PRESENTS AMICUS CURIAE

José Miguel Vivanco and Lois Whitman, on behalf of Human Rights Watch, located at 350 Fifth Avenue, 34th Floor, New York, NY 10118-3299, present this amicus brief to the Honorable Supreme Court of Argentina in the case of "García Méndez, Emilio and Musa, Laura Cristina s/case No. 7537." For that purpose, we inform the Court that our address for notifications is Talcahuano 77, 24th Floor, Dept. 6, CP (1070), City of Buenos Aires and respectfully state:

I. PURPOSE OF THE AMICUS

We request that the Honorable Supreme Court of Argentina accept us as Friends of the Court in order to submit for its consideration international human rights legal arguments that are relevant to the disposition of the case of "García Méndez, Emilio and Musa, Laura Cristina s/case No. 7537."

II. SUMMARY

We submit to the Honorable Supreme Court of Argentina this legal brief as Friends of the Court, with the purpose of offering an analysis of international human rights law applicable to the present case.

First, we will establish Human Rights Watch's competence on the issue being decided in the controversy, describe our interest to participate in the matter, and inform the Court of our relation with Fundación Sur, who is a party in the case. All of the above is in compliance with Article 2 of the Regulation on the Intervention of Friends of the Court, approved by the Regulation (Acordada) 28/2004 of this Honorable Supreme Court.

We will then briefly summarize the facts of the case. Specifically, we will show the reasons that motivated Fundación Sur's collective habeas corpus motion before the National Court of Criminal and Correctional Appeals and the procedural history of the case leading up to its presentation before this Honorable Supreme Court.

Finally, we will present legal arguments that support the assertion that the system by which Argentine judges authorize the detention of children under 16 years of age in conflict with the law violates international human rights law, particularly Articles 3, 37, and 40 of the Convention on the Rights of the Child (CRC),[1] Articles 4, 7, 8, and 29 of the American Convention on Human Rights (ACHR),[2] and Articles 5, 9, and 14 of the International Covenant on Civil and Political Rights (ICCPR).[3] It also contradicts basic principles outlined in Articles 1, 2, 5, 6, 7, 13, 17, 18, and 19 of The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)[4], and Articles 1, 2, and 11 of The United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[5]

III. BACKGROUND ON HUMAN RIGHTS WATCH AND OUR INTEREST IN THIS CASE

Human Rights Watch is a nongovernmental organization that is dedicated, since 1978, to protecting human rights. The organization is independent and impartial with

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[1] Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Argentina on January 3, 1991. After the 1994 Constitutional Reform in Argentina, the CRC was incorporated into the Argentine Constitution pursuant to Article 75 (22). Constitution of the Argentine Nation (Constitución de la Nación Argentina), http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf, art. 75 (22).

[2] American Convention on Human Rights ("Pact of San José, Costa Rica") (ACHR), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), ratified by Argentina on August 14, 1984. After the 1994 Constitutional Reform in Argentina, the ACHR was incorporated into the Argentine Constitution pursuant to Article 75 (22) . Constitution of the Argentine Nation, art. 75 (22).

[3] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Argentina on November 8, 1986. After the 1994 Constitutional Reform in Argentina, the ICCPR was incorporated into the Argentine Constitution pursuant to Article 75 (22) . Constitution of the Argentine Nation, art. 75 (22).

[4] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted November 29, 1985, G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

[5] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted December 14, 1990, G.A. Res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

respect to any political, religious or economic organizations or movements. By mandate, the organization can receive no money, either directly or indirectly, from any government. It is headquartered in New York. Human Rights Watch enjoys consultative status with the United Nations Economic and Social Council, the Council of Europe and the Organization of American States, and maintains a working relationship with the Organization of African Unity.

As part of its mandate, Human Rights Watch is committed to using judicial and quasi-judicial tools of domestic and international law to contribute to protecting and promoting human rights. That commitment has motivated this specific Human Rights Watch petition.

IV. RELATIONSHIP BETWEEN HUMAN RIGHTS WATCH AND FUNDACIÓN SUR

Human Rights Watch frequently collaborates with, and supports the work of, non-governmental organizations that protect and promote human rights in the countries we work on, including Fundación Sur.

V. DEADLINE

Pursuant to Article 1 of Regulation (Acordada) 28/2004, we present this Amicus Curiae brief within 15 business days of the date on which the Court has said the case is ready to be decided.

VI. BACKGROUND

In Argentina's juvenile justice system, the detention of children and adolescents is the norm. Both in cases in which they are accused of having committed a crime as well as when they are subjected to a custodial or protective measure because of their "personal or social situation," judges routinely order children to be

institutionalized.[6] According to the Argentine government and UNICEF, although some provinces have developed policies to promote alternatives to internment, these are, "in general, limitedly developed."[7]

In June 2006 there were 19, 579 children and adolescents detained in Argentina, 87 percent of which were detained for "non criminal" reasons. In the City of Buenos Aires, 72 percent of the 1,584 children detained did not face criminal charges.[8]

Children in conflict with the law who are under the age of 16 are subject to an arbitrary procedure that provides judges broad discretion to authorize their detention. Under Argentine law, these children are considered "non punishable" and therefore may not be criminally responsible.[9] The law, however, also grants judges deciding these cases broad discretion to order a "custodial measure" (*medida tutelar*), including institutionalization.[10]

When determining whether a child under 16 should be institutionalized, judges evaluate standards that do not target the child's conduct. According to Argentine law, the judge must analyze the child's "personality, family and social circumstances."[11] The Argentine government has recognized that children are consequently detained independently of their criminal responsibility, and due rather

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[6] Ministry of Justice and Human Rights of the Republic of Argentina and UNICEF, "Detained: The Situation of children and adolescents in Argentina [Privados de Libertad: Situación de niños, niñas y adolescentes en Argentina]," July 2006, p. 62.

[7] Ibid., p. 54.

[8] Ibid., pp. 54-57.

[9] The determination of who is a "custodial subject" is essentially made by law. Article 1 of statute 22.278 states that children under the age of 16 are not "punishable" by law. Therefore, when children under 16 are charged with a crime, judges must treat them accordingly and issue "custodial" measures, not punitive ones. *See* Penal Regime for Minors, *Official Bulletin*, 22.278, 1980, http://www.bcn.cl/carpeta_temas_profundidad/temas_profundidad.2007-04-11.5081711610/legislacion-extranjera-1/ley_22278_argentina.pdf, art. 1.

Judges handling cases concerning children below the age of 16 who have been charged with a crime apply the law of the criminal regime. The key instruments in the body of criminal law and procedure concerning children are (1) statute 22.278 and (2) the CPPN, which is the country's code on criminal procedure. Judges essentially have three options: (1) place the child in the care of his/her parents; (2) send the child to a juvenile institute; or (3) place the child in the care of "another person." *See* Penal Code of Procedure (Codigo Procesal Penal) (CPPN), No. 23. 984, 1991, http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/383/texact.htm#15, art. 412.

[10] Penal Regime for Minors, art. 1. ("Si de los estudios realizados resultare que el menor se halla abandonado, falto de asistencia, en peligro material o moral, o presenta problemas de conducta, el juez dispondrá definitivamente del mismo por auto fundado, previa audiencia de los padres, tutor o guardador.")

[11] Ibid.

to "personal characteristics, supposed 'dangerousness,' family situation; all indicators that derive from previous personality studies."[12]

Moreover, as described in the sections below, the process through which "custodial sentences" are handed down lacks basic due process safeguards.[13]

In 2005 the Argentine legislature enacted the Law on the Integral Protection of the Rights of Girls, Boys, and Adolescents, which deals with the treatment of children in non-criminal situations. This law provides for alternatives to imprisonment, which include, for instance, placement in academic enrichment programs and psychological or economic assistance.[14] But judges have not applied this regime to cases in which children under 16 are in conflict with the law.

VII. BRIEF PROCEDURAL HISTORY

On September 20, 2006, Fundación Sur brought a collective habeas corpus motion before the National Court of Criminal and Correctional Appeals (Cámara Nacional de Apelaciones en lo Criminal y Correccional, CNACC), in the City of Buenos Aires, on behalf of the children under the age of 16 in conflict with the law who had been institutionalized pursuant to judicial orders.

That same day, the Court referred the case to the National Court for Minors No. 5 (Juzgado Nacional de Menores Nro. 5). The National Court for Minors No. 5 requested the input of administrators from the different juvenile courts in Buenos Aires, the president of the National Secretary for Childhood, Adolescence and Family, and the president of the CNACC. Shortly thereafter, it denied the habeas motion.

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[12] "Detained: The Situation of children and adolescents in Argentina", p. 35.

[13] UN Committee on the Rights of the Child, "Concluding Observations on Reports Submitted by Argentina," CRC/C/15/Add.187, April 10, 2002, http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/0/3567bf5c062c819e41256c5d0043aa0b?OpenDocument (accessed July 9, 2008), para. 62.

[14] *See* Law for the Integral Protection of the Rights of Girls, Boys, and Adolescents (Ley de Protección Integral de los Derechos de las Niñas, Niños, y Adolescentes), *Official Bulletin,* 26.061, 2005, http://www.infoleg.gov.ar/infolegInternet/anexos/110000-114999/110778/norma.htm, art. 37.

After reviewing the National Court of Minors's decision, the CNACC affirmed the denial. On October 6, 2006 Fundación Sur brought a motion for annulment and a constitutionality challenge before the CNACC. Four days later, the CNACC rejected the annulment request and reaffirmed the constitutionality of the lower court's decision.

At this time, Fundación Sur filed a petition of complaint before the National Court of Penal Nullifications (Cámara Nacional de Casación Penal, CNCP). The CNCP created a "roundtable dialogue" that included the National Secretary of Childhood, Adolescence, and Family, the Minister of Public Defense, the Buenos Aires Department of Children and Adolescents, and the Attorney General to help the Court in its decision.[15] On December 11, 2007, the CNCP found that the article that allowed judges to institutionalize children in conflict with the law (who were under 16 years of age when they committed the offense) was unconstitutional. It ordered, among other things, the progressive release of children under the age of 16 institutionalized in the City of Buenos Aires.[16]

The Attorney General has now appealed this decision before this Honorable Supreme Court.

IX. LAW

A. General Considerations

The Argentine Constitution provides that international treaties ratified by Argentina take precedence over federal and state laws, and lists some human rights treaties that have "constitutional hierarchy" and should be understood as "complementary to the rights and guarantees established [in the Constitution]."[17] The list includes the ACHR, ICCPR, and the CRC, which are the treaties analyzed in this amicus brief.

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[15] "Garcia Mendez, Emilio and Musa, Laura Cristina s/petition of complaint," December 11, 2007, National Court of Penal Nullifications (Camara Nacional de Casacion Penal), Chamber 3ª.

[16] Ibid.

[17] Constitution of the Argentine Nation, (art. 75 (22).

It is a principle of international human rights law that states have the obligation to have effective measures in their domestic law to protect and respect human rights, including the compatibility of its domestic legislation with international treaties. The Vienna Convention on the Law of Treaties consecrates this principle in its Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[18] According to Article 29 of the ACHR, when provisions of internal law conflict with international law in the area of protecting human rights, that conflict shall be resolved by accepting the interpretation that extends, rather than restricts, the enjoyment of the rights guaranteed in the Convention. The same line of reasoning is used in Article 5 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19]

In addition, it is also a well-established principle of international human rights law that States are obligated to adopt measures in their domestic law that guarantee the enjoyment and protection of human rights throughout their territory, and to refrain from enacting laws that deny the protection of these rights. States do not have an unlimited margin of discretion in fulfilling this obligation. On the contrary, the measures, whatever their type, have to conform, or be adjusted to conform, to the requirements of international obligations. Thus, the Inter-American Court of Human Rights has affirmed that "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power."[20]

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[18] Vienna Convention on the Law of Treaties (Vienna Convention), *Treaty Series,* vol. 1155, p. 331, May 23, 1969, entered into force January 27, 1980.

[19] Both articles are substantively identical: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.". ICCPR, art. 5 (1).
And: "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976., art. 5 (2).

[20] Inter-American Court of Human Rights, The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986, Inter-Am.Ct.H.R. (Ser. A) No. 5 (1986), para. 21.

B. The Best Interest of the Child

The CRC requires that the best interest of the child be a primary consideration "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[21]

The Committee on the Rights of the Child has expressly stated that this principle applies within the context of the administration of juvenile justice. It has noted, for example, that "[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders."[22]

Similarly, the Inter-American Court of Human Rights has ruled that the state "must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child."[23] The Court has held that "when the person the State deprives of his or her liberty is a child . . . it has the same obligations it has regarding to any person, yet compounded by ['the right of children to the measures of protection required by his condition as a minor.']"[24] At the very minimum, this means that children in conflict with the law should at least enjoy the rights, privileges and guarantees normally afforded to adults. Thus, even if a child is deemed by the state to be incapable of being fully aware of the consequences of his or her actions, that child is still a "subject of rights" and is entitled to the "inalienable and inherent rights of the human person."[25]

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[21] CRC, art. 3. *See also* The Beijing Rules, art. 1 and United Nations Rules for the Protection of Juveniles Deprived of their Liberty, art. 1.

[22] UN Committee on the Rights of the Child, General Comment No. 10, Rights of the Child, CRC/C/GC/10 (2007), para. 10.

[23] Inter-American Court, Juvenile Reeducation Institute v. Paraguay, Judgment of September 2, 2004, Inter-Am.Ct.H.R., (Ser. C) No. 112 (2004), para. 160.

[24] Ibid. The Court has held that the State's obligations were "compounded by the added obligation established in Article 19 of the American Convention," which states that "[e]very 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."

[25] Inter-American Court of Human Rights, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 of August 28, 2002, Inter-Am.Ct.H.R., (Ser. A) No. 17 (2002), para. 41.

C. Deprivation of liberty

The basic principles set out in the CRC regarding the deprivation of liberty of children[26] are that "no child shall be deprived of his/her liberty unlawfully or arbitrarily," and that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[27]

1. Arbitrary Deprivation of Liberty

Every person has the fundamental right to be free from arbitrary deprivations of personal liberty. According to the ICCPR and the ACHR, "[n]o one shall be subjected to arbitrary arrest or detention."[28] The CRC specifically states that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily."[29]

International human rights standards attempt to restrict the arbitrariness of deprivation of a child's liberty by imposing on states two key requirements: (1) that deprivations of liberty be carried out in accordance with criteria specified by national law and (2) that children facing the possibility of institutionalization or internment be given due process rights such as the right to appropriate assistance and the right to judicial review.[30]

Specific Criteria to Determine when Deprivation of Liberty Proceeds

International law requires that in order to deprive an individual of his or her right to liberty lawfully, states must ensure that national laws specify the conditions and circumstances under which such deprivations can occur. Article 9(1) of the ICCPR

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[26] Article 11 (b) of The United Nations Rules for the Protection of Juveniles Deprived of Liberty defines a deprivation of liberty as: "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted *to leave at will, by order of any judicial, administrative or other public authority"* (emphasis added).

[27] CRC, art. 37 (b). *See also* Committee on the Rights of the Child, General Comment No. 10, para. 79.

[28] ICCPR, art. 9 (1). ACHR, art. 7 (3).

[29] CRC, art. 37 (b).

[30] *See* CRC, art. 37 (b, d).

stipulates that "[e]veryone has the right to liberty and security of person," and that, consequently, "[n]o one shall be subjected to arbitrary arrest or detention" or "deprived of his liberty *except on such grounds and in accordance with such procedure as are established by law"* (emphasis added). Similarly, Article 7(2) of the ACHR says that no deprivation of liberty should take place "except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."

In addition, Article 37(b) of the CRC states that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law." And Article 2 (3) of The Beijing Rules further develops this idea by stating that "[e]fforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice."

Although international standards do emphasize the need for criminal justice authorities to have discretion when dealing with children, that discretion is precisely to provide authorities the possibility to decide on alternatives to detention, and to avoid institutionalization to the greatest extent possible.

For example, Article 6(1) of The Beijing Rules states that "[i]n view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions."[31] Yet, the purpose of this discretion is for "those who make determinations [to] take the actions deemed to be most appropriate in each individual case."[32] Discretion is appropriate when the law has taken into account children's "special needs" and has given judges many different options—including probation, community service, financial penalties, group counseling, foster care, and educational enrichment—to allow for the flexibility to "avoid institutionalization to the greatest extent possible."[33] Finally, when

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[31] The Beijing Rules, art. 6(1).

[32] The Beijing Rules, Commentary on art. 6.

[33] The Beijing Rules, art. 18(1). *See also* The Beijing Rules, Commentary on art. 11.

commenting on the need to limit detention during trial, the Beijing Rules stress that there is a "need for alternative measures" and "encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile."[34]

Moreover, it is also necessary to provide checks and balances to curb any abuses of discretionary power and to safeguard the rights of children in conflict with the law. The Beijing Rules recommend "the formulation of specific guidelines on the exercise of discretion and the provision of systems of review, appeal, and the like in order to permit scrutiny of decisions and accountability."[35]

The requirement that the law specify conditions under which deprivations of liberty can occur serves two important functions. First, it provides children with notice. By requiring conditions to be set out in law, international standards ensure that children know which kinds of acts will be subject to punishment, and thus allow children to choose their actions accordingly. Secondly, the requirement seeks to curb judicial discretion. If conditions are specified in law, it will be more difficult for improper judicial prejudices and preferences to influence the outcome of a case.

The Argentine child penal law fails both to provide children with notice and to constrain judicial discretion. Under Argentine law, children under the age of 16 who are charged with a crime can be institutionalized if after conducting a study of the child's "personality, family and social circumstances," the judge decides that the child "has been abandoned, needs assistance, faces material or moral danger, or presents behavioral problems."[36]

Given that the standard included in the Argentine system does not target the child's conduct, the decision to institutionalize a child will bear no relation to anything within the child's control. As the Inter-American Court on Human Rights has noted, criteria such as these are "motives which should not be considered of a criminal

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[34] The Beijing Rules, Commentary on art. 13.

[35] The Beijing Rules, Commentary on art. 6.

[36] Penal Regime for Minors, article 1. ("Si de los estudios realizados resultare que el menor se halla abandonado, falto de asistencia, en peligro material o moral, o presenta problemas de conducta, el juez dispondrá definitivamente del mismo por auto fundado, previa audiencia de los padres, tutor o guardador.")

nature, but, rather, as the result of personal or circumstantial vicissitudes."[37] Such criteria clearly contradict the principle of penal legality, which the Inter-American Court of Human Rights has made clear applies to children.[38] Likewise, The Beijing Rules establish that "any reaction to juvenile offenders shall always be in proportion to the circumstances of ***both*** the offenders and the offence" (emphasis added).[39]

Moreover, not only do the legal criteria of the Argentine statute fail to put children on notice of when they might be subject to institutionalization, but they also fail to give judges meaningful guidance to determine when deprivation of liberty should take place. As noted above, judges must decide whether a child "has been abandoned, needs assistance, faces material or moral danger, or presents behavioral problems." These criteria are very general, and therefore open to considerable interpretation. While the international standards envision "specific provisions" that will place real constraints on judges, these open-ended criteria essentially allow the child's fate to be determined by the judge's own, personal disposition towards the child.

Due Process Rights

It is a well-established principle of international law that every person facing criminal charges must be given the full and plenary due process guarantees provided for in an open and democratic system of justice. Article 8 of the ACHR establishes that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law. . ." The Inter-American Court of Human Rights noted that these kinds of guarantees must play a crucially important role in the case of deprivations of liberty.[40] Article 14 of the ICCPR, on its part, establishes that, in order to offer the

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[37] Inter-American Court, Juridical Condition and Human Rights of the Child, para. 4 (b).

[38] Ibid., para. 108. "This Court has stated that the principle of penal legality 'means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.' This guarantee, set forth in Article 9 of the American Convention, must be granted to children."

[39] The Beijing Rules, art. 5 (1). When commenting on this article, the Beijing Rules state that "the principle of proportionality… is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offense but also of the personal circumstances."

[40] The Inter-American Court has stated that "[o]bservance of the right to fair trial is mandatory in all proceedings where the personal liberty of an individual is at stake." Inter-American Court , Juridical Condition and Human Rights of the Child, para. 115. *See also* ICCPR, art. 14.

accused a fair trial, states must ensure that such individuals receive a "public hearing by a competent, independent and impartial tribunal… be informed promptly and in detail … of the nature and cause of the charge against him," and be allowed "to defend [themselves] in person or through legal assistance of [their] own choosing."

These basic rights apply to children in conflict with the law. Specifically, Article 40 (2) of the CRC contains a list of guarantees to ensure that every child accused of having infringed the penal law receives fair treatment and trial. And Article 37(d) of the CRC makes clear that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Moreover, Article 7(1) of The Beijing Rules requires that "[b]asic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings."

a. The right to appropriate assistance

In international law, everyone has a right to receive appropriate assistance when facing criminal charges. The ICCPR, for example, states that every person has a right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" in the determination of criminal charges against him or her.[41] The ACHR includes similar provisions.[42]

According to the Committee on the Rights of the Child, the assistance to children in conflict with the law does not need to be legal but must be adequate.[43] In fact, the

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[41] ICCPR, art. 14 (3) (b).

[42] The ACHR establishes that every person must have "adequate time and means for the preparation of his defense" and has "the right … to defend himself personally or to be assisted by legal counsel of his own choosing." ACHR, art. 8 (2) (c) and (d).

[43] Committee on the Rights of the Child, General Comment 10, para. 49.

CRC establishes that every child must "have legal or other appropriate assistance in the preparation and presentation of his or her defence."[44]
In Argentina, however, judges have at times denied children in conflict with the law the right to have a lawyer present at the proceedings deciding their cases.[45] Because the Argentine child penal law deems children under the age of 16 legally un-punishable,[46] such children are subjected to "custodial proceedings."[47] It is during these proceedings that judges review the contents of the child's file—his or her personal, family and social background—and ultimately decide what measure they will take.

Moreover, judges have absolute discretion to determine whether the child's representatives have access to the child's file, which is the basis of the judge's decision.[48] The contents of the child's file are kept confidential by law.[49] The law aims to protect the child's privacy and to shield him or her from the damaging effects of having a criminal record later in life, but, if the confidentiality does not allow the child's representatives to have access to the file, it obviates any opportunity for effective legal representation. The law does allow the judge to exercise a certain degree of discretion to order the disclosure of the child's file in special instances.[50] But the decision of whether or not to release the files is entirely up to the judge and

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[44] CRC, art. 40 (2) (ii).

[45] *See, e.g.,* "A., G. S. s/petition for annulment ," February 10, 2005, National Court for Penal Nullifications (Camara Nacional de Casacion Penal), Chamber 1[a].

[46] Penal Regime for Minors, art. 1.

[47] "Detained: The Situation of children and adolescents in Argentina," pp. 32-35. *See also* National Secretary for Children, Adolescents and the Family, Presentation made to the National Court of Penal Nullifications, August 22, 2007, page 3: "En primer lugar, los ingresos de los jovenes—de entre 13 y 20 anos de edad—a institutos de regimen cerrado se producen exclusivamente por orden emanada de una autoridad judicial competente, generalmente en el marco de un expediente de "disposición tutelar," no teniendo conocimiento la autoridad administrative encargada de la custodia cual es, en cada caso, el fundamento que determine la adopción de la medida privativa de libertad."

[48] For the part on discretion, *See* Regulation on criminal and correctional matters for the jurisdiction of the Federal Capital (Reglamento para la jurisdicción en lo criminal y correccional de la Capital Federal), art. 179: "Este expediente será secreto salvo los casos y para los fines en que, por auto fundado, el juez de la causa dispusiere lo contrario, teniendo en cuenta los intereses del menor." On the basis of the judge's decision, *See* Penal Regime for Minors, art. 1: "Si de los estudios realizados resultare que el menor se halla abandonado, falto de asistencia, en peligro material o moral, o presenta problemas de conducta, el juez dispondrá definitivamente del mismo por auto fundado, previa audiencia de los padres, tutor o guardador."

[49] Regulation on criminal and correctional matters for the jurisdiction of the Federal Capital, art. 179.

[50] Ibid.

there is no guarantee that a lawyer will ever see the court's record or his or her client's file.[51]

b. The right to be heard

The CRC establishes that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body."[52] The Committee on the Rights of the Child has held that "this right must be fully observed at all stages of the process… but it also applies to the stages of adjudication and of implementation of the imposed measures."[53] In an advisory opinion on children's rights, the Inter-American Court of Human Rights noted the importance of having both parties present at judicial proceedings.[54]

Nevertheless, in Argentina, children are not allowed to be present at the "custodial proceedings." Article 412 of Argentina's Criminal Code of Procedure instructs courts "to avoid, as much as possible, the presence of the child in the acts" of the proceeding.[55] In this way, children are therefore also denied the possibility of "confronting" the evidence presented against them and of having the charges and allegations presented before them.

2. Measure of Last Resort and for the Shortest Period of Time

International law imposes on states the obligation to ensure that the institutionalization of children be a measure of last resort and, if deemed necessary, be restricted to the shortest possible period of time. The CRC stipulates that "[t]he arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."[56] The United Nations

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[51] Ibid.

[52] CRC, art. 12.

[53] Committee on the Rights of the Child, General Comment 10, para 44.

[54] The Court has stated that, "[a]ll proceedings require certain elements for there to be the greatest possible balance among the parties for due defense of their interests and rights. This involves, among other things, application of the principle of the presence of both parties in the actions." Inter-American Court , Juridical Condition and Human Rights of the Child, para. 132.

[55] Penal Code of Procedure, art. 412.

[56] CRC, art. 37 (b).

Rules for the Protection of Juveniles Deprived of their Liberty also calls for deprivation of liberty to be a "disposition of last resort and for the minimum necessary period and should be limited to exceptional cases" and they specifically state that "the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release."[57]

The Beijing Rules further clarify the requirement that institutionalization should be a measure of last resort when they state that "[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum" and that a "deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response."[58] When interpreting these requirements, the UN General Assembly has concluded that "strictly punitive approaches are not appropriate" and that these rules encourage "the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young."[59]

According to the Argentine government and UNICEF, however, instead of being exceptional, the institutionalization of children and adolescents in Argentina is the "norm," both in cases in which the children are accused of having committed a crime, as well as when children are detained as a consequence of a judicial or administrative measure that is adopted after analyzing the child's "personal or social situation."[60] Although some provinces have policies to promote alternatives to imprisonment, these are "in general, limitedly developed."[61]

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[57] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, art. 2.

[58] The Beijing Rules, article 17 (1) (b) and (c). Two articles later, the Rules reiterate that the placement of a juvenile in an institution "shall always be a disposition of last resort and for the minimum necessary period." The Beijing Rules, article 19 (1).

[59] The Beijing Rules, Comment on art. 17.

[60] "Detained: The Situation of children and adolescents in Argentina."p. 62.

[61] Ibid., p. 54.

Moreover, institutionalization orders in Argentina are generally indeterminate.[62] When judges decide that a child must be institutionalized, they may issue a custodial sentence that includes neither a timeline for the child's release nor a set of guidelines on how the institutionalization order should be carried out or implemented.[63]

3. The right to challenge detention (habeas corpus)

Under international law, anyone deprived of their liberty is entitled to challenge the legality of their detention (the right to habeas corpus). Specifically, Article 9(4) of the ICCPR establishes that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." This right not only includes the possibility of challenging the procedural legality of a detention, but also includes the right to a substantive review of the detention. The UN Human Rights Committee, which monitors compliance with the ICCPR, has made this clear on several occasions by stating that "[j]udicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include substantive review of whether the detention is lawful and be able to order release if the detention is incompatible with the requirements of the Covenant, in particular [the right to liberty and security, and the right to be free from arbitrary arrest or detention.]"[64]

Moreover, the CRC makes it clear that this right also applies to children. Article 37(d) states that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

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[62], Ibid.

[63] *See* National Secretary for Childhood, Adolescence and Family, Presentation to National Court of Penal Nullifications, p. 7: "Que el magistrado interviniente tiene facultades ampliamente discrecionales, pudiendo disponer medidas que no se encuentran legalmente reguladas, sin determinación de plazos ni modalidades de ejecución."

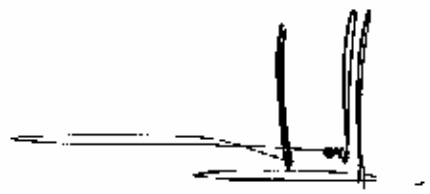
[64] *See* CCPR/C/78/D/1014/2001, 18 September 2003, Banda et al v Australia, para 7.2.

X. PETITION

For the foregoing reasons, hoping that our input can contribute to the just resolution of this case, we ask the Honorable Supreme Court of Argentina to:

1. Accept Human Rights Watch as a Friend of the Court in this case, and

2. Consider the legal arguments presented in this brief and rule accordingly.



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