

Special Treatment in the Execution of the Penalty of Deprivation of Liberty for Juvenile in the Field of International Human Rights Law and Doctrine*

La especialidad en la ejecución de la sanción privativa de libertad juvenil: análisis desde el derecho internacional de los derechos humanos y la doctrina

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Abstract: The purpose of this paper is to identify and analyze the main criteria and standards developed in the field of international human rights law that delimitate the scope of the right to a special treatment in the execution of the penalty of deprivation of liberty for juveniles in contrast with adults. The work identifies the concrete consequences of the need for a specialized execution of sentences for juveniles in the regulation of institutions and guarantees established in favour of minors within the execution of the sanction of juvenile imprisonment, and then it determines how they have been recognized and developed by the *corpus juris* of international human rights law (international legislation, doctrine and case law). First, the paper analyzes how the reinforced protection of juvenile prisoners is recognized in the international human rights system, concluding that it is widely recognized. Then, it argues that this reinforced protection requires differences with respect to the treatment of adults, which can be systematized in five areas that are subject to a detailed review: orientation of the execution of the sentence of juvenile imprisonment, prison conditions, prison regime, good order and control mechanisms.

Key words: Adolescents deprived of their liberty, international human rights standards, juvenile prisons, execution of a juvenile custodial sentence, closed youth centers

Resumen: El artículo que se presenta a continuación tiene por objeto identificar y analizar los criterios y estándares más relevantes del derecho internacional de los derechos humanos que fundan el derecho a un tratamiento especial en la ejecución de la sanción privativa de libertad juvenil respecto de los adultos. El artículo profundiza en los corolarios concretos que se desprenden de la necesidad de una ejecución especializada de jóvenes en la regulación de las etapas y garantías de la ejecución de la sanción de encierro juvenil establecidas en favor de los menores. Para ello, se analiza primeramente la

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forma en que la protección reforzada de los menores presos es reconocida por el *corpus juris* del derecho internacional de los derechos humanos (la legislación, doctrina y jurisprudencia internacional), concluyendo que tiene un reconocimiento expreso. Posteriormente, se explica que esa protección reforzada exige diferencias precisas respecto al tratamiento de adultos presos que pueden ser sistematizadas en cinco ejes, que son objeto de análisis pormenorizado: orientación de la ejecución de la sanción privativa de libertad juvenil, condiciones carcelarias, régimen penitenciario, buen orden y mecanismos de control.

Palabras clave: Adolescentes privados de libertad, estándares internacionales de derechos humanos, cárceles juveniles, ejecución de sanción privativa de libertad juvenil, centros cerrados juveniles

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I. INTRODUCTION

In the first decade of this century, Chile undertook an ambitious reform of its juvenile penal system (Castro Morales, 2016a, p. 14; 2016b, p. 139)¹. This reform followed, as reference, the guidelines of the Convention on the Rights of the Child, hereinafter CRC², particularly the set

¹ The Chilean reform is part of a regional reform movement in this area. In the vast majority of countries of the region, the tutelary model prevailed, without major variations, until the end of the 20th century. See Castro Morales (2016a, pp. 17-18; 2016b, p. 142).

² Indeed, Article 4 of the CRC establishes that "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

of standards of a criminal nature that regulate the State-adolescent offender relationship (Castro Morales, 2016b, p. 141)³.

Law No. 20.084, known as the Act on Adolescent Criminal Responsibility (hereinafter LRPA, in Spanish), establishes a special system for the prosecution, attribution of responsibility, and punishment of crimes committed by persons between 14 and 18 years of age, subjects referred to in the law as “adolescents.” The LRPA has meant a profound change with great challenges, which go hand in hand with the development of new criminal rules and practices for young offenders of criminal law that are different and more benign than those contemplated for adults.

It is an accepted fact in doctrine that these penal rules and practices for young offenders should cover not only the adjective and substantive dimensions of the penal system, but also the stage of execution of the juvenile criminal sanction (Dünkel, 2018, pp. 90-91; Tiffer Sotomayor, 2018, p. 142; Beloff, 2016, p. 14; Couso & Duce, 2013, p. 304; Berríos, 2011, pp. 163-191; Cillero, 2011, pp. 201-209; Maldonado, 2004, pp. 150-155)⁴.

With regard to the execution of juvenile penal sanctions, the LRPA has not been sufficiently precise in establishing the difference with the adult penitentiary system. While the legislator does not contemplate a law on the execution of punishment (Cillero, 2006, p. 112), as in the case of the execution of adult criminal sanctions, he did contemplate in the LRPA a set of rules aimed at achieving a differentiated execution of adult sanctions, both from the point of view of the enclosures and their modalities and in terms of the institutions in charge of their execution (2014, pp. 25-27). Regarding all else, and I am referring to key aspects of the execution of the custodial sentence of an adolescent where special treatment plays a fundamental role, such as transfers, visits, disciplinary sanction, use of force, free time, access to social reintegration activities, control of disciplinary sanctions, and community control, the LRPA says nothing. In our country, all these aspects are delegated to be regulated, executed, and controlled by the Executive through a Regulation, with little counterweight from the other powers of the State and in flagrant violation of the principle of legality of penalties (Castro Morales, 2016a, p. 111).

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3 These standards propose a palette of criminal sanctions that are more lenient and different from those for adults, a flexible criminal process that incorporates more procedural safeguards, special penalty determination rules for adolescent offenders, and a system of enforcement of juvenile criminal sanctions that is different from that of adults. See Cillero (2006), Berríos (2011) and Couso and Duce (2013), and Maldonado (2014).

4 The demand for differentiated treatment is based on criminological evidence that focuses mainly on the episodic nature of crimes committed by adolescents, the low severity of the crimes, the psychological harm generated by confinement, and the advantages of diversification or removal from the judicial system in comparison with the formal responses contemplated by the traditional criminal system. See Kaiser (1996, p. 565) and Rösner *et al.* (2011, p. 49).

This does not mean that the differences between the execution of sentences for adults and adolescents in Chile are limited to what is indicated in those rules contemplated by the LRPA and its Regulations. The specialty of the juvenile penal system goes beyond those rules issued by the Legislature or the Executive, it arises from the application of criteria or standards established by international human rights law, which must be applied in relation to the rules in force by the institutions in charge of the execution of juvenile criminal sentencing (Couso & Duce 2013, p.23).

In view of the above, an important point for the Chilean juvenile penal enforcement system, still in operation for only a few years, is the question of what are the standards established by international human rights law, from which special guidelines are derived for the enforcement of juvenile criminal sanctions, in particular the custodial sentence of adolescents. This requires systematizing, in a first phase, these legal criteria and standards and, subsequently, assessing the extent to which the courts and the institution responsible for the execution of the closed regime sanction for adolescents in Chile have taken into account these standards applicable to adolescents deprived of liberty⁵.

For international human rights law, specialty in the execution of juvenile sentences, and especially in the execution of sentences involving deprivation of liberty, is expressly recognized as a right. Within this framework of ideas, the purpose of this article is to identify and analyze the main criteria and standards developed by international human rights law that shape the specialty in the field of the execution of juvenile custodial sentences. It is intended to account for the recognition and foundations of the right to the execution of a special custodial sentence, and to identify the specific consequences of the principle of specialty in the stage of execution of a juvenile custodial sentence, which differentiate it from the execution of an adult sentence.

A study of this nature is necessary due to the limited progress⁶ that the specialty, as well as its repercussions on adolescents deprived of liberty, have had in Chile and in the Americas (Castro Morales, 2016a, p. 2;

5 The task of identifying and systematizing the special standards that the legislature and the courts must ensure has not been addressed in depth and in a comprehensive manner in Chile nor in much of the region. This work has been done, to a large extent, in relation to the rules of substantive criminal law and the rules of criminal procedure law; however, in relation to the rules for the execution of custodial sentences for adolescents, the development is still fragmentary and insufficient. In the Chilean legal literature, the difference between the adolescent and the adult prisoner (relevant for the development of the principles and standards derived from the specialty) is recognized based on their lesser development and vulnerability, and even considered to justify more demanding standards when deciding—for example, a disciplinary sanction or the substitution of the sanction—; but, in general, it does not offer a precise characterization about what are, in concrete terms, the dimensions that constitute that difference nor its normative repercussions (Castro, 2017).

6 The limited progress can be explained by several reasons. Castro Morales (2016a, p. 176) highlights the hardening of criminal policy, the priority given to other reforms of the justice system and the limited participation of experts in the enforcement of juvenile criminal sanctions. On the other hand, the

Tiffer Sotomayor *et al.*, 2014, pp. 495-496; IACHR, 2010)⁷. Additionally, a study of these characteristics is explained by the scarce discussion in Chilean and regional doctrine on the matter (Tiffer *et al.*, 2014, p. 497; Estrada, 2011, p. 545).

In order to achieve the objective of this paper, in addition to this introduction, a preliminary section will be considered, which will give an account of the recognition of the right to the execution of the special custodial sentence and the grounds for such recognition. Subsequently, an attempt will be made to identify the specific consequences of the principle of specialty in the execution stage of juvenile custodial sentences, which differentiate it from the execution of adult sentences. To this end, five axes will be distinguished: orientation of the execution of juvenile custodial sentences, prison conditions, penitentiary regime, good order, and control mechanisms. All these sections will take into consideration the standards emanating from the *corpus juris* of the rights of children and adolescents, as well as the doctrine and jurisprudence of the Inter-American Court of Human Rights on the matter—hereinafter IACHR. According to the jurisprudence of the Court, and with regard to Article 19 of the American Convention, these elements constitute a legal framework for the protection of children and adolescents, which is binding for the States that have joined the Inter-American system for the protection of human rights (Beloff, 2013, p. 449)⁸.

It is important to mention that the analysis proposed in this article focuses only on the central aspects of international human rights standards and doctrine on the execution of adolescents deprived of liberty for crimes, not considering in its analysis the adequacy of such criteria and standards to Chilean law, a topic that merits a separate investigation. On the other hand, this article will not consider in its analysis children and adolescents locked up as a protective measure⁹, nor the general standards and principles of juvenile criminal law, precautionary measures, juvenile custodial sentences as a legal sanction,

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complexity in the construction of the specialty in enforcement may be another reason for the limited progress.

7 Along the same lines, a study of this nature is necessary to provide clarity and precision—in the area of adolescents deprived of liberty—to the obligation as a guarantor that the States have in this area, which compels them to meet the specific needs of adolescents.

8 In the area of adolescents deprived of liberty, the standards are derived from general and special international instruments, as well as from judgments and advisory opinions of international organizations, including the 1924 and 1959 Declarations on the Rights of the Child; the two optional protocols to the CRC; the Beijing Rules, the 1990 Tokyo Rules, and the Havana Rules; the 1990 Riyadh Guidelines; the Observations of the Committee on the Rights of the Child, hereinafter the Committee; and the pronouncements of the Inter-American Commission on Human Rights. Within the general provisions, it should be contemplated, among other international instruments, the Mandela Rules, the Convention on the Elimination of All Forms of Discrimination against Women, and the American Convention on Human Rights. See Castro Morales (2017, p. 425) and Beloff (2013, p. 450).

9 It shall be specified that, in international human rights law, “deprivation of liberty means any form of detention, imprisonment, institutionalization, or custody, for reasons of humanitarian assistance, treatment, guardianship, protection, or for crimes and violations of law, ordered by any judicial, administrative or other public authority” (Havana Rules, No. 11.b). See also IACHR (2011, p. 14).

and the execution of other juvenile criminal sanctions. Finally, it should be noted that most of these issues have already been sufficiently developed by the doctrine in the region¹⁰.

II. RECOGNITION IN INTERNATIONAL HUMAN RIGHTS LAW OF THE ENHANCED PROTECTION THAT THE STATE MUST PROVIDE TO JUVENILES DEPRIVED OF THEIR LIBERTY

Adolescents deprived of liberty due to violation of criminal law or commission of a crime enjoy double protection by the State on the execution of their sentence.

The reinforced protection that falls on young people imprisoned for committing crimes is explained by their nature of being deprived of liberty and by the period of life in which they are. In the first case, the special position is explained by the effects of confinement, the total dependence on the institution in charge of the execution, and the low visibility that limits the levels of protection of rights (Castro Morales, 2018, p. 44; Liebling & Maruna, 2005, p. 5). In the second case, adolescents as such would present a series of characteristics that would intensify their fragility during the fulfillment of the prison sentence. The causes that increase the vulnerability of young offenders serving prison sentences revolve around three dimensions: the effects of confinement are more severe in adolescents than in adults, the fact that they are a minority group within the prison population, and the fact that adolescents suffer greater issues related to social exclusion compared to the adult prison population.

Empirical evidence has shown that the effects of confinement on youth have a greater impact on mental health than on adults (Fagan & Kupchik, 2011, p. 59). Their stage of development, limited movement, and social isolation would exacerbate the negative effects of deprivation of liberty, for example, “loss of identity, demoralization, deculturation, and psychological effects, such as stress, neurosis and depression,” among others (Castro Morales, 2018, p. 44; Beijing Rules, No. 19).

Their nature as minority group within the prison population is important because the State focuses all its efforts on the majority prison population.

¹⁰ International standards on juvenile criminal law consider, among others, a special age of criminal responsibility, legality, minimum intervention, non-discrimination, non-judicialization, and criminal sanctions for adolescents. With regard to pretrial detention, the exceptionality of precautionary measures, restricted duration, and periodic review are contemplated. For the deprivation of juvenile liberty as a sanction, exceptionality, proportionality, restricted duration, and periodic review are required. Finally, for the execution of juvenile criminal sanctions in general, and for children and adolescents locked up as a protective measure, respect for the best interests of the minor, human dignity, proportionality, and periodic review are required. See, among others, Tiffer *et al.* (2014), Couso and Duce (2010), IACHR (2011), Dünkel *et al.* (2010), and Bustos (2007).

The regional prison reality marked by overcrowding, lack of basic services, and scarce resources forces States to focus their attention on the adult population. In this scenario, minority groups serving their sentence inside prisons are left in a situation of disadvantage, marginalization, and discrimination in which their special needs can hardly be met (Castro Morales, 2020a, pp. 764-765; Castro *et al.*, 2010, p. 233).

Adolescents suffer greater issues related to social exclusion compared to the adult prison population. These include school dropout, drug use, violence, abuse, sexual exploitation, poverty, physical health problems, mental health problems, and victimization. The latter stems from physical, psychological, and sexual abuse suffered during childhood and adolescence by different actors, whether family members or institutional (General Comment No. 20, §§ 12-13, 21 and 66; Peskin *et al.*, 2013, p. 73).

During adolescence, the risks of illness and death are high, particularly from violence, suicide, mental illness, sexually transmitted diseases, HIV, unsafe abortions, and motor vehicle accidents (General Comment No. 20, § 13). Likewise, young people often receive hostile treatment from the community, which may explain the phenomena of incarceration, exploitation, or exposure to violence to which they are subjected (General Comment No. 20, § 21; Hestermann, 2018, p. 67).

All of these dimensions symbolize the profound vulnerability of juvenile prisoners, which would explain why the State is obligated to perform its role as guarantor in a reinforced manner or, as explained by the Inter-American Court of Human Rights, in a special manner (*Instituto de Reeduación del Menor v. Paraguay*, § 160).

In the case of children deprived of their liberty, this special or reinforced position forces the States to act “with greater care and responsibility” and “to take measures that take into account the needs of persons of their age” (CRC, Art. 37; General Comment No. 24, §§ 92 and 108); “their age, sex, and personality” (Beijing Rules, No. 26.2; Havana Rules, No. 18); “their personal needs and problems” (Beijing Rules, No. 26.4); and “the circumstances of the life they will lead while deprived of liberty” (IACHR, 2010, § 440).

Such measures should be guided by “the principle of [the child’s] best interest and ensure their protection, well-being, and development” (General Comment No. 13, § 34), as well as provide “the care, protection, and all necessary social, educational, professional, psychological, medical, and physical assistance” (Beijing Rules, No. 26.2) “demanded by the weakness, lack of knowledge, and defenselessness that minors naturally present in such circumstances” (IACHR, 2011, § 440).

Of course, the special or reinforced position of guarantor that the State has with respect to adolescents deprived of liberty for the violation of criminal law does not exempt it from complying with the general requirements it has with respect to those deprived of liberty in general (General Comment No. 13, § 13.c; CRC, art. 37.c; Havana Rules, No. 12-13)¹¹.

This is not trivial, and although it may seem an obvious observation, it is necessary to make it due to the historical evolution of the confinement of adolescent offenders. Let us not forget that the use of adult prisons for this group has not been an exceptional practice, and that it occurs in even more unfavorable conditions than those encountered by the majority population (Lane & Lanza-Kaduce, 2018, pp. 608-609). On the other hand, confinement in juvenile institutions, under the ideology of the guardianship system, has presented serious deficiencies in terms of respect of criminal-legal guarantees. Indeed, the confinement models that predominated since the 19th and 20th centuries, such as reformatories or their renewed version, *boot camps*¹², have been designed with discipline-centered logic, with broad discretion on the part of the institution in charge of execution; or on the use of force as a means to achieve order, with few counterweights and limited respect for general criminal guarantees (Krisberg, 2013, pp. 749 *et seq.*; Gescher, 1998, p. 120; Platt, 1997, p. 79).

III. FIRST AXIS: ORIENTATION OF THE EXECUTION OF JUVENILE CUSTODIAL SENTENCES

As mentioned in the introduction to the article, what is of interest to this research is to elucidate the meaning for the international human rights system of specialty in the execution of juvenile custodial sentences. A first thematic axis, where specialty in this area has an impact, is that of the purpose of the execution of the sentence.

The question of the purpose of imprisonment is complex and, according to Van Zyl Smit & Snacken (2013, p. 128), must recognize, on the one hand, the diversity of objectives and even the possible contradictions between them; and, on the other, the different weightings given to it at different levels of the penal system. However, it is essential to clarify the purpose of the juvenile custodial sentence because, as Lippke (2002,

11 Adolescents deprived of their liberty shall additionally be subject to the Mandela Rules and shall enjoy important general guarantees such as legality, defense, non-discrimination, etc.

12 Reformatories were created in the United States in the mid-nineteenth century and sought to erase the hereditary and environmental defects of the young offender through confinement, military discipline, and an austere life. Their guiding principles focused, among other factors, on: a) separation from the corrupting influences of adult criminals, b) being removed from their environment and locked up for their own good, c) being locked up to reform, d) being punished only as a last resort, and e) being locked up for an indeterminate period of time. *Boot camps*, in turn, are inserted in the confinement programs as a *shock* measure or *scared straight programs* in the United States, centered on military discipline, hard work, strenuous physical exercises, and rigorous rules. On this subject, see Platt (1997, pp. 73-79) and Gescher (1998, p. 3).

pp. 122-145) explains, it will be possible to determine the scope and meaning of the rights of prisoners, as well as the obligations to be met by the institution in charge of the execution of the sentence in terms of assistance, custody, and order¹³.

The debate on the objectives of prison, in general, has been profound, and different theoretical, and legal approaches can be distinguished (Frisch, 2014, p. 81). The first of these, retribution, points in its modern aspect to deserved punishment expressing a social and moral censure towards the offender, which should be graduated or proportional to the seriousness of the crime (Von Hirsch, 1976, p. 89). In the second approach, the utilitarian, punishment aims to reduce future crimes through general or special prevention. In general prevention, punishment is used as a deterrent message so that the community behaves per the social norm. In turn, special prevention is directed against the offender to reduce recidivism through incapacitation or social reintegration (Van Zyl Smit & Snacken, 2013, p. 142).

According to Van Zyl Smit and Snacken (2013, p. 140), social reintegration would give confinement the purpose of increasing the capacity of convicts to develop peacefully in the community and would bring as a consequence the need to effectively ensure the rights of inmates, provide real opportunities during and after serving the sentence, and avoid or reduce the harmful effects of prison. In turn, incapacitation aims at the protection of society through confinement and would not bring greater demands on the correctional institution, except for custody and order.

Regarding the purpose of the execution of the custodial sentence, international human rights law and doctrine give positive special prevention a preponderance over other purposes of punishment (*Case of Lori Berenson Mejía v. Peru*, § 101; Roxin & Greco, 2020, p. 134; Nash, 2013, p. 159). This preponderance, in the case of adolescents deprived of liberty, would be reinforced (CRC, art. 40.1; Beijing Rules, No. 17; Havana Rules, No. 12; General Comment No. 20, § 88; International Covenant on Civil and Political Rights, art. 14.4).

This has also been understood by the doctrine (Periago Morant, 2019, p. 47; García Pérez, 2019, p. 155; CIDENI, 2019, p. 277; Montero Hernanz, 2018, p. 411; Cillero, 2014, p. 27; Martínez Pardo, 2012, p. 21); for example, for Couso and Duce (2013), “international instruments confirm the reinforced importance that positive special prevention acquires in the execution phase of criminal sanctions for adolescents”

¹³ Assistance is traditionally linked to the provision of health care, activities, contact with the outside world, and everything related to the physical and psychological care of prisoners. Custody, in turn, refers to preventing escapes and ensuring compliance with the sentence. Finally, order is related to a safe and quiet operation (Van Zyl Smit & Snacken, 2013, p. 88).

(p. 382). Or, for Tiffer Sotomayor *et al.* (2014): “The specificity of juvenile criminal law lies precisely in the sanctions, in comparison with adult criminal law. This is why it is so important that the purpose of the juvenile criminal sanction is oriented towards positive special prevention” (p. 463).

The purpose given to the execution of the sentence is not a theoretical issue disconnected from the life of closed juvenile centers; on the contrary, it directly influences all aspects of the operation of a center: e.g., contact with the outside world, the activities of the penitentiary regime, the infrastructure, protection and security measures, etc. It is for this reason that doctrine considers that the recognition of the preponderance of positive special prevention over the other purposes at the stage of execution of the juvenile custodial sentence has a concrete impact, first, as a guiding principle that should guide the overall operation of custodial centers; and, second, as measures designed to help reintegrate adolescent offenders into society (Castro Morales, 2016, p. 233; Walter & Kirchner, 2012, p. 703).

Positive special prevention, as a reinforced purpose of juvenile criminal punishment, becomes a guiding principle that must guide all administrative actions taken inside the prison that affect a group of young people or all juvenile inmates. This implies that the institution in charge of the execution of the juvenile penalty has the obligation to evaluate the possible repercussions derived from its decision, be it positive or negative, in the reintegration process of the adolescent (García Pérez, 2019, p. 155; Montero Hernanz, 2018, p. 411; Walter & Kirchner, 2012, p. 703; Martínez Pardo, 2012, p. 21).¹⁴

On the other hand, positive special prevention, in terms of measures designed to help reintegrate adolescent offenders into society, refers to the set of activities or programs that will enable the juvenile to perform at work, with family, and in the community after having served their sentence (*Instituto de Reeducación del Menor v. Paraguay*, § 174; Beijing Rules, No. 24.1; Havana Rules, No. 12). These two dimensions, which derive from the special positive reinforced prevention of juvenile prisoners, will be explored in greater depth in the following sections of the text.

IV. SECOND AXIS: DETENTION CONDITIONS

A second thematic axis where the specialty in the execution of juvenile custodial sentences has an impact is that of detention conditions. It is a fact accepted by international human rights law and doctrine that

¹⁴ In this sense, it would operate as a procedural rule, like the best interests of the minor. See General Comment No. 14 (§ 6).

detention conditions, for adults and adolescents, must be in accordance with human dignity (Havana Rules, No. 12; Laubenthal, 2019, p. 285; Castro Morales, 2018, p. 45; López Melero, 2015 p. 205; Van Zyl Smit & Snacken, 2013, p. 149). The above brings precise repercussions for young inmates on a miscellaneous set of issues: compound design, institutional culture, housing for adolescents in general, special housing needs for young women or individuals belonging to indigenous peoples, intensity of custody, trained staff, risk prevention, and health. Each of these will be reviewed below, but first it is necessary to raise two general points.

The first general point is that when the conditions of confinement are humiliating or degrading—for example, with overcrowding, lack of hygiene or bedding, poor ventilation, etc.—, not only the rights to life and bodily integrity are infringed, but such conditions would configure the criminal legal category of torture. This is contained in the jurisprudence of the IACHR (Castro Morales, 2018, p. 47; Nash Rojas, 2013, p. 143). Likewise, evidence indicates that impoverished living conditions increase the risks of depression in the juvenile population (Moser, 2013, pp. 168-171).

The second general point revolves around the worrisome gap between the standards we will analyze below and the practice of many juvenile centers in the region. The IACHR has reported, among other cases, deficient ventilation, lighting, floor and wall conditions, hygiene, provision of food, drinking water, and personal hygiene items. There is also a lack of basic goods such as beds and mattresses, as well as difficulties for children to receive medical attention and legal assistance. Similarly, in Central America, prisons have concentrations of children that constitute a clear violation of privacy and intimacy since it is possible to find 10 to 30 children in the same cell at the centers for deprivation of liberty for child offenders in El Salvador, Guatemala, Honduras, and Nicaragua (IACHR, §§ 141-142).

IV.1. Enclosure Design and Size

The architectural design of the center, the distribution of spaces, and the rooms for the adolescents must serve the purpose of the execution of the sanction, i.e., reinsertion. The enclosure must consider adequate and sufficient space for educational, sports and work activities, as well as “the needs for privacy, sensory stimuli, and opportunities to associate with their peers and to participate in artistic and leisure activities” (García Pérez, 2019, p. 172; General Comment No. 24, § 95b; Havana Rules, No. 32).

The centers should also be small in order to ensure individualized treatment, guarantee contact with family members, and with “the social, economic and cultural environment of the community” (Havana

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Rules, No. 30; García Pérez, 2019, p. 172). The larger they are, the more problematic it will be to achieve the objectives of the execution of the sanction. In relation to the maximum capacity, there is no agreement on the appropriate number, but, by way of example, the commission that worked in Germany on the 1976 bill estimated that the capacity of a closed center should not exceed 240 posts (Walter & Kirchner, 2012, p. 710; Dünkel & Geng, 2007, p. 143).

IV.2. Organizational Culture

A relevant issue in closed juvenile centers is related to the idea of common work and commitment of all staff members to the order and care of the adolescents they serve. In this sense, the challenge of implementing a new logic within the administration of closed juvenile centers, which breaks with pragmatism, cynicism, and distancing from the management (Sparks *et al.*, 1994, p. 41), requires the incorporation of modern management techniques, such as the balanced scorecard, the management project or the quality management project, among others, which seek to engage staff in the balanced achievement of the most important goals pursued by the institution and to keep them permanently informed about progress or setbacks in the achievement of goals, costs and the quality expected in the execution of programs. In addition, the administration should permanently elaborate execution plans, strategies, and incentives that should be frequently communicated to the various areas and subjected to constant improvement processes (García Pérez, 2019, p. 177; Castro Morales, 2019, p. 94; Walter & Kirchner, 2012, p. 729).

IV.3. Lodging

Lodging must meet requirements related to hygiene, lighting, heating, and ventilation. However, 'soft law' norms do not precisely determine these issues, leaving the determination of the specific standard to national legislation and to the jurisprudence of constitutional courts or the IACHR. In addition, standards emanating from human rights bodies can be found, such as the observations of the Committee against Torture, which has criticized, among others, the practice of covering windows with opaque materials and the boarding up of cell windows with metal sheets (CPT, 2001, § 30).

The minimum space available for each adolescent prisoner is another issue being debated. Evidence shows that overcrowding affects the physical and psychological well-being of inmates. As Gaes (1985, p. 100) points out, overcrowding leads to states of stress, increased medical demands, and increased average blood pressure. However, like lodging requirements, the universal prison rules on the subject do not specify the amount of space for each inmate. Nevertheless, in Europe,

some countries have established definitions; for example, in Germany, eight square meters per adolescent deprived of liberty or, in Scandinavia, twelve square meters (Dünkel & Castro Morales, 2012, p. 113).

In terms of sleeping quarters at night there are precise rules. It is established that dormitories must be independent or for small groups, in which case a discreet night watch is necessary to protect adolescents from exploitation and from being negatively influenced by other older inmates (Havana Rules, No. 32).

Also, during the night, it is required to ensure a separation of convicted and detained persons, men and women, and young prisoners in relation to older prisoners (Havana Rules, Nos. 28-29; Beijing Rules, No. 26.3; General Comment No. 24, § 92; Van Zyl Smit & Snacken, 2013, p. 221).

Finally, there is no discussion about overcrowding, both in international human rights law and in doctrine. Overcrowding should be understood as an exceptional situation that should be avoided by juvenile penal systems. Overcrowding generates a series of negative consequences in a center, linked, among other factors, to the extension of individual plans, the deterioration in the quality of educational programs, and the increase in stress of the staff (Van Zyl Smit & Snacken, 2013, p. 152).

IV.4. Special Housing Needs: Women and Indigenous Peoples

In closed juvenile facilities, it is also possible to find minority groups for whom the enclosure must provide additional accommodations to meet their specific needs. This group includes female adolescents deprived of their liberty and indigenous adolescents (Beijing Rules, No. 26.4; General Comment No. 17, § 52; General Comment No. 24, § 102; Bangkok Rules, Nos. 2, 6, 7, 19, 20 and 31; Convention 169, arts. 8.1 and 9.2)¹⁵.

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¹⁵ The Bangkok Rules establish, in the case of women deprived of their liberty, a series of particular standards that seek to contain the risks that women may face in prison, mainly sexual abuse, discrimination, and stereotyped labor supply. Some of the standards are the need to reinforce family contact, and medical examinations to detect possible sexual abuse and diseases such as breast cancer. On the other hand, it is also recommended to restrict solitary confinement in cases of women with nursing children or with health problems, as well as searches; and to prohibit immobilization systems, such as shackles or handcuffs, during childbirth or medical examinations (Laubenthal, 2019, p. 579). Additionally, Convention 169 requires that “due regard shall be given to their customs or customary laws when applying national laws and regulations to the peoples concerned” (art. 8.1). It also states that “the authorities and courts called upon to pronounce on criminal matters shall take into account the customs of these peoples in the matter” (art. 9.2). For more detail, see the proposed modification of Prison Regulation number 518 in light of the needs of indigenous peoples, in Castro Morales *et al.* (2018).

IV.5. Intensity of Custody

In the case of juvenile prisoners, passive security, aimed at achieving custody and preventing escapes through the use of cameras, bars, security doors, walls, fences, etc., should be kept to a minimum (Havana Rules, No. 30). The doctrine is in favor of a security perimeter and, within it, of an open regime that allows a fluid transit to the different sections of the enclosure and the flexible development of the activities offered inside. In addition, control should be carried out by favoring the inmate-staff relationship. The important thing, as explained by the Beijing Rules and much of the doctrine, is that centers should be open, and that their facilities should have an educational rather than a penitentiary character, favoring social reintegration activities and the dynamic security that arises from contact, bonding, and communication between staff and young inmates (Beijing Rules, No. 19.1; García Pérez, 2019, p. 172; Van Zyl Smit & Snacken, 2013, p. 394).

IV.6. Trained Staff

Staff that deals directly with the inmates must be trained to understand the characteristics of adolescence as a stage of life and, to this end, it is essential that they are trained in areas such as juvenile psychology, pedagogy, children's rights, and human rights standards (Havana Rules, No. 85; Beijing Rules, No. 22.2; General Comment No. 15, § 27; General Comment No. 24, § 112; García Pérez, 2019, p. 174). Likewise, working with imprisoned adolescents is very complex and requires a multidisciplinary team not only of social workers and teachers, but also psychologists, psychotherapists, and psychiatrists (Walter & Kirchner, 2012, p. 728).

Training requirements must be accompanied by sufficient staffing, a realistic working day, and attractive remuneration that sustain the staff member's commitment; as well as spaces for the creation of new projects, such as sponsoring an adolescent or social volunteer work with adolescents (García Pérez, 2019, p. 174; Walter & Kirchner, 2012, p. 728).

IV.7. Risk Prevention

Inside juvenile prisons, the risk of fire, riots, illnesses, and suicides is high. For this reason, it is essential that the State minimize these dangers, contemplate action protocols, train officials, and implement alarms "that guarantee the safety of minors" (Havana Rules, No. 32). Similarly, "centers should not be located in areas of known health risks or where other dangers exist" (Havana Rules, No. 32; *Instituto de Reeduación del Menor v. Paraguay*, §§ 177-179).

Concerning COVID-19, it is pertinent to mention that different institutions, such as the Committee, the IACHR¹⁶ and UNICEF¹⁷, have advanced recommendations aimed at guiding the protocols developed within the countries to contain the effects of the pandemic on the child and youth population. As an example, the Committee emphasizes the increased health risk that the pandemic has meant for those deprived of liberty and, among its various recommendations, suggests releasing adolescent prisoners, whenever possible, and providing children who cannot be released with the means to maintain regular contact with their families, either through the Internet or by telephone (Committee, 2020, §§ 5, 7 and 8). Additionally, it suggests “Activating immediate measures to ensure that children receive nutritious food during the period of emergency, disaster, or confinement. And maintain the provision of basic services, including medical care, water, and sanitation” (§ 4).

IV.8. Health

As already noted in the first section of this article, adolescents as such, and especially in their condition of deprivation of liberty, are in a position of fragility marked, among others, by health risks associated with their stage of life, such as venereal diseases¹⁸, depression, addiction problems, eating disorders, self-harm, suicides, etc. Therefore, health is one of the most important factors in the material conditions of detention (General Comment No. 4, § 22; No. 20, §§ 58 and 60; No. 15, § 5).

Comprehensive health care is a right for adolescents¹⁹ that includes “prevention, promotion, treatment, rehabilitation, and palliative care services” (General Comment No. 15, § 25). This, in the case of juvenile prisoners, should revolve mainly around health programs, drug abuse prevention, detoxification, and protection with the participation of families and communities (General Comment No. 24, § 95d; Havana Rules, No. 54).

Medical care provided inside closed facilities should meet the general criteria required for all child health programs, i.e., availability, accessibility,

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¹⁶ Resolution No. 01/20 on Pandemic and Human Rights in the Americas.

¹⁷ The *Global Status Report on the Prevention of Violence against Children* at <https://www.unicef.org/es/comunicados-prensa/paises-no-han-logrado-prevenir-violencia-contra-los-ninos>.

¹⁸ HIV is a serious problem in adolescence, as explained in General Comment No. 3: “the bulk of new infections occur among young people between the ages of 15 and 24 years [...] Adolescents are vulnerable to HIV/AIDS, among other things, because their first sexual experience sometimes takes place in an environment where they do not have access to adequate information or guidance. Children who use drugs are also at great risk.” (§ 2).

¹⁹ Health is defined by the Committee as: “an inclusive right that encompasses not only timely and appropriate prevention, health promotion, palliative, curative, and rehabilitative services, but also the right of the child to grow and develop to their fullest potential and to live in conditions that enable them to enjoy the highest attainable standard of health, through the implementation of programs that focus on the underlying determinants of health” (General Comment No. 15, § 2).

acceptability, and quality (García Pérez, 2019, p. 158; Ortega Navarro, 2018, p. 165; General Comment No. 15, § 112)²⁰.

In the case of juveniles with psychiatric problems, “they shall receive treatment in a specialized institution under independent medical supervision.” In addition, it must be ensured “that they can continue any mental health treatment they require after release” (Havana Rules, No. 53).

Finally, the medical team should be attentive not only to health issues, but also to report without delay any violation of rights and crimes committed within the enclosure (General Comment No. 15, § 25; Havana Rules, No. 52).

V. THIRD AXIS: PENITENTIARY REGIME

A third thematic area in which specialty is important in the execution of juvenile custodial sentences is linked to a diverse set of elements of the penitentiary regime. Today, the idea that the experience in a closed prison depends not only on the conditions of confinement, but also on the mechanisms of conflict resolution, the relationships with prison officials, and the various activities of teaching, job training, work, rest and contact with the outside world seems to have been consummated (Laubenthal, 2019, p. 233; Van Zyl Smit & Snacken 2013, p. 275).

It is a fact accepted by the doctrine that any penitentiary regime must comply with four requirements. First, it must not generate situations that would amount to inhuman or degrading treatment. Second, it must allow the prisoner to exercise their fundamental rights. Third, it must pursue social reintegration. And finally, it must not be discriminatory (Van Zyl Smit & Snacken, 2013, p. 275)²¹.

20 According to the Committee, availability revolves around: “sufficient quantity of child health facilities, goods, services, and programs. Accessibility refers to non-discrimination, physical accessibility, economic accessibility, and accessibility of information. Acceptability means that all health-related facilities, goods, and services must be designed and used in a way that fully takes into account and respects medical ethics, as well as children’s needs, expectations, culture, and language. And quality considers that health-related facilities, goods, and services must be appropriate from a scientific, medical, and quality point of view. Ensuring quality requires, *inter alia*, that: (a) treatments, interventions, and medicines are based on the best available evidence; (b) medical personnel are appropriately qualified and trained in maternal and child health; (c) hospital equipment is scientifically approved and appropriate for children; (d) medicines are scientifically approved and unexpired, intended for children, and monitored for adverse reactions; and (e) the quality of care provided in health facilities is regularly assessed.” See General Comment No. 15 (§§ 113-116).

21 It is also accepted by the doctrine that the penitentiary regime must be understood as a “dynamic process” that begins with the youth’s admission to the center and ends with their monitoring, for a few months, after completion of discharge. Within this process, there are efforts by international human rights law to ensure that certain milestones have their space and due consideration within the different stages. By way of example, in admission, a record will be taken of the individual information of each inmate, the length of the sentence, the destination, the place of detention, the information on rights and obligations, the medical control, and the design of the intervention plan. In this regard, see Rules of Havana (No. 21).

The first criterion refers to “no child being subjected to torture, or other cruel, inhuman, or degrading treatment or punishment” (CRC, art. 37a). It also refers to eradicating corporal punishment²² in closed facilities (Beijing Rules, No. 17.3; Riyadh Guidelines, Nos. 54 and 21.h; Havana Rules, No. 67). Let us not forget that corporal punishment, unfortunately, still occurs as a tolerated practice in different settings in society, and that juvenile penal systems should make efforts to eradicate it (General Comment No. 8, § 12; and No. 12, § 120).

Regarding the second criterion, the penitentiary regime must facilitate the exercise not only of the general rights of all persons deprived of liberty, but also of the special guarantees provided for in the CRC²³. In this sense, for an effective exercise of rights, it is relevant that adolescents know, from the moment they enter the center, the rights and duties they have during their stay in a closed center (García Pérez, 2019, p. 83; Havana Rules, No. 24).

The third criterion alludes to the fact that the design and execution of the regime must be organized and executed around the special positive reinforced preventive purpose. At this point, the distinction made in the first axis regarding the impact of the purpose of the custodial sentence as a guiding principle and, above all, as a measure, makes sense. Regarding the latter distinction, it is essential that the regime be designed in such a way that it considers and gives priority to educational measures, training, work, free time, contact with the outside world, and support on release that are designed to help young people reintegrate into society.

The adolescent’s participation in reintegration measures will be determined by the intervention plan drawn up between officials and the adolescent at the time they enter the center. The elaboration of the intervention plan has precise requirements under international human rights law, which revolve around guiding the specificity of the plan, as well as its means, stages, and deadlines, even considering the continuation of some of these services in the free environment after the youth’s release (Havana Rules, No. 27; CIDENI, 2019, p. 311; García

22 In its General Comment No. 8 (§ 11), the Committee defined “corporal or physical punishment as any punishment in which physical force is used and which is intended to cause some degree of pain or discomfort, however light. In most cases, it consists of hitting children by slapping or beating them, with the hand, or with some object—whip, cane, belt, shoe, wooden spoon, etc. But it can also consist of kicking, shaking or pushing children, scratching, pinching, biting, pulling their hair or ears, hitting them with a stick, forcing them into uncomfortable positions, burning them, forcing them to eat boiling food or other products.” The Committee is of the opinion that “corporal punishment is always degrading” (General Comment No. 13, § 24).

23 The general principles contemplated in the CRC are: non-discrimination (art. 2), best interests of the child (art. 3), right to life (art. 6), and the right to express one’s opinion (art. 12). Likewise, the rights to freedom of expression (art. 13), freedom of thought (art. 14), to information (art. 17), the rights of children with disabilities (art. 23), to health education (art. 24), to education (art. 28), and the rights of indigenous children (art. 30). For more details, see UNICEF (2001).

Pérez, 2019, p. 190)²⁴. Psychology has offered a series of instruments to be able to determine the factors that have influenced the commission of the crime, the risks of recidivism, and violence, which have been useful to objectify the design of intervention plans (Negredo López & Pérez Ramírez, 2019, p. 163). In any case, what is relevant is that in the assessment of factors and risks the issues of adolescence are present, in order to meet the specific needs of that stage of life, which will reduce the damage that confinement has on mental health and improve social reintegration (Ostendorf, 2012, pp. 119-120).

In making a selection of the most significant issues related to the prison regime, it is possible to identify six areas in which the reinforced or special protection that the State must ensure to minors imprisoned for violation of the law must be recognized, namely: education, job training, work, rest, contact with the outside world, and permanence in the center for children who turn 18 years of age. Each of these will be reviewed below.

V.1. Education

For the education of juvenile prisoners, educational centers located outside the prison should be favored to the extent possible (Ortega Navarro, 2018, p. 141). Likewise, in order to increase the capacity of convicts for their normal development in society, it is advisable to enhance contact with the community and participation in activities outside the closed center (Havana Rules, No. 38; Unicef & UDP, 2017, p. 10).

Education programs provided inside or outside closed centers must meet all general educational requirements. In this regard, they should aim to “empower the child by developing their skills, learning and other capacities, human dignity, self-esteem, and self-confidence” (General Comment No. 1, § 2). In addition, they should be “designed and adapted to the needs and capacities of adolescents and aimed at preparing them for their reintegration into society” (General Comment No. 24, § 95c, and No. 17, § 27; Havana Rules, No. 38; Riyadh Guidelines, No. 21).

The great challenge faced by educational programs involving young offenders lies in their design. The educational model must be attractive and flexible to motivate and include young people marked by lives with difficult environments and high levels of school dropout (Ortega

²⁴ In relation to the specific model or methodology used for the intervention plan, there are no recommendations from international law on the human rights of persons deprived of their liberty. This is correct, as it opens the space to incorporate the latest scientific developments in the field of deviant behaviors. Without intending to make a detailed description of the different intervention models developed by psychology since that object is beyond the scope of this article, we can mention, among others, the evolutionary approach, the gender approach, the psycho-socio-educational approach, the risk-need-response capacity model, the desistance model, and the ecological model (Negredo López & Pérez Ramírez, 2019, p. 163).

Navarro, 2018, p. 140; General Comment No. 20, § 70; Riyadh Guidelines, Nos. 24 and 30; Havana Rules, No. 40)²⁵. Likewise, it must be a school model that avoids spaces of authoritarianism, discrimination²⁶ and violence (General Comment No. 12, § 105), and contemplates discipline mechanisms that are compatible with human rights.

V.2. Training and Work

Job training is also relevant for the normal development in the community of young people sentenced to juvenile imprisonment (Ortega Navarro, 2018, p. 161). It is conceived as a right by the Havana Rules and aims to “enable them to play a constructive and productive role in society, as well as to provide for their care and protection” (Havana Rules, No. 42; Beijing Rules, No. 26.1; Ortega Navarro, 2018, p. 146).

Work also aims at the same objective and, therefore, efforts should be made within the closed centers so that young people have the opportunity to perform a paid activity and complete job training during their sentence. In this sense, both training and work activity must be adapted to the needs of the modern labor market (General Comment No. 20, § 74; Ortega Navarro, 2018, p. 143).

As with education, priority should be given to training programs and off-site work activities; and, if these are not possible, “the organization and methods of work in closed centers should resemble as closely as possible those of work in the community, in order to prepare young people for normal working conditions” (Havana Rules, No. 45).

Adolescents, in their capacity as workers, shall enjoy all the guarantees contemplated in the labor legislation of their countries and also a fair remuneration, which shall be divided into two parts in the case of those deprived of liberty: one directed to “a savings fund to be given to them upon their release” (Havana Rules, No. 46); and the other to be used to acquire objects for “personal use, to compensate the victim harmed by their crime, or to send it to their own family or to other persons outside the center” (Havana Rules, No. 46; General Comment No. 12, § 117).

²⁵ In this regard, General Comment No. 20 identifies a set of factors that would explain school dropout: “school fees; the poverty of families and the lack of adequate social protection schemes; the lack of adequate and safe sanitation facilities for girls; the exclusion of pregnant female students and adolescent mothers; the persistence of the use of cruel, inhuman and degrading punishments; lack of effective measures to eliminate sexual harassment in schools; sexual exploitation of girls; environments not conducive to inclusion; inadequate teaching methods; outdated or outmoded curricula; lack of student participation in their own learning; and bullying. In addition, schools often lack the flexibility for adolescents to balance work or family responsibilities with education.” (§ 71)

²⁶ For example, the Havana Rules (No. 40) state that “diplomas or certificates awarded to minors during their detention shall in no case indicate that the minors have been in detention.”

V.3. Free Time

Play and rest are fundamental to the health and well-being of children and adolescents, contribute to the development of creativity, strengthen self-esteem, and enhance social, cognitive, and emotional skills (General Comment No. 17, § 9, and No. 12, § 115)²⁷. They are as important as nutrition and education, and any excessive limitation of them can have irreversible physical and psychological effects on the child's development, health, and well-being (General Comment No. 17, § 13).

Children and adolescents "have the right to time that is not determined or controlled by adults" (General Comment No. 17, § 42). This right requires the institution in charge of the execution of a custodial sentence to consider free time in the adolescents' schedules (General Comment No. 17, § 51).

Closed institutions should provide safe, appropriate spaces and opportunities for incarcerated adolescents to socialize with their peers and participate in sports, cultural, and artistic activities (Fiedler & Vogel, 2012, pp. 307-308). As is the case of education, training, and work, these leisure activities should, where feasible, be offered outside the facility (General Comment No. 17, § 51; Havana Rules, No. 47).

V.4. Contact with the Outside World

Contact with the outside world is another area of the prison regime that is reinforced in the case of the deprivation of liberty of adolescents. According to the doctrine, this area fulfills three important functions, namely: it is useful to prevent torture and abuse; also, to enhance the normalization of the prevailing penitentiary regime and preparation for release; and it is a *sine qua non* condition for the exercise of rights that deal with different spheres of personal and social life such as, e.g., the right to establish a family, to freedom of expression, to vote, etc. (Laubenthal, 2019, p. 405; Van Zyl Smit & Snacken, 2013, p. 326).

It should be noted that, historically, family and intimate visits, epistolary exchange, receipt of parcels, telephone calls, and meetings with lawyers have been recognized as the traditional ways to maintain contact with the community (Laubenthal, 2019, p. 406).

In the case of adolescents deprived of liberty, it has been explicitly considered, on the one hand, to extend family visits so that they are more frequent and longer; and, on the other hand, to extend controlled

²⁷ General Comment No. 17 explains "that play is also a central element of the spontaneous drive for development and has an important role in brain development, especially in early childhood. Play and recreation promote children's ability to negotiate, restore emotional balance, resolve conflicts, and make decisions. Through play and recreation, children learn by doing, explore and perceive the world around them, experiment with new ideas, roles and experiences, and thus learn to understand and construct their social position in the world." (§ 9)

outings outside the prison to enhance contact with support networks, as well as participation in educational activities, job training, work, leisure, and health care (Havana Rules, No. 59-60; Beijing Rules, No. 26.5; General Comment No. 24, §§ 94-95e). The latter requires permanent cooperation between the juvenile prison service and social services outside (Walkenhorst *et al.*, 2012, p. 380).

Access to information also constitutes a dimension of contact with the outside world that has traditionally been considered and which, in the case of adolescents, has particularities that revolve around the use of technology, electronic devices with Internet access, as well as the use of social networks and applications. As the Committee explains:

adolescents use the online environment to explore their identity, learn, participate, express their opinions, play, socialize, become politically involved, and find employment opportunities. The Internet also provides the possibility of accessing health information and protection mechanisms and sources of advice and guidance and can be used by institutions as a means of communicating and interacting with adolescents (General Comment No. 20, § 47).

V. 5. Support for Release from Prison

One of the challenges brought about by release is the accompaniment of young people. As Mackenzie & Freeland (2012, p. 792) explain, for a long time, the importance of this stage was not understood and young people, upon release, were left on their own, leaving behind all the achievements made while incarcerated.

Evidence indicates that repeat offenses can reach up to 55% in the first twelve months after release (Mackenzie & Freeland, 2012, p. 792). To reduce it, the executing institution is recommended to have a network of services that welcomes the released adolescent and provides them, at least during the first months of release, with “suitable accommodation, work, and clothing, as well as the necessary means for them to support themselves so their reintegration is sustained” (Havana Rules, No. 80; Pruin & Treig, 2018, p. 683).

In the same vein, the doctrine has begun to explore ways to provide supervision in addition to transition and reintegration services to young offenders. Aftercare programs, as they have traditionally been called, are designed to help individuals transition back into the community after a period of incarceration. Experts in the field emphasize the importance of beginning preparation for release early in the period of incarceration, and research on effective programs supports this proposition. This period can be used to help achieve the necessary cognitive transformation so

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that the juvenile can take advantage of the opportunities offered by the community after release (Mackenzie & Freeland, 2012, p. 792).

V.6. Permanence in the Center of Adolescents who Turn 18 Years of Age

Neuroscientific evidence shows that the brain continues to develop until about the age of 25. This evidence shows us that young adults are closer to the world of youth than to that of adults, which would make it advisable to apply the juvenile justice system to persons aged 18 or older (Castro Morales, 2020b, pp. 579-580; Dünkel *et al.*, 2017, p. 120; General Comment No. 24, § 32). It is for this reason that the Committee recommends that juvenile prisoners who reach the age of majority should not be sent to adult facilities, but remain in such juvenile facilities (General Comment No. 24, §§ 35 and 92)²⁸.

VI. FOURTH AXIS: GOOD ORDER

A fourth area in which specialty becomes relevant in the execution of juvenile imprisonment is the peaceful functioning of the center. It is accepted by the doctrine that good order is a broad concept that gives the penitentiary administration enough space to use various instruments to influence the inmates' behavior²⁹. Considering the stage of life of the inmates, it is a priority that these instruments consider an active regime, attractive incentives for adaptation³⁰, and dialoguing officials who establish close communication with the inmates (García Pérez, 2019, p. 214). Also contributing to order are the planning of the intervention plan with the participation of the youth, a sufficient supply of reintegration activities, alternative conflict resolution mechanisms, and dignified conditions that improve the quality of life and reduce the suffering caused by internment (Laubenthal, 2019, p. 593).

Discipline and coercive measures are another type of instrument at the service of order; however, in the case of the group of adolescents deprived of liberty, they should not have prominence and remain in a second order. Indeed, both doctrine and international law recognize them as necessary, but expressly reduce their application and give them a rather

28 In German juvenile criminal law, the Juvenile Court Act—known as the JGG—applies to two groups: to juveniles between 14 and 18 years of age, and to young adults between 18 and 21 years of age. For more detail, see Ostendorf and Drenkhahn (2020, p. 24).

29 One aspect to consider in closed centers is the permanent tension between the interest of prison officials to enforce prison rules and the inmates' need to expand the restricted spaces of autonomy provided by confinement (Sykes, 2017, p. 127). This clash of interests can generate spaces of violence not protected by law, so the doctrine and international human rights law deploy efforts to offer different tools to resolve this pugnacity without resorting to force. In the case of adolescents, this is what we are going to explain.

30 It refers to the enhancement of personal resources and protective factors that promote reintegration and support desistance.

exceptional character (Ortega Navarro, 2018, p. 298; Van Zyl Smit & Snacken, 2013, pp. 394-396).

From the analysis of the *corpus juris* on the rights of children and adolescents, it can be inferred that the specialty would require limiting the strategies of order focused on violence in two dimensions: restricting the application of disciplinary infractions and contemplating more severe requirements for the use of coercive measures. Each of these issues will be reviewed below.

VI.1. Increased Restrictions on the Application of Disciplinary Infractions

With regard to disciplinary offenses, the first requirement is that they should be adapted to juveniles (General Comment No. 12, § 66). When determining and applying disciplinary sanctions, officials of juvenile facilities must not lose sight of the fact that young people, due to the stage of life they are in, present impulse control problems and do not foresee the consequences of their actions (Dünkel *et al.*, 2017, p. 115). Such immaturity can generate misbehaviors, aggressiveness, self-injury, riots and suicides in adolescents—all these issues impacting the ability to adapt their behavior to the rules of the enclosure. Taking into consideration the above, the doctrine is in favor of the disciplinary regime not obviating the issues of adolescence and manifesting its tolerance with disobedience, attenuating the disciplinary punishment or incorporating response diversification mechanisms, such as the principle of opportunity (Ortega Navarro, 2018, p. 341; Rose, 2012, p. 604).

As a process involving minors, the investigation, determination, and enforcement stage of disciplinary offenses must meet the requirements of any procedure: “be transparent and informative; voluntary; respectful; relevant; inclusive; supported by training; safe and attentive to risk; and accountable” (General Comment No. 12, § 134)³¹.

In addition, closed centers must keep a complete record of all disciplinary proceedings and may not apply “disciplinary sanctions that do not

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³¹ General Comment No. 12 defines these concepts as follows: “Transparent and informative: Refers to giving children complete, accessible, diversity-sensitive, and age-appropriate information about their right to express their views freely. Voluntary: Children should not be forced to express opinions against their will and should be informed that they can stop participating at any time. Respectful: Children’s opinions should be treated with respect, and children should always be given opportunities to initiate ideas and activities. Relevant: The issues on which children are entitled to express their views should have genuine relevance to their lives and allow them to draw on their knowledge, skills, and capacity. Inclusive: Avoid existing patterns of discrimination and encourage opportunities for marginalized children to participate. Supported by training: Adults need preparation, skills, and support to effectively facilitate children’s participation. Safe and attentive to risk: In some situations, the expression of views may involve risk. Adults are responsible for the children they work with and should take every precaution to minimize the risk of children experiencing violence, exploitation, or other negative consequences of their participation. And they have a responsibility and commitment to follow-up and evaluation.” (§ 134).

conform to the provisions of the law or regulations” (Havana Rules, No. 70). Nor should they sanction a “juvenile more than once for the same disciplinary infraction; apply collective sanctions”; and violate due process, for example, by failing to report the infraction charged, “limiting the opportunity to present a defense, or denying the right to appeal to an impartial authority” (Havana Rules, No. 70).

As for disciplinary sanctions, in no case may they constitute “cruel, inhuman or degrading treatment, as well as any other sanction that may endanger the physical or mental health of the juvenile” (Havana Rules, No. 67; Ortega Navarro, 2018, p. 299). Additionally, “reduction of food, restriction or denial of contact with family members, and work as a disciplinary sanction” are prohibited (Havana Rules, No. 67; General Comment No. 24, § 95g; IACHR, 2005, § 12).

Likewise, there is special emphasis in doctrine and international human rights law on prohibiting punishment, isolation cells, and transfers as disciplinary sanctions (Beijing Rules, No. 17.3; Riyadh Guidelines, Nos. 54 and 21h; Havana Rules, No. 67; *Instituto de Reeducación del Menor vs. Paraguay*, § 167; García Pérez, 2019, p. 260; Ortega Navarro, 2018, p. 305).

Punishments can be corporal or psychological, both of which are understood by the IACHR and the doctrine as cruel and degrading. Corporal punishment refers to force used against a child, “the purpose of which is to cause pain or discomfort, however light” (General Comment No. 8, §§ 11 and 24). It consists, on the one hand, of “smacking, slapping, or beating, with the hand or with some object, such as a whip, cane, belt, shoe, wooden spoon”, etc.; but it can also consist of “forcing them into uncomfortable positions, burning them, forcing them to eat boiling food or other products, such as soap or spicy food” (General Comment No. 8, §§ 11 and 24).

Psychological punishment, in turn, includes any action or omission “in which the child is belittled, humiliated, denigrated, scapegoated, threatened, frightened, or ridiculed” (General Comment No. 8, §§ 11 and 24).

The case of silent cells or solitary confinement has been harshly criticized by the doctrine, especially for the harmful effects it brings for young people, one of the most serious being the increased risk of suicide³² (Ortega Navarro, 2018, p. 305; Shalev, 2014, p. 35). It is for

32 It should not be forgotten that the Committee has expressed concern about the high rate of adolescent suicides resulting from mental imbalances and psychosocial illnesses. These may be caused by, inter alia, “violence, ill-treatment, abuse and neglect, sexual abuse, bullying, and/or hazing in and out of school or other institutions” (General Comment No. 4, § 22).

this reason that the Committee prohibits it (General Comment No. 24, § 95a and h).

Finally, transfers cannot be used as a disciplinary sanction (Havana Rules, No. 26). This is especially relevant in the case of “problem” adolescents, with whom transfers are frequently used as a carousel system and a strategy for maintaining order. These practices, according to the doctrine, generate negative effects on their physical and psychological integrity and on their ability to maintain contact with the outside world, their family and lawyers. Additionally, they can generate setbacks in intervention plans and affect the relationships of trust that have been achieved with officials (Van Zyl Smit & Snacken, 2013, p. 406).

The decision that triggers the transfer of an adolescent prisoner from one center to another must be motivated by reasons other than punishment and must prioritize as a criterion the proximity of the new center to the adolescent’s support network, the greater satisfaction of the adolescent’s needs, and the possibilities of advancing in the intervention plan (IACHR, 2020, p. 147; 2012, § 20). If the above criteria are not met, it should not be carried out.

Finally, in the event of a transfer, the parents, guardians, attorneys, and next of kin of the minor shall be notified “without delay. And the transportation shall be carried out at the expense of the administration in ventilated and illuminated vehicles, and in conditions that do not impose physical or moral suffering” (Havana Rules, Nos. 22-26).

VI.2. Stricter Requirements for the Use of Coercive Measures

The use of coercive means within juvenile confinement requires the utmost care. Difficulties in controlling impulses, difficulties in weighing the consequences of their actions, and the high levels of stress suffered by young prisoners (Goerder, 2012, pp. 453-456) mean that coercive measures misused, or used without proportionality, generate situations of greater risk to the life and bodily integrity of the adolescent or adolescents³³. For this reason, coercive measures should always be exercised under the strict supervision of medical or psychological specialists (General Comment No. 10, § 89).

Along these lines, physical, mechanical and medical coercion may only be used when conflict resolution mechanisms have been exhausted and failed; or “when the child represents an imminent threat to themselves or others” (General Comment No. 24, § 95f; Havana Rules, No. 64). Likewise, the means used in coercion must be the least harmful and

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33 According to the Havana Rules No. 65, “In any facility where juvenile detainees are held, personnel shall be prohibited from carrying and using weapons.”

must be used for the time strictly necessary (Ortega Navarro, 2018, p. 284; Havana Rules, No. 64).

If the limits on the hypotheses of use, means, and periods in which the coercive measure(s) may be deployed are not respected, the action will no longer be authorized and will constitute torture, inhuman or degrading treatment (General Comment No. 24, § 95f).

VII. FIFTH AXIS: CONTROL MECHANISMS

The last thematic area in which specialty is important in the execution of juvenile imprisonment is in the control mechanisms. Today, there seems to be consensus regarding a high risk of abuse among and against juvenile prisoners in the execution of deprivation of liberty (General Comment No. 8, § 11, and No. 13, § 3i; Neubacher & Schmidt, 2018, pp. 772-773). To that effect, international human rights law recognizes the importance of prevention and rights protection mechanisms inside prisons (General Comment No. 20, § 49, and No. 4, § 12). The former are concerned with the detection of risk situations that could violate rights inside the prison and the visibility of prison conditions in general. The latter, on the other hand, refer to the adjudication of rights, restoring the rule of law inside prisons and determining legal responsibilities. Similarly, prison inspectors would carry out preventive control, and the role of protection would fall to the enforcement courts. In addition, the penitentiary administration will also be able to adopt mechanisms that would have a dual nature—preventive and protective—, such as the mechanisms of claims, complaints, and administrative summary proceedings (Koepel, 1998, pp. 4-7).

Based on the recognition of this basic level of mechanisms, the relevant question is whether the principle of specialty translates into a difference in the actions that these mechanisms will deploy in favor of imprisoned adolescents. A review of international law and doctrine leads to a positive answer. In the following, we will review what this difference consists of.

VII.1. Judicial Control

With respect to judicial control, there are general issues that should be mentioned, even if they seem obvious. There must be a court with express jurisdiction to resolve any violation of rights caused by any action or omission of the service during the execution stage. For example, decisions regarding the design of the intervention plan, transfers, the application of disciplinary sanctions, the use of force, departures, access to rehabilitation programs, and the provision of basic services, among other actions, may result in violations of rights that must be resolved by courts with special jurisdiction.

In addition, to determine interference with the right, the court must conduct a proportionality analysis. It is likely that the administrative decision is based on absolutely legitimate interests, such as the good order of the premises or the best interest of the child, generating a conflict of interests that must be resolved by the court by analyzing the suitability, necessity, and proportionality of the decision. In the first dimension of analysis, the court must determine whether the administrative decision is useful to satisfy the purpose it wished to safeguard; subsequently, whether the least harmful alternative was chosen, the most innocuous, or the one that had the least impact on the rights of those affected among all the options available to the administration; and, finally, whether the sacrifice of interest for the use of a means that serves the protection of another is justified, which will depend on the value assigned within the administration to the competing principles (Michael & Morlok, 2014, p. 301).

In the area of adolescents deprived of liberty, there are express requirements in terms of control that make the difference with adult confinement. There are basically four such requirements, which are analyzed below.

VII.1.1. Preventive Intervention

The judicial decision must actively encourage positive behaviors, prohibit negative behaviors, and request the institution to adopt concrete safeguard mechanisms in the case of risks for adolescents (General Comment No. 13, § 54; Martínez Pardo, 2012, pp. 26-28). In this sense, judicial intervention must go further, resolving the legal conflict and, to the extent possible, ordering the adoption of specific preventive measures that protect all adolescents in a closed center.

VII.1.2. Ensuring the Best Interest of the Child

In any decision, the courts should respect due process and protect the young person, as well as “safeguard their subsequent development and best interest and ensure that the intervention is as harmless as possible” (General Comment No. 13, § 54). Likewise, the courts should act promptly and orient their interventions towards responses that include mediation and the adoption of measures aimed at protecting the child, ending impunity for the aggressors, and compensating for the harm caused by the violence (General Comment No. 13, § 55).

VII.1.3. Qualify the Cruel, Inhuman or Degrading Treatment Considering the Characteristics of the Child

In analyzing punishment or treatment as cruel, inhuman or degrading, the court “must necessarily consider the status as children of those affected by it” (*Instituto de Reeduación del Menor v. Paraguay*, § 168; *Caso de los Hermanos Gómez Paquiyauri v. Perú*, § 170). In such cases, “children should be treated with tact and sensitivity, taking into

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account their personal situation, their needs, their age, their sex, any physical disabilities they may have, and their level of maturity” (General Comment No. 13, § 54b).

VII.1.4. Periodic Review of the Deprivation of Liberty to Consider Substitution for a Lesser Penalty

The exceptional nature given to the deprivation of liberty sanction in the area of childhood and adolescence, based on the harmful effects that confinement generates in young people, requires periodic reviews of the sanction and an evaluation of the advisability of replacing deprivation of liberty with a less intensive sanction and in a free environment (Beijing Rules, No. 19.1 and 28.1; General Comment No. 20, § 88, and No. 24, § 88; Havana Rules, No. 79; IACHR, 2020, p. 91; CIDENI, 2019, p. 312; p. 312; Montero Hernanz, 2018, p. 286). To this effect, the doctrine identifies as relevant elements to consider for the decision to substitute the harmful effects that the sanction is generating in the adolescent, the progress achieved in the intervention plan³⁴, the positive effect that the new conditions of the sanction in freedom will have on the adolescent, and the low probability that they will commit another similar offense for which they were convicted once they are released (Couso & Duce 2013, pp. 402-406).

VII.2. Prison Inspection

Regarding prison inspection, the responsible institution must be independent; while inspectors must be qualified, and have participation of health experts with legal powers to enter juvenile closed centers without restrictions and confidentially interview adolescents (García Pérez, 2019, p. 283; Havana Rules, Nos. 72-73). As for the manner in which the inspection is carried out, periodic visits must be made that “evaluate compliance with rules concerning the physical environment, hygiene, housing, food, exercise, and medical services, as well as any other aspects or conditions of center life that affect the physical and mental health of minors” (Havana Rules, No. 73; General Comment No. 24, § 95j).

In this regard, it is essential for the inspection to use an instrument with indicators to objectively measure the satisfaction of special needs. Finally, the inspectors must prepare a report with an evaluation of the way in which the center complies with the standards and make recommendations on the measures they consider necessary (Havana Rules, No. 74).

³⁴ When evaluating progress in intervention plans, the behavior of the adolescent inside the center, and the success of the objectives pursued by the sanction at the time of sentencing, it is important that the courts take into account in their weighing the gap between emotional development and judicious behavior. See Castro Morales (2020b).

VII.3. Claims and Complaints

Complaints and grievances are another way to achieve protection and prevention of rights within closed juvenile facilities. They are a form of prevention because they make it possible to solve problems and prevent them from escalating, and also a form of protection because they make it possible to know facts that constitute a violation of rights. They may be submitted at any time and must be answered without delay, in addition to allowing the assistance of legal advisors and family members in the preparation and presentation of claims and complaints (García Pérez, 2019, p. 232). And, finally, the administration of the closed center or juvenile prison must provide an independent mediator in each center, “empowered to receive and investigate any complaints and assist in the achievement of equitable solutions” (Havana Rules, Nos. 75-78; General Comment No. 24, § 95i).

VIII. CONCLUSIONS

During the course of this study, based on the analysis of the instruments of the international system and doctrine, we have been able to observe that there is a wide range of provisions that require juvenile custodial sentences to be carried out in a manner different from that of adults. It has also been determined that the reasons for this specialty revolve around the vulnerable situation of adolescents deprived of their liberty, which would require the State to reinforce its obligation to protect and assist juvenile prisoners.

For international instruments and doctrine, there is consensus that specialty in juvenile imprisonment has an impact on five dimensions of the system, namely: orientation of the execution of juvenile prison sentences, prison conditions, penitentiary regime, good order, and control mechanisms.

At this point, it can be asserted that the repercussions of the principle of specialty in the execution of juvenile custodial sentences pose major challenges for national legislation in this area, forcing legislators to rethink in depth the designs and structures that the execution of adult sentences have historically had as a reference point. This is by no means simple, since not all of the observations can be translated into specific obligations for the States parties, as we have seen; indeed, a significant number of them are formulated as general principles, giving States wide margins of interpretation to establish rules and practices at the domestic level based on these principles. On the other hand, the observations must be implemented in the dimension of the execution of penal sanctions, which has not undergone major improvements or modernization processes in recent years, operating with marked levels of overcrowding that have had an impact on the qualitative performance

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of a significant number of prison systems in the region. This aspect makes it necessary to join the voices that have long been clamoring for a comprehensive reform of the prison system in the Americas.

In this scenario, the challenge of the next stages of this research will be to elucidate how far Chile has progressed and what has happened to juvenile imprisonment more than twelve years after the implementation of the new system of juvenile responsibility. What matters is to know whether or not the set of rules contained in the LRPA, aimed at ensuring a specialized execution of adult sanctions, as well as the jurisprudential standards developed on the matter, are sufficient and in accordance with the requirements of international human rights law and doctrine, an effort that—as I explained in the introduction—requires an investigation in itself, which I hope to undertake soon.

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