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**REQUEST FOR ADVISORY OPINION ON MIGRANT CHILDREN BEFORE
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

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I. Introduction

1. Purpose of the Advisory Opinion

This Honorable Inter-American Court of Human Rights has maintained, in recent findings, the principle according to which irregular immigration situations should not be treated as criminal matters and punishments such as deprivation of liberty should not be imposed as a consequence of non-compliance with migratory norms. In addition, this Inter-American Court has substantially limited the possibility of applying custodial measures for precautionary purposes in immigration proceedings and has clearly defined a series of due process guarantees applicable to these proceedings.

Moreover, in several legal opinions and in exercise of its advisory jurisdiction, this Court has defined the scope of the duty of special protection of children and adolescents as enshrined in Article 19 of the American Convention on Human Rights, as well as a basic group of due process guarantees and reasonability rules that must govern legislation, public policies and state practices related to the exercise of the rights of the child (hereinafter, the term child shall refer to any person under the age of 18).

We, the signatory countries, understand that apart from the important progress made in the adaptation of the immigration laws to the standards of the international human rights law, there is, in the continent, a grave and pending situation of violation of the human rights of children and adolescents that migrate due to economic, social, cultural or political reasons.

This situation is, in a certain way, encouraged by a lack of legislation and public policies related to different issues that are examined in this request. To sum up, it could be pointed out that a still-frequent feature in some laws and migratory policies is the lack of the corresponding interrelation with the system of protection of the rights of the child, limiting the capability of public institutions to adequately define the measures that they must adopt whenever a child enters a country in an irregular manner.

Among the most urgent problems caused by this lack of interrelation between migratory policies and child protection policies, it is worth mentioning the absence of adequate procedures to identify the different risk situations faced by those children in mixed migration flows. These procedures should be useful to determine, in each case, the possible needs for international protection that may exist, for instance: the condition of refugee or of victim of transnational crimes or the risk of torture or inhuman treatment in the country of origin. These procedures would aid in revealing useful information for the adoption of special measures of protection of the rights of those children, as required in particular circumstances.

On occasions, it is possible to note the lack of policies and a deficit in the administrative bodies that implement those policies, the lack of technical capacity and of adequate institutional agreements to conduct a strict assessment of the possible consequences detrimental to the rights of the children that certain decisions within the framework of migratory proceedings, such as relocation or removal, may represent.

We consider another pending aspect in the field of immigration policies to be the lack of adequate procedural guarantees systems to ensure, among other safeguards, the

right to be assisted by legal counsel, legal aid and the right to a hearing of children in migratory proceedings, as well as the review of administrative acts before impartial and specialized judicial instances.

Many legal systems restrict the liberty of children based on immigration reasons, whatever the name given to these measures in the different countries may be, in some circumstances without even considering a minimum reasonable protection or evaluating alternative measures or the corresponding due process guarantees. Many children are accommodated in closed migration centers as a consequence of the precautionary measures applied to their parents based on their immigration status.

Moreover, we observe that in the decisions adopted in relation to deportation and removal, the recognition given to certain essential principles of international human rights law, such as the principle of *non-refoulement*, the protection of the status of the refugees and the principle of protection of the family life, is still weak,.

We understand that these issues, new as to the legal aspects and urgent as to the humanitarian aspect, justify the intervention of the Inter-American Court, in exercise of its advisory jurisdiction, to provide further insight and define the standards and principles adopted in its legal decisions concerning childhood and immigration. These standards and principles shall not only contribute to setting a minimum floor for the fundamental rights to be recognized by the States, but will also form a parameter or conceptual framework that will serve as an unavoidable reference to modify and revise laws and public policies on this matter.

Based on the foregoing, we consider that conditions are in place for the Honorable Inter-American Court to be able to define legal standards on the following issues: 1. Proceedings to detect people in need of international protection and special protection measures for migrant children and adolescents; 2. System of guarantees that should be applied to migratory proceedings concerning migrant children and adolescents; 3. Standards for the application of precautionary measures to a migratory proceeding based on the principle of non-detention of migrant children. 4. Measures of protection of rights that should be imposed on a priority basis and which do not entail restrictions on the personal liberty. 5. The State's obligations in the case of custody of children based on migratory reasons. 6. Due process guarantees before measures that entail deprivation of liberty of children within the framework of immigration proceedings. 7. Principle of *non-refoulement* in relation to migrant children. 8. Procedures for the identification and treatment of children who may request for asylum or refugee status. 9. Children's right to a family life when their parents are removed based on migratory reasons.

2. *The situation of human rights that gives rise to this advisory request*

2.1. It is estimated that around 25 million people of Latin America and the Caribbean have migrated to countries of Northern America and Europe, and another 6 million have migrated to other countries in the region.¹ An increasing number of them, yet to

¹ Economic Commission for Latin America and the Caribbean (CELADE), *International Migration, Human Rights and Development*, Santiago, August 2006, p. 73. Similar numbers mentioned by the United Nations, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008). According to this international organization, in Latin America there are 26 million people who do not live in their country of origin, of which 7.480.267 millions live in other Latin American countries (south-south migration).

be determined, are children and adolescents, some of which migrate together with their parents (or with one of them), at the same time that others migrate unaccompanied and separately.²

However, the number of children affected by international migration is significantly higher since there is no record of, for example, the number of children born to migrant parents after their parents migrated, to whom, generally, citizenship is conferred according to the place where they reside by virtue of the principle *ius soli* governing in all the region. Many children who reside in the country of origin when their parents decide to migrate are not included either. The number of migrant children with an irregular immigration status is another statistic about which there is no certainty. In view of this, it is possible to maintain that the figures mentioned above are limited in relation to the real number of the population of migrant children.³

It should be clarified that, in this document, when reference is made to migrant children, it is understood that the concept includes boys and girls that migrate due to different reasons, such as family reunification; migration in search of better economic, social or cultural conditions; migration in order to reduce extreme poverty, environmental degradation; or to escape from violence or other forms of abuse and persecution.

According to the opinion of different international human rights organizations, migrant persons with an irregular immigration status, on one hand, and children, on the other hand, are vulnerable social groups. Both groups require, therefore, a special commitment on the part of States who must respect, protect and guarantee their fundamental rights.⁴

Moreover, the main destinations of the migrants in Latin America are Argentina (19%), Venezuela (13%), Mexico (9,7%) and Brazil (9,19%) according to <http://www.un.org/esa/population>. Almost half of the regional emigrants left their country of origin in the 1990s to go to the United States of America, actually the largest recipient of international migrants. Towards 2004, the Latin American and Caribbean population in that country amounted to almost 18 million people. In 2008, said country hosted a little more than 45 million Latin American people, according to the US Census Bureau, 2006.2008, American Community Survey. This indicates that United States of America is still the preferred place of destination of most emigrants of the region. Mexico is the country that registers the largest population residing in the United States of America (almost 30 million in 2008), followed by Puerto Rico (4 million), Cuba (1.572.138), El Salvador (1,477.210), the Dominican Republic (1.249.471), Guatemala (915.743) and Colombia (822.036), information according to the U.S. Census Bureau, 2006-2008 American Community Survey.

² According to the U.N. Committee on the Rights of the Child, unaccompanied children are children who live outside their country of origin and "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so"; whereas separated children are children "who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members." General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, September 1, 2005, para. 8-9.

³ In the analysis of the migratory content made in this document, it was taken into account the investigation: "*Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular y algunas líneas de acción para su protección*" (Report on the Basic Legal Standards applicable to Migrant Children in Irregular Migratory Situation and some Guidelines for Their Protection) University of Lanus – Center of Human Rights and Regional Office of UNICEF for Latin America and the Caribbean/TACRO. December 2009.

⁴ Regarding the vulnerability of the situation of migrants, see, among other documents, the International Convention International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, preamble and Working Paper of the *Working Group of Intergovernmental Experts on the human rights of migrants*, E/CN.4/AC.46/1998/5 November 1998.

In the case of migrant children without a regular immigration status (or if their parents have an irregular immigration status), the lack of protection is made worse due to the combination of age and immigration status, requiring specific and adequate protection of their rights from the State (of origin, of transit, and destination of migrants) and other concerned actors. The action of the State, carried out mainly through migration policies and comprehensive policies on the protection of the rights of children, should be guided by two main principles: the safeguarding of human rights and a transversal focus on age that takes into account the rights of children affected by migration.

The particular needs of protection of the rights of migrant children, given their vulnerable situation, are especially visible in certain circumstances, as in the detention based on the immigration status, which could be determined in two ways. One of them is, without a doubt, by using the detention as punishment for having entered another country without authorization or for residing there without a permit or with an expired permit (this type of punitive responses to irregular immigration status is usually called criminalization of irregular immigration). The second cause for which the deprivation of liberty of migrants (in general and children in particular) is used is as a precautionary measure within the framework of a migratory proceeding, generally a procedure of removal from the country.

Actually, the application of custodial measures to migrants (adults and children) based on the breach of migratory norms constitutes a problem that creates a profound concern at different national and international levels. The breach of the right to liberty of migrant persons has led the United Nations General Assembly to urge States "to adopt effective measures to put an end to the arbitrary arrest and detention of migrants and to take action to prevent and punish any form of illegal deprivation of liberty of migrants".⁵

When examining the problem of detention of migrants, it is essential to clarify that, without prejudice to the different terminology that each country may use to name this situation (to host, apprehend, accommodate, ensure, detain, retain, etc), the importance is on its practical implication and its legal nature. That is, if a person is deprived of his liberty without having the possibility of freely entering and leaving (or abandoning) the place where he or she had been accommodated, then the circumstances must be assessed based on the principles, norms and standards governing the right to personal liberty.⁶

⁵ General Assembly, Resolution 59/194, *Protection of migrants*, 2005. In the same terms, the (former) Commission on Human Rights issued Decision 2001/52 on the Human rights of migrants, E/CN/4/RES/2001/52, April 24, 2001, para. 18. In turn, the Committee on the Elimination of Racial Discrimination recommended States to "ensure the security of non-citizens, in particular with regard to arbitrary detention ..." (CERD, General Recommendation XXX, *Discrimination against Non-Citizens*, 2004).

⁶ For the purposes of this document, the term 'detention' shall have a broad definition, equating it to deprivation of liberty according to what was defined by the Inter-American Commission on Human Rights in the Report on Citizen Security and Human Rights of 2009. In that report, it was pointed out that the term 'deprivation of liberty' means "Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other

The detention referred to herein is the one that is carried out based on the illegal entry into another country, because of the migrant's irregular stay, or due to the lack of a residence permit or an expired residence permit, within the framework of proceedings to identify undocumented migrants or when the deprivation of liberty is ordered as a precautionary measure until the migrant's immigration status is solved. Removal (according to each country may be also called repatriation, deportation or devolution), in turn, refers to proceedings by which the transfer of a migrant to his or her country of origin is ordered due to the violation of migration laws regarding entry or permanence.

It is worth mentioning that this Honorable Inter-American Court of Human Rights has recently issued a decision, in exercise of its contentious jurisdiction, regarding the power of States to impose a punitive punishment for non-compliance with immigration laws, analyzing to that end the compatibility between domestic legislation governing this matter and the dictates of the American Convention.⁷

To this end, in light of Articles 7.2⁸ and 7.3⁹ of the American Convention, the Court has indicated that the implementation of punitive custodial measures for the control of migratory flows, especially irregular flows, must comply with the following requirements: *i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention; ii) that the measures adopted are appropriate to achieve the purpose sought; iii) that they are necessary in the sense that they are absolutely essential to achieve the purpose sought and, among all possible measures, there is none less burdensome in relation to the right involved that would be suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation to this right must be exceptional and iv) that the measures are strictly proportionate, so that the sacrifice inherent to the restriction on the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.*¹⁰

similar institution the purpose of which is to deprive persons of their liberty", para. 143. In the same sense, see "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", document approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008. Moreover, Rule 11 (b) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty adopted by General Assembly resolution 45/113 of 14 December 1990, establishes that "the deprivation of liberty means 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". Finally, Article 4.2 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes that deprivation of liberty means "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".

⁷ Inter-American Court. *Case of Velez Looz V. Panama*. Preliminary Objections, Merits, Reparations and Legal Costs. Judgment of November 23, 2010 Series C No. 218, para. 163.

⁸ Article 7(2). "No one shall be deprived of his physical liberty 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".

⁹ Article 7(3). "No one shall be subject to arbitrary arrest or imprisonment".

¹⁰ Inter-American Court. *Case of Velez Looz V. Panama*, *supra* note 7, para. 66 and 167.

When analyzing the first two requirements, the legitimate purpose and suitability of a custodial measure within the framework of migratory control by the State, the Court has maintained that “the application of preventive custody may be suitable to regulate and control irregular immigration in order to ensure the individual's appearance before the immigration process or to guarantee the application of an order for deportation”.¹¹ However, according to the opinion of the Working Group on Arbitrary Detention “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention”.¹² Moreover, the standards mentioned in the Report of the United Nations Rapporteur on the human rights of migrants, according to which “the detention of migrants on the ground of their irregular status should under no circumstances be of a punitive nature,” has been taken into account.¹³

Furthermore, in relation to the “need of the measure” as other requirement that must be analyzed when defining the scope of the obligations of the State in relation to the protection of the rights of migrants, the Court has determined that the punitive power of States, reflected in criminal and administrative penalties, must be exercised only to the extent that is strictly necessary “in order to protect fundamental rights from attacks which may impair or endanger them”, having recourse to deprivation of liberty “only insofar as it is necessary to meet a pressing social need and in a manner proportionate to that need”.¹⁴

In this way, this Honorable Court maintains that, “the detention of people for non-compliance with immigration laws should never seek punitive purposes. Hence, a custodial measure should only be applied when it is necessary and proportionate in the specific case to the purposes mentioned supra and only for the shortest period of time”.¹⁵ Moreover, it emphasizes the obligation of States to consider alternatives to administrative custody in compliance with the requirements described and to adopt less invasive measures considering the fundamental rights of migrants.

Finally, it concludes that, in order for the migration policies of States to be compatible with the provisions of the American Convention, the central focus of such policies must not be the mandatory detention of irregular migrants; instead, States have the obligation to verify in each particular case the possibility of adopting alternative measures to deprivation of liberty.¹⁶

¹¹ Idem. para 169.

¹² Idem, para. 169, where the Court makes reference to what was established in the Report of the U.N. Working Group on Arbitrary Detention, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development”, A/HRC/7/4, January 10, 2008, para. 53.

¹³ Ibidem, para. 169 where the Court makes reference to what was mentioned in the report presented by the United Nations Special Rapporteur, “Specific Groups and individuals: Migrant Workers”, Mrs. Gabriela Rodríguez Pizarro, according to Resolution 2002/62 of the Commission on Human Rights, E/CN.4/2003/85, December 30, 2002, para. 73 (record of evidence, volume V, annex 22 to the autonomous brief of pleadings, motions and evidence, page 1993).

¹⁴ Ibidem, para. 170. The Court refers to the report of the United Nations Working Group on Arbitrary Detention, *supra* note 12, para. 63.

¹⁵ Ibidem. para.171.

¹⁶ Ibidem, para.171.

Along the same lines, the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, when examining provisions such as deprivation of liberty for breaching the laws when entering a country, has recommended that, in order to formulate legislation in conformity with the provisions of the Convention and other international instruments, "the law should annul the classification of illegal entry into [another] country as an offence punishable by deprivation of liberty".¹⁷ In the same vein, all Ibero-American States have unanimously held that "since migrating is not an offense, [...] the States shall not formulate policies oriented to the criminalization of the migrant".¹⁸ Also in South America it has been decided to "emphatically reject criminalizing illegal immigration and considering it as an illicit act from the point of view of criminal law".¹⁹

The clear position of the States of the region regarding this matter, reinforced by the standards established by the Honorable Court and the different international organizations for the protection of human rights, enables us to talk about a ***principle of non-criminalization of illegal immigration***.

2.2. Having stated the principle of non-criminalization, there are still many pending issues in relation to the recognition of human rights of migrants and, in particular, the recognition and protection of the human rights of migrant children.

A common feature in migration policies is the lack of adequate interrelation with the system of protection of the rights of the child, which limits the possibility for public institutions of properly defining the measures they must adopt when a child enters a country illegally.

This situation may not only cause uncertainty as to the legal and comprehensive protection of the rights of these children and adolescents, a framework that it is prone to the dissemination of discretionary and even arbitrary decisions, but it may also lead to the treatment of children and adolescents as adults, with the prejudices that this entails for their present and future development. Based on the foregoing, in many countries, the absence of legal precepts addressed to protect the rights of the child in these circumstances may have a significant impact on issues such as the lack of institutional proceedings and mechanisms to identify different risk situations faced by migrant children when exercising their rights. This lack of proceedings hinders the identification, in mixed migration flows, of the different needs of international protection that migrant children may have, such as, for instance, whether they qualify to have access to protection in the condition of refugees, whether they must receive special protection as victims of human trafficking, or whether the principle of *non-refoulement* is applied to them for the situation of risk they may face when sent to a specific country. Another direct consequence of the lack of an approach based on the protection of the rights of the child is the lack, in some legal systems, of an alternative to the detention of children together with adults (migrants but also, in certain cases, people who have been accused or convicted of committing a crime), failure to provide

¹⁷ United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Final Comments, Mexico, CMW/C/MEX/CO/01, of December 8, 2006, para. 15. The Convention to which reference is made is the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁸ *Montevideo Commitment on Migration and Development signed by the Heads of State and the Government of the Ibero-American Community, XVI Ibero-American Summit, Montevideo, November 5, 2006; Para. 17.*

¹⁹ *Ibidem.*

free legal aid and the lack of the adequate procedural guarantees according to the child's age within the framework of which they may defend their rights (for example, providing legal guardian to unaccompanied children). The non-existence of public policies ensuring access to education, health, family life, or recreation or the restrictions on the access to social services essential for children, based on their immigration status, also express this lack of perspective of protection of rights.

Undoubtedly, a matter of concern is the maintenance, in various legal systems, of migration policies that resort to the adoption of custodial measures of children and adolescents within the framework of migratory proceedings.

Having established the general prohibition against criminalization of illegal immigration, it is worth examining whether, as an effect of said prohibition, it is possible to resort to detention of children when such detention is associated with their immigration status. Among the more common situations in which such measure is adopted, it is possible to mention: illegally entering another country; the lack of a residence permit because there is no permit at all or the permit has expired; in the framework of a proceeding to identify undocumented migrants or when the detention is ordered until the individual's immigration status is decided (usually the options are allowing a person's stay in the country or ordering his or her forced return to the country of origin).

To this end, while some countries provide for the detention of the migrant (without prejudice to his or her age) as a criminal penalty for violating the immigration laws, other countries provide for administrative detention as precautionary measure in the framework of migratory proceedings, without considering measures that do not involve restrictions on the freedom of movement or detention, which should be mandatory and previously applied. In turn, in many cases, the detention of migrant children and adults is imposed (on a legal basis or *de facto*) based on the immigration status of the person, without needing to allege other reasons to justify the measure.

Moreover, the immigration status of the parents has direct consequences on the rights of the child, for example, when they are obliged to stay with their parents in immigration detention facilities; or when they must accompany their parents who have been removed despite being nationals of a country; or when they suffer the removal of their parents and the separation of the family. Therefore, it is essential to analyze the situation of migrant children in relation to the rights of migrant adults.

As to the procedure by which measures are adopted regarding the child, which may even imply restrictions on the liberty and may entail the detention of migrant adults and children, in several countries it is possible to identify important deficiencies regarding the competent authority to issue and execute this decision, especially due to the lack of intervention of the judiciary, the lack of determination of time limits of such measures and the lack of basic due process guarantees.

At the same time, on numerous occasions, migrant children and adults are accommodated in penitentiary centers or police stations. These facilities, on the one hand, have not been designed to accommodate people accused of committing immigration offenses and, on the other hand, have not been adapted to meet human rights standards in relation to the rights of the child. Moreover, in several countries where special centers were created (or equipped) to accommodate migrants, such centers operate in a way that do not differ at all from penitentiary centers, and this

has a substantial effect on the criminalization and stigmatization of the non-resident migrant population, having a negative and prejudicial impact on childhood.

Moreover, the lack of an approach based on the rights of children (migrants or children born to migrant parents) within the framework of procedures of removal of migrants as a penalty for the violation of the regulations governing the conditions of entry and stay of a country is evident in the region. The best interests of the child, understood as the full observance of all the rights of the child, is a guiding principle in migration proceedings.²⁰ Key components of international human rights law such as the principle of *non-refoulement*, call for the adoption of specific measures within the framework of such proceedings, which include a series of specific standards (among others, those emanating from the Committee on the Rights of the Child, as shall be described later) addressed to ensure the rights of the child.

In the context of the increase in mixed migration flows, it is also necessary to have adequate systems to timely identify the entry of children who may request asylum or refugee status and to have proceedings clearly established in order to solve adequate protective measures before and after recognizing the child as a refugee. The decisions to be adopted within the framework of special procedures regarding requests for asylum or refugee status must be made taking into account an approach based on the protection of the rights of the child in light of the principle of the best interests of the child, for example when deciding a scheme of procedural guarantees, agreements on temporary and definite solutions, among other situations.

Finally, the mechanisms of removal of the parents of resident or national children from the country of destination require a thorough revision that respects the rights of the child, giving priority to, among other things, the right to family life and the right to a full development.

In this scenario, it is essential for the Honorable Inter-American Court of Human Rights to clearly define precise standards, principles and obligations that States must comply with in relation to the human rights of migrants, especially in relation to the rights of migrant children and children born to migrant parents.

Specially, based on the above mentioned facts which constitute major concerns to the signatory countries of this request, we consider appropriate for the Inter-American Court to formulate a definition of legal standards in the following issues: 1. Procedures for the determination of the needs for international protection and of special protection measures for migrant children and adolescents; 2. System of guarantees that must be applied to migratory proceedings involving migrant children and adolescents; 3. Standards for the application of precautionary measures in a migratory proceeding on the basis of the principle of non-detention of migrant children.

²⁰ The IACHR in the Report on Citizen Security and Human Rights, 2009, in para. 88 indicated that, "(...) based on the doctrine of integral protection, which the Convention on the Rights of the Child renders as the *best interests of the child*, the latter's only possible interpretation is that each and every one of a child's human rights must be respected and observed. In other words: all decisions taken by the family, society or the State that affect an individual under the age of eighteen will have to objectively consider the effective observance of all those rights, without exception. This was the understanding of the Inter-American Court where it held that "(...) the phrase "best interests of the child", set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development and full enjoyment of their rights must be considered as the guiding principles to establish and apply provisions pertaining to all aspects of children's lives".

4. Measures of protection of rights that must be applied on a priority basis and which do not entail restrictions on personal liberty. 5. The State's obligations in the case of custody of children based on migratory reasons. 6. Due process guarantees before measures that entail deprivation of liberty of children within the framework of migratory proceedings. 7. Principle of *non-refoulement* in relation to migrant children. 8. Procedures for the identification and treatment of children who may request for asylum or refugee status. 9. Right to a family life of the children when their parents are removed due to migratory reasons.

We believe that these topics do not exhaust all the range of problematic issues related to the human rights of migrant children but, due to methodological matters, we consider that they constitute a set of closely related problems and that they could be addressed to by the Court within the framework of the process of this advisory opinion.

Moreover, they are issues that would allow the Court to develop and provide further insight to case-law principles and rules of interpretation of the American Convention already mentioned.

3. Institutional history

Respect for human rights in policies on migration is an important topic in the agenda of the member states of MERCOSUR and the rest of the other countries of Latin America and the Caribbean that may be analyzed from the point of view of: 1) the population that migrates to or transits in the countries of the region; 2) the migrants of the region that live in northern countries, such as the United States of America, Canada and Member States of the European Union.

A topic of profound interest and concern for Latin-American and Caribbean countries is the one concerning the restrictive migration policies adopted in said countries, which frequently violate fundamental rights, particularly affecting migrant children and children born to migrant parents.

The member States of MERCOSUR have incorporated the topic of migration in the different fora and spaces of international dialog (such as the South-American Conference on Migration and the Global Forum on Migration and Development) and have signed bilateral, regional and sub regional, agreements that recognize the human rights of migrants independently of their immigration status, apart from having signed the main international treaties on human rights and, in particular, on the rights of the child.

This request is included within a broader framework of work and regional interrelation between signatory countries. In this respect, in the XVIII Meeting of High Authorities of Human Rights and Foreign Ministries of MERCOSUR (RAADDHH for its acronym in Spanish) and Associated States, participating States decided to bring an advisory opinion before the Inter-American Court of Human Rights in relation to the topic of the rights of migrant children and adolescents, empowering the Institute for Public Policy in Human Rights of the MERCOSUR (IPPDH for its acronym in Spanish) to prepare a text of the request for advisory opinion. The final text of this request was approved by the RAADH at its meeting in Asunción in April 2011.

This decision shows a tendency towards the coordination of ideas regarding such topics of great public interest that have a fundamental impact on the enforcement of the human rights in the region and is the result of more than five years of work on the part of RAADDHH, through its Permanent Commission "*Iniciativa Niño Sur*", in the coordination of actions regarding the protection and promotion of the rights of the child.

The main purpose of the proposal is promoting the definition of specific standards of the Inter-American System of Human Rights in relation to the topics mentioned that express a priority concern of the member countries of MERCOSUR.

Moreover, this will contribute to the efforts of the States of the region to adapt their legislation and policies on migration and on the protection of the rights of children and adolescents to regional legal standards, constituting the basis for bilateral dialog with the central countries and the common positions of the States and of the MERCOSUR block in regional and global fora.

It is worth mentioning that this initiative also shows the firm commitment of our governments to the Inter-American System of Human Rights, which is conceived as a key component of the guarantee systems for protection of human rights in the American continent.

II. Request for advisory opinion

By means of this request, the Honorable Court is asked to determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents in light of the interpretation of Articles 1.1, 2, 4.1, 5, 7, 8, 11, 17, 19, 22.7, 22.8, 25 and 29 of the American Convention on Human Rights; Articles 1, 6, 8, 25 and 27 of the American Declaration of the Rights and Duties of Man; and Article 13 of the Inter-American Convention to Prevent and Punish Torture.

In the development of this request for advisory opinion, we, the signatory countries have decided to anticipate our position regarding some aspects we consider that must be included in the analysis of the Court; on occasions, we have also set forth our positions regarding the scope that should be given to the norms of the Convention in the topics proposed. To such end, this document shows the consensus reached by the signatory States regarding the points of view expressed herein. The formulation of these positions, as well as the review of several sources of domestic and international law, studies and investigations, and documents of experts, quoted in this request, must be understood as supporting material to the interpretative work of the Court, last interpreter of the scope of the obligations defined in the international instruments mentioned.

The analysis related to the rights of the migrant child must take into consideration two central general issues of a normative nature. In the first place, the fundamental obligation of the State to guarantee equal access to the rights of migrant children. In the second place, the need to make a broad and progressive interpretation of the rights of migrant children that are involved in the different topics set out in this request for an advisory opinion. This broad and progressive interpretation should be harmoniously combined with the rights established in the Convention on the Rights of the Child. The latter has been established by the jurisprudence of the Honorable Court, which has maintained that both the American Convention and the Convention

on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.²¹

When examining the international standards specifically applicable to the topics in question, it is hereby requested that this Court take into special consideration certain general principles of international human rights law, among others:

- the *pro homine* principle, which calls for the interpretation most favorable to the person;
- the principle of non-discrimination, which prohibits unreasonable restrictions on fundamental rights owing to different factors, such as nationality or the immigration status of the person²² and which calls for the consideration of identifying features of the person, for instance, age, cultural background and gender;
- the progressiveness and dynamism of human rights, which calls for the interpretation of norms so as to deal with present challenges (in this case, the immigration phenomenon) in order to ensure the rights to every person
- the principle of special protection or 'specialty', which calls for the consideration of a differentiated approach to the norms and policies that account for the situation of structural inequality that encompasses vast social groups, particularly children and adolescents.²³ In this case, the particular situation of factual inequality of migrant children or children born to migrant parents is worth defining.
- the principle of the "best interests of the child",²⁴ understood as the simultaneous and full observance of the rights and guarantees that must be a priority concern in each measure that may affect the child and calls for special protection of the child's rights and development;

²¹ In this respect, see the cases of the Inter-American Court of Human Rights "Street Children" (Villagrán Morales et al) v. Guatemala, Judgment of November 19, 1999 (Merits), paragraphs 194 and 195 and "Juvenile Reeducation Institute" (Panchito López) v. Paraguay, Judgment of September 2, 2004 (Preliminary Objections, Merits, Reparations and Legal Costs), paragraph 148 and Advisory Opinion OC-17/2002 on "*Juridical Condition and Human Rights of the Child*", August 28, 2002, requested by the Inter-American Commission on Human Rights, paragraphs 24 to 30. In paragraph 28 of this Advisory Opinion, the Court also indicated that "Today, this precept requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection".

²² In this respect, see Inter-American Court, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, of September 17, 2003.

²³ The latter "must be understood as an additional and complementary right that the treaty establishes that for them to have physical and emotional development they need special protection." (Inter-American Court, *Juridical Condition and Human Rights of the Child*, OC-17/02, para. 54). Regarding the principle of 'specialty', it has been said that "... it is not possible to disregard the fact that minors have a special situation in the proceedings, as they do in life and in all social relations. Neither inferior nor superior: different, thus also requiring different attention. It must be underlined, as I did above –and the Advisory Opinion is emphatic in this regard- that all international instruments pertaining to the rights of the child or minor recognize without a doubt the "difference" between them and adults and the relevance, therefore, of adopting "special" measures with respect to children. The very idea of "specialty" recognizes and reaffirms the existing difference –a de facto inequality, which the Law does not disregard- and the diverse juridical solutions that it is appropriate to contribute given this panorama of diversity. Concurring opinion of Judge Sergio García Ramírez on the Advisory Opinion OC-17, on the "*Juridical Condition and Human Rights of the Child*", August 28, 2002, para. 27.

²⁴ Convention on the Rights of the Child, Article 3.

- and the principle of “full observance of the child’s rights”,²⁵ which requires an approach centered on the rights of children but also on the effective and interdependent guarantee of those rights.

In consequence, the Honorable Inter-American Court of Human Rights is requested to specifically rule on the following issues.

1- Procedures to identify needs for international protection and potential situations of risk for the rights of migrant children.

Mixed flows have been defined as complex population movements including refugees, asylum seekers, economic migrants and other migrants.²⁶ In essence, mixed flows concern irregular movements, frequently involving transit migration, where persons move without the requisite documentation, crossing borders and arriving at their destination in an unauthorized manner. It is worth bearing in mind that people who usually travel in this way are more likely to be subject to hardship, are forced to travel in inhuman conditions and may be victims of exploitation and abuse.

Determining the adequate answer by a State in order to respond to the needs of protection of migrant children is inexorably related to the establishment of adequate and timely procedures to effectively facilitate the identification of situations of risk,, threats and the infringement - or the possible infringement- of the rights of migrants who have entered the territory of the State or who intend to stay in it.

These procedures to identify situations of risk of rights violations would be useful for, on the one hand, identifying specific needs for international protection in order to activate specific mechanisms stipulated in norms of international human rights law, international humanitarian law or the international law of refugees, among other norms. On the other hand, they would also be useful for States in the adoption of special measures of protection of the rights of children stipulated in Article 19 of the American Convention, despite their immigration status in the country where they live.

²⁵ Inter-American Court, Case of the *Juvenile Reeducation Institute V. Paraguay*, judgment of September 2, 2004, p. 147; Inter-American Court, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, of August 28, 2002, p.54.

²⁶ Considerable attention is devoted to asylum-seekers and refugees in mixed flows due to the established international legal principles of non-refoulement and refugee protection, but mixed flows also comprise diverse groups of other migrants who may be particularly vulnerable: victims of trafficking, smuggled migrants, stranded migrants, unaccompanied (and separated) minors, those subject to violence (including gender-based violence) and psychological distress and trauma during the migration process, vulnerable individuals such as pregnant women, children and the elderly, and migrants detained in transit or upon arrival. In addition, mixed flows may include migrant workers, cross-border traders and migrants moving for environmental reasons. See “Irregular Migration and Mixed Flows: IOM’s Approach” October 2009, available at

http://www.acnur.org/t3/fileadmin/Documentos/nuevo_sitio/2010/conferencia/3.%20Background%20Information%20on%20Mixed%20Migration/The%20Protection%20of%20Smuggled%20and%20Irregular%20Migrants/IOM%20-%20Migracion%20Irregular%20y%20Flujos%20Migratorios%20Mixtos.pdf.

See also the summary report of the Regional Conference Regional Conference on Refugee Protection and International Migration in the Americas – Protection Considerations in the Context of Mixed Migration, San José, Costa Rica, 19 - 20 November 2009. Among other issues, it is hereby emphasized that “... the rise in irregular migration throughout the continent has led to a number of protection challenges, especially at points of entry” and that “.... There is also often an absence of adequate mechanisms in place to identify and address the specific protection needs of certain groups such as trafficked persons and unaccompanied/separated children”, pages 4-5.

The identification is, in particular, urgent regarding children whose migration may respond to multiple causes, such as: being victim of the crime of trafficking and of serious forms of violence in the country of origin, transit or destination; family reunification; search of better economic, social or cultural conditions; escaping poverty; exclusion and environmental degradation or other forms of abuse and persecution that may qualify in line with the principles and criteria of domestic legal systems and the international system for protection.

This broad range of situations calls for the States to take action and seek an effective identification, under the approach of the full observance of the rights of children. That is to say, with due diligence, it should be possible to identify, on a case-by-case basis, the type of problems that affect the child, the rights that have been violated - or potentially violated (threatened) -, as well as the causes originating them and the factors that enhance them. This must be done in such a way that the identification includes the prevention or first response to the violation of the rights of children and allows the State to adopt a course of action that is consistent with the specific measures of protection aimed at avoiding the consummation of those risks.

Therefore, such identification should be made before defining a public course of action, either social, medical, humanitarian or migratory. This means that these procedures should be timely, that is, immediately implemented; otherwise, State behavior could not be well-oriented and therefore affect the rights of migrant children. In view of this, it is maintained that this type of identification procedure should be implemented in the first contact of the children with public authorities, be they migratory authorities or other officers.

According to the United Nations Rapporteur on the Rights of Migrants, the minimum measures that should be taken into consideration in the process of initial assessment once unaccompanied or separated children enter a country of transit or destination include: "...prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to authorities, including age assessment; prompt age appropriate and gender sensitive registration and determination of the identity of the child, in a language the child understands, by professionally qualified persons; the recording of further information in order to meet the specific needs of the child, including the reasons for being separated or unaccompanied; and an assessment of particular vulnerabilities, such as health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence, trafficking or trauma."²⁷

These identification procedures, which should be framed within the system for the observance of rights, should be suitable to achieve their purpose of gathering useful information to make a clear diagnosis of the circumstances surrounding each child. A factor that will have an impact on the suitability of these procedures is the training of the personnel that would work in each case. Another factor is the capacity of having a conversation and interacting with children of different cultures and affected by different, sometimes traumatic, circumstances. Respect for gender perspectives should also be taken into account, since, on numerous occasions, there may exist circumstances of gender or sexual violence.

²⁷ *Report of the Special Rapporteur on the human rights of migrants* presented before the Human Rights Council, A/HRC/11/7, para. 35.

It will be necessary for the respective authorities to rely on clear instructions or guidelines to act, a clear legal system, tools that facilitate their actions, in particular the identification, the recording of relevant information (for example, high-risk factors) and mechanisms to resort to the competent authorities in terms of protection and childhood, according to each case.²⁸

The information to be gathered should be confidential and also should serve to appropriately guide responses from public authorities. The procedures to identify situations in which rights have been violated must provide differentiated State responses according to the needs detected in each case, and in certain particular cases, urgent and special protection measures to alleviate or avoid incurring risks, for instance, measures to assist and care for children who have been victims of trafficking or violence.

The range of risks that children may face and the resulting needs for protection may be broad. As it was shown, it may occur that a child, victim of trafficking, avoids different forms of violence, suffers persecution, etc. Whichever is the need in question, the identification procedures or mechanisms should throw light on the situation for the State to respond adequately. In particular, in the context of mixed flows, it is key to identify the needs for international protection of children within the framework of international human rights law, refugee's rights or humanitarian law, taking into account the norms governing the action of the State in those cases.

In sum, from the first moment a child or adolescent is taken before public authorities, these should act according to the perspective of full observance of the child or adolescent's rights. This means that the State must establish a procedure that allows determining clear courses of action by identifying unaccompanied children from separated children, those who have been victims of trafficking, asylum-seekers/refugees or migrants. In this respect, there should be duly qualified personnel to conduct interviews with the children, in a non-invasive, non-intimidating and comprehensible language, respecting the gender perspective, and providing the child with information on the purpose of the interview and the gathering of information, which must be confidential. This stage should be prior to the adoption of measures of a temporary nature, since it allows the immediate satisfaction of urgent needs. To this end, it is important to conduct a psychophysical test to determine if urgent medical care is required or a psychological test in case of finding out that the child has been the victim of some kind of violence, for example, sexual violence.

Apart from counting on suitable and effective mechanisms to identify risks and needs for international protection, administrative State systems and apparatus that implement migration policies should rely on technical capacity to evaluate, in light of the best interest of the child, the adoption of special measures for the protection of the rights at the different stages of the migratory proceeding. Specially, before deciding on issues that may possibly affect their rights, such as the acquisition of legal residence in the country of destination or the removal or repatriation to the country of origin or country of transit or the recognition of the refugee condition or the provision of temporary assistance or durable or definitive solutions.

²⁸ The effort of the State to gather information in order to determine patterns or situations of general risk for the migrant population will also affect the suitability of the procedure. The determination of general risk factors may contribute to the analysis that should be made in each case to determine particular situations of risk and adopt effective preventive measures in specific cases of migrant children.

The differentiated treatment of the rights of the child and the purpose of achieving their full observance must make for a strict evaluation of the legal, social, cultural and personal consequences that measures such as deportation, whichever the name given to it, may have for the child. This evolution and determination of what is, in each case, the best interest of the child, necessarily implies the establishment of procedures and institutional agreements suitable to this end.²⁹

In different countries of the region, a child may be deported based on the his or her immigration status or the immigration status of the his or her family regardless of the analysis of other issues based on the child's best interests and affecting the child's fundamental rights. In this sense, children and their parents equally receive the same penalty of expulsion as punishment for breach of the immigration laws, such as the absence of an authorized residence. This penalty includes, in many cases, an additional penalty: the prohibition to return to the country of destination for a certain period of time. In these cases, children may be punished and therefore banned from returning to a country as a consequence of the immigration conduct of their parents.

Non-compliance with rules regarding entry or residence, or any other immigration rule, should not be the only circumstance to be assessed by the administrative authority upon ordering the deportation of minors. Expulsion should not be conceived as a penalty based on the irregular immigration status and repatriation, in any case, should be a measure the suitability of which should be assessed in terms of an approach of full observance of the rights of the child.

For these reasons, the Honorable Court has determined that "[p]rotection measures adopted by administrative authorities must be strictly in accordance with the law and must seek continuation of the child's ties with his or her family group, if this is possible and reasonable (...); in case a separation is necessary, it should be for the least possible time possible (...); those who participate in decision-making processes must have the necessary personal and professional competence to identify advisable measures from the standpoint of the child's interests (...). All this enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality."³⁰

Along the same line, the UN Rapporteur on the Rights of Migrants has referred to the principle of *non-refoulement* or non-deportation of migrant children as a non-punitive measure. According to this principle, authorities must take a "protective approach" instead of a "punitive approach",³¹ by harmonizing migration law with the rights of the child.

²⁹ In line with the guidelines of the United Nations Office of the High Commissioner on Human Rights (UNHCHR), for the purposes of this document, the expression "proceeding to determine the best interests" describes the formal proceeding, which complies with strict procedural guarantees, established to determine the best interests of the child. Special emphasis shall be placed on the adoption of important decisions affecting the child, within the context of migratory proceedings or other proceedings, and the direct or indirect purpose of such decisions shall be the determination of aspects related to the child's stay, return to a third country or to the country of origin or, in general, or of lasting solutions (integration – acquisition of residence, family reunification, relocation, resettlement, among others).

³⁰ Inter-American Court. OC-17, para. 103.

³¹ *Report of the Special Rapporteur on the human rights of migrants* presented before the Human Rights Council, A/HRC/11/7, para. 57 and 123.

To this end, migratory proceedings or proceedings deciding on the return or repatriation of children must be focused on the determination, in each specific case, of the measure that most respects children's rights. By means of said proceeding, it is fundamental to assess, ensuring procedural guarantees, the impact that each one of the possible solutions shall have on children, such as the repatriation to the country of origin, the devolution to the country of origin, the granting of a residence permit in the country of transit or destination, the assistance for the family reunification in the country where the child lives or in a third country where the child's parents live (relocation or resettlement).

The Committee on the Rights of the Child sustained that "The determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals, preferably of the same sex as the child, who are trained on age and gender sensitive related interviewing techniques."³²

To that end, a series of measures in the country of destination of migrant children, as well as in the country of transit and of origin should be adopted (as has been indicated by the United Nations Rapporteur),³³ so as to effectively determine, in each case, the alternatives harmonizing the objectives of migration policies with the fundamental principles and standards concerning the rights of the child.

Based on the foregoing, we consider it is appropriate to ask the Honorable Inter-American Court of Human Rights the following question:

Which are, in light of Articles 1, 2 5, 7, 8, 19, 22.7 and 25 of the American Convention and Articles 1, 25 and 27 of the American Declaration of the Rights and Duties of Man, the procedures that should be adopted in order to identify the different risks for the rights of migrant children; to determine the needs for international protection and to adopt, if applicable, the special protective measures required?

2. System of due process guarantees

This question refers to a series of basic guarantees of due process that should be provided in relation to the measures applicable to children in migratory proceedings.

To this end, international rules embody a series of conditions that must be satisfied in order for the measures applied by the State to be legal. Due legal process refers to all the requirements that must be observed in procedural stages in order for an individual to be able to defend his rights adequately *vis-à-vis* any act of the State that could affect them.³⁴ Moreover, the Inter-American Court itself has indicated that it is an

³² Committee on the Rights of the Child, General Comment N° 6, para. 20.

³³ *Report of the Special Rapporteur on the human rights of migrants* presented before the Human Rights Council, A/HRC/11/7, para. 57.

³⁴ Inter-American Court, Advisory Opinion OC-18/03, para. 123.

attribute of States to adopt sovereign decisions concerning their immigration policy, which must be compatible with the human rights protection rules established in the American Convention".³⁵

International standards recognize, especially in the Inter-American System of Human Rights, that any act of the State in an administrative or judicial proceeding must comply with due process of law and that these minimum guarantees are applied whenever an individual's right may be affected, which includes immigration proceedings.³⁶ The Inter-American Court has maintained that although States may establish mechanisms to control the entry into and departure from their territory of undocumented migrants, these mechanisms must always be applied with strict regard for the guarantees of due process and respect for human dignity".³⁷

Moreover, due process of law is a right that must be ensured to all persons subject to the jurisdiction of a State, irrespective of their migratory status,³⁸ especially when dealing with children and adolescents.

In this respect, the Court in recent findings has clearly defined the guarantees of due process that must be ensured along the entire migratory proceeding. In this way, it has established that "the officer authorized by law to exercise judicial power shall comply with the characteristics of impartiality and independence that govern every organ empowered to determine the rights and obligations of persons".

Along this line, it indicated that "it is necessary that any administrative, legislative or judicial authority whose decisions may affect the rights of persons adopt those decisions in strict compliance with the guarantees of due process of law", given that "the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any person, irrespective of his migratory status".³⁹

Another guarantee to which the Court has referred in the case mentioned above is the right to be assisted by counsel of the person subjected to a migration proceeding. To such end, it indicated that "it is worth emphasizing the importance of legal aid in cases like the instant one, in which there is an alien who does not know the legal system of the country and who is in a particularly vulnerable situation given that he is deprived of liberty, for which the recipient State must take into account the particular

³⁵ Inter-American Court, Case of provisional measures regarding the Dominican Republic, order of August 18, 2000, fourth Considering clause.

³⁶ Inter-American Court, Case of *Baena Ricardo et al*, judgment of February 2, 2001 para. 124; Case of Ivcher Bronstein V. Peru, Judgment of February 6, 2001, para. 102; OC- 17/02, Juridical Condition and Human Rights of the Child, paras.115-136; OC-18/03, Juridical Condition and Rights of Undocumented Migrants, paras. 121-126.

³⁷ Inter-American Court, Advisory opinion OC-18/03, para. 119.

³⁸ See, in this respect, the principles established in the Report of the Working Group on Arbitrary Detention, Annex II, Deliberation N° 5: *Situation regarding immigrants and asylum-seekers*, E/CN.4/2000/4, of December 28, 1999. The Inter-American Court sustained that "the broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination" (Inter-American Court, OC-18/03, para. 173.7). Likewise, the Inter-American Commission on Human Rights (IACHR, Office of the Rapporteur on Migrant Workers and their Families in the Hemisphere, *Second Progress Report*, paras. 89 and 90).

³⁹ Ibid. para. 142 and 143.

characteristics of his situation, in order for him to have effective access to justice in equal terms". Moreover, it specified the characteristics that the person who represents the individual subjected to a proceeding must have and emphasized that "in the administrative or judicial fora, where decisions must be taken by which an accused may be deported, expelled or deprived of his freedom, the provision of free public legal aid service is necessary to avoid the violation of the right to due process".⁴⁰

In relation to the right to information, especially regarding the right to information on consular assistance, this Honorable Tribunal reiterated that it is one of the essential guarantees of due process that fosters real equality of those individuals who are brought before the court.⁴¹ According to the case law, the right to due process of law that a State Party must offer to an individual consists of three essential elements: "i) the right to be informed of his rights under the Vienna Convention; ii) the right to have effective access to communication with the consular official and iii) the right to consular assistance".⁴²

With respect to migrant children, especially unaccompanied children, the right to be heard (embodied in Article 12.2 of the Convention on the Rights of the Child) is particularly relevant and is closely related to the suitability of the procedures referred to above in order to identify the risk of rights violations, needs for international protection and the strict assessment of the consequences that the measures to be adopted in a migratory proceeding may have.

In order to effectively secure the rights provided, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative to defend their rights, interests and secure their welfare.⁴³

It is worth bearing in mind that delay in the implementation of these measures represents a threat to the safety of children, exposing them to the risk of being victims of trafficking or other abuses.⁴⁴ These guarantees should also be taken into account in the framework of all the procedures, especially in order to determine the most adequate option for the case.

As indicated by the Court in exercise of its advisory jurisdiction, the guarantees set forth in Articles 8 and 25 of the Convention must be correlated with the specific rights

⁴⁰ Ibid. para. 132 and 146.

⁴¹ It is worth mentioning that the right to information on consular assistance, essential to aliens in general, does not apply to refugees. OC-16 of the Inter- American Court does not mention it.

⁴² Ibid. para. 152 and 153. It is worth mentioning that the Court clarifies, in this regard, that these standards do not apply to detained individuals who had requested a measure of international protection (*supra* para. 106). If they are arrested, such persons enjoy the rights enshrined in the Vienna Convention. However, there are other considerations to protect their interests, which the Court does not deem pertinent to examine in this Judgment.

⁴³ Committee on the Rights of the Child, General Comment N° 6: *Treatment of unaccompanied and separated children outside their country of origin*, para.63.

⁴⁴ According to the Parliamentary Assembly Recommendation 1703 (2005) on Protection and assistance for separated children seeking asylum.

established in Article 19, and special measures for protection of children, who require a different treatment based on their particular conditions, must be adopted.⁴⁵

To this end, the Court has indicated in the case of Rosendo Cantú V. Mexico that “The obligation to protect the best interest of the children during the proceedings of which they are a part, may imply, *inter alia*, the following: i) to provide with information and to implement the appropriate procedures, adapting them to the child’s particular necessities, and guaranteeing that the child have legal and other assistance at all times, pursuant to their needs; ii) in cases in which children have been victims of crimes such as sexual abuse or other mistreatment, to assure that the exercise of their right to be heard is provided ensuring full protection, making sure that personnel are trained to address children and that the interview rooms are safe and not intimidating, hostile, insensitive or inappropriate, and iii) to ensure that children are not interrogated on several occasions to avoid, to the extent possible, the revictimization or traumatic effects of the child”.⁴⁶

Moreover, a recurring problem faced by migrant children is the debate about the methods and criteria to define the child's age. In many cases, children stay in the country of transit or destination without any document proving their identity and age, and are thus often treated as adults and are not provided with the assistance and protection appropriate for their condition. In this respect, the Committee on the Rights of the Child has established that the assessment of the child’s age should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she//he should be treated as such.⁴⁷

Based on the foregoing, we ask the Honorable Inter-American Court of Human Rights the following question:

Which are, in light of Articles 1, 2, 7, 8, 19 and 25 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, the due process guarantees that should govern immigration proceedings in which migrant children are involved?

3. The non-detention of children. Standards for the application of precautionary measures in immigration proceedings.

The detention of migrants is expressly or impliedly prohibited in some countries.⁴⁸ In other countries, the possibility of detention is conceived as a precautionary measure

⁴⁵ Inter-American Court, OC-17, paras. 95 and 96.

⁴⁶ Inter-American Court. Case of Rosendo Cantu et al V. Mexico. Preliminary Objection, Merits, Reparations and Legal Costs. Judgment of August 31, 2010; Series C N° 216, para. 201. 201.

⁴⁷ Committee on the Rights of the Child, General Comment N° 6 2005), para. 31.

⁴⁸ Venezuela, Law on Aliens and Migration (*Ley de Extranjeria Migracion*, No. 37.944, 2004, art. 46). There are countries that do not stipulate detention in their migratory laws (Bolivia, Supreme Decree No. 24.423, 1996; Perú, Legislative Decree No. 703, 1991; Uruguay, Law 18.250, 2008). Others, as Argentina,

addressed to guarantee the enforcement of a resolution that is adopted within the framework of an immigration proceeding (entry into the country, granting of a residence permit and, especially, procedures of expulsion or deportation).

The assessment of the possibility of the detention of migrants as a precautionary measure must be made under a restrictive criterion and as a last resort solution and only for exceptional cases where other more flexible measures could not be imposed or were ineffective. This principle is important to avoid the abusive or arbitrary use of administrative detentions as a device to control or manage immigration flux.⁴⁹

In this regard, it is worth mentioning that, according to recent case-law of the Honorable Court, the custodial measure must be stipulated in the law, pursue a legitimate goal and be suitable, necessary and proportional.⁵⁰ To this end, the Court has indicated that "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detentions," and that "The detention of migrants on the ground of their irregular status should under no circumstances be of a punitive nature".⁵¹

Moreover, the Court has defined, in this same case, the principles of necessity and proportionality of the measure and the determination of the shortest period of time possible. To such end, it expressed that "based on this principle, it is deduced that the detention of people for non-compliance with immigration laws should never involve punitive purposes. Hence, a custodial measure should only be applied when it is necessary and proportionate in the specific case to the purposes mentioned *supra* and only for the shortest period of time".⁵²

The assessment that should be done when children are involved requires that any measure involving deprivation of liberty shall be used only as a measure of last resort once all possible efforts were made to apply measures of protection of rights in a family and community environment or alternatives to any form of imprisonment.⁵³

stipulate the general principle according to which, during the procedure of removal (administrative and judicial), the person shall not be deprived of liberty (Law 25.871, 2004).

⁴⁹ In the report prepared at the request of the European Parliament, it is emphasized that detention should be the exception to the rule and used as a last resort when alternative, more relaxed measures have failed, in accordance with the provisions set out in international law on refugees and human rights. Detention should not be used as a policy to manage immigration flux (Steps Consulting Social, *The conditions in centers for third country national (detention camps, open centers as well as transit centers and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, Brussels, December 2007, p. 209).

⁵⁰ Inter-American Court. Case of Velez Looor V. Panama, *supra* note 7, para. 167.

⁵¹ Inter-American Court. Case of Velez Looor V. Panama, *supra* note 7, para. 169, where the Court refers to the Report of the United Nations Working Group on Arbitrary Detention, Group Report, Annex II, Deliberation N° 5: Situation regarding migrants and asylum seekers, 1999, E/CN.4/2000/4, Principle 7. and the Report presented by the Special Rapporteur, Mrs. Gabriela Rodriguez Pizarro, according to resolution 2002/62 of the Commission on Human Rights, E/CN.4/2003/85, December 30, 2002, para. 73 (record of evidence, volume V, annex 22 to the autonomous brief of pleadings, motions and evidence, page 1993).

⁵² Inter-American Court. Case of Vélez Looor V. Panama, *supra* note 7, para. 171,

⁵³ *Convention on the Rights of the Child, Articles 37 and 40.4.* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly, Resolution 45/113 of December 14, 1990, rules 1.2 and 1.7; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Beijing Rules*, General Assembly Resolution 40/33 of November 29, 1985, rules 13.1 and 19; *Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2002/23 on International Protection of Refugees*,

In any case, all State answers to these cases and the possible detention of migrant children as a precautionary measure would require, in the first place, that a formal law authorize and regulate such possibility⁵⁴ and, as has been emphasized, the law must expressly order the imposition of such a measure in exceptional cases, giving priority to such other measures that do not limit the right to personal liberty.⁵⁵ In turn, the law must establish specific particular causes leading competent authorities to use this exceptional remedy. Moreover, the application of one of these causes in each case must be well-grounded and justified in the corresponding individual circumstances, in order to effectively ensure that it is a restriction necessary in order to provide adequate protection to the rights of the child and that it constitutes a measure proportional to the purpose sought.

To this end, the examination regarding the suitability of the measure must be made based on general principles of international human rights law, such as the *pro homine* principle and the principle of integrality and interdependence of such rights, which in this context would be represented by the *favor libertatis* principle (which protects fundamental rights such as the right to personal liberty).⁵⁶ Based on this criterion, in the conclusion of an exhaustive report prepared at the request of the European Parliament, which entailed the visit to and evaluation of near 130 detention centers for migrants of the European Union, the experts emphasized, on the one hand, that the confinement of minors and their families 'should be banned' and, on the other hand, that depriving a child of his or her freedom can in no way be "in their best interests", other practices can be used.⁵⁷

When migrant children are with their parents, their confinement is usually justified in light of a balance between the principle of family unity (that is, the right to family life) and the State's interest in the control of irregular immigration. However, such arguments should not be invoked to the detriment of the other standards discussed herein.

In this respect, in the decision-making process, competent authorities should consider the child's right to family unity, to an adequate level of development, to education, to

2002, p.4; *Report of the Working Group on Arbitrary Detention, E/CN.4/1999/63*, of December 18, 1998, p.78; Inter-American Court of Human Rights, *Case of the Juvenile Reeducation Institute V. Paraguay*, p. 228-231; Inter-American Court, *case of Bulacio V. Argentina*, Judgment of September 18, 2003, para. 133.

⁵⁴ The requisite of a formal law for the restriction on a fundamental right has been well-grounded, among other international organizations, by the Inter-American Court of Human Rights (see, among others, Advisory Opinion OC-6/86, of May 9, 1986, *The Word "Laws" in Article 30 of the American Convention on Human Rights*).

⁵⁵ Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), *Human rights of irregular migrants*, of June 27, 2006, p. 12.4; Council of Europe, *Twenty Guidelines on Forced Return*, September 2005, p. 11.

⁵⁶ The right to personal liberty enjoys a special protection under the international (and constitutional) law, given that it is considered to be the key for democracy and the Rule of Law and, therefore, a restriction on this right can only be imposed on particular circumstances and with the due respect for the substantive and formal requirements.

⁵⁷ *The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, p. 22, recommendations to Member States, and p. 210, recommendations to European Institutions.

health, to recreation and game, among others. Therefore, in order to guarantee the rights of the child and to avoid the detention of the family, respect for family unity should be maintained without resorting to a custodial measure. The United Nations Rapporteur on the Rights of Migrants indicated that all efforts should be made to release families with children from detention and place them in alternative accommodation suitable for families with children.⁵⁸ As it has been indicated, detention centers are not appropriate places for a child to exercise his or her rights adequately.⁵⁹ In this way, it has been emphasized that the detention of children has a well-documented detrimental effect on the development and emotional and physical well-being of children, who may suffer depression, changes in behavior and confusion in addition to refusal to eat, weight loss, lack of sleep, skin and respiratory problems, among other things.⁶⁰

As to children who are unaccompanied or separated from their parents, international organizations emphasize that, as a general principle, they should never be detained.⁶¹ In this case, as mentioned in the following paragraph, States must adopt measures of protection of rights and provide adequate responses to solutions based on the family and the community and not on the placement in institutions until the child's situation is not definitely solved, either by means of the child's safe return to the country of origin or by the regularization of the child's immigration status and subsequent adoption of permanent protection measures.

Similarly, specialized organizations, like the United Nations Rapporteur on the Rights of Migrants, had indicated that the detention of children will never be in their best interest and that the ideal utilization of a rights-based approach would imply adopting alternative measures for the entire family.⁶²

In this respect, the third specific question to be made to this Honorable Inter-American Court of Human Rights regarding this issue, is the following:

In light of Articles 1, 7, 8, 19 and 29 of the American Convention and Article 25 of the American Declaration of Rights and Duties of Man, in what way should the principle of detention as a last resort precautionary measure be

⁵⁸ *Mission to the United States of America*, A/HRC/7/12/Add.2, of March 5, 2008, para. 125.

⁵⁹ *The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones)*, p. 22. Moreover, according to UNICEF Australia, the detention of children and adults in a same place is not in the best interests of the child since the detention of children is inherently undesirable due to many reasons. The only option would be to release the child together with his or her family. Therefore, alternatives to detention should always be considered. These alternatives must take into account all aspects of the best interests of the child, including the maintenance of the family unity (UNHCR, *Submission to the National Inquiry into Children in Immigration Detention*).

⁶⁰ *Alternatives to immigration detention of families and children*, A discussion paper by John Bercow MP, Lord Dubs and Evan Harris MP for the All Party Parliamentary Groups on Children and Refugees, Supported by the No Place for a Child Coalition, July 2006, p. 9.

⁶¹ Report of the Working Group on Arbitrary Detention, in its visit to the United Kingdom on the issue of migrants and asylum-seekers, E/CN.4/1999/63/Add.3, p. 37. See also, Report of the United Nations Special Rapporteur on the Human Rights of Migrants, E/CN.4/2003/85, para. 75. a.

⁶² UNICEF, *Examples of Good Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration*, Draft, New York, 18 June 2010, www.unicef.org/socialpolicy/files/UNICEF_Good_Practices_Children_HRs_and_Migration_June_2010.pdf; Report of the United Nations Rapporteur on the Rights of the Migrants, presented before the Human Rights Council, A/HRC/11/7, Geneva of May 14, 2009.

interpreted in the framework of immigration proceedings when children in the company of their parents are involved, and when there are children who are unaccompanied or separated from their parents?

4. Measures of protection of rights that do not entail restrictions on liberty

States have, as a priority, the duty of formulating policies addressed to ensure the protection of the rights of children and adolescents. Such policies must not include detention as a possibility. To that end, the State must order other mandatory measures alternative to detention which must be implemented prior to any other measure of institutionalization so that deprivation of liberty becomes a measure of last resort.⁶³ This was defined by the Inter-American Court in the case of *Vélez Lloor v. Panamá* for adult migrants, where it held that before immigration proceedings and in order to avoid the application of custodial measures, "it is essential for States to seek alternatives to detention whenever possible".⁶⁴

Especially, States are obliged to design and implement mechanisms of specific protection of migrant children which would consist in alternative measures for the protection of the rights of migrant children, in full observance of the obligation required under international law.

As mentioned by the United Nations Rapporteur on the Rights of Migrants,⁶⁵ States should develop policies including the options that are expressly adequate for migrant children, while they are in the company of their families or while separated from their parents.

Decisions on the measures that should be adopted in each case must respect certain basic requirements of legality, reasonability and due process. In this way, in order to guarantee that a measure represents the least intrusive option, even when it restricts freedom, the measure should be, in the first place, stipulated in a law clearly indicating that it is a priority to apply the least intrusive option. In the second place, if it is decided not to apply such measure, the decision should be well-grounded by administrative and judicial bodies (and therefore, the resulting deprivation of liberty should also be well-grounded). If these steps are taken, due guarantees to challenge such decision are ensured as well as the right of the child to be heard and to have his or her opinion taken into account along the duration of the proceeding.

In order to avoid the precautionary detention, States should implement adequate alternative care options, with priority given to family - and community-based solutions,⁶⁶ such as: the search in the country of destination of the extended family or

⁶³ To this end, the Committee on the Elimination of Racial Discrimination noted with concern that people entering or residing in the country without proper papers are automatically detained and recommended, inasmuch as detention should be a last resort, the adoption of alternatives to detention for undocumented migrants. CERD, Concluding Observations, Bahamas, CERD/C/64/CO/1, of April 28, 2004, para. 17.

⁶⁴ Inter-American Court. *Case of Vélez Lloor V. Panamá*, supra note 7, para. 171,

⁶⁵ Report of the Special Rapporteur on the Human Rights of Migrants, presented before the Council of Human Rights, A/HRC/11/7, May 14, 2009, paras. 60-62.

⁶⁶ United Nations A/Res/64/142. Guidelines for the Alternative Care of Children, February 24, 2010, para.53 and subs. and Advisory Opinion 17, para. 73.

relatives who could take care of the child; other lodging measures and the option to resort to substitute families; the requirement of the presentation of a personal recognizance bond (sworn promise to appear before a competent authority); adoption of measures to ensure the presence of migrant persons (children and, if applicable, their parents) at the different stages of the procedures (administrative and judicial) related to the entry or stay in the country, such as the periodic appearance before a public institution; the appointment of a guarantor, among others.

Therefore, the fourth specific question to be made to this Honorable Inter-American Court of Human Rights regarding this issue, is the following:

What characteristics, in light of Articles 2, 7, 19, 25 and 29 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, should adequate alternative measures for the protection of the rights of the child have in order to be the priority response of the State to avoid any kind of restriction on freedom? Which due process guarantees should be offered in the decision-making process regarding alternative measures to detention?

5. State obligations in the case of custody of children based on migratory reasons.

As a general principle, according to international standards, every person under the custody of the State must be treated in a humane manner, in full respect for his dignity, rights and fundamental guarantees. Moreover, and taking into account the special role of guarantor of States, the State must guarantee the right to life and to humane treatment of persons under its custody. This entails the adoption of measures related not only with the place where people are detained but also with the conditions of detention.⁶⁷

Moreover, in the case of migrants that, as has been mentioned, should only be detained in exceptional cases, as a precautionary measure and prior compliance with a series of formal requirements, it is possible to order certain measures of provisional lodging. In addition, there are specific standards to guarantee the place and the conditions in which such measures should be implemented; some of them specifically refer to children.

To this end, it is worth mentioning that persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges.⁶⁸ Detention in this type of institution is totally and

⁶⁷ The Inter-American Court of Human Rights deems that "the way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee's vulnerability; this guarantee function of the State is especially important when the detainee is a minor" and that this circumstance gives the State the obligation to exercise its function as guarantor taking all care required by the weakness, the lack of knowledge, and the defenselessness that minors naturally have under those circumstances"; Inter-American Court of Human Rights, *Case of Bulacio V. Argentina*, para. 126.

⁶⁸ Inter-American Commission on Human Rights (IACHR) *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Resolution 01/08, March 2008, Principle XIX. See also, International Convention on the Protection of the Rights of All Migrant Workers and Their Families in the Hemisphere, Article 17; Inter-American Commission on Human Rights, *Second Progress Report of the*

absolutely “incompatible with the basic guarantees of the human rights”.⁶⁹ The Inter-American Court of Human Rights has maintained that “in case their detention is necessary and proportionate to the specific case, migrants must be held in facilities specifically destined to that end, according to their legal situation and not in common prisons, the purpose of which is incompatible with the nature of the possible detention of a person for his or her immigration status or in other places where they could be together with people accused or convicted of crimes. This principle of separation addresses, certainly, the different purposes of the deprivation of liberty”.⁷⁰ Therefore, it concluded that in the specific case of detentions in immigration proceedings, States must provide public establishments other than those intended for persons imprisoned under criminal law.⁷¹

In relation to accommodation conditions, it has been established that detained aliens should not be exposed to any conditions or treatment that would violate their basic rights or endanger their physical integrity or lives.⁷² In this respect, the Inter-American Commission on Human Rights referred to the appropriate conditions facing migrants when detained emphasizing that “States have the obligation to ensure that detained aliens, especially those detained for administrative reasons, not be exposed to any conditions or treatment that would violate their basic rights or endanger their physical integrity or lives”.⁷³ Moreover, the Court emphasized that “[E]ven though deprivation of liberty often entails, as an inevitable consequence, the breach of other human rights apart from the right to personal liberty, in the case of deprivation of liberty of persons under aliens legislation, they should be accommodated in centers especially designed for that purpose offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel, avoiding as far as possible, the disintegration of the family group. In consequence, the State must adopt certain positive, specific and directed measures in order not only to guarantee the enjoyment and exercise of those rights, the restriction of which is not a collateral effect of the situation of imprisonment but also to ensure that such deprivation of liberty does not entail a higher risk to the infringement of the rights, integrity and personal and family welfare of migrants”.⁷⁴

Regarding minors, general principles (best interest of the child, special protection or specialty and full observance of rights) should be borne in mind when stipulating and imposing the conditions under which any measure should be implemented in such exceptional and special circumstances: one is dealing with children who are in a

Special Rapporteur on Migrant Workers and Their Families in the Hemisphere, para. 110; Working Group on Arbitrary Detention, Deliberation N°5 on the situation of migrants and asylum-seekers, principle 9.

⁶⁹ IACHR, Resolution 03/08. In equal terms, see the *Second Progress Report*, Rapporteur on Migrant Workers and Their Families of the IACHR, para. 110.

⁷⁰ Inter-American Court. *Case of Vélez Loor V. Panamá*, supra note 7, para. 208.

⁷¹ Inter-American Court. *Case of Vélez Loor V. Panamá*, supra note 7.

⁷² Report of the Working Group on Arbitrary Detention, A/HRC/7/4, paras. 57 and 58. In the same terms, IACHR, Rapporteur on Migrant Workers, *Second Progress Report*, para. 99.g.

⁷³ Inter-American Commission on Human Rights. Rapporteur on Migrant Workers, *Second Progress Report*, para. 94.

⁷⁴ Inter-American Court. *Case of Vélez Loor V. Panamá*, supra note 7, para. 209.

special vulnerable condition, and in the worst case scenario, have violated an administrative rule.

Regarding migrant children who are in the country of transit or destination under State custody and in the company of their parents, different principles should be harmoniously interpreted within the framework of the general standards of the international human rights law. Among these principles, the following should be highlighted: that “every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so” (Article 37.c Convention on the Rights of the Child);⁷⁵ children shall not be separated from their parents;⁷⁶ and the obligation to guarantee the right to family life (Articles 9, 11 and 18 of the Convention on The Rights of the Child). States should provide adequate facilities and resources to allow the accommodation of families in order to guarantee the family unit. Therefore, principles addressed to avoid the restriction on freedom of children should be decisive when defining the situation of their parents, despite their immigration status. Instead of restricting the liberty of the children in order to accompany their parents, States should explore adequate measures to guarantee the protection of the rights of children. This would avoid restricting the rights of children based on the immigration status of their parents. To that end, States should adopt alternative measures to the detention of the parents, seeking the liberty of the family group during an immigration proceeding.⁷⁷

As to the circumstances under which migrant children are deprived of their liberty, it is essential to ensure certain aspects. In the first place, the rules of the facility, the competent authorities, the space, the schedule, the activities, among other things, should be designed taking into account the rights of the child. To that end, the direct participation of bodies and authorities in charge of protecting the childhood constitutes an unavoidable requisite.

In turn, in the case of unaccompanied migrant children, the Committee on the Rights of the Child has indicated that “special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s best interests not to do so”. In turn, “facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian”. Moreover, as to the exercise of the basic rights of the child under these circumstances, the Committee emphasized the right of migrant children to be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counseling where necessary. During their detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education

⁷⁵ In equal terms, the Inter-American Court has established that “in order to protect the right of detained children, specially their right to humane treatment, it is essential to separate them from detained adults”. Inter-American Court OC-17/02, Juridical Condition and Human Rights of the Child, para. 28.

⁷⁶ IACHR, *Principles and Best Practices on the Protection of People Deprived of Liberty in the Americas* Principle XIX.

⁷⁷ According to the UN Rapporteur on the Rights of Migrants, *migrant families with children should not be accommodated in facilities similar to prisons, but in alternative places, appropriate to their condition* (Mission to the United States of America, cit., 2008, para. 125). Similarly, see UNICEF Australia, *Submission to the National Inquiry into Children in Immigration Detention*.

upon release. They also have the right to recreation and play as provided for in Article 31 of the Convention".⁷⁸

In any case, following the guidelines of the Committee, it is essential to emphasize that any measure applicable to migrant children must be accompanied by a series of public policies meant to ensure that not only the choice of facilities but also the accommodation conditions (as well as the justifications for that decision) are governed by the principle of respect of all the rights embodied in international human rights law and not by the principle of "detention" of children.⁷⁹ To that end, as indicated by the Inter-American Court, those working in centers where children are detained should be specially qualified to serve their function.⁸⁰ The effective guarantee and application of these obligations, principles and standards call for the adoption of State policies based on an adequate legal framework. It is truly difficult to comply with such requirements without the implementation of measures that create spaces suitable to the care or protection of the rights of migrant children and that ensure their access to rights such as the right to education, recreation and health.

Moreover, the Inter-American Court in Advisory Opinion N° 17 maintained that "effective and timely protection of the interests of the child and the family must be provided through intervention by duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of tasks (...) In brief, it is not enough for there to be jurisdictional or administrative bodies involved; they must have all the necessary elements to safeguard the best interests of the child." Moreover, the Court emphasized the provision of Article 3 of the Convention on the Rights of the Child: "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".⁸¹

In consequence, the fifth question to be made to the Honorable Inter-American Court of Human Rights regarding this issue is the following:

What are the basic conditions that accommodation facilities for migrant children must satisfy and what are the State's main obligations regarding children (unaccompanied or accompanied) who are under the custody of the

⁷⁸ Committee on the Rights of the Child, General Comment N° 6, para. 63.

⁷⁹ Committee on the Rights of the Child, General Comment N° 6, para. 63. The Committee recommended the Mexican State to take measures to "ensure that asylum-seeking children and children who have an irregular migratory status, "are not detained and have access to special reception and care arrangements" (CDN, Concluding Observations, Mexico, CRC/C/MEX/CO/3, of June 8, 2006, para. 61.d). See also Supreme Court of South-Africa (Transvaal Provincial Division), Case of *Centre for Child Law and Isabelle Ellis V. The Minister for Home Affairs and others*, Case n° 22866/2004, September 8, 2004.

⁸⁰ The Inter-American Court in the case of "Panchito López," in paragraph 211 defines the issue of special training in the following terms: those who exercise discretion should be specially qualified or trained in the human rights of the child and child psychology to avoid any abuse of the discretionary authority and to ensure that the measures ordered in any case are appropriate and proportionate". See Rule 6.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") approved by the General Assembly in its resolution 40/33 of November 28, 1985, and Article 40.4 of the Convention on the Rights of the Child).

⁸¹ Inter-American Court, OC- 17, paras. 78.

State based on immigration reasons, in light of Articles 1, 2, 4.1, 5, 7, 17 and 19 of the American Convention and Articles 1 and 25 of the American Declaration of the Rights and Duties of Man?

6. Due process guarantees before measures that entail restrictions on the personal freedom of children based on migratory reasons.

In the foregoing questions, we, the signatory countries have established our position regarding the need to assert the principle of non-detention of children due to migratory reasons.

In this regard, it is our intention to strengthen this rule by requesting that the Inter-American Court of Human Rights provide a specific definition of the due process guarantees that are directly applicable to revise and question decisions that may entail restrictions on or possible deprivations of the liberty of children due to migratory reasons or within the framework of immigration proceedings.

In recent findings, the Honorable Inter-American Court referred to a group of due process guarantees that are applicable to the decisions made by immigration authorities regarding the restriction or deprivation of the liberty of migrants. For example, it has indicated that "in order to satisfy the requirement of Article 7.4 of 'being brought' without delay before a judge or other officer authorized by law to carry out the judicial functions, [...] competent authorities must hear the detained person personally and evaluate all the explanations that the latter provides in order to decide whether to [...] release him or to maintain the deprivation of liberty".⁸²

In that ruling, the Court determined that the review of this type of restrictive measure must be judicial: "the Tribunal deems that [...] review by a court is a fundamental requirement to guarantee an adequate control of the administrative acts that affect fundamental rights".⁸³

We understand that the application of this system of procedural guarantees related to the restriction on personal liberty must consist of specific and differentiated elements when the personal liberty of children is at stake.

Therefore, apart from the substantive and procedural guarantees required by international standards to avoid the application of arbitrary methods or measures, specific mechanisms of protection should be considered in order to adapt such guarantees to the situation of children.

Moreover, in light of the fact that certain measures, such as the accommodation in health care facilities or in border centers, restrict the freedom of movement, it is worth mentioning that Article 37 of the Convention on the Rights of the Child embodies the right of every child to challenge the lawfulness of the deprivation of liberty before an independent, impartial and competent tribunal or other authority, and to a prompt decision on such action. This guarantee also includes the right to an effective recourse to avoid an arbitrary detention.⁸⁴ Judicial intervention, as a competent authority to

⁸² Inter-American Court. *Case of Vélez Loor V. Panamá*, supra note 7, para. 109.

⁸³ Ibid. para. 126.

⁸⁴ On the right to an effective remedy, see the case-law of the Inter-American Court of Human Rights and of the European Court of Human Rights, regarding Articles 25 and 13 of the American and European

order the possible deprivation of liberty or to immediately verify the lawfulness and reasonability of the measure ordered by an administrative body, is an essential guarantee within the framework of the mechanisms of migratory control, especially if the measure concerns children. As it has been mentioned in sub-heading II.4), the decision of the competent authority (administrative or judicial) of not applying a measure alternative to the detention must also entail the use of effective remedies to question such a decision.

Procedural guarantees must include, among others, the right to be informed of the reasons for the application of the measure in a language the child understands; immediate judicial control by a competent, impartial and independent court or tribunal, previously established by law; the right to a hearing; the right to notify a third party – for instance, a relative, a lawyer or consul of the country of origin, if applicable- of the application of any measure, especially if the liberty of a person has been restricted; the right to receive free legal counsel and the right to be assisted by an interpreter, if necessary.

The right to contact a relative or adult, moreover, is essential when detainees are minors. In this scenario, the authority carrying out the detention and in charge of the detention place for the minor must immediately notify the next of kin or, otherwise, their representatives. The purpose of the notification is for the minor to receive timely assistance from the person notified.⁸⁵

It is important to recall that migrant children also have the right to consular assistance which is recognized for every alien detained outside his or her country of origin.⁸⁶ The enforcement of this right implies, for the person under the custody of the State in any way, the possibility of contacting a consular officer of his or her country, except in the case of refugees, as the State in whose territory the detention is carried out has the obligation to inform the alien on his or her right and guarantee the means for the alien's effective defense.⁸⁷

Based on the foregoing, any decision to be adopted concerning children and adolescents under the custody of the State calls for the implementation of measures and mechanisms to effectively guarantee, prior to and during the enforcement of the measure, the basic guarantees of due process, according to the condition and age of the person, taking into account the special protection of the rights of the child and regardless of the child's immigration status.

Convention on Human Rights, respectively. For instance, see Advisory Opinion OC-18/03 of the Inter-American Court (para. 126) and the judgment of the case of *Conka V. Belgium* (TEDH, Case N° 51564/1999) of February 5, 2002.

⁸⁵ Inter-American Court, *the Right to Information on Consular Assistance. In the Framework of the guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999*, para. 106; Case of *Bulacio V. Argentina*, para. 130; Case of the *Gomez Paquiyauri Brothers V. Peru*, Judgment of July 8, 2004, para.93.

⁸⁶ Article 36 of the Vienna Convention on Consular Relations 1963 and Article 16.7 of the Convention on the Protection of the Rights of all Migrant Workers and Their Families.

⁸⁷ According to the Inter-American Court, this right, like the right to have a translator when the individual (the child in this case) does not speak the language in which the procedure is conducted, is based on the need to "recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination". (Inter-American Court, OC-16/99, para. 119).

In consequence, the sixth question to be brought to the attention of the Honorable Inter-American Court of Human Rights regarding this issue is the following:

If custodial measures are applied to children in immigration proceedings, which are, in light of Articles 1, 2, 7, 8, 19 and 25 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, the due process guarantees that should govern immigration proceedings in which migrant children are involved?

7. The principle of *non-refoulement* in relation to migrant children.

Due process guarantees also constitute an essential safeguard for the respect of the principle of *non-refoulement*, a peremptory norm under international law.

In this respect, the American Convention establishes in its Article 22.8 that “in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”. The Inter-American Convention to Prevent and Punish Torture embodies the principle of *non-refoulement* in Article 13.4). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment also enshrines the principle of *non-refoulement* in Article 3. According to these norms, the State must identify the needs for the protection of the rights of children.

When examining the treatment that States must afford to unaccompanied children, the Committee on the Rights of the Child highlighted the prohibition to return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child. Therefore, it emphasized the importance of making a prior assessment of the risk of such repatriation measure. In turn, according to the Committee, this risk is not just the deprivation of liberty or the violation of rights such as the rights to physical integrity or life but “the assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services [...]. Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child. Such a determination shall, *inter alia*, take into account the safety, security and conditions, including socio-economic conditions awaiting the child upon return...”.⁸⁸

In this way, no child may be deported to a territory in which his or her life, survival, development or freedom are at risk, not only for fear of being subjected to torture or other cruel, inhuman or degrading treatment, but also for the lack of essential elements for normal and humane growth.

Upon examining whether a measure of repatriation should be adopted, it is considered that States are obliged to take these circumstances into account, the assessment of

⁸⁸ Committee on the Rights of the Child, *General Comment 6*, cit., paras. 27 and 84.

which is unavoidable if the goal is the identification of the solution that adequately respects the rights of the child that are threatened or affected.⁸⁹

Children who are not refugees or who cannot demand complementary forms of international protection should be treated in a manner which is compatible with other obligations, seeking full observance of their rights.

As the Committee on the Rights of the Child has established, if the child does not comply with the requirements necessary to obtain the status of refugee, according to the provisions of the 1951 Convention, its 1967 Protocol or a broad definition of legislation or applicable domestic law, the child must enjoy a complementary form of protection according to their needs for protection (see, Article 22.8 of the American Convention, Article 3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and other instruments on the protection of human rights and the applicable norms of domestic law).

Based on the foregoing, the seventh question to be made to this Honorable Inter-American Court of Human Rights is the following:

What is the scope and content of the principle of non-refoulement in light of Articles 1, 2, 4.1, 5, 7, 8, 19, 22.7, 22.8 and 25 of the American Convention, Article 13.4) of the Inter-American Convention to Prevent and Punish Torture and Articles 1, 25 and 27 of the American Declaration on the Rights and Duties of Man when a measure that may entail the return of a child to certain country is applied?

8. Procedure to identify refugees' needs for International protection

In heading 1 of this section, reference is made to the procedure of identification of the needs for protection of migrant children in general. In this sub-heading, such procedure is applied to a specific case of children who are refugees in light of the specific duties established in Article 22.7 of the American Convention on Human Rights.

Currently, one of the biggest challenges of the international protection of refugees consists in identifying those persons who need international protection within mixed migratory flux, as well as identifying their specific needs. In this respect, steps must be taken to establish entry systems that are able to identify new arrivals with international protection needs and which provide appropriate and differentiated solutions for them, together with other solutions appropriate for other groups involved in mixed movements.⁹⁰

Article 22.7 of the American Convention on the right to seek and be granted asylum, applies to children with protection needs who are recognized as refugees, or children who have requested asylum or the recognition of their status as refugees or those

⁸⁹ To this end, children, their families or guardians, as well as legal representatives, must have the information and tools necessary to incorporate these situations in order to request a thorough examination of the case. The above in the framework of the respect for the guarantees of due process, specially the right of the child to a hearing.

⁹⁰ See UNHCR, Protection of Refugees and Mixed Migration: A 10-Point Plan of Action. 2007.

children who could need it.⁹¹ The relationship existing between the right to be granted asylum embodied in regional treaties on human rights and the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol have been acknowledged and emphasized in the jurisprudence of the Inter-American Commission on Human Rights.⁹²

In the case of children covered by Article 22.7 of the American Convention, States must facilitate the identification of children who cannot or do not want to return to their countries of origin based on a well-founded fear of being persecuted under the terms of the definition of refugee stipulated in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol in relation to Article 22 of the Convention on the Rights of the Child. Moreover, States should identify those children who comply with the elements of the broadest definitions stipulated in legislation and internal practices that, in general, consider that refugees are those persons who have left their countries of origin because their lives, safety or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously affecting the public order.

For the practical implementation of measures directed to ensuring the international protection of children it is important to comply with a series of requirements: identification of special protection needs; reference to the system of asylum; processing of a request by means of a differentiated procedure that contemplates the specific needs of children who are recognized as refugees; consideration of a request subjected to the above mentioned substantive criteria, which provide the definition of refugee.

It is important to mention what has been indicated in heading 1 of the request on the need to conduct a strict evaluation, in light of the best interests of the child and the principle of special protection, of the different measures that may be adopted during migratory administrative procedures and, if applicable, refugee status determination, as well as in institutional arrangements to provide temporary and durable solutions.

In view of the above, it is essential to have a clear definition of the measures and actions that States should adopt in order to identify the needs and risks for the purpose of the international protection of the rights of the child.⁹³

⁹¹ According to authorized doctrine in this matter, this Article of the Convention stipulates a general legal framework to seek and be granted asylum that is complemented by "international agreements" to which it referred, like the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as *lex specialis*. See, Leonardo Franco (coordinator), *El Asilo y la Proteccion Internacional de los Refugiados en America Latina (Asylum and International Protection of Refugees in Latin America)*, UNLA ACNUR, Siglo XXI Editores Argentina, 2003.

⁹² The case law of the Inter-American Commission on Human Rights has referred to this relationship in various cases, such as: In report Lumber 27/93 of case 11.092 Joseph V. Canada of October 6, 1993; report Lumber 51/96 of case 10.675 of the Haitian Centre for Human Rights et al V. United States of America of March 13, 1997; report number 6/02 of case 12.071, 120 Cuban Nationals and 8 Haitian Nationals detained in the Bahamas of April 3, 2002 and report number 53/04 of case 301/2002 of Rinaldo Juan Pacheco Osco et al V. Bolivia, of October 13, 2004.

⁹³ Other elements of a system of protection of children with protection needs like refugees include, *inter alia*, the appointment of a guardian, provision of temporary care and monitoring, refugee status determination, individual documentation, tracing, verification of family relationship, family reunification, identification and implementation of durable solutions.. Cf. UNHCR Guidelines on Determining the Best Interests of the Child , May 2008.

Based on the foregoing, the eighth question to be made to this Honorable Inter-American Court of Human Rights is the following:

In light of Article 22.7 of the American Convention and Article 27 of the American Declaration on the Rights and Duties of Man, what are the characteristics that the procedures to be used when identifying a potential request for asylum or for recognition of the refugee status of a migrant child should have?

9. Right to a family life of the children when their parents are removed due to migratory reasons.

Many decisions that States regularly adopt within the framework of migratory policies related to the entry, stay or departure of migrants, usually affect the right to family life in respect to its union or separation. This right has been broadly acknowledged by the entire international community and, especially, by the States of Latin America and the Caribbean. For that reason, the Universal Declaration of Human Rights and various other human rights treaties enshrine the right of every person to form a family and, as a consequence, have established States' obligations to protect, respect and guarantee this right to every person subjected to their jurisdictions.⁹⁴

It is worth recalling that the Inter- American Court has stipulated that States, apart from having the responsibility of ensuring the protection and respect of the rights of children, have the obligation to favor, in the broadest manner, the development and strengthening of the family nucleus, since the recognition of the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a fundamental principle of International Human Rights Law".⁹⁵

The Court has also mentioned that "the child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person's right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child (...). These provisions are especially significant when [the] separation of a child from his or her family is being analyzed".⁹⁶ Finally, the Court maintains that "the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary".⁹⁷

Specifically, the Convention on the Rights of the Child establishes in Article 9 that States Parties shall ensure that a child shall not be separated from his or her parents

⁹⁴ Article 16 of the Universal Declaration of Human Rights; Articles 8, 9, 10, 16 among others, of the Convention on the Rights of the Child; Articles 11 and 17 of the American Convention on Human Rights; Article 16 of Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"; Articles 17 and 23 of the International Covenant on Civil and Political Rights; Article 10 of the International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of Migratory Workers and their Families Article 44.

⁹⁵ Inter-American Court, Advisory Opinion OC-17/02, para. 66.

⁹⁶ Inter-American Court. OC-17/02, para. 71.

⁹⁷ Ibid. para. 77.

against their will, except when a violation of the rights of the child in the family group has been verified, for example, when there are serious circumstances harmful to the child's health or physical development or in a particular case such as one involving abuse or neglect of the child by the parents. Moreover, in such cases, competent authorities subject to judicial review shall determine, in accordance with applicable law and procedures, that separation is necessary for the best interests of the child. This implies that, exceptionally, a child may be separated from his parents if the following requirements are met: in the first place, that it is stipulated in the law; next, the decision to be adopted must respect due process guarantees (both for children and their parents); in turn, said decision must be revised by a judicial authority.

A series of consequences arise from here. One of them is that it is impossible to conclude that the separation as a result of the removal of the parents due to their migratory status is the measure that most respects the rights of the child. In light of the *ius solis* criterion governing in almost all Latin America and the Caribbean, children born in the country of destination, because they are nationals, cannot be removed; therefore, nothing good could result from the removal of their parents. On the contrary, this would affect the rights embodied in several international treaties already mentioned and would violate Articles 9, 11 and 18, among others, of the Convention on the Rights of the Child.

Moreover, the Inter-American Commission has indicated that the procedures of removal of migrant adults must ensure that the rights and interests of such children were taken into account in removal proceedings, since the decision would obviously have a dramatic impact on their welfare and development. It emphasized that the State cannot force parents (who would be removed) to make a choice between the "love and care" of a parent in circumstances of poverty and hardship, or the health, education and welfare benefits available to children in States with efficient educational and health services. In view of this, the Commission emphasizes the relevance of including the perspective and interests of the child in those procedures.⁹⁸

The measures to deport parents do not find sufficient justification if certain principles of international human rights law, like the *pro homine* principle or the principle of proportionality, are duly taken into account. If, as maintained by the Inter-American Court, based on the Riyadh Guidelines,⁹⁹ "the family is the central unit responsible for the primary socialization of children", and therefore governmental and social efforts to preserve the integrity of the family should be pursued, it is evident that an administrative decision (in this case, irregular migration) cannot be the only basis for a decision that involves the separation of the child from his or her family.¹⁰⁰ The Inter-American Commission has indicated that State powers in the control of the entry, residence and expulsion of removable aliens, must be balanced against the harm that may result to the rights of the individuals concerned in the particular case, such as the right to family life. In view of the above, it is imperative to resort to the principle of

⁹⁸ IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, of February 28, 2000. See, IACHR: "Wayne Smith, Hugo Armendariz , et al V. United States of America, of July 12, 2010 paras. 158 and 159.

⁹⁹ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

¹⁰⁰ Inter-American Court, Advisory Opinion OC-17/02, para. 67.

reasonability,¹⁰¹ as well as other principles deriving from international human rights instruments.

Moreover, as it has been indicated, according to the Convention on the Rights of the Child, the separation of parents and children must be stipulated in a law, resulting from a proceeding in compliance with basic guarantees, which ensures judicial intervention and that the justification of the separation is the violation of the rights of such child within the framework of family life.

The right of a child not to be separated from his or her parents and the principle of family unity must be strictly taken into account in the assessment of the migratory situation of the parents, especially when ordering measures such as deportation.

Finally, the ninth question to be made to the Honorable Inter-American Court of Human Rights is the following:

What is the scope that must be given to the protection of the right of the child not to be separated from his/her parents in the case that a deportation measure could be imposed on one or both parents, as a consequence of their migratory status, in light of Articles 8, 17, 19 and 25 of the American Convention and Articles 6 and 25 of the American Declaration on the Rights and Duties of Man?

III. Conclusions

In view of the foregoing, this Honorable Court is formally asked to consider this request for advisory opinion as submitted according to the provisions of Article 64.1 of the American Convention on Human Rights and to conduct the applicable proceeding.

¹⁰¹ According to the IACHR, in view of the interpretation of the American Declaration and the Convention on the Rights of the Child, " where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicate that this balancing must be made on a case by case basis and that the reasons justifying interference with family life must be very serious indeed" (IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, para.166 166).