are at a formative stage in their physical, mental, spiritual, moral, psychological, and social development, all of which influence their life plans.¹⁰³ The IACtHR has held that the state has a special role as guarantor of the rights of persons deprived of freedom, a responsibility that becomes crucial when dealing with children in detention. Vis-à-vis child detainees, the state must fulfil this role with the greatest care and responsibility, adopting special measures to ensure the best interests of the child.¹⁰⁴ The state should be particularly attentive to children's living conditions when they are deprived of liberty and apply higher standards to classify treatment or punishment as cruel, inhuman, or degrading compared to adult detainees. Additionally, the state's protective obligations towards child detainees include ensuring their right to establish contact with their relatives. This requires the state's obligation to immediately inform the child's relatives or representatives of his or her detention, even if the child has not requested it.¹⁰⁵

The IACmHR's case law demonstrates that violence and inhumane living conditions in a detention facility, which threaten the life, safety, or personal integrity of child detainees, can be considered a situation of extreme gravity and urgency that warrants the adoption of provisional measures. In *Matter of Children Deprived of Liberty in the 'Complexo do Tatuapé' of FEBEM*, the IACmHR ordered the state to immediately implement the necessary measures to protect the life and personal integrity of all the children and adolescents residing in the detention facility, and to maintain the necessary measures that prevent young inmates from experiencing cruel, inhuman, or degrading treatment. Further provisional measures required from the state included substantial reductions in overcrowding within the facility, confiscation of weapons in the possession of the young people, separation of inmates in keeping with relevant international standards while considering the best interests of the child, provision of necessary medical care to ensure the detained children's right to personal integrity, and periodic inspections of the detention conditions and the physical and emotional well-being of the detained children.¹⁰⁶

In its Advisory Opinion OC-29/22 on differentiated approaches concerning certain groups of persons in detention, the IACtHR addressed the states' protective obligations towards children incarcerated with their mothers or primary caregivers.

102 *Juvenile Reeducation Institute vs. Paraguay*, para. 161.

103 *Ibid.*, paras. 172-173.

104 *Ibid.*, paras. 160-162, *Bulacio vs. Argentina*, para. 126.

105 *Bulacio vs. Argentina*, para. 130.

106 IACtHR, *Matter of Children Deprived of Liberty in the 'Complexo do Tatuapé' of FEBEM*, Provisional measures regarding Brazil, orders of 17 November 2005, 30 November 2005, 4 July 2006, 3 July 2007, 10 June 2008, on account that the state had not complied with the precautionary measures ordered priorly by the IACmHR. On 25 November 2008, the IACtHR rescinded the provisional measures considering that the state had achieved 'remarkable progress' in complying with court orders.

It urged states to adopt a differentiated approach in the treatment of such children. According to the IACtHR, Article 19 of the ACHR requires states to adopt necessary measures to ensure the appropriate development of children's physical, mental, and emotional capacities through specialised health care and adequate nutrition, which are connected to the proper implementation of the right to health and the right to food.¹⁰⁷ In view of the state's special role as a guarantor of rights, when children live with their mothers or primary caregivers in prison, the state is responsible for providing the necessary means to ensure their proper upbringing, survival, and integral development free from fear.¹⁰⁸ Children should be provided with special protective measures that promote the integral development of their personalities, talents, and mental and physical capacities. Such measures should include, at a minimum, medical care, access to early childhood and basic education, and areas for play and recreation with direct access to natural light and open-air spaces. Moreover, the IACtHR called for the respect of children's rights to grow up in a family and social environment appropriate for their development. Any decision by state authorities regarding the admission or release of a child with a parent or responsible adult in prison, as well as any decision related to separation from such parents or caregivers, must follow a thorough individual evaluation that gives due consideration to the protection of the child's rights and best interests.¹⁰⁹

4. Conclusions

In the Inter-American system, children are entitled to special protective measures guaranteed by the principal human rights instruments adopted under the auspices of the OAS: the ADRDM and the ACHR. Both instruments create legal obligations for OAS member states regarding children's rights protection. States' compliance with human rights is overseen by the IACmHR and IACtHR, which can receive and consider individual complaints under the ACHR against states that are parties to it. For OAS member states outside the ACHR framework, accountability for human rights violations is based only on the ADRDM and is enforced exclusively by the IACmHR.

The conceptual framework for children's rights protection developed by the IACmHR and IACtHR rests upon the following principles: (I) the scope of the right to special protection under Article 19 of the ACHR and states' corresponding obligations should consider the UN Convention on the Rights of the Child; (II) children are genuine rights holders and subjects of international human rights law, and they can assert their rights before an international court; (III) while adopting special protection measures, states should respect the right to a fair trial, judicial protection, and the principle of the child's best interest; (IV) special protection measures should be

107 Advisory Opinion OC-29/22, paras. 208-213.

108 *Ibid.*, paras. 214-223.

109 *Ibid.*, para. 185.

determined individually, based on the particular circumstances and the personal condition of each child; (V) protective measures should focus on reeducation and re-socialisation, with deprivation of liberty applied only as last resort; and (VI) the family plays a primary role in protecting children, therefore, state authorities should support family unity and prevent its separation.

Children in different situations of vulnerability require special attention and tailored protective measures. At-risk children need special measures that ensure their survival, full development, and provide minimum conditions for a dignified life. Girls require special protection from sexual violence, both in educational institutions and within the family environment. Protective measures for Indigenous children should focus on respecting their distinct cultural identity and preventing the vulnerable situation of their community from undermining their life aspirations. Special protection for migrant children requires culturally appropriate and gender-sensitive measures to ensure access to health care, education, adequate conditions for development, and legal and medical assistance. For children deprived of liberty, protection requires that they are treated separately from adults and provided with regular health care, access to education, and living conditions that allow for normal growth and development. This also includes preventing violence in detention facilities and maintaining contact with the child's relatives. Children living with incarcerated mothers (or caregivers) require a differentiated approach, with measures ensuring the integral development of their personality through medical care, access to education, appropriate living conditions, direct access to natural light, open-air spaces, and areas for recreation, while respecting their right to grow up in a family and a social environment appropriate for their development.

Judge Cançado Trindade has argued that the jurisprudence of the Inter-American human rights bodies reflects the unique judicial heritage of all the countries and peoples of the Western Hemisphere.¹¹⁰ The recurring themes in the IACmHR's and IACtHR's case law, including the gravest and most systematic violations of children's rights, further demonstrate that their role as final arbiters of human rights cannot be overstated in a region where justice too often seems scarce, especially for the youngest and most vulnerable.

110 Cançado Trindade, 2003, p. 307.

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