SOMETHING'S HAPPENING HERE: CHILDREN AND HUMAN RIGHTS JURISPRUDENCE IN TWO INTERNATIONAL COURTS

Bernardine Dohrn*

I. INTRODUCTION

Children's rights are undergoing an unprecedented expansion in multiple domains as varied as corporal punishment, deprivation of liberty, rape, participation, juvenile justice, adoption, abduction, street children, child protection, and custody—a case law jurisprudence of human rights barely known within the United States. In particular, two regional human rights courts are cautiously but substantively creating a body of case law developed from the right of individual petition under human rights treaties that is becoming a new "children's common law": the European Court of Human Rights[1] ("ECHR") and the Inter-American Court of Human Rights ("IACHR").[2] Both enabling treaties are "adult treaties"; they mention children explicitly numerous times,[3] but

* Bernardine Dohrn is Associate Clinical Professor of Law and Director of the Children and Family Justice Center, Northwestern University School of Law, Bluhm Legal Clinic. Research and support was provided by Dan Soldado (J.D. 2006) and E. Toni Curtis.

[1] The European Court of Human Rights ("ECHR"), sitting in Strasbourg, Belgium, was established by the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified today by forty-six nations, which went into effect in 1953. The ECHR is composed of the number of judges equal to the number of High Contracting Parties, who are elected for terms of six years and may be re-elected. Article 34 provides that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention." European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Rome, art. 34, Apr. 21, 1950 [hereinafter European Convention].

[2] The Inter-American Court of Human Rights ("IACHR"), sitting in San José, Costa Rica, was established by the American Convention on Human Rights, ratified today by twenty-five nations, which went into effect in 1978. The IACHR is composed of seven judges who are elected by the State Parties to the Convention in the General Assembly of the Organization for terms of six years and may be re-elected once. The Court is a body of the Organization of American States ("OAS"). The Inter-American Commission on Human Rights is also composed of seven elected members who represent all member countries of the OAS; it sits in Washington, D.C. All members of the OAS, including the U.S., are parties to the Inter-American Commission on Human Rights, but only those who have ratified the Inter-American Convention on Human Rights (not the U.S.) are subject to the jurisdiction of the Inter-American Court.

[3] For example, Article 19 of the Inter-American Convention of Human Rights provides: "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." Organization of American States,

are focused on the human rights of all persons. Yet a growing cohort of children's rights attorneys, NGOs,[4] and ordinary lawyers are bringing a rainbow of cases involving the children's rights to these two courts.

This paper will argue three propositions:

First: Substantive law and standards involving the rights of the child are being forged through common law analysis and interpretation by the ECHR and IACHR. Most surprisingly, these courts have incorporated and drawn upon subsequent treaties, particularly the Convention on the Rights of the Child ("CRC"), which does not itself have an individual right of petition.

Second: The ECHR and IACHR are cautiously but significantly re-defining the paradoxical and contested zone where children's rights meet parental rights. In this arena the courts have steered away from violating national norms and traditions, and frequently have affirmed the national holding based on a margin of appreciation.[5] While deferential to the right of parents to serve as the principal social entity protecting and devoted to children,[6] both regional courts have nonetheless recognized children as human persons and infused their right to survival, development, life, protection, and participation with new meanings.

Third: the dynamic and inevitably changing nature of childhood is being recognized through several specific legal constructs. Specifically, children's right to participation, effective participation, their right to be heard,[7] and their

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American Convention on Human Rights, art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.oas.org. Other references include: provision for the best interests of the child solely in the case of dissolution of marriage (art. 17(4)), equal rights for children born out of wedlock (art. 17(5)), prohibition of the juvenile death penalty (art. 4(5)), separation of juveniles from adults in specialized tribunals in criminal proceedings, so that they may be treated in accordance with their status as minors (art. 5(5)), and the right of parents to provide for the religious and moral education of their children in accordance with their own convictions (art. 12(4)). *Id.* In contrast, the European Convention for the Protection of Human Rights and Fundamental Freedoms speaks of "no one" and "everyone," mentioning a "minor" just once in Article 5(1)(d), providing that a minor may be detained by lawful order for the purposed of educational supervision or bringing him before the competent legal authority. European Convention, *supra* note 1, at art. 5(1)(d).

[4] Non-governmental organizations.

[5] The principle of a margin of appreciation includes deference to the nation state, both as recognition of the decision-makers closest to the ground who know the facts and the people involved, and of a reluctance to move too far beyond the given law and norms at a particular moment. *See, e.g.*, Fretté v. France, 36515/97 ECHR § 3, ¶ 40 (2002). *See also* Costello-Roberts v. United Kingdom, 13134/87 ECHR (1993).

[6] *See, e.g.*, United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, Nov. 20, 1989, at Preamble ("Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.") [hereinafter CRC]. Or more substantively, Article 5:

> State Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Id. at art. 5.

[7] "[T]he opportunity to be heard in any judicial or administrative proceedings affecting the child." *Id.* at art. 12(2).

"right to express their views freely in all matters affecting the child, the views of the child to be given due weight in accordance with the age and maturity of the child"[8] are emerging as recognized rights in manifold areas of law and elevated in the courts' analyses. The courts are integrating this realm of participation with the overarching principle of best interests of the child[9] as the primary consideration in all actions concerning children. With increasing frequency courts acknowledge the dynamic factors of age, gender, and developmental capacity as relevant factors in deciding violations of human rights.[10]

Finally, there will be a concluding discussion about the scope and substance of rapidly developing areas of law in international human rights courts and national courts, and their interpretive and *instructive*[11] import for children's rights attorneys in national courts, including the United States.

II. The International Human Rights of the Child: Cases from the European Court of Human Rights

Because the ECHR has been functioning for more than five decades, the cases analyzed below do not represent the full range of decisions involving children's rights, particularly in the area of domestic relations, custody, and family law. Here, the discussion will focus on targeted areas of children's rights, noting particularly the ECHR's recent discussions of children's rights in relationship to their role in families. Specific areas include juveniles deprived of their liberty, violence against children (including torture, corporal punishment, and abuse/neglect), and family law as it relates to adoption, abduction, and visiting or contact with parents.[12] Of particular note are the ECHR's growing references to the Convention on the Rights of the Child as interpretive of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[13]

The ECHR may order damages and costs, and enforceability of the court's judgments includes both the obligation to put an end to the violation and to redress its effects, subject to supervision by the European Committee of Ministers.[14]

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[8] *Id.* at art. 12(1).

[9] "In all actions concerning children . . . the best interests of the child shall be a primary consideration." *Id.* at art. 3.

[10] *See, e.g.*, Aydin v. Turkey, 57/1996/676/866 ECHR (1997); Selcuk v. Turkey, 21768/02 ECHR § 4 (2006); Pini v. Romania, 78028/01 & 78030/01 ECHR § 2 (2004).

[11] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).

[12] The attorneys who bring cases to these international Courts of human rights appear to be appellate attorneys or barristers who frequently, although not always, have no direct relationship with the child. Duties of ethical responsibility to the client appear to be based on national law.

[13] *See Pini*, 78028/01 & 78030/01 ECHR; *Selcuk*, 21768/02 ECHR. *See also* Gil v. Spain, 56673/00 ECHR § 4 (2003); Maire v. Portugal, 48206/99, ECHR § 3 (2003).

[14] European Convention, *supra* note 1, at art. 46.

A. *Rights of Children Tried as Adults/Effective Participation and Sentencing*

The sensational British child murder case ("the Bulger case") involved the abduction of a two-year-old child from a shopping mall by two children aged ten. The baby, James Bulger, was bludgeoned to death and left on a railroad track. Appealed to the ECHR, the twin judgments of 1999 are known as *T. v. United Kingdom*[15] and *V. v. United Kingdom.*[16] The two children were tried as adults in Old Bailey where they were placed in a specially raised dock for their three-week trial. The media covered the trial extensively, and hostile crowds gathered during the transport of the child defendants to and from court, at one time surrounding and rocking the van in which they were placed. In violation of British law, the tabloids published the children's names and photos.

The minimum criminal age of responsibility in England and Wales is ten years, below which no one can be found guilty of a criminal offense. Generally, children under eighteen are tried in the specialist Youth Court, with informal procedures and the exclusion of the general public. The exceptions are those children charged with murder, manslaughter, or an offense punishable by a sentence of fourteen years or more if committed by an adult; those are tried in the (adult criminal) Crown Court before a judge and jury.

The ECHR held that the neither the attribution of criminal responsibility nor the (adult) criminal trial of young children, *in and of itself*, gave rise to a violation of the Convention, under Article 3.[17] However, the ECHR did conclude the requirement of *effective participation* in the trial mandated that the trial court take full account of the defendants' ages, levels of maturity, and intellectual and emotional capacities, and that steps be taken to promote their ability to understand and participate in the proceedings.[18] In the instant cases, the young defendants suffered traumatic effects during and after the trial; there was no serious argument that the boys were able to follow or participate in the proceedings. The ECHR suggested that appropriate procedures for very young defendants might include informal procedures such as the judges and barristers not wearing wigs or gowns, taking frequent breaks, having a social worker sit with the children to explain the proceedings, and conducting "the hearing in such as way as to reduce as far as possible their feelings of intimidation and inhibition."[19]

Furthermore, the ECHR held the sentencing of T. and V. violated the European Convention, holding that the mandatory sentence of imprisonment "at her Majesty's pleasure" required that a "tariff" be set to satisfy the requirements of retribution and deterrence. After expiration of the tariff, the prisoner becomes eligible for release on license.[20] In this case, the ECHR concluded

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[15] T. v. United Kingdom, 24724/94 ECHR (1999).

[16] V. v. United Kingdom, 24888/94, ECHR (1999).

[17] "No one shall be subjected to torture, or to inhuman or degrading treatment or punishment." European Convention, *supra* note 1, at art. 3.

[18] *V. v. United Kingdom*, 24888/94 ECHR at ¶ 86.

[19] *Id.* at ¶ 87.

[20] Pursuant to the Criminal Justice Act of 1991, the Secretary of State determines both the length of the defendant's tariff, and whether to release. The length of the tariff is determined by a recommendation by the trial judge, the opinion of the Lord Chief Justice, and ultimately

that the complex interventions by the Home Secretary (executive) who increased the tariff recommended by the Lord Chief Justice (a move later condemned by the House of Lords, which concluded that the increased sentence was based on the public uproar[21]) violated the requirements of both Article 6 to have an independent court and Article 5(4) to be entitled to have the lawfulness of indefinite detention decided speedily by a court.

Subsequent to the *T.* and *V.* judgments, the ECHR again addressed the right of a child to participate effectively in his trial, pursuant to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms in the *Case of S.C. v. United Kingdom.*[22] S.C. at the age of eleven was charged with attempted robbery of an eighty-seven-year-old woman who was knocked to the ground in an attempt to take her handbag. His fourteen-year-old co-defendant stayed with the victim. S.C.'s defense was that he acted under duress, being threatened by the fourteen-year-old. He was sentenced to a two-year supervision order and placed with foster parents. One month later, the Youth Court reviewed the defendant's history of delinquency, which included robbery, burglary, theft, and arson, and concluded that he should be tried in the (adult) Crown Court.

S.C.'s defense counsel obtained two expert reports: the first, from an adolescent forensic psychiatrist who spoke to him for twenty minutes before S.C. terminated the interview; and a second by a consultant clinical psychologist. The reports included a full scale IQ of fifty-six, learning delays, impaired reasoning skills, conduct disorder of the unsocialized type, disrupted educational career, cognitive abilities in the range of six years and two months to eight years and two months, rather than his eleven years.

The Crown Court adjusted the hearing based on the child's age. The child was accompanied by a social worker, was not required to sit in the dock, and the court dispensed with wigs and gowns and took frequent breaks. The Crown Court sentenced S.C. to two-and-a-half years' detention. He appealed on the grounds that he had been deprived of a fair trial due to his age and impaired intellectual ability, and gave new testimonial evidence by the social worker who had been with him in Crown Court. The British court dismissed the appeal, noting S.C. had made improvements in behavior and work while incarcerated, which therefore must be in his best interests.

Despite the special protections put in place by the trial judge,[23] the European Court concluded that S.C. was unable to fully comprehend or participate in the trial process and could not adequately give instructions. Although Article 6(3)(c) does not require that a child understand every point of law or evidence, effective participation "presupposes that the accused has a broad

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by the Secretary of State. Criminal Justice Act, 1991, c. 53, § 35(2) (Eng.). *See also* Hussain v. United Kingdom, 21928/93 ECHR ¶¶ 27-30 (1996).

[21] A petition with thousands of signatures was submitted to the Lord Chief Justice demanding that the children receive life sentences.

[22] S.C. v. United Kingdom, 60958/00 ECHR § 4 (2004).

[23] Following the *T.* and *V.* judgments, the Lord Chief Justice issued a practice direction concerning the trial of children in the Crown Court, drawing upon the requirements mandated by the judgment. The practice direction was not in force at the time of the *S.C.* trial, but the trial judge complied with many of the same safeguards.

understanding of the nature of the trial process and what is at stake for him or her, including the significance of any penalty that may be imposed."[24] Participation must include understanding

> the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defense.[25]

In effect, the court in the *S.C.* judgment retrieves and breathes new life into the decisions in *T.* and *V.* by giving substance to the requirement that children tried in adult proceedings must be able to effectively participate in their trial. This human rights requirement is distinguished from the rigors of proving "fitness to plead."[26] When the state determines to try a child in criminal court (as distinguished from a forum to determine the child's best interest and those of the community), a child who is at risk of not being able to participate effectively in his trial because of his young age or limited intellectual capacity, "it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and makes proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly."[27]

Clearly, this 5-2 decision narrows the ability to try extremely young, incapacitated, or emotionally- or intellectually-challenged children in adult criminal court because such defendants must be able to effectively participate in their trials.

Prior to the *T.* and *V.* cases and well before *S.C.*, the ECHR addressed the issue of life sentences for juveniles in the case of *Hussain v. United Kingdom*. Here, a sixteen-year-old defendant was sentenced to detention during Her Majesty's pleasure for the brutal murder of his two-year-old brother. The trial judge wrote to the Secretary of State that the baby was covered with more than sixty bruises and his brain and spine had been injured by considerable violence over two to three days, referring to the defendant as "an unscrupulous young liar . . . probably a very dangerous young man who is quite unmoved by brutality . . . . I can do no more than sound this somber note of warning."[28]

It was eight full years after conviction that Hussain's tariff was set at fifteen years by the Secretary of State. After the expiration of the tariff, the Parole Board reviewed Hussain's detention four times. He had been detained for seventeen years when he brought the case to the ECHR asking for a declaration that his rights had been violated pursuant to Article 5(4) of the European Convention based on the failure to have his detention reviewed by a court-like body and by the denial of an oral hearing where he could personally make his case that he was no longer dangerous. The Government argued that the sentence of detention during Her Majesty's pleasure was essentially punitive and was automatic for juvenile murderers based on the gravity of their crime, regardless of their mental state or dangerousness. In addition, it asserted that

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[24] *S.C. v. United Kingdom*, 60958/00 ECHR at ¶ 29.

[25] *Id.*

[26] "Fitness to plead" is a defense involving the incapacity of the child to distinguish right and wrong. *Id.* at ¶ 23.

[27] *Id.* at ¶ 35.

[28] Hussain v. United Kingdom, 21928/93 ECHR ¶ 10 (1996).

the acceptability to the public of an early release must be considered as an element of maintaining public confidence in the system of criminal justice.[29]

The court concluded that a tariff is based on the requirements of both retribution and deterrence, but that an indeterminate sentence for a juvenile person, which could be a life sentence, could only be justified by dangerousness and the need to protect the public. Indeed, the court noted that the failure to take into account developments and changes that "inevitably occur with maturation would mean that young persons detained . . . would be treated as having forfeited their liberty for the rest of their lives, a situation which . . . might give rise to questions under Article 3 . . . of the Convention."[30] That is, a life sentence for a juvenile offender might well violate the prohibition against torture, inhuman or degrading treatment or punishment.

Hussain, the court unanimously concluded, is entitled to have the issue of his continuing detention during her Majesty's pleasure reviewed by a court at reasonable intervals and to appear in person at an oral hearing.

In *Selcuk v. Turkey*,[31] decided this year, a unanimous ECHR found that the failure of the authorities to take into account the age of the minor in continuing pre-trial detention with adults was a violation of Article 5(3). Selcuk was arrested for robbery of a computer from a primary school at the age of sixteen. The judge ordered his detention with adults, which was challenged by his attorney based on his minor status pursuant to Article 5(3) and, strikingly, pursuant to Article 37(b) of the CRC. The ECHR agreed with the challenge to Article 5(3)[32] noting that the child's attorney repeatedly brought to the attention of the authorities that the client was a minor, and invoking Article 37(b) of the CRC, she requested the court to release the defendant. "It appears from the case-file that the authorities never took the applicant's age into consideration when deciding on his continued detention."[33]

Thus the ECHR notes approval of the use of the CRC in interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms when it comes to the continuing detention of a minor. The court elevates the relevance of age as a consideration. At the same time, the ECHR appears not to address the incarceration of the minor with adults, but only notes it in a passing description of the facts of the case.

B. Violence Against Children

The ECHR addresses a range of cases involving violence against children by state authorities, schools, private parties, and families. A growing jurisprudence articulates the special obligation of the state to protect the young and to take age into account in determining the impact and consequences of violence. Issues of gender and rape are being clarified, and traditional biases degrading

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[29] *Id.* at ¶ 49.

[30] *Id.* at ¶ 53.

[31] Selcuk v. Turkey, 21768/02 ECHR § 4 (2006).

[32] "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be . . . entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." European Convention, *supra* note 1, at art. 5(3).

[33] *Selcuk*, 21768/02 at ¶ 35.

girls and women are rejected. The Convention on the Rights of the Child is cited as a basis for interpreting relevant Articles in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[34] Cases range from the torture, disappearance, and police rape of children to corporal punishment in British boarding schools and parental neglect, and articulate the state's clear obligation to provide due process to the parents of children alleged to be in need of removal of parental authority and/or denial of access (visiting).

1. Torture/Rape

In the case of *Aydin v. Turkey*,[35] the ECHR held for the first time that rape by a public official of a person in custody amounts to torture. Aydin, a seventeen-year-old girl, was seized at her home by four security officials, along with her father and sister-in-law, taken to the town square, blindfolded, and transported to the district gendarmerie headquarters. Aydin, who had never traveled outside her village, was separated from her family, taken upstairs to a "torture room", stripped, and put into a car tire and spun. Later, she was again stripped and this time raped in a locked room and beaten for an hour. The gendarmerie released her into the mountains four days later, and she made her way back to her village, where she complained to the public prosecutor of the rape and beatings.

Within a week, authorities sent Aydin to two doctors to establish whether she was a virgin and if there were marks of physical violence or injury; the results were inconclusive. The gendarmerie headquarters denied that she—or anyone—had been in custody but declared that the "investigation" was ongoing. The applicant married and left the jurisdiction, looking for work.

The ECHR concluded that to be raped by an official of the state is an especially grave and abhorrent form of ill-treatment that amounted to torture because it was deliberate inhuman treatment causing very serious and cruel suffering.[36] Based on the hearings and investigations conducted by the Commission, the court concluded that Aydin was held for three days; blindfolded; in a constant state of physical pain, mental anguish, and apprehension; beaten; paraded naked; and pummeled with high-pressure water.

Rape, the court noted, exploits the vulnerability and weakened resistance of the victim, involves the acute pain of forced penetration, and leaves one feeling debased, with deep psychological scars. The judgment, which never refers to Aydin as a child, a girl, or even a female person, concludes for the first time that "having regard to her sex and *youth* and the circumstances under which she was held," the accumulation of acts of physical and mental violence, *and* the especially cruel act of rape amounted to torture in breach of Article 3.[37]

Torture recognizes no exception, no derogation, even in the case of a public emergency threatening the life of a nation or any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities.

In addition, the majority concluded that there was a violation of Articles 6 and 13; the right to "a fair and public hearing within a reasonable time by an

[34] *See, e.g.*, Pini v. Romania, 78028/01 & 78030/01 ECHR § 2 (2004).
[35] Aydin v. Turkey, 57/1996/676/866 ECHR (1997).
[36] *Id.* at ¶¶ 78, 83.
[37] *Id.* at ¶ 84 (emphasis added).

independent and impartial tribunal established by law"[38] was violated by the absence of independent and rigorous criminal investigation, intimidation, and lack of professional standards for taking medical evidence (noting that the authorities were focused on the question of whether she was a virgin as opposed to a rape victim). Further, Article 13 guarantees the availability at the national level of an effective remedy to enforce the substance of the Convention, given the fundamental importance of the prohibition of torture and the especially vulnerable. The dissent concluded that there was not evidence of rape by authorities beyond a reasonable doubt.

2. *Rape/Consent*

In *M.C. v. Bulgaria*,[39] the ECHR concluded that the positive obligations in Articles 3 and 8 of the European Convention require the state to enact legislation to punish rape and to effectively investigate it. Here, M.C., a minor who complained of rape, alleged that Belgian law prosecuted only cases of excessive violence, determined lack of consent based on resistance rather than multiple factors, and made children particularly vulnerable to rape since the age of consent was fourteen. NGOs intervened to submit briefs on consent and girls' and women's right to autonomy.

Conflicting evidence in *M.C.* led the state to not act for a year, to issue a report that there was no evidence of rape, to re-open the investigation because the first was not objective or thorough, and again closed the case for lack of evidence. The ECHR noted that states have a margin of appreciation for cultural differences in law, but are bound by the Convention. The ECHR recognized the trend toward assessing consent based on multiple factors in rape crimes, rather than relying on the level of resistance to force as the "constituent element," and agreement by the Committee of Ministers that this development was essential for the protection of women/girls.[40]

The ECHR held the application of the rape law in Bulgaria was inconsistent and almost exclusively involved significant force cases, that the investigation was too constrictive, and that the state's positive obligations under Articles 3 and 8 were to ensure that girls/women/children are not subject to ill-treatment and are entitled to protection of their private life. The case turns more on explicit issues of gender than of age or childhood.

3. *Corporal Punishment*

One of the most dynamic areas extending children's human rights is the evolving protection of children from corporal punishment in three domains: criminal corporal punishment by the state, corporal punishment in schools (both public and private), and parental corporal punishment as reasonable chastisement or punishment.

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[38] *Id.* at ¶ 91.

[39] M.C. v. Bulgaria, 39272/98 ECHR § 1 (2003).

[40] *Id.* at ¶ 156. "[T]he Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy." *Id.* at ¶ 166.

In *Tyrer v. United Kingdom*,[41] the ECHR concluded that judicial corporal punishment for delinquent crimes by an adolescent on the Isle of Man violated Article 3's prohibition of degrading punishment—even though the "strokes" had been reaffirmed in a democratic referendum by the population of the Isle of Man. Tyrer was a fifteen-year-old arrested and convicted after a school fight. The punishment of "birching," which raised welts on his skin, was administered by authorities on his bare buttocks the same day the punishment was announced. The ECHR held that while the punishment did not meet the level of severity that amounted to torture or inhuman punishment, it did violate Article 3's prohibition of degrading punishment. The judgment noted that all of England, Wales, the rest of the U.K., and Europe had abolished corporal punishment of children as a judicial sentence for delinquency.

Thirteen years later, a closely divided ECHR (5-4) upheld the private school "slippering" of a seven-year-old boy for talking in the corridor in *Costello-Roberts v. United Kingdom*.[42] Five years before this case, England had abolished corporal punishment in public (independent) schools by removing the defense of reasonable chastisement for teachers (1987); the brochure of this private school gave parents notice only that the school believed in strict punishment. Although the seven-year-old new student received three "whacks" on his bottom through his shorts with a slipper, it was in the privacy of the headmaster's office and with no evidence of severe or long-lasting effects. *Costello-Roberts* concludes that ill-treatment must attain a minimum level of severity to fall within Article 3 (citing *Tyrer*) and that the determination of a violation is relative, depending upon all the circumstances of case.

Thus, the majority of the ECHR held that this school corporal punishment did not reach the minimum level of severity to violate Article 3, although the ECHR expressed "certain misgivings" about the automatic nature of the punishment for three demerits and the three-day wait before the "whack" was administered.

The dissent pointed out that Europe and U.K. independent schools have progressively outlawed corporal punishment, that the school gave no notice to the mother and sought no consent from parents, and that the three-day delay and the ritualized nature of the corporal punishment were of concern. *Costello-Roberts*, the dissent concluded, was a borderline decision and not to be taken as approval in any way of the retention of corporal punishment as part of the disciplinary regime of a school.

In the case of *A. v. United Kingdom*, just seven years later, the ECHR unanimously held that harsh parental corporal punishment of a nine-year-old boy violated Article 3.[43] Furthermore, by that time the U.K. had abolished corporal punishment in all schools (1998). In this case, A.'s stepfather had previously been reported to the child protection registry (when still a boyfriend of the mother). He was charged with assault for beating A. with a garden cane with considerable force on more than one occasion, but the court acquitted the father based on the parental defense of reasonable chastisement or correction.

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[41] Tyrer v. United Kingdom, 5856/72 ECHR (1978).

[42] Costello-Roberts v. United Kingdom, 13134/87 ECHR (1993).

[43] A. v. United Kingdom, 25599/94 ECHR ¶¶ 19-21 (1998).

The government of the U.K. asked the ECHR not to make a general statement about corporal punishment of children but to limit the judgment to the facts of the *A.* case. The U.K. accepted that the case of *A.* violated Article 3 and stated that its law providing for the parental defense of reasonable chastisement must be amended. Yet the ECHR concluded that the U.K. failed to meet its affirmative obligations under Article 3 by protecting A. and not holding accountable the perpetrator of the assaults.[44]

4. Child Abuse and Neglect: Parental Responsibility and Access

Haase v. Germany[45] stands for the proposition that in cases of allegations of parental unfitness or withdrawal of parental responsibility, parents must be provided with fair procedures and involvement in the decision-making process as a whole, to a degree sufficient to provide them with the required protection of their interests in measures of interference with family rights pursuant to Article 8 of the Convention.[46] In *Haase,* the mother had twelve children—seven with her first husband and five with Mr. Haase, including a seven-day-old daughter. The Haases made an application for family aid, but then, as it turned into an assessment of their family life, the Haases refused to cooperate with authorities. An expert report resulted in an interim injunction withdrawing parental rights over the seven children and authorizing the use of force if necessary to remove them from their parents immediately. Without hearing from the parents or the children, the district court adopted the expert report that the parents' inability to provide care and education was an abuse of parental authority and jeopardized the physical, mental, and psychological well-being of all the children such that immediate separation and prohibition of access (visiting) was the only way to protect them. The children were removed from different schools, a nursery, home, and the hospital where the seven-day-old girl was taken without the knowledge of the mother.

There followed numerous appeals, another expert, and a year later, interviews with the children, some of whom expressed a desire to return to their parents and others who did not. The family pediatrician testified that the

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[44] Note that subsequent legislation in the U.K. continues the conflict and turmoil. The English Human Rights Act of 2001 retained the reasonable chastisement defense for parents, but asked the courts to consider the effect, sex, age, health, and duration of the corporal punishment. This law was widely criticized by the Committee on the Child and by child welfare organizations. In 2005, Parliament approved the repeal of the reasonable chastisement defense for parents but legitimized "smacking" of children by parents. United Kingdom Parliament, Joint Committee on Human Rights—Nineteenth Report, Part 4 (8 Sept. 2004), *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102. htm.

[45] Haase v. Germany, 11057/02 ECHR § 3 (2004).

[46] The European Convention on Human Rights Article 8 provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 1, at art. 8.

Haases were loving parents with a big family and that he had seen no signs of violence or abuse.

The ECHR held unanimously that Germany violated Article 8 with its interference in the Haases' right to family life. The ECHR sets forth a standard at variance with current U.S. law and practice: taking a child into public care should normally act only as a "temporary measure to be discontinued as soon as circumstances permit, and . . . with the ultimate aim of reuniting the natural parent and child."[47]

As to the law, a balance must be struck between the competing interests of the individual and of the community as a whole, which includes a certain margin of appreciation—a margin that varies with the nature and seriousness of the issues at stake. In emergency situations, the ECHR recognizes a wide margin of appreciation, yet there must be circumstances justifying the removal, careful assessment of the impact on the parents and the child, and the elimination of possible alternatives to taking the child into public care.[48] In particular, the ECHR noted

> the taking of a newborn baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure which neither she nor her partner had been involved.[49]

Following removal of the children, even stricter safeguards are required for any further restriction of parental authority and access.

The fair balancing of the interests of the parents and those of the child in care includes the particular importance of the best interests of the child, which may override the interests of the parent (for example, harming a child's health or development). But, the ECHR emphasized, the proceedings must be fair and assure that the parents "have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests."[50]

The Court concluded that Article 8 was violated in that: (1) the risk of harm was not adequately considered; (2) alternatives to immediate removal were not explored; (3) the children were not heard; (4) the imminent danger (urgency) was not established; (5) the removal of six children from their schools, kindergarten, and home; placing them in unidentified foster homes; and denying access to each other and parents was not proportionate; and (6) the developmental harm to the children of separation was not explored. In harsh and passionate language, the ECHR concluded that the initial removal was not supported by relevant and sufficient reasons *and* the parents were not sufficiently involved in the decision-making process to protect their interests. The court called the removal of the newborn "Draconian" and noted the quality of "irreversibility" of the separation.

Note that the remedy in such cases is both a monetary damage award and, pursuant to Article 46 of the European Convention, the imposition on the State

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[47] *Haase*, 11057/02 ECHR at ¶ 93.
[48] *Id.* at ¶ 90.
[49] *Id.* at ¶ 91.
[50] *Id.* at ¶ 94.

of a legal obligation "to put an end to the violation found by the Court and to redress so far as possible its effects,"[51] subject to supervision by the Committee of Ministers.

C. *Family Law and Children's Rights*

1. Adoption/Parental Rights

In *Pini v. Romania*,[52] involving the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption[53], as well as the European Convention and Romanian law, two Italian families each adopted a girl from Romania. Both children had been abandoned at a young age and were being cared for by a private institution for orphans, the Poiana Soarelui Educational Centre in Brasov ("CEPSB"). The adoptive couples met the girls at the institution when the children were approximately nine years old. The adoption was ordered, appealed by the Romanian Committee for Adoption, but the court rejected the appeal and entered final orders. There followed two years of efforts by the adoptive parents to have the orders enforced, including sending a bailiff to the orphanage door, and the filing a criminal complaint against CEPSB, which was not prosecuted.

The children, now aged eleven, filed to have their adoptions revoked, with the Director of the CEPSB as their guardian, arguing that they expressly wished to remain in the family-like environment in which they were growing up and being educated, and that they never met their adoptive parents nor do they speak Italian. Intervenors, including the Baroness Nicholson of Winterbourne, a British national and rapporteur for the European Parliament, provided evidence that the CEPSB was an excellent and family-like institution and that the girls were well and personally cared for. At the same time, the Baroness's report to the European Parliament on Romania's application for membership of the European Union noted that the fate of Romanian children in institutions remained a "major cause for concern and a problem in terms of fundamental rights, with an impact on the accession procedure."[54] The Director of the CEPSB was quoted in the media as saying that it was time "to stop exporting Romanian children."[55]

The ECHR found a violation of Article 8, noting that the Article must be interpreted in light of the Convention on the Rights of the Child[56] and the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, as well the European Convention on the Adoption of Children.

The ECHR concluded that the final order of adoption and the adoptive parents' reliance established a relationship of family life and that that relationship was violated by the failure of the national authorities to take the necessary steps to implement that right. At the same time, the ECHR recognized the

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[51] *Id.* at ¶ 115.
[52] Pini v. Romania, 78028/01 & 78030/01 ECHR (2004).
[53] Ratified by Romania on October 18, 1994. *Id.* at ¶ 100.
[54] *Id.* at ¶ 101.
[55] *Id.* at ¶ 96.
[56] *Id.* at ¶ 139.

competing interests of the adoptive parents and the adopted children and firmly put the expressed wishes of the children and the children's best interests ahead of formal law. "There are unquestionably no grounds, from the children's perspective, for creating emotional ties against their will between them and people to whom they are not biologically related and whom they view as strangers."[57]

The best interests of the child will override the interests of the parents, and "adoption is a means of providing a child with a family, not a family with a child."[58] Once the children turned ten, their consent was required under Romanian law, and the ECHR held that they are also entitled to have their adoption order revoked once they reach that age. The court deplored the adoption process, the lack of effective contact between the children and adoptive parents before the adoption, and the absence of psychological support to prepare the children for departure. It was remarkably forgiving, however, of the lengthy proceedings and resistance to enforcing the adoption order, and in fact explicitly noted the possibility of a fresh examination of the evidence at a later stage when required. The children's consistent refusal to be adopted after reaching the age of ten carried weight and led to the ECHR's conclusion that there was no violation of Article 8.

Instead, the ECHR concluded that Romania violated Article 6(1)[59] by failing to take effective measures to comply with final, enforceable judicial decisions for more than three years. Noting with regret the "probably irreversible consequences of the passage of time for the potential relationship between the applicants and their adopted daughters,"[60] the ECHR concluded that the now thirteen-year-old girls remained strongly opposed to being adopted and moving to Italy.

In the case of *Görgülü v. Germany*,[61] the ECHR tackled the vexing issues of a case similar in ways to the Baby Richard[62] case in the U.S. The mother gave the child up for adoption, the father attempted to locate the child and obtain custody and access, and was denied and delayed over a period of two years. The ECHR concluded that Germany violated Article 8 in regard to both custody and access to the child by the father. Again, the court noted the operating principles: analysis of the case as a whole, whether decisions were relevant and sufficient, the crucial importance of the consideration of the best interest of the child, and the margin of appreciation for national authorities who have the benefit of direct contact with all persons concerned (although the wide margin of appreciation in matters of custody is replaced by a stricter scrutiny regarding further limitations, such as access and legal limitations).[63]

Article 8 requires where there is the existence of a family tie, that the state act to enable that tie to be developed, and it imposes the obligation to aim at

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[57] *Id.* at ¶ 153.

[58] *Id.* at ¶ 156 (citing Fretté v. France, 36515/97 ECHR § 3 (2002)).

[59] *Id.* at ¶ 167 (citing Art. 6 § 1 of the European Convention as providing for the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal."). Note that court found a violation by a 4-3 vote.

[60] *Id.* at ¶ 188.

[61] Görgülü v. Germany, 74969/01 ECHR 2004.

[62] *See generally In re* Kirchner, 649 N.E.2d 324 (Ill. 1995).

[63] *Görgülü*, 74969/01 ECHR ¶¶ 41-42.

reuniting a natural parent with his or her own child.[64] In *Görgülü*, the state viewed separation from the foster family only as an instant separation, and the state never pursued alternative strategies for making the transition feasible for the child. Similarly, the suspension of access which diminished and progressively destroyed the natural bonding possible between father and child also violated Article 8.

2. Abduction (Parental)

In a series of cases involving parental child abduction during the course of divorce and separation, the ECHR interpreted Article 8's right to family life in light of the Hague Convention on Child Abduction. For example, in *Iglesias Gil and A.U.I. v. Spain*,[65] the mother sought return of her son from the father who had taken him to the U.S. despite the mother being granted custody in Spain where the child was born and where they lived. After lengthy proceedings over a three-year period, the father returned the son but threatened and attempted to blackmail the mother. The ECHR concluded that a breach of Article 8 had occurred and that Spain's international efforts to locate and return the child were not enough to protect the child. Citing Spain's ratification of the Convention on the Rights of the Child, the ECHR awarded damages and expenses.

Similarly, in *Maire v. Portugal*,[66] the father had a child in France with a Portuguese national, and a French court granted him custody of the child. The mother took the child into Portugal and remained there with the child despite a French court declaring a divorce, giving the father custody, sentencing the mother to a year imprisonment, and issuing a warrant for her arrest. Portugal was unable to locate the mother and child; however, the father located her in an apartment in Portugal. After four years, the Portuguese police found the mother and child, placed the child in a children's home, and issued the family court judgment to the mother. On appeal, the decision was upheld, but further appeals are pending.

The ECHR held that the obligation on states to take measures to reunite a child with its parent is limited by the rights of the child, citing the CRC, and by the refusal of the state to coerce parties into acting. Portugal, however, delayed enforcement of the child's return, failed to sanction the mother, and demonstrated a lack of urgency which was not in the best interests of the child, violating Article 8. The ECHR awarded damages.

In the emerging Hague parental abduction cases, cases of parents of different nationalities have resulted in different countries making distinct and inconsistent determinations. In *Sylvester v. Austria*,[67] the ECHR concluded that there was a violation of Article 8 in an egregious case of state obstruction with the Hague Convention. In *Sylvester*, the mother took the child from the father and the country and state of origin (Wisconsin, where the child was born and lived with the married parents) and returned to her parents in her Native Aus-

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[64] *Id.* at ¶ 45.
[65] Gil v. Spain, 56673/00 ECHR (2003).
[66] Maire v. Portugal, 48206/99 ECHR (2003).
[67] Sylvester v. Austria, 36812/97 & 40104/98 ECHR (2003).

tria. She remained in hiding and on the move with the child to avoid being served with a court order of removal pursuant to the Hague Convention. Austria delayed enforcement of the judicial order, failed to sanction the abducting parent, and created adverse conditions for the child's future relationship with the father by the extreme delay and then by reversing their prior Hague order. The ECHR's determination of violations of articles 8 and 6 and an award of damages to the father seven years later seems hollow.

3. Visiting/Contact

Two Dutch cases of parental access, decided two years apart, were also decided differently by the ECHR. In *Yousef v. the Netherlands*,[68] an unmarried Dutch mother would not allow the Egyptian national father to recognize the child as his biological child,[69] although he had been appointed auxiliary guardian by the court. The father lived in the grandmother's home with the mother and child for a year before returning to the Middle East for two-and-a-half years. Upon return, the mother permitted him to see his daughter but refused recognition.

The mother became terminally ill and made a will providing that her brother would become the child's guardian. The father applied for recognition, but the court rejected the application, noting that the name change accompanying recognition would not be in the best interests of the child. In her final will, the mother said that she did not want the father to visit. After her death, the courts refused the father's request, on appeal determined that the mother's interest terminated upon her death but that the decision regarding the father had properly weighed the child's interests.

The ECHR held that there was a family life established between the father and his daughter and that the state must act in a manner to enable the tie to develop. The denial of his right to recognize his daughter interfered with the right to respect for family life; however the law of the Netherlands called for a "balancing" of interests. Thus, the interference was in accordance with national law of the Netherlands. In addition, the Court noted there were more than formal reasons for denying the father recognition in this case: no violation of Article 8 had been established.

In *Lebbink v. Netherlands*,[70] the court held the father of a child born out of wedlock was an auxiliary guardian until the law abolished that position. For a year, the father visited his daughter, but he did not seek official recognition in deference to the mother's wishes. As the parental relationship deteriorated, the father applied for access to visit, and the court appointed a Child Protection Board to look at the circumstances of the child. Both the appellate and Supreme Court held that no family life existed because the father never cohabited with his daughter.

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[68] Yousef v. Netherlands, 33711/96 ECHR (2002).

[69] *Id.* at ¶ 38 (explaining that in the Netherlands, the unmarried mother's wishes regarding the child's name and whether the father is recognized as the biological parent are determinative).

[70] Lebbink v. Netherlands, 45582/99 ECHR (2004).

The ECHR found that there can be an existing family life relationship where the father is the birth parent and the child is born out of wedlock.[71] The circumstances of each case must be analyzed, including the father's interest and connection to the child. Although the father had not sought recognition and did not live with his daughter, the Court held other factors present established a relationship. In this case, the father's involvement in the early months of the child's life and the father's role as auxiliary guardian created ties. The denial of his request for access therefore violated Article 8. The dissent disagreed on the facts that there was an established family relationship.

In *Kosmopoulou v. Greece*,[72] the mother left her daughter and husband in Greece and went to England. The father obtained custody, but upon the mother's return, the mother obtained interim access. However, that order was set aside. Three psychologists who examined the child (now, at the time of the Greek case, nine years old) concluded that the child suffered from physical negligence and abandonment by the mother and that keeping distance from the mother would assist the child in suppressing her negative feelings.[73] The child also refused to stay with the mother and repeatedly refused to visit with her mother. At one point, they were both brought to a local police station because of the child's refusal to stay at the mother's house for a visit, and the mother kicked the child and tore out clumps of her hair.

The ECHR held that the obligation not to interfere with family life includes a margin of appreciation as well as regard for the best interests of the child and her rights under Article 8.[74] Further, the state must strike a fair balance among the sometimes competing interests of mother, father, and child. The ECHR found a violation of Article 8 in *Kosmopoulou* because Greece suspended the mother's visiting orders with her nine-year-old daughter at a crucial moment, without hearing representations from the mother and without permitting her to have access to the psychiatric report. "It is of paramount importance for parents always to be placed in a position enabling them to put forward all arguments in favour of obtaining contact with the child and to have access to all relevant information which was at the disposal of the domestic courts."[75] Ultimately, the ECHR found that the mother's procedural guarantees were not in effect, and therefore a violation of Article 8 had occurred.

The complex interplay of children's stated needs, the best interests of the child, and parental rights to due process characterize the ECHR's efforts to establish case law under Article 8.

III. The International Human Rights of the Child: Cases from the Inter-American Court of Human Rights

Unsurprisingly, the cases from the IACHR involving children focus more on state violence against children and the failure of the state to protect children than on private party disputes as to custody and access. The IACHR has been

[71] *Id.*
[72] Kosmopoulou v. Greece, 60457/00 ECHR (2004).
[73] *Id.* at ¶ 16.
[74] *Id.* at ¶¶ 42-50.
[75] *Id.* at ¶ 49.

hearing cases since 1978, twenty years less than the ECHR. Nonetheless, the IACHR has produced an emerging line of children's rights cases that balance complex interests with a powerful delineation of children's interests and needs.

A. *Violence Against Children: Police*

The first landmark children's rights case decided by the IACHR is known as the "Bosques case," or the case of *Villangrán Morales v. Guatemala.*[76] The abduction, torture, and murder of five young men (including seventeen-year-old Anstraum Villagrán and two other children ages fifteen and seventeen) who were street children in Las Casetas, a high crime area of Guatemala City, by members of the Fifth National Police Corps in 1990 resulted in total impunity. The accused were acquitted on all charges, and appeals were upheld. The IACHR found that in the years following their deaths, the Guatemalan government never undertook proper investigations or prosecutions. The court unanimously held that Guatemala violated the Rights of the Child (Article 19) as well as Articles 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection). The IACHR ordered reparations to be paid to the families of the murdered children and youth, based on the individual situations of each family.

Three elements stand out in this case about the murder of street children[77] by state agents and the subsequent impunity for the crimes. First, the IACHR engaged in an explicit discussion of the Convention on the Rights of the Child, signed by Guatemala at the time of the Bosques murders but not then ratified. The IACHR used the state obligations specified in the CRC to interpret Article 19 of the ACHR Rights of the Child provision.[78] The Court concluded that the state did not take adequate measures to protect street children, but rather made them outcasts.

This incorporation of the subsequently-ratified CRC into the ACHR provision on the Rights of the Child illustrates the indivisibility of human rights standards in the sense that it begins a process of integrating the provisions of one international human rights treaty with another, in this case using the greater depth of the CRC on matters involving children to interpret and give substance to an article about children in an adult treaty, the ACHR. Perhaps more significantly, *Villangrán Morales* expands *enforceable* substantive and procedural rights for children, by incorporating the substance of the CRC into the individual right of petition in the ACHR.[79]

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[76] Morales v. Guatemala, Inter-Am. Ct. H.R. (Ser. B) No. 63 (1999) (also known as the "Bosques Case" or "Street Children Case").

[77] *See* Morales v. Guatemala, Inter-Am. Ct. H.R. (Ser. C) No. 32 at ¶ 13 (1997) (identifying the murdered youths by name and age: Henry Giovani Contreras, eighteen, Federico Clemente Figueroa-Túnchez, twenty, Julio Roberto Caal-Sandoval, fifteen, Jovito Josué Juárez-Cifuentes, seventeen, and Anstraum Villagrán, seventeen).

[78] Article 19 provides: "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."

[79] *See* Organization of American States, American Convention on Human Rights, art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, stating that "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or

Second, the petition was submitted by the parents of the murdered children. The IACHR discussed the suffering and agony of the parents at several points of the ruling and noted the torture of the street children (e.g., burns, eyes gouged out, tongue cut out), the length of time between the abduction and their deaths, and the humiliation and dismissal of the parents and families of the deceased in the investigation, trials, and appeals within the Guatemalan legal system. The principle remedy in *Villagrán Morales* was reparations to the family.[80] At no point did the IACHR consider the limitations of the families or their inability to protect their children during their lifetime.

Third, a noted Central American NGO, Casa Alianza, brought the case and provided the team of attorneys. It took nine years to obtain a measure of justice. Casa Alianza worked to have the members of the police indicted and tried, appealed the cases, brought in expert witnesses, challenged the evidence, and ultimately brought the case to the international human rights system for a ruling at the IACHR. This model of sustained NGO advocacy was required to obtain the (delayed) justice of *Villagrán Morales.*

Similar children's rights cases of abductions, beatings, torture, and murder by police with subsequent impunity at the IACHR have continued and expanded this line of findings of children's human rights abuses. Cases include Nicaragua,[81] Argentina, Colombia, and the Dominican Republic. For example, in *Las Palmeras Case*,[82] the petition alleged that the Colombian National Police force conducted operations in Las Palmeras around a school, where they detained citizens, teachers, and workers; executed or tortured some of them; and fired on students, dressing victims up in military uniforms. After seven years, the state was still investigating the incidents. The IACHR ordered exhumation of the bodies to determine the causes of death and concluded that Colombia violated Articles 8 and 25. The court held that the Colombian judge was not impartial and denied the next of kin due process, and that when the state "fail[s] to convict and punish the responsible parties. . . [it] fosters impunity."[83] The Court concluded, "it is not enough that such [procedures] exist formally; they must be effective."[84]

Bulacio v. Argentina[85] involved a youth detained and beaten by police, who then failed to notify the child's parents. Walter David Bulacio was repeatedly hospitalized due to his injuries and eventually died. After ten years of

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complaints of violation of this Convention by a State Party." The procedure requires that the petition first go to the Commission, and only the Commission and States Parties may submit a case to the Court. *Id.* at art. 61.

[80] *See* reparations decision, Morales v. Guatemala, Inter-Am. Ct. H.R. (Ser. C) No. 77 at ¶¶ 57-64 (2001).

[81] *See* Genie Lacayo Case, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997), The *Lacayo* case involved a sixteen-year-old boy who was shot and died from loss of blood after he was left on the side of the road after trying to pass a military vehicle in Managua. *Id.* at ¶ 12. The Inter-American Court found violations of Article 8 (fair trial) due to hampering of the investigation (burning evidence, refusal of witnesses to testify, refusal to hear appeals, delays, and lack of remedies for the family). *Id.* at ¶¶ 62, 63, 76, 97.

[82] Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 (2001).

[83] *Id.* at ¶ 56.

[84] *Id.* at ¶ 58.

[85] Bulacio v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 100 (2003).

criminal charges against the police captain, the Argentinian courts never reached a decision. A human rights case was filed with the IACHR, and the parties reached a friendly settlement in 2003, limiting the case at the IACHR to the question of reparations to the next of kin. The IACHR held that Argentina violated Articles 4, 5, 7 and 19 (Rights of the Child), as well as Articles 8 and 25, and concluded that Argentina must continue its investigation of the case, enact preventive legislation, and pay reparations and legal fees to the victim and next of kin.

In a subsequent case of "forced disappearance" of a fourteen-year-old boy, kidnapped from his parents' home by members of the Guatemalan Army in 1981,[86] the IACHR declared that Guatemala violated Articles 4, 5, 7, 8, 17 (Rights of the Family), 19 (Rights of the Child) and 25 in the death of Marco Antonio Molina Theissen. The IACHR ordered the state to pay reparations to each family member (mother, deceased father, and three sisters) according to their relationship, and ordered other actions as remedies for past violations.

This line of cases involving state violence against children continued in the case of *Serrano Cruz Sisters v. El Salvador* (2005),[87] where two young girls were forcibly disappeared by soldiers, and their whereabouts remain unknown. The IACHR concluded they could not hear the initial violation by state actors because El Salvador had not yet availed itself of the IACHR's jurisdiction, but it would hear the case on procedural and investigative defects that occurred after the incident when El Salvador had accepted the Court's jurisdiction. The state violated Articles 5, 8 and 25, due to the harm inflicted on the Serrano Cruz sisters and their family by the defective investigation.[88]

B. Violations of the Rights of Children in Detention; Incarceration with Adults and Trial as Adults

In *Minors in Detention v. Honduras*,[89] the Inter-American Commission on Human Rights ("the Commission")[90] took up the unlawful detention of juveniles in adult prison facilities. This case involved the unlawful arrest of street children, orphans, and vagrants who were incarcerated in Tegucigalpa's central prison and held in an adult facility, sometimes with approximately eighty adult prisoners in each cell. The Commission found first, that taken together, the provisions of the American Convention, Article 19 (Rights of the Child), international treaties and rules, and the Honduran Constitution, Article 122(2) require the state to keep juveniles separate from adult inmates. Article 37 of the CRC provides that ". . . every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do

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[86] Theissen v. Guatemala, Inter-Am. Ct. H.R. (Ser. C) No. 106 (2004).

[87] Serrano Cruz Sisters v. El Salvador, Inter-Am. Ct. H.R. (Ser. C) No. 120 (2005).

[88] *See also* Jean & Bosico v. Domincan Republic, Inter-Am. Ct. H.R. (Ser. C.) No. 130 (2005).

[89] Minors in Detention v. Honduras, Case 11.491, Inter-Am. C.H.R., Report No. 41/99 (1999).

[90] The Inter-American Commission on Human Rights is the body to which appeals must go prior to being heard by the IACHR. Commissioners are elected by all members of the Organization of American States, including those who have not ratified the treaty.

so. . . ."[91] The Honduran Constitution provides that "[n]o juvenile under the age of 18 shall be confined in a jail or a prison."[92]

Further, the Commission concluded that "Honduras has an administrative practice of allowing children of both sexes under the age of eighteen to be deprived of their freedom and confined to penal institutions for adults."[93] A Honduran Supreme Court ruling *in banc* initiated the practice when it adopted the practice as a temporary measure to cope with rising juvenile delinquency and lack of security at juvenile facilities. The Honduran Supreme Court revoked their ruling on November 29, 1995, but the Commission concluded that the general practice of detaining children together with adults had continued after the revocation. Rape, physical assault, and abuse of the detained children had been well documented. Despite Honduras' assertion that the children in adult prisons were being held separately from adults in those prisons, the Commission concluded that

> the practice of incarcerating minors under the age of 18 in adult penal institutions, thus placing their physical, mental and moral health in serious peril, is a violation of Article 19 of the Convention, which stipulates the obligation to provide special protection for children, a non-derogable obligation echoed in the Constitution and laws of Honduras.[94]

The Commission concluded that Article 5(5) taken together with Article 19 prohibits the state from housing detained minors in the same facility as those housing adults. "[M]inors shall be housed separately from adults, in other words, in special juvenile facilities."[95] Citing abuse, beatings, sexual violations, and subhuman conditions, "[t]he Commission considers that the cohabitation of juvenile and adult inmates is a violation of the human dignity of these minors and has led to abuses of the juveniles' personal integrity."[96] Again, the Commission took note of Article 37 of the CRC, concluding that the Honduran practice of incarcerating children in adult prison facilities violated the duty to provide special protection to children.

In addition, the state of Honduras violated Article 7 of the American Convention by failing to guarantee the non-criminalized children's right to personal liberty and right to be free from arbitrary arrest and imprisonment. In a strongly-worded opinion, the IACHR stated that children who are abandoned, orphaned, or vagrant cannot be incarcerated simply because they are at risk and that incarcerating them constituted a serious violation of human rights. Children may not be "protected" by the state by being deprived of their liberty.

Minors in Detention cites Article 39 of the CRC, the Beijing Rules,[97] the Riyadh Guidelines,[98] and the Havana Rules,[99] as well as Article 37 of the Convention of the Rights of the Child ("[t]he arrest, detention or imprisonment of a

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[91] CRC, *supra* note 6, at art. 37.
[92] *Minors in Detention*, Case 11.491, Inter-Am. C.H.R. at ¶ 2.
[93] *Id.* at ¶ 76.
[94] *Id.* at ¶ 98.
[95] *Id.* at ¶ 125.
[96] *Id.* at ¶ 130.
[97] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), G.A. Res. 40/33, ¶¶ 1.1-1.3, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).
[98] United Nations Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines"), G. A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec.14, 1990).

child shall . . . be used only as a measure of last resort").[100] In summary, the IACHR identifies a clear tendency in international human rights law to provide greater protection to minors than to adults and to limit the role of punishment. "This is why States are required to afford them greater guarantees in the event of their detention, which should only be an exceptional measure."[101]

Here, as well as in *Villangrán Morales*, decided by the IACHR the same year, the IACHR affirmatively asserted its duty to refer to "other international instruments that contain even more specific rules regarding the protection of children."[102] Citing Article 29 of the American Convention, the IACHR affirmed the use of a "combination of the regional and universal human rights systems for purposes of interpreting the Convention."[103]

Importantly, the Commission held that Honduras violated Article 8(e) of the American Convention by failing to provide the right to a public defender to the incarcerated juveniles if they had not engaged private representation. Again, the Commission read the American Convention in conjunction with Article 37(d)[104] and Article 40[105] of the CRC.

Finally, the Commission held that one of the principal rules of international law in the matter of children's rights is the prohibition against prosecuting children as adults. Citing Article 5(5) of the American Convention, requiring the state to bring minors "before special tribunals, as speedily as possible, for trial,"[106] the Commission held that there is an obligation to create a special jurisdiction "which shall be the *only* court competent to prosecute minors."[107] The Commission concluded that the Honduran Constitution, Article 122, taken together with Article 19 of the American Convention's obligation to provide special protection for children results in distinct and specialized jurisdiction for juvenile justice.

Five years later, the Inter-American Court of Human Rights found similar human rights violations against Paraguay[108], where conditions at juvenile detention facilities subjected the children to inadequate conditions. The children's detention system of Paraguay was overpopulated, had poor health care, lacked infrastructure, and had insufficient competent staff. Following fires in the facility that killed twelve students, the state dispersed the remaining children throughout the adult penitentiaries, even those not yet sentenced, and separated them from their families. The IACHR held that the state of Paraguay violated international law and standards, including Articles 2, 4, 5, 8 and 25 of

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[99] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G. A. Res. 45/113, ¶ 1, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

[100] Convention on the Rights of the Child, *supra* note 6, at art. 37.

[101] *Minors in Detention*, Case 11.491, Inter-Am. C.H.R. at ¶ 113.

[102] *Id.* at ¶ 72.

[103] *Id.*

[104] CRC, *supra* note 6, at art. 37(d) ("Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.").

[105] *Id.* at art. 40(2)(b)(iii) (stating that a child has the right "[t]o have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance").

[106] *Minors in Detention*, Case 11.491, Inter-Am. C.H.R. at ¶ 99.

[107] *Id.* (emphasis added).

[108] Children's Rehabilitation v. Paraguay, Inter-Am. Ct. H.R. (Ser. C) No. 112 (2004).

the American Convention, and violated the children's personal integrity and judicial rights, and the Court ordered reparations to the families.

IV. INTEGRATION OF INTERNATIONAL HUMAN RIGHTS BY NATIONAL COURTS

Harold Koh, now Dean of Yale Law School, has written that the enforceability of international human rights law depends on the establishment of a set of norms, the formalization of those norms into a structure, the legal ratification and acknowledgement of international standards, and most effectively, the integration or absorption of international standards into domestic law.[109]

In that regard, it is worth noting that nations as distinct as South Africa, Canada, and the United States have decided children's rights cases with reference to international human rights law and the cases discussed above. These three examples are a modest selection of such integration or domestication of children's human rights into national law.

Perhaps most remarkably, the new Constitutional Court of South Africa ("Constitutional Court") has issued judgments in a series of children's rights cases involving the right to housing, the right to health care treatment, and the right to be free from judicial corporal punishment. In *State v. Williams*,[110] the Constitutional Court reviewed the long history of the abolition of judicial whipping and beatings throughout the world, reviewed international law and treaties, and then analyzed the new South African Constitution, drawing in large part on human rights standards. The Constitutional Court concluded that children have the right to be free from cruel, inhuman, and degrading punishment and that corporal punishment as a sentence for criminal activities by minors will no longer be constitutional.

In *Canadian Foundation for Children, Youth and the Law v. Canada*,[111] the Canadian Supreme Court took up the issues of both school and parental corporal punishment of children. Under scrutiny was Article 43 of the Criminal Code which provided a defense of reasonable chastisement to assault charges where the parent or person in the position of parental authority used reasonable force as an instructional measure.[112]

The Supreme Court concluded, almost without discussion, that corporal punishment by teachers was not constitutional but created a patchwork of criteria for reasonable chastisement by parents. For example, the Canadian Supreme Court prohibited the hitting of a child under the age of two, disabled children, and children over the age of twelve (since adolescents respond to physical force with anger and violence). The Court similarly forbade hitting a child with an implement or about the head or face. In the course of its analysis,

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[109] *See* Harold Hongshu Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

[110] State v. Williams, CCT/20/04 Const. Ct. S. Africa (1995).

[111] Can. Found. for Children, Youth & the Law v. Canada., 1 S.C.R. 76 (2004).

[112] Canada Criminal Code, R.S.C., c. C-46, s. 43 (1985) ("Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.").

the Canadian Supreme Court noted the trend toward abolishing corporal punishment of children altogether, citing ECHR cases and commentary by the Committee on the Child.

The U.S. Supreme Court in *Roper v. Simmons*[113] engaged in a surprising four-page discussion of international law and human rights standards, the law of other nations, and the law of England and Wales in regard to the execution of juvenile offenders. While not determinative, the U.S. Supreme Court noted international treaties, law, and practice is "instructive" of our own laws and traditions, particularly regarding an interpretation of the Eighth Amendment's prohibition against "cruel and unusual" punishment as indicated by "evolving standards of decency."[114]

V. Conclusions of Common Law Analysis Jurisprudence by Regional Human Rights Courts

The cases discussed in this article are a mere sample of the rich array of case law being developed by international human rights courts in the arena of children's rights. Several remarkable steps have been taken, almost without commentary. First, cases involving children as petitioners, victims and subjects are being brought to the European Court of Human Rights and the Inter-American Court of Human Rights in increasing numbers. Second, the regional treaties that provide the basis for jurisdiction are being interpreted and expanded through the analytical use of other international human rights treaties and laws involving children—treaties for which there is no individual right of petition. Thus courts draw upon the Convention on the Rights of the Child, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, and the Hague Convention on Child Abduction to give substance and content to the rights of the child to protection, safety, survival, family life, and regard for the dignity of the person embodied in the general language of the regional treaties. Third, age, gender, and developmental competence are being deemed relevant factors in deciding violations of human rights. Fourth, children's right to participation, their right to be heard, and their right to express their opinions are being acknowledged, recognized, and elevated in the courts' analyses. Fifth, the body of jurisprudence is becoming a form of common law, distinguishable on the facts but relied upon both for principles of law and for methodological analysis.

Finally, in the contested zone of parental rights and children's rights, the careful balancing of competing interests is undergoing interesting developments. Both the ECHR and the IACHR recognize the margin of appreciation due to the nation state and its legal traditions and procedures. Both give great weight to the particular rights of family life and parental ties to and interest in their children. It is increasingly noted that states have the obligation to assure that parents must be given a full right to participate in and have access to relevant information and have timely decision-making when their parental interests in recognition, custody, access, enforcement, and decision-making are involved. Parents' interests prevail over state convenience, cost, or frustration.

[113] Roper v. Simmons, 543 U.S. 551, 575-78 (2005).
[114] *Id.* at 563.

At the same time, giving meaning to "best interests of the child" is being steadily, if cautiously, approached. Children's best interests trump parent's interests in the balance. Children's ability to participate must be negotiated. Children's wishes must be heard and taken into account, with due regard to their age and development. Children have a right to know and have access to their parents. They have a right to protection against the harshness of adult law, incarceration, institutions, and a right to special protection against violence.

* * *

Perhaps this somewhat capricious array of human rights decisions by regional human rights courts will provide a spark to encourage children's lawyers in the U.S. to look to developments at the ECHR and the IACHR for standards, concepts, and trajectories that will strengthen the rights of children in families.