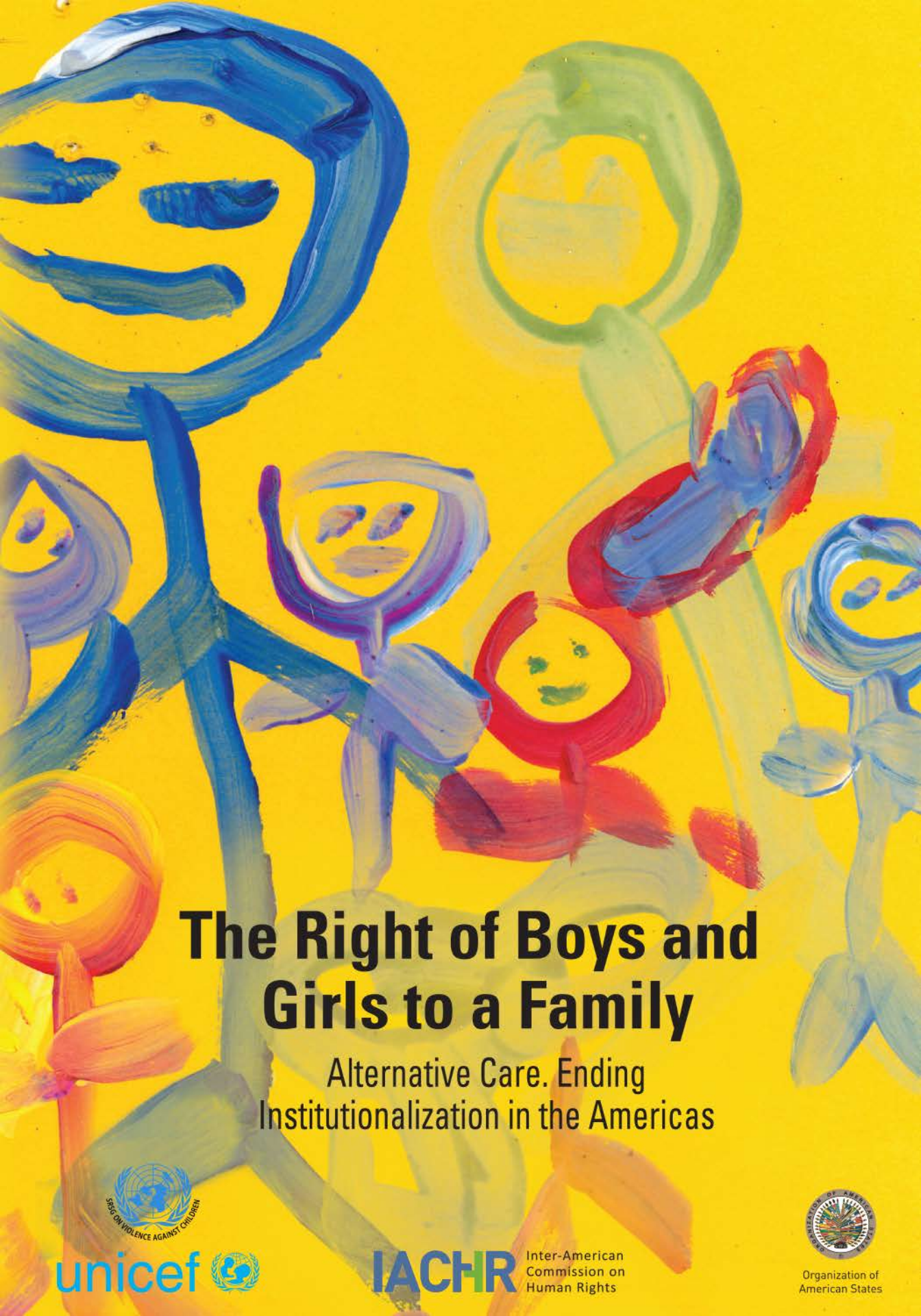

The Right of Boys and Girls to a Family

Alternative Care. Ending Institutionalization in the Americas

SRSG ON VIOLENCE AGAINST CHILDREN

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Inter-American Commission on Human Rights IACHR

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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Prologue

More than two decades after the entry into force of the United Nations Convention on the Rights of the Child (CRC), there is no doubt that this international instrument exemplified one of the greatest transformations in the perception of childhood from the legal standpoint, while it also brought about profound implications for the social and cultural attitudes towards children. The most significant transformation operated by the CRC was the recognition of every girl and boy as subject of rights, in addition to recognizing their right to special and enhanced protection due to their condition of being persons in growth and development.

Within the Inter-American System of Human Rights, the Inter-American Commission and Court of Human Rights have extensivelydeveloped the concept of *corpus juris* of the rights of children in order to establish a holistic protection framework under Articles 19 of the American Convention on Human Rights and VII of the American Declaration of the Rights and Duties of Man, which includes the international standards of human rights developed in the area of children, including the CRC.

The positive developments brought about by the CRC are outstanding, in particular the progress achieved with the development of legal frameworks to ensure implementation of the CRC. Another important development is the progressive adoption of public policies, programs and services, and the allocation of financial and human resources to promote and protect the rights of boys and girls under the holistic perspective of the rights of the child promoted by the CRC. The Committee on the Rights of the Child emphasizes that States must design their interventions in a comprehensive, coordinated and complementary manner, in order to effectively guarantee all the rights of children. Therefore, CRC requires States to ensure the necessary conditions for the effective exercise, enjoyment and respect of all the rights for every child, and that the interventions are not limited to offering isolated and unconnected responses, or focus only on offering a reactive response to existing violations of rights. The establishment of National Systems for the Promotion and Protection of Children's Rights in the States is a response to those requirements of the CRC.

The CRC, the American Declaration of the Rights and Duties of the Man, as well as the American Convention on Human Rights, confer a fundamental role to families in guaranteeing the care, well-being and protection of children, because family is the natural environment for the growth and development of children, particularly in their first stages of life. In this way, the CRC establishes that the State has the obligation to promote and favor an adequate support to the families so that they can fulfill their shared parental responsibilities to care for and raise their children, and in this way ensure the protection of children and their rights. Nevertheless, the persons closest to children, who should protect them and take care of them, may in some instances expose children to situations that threaten their personal integrity and development. In order to prevent violations of the rights of children from occurring and to guarantee effective protection for children, States should devote efforts in strengthening the family and community settings.

One of the States' duties, which is imperative to reflect in the National Systems for the Promotion and Protection of Children's Rights, is to ensure the right of the child to be raised in his or herfamily and community environment, and to give adequate attention to children who lack, or are at risk of losing, parental care. However, reality differs from the standards that have been established in international human rights law. First, it is a matter of concern that it is not possible to accurately establish how many boys and girls in the region are under alternative residential care in centers or institutions, and how they are being taken care of. Despite the lack of accurate data, the available information shows that there are many children who are unnecessarily institutionalized, and who, with the adequate support to their families, could be cared for and raised by them. It is necessary that the National Systems for the Promotion and Protection of Children's Rights place greater efforts in strengthening the capacity of the families to raise their children, and for prevention as well as early detection of situations of violence, abuse and neglect against girls and boys. A second aspect observed refers to the absence or deficit of regulations on the functioning of centers and institutions that care for children who require special protection. The regulations should ensure an adequate functioning of these facilities that respects and protects the rights of children. Thirdly, and related to the above-mentioned, the operational structure of residential institutions, especially those of large dimensions that cannot provide personalized attention, exposes boys and girls to other severe violations of their rights, such as violence, abuse and neglect which impact their development.

For this reason, the Study of the Secretary General of the United Nations on Violence Against all Children, which was presented in 2006, evidenced the high rates of violence to which children could be exposed to, who lacked parental care and were admitted in a residential institution, in comparison to children who were in family-based alternative care. The recent Global Survey "Toward a world free of violence", developed by the Special Representative of the United Nations' Secretary General on Violence against Children, as a follow up to the U.N. Study of 2006, shows that despite some positive developments promoted over the last years, there are still serious challenges for the protection of children without parental care. The recent Global Survey also confirms that the boys and girls in institutions, in all the regions of the world, are among the most vulnerable groups at risk of being victims of violence and stigmatization.

The United Nations Guidelines for the Alternative Care of Children, of 2009, established a series of general principles, in order to promote public policies which strengthen the families' possibilities to care for and raise their children, meanwhile setting the minimum standards of the forms of alternative care in those cases which require the separation of the child from his or her parents, based on reasons of protection and best interests of the child.

Within the strategic partnership in the Americas, we, the Special Representative of the United Nations' Secretary General on Violence against Children and the Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights, have identified that an urgent need remains to promote changes in order to transform the current overall state in this field, in the region.

This Thematic Report further develops the analysis of the regional context and reiterates the grave concern for the situation in which thousands of children still live, in the hemisphere. To revert this state of things, and prevent children from being deprived of their right to live and grow in their family and to be cared for and raised in a family-based environment, and at the same time to ensure their right to a dignified life free from all forms of violence, this Report sets out the applicable standards and makes a number of concrete recommendations to States to support the families in their parenting responsibilities. The Report also identifies what the principles and guarantees for adequate protection should be, in the event that alternative care is necessary, and urges the States to end the institutionalization of children through a planned process permitting adecuate care in response to the needs of protection and best interests of children.

The Report of importance that we have the honor to present, symbolizes a major contribution from the Inter-American System of Human Rights in this subject. We are convinced that this Report will be a substantive resource to accelerate progress in the national implementation of the standards of children's rights and in the protection of human rights of boys and girls who are particularly vulnerable to the violation of their rights and to violence.

Marta Santos Pais
Special Representative of the United Nations' Secretary General on Violence against Children

Rosa María Ortíz
Commissioner and Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights

Washington, December 2013.

THE RIGHT OF GIRLS AND BOYS TO A FAMILY.
ALTERNATIVE CARE.
ENDING INSTITUTIONALIZATION IN THE AMERICAS

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I. EXECUTIVE SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter, the "Inter-American Commission", "the Commission", or "the IACHR") presents this report which analyzes the obligations of the States derived from the right of the child to a family, and makes recommendations aimed at strengthening the protection of children and adolescents who are without, or at risk of losing, parental care. In this regard, it provides a detailed analysis of the States' obligations to strengthen the possibilities of the families to care for and raise their children through the development of appropriate programs and services, within the National Systems for the Promotion and Protection of Children's Rights with special focus on those families who are in a particularely vulnerable condition, in the enjoyment of their rights.

2. The IACHR also presents the parameters applicable to alternative care, as well as the main rights that must be especially protected in the cases of children without parental care. This report identifies the main difficulties presented by the model of residential institutional care, for the adequate protection of the rights of children and adolescents who are admitted to them, due largely to the absence of adequate regulation and supervision of its functioning. The Commission has also found that the model of care provided in large residential institutions, which care for a large number of children without possibilities to provide them with personalized attention, and that generally operate in closed regimes or that unnecessarily restrict contact with the exterior, do not reach the objectives of preserving and restoring of the children's rights.

3. Therefore, the Commission recommends that States strengthen a process of deinstitutionalization of children who are in these types of establishments, and strengthen other forms of alternative care which are more favorable and consistent with the protection of the rights of children, such as family-based alternative care. This change of approach does not mean a lesser degree of protection, instead it promotes protection measures consistent to the needs of children and adolescents deprived of parental care.

4. In the report, the Commission highlights that, according to international human rights law, States are obliged to favor, in the broadest possible way, the development and strengthing of the family as a measure of protection of the

[1] For the purposes of this report, the Commission will use the term "children" to refer indiscriminately to all girls, boys, and adolescents, understood as all persons under the age of 18, in keeping with the term used in the Convention on the Rights of the Child and the international *corpus juris* on the matter. This notwithstanding the fact that, at times in the report, the Commission will refer to "children and adolescents" and "boys and girls".

child. This includes the development of policies, programs and services to support and strengthen families. Thus, as derived from the rights contained in Article VII of the American Declaration of the Rights and Duties of Man (hereinafter, the American Declaration, the Declaration or ADRDM), and Article 19 of the American Convention on Human Rights (hereinafter the American Convention, the Convention or the ACHR), States must articulate the appropriate actions to support families, and address the main causes of separation of children from their parents.

5. The Commission acknowledges the existence of situations which require a protective intervention by the State implying a temporary or even permanent separation of the child from his or her family to attain a better protection of their rights and best interests. Risk situations of this nature require a rigorous and specialized surveillance by the State. In this sense, States have the duty to regulate the causes that justify the removal of children from their families for reasons of protection. In order for the interference to be consistent with the parameters of international human rights law, the separation must only proceed in exceptional circumstances, where there are reasonable grounds for this, and are in the best interests of the child.

6. In relation to the causes that usually lead to the separation of children from their families, the Commission has identified among others the following: poverty or material limitations of families belonging to socially excluded sectors; violence at home; relinquishment and abandonment of children. The Commission has found that, although the separation of children from their families based only in poverty has been, in principle, overcome, in practice, poverty remains the great backdrop of the situations in which a child is separated from his or her family and is placed in residential alternative care.

7. The Commission emphasizes the duty of prevention and protection of States in relation to violence against children, in all fields, even in the private field. States have the duty to prevent and protect children from violence in the family. The Commission highlights the duty of States in the prevention of situations that usually lead to the removal of children from their families for reasons of protection, as part of the duties derived from Article 19 of the Convention, in relation to Article 17(1) of the same instrument. Likewise, the Commission addresses the principles and guarantees applicable to those cases in which the separation of children from their families is justified for reasons of protection and attending their best interests.

8. It is important to highlight that the intervention of public authorities through a protection measure is not in contradiction to the right to family life, but derives from the absence of adequate parental care and from the State's obligation to protect and guarantee the rights of children in accordance to Article 19 of the American Convention and VII of the American Declaration. The American Convention requires that any measure which could imply that a child is separated from his or her parents has to strictly respect the principle of legality and be in accordance to due process guarantees.

9. The IACHR emphasizes that separation of children from their family must respond to the application of a special measure of protection issued by a

competent authority, be legitimate, in accordance to the law, adopted with respect of due process guarantees, and must aim at safeguarding the rights of the child. The Commission notes that, in general, the causes that lead to the temporary separation of the child from his or her family may include some generic or broad assertions and in this regard, reiterates that the decisions in these type of processes should be based on objective criteria and be properly motivated, based on the contributions of multidisciplinary technical teams, and the specialized assesments performed by them. In the same way, the regulation should clearly contain the requirements and procedures for the admission and departure of children into residential care facilities, to ensure that no child enters with these characteristics, without it being strictly necessary and appropriate, in accordance to his or her best interests. Also, that no child remain in a facility for more than the necessary time.

10. The Commission has closely followed the conditions of children in residential institutions, and has expressed concern for various violations of human rights that it has identified on several occasions.

11. This report shows that institutionalization exposes children to a greater risk of suffering various forms of violence, abuse, neglect and even exploitation in relation to children who are in other forms of alternative care. In this sense, in the Americas, as in all regions of the world, children and adolescents in residential institutions are exposed to structural violence derived from the conditions in which many of these institutions operate. Violence in these institutions is usually the result of several factors associated with how these establishments function, such as the precariousness of their facilities in terms of health and safety, overcrowding, lack of trained personnel to work with children, social isolation, disciplinary actions or control methods that involve violence, the use of force or unnecessary psychiatric medication, and the use of some forms of treatment that constitute in and of themselves a form of violence, among others.

12. The Commission highlights the urgent and pressing need for States in the region to adopt appropriate legislation governing the operation of residential facilities of both public and private character, in particular with regard to: the licensing and authorization; the standards for service; the supervision and control. It is also urgent to foresee appropriate administrative, civil and/or criminal sanctions in cases of non-compliance with the regulations. The Commission has noted that States do not always have information on the functioning and conditions of residential institutions, especially those of a private or a mixed nature.

13. The Commission has observed that children and adolescents admitted to a residential institution usually spend long periods of time, institutionalized. This prolonged stay in institutions is generally attributable to the absence of an individualized care plan that promotes family and community reintegration of the child. The IACHR also observes the lack of adequate and appropriate programs and services to help families overcome the causes that led to the institutionalization of the child and that strengthen their capacities to fulfill their parental responsibilities.

14. In addition, the Commission is concerned to confirm that certain groups of children and adolescents, such as those with some type of disability, or of African descent or Indigenous are overrepresented in residential institutions, and that the number of those released or depart from these institutions is disproportionally low.

15. The Commission also highlights its concerns regarding the difficulties identified in the region with regard to the strict observance of the guarantees contained in Articles 8 and 25 of the ACHR on the decisions made regarding the separation of children from their parents. In this regard, the IACHR notes that when the protective measure involves the separation of the child from his or her family, the adoption of the measure should be subjected to judicial review, so that it satisfies Article 11(2) of the ACHR and Article 9 of the United Nations Convention on the Rights of the Child[2] (hereinafter, the Convention on the Rights of the Child, or the CRC). In addition, the IACHR reminds States that the following standards are applicable: the proceedings in this matter should be handled with exceptional diligence, be adapted and accessible to the child in order to guarantee the right of children to participate in processes that affect them and ensure the availability of an independent and specialized legal representation for the child, allowing the effective defense of their interests and rights.

16. The Commission concludes that the special measures of protectioninvolving the removal of children from his or her family are exceptional measures to be adopted only after all the possibilities of supporting the family have been exhausted, and as long as they objectively and reasonably constitute the best choice for the interests of the child and protection of his or her rights. The aim of these measures should be to ensure the protection and safety of the child through his or her alternative care. If this is not possible, the alternative is to take the appropriate actions to overcome the circumstances that led to the separation and to promote the reintegration of the child to his or her family, provided it is not contrary to their best interests, or find another permanent solution for the child.

17. The Commission takes note of the priority of forms of alternative care set by the international human rights law, having to consider the placement in the extended family first, and if that is not possible, in a foster family. Only as a measure of last resort should authorities consider the admission to a residential care facility that can provide personalized attention in an environment similar to that of a family. The institutionalization in facilities with large dimentions should be progressively replaced by the models of care above mentioned.

18. The report concludes with a series of recommendations to States based on the standards set forth by international human rights law in the subject. The Commission hopes that this report will serve as a tool to States and assist them in the fulfillment of their international obligations concerning the duty to respect and

[2] Adopted and opened for signature and ratification by General Assembly resolution 44/25 of November 20, 1989. Entry into force: September 2, 1990.

guarantee the rights of children and adolescents, especially those deprived of parental care or who are at risk of losing it.

II. INTRODUCTION

19. The Inter-American Commission on Human Rights is a principal body of the Organization of American States (hereinafter "the OAS") charged with promoting and protecting human rights in the Hemisphere. The human rights of children have been a topic of special interest to the Commission over the years. Accordingly, at its 100th period of sessions, held in Washington, D.C., from September 24 to October 13, 1998, the Commission decided to create the Rapporteurship on the Rights of the Child, to which it entrusted with study and promotion of activities that would enable it to assess the human rights situation of children in the OAS Member States, and propose effective measures for them to adjust their domestic legislation and practices in order to respect and ensure the enjoyment and exercise of the human rights of children and adolescents in the region.

20. Thus the Commission and the Rapporteurship, through the petition and case system, precautionary measures, hearings, visits, and reports, have paid special attention to the situation of children in the Americas. In recent decades, a profound change has taken place within the regulatory frameworks, the public policies, and the manner of providing social services to children and families in the American States, especially after the adoption of the United Nations Convention on the Rights of the Child. However, despite these important changes, difficulties and challenges persist, in translating to reality the principles of international law on human rights of children and adolescents, recognized in legal frameworks. Furthermore, the need still exists for the States of the region to deepen certain areas of their legislative frameworks, in order to adjust them according to the principles and standards required under international human rights law, especially regarding the rights and obligations set forth in Article 19 of the American Convention on Human Rights and Article VII of the American Declaration of the Rights and Duties of Man.

21. The IACHR has become aware of the situation of children and adolescents placed in residential institutions. On numerous occasions, it has received information with concern, on the reasons for entry of children into institutions of this type, and on the living conditions under which they remain in and the type of care that they receive in them, considering they do not meet the standards of the inter-American human rights system.

22. Expressions of this concern were also manifested by the United Nations Committee on the Rights of the Child, which in 2005 organized a Day of General Discussion on the topic theme of children without parental care or at risk of being so, and by the the Independent Expert for the United Nations Secretary-General's Study on Violence against Children (herein, the Independent Expert for the Study on Violence against Children or the Independent Expert, and the "Study on Violence against Children" or "the Study", respectively), who included his principal observations on the

matter in the Study and in his report to the United Nations General Assembly.[3] Within the Universal System, the previously mentioned led to the adoption in 2009 of the UN Guidelines for the Alternative Care of Children (hereinafter "the UN Guidelines" or "the Guidelines")[4] by the United Nations General Assembly.

23. In view of the foregoing, the Commission decided to prepare a report on the topic of the rights of children without parental care in residential institutions in the Americas. During the drafting process and as a result of the data collected, the Commission deemed it appropriate for the report to take into consideration the obligations of the States in relation to the duty of protection of family, recognized in Articles 17(1) of the Convention and VI of the Declaration, and to favor the capacities of the families as a measure of protection of children. The IACHR considers that the policies for the protection of the family represent a fundamental component to prevent the separation of children from their families for reasons of protection, as well as to facilitatefamily reintegration and the overcoming of the causes that led to alternative care.

24. Additionally, the Commission has deemed appropriate to frame their analysis and recommendations regarding residential institutions within the framework of national plans and/or strategies of alternative care, and in the principles under which these are to be ruled by in accordance to the international human rights law. The IACHR has made its recommendations taking into consideration that the duty of protection of the State in regards to children without adequate parental care, or who are at risk of being so, must be provided and organized within the National Systems for the Promotion and Protection of Children's Rights.

25. In order to gather information on the situation of children and adolescents in residential institutions in the different State Members, in May 2011 the Commission sent a request of information in the form of a questionnaire to the States and the civil society organizations , which has been included as an annex to this report.[5]

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[3] The complete text of the U.N. Study on Violence against Children is available at: http://www.unviolencestudy.org/

The United Nations General Assembly adopted, in its resolution A/61/299 of August 29, 2006, the report of the Independent Expert for the UN Study on Violence against Children. The report includes the main findings contained in the UN Study as well as a series of recommendations to the States. Available at: http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf

[4] Adopted by the United Nations General Assembly in its resolution 64/142 of December 18, 2009. The United Nations General Assembly welcomed the Guidelines for the Alternative Care of Children, indicating that no country held any objections to their content, indicating the degree of the extent to which they have been accepted by all countries around the world. Available at: http://iss-ssi.org/2009/assets/files/guidelines/ANG/Guidelines%20for%20the%20Alternative%20Care%20of%20Children%20.pdf

[5] The questionnaire was prepared by the IACHR Rapporteurship on the Rights of the Child in cooperation with UNICEF Regional Office for Latin America and the Caribbean (UNICEF LACRO). The request for information was accompanied by a conceptual document written with contributions from the Special Representative of the United Nations Secretary-General on Violence against Children.

The States that answered the questionnaire sent by the IACHR are: Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Grenada, Guyana, Honduras, Mexico, Nicaragua, Paraguay, and the United States. From their part, the organizations of civil society that submitted their answers and information to the IACHR are: Gire, Casacidn, Dissability Rights International Mexico, Yumildre y the University of Lanús.

26. Likewise, in the process of preparing this report, the Commission held three sub-regional consultations to which it invited representatives of governments, civil society organizations, and academic institutions from the region to gather additional data on the normative and technical aspects of, and the practices related to, the situation of children and adolescents in residential institutions in the Americas.[6] In addition, a survey was conducted to obtain secondary information from research projects, studies, and reports on the matter, including the data produced by international organizations, academic bodies, government institutions, and nongovernmental organizations. The data provided by States, civil society organizations, and academic institutions, through replies to the questionnaire and in the framework of the sub-regional consultations, were very useful to the Commission, which expresses gratitude to everyone involved for their participation and contributions. UNICEF Regional Office for Latin America and the Caribbean (UNICEF LACRO) and the Special Representative of the United Nations Secretary-General on Violence against Children made valuable contributions and inputs to the preparation of this report and also provided support for the sub-regional consultations, for which the Commission is also grateful.

27. This report is divided into four fundamental chapters. The first analyzes the child's right to live in and be raised by his or her family, and the State's duty to support families as a measure of protection for children and adolescents. The second part is about the principles for the alternative care of children, the judicial guarantees that must be observed in proceedings where separation of the child from his or her family is determined as a special measure of protection, and the rights which are particularly protected in this type of proceedings. In third place, the report describes the family-based model of alternative care, emphasizing that it is with this model in which the general respect for the rights of children is complied with. . Finally, the report focuses on the figure of residential care and the obligations of States in terms of regulation, quality of service and supervision, devoting special attention to residential institutions and the main issues that the IACHR has identified in the region.

28. The Commission notes that residential care facilities have different names depending on the countries of the hemisphere, as well as the existence of multiple variants and modalities. The Commission has found that the same or similar terms are used in the countries of the region, in some cases, to define alternative residential care settings which are significantly different from each other. For the

[6] The consultations were held in Trinidad and Tobago (May 3 and 4, 2011), Peru (June 23 and 24, 2011), and Guatemala (July 25 and 26, 2011).

purposes of this report, we have referred to those facilities where residential care is provided on a full time basis, as is the case of the orphanages, shelters, care homes for children, small-group homes and other facilities that meet the description above. The Commission also refers to residential facilities for medical or psychiatric care. The facilities that will be addressed may be public, private or mixed public/private, of a transitory or emergency, or rather a permanent nature.

29. In this report, the Comission distinguishes foster family care from the residential care center and from the residential institution.[7] The terminological distinction seeks to conceptually separate two large models of care differing from that of the family. The term "residential care s" is used to describe small-sized environments, with a small number of children, which are organized and operate in a manner similar to that of a family environment, in an open system and interacting with the community, and in which children have access to the services provided in the community. The term "residential institutions" is reserved for large establishments with a high number of children, and generally operate in a closed operating system, this means, providing services within the institution, and not allowing, or allowing in a limited manner, the interaction of children with the community environment.

30. The Commission recognizes that the Member States have made considerable efforts to bring their domestic legislation, public policies, and practices into line with the provisions of the American Convention and American Declaration and with the corpus juris on children's rights. However, there are still difficulties in terms of prevention and response to the situations that generate alternative care, as well as in the regulation and supervision of residential care centers and institutions. There are also significant difficulties persisting in terms of the conditions in which these care for and attend to to children. This report identifies the major problems and challenges that the States of the region face, and develops the international human rights standards that must be observed by the systems of protection. For this purpose, the report includes a series of recommendations to enable Member States to effectively meet their international obligations regarding the rights of children and adolescents.

III. THE RIGHT OF BOYS AND GIRLS TO A FAMILY

A. The *corpus juris* of the human rights of children and adolescents

31. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or the "I/A Court HR") have consistently referred to the *corpus juris* of the human rights

[7] See Guidelines 23 and 29 of the U.N. Guidelines for the Alternative Care of Children. Additionally, references to the terms used by the U.N. Guidelines on the Alternative Care of Children can be found in, *Advancing the implementation of the Guidelines for the Alternative Care of Children*, Centre for Excellence for Looked After Children in Scotland (CELCIS), University of Strathclyde, International Social Service (ISS), Oak Foundation, SOS Children's Villages International, and the United Nations Fund for Children (UNICEF) 2012, pages 34 and 35. Available at: http://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-forward-implementing-the-guidelines-ENG.pdf

of children and adolescents in their decisions. The concept of *corpus juris* in matters related to children referrs to a group of fundamental rules that are interrelated for the purpose of guaranteeing the human rights of children and adolescents.

32. The Court and the Commission have established that the *corpus juris* of International Human Rights Law is formed by a series of international instruments with different legal content and effects (treaties, conventions, decisions, and declarations), as well as by the decisions adopted by international human rights bodies.[8] This conception pertaining to international human rights law, and the interpretation of treaties, is particularly important for the protection and defense of the human rights of children, which has advanced substantially by the evolutive interpretation of international protection instruments.[9] On this point, the Court has considered:

> [t]his evolutive interpretation is consequent with the general rules of the interpretation of treaty embodied in the 1969 Vienna Convention. Both this Court […] and the European Court of Human Rights […] have indicated that human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.[10]

33. The Court and the Commission have repeatedly and consistently applied this notion of *corpus juris* in its decisions on the rights of children and adolescents, so as to determine the scope of the States' obligations regarding children's rights. Both bodies of the inter-American system have held that the aforementioned *corpus juris* plays an important role in the interpretation of the various provisions of the American Declaration and the American Convention in this respect.[11] Accordingly, the Court has highlighted that the *corpus juris* on children's rights is the result of important

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[8] I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99, October 1, 1999. Series A, No. 16, para. 115; IACHR, *The Rights of the Child in the Inter-American Human Rights System (second edition),* OEA/Ser.L/V/II.133, Doc. 34, October 29, 2008 (hereinafter "*The Rights of the Child in the Inter-American Human Rights System*"), para. 39; IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II., Doc. 78, July 13, 2011(hereinafter "*Juvenile Justice and Human Rights in the Americas*"), para. 16.

[9] I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 193; and I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99, October 1, 1999. Series A, No. 16, para. 114.

[10] I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 193; and I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99, October 1, 1999. Series A, No. 16, para. 114.

[11] I/A Court H.R., *Case of Gelman v. Uruguay*, Judgment of February 24, 2011, Series C No. 221, para. 121; I/A Court H.R., Case of *Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 165, 166, 167 and 168; I/A Court H.R., *Case of Contreras et al. v. El Salvador*. Merits, Reparations, and Costs. Judgment of August 31, 2011. Series C No. 232, paras. 107 and 112; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, paras. 166–168.

developments in international human rights law in this field, the milestone of which was the adoption of the United Nations Convention on the Rights of the Child (hereinafter, "the Convention on the Rights of the Child" or "the CRC"). The CRC acknowledged children as subjects of rights and recognized their dignity as persons, as well as the special protection they deserve because of their level of development. In this connection, the Court has indicated in its jurisprudence 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.[12]

34. Consequently, to interpret the meaning, content, and scope of Article 19 of the American Convention,[13] Article VII of the American Declaration,[14] and Article 16 of the Protocol of San Salvador,[15] - which guarantee the right of children to special measures of protection on the part of their families, society, and the State-, it is important to make reference not only to the provisions of said instruments of the Inter-American Human Rights System but also to other international instruments that contain more specific regulations on the protection of children.

35. In regard to the international community of States, it has affirmed, through the adoption of a large number of resolutions and international instruments of different nature on various aspects related to the rights of children, a clear position in relation to the recognition that children and adolescents are rights-holders and deserve a special protection.[16] The almost universal ratification of the United Nations

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[12] I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 194.

[13] Article 19: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." American Convention on Human Rights, signed in San José, Costa Rica, on November 22, 1969, at the Inter-American Specialized Conference on Human Rights.

[14] Article VII: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." American Declaration of the Rights and Duties of Man, adopted at the Ninth International Conference of American States, Bogotá, Colombia, 1948.

[15] Article 16, Rights of Children: "Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," adopted in San Salvador, El Salvador, on November 17, 1988, at the eighteenth regular session of the General Assembly.

[16] For example, each year the United Nations General Assembly adopts an "omnibus resolution" on the rights of the child; presently, the Human Rights Council adopts an annual resolution on the rights of the child, and the United Nations Security Council adopts resolutions on children in armed conflict. Noteworthy, in relation to the special procedures under the United Nations system, is the existence of mandates related to

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Convention on the Rights of the Child gives a clear measure of the extent of this solid consensus. The Commission and the Court have indicated that the integration of the regional system with the universal system of human rights, for the purpose of interpretation of the American Convention, finds its grounds in Article 29 of the American Convention and in the repeated practice of the Court and the Commission in this subject[17].

36. Accordingly, and with regard to the subject of this report, the Commission considers that the legal framework for protection of the human rights of children should take into special account, for interpretation purposes of the content and scope of Article 19 of the American Convention and Article VII of the American Declaration, the United Nations Convention on the Rights of the Child as well as the United Nations Guidelines for the Alternative Care of Children.[18]

37. Moreover, when applicable, consideration will be given to other international human rights instruments of a general scope, as well as to the relevant specific international instruments, under both the United Nations and the Inter-American Human Rights Systems.

38. For purposes of interpretation, the *corpus juris* also includes the decisions adopted by the United Nations Committee on the Rights of the Child in furtherance of its mandate, and the decisions of other human rights bodies and special mechanisms under the universal system.[19] The aforementioned shows not only the

…continuation
the rights of the child, which include: the Special Rapporteur on the sale of children, child prostitution, and child pornography; the Special Rapporteur on the right to education; and the Special Rapporteur on trafficking in persons, especially women and children. Other special procedures have also addressed the rights of the child within their thematic spheres of competence, for example, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on the human rights of internally displaced persons. Reference should also be made to the United Nations Special Representative of the Secretary-General on violence against children and to the United Nations Special Representative of the Secretary-General for children and armed conflict.

[17] IACHR, Report No. 41/99, *Case 11,491, Juvenile detained against Honduras*, March 10, 1999, paragraph 72. I/A Court H.R., *Case Contreras and others v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011 Serie C No. 232, paragraph 112.

[18] In relation to the U.N. Guidelines for the Alternative Care of Children, it bears mentioning that the Committee on the Rights of the Child, by virtue of the power granted it under Article 43 of the CRC to oversee implementation of the Convention by the States Parties, requests them to take into account the contents of the "Guidelines for the Alternative Care of Children" when they report to the Committee on the degree of fulfillment of their international obligations under the CRC, pursuant to Article 44 of thereof. The Committee is therefore of the view that the U.N. Guidelines for the Alternative Care of Children provide information for coming to a clearer understanding of and effectively implementing the Articles of the CRC on the subject of children without parental care or at risk of being so. Document "Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under Article 44, paragraph 1 (b), of the Convention on the Rights of the Child," adopted by the Committee on the Rights of the Child at its fifty-fifth session (September 13–October 1, 2010), CRC/C/58/Rev.2.

[19] IACHR, *The Rights of the Child in the Inter-American Human Rights System*, para. 43. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 19.

existence of a common legal framework in the international human rights law applicable to children, but also the global interdependence of the different international systems for protection of the human rights of children, which has been reflected in the jurisprudence of the Inter-American Court.

39. Lastly, the Commission underscores that Member States which have not ratified the American Convention are equally bound by the *corpus juris* on children's rights, because Article VII of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration") provides that all children have the right to special protection, care, and aid.[20]

B. The duty of special protection of children and adolescents

40. Article 19 of the American Convention establishes that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." Similarly, the American Declaration states in its Article VII that "[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."

41. The Commission and the Court have clearly stated that children "have the same rights as all human beings (…) and also special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State."[21] Consequently, Article 19 of the ACHR should be viewed as an additional and complementary right that the treaty establishes for children, who, due to their state of development, require special protection.[22] This special protection that is to be given to children under international human rights law is based on their condition as developing persons and is justified in regards to their differences from adult persons, in terms of

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[20] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 20; and *The Rights of the Child in the Inter-American Human Rights System*.

[21] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54.

[22] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 54, 55, and 60; I/A Court H.R., *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006. Series C No. 148, para. 244; I/A Court H.R., *Case of the Mapiripán Massacre vs. Colombia*, Judgment of September 15, 2005. Series C No. 134, para. 152; and especially I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay,* Judgment of September 2, 2004. Series C No. 112, para. 147; I/A Court H.R., *Case of Servellón García et al. v. Honduras*, Judgment of September 21, 2006, para. 113; I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 164; I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, para. 408; and *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment of November 24, 2009, para. 184; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, paras. 124, 163–164, and 171; I/A Court H.R., *Case of Bulacio vs. Argentina*, Merits, Reparations, and Costs. Judgment of September 18, 2003. Series C No. 100, paras. 126 and 134; I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 146 and 185; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, para. 172.

possibilities for, and challenges in, realizing the effective exercise and full applicability of their rights.[23]

In the words of the Court:

> As was pointed out during the discussions on the Convention on the Rights of the Child, it is important to highlight that children have the same rights as all human beings–minors or adults–, and also special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State.[24]

42. Thus the duty of special protection is based on recognition of the special condition of children who, because of their progressive development at all levels—physical, cognitive, emotional, psychological, and social—depend on adults for effective access to and enjoyment of all their rights, as well as for recourse to legal action to demand them.[25] This dependency on adults, and its intensity, is modified in accordance with the evolution of the capacities of the child and his or her degree of maturity. Therefore, to guarantee their most fundamental rights, children rely directly

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[23] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 51.

The need to provide special protection to children has been expressed in various international human rights instruments. The preamble to the United Nations Convention on the Rights of the Child makes specific mention to this notion of special protection for children. It is also recognized in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. Likewise, it is referenced in pertinent statutes and instruments of specialized agencies and international organizations with mandates related to children. In this connection, the United Nations International Covenant on Civil and Political Rights contains an Article with wording similar to that of Article 19 of the ACHR. Article 24(1) of the Covenant establishes that "[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." The Human Rights Committee, the treaty body charged with overseeing compliance with the Covenant, clarifies in its General Comment No. 17 that "[t]he implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under Article 2 to ensure that everyone enjoys the rights provided for in the Covenant" (para. 1). Specialized international instruments preceding the Convention on the Rights of the Child also reflect the concept of special protection, which is the case, for example, of the 1924 Geneva Declaration on the Rights of the Child and the 1959 Declaration of the Rights of the Child.

[24] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54.

[25] I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 185; I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 164; I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 126; I/A Court H.R., *Case of Bulacio v. Argentina*. Merits, Reparations, and Costs. Judgment of September 18, 2003. Series C No. 100, paras. 126 and 134; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, para. 177; and I/A Court H.R., *Case of Servellón García v. Honduras*, Judgment of September 21, 2006, Serie C No. 152, para. 116. Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session, para. 17.

on adults to receive necessary attention and care, particularly in the first stages of their lives. It is because of this special situation in which children, find themselves with regard to the exercise of their rights, that international human rights law places the States in a position of reinforced guarantors, which entails the adoption of a series of measures of different types and content, directed towards children.[26]

43. In this regard, in the Inter-American human rights system, Article 19 of the American Convention and Article VII of the American Declaration, give rise to the obligation of Member States to take all necessary measures to ensure the effective validity of the rights of the child, removing any obstacles, and taking into account the particular circumstances and challenges children face, in the enjoyment of their rights.[27]

44. In examining the scope and content of the duty of special protection, it must be taken into consideration that the condition of dependence of children evolves naturally over time in accordance with their growth, maturity level, and gradually increasing personal autonomy. This results in a corresponding change in the content of the duties and responsibilities of the family, community, and State toward children. Consequently, those duties and responsibilities must be consistent with the children's level of development and their gradually evolving ability to take decisions independently about themselves and the exercise of their rights.[28] This rationale is consistent with the vision of children as subjects of rights that must be respected and promoted integrally , thus leaving behind the notion of children regarded simply as object and recipients of assistance and care.

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[26] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60; I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations, and Costs. Judgment of September 18, 2003. Series C No. 100, paras. 126 and 134; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, para. 177, and I/A Court H.R., *Case of Servellón García v. Honduras*, para. 116. I/A Court H.R., I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 164; I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005. Series C No. 134, para. 152, and I/A Court H.R., *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006. Series C No. 148, para. 244; I/A Court H.R., *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment of November 24, 2009, para. 184.

[27] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 60. This international consensus is also reflected in other international instruments, such as the International Covenant on Civil and Political Rights (Art. 24) and the Protocol of San Salvador (Art. 16).

[28] The Inter-American Court of Human Rights has established that "In the case of children, they exercise this right in a progressive manner in the sense that the minor of age develops a greater level of personal autonomy with time". I/A Court H.R., *Case of Gelman v. Uruguay.* Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 129. Committee on the Rights of the Child, General Comment No.12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 84 and 85; and Committee on the Rights of the Child, General Comment No. 7*, Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session, para. 17.

45. The special protection obligation set forth in Article 19 of the ACHR is related to Article 1(1) of the ACHR [29] in relation to the obligations of respect and guarantee, and with Article 2 of the ACHR[30] thereof regarding the duty to adopt such provisions of domestic law as may be necessary and adequate in order to give effect to the duty of special protection for children.

46. Among the domestic legislative measures that the Member States must adopt to meet the obligations under Article 19 of the ACHR and Article VII of the ADRDM are (i) obligations of a general nature that are directed at children as a whole and are designed to promote and ensure the effective enjoyment of all their human rights; (ii) those of a specific nature directed at specific groups of children, established according to the particular vulnerable circumstances in which they find themselves and their special needs for special protection; and (iii) the Inter-American Court has also indicated that "it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child"[31], in other words, this assumes that a special measure entailing suitable, appropriate, and individualized protection will be determined and implemented—one that takes account of the child's need for protection as an individual in his or her specific context. Hence the Court has drawn a distinction between the different levels of obligations imposed on States under Article 19 of the Convention.

47. In the case of children without parental care or at risk of being so, considering the preeminent role played by the family in the child's life and the primary responsibility of the family for affording the child the conditions needed for his or her well-being and protection, the absence of this care or the inability or impossibility of parents to meet their parental responsibilities places the child in a particularly vulnerable situation that could affect all of the child's rights, including the rights to life, personal integrity and integral development. Accordingly, the State must adopt special, appropriate, and suitable measures to protect the rights of all children who are, or might be, in this situation. This protection obligation under Article 19 of the ACHR and the general responsibilities under Articles 1(1) and 2 of the ACHR require the State to adopt a normative framework, public policies, programs, and services, to establish appropriate institutions and agencies, and to take any other necessary measure to

[29] Article 1 of the Convention establishes the obligation to respect rights: "1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, 'person' means every human being."

[30] Article 2 of the Convention establishes the obligation to adopt provisions under domestic law: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[31] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 61.

protect and guarantee the rights of children who are part of this group that is prone to having its rights violated.

48. In addition, and considering that the Court has indicated that the obligations to protect and guarantee can be determined according to the protection needs of the subject of the rights,[32] the obligation exists to take an individualized course of intervention to meet the specific protection needs of a child who is deprived of adequate parental care or at risk of being so. This intervention, of which the purpose is to adopt a special measure of protection, must be carried out in the framework of a specially adapted procedure—one that is respectful of the principle of legality and provides due guarantees, as considered in detail in subsequent sections.

C. The right of the child to a family

49. The American Convention recognizes rights associated to family and family life free from unlawful interference in two provisions in its article, from different perspectives. On one hand, the American Convention in its Article 17(1) recognizes the right to protection of the family and in Article 11(2) it recognizes the right to a family life free from unlawful interference, which gives rise to the obligation to respect the right by prohibiting arbitrary or unlawful interference with the right to family life.[33] In the same terms, Article VI of the American Declaration recognizes the right to family and Article V recognizes the right to protection of family from abusive attacks.

50. In the following an analysis will be given, first of all, of the right to a family and the preeminence that international human rights law conferrs to the family as an interpersonal bond and natural environment for the personal integral development of all its members and, in particular, children because of their very condition. Likewise established will be the close relationship existing between the right of the child to a family and the exercise of his or her other rights, and, therefore, with Article 19 of the ACHR. At the end of the section, a general reference will be made to the characteristics that any intervention in family life should have to prevent it from constituting unlawful interference with family life, which is incompatible with the American Convention and the American Declaration. The principles and guarantees that should prevail in interventions restricting the rights to family and family life, in keeping

[32] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, para. 154; In the same sense: I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60; I/A Court H.R., *Case of Fornerón and daughter v. Argentina.* Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 45; I/A Court H.R., *Case of Gelman v. Uruguay,* Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 121.

[33] I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, paras. 156–158; I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 66–71; I/A Court H.R. *Case of Artavia Murillo et al. ("In Vitro Fertilization ") v. Costa Rica.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257, paras. 142–145.

with the American Convention and Declaration, will be addressed in detail in later sections of this report. In a subsequent passage, an in-depth analysis will be made of Article 17(1) of the Convention, in particular with regard to the obligations to provide services that said Article imposes on States.

51. International human rights law recognizes the family as the central nucleus for the protection of children and adolescents, as well as recognizing the right of children to live with their families.[34] Specifically, Article 17(1) of the American Convention provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"; Article VI of the American Declaration expresses that notion in similar terms: "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore".

[34] According to the Inter-American Court of Human Rights, the concept of family should not be confined exclusively to marriage or to a univocal and immutable concept of family. The Court, in the decision *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02, August 28, 2002, Series A, No. 17, citing a decision of the European Court of Human Rights, states that the concept of family life "is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage" (para. 69). The Inter-American Court also "deems that the term 'next of kin' must be understood in a broad sense that encompasses all persons linked by close kinship" (para. 70). In another decision, the Inter-American Court held more specifically that "the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family. In this regard, it reiterates that "the concept of family life is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage," while at the same time it rejects "a limited, stereotyped perception of the concept of family, which has no basis in the Convention, since there is no specific model of family (the 'traditional family')", I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile.* Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, paras. 142 and 145. Further, the Court considers, in light of Article 17(1) of the Convention, that the imposition of a specific vision of the family could constitute arbitrary interference with the right to private life, recognized in Article 11(2) of the American Convention: "Indeed, the Court considers that the imposition of a single concept of family should be analyzed not only as possible arbitrary interference with private life, in accordance with Article 11(2) of the American Convention, but also, because of the impact it may have on a family unit, in light of Article 17 of said Convention." I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile,* Judgment of February 24, 2012. para. 175. "The Court notes that social, cultural, and institutional changes are taking place in the framework of contemporary societies, which are aimed at being more inclusive of their citizens' different lifestyles. This is evident in the social acceptance of interracial couples, single mothers or fathers and divorced couples, which at one time were not accepted by society. In this regard, the law and the State must help to promote social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights*."* I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*, Judgment of February 24, 2012. para. 120. See also I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 98 The Commission uses the term family as established by the jurisprudence of the inter-American system, i.e., in the broad sense described.

As concerns the United Nations system, mention should be made to the views of the Committee on the Rights of the Child regarding the concept of family; thus, the Committee on the Rights of the Child, in General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session, paras. 15 and 19, indicates that "[t]he Committee recognizes that 'family' here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests. […] The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children."

52. For its part, the Convention on the Rights of the Child acknowledges something similar when indicating in its preamble that the family is the natural environment for the growth and well-being of all its members and particularly children. In addition, the CRC refers in various provisions to the right of the child to live with his or her parents and to be cared for by them, as well as the obligation of States to support families so as to enable them to effectively fulfill their functions.[35] The recognition of the right to a family and to the development of a family life free from unlawful interference is also recognized in various international human rights instruments, among them in Article 15 of the Protocol of San Salvador,[36] Article 16(3) of the Universal Declaration,[37] Article 23(1) of the International Covenant on Civil and Political Rights,[38] and Article 10 of the International Covenant on Economic, Social and Cultural Rights.[39] Other specific international human rights instruments, such as the United Nations Convention on the Rights of Persons with Disabilities,[40] also recognize the right to a family, and in particular, the said instrument underscores that all children with disabilities[41] must be given the opportunity to live and grow up in a family, recognizing the particular challenges this group faces in realizing this right.[42]

53. The Court and the Commission have, in various decisions concerning the right to protection of the family recognized in Article 17(1), in relation to Article 19, taken a position on the content and scope of the Member States' obligations regarding

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[35] In particular, Articles 3(2), 5, 7, 8, 9, 10, 11, 18, 20, 21, and 27 of the CRC, which will be examined later in this report.

[36] Article 15 of the Additional Protocol to the American Convention on the Subject of Economic, Social and Cultural Rights "Protocol of San Salvador" establishes the Right to the Formation and the Protection of Families: "1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions (…) 3. The States Parties hereby undertake to accord adequate protection to the family unit (…)"

[37] Article 16(3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[38] Article 23(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[39] Article 10(1): "1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. (…)"

[40] United Nations Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly in its resolution 61/106 of December 13, 2006.

[41] In referring to "disabilities" or to a "child with disabilities," the Commission uses the definition contained in the United Nations Convention on the Rights of Persons with Disabilities: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1).

[42] See Articles 19 and 23 of the United Nations Convention on the Rights of Persons with Disabilities.

the rights established in these articles. The Court has expressed itself in the following terms:

> In principle, the family should provide the best protection of children (…). And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus." In this regard, "[r]ecognition 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.[43]

54. International human rights law recognizes the right of children to live with their families and to be cared for and brought up by their parents in the family setting. The primary responsibility for the well-being of children and the enjoyment of their rights lies with their parents and with members of their families of origin, regardless of the composition of said families and of how they are constituted. In turn, parents have a number of rights and responsibilities in the context of parent-child family relationships, which States must respect and guarantee. In this connection, the Convention on the Rights of the Child is clear in pointing out that parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and the physical, mental, spiritual, moral and social development of the child, with the best interests of the child and his or her well-being being necessarily their basic concern. The CRC is also clear in establishing the obligation of States to render necessary support and adequate assistance to parents and families in the fulfillment of family responsibilities.

55. Article 5 of the CRC makes the following reference to parental child-rearing responsibilities and to the duty of the State to respect the exercise of parental duties:

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

[43] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 66; I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 156; I/A Court H.R., *Case of Gelman v. Uruguay*, Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para 125.

The wording used in Article 14(2) of the CRC is similar but more specific when it indicates that:

> States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right [right to freedom of thought, conscience, and religion] in a manner consistent with the evolving capacities of the child.

56. Article 18 of the CRC introduces the obligations of the State to support and render assistance to parents and family in the performance of parental responsibilities:

> 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children (…).

57. The right to a family is closely related to the effective exercise of all rights of the child, due to the position held by the family in the child's life and its role in the provision of protection, care, and upbringing. During the first few years of a child's life, when he or she is most dependent on adults for the realization of rights, the relationship between the right to a family and the rights to life, integral development, and personal integrity, is a particularly strong one. In accordance with the role the family plays in the child's life and the strong relationship between the right to a family and other rights of the child, the CRC relates the right to family to the fullfillment of the principle of best interests of the child, established in Article 3 of the CRC.[44] In this article,

[44] The Committee on the Rights of the Child has understood that the so-called "principle of the best interests of the child," recognized in Article 3 of the CRC, is one of the four basic principles that underpin and inform the entire Convention on the Rights of the Child and its implementation. Committee on the Rights of the Child, General Comment number 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, November 27, 2003, thirty-fourth session, para. 12.

Article 3 of the CRC establishes: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (…)."

the CRC links, in particular, the implementation of the rights and interests of the child to two factors: (i) on the one hand, the rights and duties of parents, legal guardians, or other individuals legally responsible for the child; and (ii) on the other hand, the responsibility of States to ensure such protection and care as are necessary for the child's well-being. This connection points to the fundamental, primary importance of the family in the child's life and in the realization of his or her rights and best interests, especially in the early childhood stages, and simultaneously establishes the State's obligation to ensure that conditions exist in order for said effective protection to be provided by the child's parents and family, considering the realization of all the rights of the child, or, in the case in which this is not possible or is against the rights of the child, to take appropriate measures for the child's protection. Additionally, in line with the holistic interpretation of the CRC by the Committee on the Rights of the Child, the realization of the interests of the child must be considered in light of the progressive autonomy of children in making decisions that affect them and the exercise of their rights.[45]

58. The right to a family is also linked in particular to the right to identity and the right to a name recognized in Article 18 of the American Convention. Article 18 provides that:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

59. The Court and the Commission have heard cases in which they have examined the right to a name and the provisions of Article 18 of the American Convention. In referring to the content of Article 18 of the Convention, the Inter-American Court established that the right to a name constitutes a basic and essential element of the identity of each individual, without which he or she cannot be recognized by society or registered by the State.[46] For its part the Commission, in relation to cases on the forced disappearance of children , has recognized the existence of the right to identity, associated with other rights such as the right to a name, a nationality, a family and to have family relations, all of which are included in the American Convention.[47]

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[45] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 74, 84, and 85. General Comment No. 14 (2013) on *the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* adopted by the Committee on the Rights of the Child at its 62nd session, paras. 43 and 44.

[46] I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005, paras 182 and 184.

[47] IACHR, Application before the Inter-American Court of Human Rights in the case of *Gregoria Herminia Contreras et al. (Case 12.517) against the Republic of El Salvador*, para. 217. See also the position of the IACHR in the case before the I/A Court H.R., *Case of the Serrano Cruz Sisters v. El Salvador*, Judgment of March 1, 2005. Merits, Reparations, and Costs, para. 117, ".(…) the right to identity, particularly in the case of children and of forced disappearance, is a complex legal issue that acquired relevance with the adoption of the

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60. Article 8 of the United Nations Convention on the Rights of the Child addresses the right to identity as follows:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
>
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

61. Article 8 of the CRC is clear in pointing out that one of the elements of the right to identity is the right of the child "to preserve his or her family relations as recognized by law without unlawful interference." Children's personalities and identities are forged by multiple factors, notable among them the creation of affective ties between themselves and the persons closest to them, who provide them with care and affection and give them the guidance and direction they need for their personal development. The influence of the people closest to children during their growth process and the gradual development of every aspect of their personalities results in the establishment of an intrinsic link between the family and the right to identity.

62. The Court has stated the following with regard to the right to identity:

> [the right to identity] can be conceptualized, in general, as a series of attributes and characteristics that allow the individualization of the person in society and, in this regard, includes several other rights according to the subject of law in question and the circumstances of the case. Personal identity is closely related to the person in his or her specific individuality and private life, both supported by a historical and biological experience, and also by the way in which the said individual relates to others, by developing social and family ties. This is why, although identity is not a right that is exclusive to children, it has special importance during childhood.[48]

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Convention on the Rights of the Child. This right has been recognized by case law and by legal writings as both an autonomous right and as the expression of other rights or as a constituent element of these. The right to identity is intimately associated with the right to the recognition of legal personality, the right to a name, a nationality, and a family and to have family relationships. The total or partial suppression or modification of the right of the child to preserve his identity and its intrinsic elements entails State responsibility."

[48] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 123; I/A Court H.R., *Case of Gelman v. Uruguay*, Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 122; and I/A Court H.R., *Case of Contreras et al. v. El Salvador*. Merits, Reparations, and Costs. Judgment of August 31, 2011. Series C No. 232, para. 113.

> And the Court has added:
>
> > Thus, with regard to boys, girls, and adolescents, based on the provisions of Article 8 of the Convention on the Rights of the Child, the right to identity comprises, among other matters, the right to family relationships.[49]

In a recent decision, the Court once again clarified the link between the right to identity and the right to a family:

> > The family relationships and the biological aspects of the history of an individual, particularly a child, constitute a fundamental element of his or her identity, so that any act or omission of the State that has an effect on the said components can constitute a violation of the right to identity.[50]

63. Associated with the foregoing, it is important to present the position held by the IACHR and the Court on situations in which children have been separated from their parents and their biological families as a result of an action attributable to the State. On occasions on which the IACHR and the Court have had the opportunity to rule on the matter, they concluded that there had been violations of both the right to family protection and the right to identity, as well as of Article 19 of the ACHR. As stated by the Court:

> > […] the fact that, in all these years, M [the name of the girl] has not had any contact or ties with her family of origin has not allowed her to create the family relationships that correspond to her by law. Consequently, the impossibility of M to grow up with her biological family and the absence of measures aimed at establishing a relationship between father and daughter affected the right to identity of the child M, in addition to her right to the protection of the family.[51]

64. Consequently, analyzed from the viewpoint of the State's obligations stemming from Articles 17(1) and 19 of the American Convention, children are entitled

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[49] I/A Court H.R., Matter of L.M. regarding Paraguay. Order of the Inter-American Court of Human Rights of July 01, 2011, Considerative paragraph 15; See also, I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 122. In the same sense see the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Article 3.

[50] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 113.

[51] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 123.

to live with their families, primarily their biological families,[52] and that the protection measures to be provided for them by the State, recognized in Article 19, prioritize strengthening the family as the principal unit for protecting and caring the child.[53] States are obligated to act in favor of, in the broadest form possible, the development and consolidation of the family nucleus, as a protecting measure of the child.[54] From the former, it is inferred that States require a National System for the Promotion and Protection of the Rights of the Child that includes policies for family support and assistance, which takes into account the role of families as the natural environment in which children grow and should be provided of care and the necessary protection for their integral, harmonious development.[55]

D. Measures that imply family separation: principle of necessity, exceptionality and temporal determination (transiency)

65. Likewise, obligations for the States arise in situations in which the capacity or ability of families to care and protect a child is limited, in practice. In the face of such particular circumstances of the family, it is the obligation of the State to take special measures of protection to support the family in order to recover said situation. However, if the best interest of child so warrants, the authorities can take special measures of protection involving the separation of the child from his or her family.

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[52] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 119.

[53] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, paras. 71–73, and 76.

[54] See I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 66; I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 125; and I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 157. IACHR, *Report No. 83/10, Case 12.584, Merits. Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina,* November 29, 2010, para. 105. See also the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), adopted by the United Nations General Assembly in its resolution 45/112 of December 14, 1990, Guidelines 12 and 13. Along the same lines, Articles 1, 2, and 3 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, adopted by the United Nations General Assembly in its resolution 41/85 of December 3, 1986.

[55] The same rationale applies to several of the General Comments of the Committee on the Rights of the Child that touch on topics related to the importance of family care and the State's obligation to support it, in particular: Committee on the Rights of the Child, General Comment number 3, *HIV/AIDS and the rights of the child*, CRC/GC/2003/3, March 17, 2003, thirty-second session; Committee on the Rights of the Child, General Comment number 4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, July 21, 2003; General Comment number 7*, Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session; Committee on the Rights of the Child, General Comment number 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Art. 19, para. 2, and Arts. 28 and 37, inter alia),* CRC/C/GC/8, August 21, 2006, forty-second session; Committee on the Rights of the Child, General Comment number 9, *The rights of children with disabilities*, CRC/C/GC/9, February 27, 2007, forty-third session; Committee on the Rights of the Child, General Comment number 13, *The right of the child to freedom from all forms of violence,* CRC/C/GC/13, April 18, 2011.

66. One of the contents of the right to a family is the possibility of defense from any unlawful or arbitrary interference with family life. Article 11(2) of the American Convention and Article V of the American Declaration establish that no one may be the object of arbitrary or abusive interference with his or her private family life.[56] The principles of necessity, exceptionality, and temporal determination in relation to special measures of protection that involve the separation of a child from his or her parents, for the purpose of protection, are derived from a necessary balance between the rights contained in Articles 17(1) and 11(2), and Article 19 of the Convention, and V and VI of the American Declaration with VII of the same instrument.

In this regard, the Court has stated that:

> [t]he 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, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, and 8 of the European Human Rights Convention. These provisions are especially significant when separation of a child from his or her family is being analyzed.[57]
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> (…) 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.[58]

67. These principles of necessity, exceptionality, and temporal determination in relation to the possible separation of a child from his or her family, for reasons of protection, have also been established in the universal human rights system, particularly by the CRC, and by other international instruments and norms, such as the

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[56] Article 11(2) of the American Convention on Human Rights: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." The prohibition of arbitrary interference in personal life is also covered in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights. Article 16 of the CRC expressly recognizes the right of children, as holders of rights, to a family life free from arbitrary or unlawful interference.

[57] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 71; and I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 157.

[58] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, operative paragraph 5 and para. 77.

United Nations Guidelines for the Alternative Care of Children, and by the United Nations Committee on the Rights of the Child in many of their decisions. Precisely, the U.N. Guidelines for the Alternative Care of Children have set out orientations for policy and practice regarding the protection and well-being of children deprived of parental care or at risk of being so, based on the aforementioned principles.

68. In that regard, Article 9 of the Convention on the Rights of the Child establishes that:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> (…)
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (…).

69. Guideline 14 of the U.N. Guidelines for the Alternative Care of Children specifies the following with regard to protection measures involving the separation of the child from his or her parents or family:

> Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration. Removal decisions should be regularly reviewed and the child's return to parental care, once the original causes of removal have been resolved or have disappeared, should be in the best interests of the child (…).

70. Certain situations and circumstances require that the State take protective action involving the temporary separation of the child from his or her parents in order to protect the child's rights and well-being, thus serving the best interests of the child. From the special duty of protection recognized in Article 19 of the Convention derives the obligation to establish special measures to protect children when it is deemed that they lack adequate parental care and that, based in their best interests, protection, and well-being, they must be separated temporarily from the family nucleus. In this matter, the CRC establishes expressly, in its Article 20, the duty of States to ensure special measures of protection and alternative care for children deprived of adequate parental care:

> 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to

> remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. (…)"

71. In their decisions, the Commission and the Court have reiterated that any protection measures involving the separation of a child from his or her family should be based on these principles of necessity, exceptionality, and temporal determination.[59] For the interference to be consistent with the parameters set by the American Convention, the separation may only take place in exceptional circumstances, when there are determining reasons, based on the child's best interests of the child. Furthermore, to give adequate fulfillment to Article 11(2) of the Convention and V of the Declaration regarding the prohibition of unlawful or arbitrary interference with family life, the decision concerning the set of circumstances justifying these alternative care measures must be made by a competent authority in accordance with applicable law and procedures, with strict respect for due process guarantees, and must be subject to judicial review.[60] Moreover, in cases where a child is separated from the family nucleus, the State must do its utmost to preserve family ties by intervening on a temporary basis and directing its action toward the reintegration of the child into his or her family and community, as long as this is not contrary to the child's best interests. The Inter-American Court has very clearly established that children must be returned to their parents as soon as circumstances allow.[61]

72. Similarly, the purpose of the temporary special measures of protection involving the separation of the child from his or her parents may be inferred from the said principles of necessity, exceptionality, and temporality, stemming from a joint analysis of Articles 11(2), 17(1), and 19 of the Convention, and V,VI and VII of the Declaration. Hence, the special measures of protection entailing placement of a child under alternative care must be aimed, from their very design, determination,

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[59] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, operative paragraph 75 and para. 77, and IACHR Report No. 83/10, Case 12.584, Merits. Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina, November 29, 2010, paras. 103, 108 y 110, and, I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, paras. 47 and 48

[60] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, operative para.113. See, IACHR, Report No. 83/10, Case 12.584, Merits. Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina, November 29, 2010, para. 110; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, paras. 116 y 117.

[61] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, operative paragraph 75 and para. 77.

implementation, and review, at restoring rights, primarily in reestablishing family life and resolving the causes that led to adoption of the separation measure. The aforementioned is applied only in those cases when the child's reintegration into the family of origin is not contrary to his or her interests. Consequently, the measure must come under periodic review in order to follow up on the child's situation and well-being and enable appropriate action to be taken to bring about circumstances allowing the child to return to his or her family of origin and parental custody as soon as possible.

73. The Commission considers that, in keeping with the requirements under Article 11(2) of the Convention and V of the Declaration, it should be possible at all times to verify the suitability and legitimacy of special measures of protection involving the separation of the child from his or her parents and biological family. The decision to apply this kind of measure, as well as its review, must meet the requirements of legitimacy and suitability and must therefore be founded on objective criteria previously set by law, be made by specialized technical personnel trained to conduct this type of evaluation, and be subject to review by a judicial authority.[62]

74. However, in situations and cases in which it proves impossible to restore a child's ties with his or her parents or extended family, special measures of protection of a permanent nature will be taken to bring about a definitive solution to the child's situation, in keeping with the best interests of the child and, in particular, with his right to live, grow up, and develop within a family. Legal adoption facilitates a permanent solution in these cases. Due respect for rights under Articles 17(1) and 11(2) of the Convention, in relation to parental rights, implies that decisions on the definitive removal from parental custody and the ruling on a child's adoptability should be made by a competent judicial authority, with strict respect for the law and procedural guarantees.[63] Permanent special measures of protection are not the subject of this report, although some specific references will be made to adoption whenever relevant in the logical exposition of content of this report.

75. In conclusion, States have the following obligations that derive from a joint analysis of Articles 11(2), 17(1), and 19 of the American Convention and Articles V, VI, and VII of the American Declaration: (i) first of all, the positive obligation of States to adopt measures to protect the family that enable and ensure the effective exercise of parental rights and responsibilities, thus preventing situations in which children are unprotected; (ii) likewise, the obligation of States to design and implement special measures of protection of a temporary nature to adequately meet the child's needs for protection when the family, despite having received appropriate support, cannot effectively meet its obligations to provide care or when remaining in the family setting may be contrary to the best interests of the child, in which case protection measures must be adopted that involve separation of the child from his or her family and

[62] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 113. IACHR, *Report No. 83/10, Case 12.584, Merits. Milagros Fornerón and Leonardo Aníbal Fornerón*, Argentina, November 29, 2010, paras. 103 and 110.

[63] See Articles 9 and 21 of the CRC.

placement in an alternative care environment; and (iii) in light of the aforementioned articles, the alternative care measures must be duly justified by law, temporary in nature, and directed at restoring rights, reestablishing family ties, and reintegrating into a family environment as soon as possible, based on the best interests of the child and must be subject to judicial review.[64]

E. Laws, policies and practices to support and protect families

76. Laws and policies to support and protect the family contribute towards enabling parents in the exercise of their parental functions and help avoid that families are immersed in situations in which their capacity to provide their children with adequate care and well-being is limited. In this connection, as mentioned above, the Court has held that States are obligated to favor, in the broadest manner possible, development and strengthening of the family nucleus as a means of protecting the child, thereby establishing an intrinsic connection between Article 17(1) and Article 19 of the Convention.[65]

77. The right to protection of family recognized in Article 17(1) of the ACHR, and V of the Declaration assumes significant relevance in reference to the matter of children without adequate parental care or at risk of being so. In general, laws, policies, practices and measures to support and strengthen family constitute an important means of protecting the rights of the child. If we consider the role played by the family in the life of a child, these laws, policies and measures directed to the family have the potential of making a direct and positive contribution to the realization and exercise of all rights of the child, including the right to live in his or her own family and to be brought up in it. Particularly, the adoption and implementation of measures and public policies to protect the family are relevant in order to prevent situations in which a child is vulnerable to lack of protection, which could lead to his or her separation from the family nucleus; they could also become suitable measures for supporting the reintegration of the child to his or her family of origin, by helping the family address the causes that led to the adoption of the special measures of protection.

78. If we take the *corpus juris* on this matter into account, the Protocol of San Salvador[66] and the Convention on the Rights of the Child establish in various

[64] Beijing Rules, Rules 17 and 18. I/A Court H.R., *Case of Gelman v. Uruguay*, Merits and Reparations. Judgment of February 24, 2011, Series C No. 221, para. 125; I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 75.

[65] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 66; I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile. Merits,* Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. para. 169; I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, paras. 156 and 157; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, para. 116.

[66] Article 15 of the Protocol of San Salvador establishes that "[t]he States Parties hereby undertake to accord adequate protection to the family unit and in particular: a. To provide special care and assistance to mothers during a reasonable period before and after childbirth; b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years; c. To adopt special measures for the

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provisions that, for the purpose of guaranteeing and promoting the rights of the child, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their parental responsibilities.[67] Other international instruments also emphasize the State's obligation to increase to the extent possible the capacity of families to perform parental responsibilities, linking this obligation to the protection of children and their rights. In that sense, the United Nations Human Rights Committee expressly linked the protection due the family under Article 23(1) of the International Covenant on Civil and Political Rights to the fulfillment of the duty to protect children because of their special condition, recognized in Article 24(1) of the same Covenant.[68] For their part, the United Nations Guidelines for the Prevention of Juvenile Delinquency, also known as the Riyadh Guidelines,[69] indicate that "[e]very society should place a high priority on the needs and well-being of the family and of all its members" and likewise that "[t]he State must also safeguard stability of the household, facilitating, through its policies, provision of adequate services for the families, ensuring conditions that enable attainment of a decent life."[70] The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (hereinafter "Declaration on Social and Legal Principles relating to the Protection and Welfare of Children"[71] underscores the high priority States should give to family and child welfare and indicates that child welfare depends upon family welfare.[72]

79. In 2005, the United Nations Committee on the Rights of the Child devoted a Day of General Discussion on the theme of children without parental care or at risk of being so. One of the main conclusions drawn by said committee as a result of the discussion with States, United Nations specialized agencies, civil society organizations, academics and experts, highlights the need to develop comprehensive,

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protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities; d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility."

[67] Specifically, Articles 18 and 27 of the CRC.

[68] Human Rights Committee, General Comment No. 17: *Article 24 – Rights of the child,* thirty-fifth session, HRI/GEN/1/Rev.7, p. 144 (1989); and General Comment No. 19: *Article 23 – The family,* thirty-ninth session, HRI/GEN/1/Rev.7, p. 149 (1990).

[69] United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), adopted by the United Nations General Assembly in its resolution 45/112 of December 14, 1990.

[70] Riyadh Guidelines, Guidelines 11–13. Likewise, Committee on the Rights of the Child - Day of General Discussion on the theme of children without parental care, 2005, Report of the fortieth session of the Human Rights Committee, CRC/C/153, paras. 636–689, and I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 67.

[71] Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, adopted by the United Nations General Assembly in its resolution 41/85 of December 3, 1986.

[72] Articles 1 and 2. Declaration adopted by the United Nations General Assembly in its resolution 41/85 of December 3, 1986.

complementary public policies to support families in development of their parental responsibilities and thus avoid situations which leave children unprotected:

> Acting on the basic premises that children do not develop properly outside of a nurturing "family" environment and that parents need a decent chance to raise their children, the Committee recommends that States parties develop, adopt and implement, in collaboration with the civil society, i.e. with non-governmental organizations, communities, families and children, a comprehensive national policy on families and children which supports and strengthens families. The national policy should not only focus on the State subsidies and material assistance to families in need but to provide families with support in the form of so-called service plans, including access to social and health services, child-sensitive family counseling services, education and adequate housing. The Committee recommends that the families and the family associations are integrated into the development of the national family policies and service plans.[73]
>
> (…)
>
> The Committee recommends that States parties develop and implement a comprehensive policy for the prevention of the placement in alternative care which is based on a multidisciplinary approach, includes appropriate legislation and a complimentary service system. The Committee further recommends that all prevention policies should be based on the principle of the best interests of the child.[74]

80. Along the same lines, several of the U.N. Guidelines for the Alternative Care of Children make reference to the obligation of the Member States to design and implement measures and policies to render support and assistance to families:

> The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the caregiving role.[75]

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[73] Committee on the Rights of the Child – Day of General Discussion on the theme of children without parental care, 2005, Report of the fortieth session of the Committee on the Rights of the Child, CRC/C/153, para. 645.

[74] Committee on the Rights of the Child – Day of General Discussion on the theme of children without parental care, 2005, Report of the fortieth session of the Committee on the Rights of the Child, CRC/C/153, para. 650.

[75] Guideline 3.

> States should pursue policies that ensure support for families in meeting their responsibilities towards the child and promote the right of the child to have a relationship with both parents. These policies should address the root causes of child abandonment, relinquishment and separation of the child from his/her family (…).[76]
>
> States should develop and implement consistent and mutually reinforcing family-oriented policies designed to promote and strengthen parents' ability to care for their children.[77]
>
> States should implement effective measures to prevent child abandonment, relinquishment and separation of the child from his/her family. Social policies and programs should, inter alia, empower families with attitudes, skills, capacities and tools to enable them to provide adequately for the protection, care and development of their children. (…).[78]

81. For purposes of understanding the scope and content of the obligations stemming from the right to protection of the family contained in Article 17(1) of the ACHR, related to Article 19 and VI of the Declaration thereof and in light of the corpus *juris* on the matter, reference should first be made to the general obligations for implementation set out in Articles 1(1) and 2 of the Convention.

82. Article 1(1) of the American Convention establishes that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The scope of this provision has been repeatedly examined by the Commission and the Court for the purpos of determining the concept of positive obligations in human rights. The Court was clear in its jurisprudence when it ruled that:

> (…) States have the obligation to recognize and respect rights and liberties of the human person, as well as to protect and ensure their

[76] Guideline 32.

[77] Guideline 33.

[78] Guideline 34.

> exercise through the respective guarantees (Article 1(1)), which are suitable means for them to be effective under all circumstances.[79]

With regard to the obligation to guarantee, the Court has established that it may be fulfilled in different ways, based on the specific right that the State must guarantee and on the specific needs for protection.[80] This obligation refers to the duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority are exercised, so that they are able to ensure by law the free and full exercise of human rights.[81]

83. For its part, the scope of the legal concept of legislative or other positive obligations under the inter-American system, is complemented by Article 2 of the American Convention, which provides:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

As concerns the interpretation of this article, the Court has established that:

> (…) the general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees. Furthermore, adoption of these measures becomes necessary when there is evidence of

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[79] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 92.

[80] I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, para. 236; and I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia,* Judgment of September 15, 2005. Series C No. 134, paras. 111 and 113; I/A Court H.R., *Case of Perozo v. Venezuela,* Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 28, 2009, series C, No. 195, para. 298, and I/A Court H.R., *Case of Anzualdo Castro v. Peru,* Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 22, 2009, series C, No. 202, para. 62.

[81] I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, para. 236; and I/A Court H.R., *Case Velásquez Rodríguez s. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4, para. 166; I/A Court H.R., *Case of Anzualdo Castro v. Peru,* Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 22, 2009, series C, No. 202, para. 62; and, I/A Court H.R., *Case of Godínez Cruz v. Honduras,* Judgment of January 20, 1989, Series C No. 5, para. 175. IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, para. 37.

practices that are violations of the American Convention in any way."[82]

84. Regarding the obligation to protect the family recognized in Article 17(1) of the American Convention, this is an obligation of a positive nature that entails the duty of States to adopt a domestic legal framework, along with social public policies, programs, and services, as well as to adjust the institutional structure and practices, in order to give effect to this right. In that regard, the State must give the right a concrete and specific content, through norms and public policies for its implementation and application, so that people will effectively have access to the right and so that it may be exercised and, as appropriate, enforced by public authorities and courts of justice. In giving content to the right contained in Article 17(1) of the ACHR, consideration must necessarily be given to the social role which the Convention itself establishes for the family, that is, the primary function of providing for the adequate protection, care, and well-being of all its members and, in particular, the protection of the rights of children.

85. In regard to adequate and effective compliance with the obligation to adopt any form of appropriate measures necessary to support and strengthen families, the Committee on the Rights of the Child and the Committee on Human Rights have both expressed their concern with the type and the quality of data they receive from the States in regard to the compliance with this obligation, to the suitability of the measures to achieve their objectives, and to the level of coverage of those measures. It should be mentioned that the Committee on the Rights of the Child, within the framework of the jurisdiction granted to it under the provisions of Article 43 of the CRC to oversee realization of the States parties with said Convention, expressly requests that the States, when reporting to the Committee[83] make reference to the data relating to the fulfillment of the obligation to provide support to families to carry out their parental responsibilities. Specifically, the Committee requests that States Parties provide disaggregated data on "the number of services and programs aimed at providing appropriate assistance to parents and legal guardians to fulfill their responsibilities with regard to upbringing of children, and the number and percentage of children and families who have benefitted from those services and programs."[84] For its part, the

[82] I/A Court H.R., *Case La Cantuta v. Peru.* Judgment of November 29, 2006, Serie C No. 162, para. 172. ICHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, para. 37. See also, I/A Court H.R., *Case the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. Series C No. 79, para. 134; I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, Series C No. 52, para. 207; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama.* Competence. Judgment of November 28, 2003, Series C No. 104, para. 180; I/A Court H.R., *Case of Cantoral Benavides v. Peru*, Judgment of August 18, 2000, Series C No. 69, para. 178.

[83] Duty to report established in Article 44 of CRC.

[84] Document "General Guidelines on the structure and content of the reports to be presented by the States parties in accordance with Article 44, paragraph 1(b), of the Convention on the Rights of the Child", adopted by the Committee in its 55th Regular Session (September 13 to October 1,2010), CRC/C/58/Rev.2. The Committee requests States parties, with regard to the group of Articles included in the section "Family setting and alternative care of children, Articles 5, 9 to 11, 18 (paragraphs (1) and (2)), 19 to 21, 25, 27 (paragraph (4) and (39))", to provide information on family support measures under paragraph 1.

Committee on Human Rights has called attention to the fact that, "often, the reports submitted by States Parties do not provide sufficient information on how the State and society meet their obligation to protect the family and its members,"[85] in connection to the right to protection of the family recognized in Article 23 of the Covenant, and further indicating that "in order to provide the protection provided for in Article 23 in an effective manner, States parties need to adopt legislative, administrative or other types of measures. States Parties should provide detailed information regarding the nature of those measures and the means used to ensure their effective implementation." [86]

86. Accordingly, the content of this right must be oriented toward promoting and ensuring that families have the possibility and the minimum means needed to perform their role and responsibilities and, especially in relation to Article 19 of the ACHR, the necessary resources to provide adequate care to children. Thus, the content and scope of the obligations stemming from Article 17(1) of the ACHR must be interpreted together with Articles 3(2), 18(2), and 27 of the Convention on the Rights of the Child, which, along the same lines as what was just mentioned, establish that "[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention [the acknowledged rights of the child], States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children." [87] In this respect, the Court has considered that:

> The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in

[85] Committee on Human Rights, General Comment No. 19, *Article 23 – The family*, 39th Regular Session, U.N. Doc. HRI/GEN/1/Rev.7 at 171 (1990), para. 1

[86] Committee on Human Rights, General Comment No. 19, *Article 23 – The family*, 39th Regular Session, U.N. Doc. HRI/GEN/1/Rev.7 at 171 (1990), para. 3

[87] Article 3(2) of the CRC: "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures"; Article 18(2) of the CRC: "For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children"; Article 27 of th CRC: "(1) States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. (2) The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. (3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.(…)."

performing its natural function of providing protection to the children who are members of the family."[88]

87. The content that should be given to the right to protection of the family under Article 17(1) of the ACHR is directly related to the realization of the rights of the child, as recognized in the *corpus juris* on children, but it should be noted that it is for the State to specify the measures it will adopt to fulfill this right, as the Court itself pointed out in interpreting the scope of Article 2 of the ACHR. However, the foregoing does not exempt each State Party from having to justify the appropriateness of the particular means it has chosen, and to demonstrate whether that means will achieve the intended effect and result.[89] Thus the State has a positive duty to act in order to regulate and give effect to the content of this right based on the social function of the family. Moreover it should be recalled that, as established in the Vienna Convention on the Law of Treaties, international obligations assumed by the Member States must be performed in good faith, which precludes any actions and omissions, or inactivity, by States that are detrimental to the compliance with their international obligations under the treaty.[90]

88. As done by the Court in relation to Article 2 of the ACHR, the Committee on the Rights of the Child has also stated in relation to the "legislative, administrative, and other measures" to be adopted by the States parties pursuant to Article 4 of the CRC[91] that "[t]he Committee cannot prescribe in detail the measures which each or every State Party will find appropriate to ensure effective implementation of the Convention."[92] However, the Committee establishes some guidelines which it considers that States should follow to implement Article 4 of the CRC. These guidelines are covered primarily in General Comment number 5 of the Committee on the Rights of the Child on the "General Measures of Implementation of the Convention on the Rights of the Child." Although these guidelines do not exhaust the measures that States shall

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[88] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02, August 28, 2002, Series A No. 17, para. 53. Likewise, Human Rights Committee, General Comment No.17, *Rights of Child (Art. 24),* 07/04/1989, CCPR/C/35, paras. 2, 3, and 6.

[89] This position has been established by the various treaty bodies in their examination of obligations under Articles with content similar to that of Article 2 of the ACHR that contain general obligations for implementation of the respective treaties. See, General Comment No. 3 (1990), *The Nature of States Parties' Obligations, Article 2 of the International Covenant on Economic, Social and Cultural Rights*, para. 4 in fine. Also, *General Recommendation No. 28 regarding Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,* para. 23.

[90] Article 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[91] Article 4 of the CRC: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

[92] Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, November 27, 2003, thirty-fourth session, para. 26.

take to meet the obligation of protecting the rights of children and adolescents, they set minimum criteria and standards that provide guidance on the appropriate implementation of this obligation.

89. The contents of General Comment number 5, as well as the specific indications included in the various General Comments of the Committee, are helpful in determining the obligations of the States when ensuring the effective fulfillment of the right to protect the family through positive measures, in light of the what was described in the preceding paragraphs and particularely with regard to the adoption of public social policies, programs, services and the creation of the required agencies and other bodies. In that regard, it is pertinent to point out the main aspects contained in General Comment number 5:

> i)The development of public policies and measures, in this case aimed at supporting and strengthening families, demands, primarily, an analysis of reality based on solid research and in the gathering of reliable data that will help identify the structural causes or the circumstances that substantially weaken the possibilities, material or otherwise, of families to provide their children the care and well-being necessary for their comprehensive development and the protection of their rights as recognized on the Convention on the Rights of the Child;
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> ii) Based on this information, States will be able to formulate a strong and well-grounded integral national strategy or plan of action to implement any type of decision or measure, including programs, services, assistance, allowances or benefits deemed appropriate and relevant to address whatever situations are uncovered. The type of measure and specific characteristics needed are not likely to be identified a priori and will depend on the assessment of the States, although the overall logic of some measures or actions may have demonstrated, in practice, to have a positive impact in confronting certain contexts and challenges;
>
> iii) Setting clear objectives, outcomes and indicators in plans and strategies will make it possible to measure the efforts necessary, both financial and in human resources, to meet the objectives set and the temporary framework needed for it, and to, therefore, draw up realistic plans. Thus, States can develop better plans, improve performance and verify the degree of compliance with its International obligations, especially when economic, social and cultural rights are involved;
>
> iv) Adequately meeting the international obligations of the States, and the principles of good governance, and, especially, the principles of transparency and accountability implies that the effectiveness of the plans and strategies and the objectives achieved must be evaluated regularly, in order for the evaluations to help formulate, in a proper

and timely manner, future decisions regarding public policies and any adjustments and actions that need to be introduced;

v) The development of plans and public policies must be carried out through a process of consultation and social participation;

vi) The importance and relevance of establishing cross-sectorial coordination should be emphasized given the fact that, invariably, various governmental agencies and administrative entities have an impact on the lives of families and children and on the enjoyment of their rights. This coordination will make it possible to carry out integral and complementary policies to improve the effectiveness of government intervention;

vii) Guaranteeing the accessibility, availability, adaptability and quality of programs and services at the local level, bringing services closer to families, children and their communities;

viii) The implementation of the principle of active transparency, by which States are obliged to proactively disseminate the existence and content of these policies, programs and services to families who may benefit from them. "This imposes upon the State the obligation to, of its own initiative, provide the public as much information as possible, included, information on how to access those services. Such information must be complete, comprehensible, updated and be provided in a language that is accessible to all. Likewise, given that important sectors of the population do not have access to new technologies, but that the effective enjoyment of many of their rights may be dependent on having the information to do so, the State must find effective ways to meet its obligation of active transparency in such circumstances."[93]

[93] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 294. Although the Committee on the Rights of the Child mentions the "broad dissemination" of the policies, in a recent ruling the Inter-American Court pointed out more specifically the obligation to "active transparency" with regard to programs and services to which certain persons may have legal access according to domestic legislation. *Mutatis mutandi*, I/A Court H.R., *Case of Claude Reyes et al v. Chile.* Merits, Reparations and Costs. Sentence dated September 19, 2006. Series C No. 151, para. 79. Likewise, the scope of this obligation is established in the resolution of the Inter-American Juridical Committee on the "Principles on the Right of Access to Information," which establishes that, "Public bodies should disseminate information about their functions and activities—including, but not limited to, their policies, opportunities for consultation, activities that affect members of the public, budgets, subsidies, benefits and contracts—on a routine and proactive basis, even in the absence of a specific request and in a manner that ensures that the information is understandable and accessible." Inter-American Juridical Committee, "Principles on the right to access to information," 73rd Regular Session, August 7, 2008, OEA/Ser. Q CJI/RES.147 (LXXIII-O/08), fourth paragraph.

ix) The creation of complaint mechanisms that are of public knowledge, efficient, reliable and effective.

90. The Inter-American Commission is well aware of the persistent weaknesses with regard to the availability of information, data and statistics to the States, on children without parental care, which precludes the adequate planning of public policies, programs and services and, at the same time, implies an impediment to providing appropriate services to children in these circumstances and their families. Consequently, one of the first actions States should undertake would be to create mechanisms to gather data on the number of children without parental care and the causes that have led to those circumstances. The Committee on the Rights of the Child has also addressed the situation in the following statements:

> The Committee notes with concern the lack of data and statistics on the number of children without parental care. In particular it notes that there is a lack of data regarding children who are in informal care, e.g. cared for by relatives, or who are entirely without care, such as children living on the street.[94]

> The Committee recommends that States parties strengthen their mechanisms for data collection and develop indicators consistent with the Convention in order to ensure that data is collected on all children in alternative care, including informal care. It further encourages the States parties to use these indicators and data to formulate policies and programmes regarding alternative care.[95]

91. The United Nations Committee on the Rights of the Child makes specific mention of the importance of States taking into consideration those groups in conditions of vulnerability, with respect to the exercise of their right: "[p]articular attention will need to be given to identifying and giving priority to marginalized and disadvantaged groups of children. The non-discrimination principle in the Convention requires that all the rights guaranteed by the Convention should be recognized for all children within the jurisdiction of States. (…) the non-discrimination principle does not prevent the taking of special measures to diminish discrimination."[96] Furthermore:

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[94] Day of General Discussion of the Committee on the Rights of the Child on the topic of children without parental care, 2005, Report of the 40th Session of the Committee on the Rights of the Child, CRC/C/153, para. 681. Available at: http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx

[95] Day of General Discussion of the Committee on the Rights of the Child on the topic of children without parental care, 2005, Report of the 40th Session of the Committee on the Rights of the Child, CRC/C/153, para. 682. Available at: http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx

[96] Committee on the Rights of the Child, General Comment No. 5 *General Measures of Implementation for the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44),* CRC/GC/2003/5, November 27, 34th Session, para. 30. Also see II World Conference on Human Rights adopted from June 14 to 25, 1993, Vienna, Austria, p. 69 para. 21: "[N]ational and international mechanisms and programs should be strengthened for the defense and protection of children, in particular, the girl-child,

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> [t]his non-discrimination obligation [Article 2 of the CRC] requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment."[97]

92. The Commission is well aware that States in the region have made serious efforts to provide protection to families and that, for that purpose , they have developed public policies, programs and services to help strengthen capacities within the family and, thus, guarantee that its members enjoy and effectively exercise their rights. The Commission therefore celebrates the fact that, in this manner, States are meeting their obligations as established in Article 17(1). However, the Commission has also observed that, in general, there is a need to strengthen the integral and complementary nature of the measures, their coverage and funding, as well as to conduct regular evaluations of their effectiveness in achieving the desired objectives. Furthermore, the Commission points out the importance that the aforementioned public policies for families take into due consideration the particular cultural, religious and linguistic characteristics of families.

93. On the other hand, U.N. Guidelines for the Alternative Care of Children recommend a series of various types of social policies and programs aimed at strengthening and providing support to families to help them carry out their parental responsibilities.[98] The Committee on the Rights of the Child, through its General Comments and through its Concluding Observations to the States, has made some recommendations on actions and measures to support, assist and strengthen families. Likewise, the Independent Expert for the U.N. Study on Violence against Children also identified a series of measures and support services for families.[99] These references

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abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies."

[97] Committee on the Rights of the Child, General Comment No.5 *General Measures for the Implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, 34th Regular Session, para. 12.

[98] For details of the proposed measures see guidelines 32 to 38.

[99] Among them, for instance, "good and accessible basic social and health services; home visits by social workers, visiting nurses or community based support groups; (…); programs that provide child rearing skills; provide material support to ease the burden of poverty and measures to make it possible for parents

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provide general indications regarding what types of actions have the potential to improve the conditions, capacities and abilities of families to meet the upbringing needs and basic welfare of their children and, therefore, the effective exercise of children's rights."[100]

94. The Commission notes that there are diverse circumstances and situations in which families may find that their ability and possibilities to fully meet their parental responsibilities and provide the necessary care and protection for their children are limited. Among those situations are economic difficulty or poverty contexts which families may face, and their consecuences on basic living conditions; special personal situations of one or both parents, be they of a medical nature or other; or also, the requirements or special care needs of the child due to some personal situation or condition, be it of a medical nature or of some other type. In other cases, the need to intervene to provide special protection for the child arises as a consequence of situations in which the child is the victim of abuse, mistreatment, neglect, abandonment, exploitation or some other form of violence inside his/her own home. [101] Different situations will require different interventions and the implementation of diverse measures by government authorities that are suited to the circumstances,

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with demanding child care duties to rest every so often, "pages 207 and 208, in addition to other measures outlined throughout the report. The U.N. Study pointed out that all the information gathered in the preparation of the report and all the evidence presented, led to the conclusion that: "[t]he benefits of keeping children together with their families are indisputable with regard to their health, happiness and serving their best interests. Furthermore, the cost of supporting families in order for them to keep their children at home is substantially less than placing them in institutions," p. 208. See: http://www.unviolencestudy.org/spanish/index.html

[100] Day of General Discussion of the Committee on the rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Regular Session of the Committee on the Rights of the Child, CRC/C/153, paragraphs 636-689. See also, Committee on the Rights of the Child, General Comment No. 3, *HIV/AIDS and the rights of the child*, CRC/GC/2003/3, March 17, 2003, 32nd Regular Session; Committee on the Rights of the Child, General Comment No. 7, *Realization of the rights of the child during infancy*, CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, para. 21;,Committee on the Rights of the Child, General Comment No. 8, *Right of the child to protection from corporal punishment and other forms of cruel or degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among others),* CRC/C/GC/8, of August 28, 2006, 42nd Regular Session; Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence,* CRC/C/GC/13, April 18, 2011. In general, among the family support and assistance measures to which the Committee on the Rights of the Child makes reference, are: the creation of institutions, facilities and services to support families provide care to their children, including day care centers and full-time schools, and will help parents coordinate their workday with their family and parental responsibilities (in that regard also Article 18 of the CRC); counseling and training programs for families on the rights of the child and positive child rearing without violence; and, loans or direct material assistance in order to ensure a decent and appropriate standard of living for the family and child that will make his/her integral development possible.

[101] The U.N. Guidelines for the Alternative Care of Children identify certain situations in real life that, in general terms, could affect families and have an impact on their capacity to provide protection and care for the child, among them: socio-economic conditions; instances of discrimination that some families may face; the personal or medical condition of the parents and/or the child; and, the need to acquire knowledge and training in the appropriate care of their child, positive child rearing without violence and the protection of the rights of their children.

ensuring the respect and guarantee of the various rights involved, in other words, both the rights of children as well as the rights of parents.

95. From the information analyzed by the Commission it is inferred that, in the region, the main underlying causes that led to the adoption of a protection measure consistent in the separation of a child from his/her parents, are the following:[102] i) the socio-economic family situation; ii) violence; and iii) abandonment, relinquishment or neglect. Although, the legal ground of separation of a child from his/her parents due only to poverty has been overcome, it should be pointed out that children and adolescents in the social classes most vulnerable to poverty continue to account for the majority of cases subject to a separation measure. The information gathered by the Commission in the region leads to similar conclusions: poverty continues to be the great background for special measures of protection and the separation of children from their families. Violence against children constitutes another of the main causes.[103] The scope and content of the obligations the States bear with regard to the protection of families in connection with the most common situations of vulnerability cited in this paragraph are analyzed below.

1. Material Conditions for a dignified life

96. Poverty[104] can become one of the underlying causes for the limitation of a family's material ability to provide appropriate care for its children and the basic conditions necessary to lead a decent life. Furthermore, poverty could become one of the reasons why parents make the decision to relinquish custody of their children, give them up for adoption or abandon them. The Court has been clear in establishing that poverty itself cannot be the only reason for the separation of children from their

[102] The U.N. Study on Violence against Children also identified those as the main causes that lead to the implementation of special measures of protection that imply the separation of children from their families, see pages 185 and 186. http://www.unviolencestudy.org/spanish/index.html

[103] For instance, a study conducted in Argentina, "The situation of children and adolescents without parental care in the Republic of Argentina. National survey and recommendations for the promotion and strengthening of the right to family and community living," National Secretariat for Children, Adolescents and Family (SENNAF) and UNICEF, June 2012, reveals the following data: violence and mistreatment 44%, abandonment 31%, sexual abuse 13%, causes linked to situations in which parents suffer from mental health illnesses, use psychoactive substances, are in prison or have died 11%. See, Ministry of Labor, Human Services and Social Security, Assessment of procedural and physical standards in children's residential care institutions in Guyana. Summary and Recommendations, August 2006, p. 14. See also, Observatory of the Judicial System, Rhetoric and Reality: Application of the Children and Adolescents Code in Maldonado [Observatorio del Sistema Judicial, La protección judicial de derechos. Realidad, perspectivas y cambios en el marco de la aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo, Paysandú y Salto, Fundación Justicia y Derecho], Montevideo and Salto, UNICEF, Montevideo, 2009.

[104] The Committee on Economic, Social and Cultural Rights stated in 2001, that poverty is "a human condition characterized by the continuous or chronic deprivation of resources, capacity, options, security and the power necessary to enjoy an adequate standard of living and other civil, cultural, political and social rights." (E/C.12/2001/10, para. 8). In turn, extreme poverty has been defined as "a combination of scarcity of resources, lack of human development and social exclusion," (A/HRC/7/15, para. 23), in which an extended lack of basic security affects several areas of a person's life at the same time, seriously compromising a person's ability to exercise or recover his/her rights in a foreseeable future /CN.4/Sub.2/1996/13).

parents, and the resulting abridgement of other rights enshrined in the Convention, but, rather, it should be considered a signal of the need to support the family.[105]

97. In that regard, Guideline No. 15 of the United Nations Guidelines for the Alternative Care of Children states:

> Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.

98. For its part, the Committee on the Rights of the Child has shown its concern with socio-economic conditions being the main underlying cause in a large number of cases in which authorities have made the decision to separate children from their parents for protection reasons:

> The Committee is deeply concerned about the fact that children living in poverty are over-represented among the children separated from their parents, both in the developed and developing countries.[106]

> In accordance with Article 27 of the Convention [CRC], the Committee urges States parties to ensure that poverty as such should not lead to the separation decision and to the out-of-home placement. It recommends that States parties take all necessary measures to raise the standard of living among families living in poverty, inter alia, through implementing poverty reduction strategies and community development, including the participation of children. The Committee requests States parties to increase efforts to provide material assistance and support to economically and/or socially disadvantaged children and their families. Moreover, States parties should ensure that children living in poverty are provided with access to social and health services, education and adequate housing.[107]

99. The Commission realizes that poverty itself is an urgent human rights problem because it affects human dignity and, at the same time, is both the cause and

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[105] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, series A No. 17. para. 76.

[106] Day of General Discussion of the Committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Session of the Committee on the Rights of the Child, CRC/C/153, para. 658. Available at: http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx

[107] Day of General Discussion of the Committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Session of the Committee on the Rights of the Child, CRC/C/153, para. 659. Available at: http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx

consequence of human rights violations, becoming a condition that leads to other violations. Poverty is further characterized as a cause of multiple and interconnected violations of civil, political, economic, social and cultural rights. The Commission agrees with the United Nations Special Rapporteur on Extreme Poverty and Human Rights in realizing that "[p]ersons living in poverty are confronted by the most severe obstacles –physical, economic, cultural and social –to accessing their rights and entitlements. Consequently, they experience many interrelated and mutually reinforcing deprivations –including dangerous work conditions, unsafe housing, lack of nutritious food, unequal access to justice, lack of political power and limited access to health care –that prevent them from realizing their rights and perpetuate their poverty. Persons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another."[108]

100. The Commission shares the vision that "[e]xtreme poverty is not inevitable. It is, at least in part, created, enabled and perpetuated by acts and omissions of States and other economic actors. In the past, public policies have often failed to reach persons living in extreme poverty, resulting in the transmission of poverty across generations. Structural and systemic inequalities –social, political, economic and cultural –often remain unaddressed and further entrench poverty."[109]

101. Plans to combat poverty, and the programs and services that are derived from them, are elements in the national polices and strategies on human rights and human development of the States, and contribute to improving the material living conditions of families and children, and thus to ensure the right to special protection under Article 19 of the Convention and VII of the Declaration, in connection with the right to the protection of the family provided for in Article 17(1) of the Convention and VI of the Declaration.

102. In that regard, Article 2 of the Charter of the Organization of American States[110] (OAS) (hereinafter, "the OAS Charter" or "the Charter"), states that the eradication of poverty is an essential purpose of the OAS. Chapter VII of the Charter is further dedicated to the topic of "Integral Development" which, according to the Charter, "encompasses the economic, social, educational, cultural, scientific and technological fields"[111] and considers it "an integral and continuous process for the establishment of a more just economic and social order that will make possible and

[108] Guiding Principles on Extreme Poverty and Human Rights of the United Nations, presented by the Special Rapporteur on extreme poverty and human rights, U.N. Human Rights Council, 221st Regular Session, A/HRC/21/39, July 18, 2012, para. 4.

[109] Guiding Principles on Extreme Poverty and Human Rights of the United Nations, presented by the Special Rapporteur on extreme poverty and human rights, U.N. Human Rights Council, 21st Regular Session, A/HRC/21/39, July 18, 2012, para. 5.

[110] The Charter of the Organization of American States can be found at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm

[111] Article 30 of the OAS Charter.

contribute to the fulfillment of the individual."[112] The Charter indicates that in order to achieve this, national objectives and priorities shall be set in the development plans of the countries.[113] In a similar sense, The Inter-American Democratic Charter[114] (hereinafter, "the Democratic Charter") declares that "democracy and social and economic development are interdependent and are mutually reinforcing"[115] and further states that "OAS member States are committed to adopting and implementing all those actions required to (…) reduce poverty, and eradicate extreme poverty, taking into account the different economic realities and conditions of the countries of the Hemisphere."[116] In agreement with both Charters, the preamble to the American Convention reiterates:

> (…) in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

103. In several of its decisions, the Court has addressed the right to life in connection with the material living conditions of children directly affected by their families' poverty. In the opinion of the Court:

> Regarding the conditions for care of children, the right to life that is enshrined in Article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also to provide the measures required for life to develop under decent conditions.[117]

104. The concept of a decent life, as it relates to children, developed by the Inter-American Court and the Inter-American Commission, coincides with the concept used by the CRC and by the Committee on the Rights of the Child in their decisions, and presumes a close link with the concept of integral development of the child. Article 6 of the CRC recognizes "the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child"[118]; in

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[112] Article 33 OAS Charter.

[113] Article 31 OAS Charter.

[114] The Inter-American Democratic Charter can be found at: http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

[115] Article 11 Democratic Charter.

[116] Article 12 Democratic Charter.

[117] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, series A No. 17, para. 80 and para. 7. In that same regard, I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 144 and 191.

[118] Article 6 of the CRC establishes: "(1) States Parties recognize that every child has an inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child." Furthermore, the Committee on the Rights of the Child elevates the contents of this Article to the

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that regard, the Committee has established that that the effective exercise of the child's right to life and to integral development must be understood to be intimately interconnected and, at the same time, connected to the effective exercise and enjoyment of all the other rights enshrined in the Convention.[119] The Committee has further stated that it "expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children."[120] In that regard, the Committee has stated:

> States parties are reminded that Article 6 [the right to life, survival and development] encompasses all aspects of development, and that a young child's health and psychological well-being are, in many respects, interdependent.(…) The Committee reminds States parties (and others concerned) that the right to survival and development can only be implemented in a holistic manner through the enforcement of all the other provisions of the Convention, including the right to health, to adequate nutrition, to social security, an adequate standard of living, to a healthy and secure environment, to education and play (Arts. 24, 27, 28, 29 and 31), as well as through respect for the responsibilities of parents and the provision of assistance and quality services (Arts. 5 and 18).[121]

105. Along the same lines, Article 27 of the CRC links parental responsibilities with the obligation of States with regard to children, and the attainment of an adequate standard of living for their integral development. Thus, Article 27 of the CRC introduces an objective parameter that will have to be taken into consideration by

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level of general principle to guide the implementation of the whole Convention. In that regard, see General Comment No.5, Committee on the Rights of the Child, *General Measures of Implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*, 34th Regular Session (2003), UN Doc. HRI/GEN/1/Rev.7 para. 12 and General Comment No. 11, *Indigenous children and their rights under the Convention*, CRC/C/GC/11 of February 12, 2009, 50th Regular Session, para. 35.

[119] Committee on the Rights of the Child, General Comment No. 5 *General Measures of Implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*," CRC/GC/2003/5, November 27, 2003, 34th Regular Session, para. 12; Committee on the Rights of the Child. General Comment No. 7, *Implementing child's rights in early childhood*, 40th Regular Session, U.N. Doc. CRC/C/GC/7/Rev.1, September 20, 2006, para. 10.

[120] Committee on the Rights of the Child, General Comment No. 5, *General Measures for the Implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, 34th Regular Session, para. 12.

[121] Committee on the Rights of the Child, General Comment No. 7, *Implementing the child's rights in early childhood,* CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, para. 10.

the States when determining the scope of their obligation with regard to the protection of the child and the protection of the family:

> 1. States parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing..(…)

106. The concepts of "decent life" and "integral personal development" have been established in the jurisprudence of the Inter-American Court through various decisions, in particular, in relation to children.[122] Therefore, the special protection of which children should be provided with, by their families, society and the State, must take into consideration the content and scope of the right to a decent life and to the integral personal development of children as the parameters for its fulfillment.

107. In addition, the Court has stated and underscored the obligation of the States to take positive actions to ensure the effective exercise of the rights of children and this should be accomplished by giving priority to providing protection and

[122] In the case, "Children of the Street" the Court linked the concept of a decent life with the concept "full and harmonious personality development" or "comprehensive personality development ",I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 144 and 191. In another decision, the Court determined that "the development of the child is a holistic concept that encompasses physical, mental, spiritual, moral, psychological, and social development," as the Court had previously established in the decision "Institute for the Reeducation of Minors," I/A Court H.R., *Case Chitay Nech et al v. Guatemala.* Preliminary Exceptions, Merits, Reparations and Costs. Sentence of May 25, 2010. Series C No. 212, para. 169. In the sentence "Institute for the Reeducation of Minors," the Court specifically cites Articles 6 and 27 of the Convention on the Rights of the Child and the Committee on the Rights of the Child interpretation of the word "development" in broad and holistic terms encompassing the various aspects of the child; the Court, as the Committee had also done, considered that the right to life includes the obligation of the State to ensure "to the maximum extent possible, the survival and development of the child." I/A Court H.R., *Case Reeducation Institute of Minor v. Paraguay,* Preliminary Exceptions, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 161. See also, I/A court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Sentence dated March 29, 2006, para.176; I/A court H.R., *Juridical Condition and the Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 67, 80, 84 and 86. With regard to the interpretation by the Committee on the Rights of the Child, cited by the Court in the aforementioned decisions, see United Nations Committee on the Rights of the Child, General Comment No. 5, *General Measures for the Implementation of the Convention on the Rights of the Child (Articles 4 and 42, and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, 34th Regular Session, para. 12.

assistance for the family, including the adoption of economic and social measures in order to fully comply with their responsibilities:

> (…) according to the provisions set forth in the Convention on the Rights of the Child, children's rights require the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights. This requires, among others, economic, social and cultural measures. (…) The State, given its responsibility for the common weal, must likewise safeguard the prevailing role of the family in the protection of the child; and it must also provide assistance to the family by public authorities, by adopting measures that promote family unity.[123]

In the same decision, the Court linked the aforementioned obligations of the States with the provisions of Article 4 of the CRC, stating that:

> Full exercise of economic, social and cultural rights of children has been associated with the possibilities of the State that is under obligation (Article 4 of the Convention on the Rights of the Child), which must make its best effort, in a constant and deliberate manner, to ensure access of children to those rights, and their enjoyment of such rights, avoiding regressions and unjustifiable delays, and allocating as many resources as possible to this compliance.[124]

In another decision, the Court reaffirms this interpretation of the scope of the right to life recognized in Article 4 of the American Convention in connection with the concept of "decent life," stating that:

> One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete actions geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.[125]

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[123] I/A Court H.R., *Juridical condition and the Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A No.17,para. 88 and point 8 of the Court's opinion. In the same regard, see General Comment No.17, General Comments adopted by the Human Rights Committee, *Article 24—Rights of the Child*, 35th Session, U.N. Doc. HRI/GEN/1/Rev.7 at 165 (1989), para. 3.

[124] I/A Court H.R., *Juridical Condition and the Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 81, also see para. 64.

[125] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 162.

> In addition, in the aforementioned decision, the Court linked Article 4 of the American Convention and the right to a "decent life" with the duty of progressive development established in Article 26 of said instrument and with the rights to health, nutrition, education, a healthy environment and to the benefits of culture, recognized in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), and to relevant provisions of ILO Convention No. 169, because it deals with an indigenous community.[126]

108. It is worth mentioning that the Court and the Commission have affirmed the interdependence between civil and political rights and economic, social and cultural rights, in the same manner that human rights bodies from the universal system for the protection of human rights have consistently done.[127] In this regard:

> (…) the Court deems it appropriate to recall the interdependence that exists between civil and political rights and economic, social and cultural rights, since they should be fully understood as human rights, without any rank, and enforceable in all cases before competent authorities.[128]

109. In accordance with the preceding, the implementation of measures and public policies for the purpose of promoting and guaranteeing the rights recognized in Articles 19 and 17(1) of the Convention also requires taking into consideration Article 26 of the Convention due to the positive obligations and the obligations to provide

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[126] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 163, also see paragraphs 168, 175, 176 and 221. In the reference case, the State had ratified the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights, in addition to the ILO Convention No. 169. In the Case of *Yakye Axa Community Vs Paraguay*, the Commission argued that the State "has the obligation to ensure the conditions necessary to live a decent life, an obligation underscored by the commitment established in Article 26 of the American Convention, to adopt appropriate measures to achieve the full realization of social rights. However, through omission in its health policies, the State reduced the capacity of the members of the Yakye Axa Community to enjoy basic sanitary, nutritional and housing standards" [para. 157, (e)].

[127] Committee on Human Rights, General Comment 17, *Rights of Child (Art. 24)*, 07/04/1989, CCPR/C/35, paragraphs 3 and 6; the United Nations Committee on the Rights of the Child has repeatedly expressed the same position, as evidenced in the citations included in this section.

[128] I/A Court H.R., *Case Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru.* Preliminary Exceptions, Merits, Reparations and Costs. Sentence dated July 1, 2009 Series C No. 198, para. 101. With regard to the opinion issued by the Commission see, IACHR Report*, Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II., Doc. 54, December 30, 2009, para. 954. Also see Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador," which specifically recognizes in tis preamble the "close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."

services that are involved in the realization of those rights. Article 26 of the ACHR establishes that:

> The State Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic or technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the organization of American States as amended by the Protocol of Buenos Aires.

110. With regard to the provisions of Article 26 of the ACHR, the Court recalls that "the content of Article 26 of the Convention was the subject-matter of an intense debate in the preparatory works of the Convention, as a result of the States Parties' interest to assign a "direct reference" to economic, social and cultural "rights"; "a provision establishing certain legal mandatory nature [...] in its compliance and application"; as well as "the [respective] mechanisms [for its] promotion."[129]

111. The Court has clarified that although Article 26 is embodied in Chapter III of the Convention it is also found in Part I of that instrument, and is, therefore, subject to the general obligations contained in Articles 1(1) and 2 of the American Convention. In that regard, the American Convention recognizes in Article 1(1) the obligation of the States to respect the rights recognized in said instrument and to ensure their free and full exercise to every person under their jurisdiction, without discrimination; and Article 2 contains the duty to adopt whatever internal provisions – legislative or of other type—are necessary to effectively implement the rights and freedoms established in the American Convention.[130] In this regard, and in accordance with this principle, the Commission has established that a violation of Article 26 may imply a violation of the duty to respect and guarantee established in Article 1(1) of the American Convention.

112. Furthermore, the Commission has made reference to the States' compliance with Article 26 of the American Convention and to the provisions of the

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[129] The Draft Treaty drawn up by the Inter-American Commission made reference to economic, social and cultural rights in two Articles which, according to some States, merely "gathered in a declarative text, conclusions that had been reached at the Buenos Aires Conference." The review of that preparatory work to the Convention also showed that the main observations that constituted the basis for the Convention's approval placed special emphasis on "giving economic, social and cultural rights the maximum protection compatible with the conditions present in the vast majority of American States." I/A Court H.R., *Case Acevedo Buendía et al ("Discharged and Retired Employees of the Comptroller") v. Peru.* Preliminary Exceptions, Merits, Reparations and Costs. Sentence dated July 1, 2009, Series C No. 198, para. 99. With regard to the references the Court makes to the debates in the framework of the preparatory work to the ACHR, see Specialized Inter-American Conference on Human Rights (San Jose, Costa Rica, 7-22 of November 1969). Records and Documents.

[130] I/A Court H.R., *Case Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru.* Preliminary Exceptions, Merits, Reparations and Costs. Sentence dated July 1, 2009, Series C No. 198, para. 100.

Charter of the Organization of American States and in the American Declaration, indicating that it is essential that the rights recognized in these provisions are fully realized: "[i]t is essential that the economic, social, and cultural rights recognized in international and constitutional provisions have real effect in the daily lives of each of the inhabitants (…), thereby guaranteeing minimal conditions for leading a dignified life."[131] With regard to the principle of "progressive development", the Commission established that:

> The progressive nature of the duty to ensure the observance of some of these rights, as is recognized in the language of the provisions cited, does not mean that [name of the State] can delay in adopting all measures needed to make them effective. To the contrary, [name of the State] has the obligation to immediately begin the process leading to the complete realization of the rights contained in those provisions. In no way can the progressive nature of the rights mean that Colombia can indefinitely postpone the efforts aimed at their complete attainment.[132]

113. With regard to poverty reduction and eradication policies and plans, the Guiding Principles on Extreme Poverty and Human Rights of the United Nations[133] establish that the design and implementation of these policies and plans must be done with a focus on human rights, seeking to promote and facilitate the full enjoyment of those rights. That focus must be based on the basic principles of: i) dignity, universality, indivisibility, interrelatedness and interdependence of all rights, ii) the equal enjoyment of all human rights by persons living in extreme poverty, iii) equality between men and women, iv) agency and autonomy of persons living in extreme poverty, v) participation and empowerment, vi) transparency and access to information, and vii) accountability. With regard to requirements for implementation of poverty reduction and eradication policies and plans, the Guiding Principles establish that States must: i) implement a comprehensive national strategy to reduce poverty and social exclusion, ii) ensure that public policies give due priority to persons who live in extreme poverty, iii) guarantee that the facilities, goods and services necessary for the enjoyment of human rights are of good quality, available, accessible and adaptable, and iv) policy coherence.[134]

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[131] I/ACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V.II.102 Doc. 9 rev. 1, February 26, 1999, chapter III. para. 5. Also see, IACHR, *Work, education and women's resources: The road to equality in ensuring economic, social and cultural rights*, para. 29 to 58.

[132] IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V.II.102 Doc. 9 rev. 1, February 26, 1999, chapter III. para. 6. Also see, IACHR, *Work, education and women's resources: The road to equality in ensuring economic, social and cultural rights*, para. 29 to 58

[133] Guiding Principles on Extreme Poverty and Human Rights of the United Nations, presented by the Special Rapporteur on extreme poverty and human rights, UN Human Rights Council, 21st Regular Session, A/HRC/21/39, July 18, 2012.

[134] The Guiding Principles on Extreme Poverty and Human Rights of the United Nations emphasize several specific rights whose realization by individuals living in poverty is particularly limited or diminished, and offer guidance on how to respect, protect, and realize those rights for persons who live in poverty. Specific rights: i) right to life and personal integrity, ii) right to liberty and personal security, iii) right to equal

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114. In addition, the United Nations Guiding Principles on extreme poverty and human rights make specific reference to the rights of children, stating that:[135]:

> Given that most of those living in poverty are children and that poverty in childhood is a root cause of poverty in adulthood, children's rights must be accorded priority. Even short periods of deprivation and exclusion can dramatically and irreversibly harm a child's right to survival and development. To eradicate poverty, States must take immediate action to combat childhood poverty.
>
> States must ensure that all children have equal access to basic services, including within the household. At a minimum, children are entitled to a package of basic social services that includes high-quality health care, adequate food, housing, safe drinking water and sanitation and primary education, so that they can grow to their full potential, free of disease, malnutrition, illiteracy and other deprivations.
>
> Poverty renders children, in particular girls, vulnerable to exploitation, neglect and abuse. States must respect and promote the rights of children living in poverty, including by strengthening and allocating the necessary resources to child protection strategies and programmes, with a particular focus on marginalized children, such as street children, child soldiers, children with disabilities, victims of trafficking, child heads of households and children living in care institutions, all of whom are at a heightened risk of exploitation and abuse.
>
> States must promote children's right to have their voices heard in decision making processes relevant to their lives.

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protection before the law, equal access to justice, and effective means of restitution, iv) right to recognition of juridical personality, v) right to privacy and the protection of the family and abode, vi) right to an adequate standard of living, vii) right to adequate food and nutrition, viii) right to water and sewer, ix) right to adequate housing, secure possession and protection from forced eviction, x) right to the highest possible standard of mental and physical health, xii) right to work and to rights at work, xiii) right to social security, xiv) right to education, xv) right to take part in cultural activities and to enjoy the benefits of advances in science and its applications. It should be emphasized that the Guiding Principles are based on international and regional instruments and agreements such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Convention on the Elimination of all Forms of Discrimination against Women, the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities, in addition to the general comments and recommendations of treaty bodies. "Guiding Principles on extreme poverty and human rights," UN Human Rights Council, 21st Regular Session, A/HRC/21/39, July 18, 2012.

[135] Guiding Principles on extreme poverty and human rights, UN Human Rights Council, 21st Regular Session, A/HRC/21/39, July 18, 2012. Paragraphs 32 to 35.

2. Prevention of violence against children

115. The Commission and the Court have expressed their concern with the phenomenom of violence[136] and its impact on human rights and, in particular, on children and their rights.[137] The Commission recognizes the fundamental importance of the family, including the extended family, in the care and protection of children; however, it also recognizes that a considerable number of acts of violence take place within the family environment and that, therefore, it is necessary to adopt appropriate measures to protect children. With regard to acts of violence that occur at home, the States have the duty to respect and enforce respect of the human rights of children and adolescents, even in the private sphere.[138] In that regard, international human rights law does not admit arguments based on the dichotomy of public versus private which tend to unjustifiably restrict human rights.[139] Therefore, States are obliged to protect all people under their jurisdiction, and that obligation is imposed not only with respect to the power of the State, but also in relation to the actions of private individuals.[140]

116. More concisely, the Commission has maintained in the *Report on corporal punishment and human rights of children and adolescents* that, to meet their international obligation to protect children, States must ensure that the realization of the rights of parents, guardians and other persons responsible for the care and education of children and adolescents, does not imply ignoring the rights of children, including their right to personal integrity.[141] Furthermore, due to the particular needs

[136] With regard to the definition of the concept of violence, the Committee on the Rights of the Child has been very precise in pointing out that: The Committee has consistently maintained the position that all forms of violence against children, however light, are unacceptable. "All forms of physical or mental violence" does not leave room for any level of legalized violence against children. Frequency, severity of harm and intent to harm are not prerequisites for the definitions of violence. States parties may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child's absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable.", General Comment No. 13*, The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, paragraph 17. The Commission expressed a similar opinion in the *Report on corporal punishment and human rights of children and adolescents*, OEA/Ser. L/V/II. 135, August 5, 2009.

[137] The Commission and the Court have had the opportunity to state their views on the various forms of violence, the impact it has on human rights, the various contexts and environments in which it may take place, as well as the obligations States have as a result. With regard to the contexts or environments in which violence may take place, the Commission has drawn a distinction between violence that occurs in a public setting from violence in a private setting; the Commission has made it clear to States that they have obligations in both settings in terms of prevention and response to violence, but it has made some specific observations and established distinctions depending on the context. See, IACHR, *Report on corporal punishment and human rights of children and adolescents*. I/A Court H.R., *Case González et al ("Cotton Field") v. Mexico*. Preliminary Exception, Merits, Reparations and Costs. Sentence dated November 16, 2009. Series C No. 205.

[138] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, para. 69.

[139] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, para. 70.

[140] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, para. 74.

[141] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, para. 77. A similar opinion was expressed by the Committee on the Rights of the Child, General Comment No. 8, *Right of*

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involved in the protection of children, States are obligated to take every measure necessary to ensure the effective realization of the rights of children, and that their rights are respected in all settings, both public and private.[142]

117. The obligations of the States to respect the norms of protection, which is the responsibility of the States Parties to the Convention, extend their effects beyond the relationship between its agents and State institutions, and the persons subject to its jurisdiction, because they are manifested in the positive obligation of the State to adopt the necessary measures to ensure the effective protection of human rights in inter-individual relations. Consequently, the State may be responsible also for the actions of private parties which were not originally attributable to the State.[143]

118. With regard to the prevention of violence, the Commission and the Court have found that the legal prohibition of a certain conduct in order to satisfy the obligation to protect children is insufficient, particularly taking into consideration the duty of special protection derived from Articles 19 of the Convention and VII of the Declaration and to the challenges faced by children in realizing their rights because of their condition. The Commission has unequivocally asserted that States are obligated to adopt all types of measures that are appropriate to prevent and confront the structural causes of violence. [144]

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the child to protection from corporal punishment and other forms of cruel and degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among others), CRC/C/GC/8, August 21, 2006, 42nd Regular Session.

[142] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*. Committee on the Rights of the Child, United Nations, General Comment No.8, *Right of the child to protection from corporal punishment and other forms of cruel or degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among others),* CRC/C/GC/8, of August 28, 2006, 42nd Regular Session; I/A Court H.R., *Case Ximenes Lópes vs. Brazil,* Sentence dated July 4, 2006. Series C No. 149, para. 88.

[143] I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of January 31, 2006, para. 113; I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005. Series C No. 134, para. 111; and I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[144] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, para. 92. With regard to corporal punishment, as a form of violence against children, the commission has already indicated in *its report on Corporal punishment and human rights of children and adolescents* that, "the obligations assumed by the States to respect and ensure rights in order to protect children and adolescents against corporal punishment, demands the implementation of all types of measures whose objective must be the eradication of this practice." But that, even taking into account the urgent nature of the legal prohibition of corporal punishment against children, "the legal prohibition must be complemented with other types of measures, whether judicial, educational, financial, among others, that, together, will make it possible to eradicate the use of that punishment in the everyday life of children and adolescents." IACHR, *Report on corporal punishment and human rights of children and adolescents*, paragraphs 92 and 116. Also see, I/A Court H.R., *Resolution of January 27, 2009, with regard to the Petition for Advisory Opinion filed by the Inter-American Commission on Human Rights,* paragraphs 7, 11 and 12, available at: http://www.corteidh.or.cr/docs/asuntos/opinion.pdf . Similar to the opinions expressed by the Court and the Commission, see opinion of the Committee on the Rights of the Child, General Comment No.8, *Right of the Child to Protection from corporal punishment and other forms of cruel or degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among others),* CRC/C/GC/8, of August 21, 2006, 42nd Regular Session.

119. With regard to the obligation to prevent violence, the Court has noted in relation to violence against women that to establish "the obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act (…)"[145], and that "the prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence [against women]. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may become victims of violence."[146] The Court has established that the obligation to prevent is "one of means or conduct, and failure to comply with it is not proved merely because the right has been violated."[147]

120. The Court has clearly connected the obligation to prevent violence against children within the family with the general obligation to protect and ensure the effective realization of the rights of children. In that regard, the Court has said:

> This Court has repeatedly established, through analysis of the general provision set forth in Article 1(1) of the American Convention, that the State is under the obligation to respect the rights and liberties recognized therein and to organize public authorities to ensure persons under its jurisdiction free and full exercise of human rights. According to legal standards regarding international responsibility of the State that are applicable to International Human Rights Law, actions or omissions by any public authority, of any branch of government, are imputable to the State which incurs responsibility under the terms set forth in the American Convention. This general obligation requires the States Parties to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties. By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention have the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this Convention, to adopt all positive

[145] I/A Court H.R., *Case González et al ("Cotton Field) v. Mexico*. Preliminary Exception, Merits, Reparations and Costs. Sentence of November 16, 2009. Series C No. 205, para. 252. In a similar sense see, IACHR, *Report on corporal punishment and human rights of children and adolescents*, paragraph 75.

[146] I/A Court H.R., *Case González et al ("Cotton Field") v. Mexico*. Preliminary Exception, Merits, Reparations and Costs. Sentence of November 16, 2009. Series C No. 205, para. 258.

[147] I/A Court H.R., *Case González et al ("Cotton Field") v. Mexico*. Preliminary Exception, Merits, Reparations and Costs. Series C No. 205, para. 252. I/A Court H.R., *Case Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4,, para. 175; I/A Court H.R., *Case Perozo et a v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 28, 2009, series C, No. 195, para. 149, and I/A Court H.R., *Case Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 22, 2009, series C, No. 202, para. 63.

> measures to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.[148]

121. In the context of the universal system, Article 19 of the Convention on the Rights of the Child focuses on those situations that place the personal integrity of children at risk; in particular, this article addresses any type of violence against children that may take place within the family. With regard to this type of situations which imply the violation of the right to personal integrity of the child and his/her dignity, the CRC establishes the State's special obligation of prevention because it concerns children. In the event that one of these acts of violence has taken place, the CRC further imposes upon the State the obligation to implement any measures necessary for the identification, notification and investigation of the act of violence in addition to the protection, rehabilitation and restitution of the rights of the child. Article 19 of the CRC establishes that:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

122. The Commission recognizes that acts of violence, neglect or exploitation that take place within the family are serious situations that affect the rights of children and may justify the intervention of the State through a special measure of protection emanating from the mandate in Article 19 of the American Convention and VII of the Declaration. Given the seriousness of such situations, their occurance may motivate the separation of the child from his or her family, and constitute grounds for the temporary suspension or even the termination of parental rights, as a measure to protect the child. In addition, the State has an obligation to prevent violence against

[148] I/A Court H.R. *Juridical Condition and the Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 002, series A No. 17, para. 87. Also see, IACHR *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, pointing out the duty of prevention as part of the obligations established under the provisions of Article 1 and 2 of the ACHR, paragraph 92, and the recommendation contained in paragraph 119(4).

children which is imposed by the especial duty to protect children established in Article 19 of the ACHR as well as in Article 19 of the CRC.

123. The magnitude of the problem of violence and the severe impact the various types of violence have on the rights of children, their personal integrity, well-being, and integral development, as well as the need to learn more about the structural causes of this phenomenon, its various manifestations, and the consequences and impact it has on the rights of children, led the United Nations to carry out a global study on violence against children. The Independent Expert for the U.N. Study on Violence against Children produced a global Study as well as a report; the report was adopted by the General Assembly of the United Nations and includes a summary of the main findings contained in the Study as well as a series of recommendations to the States on prevention and appropriate response to violence against children.[149] The U.N. Study on Violence against Children identifies the family as one of the settings in which violence against children may occur, which generates special concern given the role of the protection that the family should fulfill, as well as the challenges of detecting violence when it occurs in a private environment. The U.N. Study on Violence against Children also gives fundamental importance to the prevention of violence in all environments, including the family. The report of the Independent Expert for the U.N. Study mentions that:

> All violence against children is preventable. States must invest in evidence-based policies and programs to address factors that give rise to violence against children.

[149] In 2001, after holding two days of general discussion in 2000 and 2001, on the topic of violence against children, the Committee on the Rights of the Child recommended in its annual report to the United Nations General Assembly, to conduct a study to analyze this problem. The General Assembly, through resolution 56/138, requested the Secretary General to conduct a detailed study of the issue of violence against children and to present recommendations for consideration by Member States in order to take appropriate action. In 2003, an Independent Expert is named to head this Study. The U.N. Study was concluded in 2006. The official report of the Study, with main findings and recommendations, was adopted in 2006 by the General Assembly of the United Nation, Resolution A/61/299 of August 29, 2006. The U.N. Study on Violence against Children is available at: http://www.unviolencestudy.org/spanish/index.html The report presented by the Independent Expert before the United Nations General Assembly, adopted by resolution A/61/299 of August 29, 2006, is available at: http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf

The U.N. Study on Violence against Children marks the first global, holistic and exhaustive effort to identify, document and characterize the true scope of violence against children in all its forms across the world and identify what efforts are being made to prevent it, respond to it and eradicate it. The U.N. Study concludes with a series of recommendations to Member States based on the findings. In 2009, the Secretary General of the United Nations named a Special Representative on Violence against Children with the mandate to promote and implement the recommendations contained in the U.N. Study. That mandate was renewed in 2012.

> States have the primary responsibility to uphold children's rights to protection and access to services and support families' capacity to provide children with care in a safe environment.[150]

124. The U.N. Study also emphasizes that the prevention component must not be limited exclusively to the adoption of provisions that prohibit violence and punish perpetrators. The foregoing without prejudice to the existence of norms that prohibit and impose sanctions, or other type of appropriate consequences, for the various forms of violence against children, represent measures of significant importance for the protection of children's rights, also constituting an element to dissuade individuals from resorting to those behaviors. The report of the Independent Expert for the U.N. Study points out, however, that this is not sufficient to meet the obligation to guarantee the rights of children and the duty to prevent those violations.[151]

125. Specifically, the element of prevention of violence is included in the third of the twelve general recommendations made by the U.N. Study to the States. Furthermore, its contents are linked to the rest of the recommendations contained in the report of the Independent Expert for the U.N. Study.[152] The third recommendation states:

> I recommend that States prioritize preventing violence against children by addressing its underlying causes. Just as resources devoted to intervening after violence has occurred are essential, States should allocate adequate resources to address risk factors and prevent violence before it occurs. Policies and programmes should address immediate risk factors (…). In line with the Millennium Development Goals, attention should be focused on economic and social policies that address poverty, gender and other forms of inequality, income gaps, unemployment, urban overcrowding, and other factors which undermine society.[153]

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[150] Report of the Independent Expert for the U.N. Study on Violence against Children to the United Nations General Assembly, resolution A/61/299 of August 29, 2006, paragraph 93(b) and (c), with regard to the principles that inspired the undertaking of the U.N. Study and the recommendations therein.

[151] The Report states the following: "Every society, no matter its cultural, economic or social background, can and must stop violence against children. This does not mean sanctioning perpetrators only, but requires transformation of the "mindset" of societies and the underlying economic and social conditions associated with violence", Independent Expert's Report to the General Assembly, adopted by Resolution A/61/299 of August 29, 2006, paragraph 3.

[152] With regard to the general and specific recommendations contained in the Report, it states the following: "My recommendations consist of a set of overarching recommendations which apply to all efforts to prevent violence against children and to respond to it if it occurs, and specific recommendations which apply to the home and family, schools and other educational settings, institutions for care or detention, the workplace and the community. They are addressed primarily to States and refer to their legislative, judicial, administrative, policymaking, service delivery and institutional functions. (…)", paragraphs 94 and 95 of the Independent Expert's Report to the General Assembly, Resolution A/61/299 of August 29, 2006.

[153] General Recommendation No.3 is included in paragraph 99 of the Independent Expert's Report to the General Assembly, adopted by Resolution A/61/299 of August 29, 2006.

126. In the section dedicated to specific or concrete recommendations according to settings, the Independent Expert for the U.N. Study recommends the following with regard to the home and family:

> Bearing in mind that the family has the primary responsibility for the upbringing and development of the child and that the State should support parents and caregivers, to care for children, I recommend that States:
>
> a) Develop or enhance programmes to support parents and other carers in their child-rearing role. Investments in health care, education and social welfare services should include quality early childhood development programmes, home visitation, pre- and post-natal services and income-generation programmes for disadvantaged groups;
>
> (b) Develop targeted programmes for families facing especially difficult circumstances. These may include families headed by women or children, those belonging to ethnic minorities or other groups facing discrimination, and families caring for children with disabilities;
>
> (c) Develop gender-sensitive parent education programmes focusing on non-violent forms of discipline. Such programmes should promote healthy parent-child relationships and orient parents towards constructive and positive forms of discipline and child development approaches, taking into account children's evolving capacities and the importance of respecting their views.[154]

127. In addition, with regard to the contents, scope and nature of the obligation of prevention of violence that the State has as part of its obligation to protect and guarantee the rights of children, the Independent Expert points out the following:

> I recommend that all States develop a multifaceted and systematic framework to respond to violence against children which is integrated into national planning processes. A national strategy, policy or plan of action on violence against children with realistic and time-bound targets, coordinated by an agency with the capacity to involve multiple sectors in a broad-based implementation strategy, should be formulated. National laws, policies, plans and programmes should fully comply with international human rights and current scientific knowledge. The implementation of the national strategy, policy or plan should be systematically evaluated according to established

[154] Report of the Independent Expert for the U.N. Study on Violence against Children to the United Nations General Assembly, resolution A/61/299 of August 29, 2006, paragraph 110.

> targets and timetables, and provided with adequate human and financial resources to support its implementation. However, any strategy, policy, plan or programme to address the issue of violence against children must be compatible with the conditions and resources of the country under consideration.[155]

128. The Commission considers that, even though the State has a broad range of possibilities to determine the concrete measures it will implement to encourage the prevention of violence in the family and guarantee the protection of children and adolescents, this does not preclude its immediate obligation to take all necessary, appropriate and effective measures of any type to prevent and respond to acts of violence against children.

129. The Committee on the Rights of the Child also underscores the obligations of the State, of primary or general prevention, in its General Comment number 13, The right of the child to freedom from all forms of violence,[156] and warns that States must "overcome isolated, fragmented and reactive initiatives to address child caregiving and protection which have had limited impact on the prevention and elimination of all forms of violence,"[157] and "[to] promote a holistic approach to implementing Article 19, based on the Convention's overall perspective on securing children's rights to survival, dignity, well-being, health, development, participation and non-discrimination—the fulfillment of which is threatened by violence"[158]. In the aforementioned General Comment, the Committee outlines several measures of various types aimed to preventing violence in different environments, which States will need to take into account in order to comply with the mandate of providing protection against violence established in Article 19 of the CRC.[159]

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[155] Report of the Independent Expert for the U.N. Study on Violence against Children to the United Nations General Assembly, resolution A/61/299 of August 29, 2006, paragraph 96.

[156] General Comment number 13, *The right of the child to freedom from all forms of violence* CRC/C/GC/13, April 18, 2011.

[157] General Comment number 13, *The right of the child to freedom from all forms of violence* CRC/C/GC/13, April 18, 2011, paragraph 11(c).

[158] General Comment number 13, *The right of the child to freedom from all forms of violence* CRC/C/GC/13, April 118, 2011, paragraph 11(d).

[159] The Committee adds that: "Article 4 [of the CRC] obliges States parties to undertake all appropriate measures to implement all the rights in the Convention, including Article 19. In applying Article 4 of the Convention, it must be noted that the right to protection from all forms of violence outlined in Article 19 is a civil right and freedom. Implementation of Article 19 is therefore an immediate and unqualified obligation of States parties. In the light of Article 4, whatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups (see the Committee's general comment No. 5, para. 8). The article stresses that available resources must be utilized to the maximum extent." Committee on the Rights of the Child, General Comment number 13, *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, paragraph 65.

3. Prevention of relinquishment and abandonment of children

130. The circumstances that lead parents to relinquish custody or care of a child, temporarily or permanently, or that lead to abandonment, may be potentially the same as those that, in general terms, limit the capacities of families to fulfill their parental responsibilities. In accordance with the provisions of Articles 17(1) and 19 of the Convention, and Articles VI and VII of the Declaration, the State has the duty to take any appropriate and necessary steps to guarantee that parents or, as the case may be, the extended family, are provided with appropriate counseling and professional support and, especially, access to relevant information on family support services and programs, in addition to legal assistance regarding the legal effects of the relinquishment custody and care of their child.

131. With regard to situations in which one of the parents exercises custody and care for the child, and decides to relinquish care of the child temporarily or permanently, including in cases of mono parental families, the Court and the Commission have indicated that the State has a duty to take every reasonable step, taking into consideration the specific context, to try to locate the other parent or the extended family in order to determine whether there is a willingness on their part to maintain the parent-child tie, before proceeding with temporary or permanent decisions regarding the care of the child by a family other than his/her biological family.[160]

132. The U.N. Guidelines for the Alternative Care of Children state the following:

> When a public or private agency or facility is approached by a parent or legal guardian wishing to relinquish a child permanently, the State should ensure that the family receives counseling and social support to encourage and enable them to continue to care for the child. If this fails, a social work or other appropriate professional assessment should be undertaken to determine whether there are other family members who wish to take permanent responsibility for the child, and whether such arrangements would be in the child's best interests. Where such arrangements are not possible or in the child's best

[160] I/A Court H.R., *Case Fornerón and daughter v. Argentina.* Merits, Reparations and Costs. Sentence of April 27, 2012 Series C No. 242. para. 119. "the Court considers, as indicated by expert witness García Méndez during the public hearing in this case, that the right of the child to grow up with his or her family of origin is of fundamental importance and is one of the most relevant legal criteria derived from Articles 17 and 19 of the American Convention, as well as from Articles 8, 9, 18 and 21 of the Convention on the Rights of the Child. Hence, the family to which every child has a right is, first and foremost, the biological family, which includes the closest family members, who should provide protection to the child and, in turn, should be the principal subject of measures of protection by the State. Consequently, in the absence of one of the parents, the judicial authorities are obliged to seek the father or mother or other members of the biological family. "

> interests, efforts should be made to find a permanent family placement within a reasonable period. (…).[161]
>
> When a public or private agency or facility is approached by a parent or caregiver wishing to place a child in care for a short or indefinite period, the State should ensure the availability of counseling and social support to encourage and enable them to continue to care for the child. A child should be admitted to alternative care only when such efforts have been exhausted and acceptable and justified reasons for entry into care exist (…).[162]

133. In that regard, family protection and support measures should be provided also during pregnancy and following the birth of the child, in order to guarantee decent conditions for the appropriate development of the pregnancy and the care of the child, and prevent families from being exposed to precarious or other conditions that may lead to the decision of temporary or permanent relinquishment or abandonment of the child.[163]

134. When the parents are adolescents under 18 years of age and have expressed their willingness to temporary or permanent relinquish their parental responsibilities, the State's obligation of special protection also applies to them, given that, as individuals under the age of 18, they are themselves beneficiaries of this protection under the provisions of Article 19 of the Convention. In cases like these, the Commission agrees with the Committee on the Rights of the Child in expressing its concern in two aspects: i) with regard to any social, family or other type of pressure influencing the adolescents to give up their child for adoption or to temporarily relinquish their custody ; and, ii) the limited capacities and material possibilities of the adolescents to take care of their children and, therefore, the need to provide them appropriate counseling and support through progams and services that provide care and assistance. The Commission has expressed its concern with the fact that adolescent mothers quit their studies, which affects their right to education, and, therefore, urges States to continue to implement measures to ensure that pregnant adolescents and adolescent mothers have the support necessary to continue studying, and reminds authorities and educational institutions that any obstacle or impediment to that objective is a violation of this right.

135. It is precisely to reduce the number of cases of abandonment of newly born babies, of parents giving up their children for adoption and voluntarily relinquishing their children, especially when the parents are adolescents, that the State should develop and implement programs and services to prepare adolescents to make fundamental decisions with regard to their sexual and reproductive health and to

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[161] Guideline 44.

[162] Guideline 45.

[163] In a similar sense, U.N. Guidelines for the Alternative Care of Children, Guideline 41.

assume responsibilities in this regard.[164] The goal of programs and services to provide assistance and support to future parents, specially to adolescents, must be to offer them the possibility to exercise their parental role with dignity and avoid that they relinquish custody of their children or consent to adoption due to the conditions of discrimination or vulnerability that they face.[165]

136. In the Commission's view, stronger protections must be provided to families headed by adolescents and to their children, as well as to other families in especially vulnerable situations that limit their capacity to develop their parental responsibilities in an appropriate manner, including the limitation of their material capacities. Single-parent families who may be exposed to poverty due to limited income, families where a parent or a child has special needs or a disability, and families facing a series of situations of vulnerability at the same time, including belonging to a social group which has been traditionally excluded or discriminated against, are some of the considerations that the State must take into account when formulating public policy and developing programs and services to support families. The relinquishment or abandonment of a child, are actions that raise serious concern within the Commission and the Committee on the Rights of the Child, and, in certain societies, may disproportionately affect children born out of wedlock and children with disabilities.[166]With regard to children born out of wedlock, States must take every measure necessary to ensure that the law recognizes equal rights for children born both out of and in wedlock.

137. The United Nations Guidelines for the Alternative Care of Children identify certain types of families that may be more exposed to situations of vulnerability and, according to the Commission, also deserving of the State's special attention under the provisions of Articles 17(1) and 19 of the Convention and VI and VII of the Declaration. The Guideline 36 states that:

> Special attention should be paid, in accordance with local laws, to the provision and promotion of support and care services for single and adolescent parents and their children, whether or not born out of

[164] Committee on the Rights of the Child, General Comment 4*, Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, July 21, 2003, 33rd Regular Session, para. 28, also see paras. 16, 20, 26, 30, 31 and 35. Committee on the Rights of the Child, General Comment No.15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24),* CRC/C/GC/15, of May 14, 2013, paras.24, 31, 56, 59, 60 and 70. With regard to the obligation of the States in relation to access to information on reproductive health, see IACHR report: *Access to information on reproductive health from a human rights perspective* (2011). U.N. Guidelines for the Alternative Care of Children also include a reference to policies on sexual and reproductive health aimed at young people, as an appropriate measure to prevent the abandonment or relinquishment of the child, see Guideline 34 (c). In addition, United Nations, Committee for the Elimination of Discrimination against Women, General Recommendation no. 24, Women and Health, para. 28.

[165] In a similar sense, see Guideline 41 of the U.N. Guidelines for the Alternative Care of Children.

[166] General Comment number 13, *The right of the child to freedom from all forms of violence* CRC/C/GC/13, April 18, 2011, para. 20(e).

> wedlock. States should ensure that adolescent parents retain all rights inherent to their status both as parents and as children, including access to all appropriate services for their own development, allowances to which parents are entitled, and their inheritance rights. Measures should be adopted to ensure the protection of pregnant adolescents and to guarantee that they do not interrupt their studies. Efforts should also be made to reduce stigma attached to single and adolescent parenthood.

138. Based on the information gathered, the Commission agrees with the Committee on the Rights of the Child and the Independent Expert on the U.N. Study on Violence against Children in expressing special concern with the number of cases of abandonment or relinquishment of children with disabilities or serious illnesses, adding that "[m]any [children] have been given up by parents who, lacking money or support services to cope with their children's disabilities, feel they have no alternative."[167]

139. The United Nations Convention on the Rights of Persons with Disabilities recognizes that persons with disabilities have the right to family life under equal conditions, and establishes the obligation of the State to provide the necessary support to parents with disabilities or parents with children with disabilities, to be able to carry out their parental responsibilities and prevent the abandonment of the children:

> (…) States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.[168]

> States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.[169]

140. The information obtained clearly shows that, in general, there are fewer social support programs available for children with disabilities and their families, and, as a result, children with disabilities are more likely to remain in group homes or residential centers for the rest of their lives.[170] In this regard, both the Committee on

[167] U.N. Study on Violence against Children, p. 175.

[168] United Nations Convention on the Rights of Persons with Disabilities, adopted by the General Assembly of the United Nations in Resolution 61/106, December 13, 2006, Article 23(2).

[169] United Nations Convention on the Rights of Persons with Disabilities, adopted by the General Assembly of the United Nations in Resolution 61/106, December 13, 2006, Article 23(3).

[170] Disability Rights International, Response to questionnaire. Disability Rights International y la Comisión Mexicana de Defensa y Promoción de los Derechos Humanos. "Abandonados y Desaparecidos: Segregación y Abuso de Niños y Adultos con Discapacidad en México." [Disability Rights International and the

Continues…

the Rights of the Child and the U.N. Study on Violence against Children make recommendations to the States with regard to prevention, especially the implementation of support and counseling services for families, as well as providing opportunities so that the care of the child does not fall entirely on the family. For instance, in-home assistance or care services available during the day right in the community make it possible for parents to continue working and reduce pressure in the family environment.[171] The aforementioned U.N. Study found that, in some countries, the implementation of family support programs resulted in a 70% reduction in the number of children with disabilities living in alternative residential s.[172] Based on the information gathered in the context of the present report, in certain States of the region children with disabilities represent a very high percentage of the total number of children living in group homes or residential s. For instance, in Peru, it represents 10.8% of the total population living in those institutions.[173]

141. Last, the Commission is concerned that children in the region whose births are not registered. In previous occasions, the Commission has expressed its concern with regard to violations of the right to recognition of legal personality and access to other fundamental rights that may be affected due to the lack of documentation certifying the identity of the child. With regard tothe subject of this report, the Commission is concerned that children and their families, who may be in special vulnerable conditions in the exercise of their rights, may not have birth certificates to legally certify the child's family relationship and ties with parents and extended family. The State's efforts to preserve the child's ties to his or her family of

…continuation
Mexican Commission for the Defense and Promotion of Human Rights of Abandoned and Disappeared Persons: Segregation and Abuse of Children and Adults with Disabilities in Mexico}. Printed Edition updated to June 2011.

[171] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilitie*s, , is especially relevant in this regard and paragraph 44 specifically establishes that, "Children with disabilities are best cared for and nurtured within their own family environment provided that the family is adequately provided for in all aspects. Such support to families includes education of parent/s and siblings, not only on the disability and its causes but also on each child's unique physical and mental requirements; psychological support that is sensitive to the stress and difficulties imposed on families of children with disabilities; education on the family's common language, for example sign language, so that parents and siblings can communicate with family members with disabilities; material support in the form of special allowances as well as consumable supplies and necessary equipment, such as special furniture and mobility devices that is deemed necessary for the child with a disability to live a dignified, self-reliant lifestyle, and be fully included in the family and community. […] Support services should also include different forms of respite care, such as care assistance in the home and day-care facilities directly accessible at community level. Such services enable parents to work, as well as relieve stress and maintain healthy family environments." Committee on the Rights of the Child, General Comment No. 9, *Rights of children with disabilities*, CRC/C/GC/9, February 27, 2007, 43rd Regular Session.

[172] U.N. Study on Violence against Children, page 209, citing the data collected during two decades by analyzing the cases of the United States and Canada.

[173] Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, page 246.

origin may be hindered by the absence of this documentation. Furthermore, the lack of birth certificates and identification documents make children vulnerable to other serious violations of their rights, such as the sale of children and human trafficking for exploitation purposes.

IV. PRINCIPLES APPLICABLE TO DECISIONS ON ALTERNATIVE CARE; DUE PROCESS GUARANTEES AND ESPECIALLY PROTECTED RIGHTS

142. Articles 17(1) and 19 of the Convention in connection to Article 1(1) and 2 of the same instrument, and Articles VI and VII of the Declaration, establish the State's obligation to develop and implement a series of special measures of protection for children who lack appropriate parental care or may be at risk of being so. The development and implementation of this type of measure should be framed in the functioning of the National Systems for the Promotion and Protection of Children's Rights which States must implement in order to comply with their obligation to protect children. Therefore, the objective of these measures must be the preservation or restitution of the rights affected and the resolution of the situations that led to them.

A. Objective of the preservation and restitution of rights

143. The measures that entail interference with the right to a family and family life, must respect the principles of necessity, exceptionality and temporal determination. These special measures of protection have a temporary nature and must be aimed at the preservation and restitution of the rights of the child, including the right to a family. The objective of preservation and restitution of rights and the respect to the best interests of the child must guide any decision on the various forms of special measures of protection, as well as their content, implementation and review. Therefore, special measures of protection must be aimed at providing the protection, safety and well-being which the child needs, while striving from the first moment on for the restitution of all his/her rights, including the right to a family and family life, in addition to promoting the resolution of the circumstances that led to the adoption of the special measure of protection.

144. The determination and implementation of the special measure of protectionthat better suit the best interests of the child must be done taking into account the specific circumstances surrounding the child and his/her family, as well as the impact those measures may have on the child's well-being and rights.[174] Therefore, the analysis of these circumstances and the needs for the protection of the child must be done by professionals with the appropriate training and experience to be able to identify the elements that led to the vulnerability of the child, the type of support

[174] Day of General Discussion of the Committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Regular Session of the Committee on the Rights of the Child, CRC/C/153, paras. 667, 668 and 669.

required by the child and the family to respond to the situation, and the course of action that would better serve the interest and rights of the child.[175]

145. In addition, the principles of necessity, exceptionality and temporal determination, as well as the objective of restoring the rights of the child, generate the obligation to regularly review those measures of special protection. The purpose of the periodic review of the temporary protection measure is to determine whether the measure achieves its objective during the period of time in which it is in force, and, therefore, whether it serves the best interests of the child. In addition, periodic supervision should help guide the implementation of the measure toward the prompt return of the child to his or her family, when in accordance with the interest of the child.

146. In summary, the determination of the type of special measure of protection, its contents, implementation and review, must be accomplished based on technical evaluations that take into account objective criteria and are carried out by a trained, specialized and multidisciplinary team. The child, his/her parents, relatives and other individuals who play a significant role in the child's life must be involved in the decision-making process.[176] This is necessary in order to ensure that the analysis of the circumstances affecting the child and his or her family, and the decisions made within the framework of a process of protection, are the most appropriate for the protection of the child and his or her rights.

B. The principle of the best interests of the child

147. Article 3(1) of the UN Convention on the Rights of the Child (CRC) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The Committee on the Rights of the Child has called this "the principle of the best interests of the child" and has made it one of the general guiding principles for the interpretation and implementation of all the provisions of the CRC.[177]

148. As the Committee on the Rights of the Child has stated, the principle of the best interests of the child is tied directly to the concept of children as subjects of rights, with their dignity and their special protection needs. Hence, the primary

[175] Day of General Discussion of the Committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Regular Session of the Committee on the Rights of the Child, CRC/C/153, para. 654.

[176] See U.N. Guidelines for the Alternative Care of Children, Guideline 67.

[177] Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44), CRC/GC/2003/5, November 27, 2003, paragraph 12; Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, para. 1 and Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraphs 59 and 65.

consideration in the application thereof should be to completely ensure full respect for, and the effective exercise of, all children's rights.[178] With respect to the best interests of the child, the Court has stated the following:

> Regarding the best interests of the child, the Court reiterates that this regulating principle of law on the rights of the child is based on the dignity of the human being, on the inherent characteristics of children, and on the need to promote their development so they can realize their full potential. In this regard, it should be noted that, in order to ensure the prevalence of the best interests of the child to the fullest possible extent, the preamble to the Convention on the Rights of the Child stipulates that childhood is entitled to "special care," and Article 19 of the American Convention indicates that every child has the right to special "measures of protection.[179]
> (…)
> In addition, the Court has established that the best interests of the child constitute the reference point to ensure effective realization of all rights contained in the CRC–the observance of this principle will allow the subject to fully develop his or her potential–[180] and that the "prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the [American] Convention when the case refers to children."[181]

149. Actions of the State and of society regarding protection of children and promotion and preservation of their rights should follow this criterion of the best interests of the child.[182] Moreover, the Court understands that the principle of the best

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[178] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* para. 4, and Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood,* CRC/C/GC/7/Rev.1, September 20, 2006, Fortieth session, paragraph 13.

[179] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 49; See also Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraphs 56 and 60; Inter-American Court of Human Rights, *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 108; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, paragraph 126.

[180] See I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 59. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 22.

[181] I/A Court H.R., *Case of the Yean and Bosico Children v. the Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005, Series C, No. 130, para. 134. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 22.

[182] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 59.

interests of the child acts as a guarantee with respect to decisions that may in some way limit the rights of the child; such that, for the restriction to be legitimate, it must be based on the best interests of the child:

> Any State, social or family decision that involves a restriction of the exercise of any right of the child must take into account the best interests of the child, and be strictly adapted to the provisions that regulate the matter."[183] In this regard, it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.[184]
>
> Any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child.[185]

150. Consequently, the Court and the Commission, by means of their decisions, have held this principle up as a prominent tool for interpreting the American Convention with respect to the scope and content of Article 19, as well as fulfillment of the obligations to respect and guarantee established under al of the American Convention, in connection with the rights of children.[186]

151. The United Nations Committee on the Rights of the Child has made some clarifications regarding the principle of the best interests of the child so it may be better understood.[187] In this connection, an initial observation made by the Committee holds that the best interests of the child must be applied at two levels. The first, regarding measures of any kind aimed at children as a group or collective; the second, with respect to decisions made about individual cases or situations wherein the rights of the child are being determined.[188]

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[183] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 48; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, paragraph 126; I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 65.

[184] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 61, and Inter-American Court of Human Rights, *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 45.

[185] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 73.

[186] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraphs 56 and 59.

[187] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session.

[188] Committee on the Rights of the Child, *General comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 22 and 23.

152. Every law, regulation, policy , or program affecting children as a group or collective must be guided by the criterion of "best interests" of children; this applies to legislation, regulations, and programs Member States should adopt for purposes of prevention and protection of situations in which children may be deprived of their parents' care.[189]

153. Furthermore, the principle of the best interests of the child applies in those situations where decisions regarding the rights of the child are made on an individual basis, based on specific circumstances. In such cases, the best interests of the child constitute the reference point to ensure the full and effective enjoyment of all of their rights and the complete and harmonious development of the child.[190]

154. Consequently, regarding the matter of children deprived of adequate parental care or at risk of being so, legislators, judges, public authorities, and all publicly- and privately-run care centers and institutions should use the best interests of the child as their primary and fundamental consideration when adopting any special measures of protection aimed at children. The best interests of the child and the protection of children's rights must be effectively considered when regulating, implementing, monitoring, and reviewing the appropriateness of special measures of protection; this includes all decisions tied to establishing the specific content of an individualized protection measure for a child, as well as the amendment and cessation thereof.

155. By the same token, and pursuant to Article 3 of the CRC, Guideline 7 of the U.N. Guidelines for the Alternative Care of Children provides that:

> […] determination of the best interests of the child shall be designed to identify courses of action for children deprived of parental care, or at risk of being so, that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family, social and cultural environment and their status

[189] See, Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, Thirty-forth session, paragraph 12; Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood,* CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session, paragraph 13, Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 72.

[190] I/A Court H.R., *Case of the Yean and Bosico Children v. the Dominican Republic*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005, Series C, No. 130, paragraph 134. In this regard, the Commission has stated that based on the doctrine of integral protection set forth in the CRC itself, the best interests of the child must be construed as meaning the effective enjoyment of each and every one of their human rights (See IACHR, *Report on corporal punishment and human rights of children and adolescents*, OEA/Ser.L/V/II.135, August 5, 2009, paragraph 25; and IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 23. See also: I/A Court H.R, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraphs 56 to 61.

> as subjects of rights, both at the time of the determination and in the longer term. […]

156. In another of the specifications made by the Committee in an effort to improve understanding of this principle and how it should be applied, the Committee has clarified that "the best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration."[191] The Committee, in likening this principle to a "procedural right," refers not only to decisions that may be made in the judicial sphere, but also, in accordance with the very language of Article 3 of the CRC, to any type of decision affecting children and their rights made by public authorities and social welfare or protection and care institutions, whether public or private. The similarity established by the Committee between the functionability of this principle and a "procedural right" underscores the importance of ensuring, in the framework of the norms, a space for it to be considered in all decision-making procedures and mechanisms, thus guaranteeing the due analysis thereof for purposes of influencing the decision-making process.[192]

157. In addition, the IACHR observes that an accurate determination must be made of what the best interests of the child are in each specific context or situation, based on the objective assessment and verification of the conditions in which the child finds him or herself, and the effect that they have on the enjoyment of his or her rights, well-being, and development.[193] The IACHR is therefore of the opinion that it is not enough to simply state that the best interests of the child have been taken into account when decisions affecting a child are made, rather that this should be justified objectively based on whatever conditions have been verified regarding the personal circumstances of the child. In this respect, both the Commission and the Court have been emphatic in stating that this principle should not be used *in abstracto* or only in nominative form as a basis for decisions affecting a child and a child's family. The determination of what the best interests of the child are in each specific case must be made in a reasoned manner and be justified based on the protection of the child's rights; it must also be duly substantiated in the process with the applicable and relevant documentation.[194] The

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[191] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, para. 6: The Committee underlines that the child's best interests is a threefold concept: a) a substantive right, b) a fundamental, interpretative legal principle, c) a rule of procedure. Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 70.

[192] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, para. 85.

[193] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 48-51, and in addition paras. 52-84.

[194] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraphs 109 and 110.

Committee on the Rights of the Child has also observed with concern that on occasions, the best interests of the child are invoked to justify measures that may even be against a child's rights; in this regard it has underscored the fact that "the interpretation of a child's best interests must be consistent with the whole Convention."[195]

158. To this end, the observance and evaluation of the conditions and circumstances that may affect the rights of the child, his/her wellbeing and protection, must be conducted by professional personnel duly trained for those purposes.[196] The purpose of such a requirement is to ensure that evaluations of the circumstances that impact and determine the best interests of the child are conducted by people with competence and experience to do so. Analysis and assessments in the framework of special measures of protection require the use of expert opinions and technical criteria that objectively assess the welfare of the child and identify the most effective way of serving the child's interest in a given case.

159. The preponderance that is to be given to the best interests of the child may result in limiting or restricting the rights of others when such rights are counter to the interests of the child. This is particularly relevant when it comes to determining the suitability of parental care and assessing the need to adopt special measures of protection that entail separating a child from his or her parents. In such cases, the Court has stressed that despite the fact that the bests interests of a child are a legitimate aim that may end up limiting the rights of other persons, like those of the child's parents, that does not in any way obviate the need for appropriate justification. In this regard, the Court finds that "the determination of the child's best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks […] and not those that are speculative or imaginary."[197] The Commission has taken a similar position by indicating that the best interest of the child "is not only a legitimate aim, but also a pressing social need," while at the same time it has criticized the merely nominal use thereof without any explanation as to the "suitability or causal relationship" between the decisions made and mention of the best interests of the child, believing that this constitutes "speculative and abstract reasoning" that is not enough to justify the decision made by the authorities.[198]

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[195] Committee on the Rights of the Child, General Comment No. 13, *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, paragraph 61.

[196] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 47, 92, 94 and 95.

[197] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 109; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 50.

[198] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 100.

160. Both the Court and the Commission have held that the best interests of the child cannot be used in an attempt to justify decisions that discriminate against other persons and their rights, and that are based on nothing more than social stereotypes, preconceptions, and prejudices regarding certain behaviors or groups of people. In that connection, in one case it heard involving the care and custody of three girls, the Court found the following:

> The child's best interest cannot be used to justify discrimination against the parents based on their sexual orientation. Therefore, the judge cannot take this social condition into consideration as an element in a custody ruling.[199]

> A determination based on unfounded and stereotyped presumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development is not appropriate for the purpose of guaranteeing the legitimate goal of protecting the child's best interest. The Court finds that considerations based on stereotypes of sexual orientation, that is, preconceptions regarding the attributes, behaviors, or characteristics of homosexuals or the impact these may have on children are not admissible.[200]

161. Similarly, poverty or any other form of social exclusion of which the parents may be object can also not, per se, constitute sufficient basis for separating a child from his or her family by invoking the child's best interest.[201]

162. The Court and the Commission agree with the Committee on the Rights of the Child in noting that an important complementary relationship exists between the best interests of the child and the right of the child to be heard and to having his or her opinions duly taken into account–in accordance with the child's age and maturity–in all matters affecting him or her as established under Article 12 of the CRC. In this regard, the Committee has stated that, "there can be no correct application of Article 3 [of the CRC] if the components of Article 12 are not respected." And that, "[l]ikewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives."[202]

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[199] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 110.

[200] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 111. Regarding the concept of stereotypes, *mutatis mutandis,* Inter-American Court of Human Rights, *Case of González Et. Al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009, Series C, No. 205, paragraph 401.

[201] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 76.

[202] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 74. Committee on the Rights of the Child, General comment No.

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163. Moreover, the Committee has stated that, "[w]henever a decision is made to remove a child from her or his family […] the view of the child must be taken into account in order to determine the best interests of the child."[203] The Committee notes that, in its experience, on such occasions, "the child's right to be heard is not always taken into account by States parties" and that "[t]he Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family."[204]

164. In addition, in determining what the best interest of the child is, it is important to hear from the parents, extended family, and other individuals who have direct contact with the child or who may be important in the child's life.[205]

165. The U.N. Guidelines for the Alternative Care of Children, in Guideline 7, likewise places special emphasis on the relationship between the determination of the best interests of the child and the views expressed by the child regarding his or her own situation, desires, and opinions thereon.

> (…)The determination process should take account of, inter alia, the right of the child to be heard and to have his/her views taken into account in accordance with his/her age and maturity.

166. Lastly, the age and maturity of the child have an impact on the determination of what the child's best interest is.[206] Children's level of development and maturity enable them to understand and form their own opinions regarding their circumstances and decisions related to the exercise of their rights and, consequently, are relevant factors in terms of the level of influence their opinions will have in determining what are to be considered their best interests in a specific case. A child's age and maturity should be duly taken into account by any authority in a position to make any type of decision regarding the care and well-being of that child. The right of

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14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, para. 43.

[203] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 53.

[204] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 54.

[205] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 74.

[206] Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, para. 44; Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraphs 84 and 85; Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, of September 20, 2006, Fortieth session, paragraph 17.

the child to be heard in all matters affecting him or her and to have due weight given to his or her views means that if the competent authorities stray from the child's views when it comes to determining the child's best interest, such authorities, at a minimum, would be required to provide effective justification and objective grounds for doing so, with the understanding that the child's position was not the option that best served the child's best interests.[207]

C. Principles for determining and implementing special measures of protection involving separation from the family

167. Earlier in this report it has been noted that the principles of necessity, exceptionality, and temporal determination must prevail when it comes to implementing temporary protection measures that involve separating a child from his or her parents, bearing in mind the right to a family (Article 17(1) of the American Convention and VI of the American Declaration) and the right to a family life free of arbitrary interference (Article 11(2) of the American Convention and V of the American Declaration). The Court has established in its case law that "the right to private life is not an absolute right and, therefore, may be restricted by States provided that the intrusions are neither abusive nor arbitrary. For this reason, these must be regulated by the law, pursue a legitimate goal and comply with the requirements of suitability, necessity and proportionality, in other words, they must be necessary in a democratic society."[208] Otherwise, the measures would amount to an illegal restriction that would violate Article 11(2) and the prohibition of arbitrary interference in peoples' private lives.

168. Special measures of protection that derive from Article 19 of the Convention and Article VII of the Declaration, for their part, aim to ensure the child's best interests, well-being, and rights and, as a result, should be adjusted to fit the child's specific and individual needs for protection and care, effectively taking into account the child's personal circumstances as well as those of his or her family. These measures may end up requiring the child to be temporarily separated from his or her parents if that is in the child's best interests.

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[207] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 200; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, paragraph 230. See also, Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, May 29, 2013, sixty-second session, para. 97 and Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraph 44.

[208] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 164; Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 27, 2009, Series C, No.193, paragraph 56, and, Inter-American Court of Human Rights, *Case of Escher Et. Al. v Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009, Series C, No. 200, paragraph 116.

169. It is important to highlight that the Court has repeatedly indicated, in accordance with Article 19 of the American Convention and the special duty to protect, that States must act with greater diligence, care, and responsibility when it comes to children, and must adopt special measures aimed at ensuring the best interests of the child.[209] As to the matter of children without parental care or at risk of losing such care, given the seriousness and irreversible nature of the harm that could be caused to the child, the duty to act with diligence is even more reinforced.

170. Additionally, regarding the technical assessments that should be conducted on the existence of risk factors and protection factors for children, the involvement of professionals who are specialists in different disciplines related to the rights of children and their well-being is required. Such processes should also be adapted for the making of this type of decisions; consequently, principles of specialization and professionalization rule in this subject matter.

1. Principles of exceptionality and temporal determination

171. International human rights law establishes exceptionality and temporal determination in the adoption and implementation of protection measures that involve separating a child from his or her parents, taking into account the right to a family and the right to privacy free of arbitrary interference.[210] The concurrence of exceptional circumstances that justify , under the American Convention, restriction to the family life, suppose the existence of reasonable grounds for such restriction , based on the child's best interests.[211]

172. Exceptionality implies that prior to separating a child from his or her parents all possible efforts have been made to support and assist the family in providing adequate care, protection, and attention to the child. States must, therefore, regulate and adopt positive and service-based measures aimed at ensuring effective protection of the rights contained in Articles 19 and 17(1), including prevention actions framed in national plans, programs, and services to support and strengthen families, as well as individualized interventions for providing support to the child's parents and family.

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[209] I/A Court H.R., *Juridical Condition and Human Rights of the Child,* Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraphs 51 to 54, 56, 59, and 60; I/A Court H.R., *Case of Servellón García v. Honduras*. Merits, Reparations, and Costs. Judgment of September 21, 2006, Series C, No. 152, paragraph 116; I/A Court H.R., *Case of Chitay Nech Et. Al. v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010, Series C, No. 212, paragraph 164.

[210] IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, paragraph 108; and I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 73.

[211] IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón*, Argentina, November 29, 2010, paragraph 110; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 116; I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 77, and I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, Series C, No. 221, paragraph 125.

173. The principle of exceptionality guides the very objective of special measures of protection, since such measures seek to restore rights and return the child as quickly as possible to his or her family. The measure is thus temporary in nature and, from the time it is implemented, the measure's content must be geared toward the objectives of overcoming surmounting the circumstances that gave rise to it. The Commission observes positively that some legislation incorporates maximum time periods pre-determined in the law for how long special measures of protection may remain in force, for the purpose of preventing potential situations of inactivity or lack of diligence on the part of the authorities in seeking to restore rights, which unnecessarily and unjustifiably prolong implementation of the measure. This also forces measures to be reviewed before they expire in order to determine whether or not they need to be extended. These periods of time established by law should be short, in keeping with the principles of exceptionality and temporal determination, and, where necessary, a measure could be prolonged, although always following a review thereof and the adecuate justification for deciding to keep it in place. Establishment, by law, of maximum lengths of time that special measures of protection may remain in force should not inhibit in any way the possibility of reviewing such measures at any given time. The Commission believes that automatic extensions of special measures of protection which involve the separation of children from their parents, without an assessment of the context and due justification, would constitute a violation of the aforementioned principles.

174. Considering the temporary nature of protection measures and bearing in mind the objective thereof, such measures should be reviewed periodically to determine whether or not they continue to be necessary for the child's protection, or whether they should be amended or even lifted; consequently, protection measures must be reviewed periodically and such duty must be scrupulously followed using criteria that make it possible to objectively determine the legitimacy and appropriateness of keeping a measure in place. The Commission understands that laws should expressly establish the regularity with which special measures of protection should be reviewed for purposes of effectively adhering to the principles of exceptionality and temporal determination that prevail in this matter. The Commission agrees with the assessment made by the U.N. Guidelines for the Alternative Care of Children in terms of how often measures should be reviewed; bearing in mind the importance of the passage of time in the lives of children, the development of their personalities, their emotional ties, and their identity, it is fully justified that these periods should be characterized for their short duration, since the impact on their rights may become very serious and irreparable.[212] To that end, Guideline 67 provides that:

> States should ensure the right of any child who has been placed in temporary care to regular and thorough review – preferably at least

[212] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, para. 52; Inter-American Court of Human Rights Order of July 1, 2011. Provisional Measures with Regard to Paraguay, Matter of L.M., "Considering that" para. 18.

every three months – of the appropriateness of his/her care and treatment, taking into account, notably, his/her personal development and any changing needs, developments in his/her family environment, and the adequacy and necessity of the current placement in these circumstances. The review should be carried out by duly qualified and authorized persons, and should fully involve the child and all relevant persons in the child's life.

2. Principles of legality and legitimacy

175. The principle of legality should be strictly applied to any decision that affects the rights of children. Although special measures of protection may pursue a legitimate goal, this justification alone cannot serve as the basis for actions taken by public authorities that affect families' lives, even for purposes of protecting one of the members of a family. The duty of States to provide special protection to children, which is established under Articles 19 of the American Convention and VII of the American Declaration, should include due consideration of the right to a family and the right to a family life without arbitrary interference, protected under in Articles 17(1) and 11(2) of the Convention, and VI and V of the Declaration.

176. It is worth recalling that, prior to the entry into force of the United Nations Convention on the Rights of the Child, the so-called irregular situation doctrine or paradigm of tutelary protection predominated in the region; this was based on the understanding that children were objects of protection in the making of decisions regarding their personal situation and welfare. This approach was highly paternalistic and ignored a child's status as a subject of rights, and the need for any measure adopted by the State with regard to his or her situation to be taken with strict respect for the child's rights and in accordance with all due process guarantees. The paradigm shift marked by the entry into force of the Convention on the Rights of the Child and the express recognition of children as rights holders, also known as the comprehensive protection paradigm, signified a profound transformation in the concept of protection measures, the objective thereof, and the principles and rights that must govern the regulation, determination, implementation, supervision, and review of such measures.[213]

[213] The doctrine of "irregular situations" or "titulary protection" was based on a differentiation made between children whose needs for protection and care were covered by their families and those who were in a situation of "abandonment" or "neglect," which led to different legal treatment for the latter; to that end, a paternalistic or philanthropic discourse was used that was inconsistent with a human rights approach. The doctrine of "comprehensive protection" is based on the fundamental premise of recognizing children as subjects of rights, who, because of their special status in terms of growth and development, should enjoy protection that is reinforced by the State, the community, and the family. State intervention is organized and justified to completely ensure all of a child's rights and is undertaken with respect for all legal and procedural rights recognized in international human rights law.

177. Article 30 of the American Convention establishes the principle of legality with regard to restrictions on the rights recognized therein:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

In this regard, the Court has held that:

> According to the Court's consistent case law, for the restriction of a right to be compatible with the American Convention, it must fulfill several requirements, among others and above all, it must be based on law.[214]

178. The Court and the Commission have indicated that any decision that entails limiting the right to a family must be duly grounded in objective criteria that have been pre-established by law.[215] Thus, in cases involving children who lack adequate parental care or are at risk of losing such care, measures taken pursuant to Article 19 of the American Convention and Article VII of the American Declaration, and that involve interference in the family life as well as the separation of a child from his or her parents, should be adopted in accordance with the principle of legality as they entail restricting the right of the child, and of his or her parents, to a family life free from arbitrary or illegal interference.

179. It is important to underscore the fact that intervention by public authorities by means of protection measures does not contradict the right to family life, rather it is a direct result of the absence of adequate parental care and of States' obligation to protect and ensure the rights of children based on Article 19 of the Convention and Article VII of the Declaration. The requirement that derives from the American Convention is that special measures of protection that involve separating a child from his or her parents must be implemented in accordance with the principle of legality.

180. Pursuant to the American Convention, the grounds or causes that enable public authorities to make decisions regarding the removal of custody and the separation of a child from his or her parents must be duly established in the law. The Commission observes that in several of the laws existing in the region, regulations governing some of the grounds or causes use generic or broad categories that may allow a certain degree of flexibility, but also may give rise to arbitrariness, when it comes to

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[214] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, para. 117.

[215] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paras. 103 and 113.

enforcement of the law by judicial operators. The Commission finds that the categories used under the law may provide certain flexibility to judicial operators and law enforcement authorities when making assessments, but in no case should this give way to subjective and even stereotyped or prejudice-based interpretations as to what constitutes an unsafe situation for a child.[216] In this respect, and by way of example, the Office of the Ombudsman of Peru has issued some warnings regarding the broad discretion that legal authorities have applied when invoking a residual generic category stipulated under Peruvian law as ground for justifying the separation of a child from his or her parents. The Office of the Ombudsman further observes that the legislation includes as a ground, "parents' lack of moral qualities," a concept that is susceptible to interpretation based on subjective notions tied to whatever the judicial operator deems moral or immoral.[217] In other case files examined by the Office of the Ombudsman, it was found that grounds not provided for under the law were invoked in adopting special measures of protection that involved separating children from their families.[218]

181. Regarding the matter of broad or generic categories and the risk that these could lead judicial operators to integrate presumptions and stereotypes when applying them, the Court, as noted above, has held that:

> [A] decision based on presumptions and stereotypes about parental capacity and aptness to be able to guarantee and promote the well-being and development of the child is not sufficient to ensure the best interests of the child.[219]

182. Furthermore, regarding the principle of legality, the Court has determined that not all legal regulations are suitable and sufficient for justifying restriction of a right. Regulations, beyond pursuing a legitimate aim, must be objective, reasonable, and predictable in order to be consistent with the Convention such that the possibility of abuse of authority in their enforcement is reduced. The Court has said that,

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[216] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paras. 109 to 111, 121, and 124 to 127.

[217] Office of the Ombudsman of the State of Peru, Report No. 153, *Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención* [Neglected Children and Adolescents*:* Input for a New Care Model], Lima, 2011, p. 113.

[218] Office of the Ombudsman of the State of Peru, Report No. 153, *Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención* [Neglected Children and Adolescents: Input for a New Care Model], Lima, 2011, p. 136.

[219] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, para. 99, and I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, para. 111.

"even legal separations of a child from his or her biological family are only admissible when they are duly justified by the best interests of the child (…)."[220]

183. The legitimate goal guiding the law in this area must be based on the best interests of the child, namely, on the dignity and personal safety of the child and on the effective enjoyment and protection of all rights that enable the child to develop fully. Implementation of a special measure of protection should not be construed as punishment or a penalty against parents who have failed in their parental obligations or as criticism of parents' actions, but rather as a response arising out of Article 19 of the Convention to a family situation that objectively jeopardizes a child's safety, rights, and well-being. The idea is that this situation can be rectified by means of a special measure of protection and the rights of the child can be fully restored, including the child's right to live with his or her family and receive the necessary and basic care from the family. The underlying cause for adopting any special measure of protection is a situation in which the rights of a child are not being protected; such a situation need not necessarily involve intentional or wrongful behavior by the parents, rather there must be verification of real conditions that jeopardize the personal integrity and development of a child and that necessarily require such protective intervention; this consideration must prevail over all others and must be justified based on objective and sufficient evidence.

184. In addition, the law or regulation-norms of development should contain objective technical criteria that are to be taken into account in the moment of assessing the unprotected situation in which a child finds him or herself. Regulation of these objective criteria, based on the current technical knowledge in this subject, assumes a guarantee to avoid that decisions regarding special measures of protection will not be made subjectively or arbitrarily. In this connection, the Commission observes that generally medical-legal and psychological reports are requested, as well as socio-environmental and family setting assessments, among other reports and expert opinions.

185. In summary, the Commission understands that a certain degree of complexity may exist in the regulation of the reasons or circumstances that motivate the adoption of a special measure of protection which separates a child from his or her parents. Moreover, the Commission is aware of the limitations that would exist in a regulation that sought to compile an exhaustive catalogue of cases of thoroughly detailed circumstances or reasons. The laws of Member States often include broad legal categories and, as a result, introduce a certain level of flexibility in the decisions made by the authorities in this area. In this regard, the Commission reiterates its view on the importance of ensuring the involvement of technical professionals with specializations in different child-related disciplines (psychologists, social workers, physicians, etc.), who

[220] I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, Series C, No. 221, para. 125. See also, I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, para. 116; I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, para. 77.

have the training necessary to address the subject of lack of protection arising from socio-family conflicts, in order to provide sufficient technical elements as grounds for determining a specific course of action to effectively protect the child, and thus reduce the risk of arbitrariness in the moment that a decision is made by a competent authority.

186. The Court has also signaled the need for competent authorities to justify the grounds on which special measures of protection that entail the temporary separation of a child from his or her family, should be taken. The Court has further stated that merely citing nominally the best interests of the child is not, per se, sufficient to justify a given special measure of protection. As previously stated, an objective and proven assessment of the child's real situation should exist, and of specific parental behaviors and their negative impact on the rights of the child as a basis for invoking this principle when making decisions.[221] Otherwise, citing the best interests of the child would not be sufficient as grounds for a decision: "(…) the judicial decisions on such matters [decisions on guardianship and custody] would need to define in a specific and concrete manner the connections and causality between the behavior and the alleged impact on the child's development. Otherwise, there is a risk of basing the decision on stereotypes."[222] To that end, a strict scrutiny test would have to be applied to substantiate the specific harm allegedly suffered by the child.[223]

187. The Commission is especially concerned about those cases in which the grounds or reasons that permit special measures of protection to be taken might, themselves, constitute discriminatory treatment based on socio-economic or other reasons. The Court has indicated that "[the] lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family, and the resulting deprivation of other rights protected by the Convention," and has added that this would constitute a form of discrimination against low-income families or families in a situation that limits their ability to access the material resources necessary for their members' well-being.[224] The United Nations Convention on the Rights of Persons with Disabilities likewise expressly prohibits children from being separated from parents exclusively on the basis of a disability of either the child or one or both of the parents, as this would constitute a form of discrimination.[225]

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[221] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, para. 109; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 50.

[222] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 125.

[223] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, paragraph 131.

[224] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 76.

[225] Article 23(4) of the UN Convention on the Rights of Persons with Disabilities provides that: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except

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188. The Commission is encouraged by the fact that several States in the region, namely, Argentina, Brazil, Ecuador, and Nicaragua, among others, have stipulated in their legislation that a lack of material resources on the part of the parents, the family, or the legal representatives or guardians of children may not be the sole or primary basis for a decision to place a child in an institution.[226] Nevertheless, despite the existence of such laws, the information received by the Commission shows that, in practice, in many States in the region the main reason why parents lose custody and children are placed in institutions is the precariousness of material resources families. Moreover, the placement of children and adolescents in institutions is still seen, in many contexts, as an adequate policy for addressing poverty and often as a better alternative than the family.[227] In the same regard, the Committee on the Rights of the Child has expressed its concern, for example in regard to Panama,[228] Paraguay,[229] and El Salvador,[230] among other States in the region.

189. The Commission underscores the obligation States have to eliminate all norms and practices that are discriminatory or imply arbitrary, differentiated treatment. The Commission understands that the overrepresentation of certain groups of children in alternative care and in residential institutions may be an indicator that certain groups of families and children require a reinforced assistance and support from the State to prevent separation since they are in a situation of special vulnerability. The Commission forewarns that overrepresentation of certain groups of children in alternative care and in adoption processes may be indicative of arbitrary or

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when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents."

[226] This is the case, for example, as provided for under legislation in Argentina (Law 26.061, Article 33), Brazil (Statute on Children and Adolescents [Estatuto del Niño y del adolescente], Article 23), Ecuador (Code of Childhood and Adolescence [Código de la Niñez y la Adolescencia], Article 221), or Nicaragua (Code of Childhood and Adolescence [Código de la Niñez y la Adolescencia], Article 22), among other States in the region.

[227] UNICEF Submission to the Committee on the Rights of the Child Day of General Discussion on Children without Parental Care, Geneva, 16 September 2005. Ministry of Labour, Human Services and Social Security, Assessment of procedural and physical standards in children's residential care institutions in Guyana. Summary and Recommendations, August 2006; RELAF - Latin American Foster Care Network, "Niñez y adolescencia institucionalizada: visibilización de graves violaciones de DDHH" [Institutionalized Childhood and Adolescence: Raising the Profile of Serious Human Rights Violations]. Series: Publications on childhood without parental care in Latin America: Contexts, causes, and responses, 2011.

[228] Committee on the Rights of the Child, Consideration of the Reports Submitted by the States Party under Article 44 of the Convention. Concluding Observations: Panama, CRC/C/15/Add.233, June 30, 2004, paragraphs 35 and 36.

[229] Committee on the Rights of the Child, Consideration of the Reports Submitted by the States Party under Article 44 of the Convention. Concluding Observations: Paraguay, CRC/C/PRY/CO/3, February 10, 2010, paragraph 40.

[230] Committee on the Rights of the Child, Consideration of the Reports Submitted by the States Party under Article 44 of the Convention. Concluding Observations: El Salvador, CRC/C/SLV/CO/3-4, February 17, 2010, paragraph 49.

discriminatory treatment of these groups of children and their families when authorities are making decisions on the temporary or permanent removal of a child from the custody of his or her parents or relatives.

190. Based on the gathered information, the Commission observes that children belonging to some communities in the Americas, such as afro-descendent and indigenous children, are overrepresented in residential care institutions.[231] For example, according to the data collected by the Commission, afro-descendent children represent 14% of the national child population in the United States, yet they account for 30% of the national population in alternative care.[232] In the case of Brazil, according to the information received, 63.6% of children found in institutions are afro-descendants.[233]

191. The Commission has also received data that show that in Canada, children belonging to indigenous communities have a disproportionately high representation in residential institutions.[234] Despite representing only 5% of the child

[231] The Independent Expert for the United Nations Study on Violence against Children reaches similar conclusions when indicating that: "Historically, children from racial and ethnic minorities tend to be over-represented in care (for example, in Australia, Brazil, and Canada as mentioned above), and in many cases, this trend persists," and "[i]n Australia and Canada, for example, entire generations of such children were removed from their families and send to residential schools, and denied their own culture, clothing and language." […] [P]rejudice against ethnic minorities is reported to have led staff in residential institutions to discourage contact between parents and their institutionalized children," pages 179, 180 and 1845, http://www.unviolencestudy.org/spanish/index.html. You may also find an historical perspective on the overrepresentation of indigenous groups in residential schools in the study: "Indigenous Peoples and Boarding Schools" prepared by the *Boarding School Healing Project*. Available at: http://www.boardingschoolhealingproject.org/files/bshpreport.pdf. See, Smith, Andrea, "Indigenous Peoples and Boarding Schools: a comparative study", Permanent Forum on Indigenous Issues, E/C.19/2009/CRP. 1, 2009, pages 4–8. Available at: http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_crp1.pdf; see also the hearing on the "Situation of Indigenous Children in Schools in the United States" presented by the *Boarding School Healing Project* during the 140th period of sessions of the IACHR. Available at: http://www.oas.org/es/IACHR/audiencias/Hearings.aspx?Lang=es&Session=120&page=2

[232] Children's Rights (USA), "What Works in Child Welfare Reform: Reducing Reliance on Congregate Care in Tennessee", July 2011, p. 173. Available at: http://www.childrensrights.org/wp-content/uploads/2011/07/2011-07-25_what_works_reducing_reliance_on_congregate_care_in_tn_final-report.pdf

[233] Applied Economic Research Institute (IPEA), National study on SAC network shelters for children and adolescents, 2003 [Instituto de Pesquisa Econômica Aplicada (Ipea), Levantamento nacional de abrigos para crianças e adolescentes da rede SAC].

[234] Blackstock, C. and Alderman, J. A., "The Untouchable Guardian: The State and Aboriginal Children in the Child Welfare System in Canada. "Children without parental care: Qualitative alternatives, Early Childhood Matters," Bernhard van Leer Foundation, 2005. Available at: http://www.crin.org/docs/Children%20Without%20Parental%20Care.pdf ; see also, Trocme, Nico; Knoke, Della and Blackstock, Cindy, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System," in: *Social Service Review*, University of Chicago, December 2004, available at: https://www.mcgill.ca/crcf/sites/mcgill.ca.crcf/files/2004-Overrepresentation_Aboriginal_Children.pdf

In addition, in Canada, in 2008, the Indian Residential Schools Truth and Reconciliation Commission was created, and given a five-year mandate, to inform the people of Canada about what had occurred in residential schools for indigenous children and adolescents. According to the Commission, from the late 19th century through the late 1990s, more than 150,000 indigenous children and adolescents were placed in more than 130 institutions. In these, the majority of which were run by religious institutions, they were prohibited

Continues…

population, indigenous children account for approximately 30-40% of those in child welfare centers run or authorized by the State.[235] By the same token, the Committee on the Rights of the Child has recommended reducing the number of indigenous children placed in institutions and that support be given to allow them to remain in their families and/or community: "[i]n States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity."[236]

192. Lastly, the principle of legality rules not only with respect to the grounds, reasons or suppositions that allow public authorities to adopt measures that imply separating a child from his or her parents, it also applies in regard to regulation of the due process l guarantees necessary for ensuring effective respect of the rights involved. In this regard, the Court has indicated that there are material and formal requirements that must be observed when it comes to limiting rights. The material aspect requires restrictions to be provided for in legal norms, while the formal aspect requires that the enforcement of the norm in a specific case and the determination of the concurrence of the norm's premises in order to determine the limitation of the right, should be carried out in strict compliance with procedures duly established under the law.

3. Principles of necessity and appropriateness

193. The temporary separation of a child from his or her parents, as a means of protection, must be a measure necessary for the child's protection and well-being, when that has not been possible within the family environment.

…continuation
from speaking their language and practicing their customs. For more information, visit the official website of the Indian Residential Schools Truth and Reconciliation Commission of Canada: http://www.trc.ca

[235] Fowler, Ken, "Children in care in Newfoundland and Labrador. A review of issues and trends with recommendations for programs and services," Department of Psychology, Memorial University of Newfoundland, September 2008, p. 1; available at: http://www.gov.nl.ca/cyfs/publications/childcare/InCareReport.pdf See also, Bernhard van Leer Foundation, "Children without parental care: Qualitative alternatives, Early Childhood Matters," Bernhard van Leer Foundation, 2005.

[236] Committee on the Rights of the Child, General Comment No. 11, *Indigenous children and their rights under the Convention*, CRC/C/GC/11, February 12, 2009, Forty-fourth session, paragraphs, 18, 48 and 56. See also: Committee on the Rights of the Child, Consideration of the Reports Submitted by the States Party under Article 44 of the Convention. Concluding observations: Chile, CRC/C/CHL/CO/3, April 23, 2007, paragraph 45. Similarly, the Independent Expert for the United Nations Study on Violence against Children, in his report to the United Nations General Assembly, indicated that: "Acknowledging the special vulnerability of indigenous children and children belonging to minorities, States should ensure that these children and their families are provided with culturally based support and care services and that social workers have adequate training to work effectively with them.", Resolution A/61/299, August 29, 2006, paragraph 112(a).

194. The element of necessity may come into play as a result of the seriousness of the conditions of lacking in protection a child is or of the urgency to provide a child with a safe environment which, for the sake of his or her best interests, necessitate the adoption of a protection measure that implies removing the child from the family to place him or her in a safe setting where his or her rights are respected. In the opinion of the Commission, the factors of seriousness and urgency can warrant immediate intervention by the authorities, but in no case may that impede –once the integrity of the child has been ensured via immediate action– such a decision from being reported to the competent authority as quickly as possible for its review under a legally established procedure with all due guarantees.

195. The elements of necessity and appropriateness of the protection measure must be timely justified and documented in the decision made. Such a decision should be based on the respective technical assessments conducted by teams of professional experts. In the context of the technical assessment, the conducted regarding the necessity for special measures of protection should take into account the individual circumstances and conditions of the family and the child in order to justify the benefit for the child of the separation from his or her family and the specific and appropriate content of the intervention in order to restore all rights as quickly as possible. The assessment should be performed by a multidisciplinary team comprised of professionals especially trained for this purpose and should be conducted based on objective technical criteria already established in the norm in order to determine, in a rational and justified manner, the necessity for the measure and the of it's content. In this connection, Guideline 39 of the U.N. Guidelines for the Alternative Care of Children indicates that:

> Proper criteria based on sound professional principles should be developed and consistently applied for assessing the child's and family's situation, including the family's actual and potential capacity to care for the child, in cases where the competent authority or agency has reasonable grounds to believe that the well-being of the child is at risk.

196. The multidisciplinary team of professionals must also monitor the implementation of the measure of protection in order to assess any developments or changes that might occur, analyze the necessity and appropriateness during the period of time of the measure, and provide technical advice as to whether a measure should remain in place, be amended or lifted.

197. In those cases in which the most appropriate form of protection measure, based on the specific needs of the child, is his or her placement in a residential care, this element should be timely documented in the technical assessment performed in order to determine the measure. The CRC and the U.N. Guidelines for the Alternative Care of Children emphasize the importance of analyzing the appropriateness of this measure towards the child's specific care and protection needs, in relation to which it is

deemed that a residential care center is situated in a special condition of suitability in order to positively meet those needs.

4. Principle of exceptional diligence

198. Pursuant to Articles 19 of the American Convention and VII of the American Declaration, States must act with greater diligence, care, and responsibility when it comes to children and must take special measures towards the principle of the best interests of the child.

199. Considering the importance international human rights law assigns to the family and given the seriousness, due to its being both irreversible and irreparable, of the harm that can be caused to the child in the relationship with his or her parents, especially in early childhood,[237] the Commission and the Court have set a standard of exceptional diligence with respect to matters of adoption, guardianship, and custody of children. Specifically, the Court has determined that when a child is separated from his or her parents or family of origin, the child's rights to personal integrity and comprehensive development, as well as the rights to a family and to identity, can be seriously and irreversibly affected.[238] The nature and intensity of this impact on the rights of the child warrant a duty of particularly reinforced diligence on the part of public authorities in all actions they take, especially with respect to any decision that entails separating a child from his or her parents or family of origin.

200. This duty of reinforced exceptional diligence applies to all matters related to decision-making by public authorities that imply separating a child from his or her family and entering a form of alternative care: from diligence in assessing the circumstances surrounding and affecting a child, the objective valuation of the impact such circumstances have on the child's rights, justifying the decisions, the celerity with which such decisions are made, and the oportune review thereof. This standard of exceptional diligence requires that all intervening authorities respect it, in other words, it includes both judicial and administrative authorities. The Commission understands that the fulfillment of the duty of diligence must be monitored by timely mechanisms designed for that very purpose; such mechanisms should be stipulated in the law, in which the attendant responsibilities and penalties for failure to fulfill this duty are determined.

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[237] Inter-American Court of Human Rights Order of July 1, 2011, *Provisional Measures with Respect to Paraguay, Matter of L.M.*, Considerative paragraph 16; and Inter-American Court of Human Rights, *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 51.

[238] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012, Series C, No. 242, paragraph 51; Inter-American Court of Human Rights Order of July 1, 2011, *Provisional Measures with Respect to Paraguay, Matter of L.M.,* Considerative paragraph 16.

5. Principles of specialization and professionalization

201. The principles of specialization and professionalization with respect to the promotion and protection of children's rights have been widely recognized in international human rights law and derive from the very duty to provide the special protection children deserve. It is verified that, as of the entry into force of the Convention on the Rights of the Child, treatment of children and adolescents has evolved toward a progressive specialization and professionalization of all interventions having to do with their care and protection. As a result of the duty to provide special protection the necessity is derived, that norms, institutional frameworks, procedures, interventions, and professionals linked with children should possess the necessary characteristics, specifities, and qualities that allow them to adecuately respond to the particular circumstances of children and the effective applicability and defense of their rights.

202. A number of the CRC's Articles contain references in this regard, and the Committee on the Rights of the Child has reiterated these principles in its decisions when referring to: (i) the need for public and private institutions that are designed and organized to promote and protect children's rights and are sufficiently equipped to do so; (ii) that such institutions have technical staff educated and trained on the rights of children who can attend to the requirements and needs of children and of their development; (iii) the existence of administrative and judicial authorities who specialize in handling matters and making decisions that afect the rights of children in order to ensure their adecuate treatment and effective protection ; and (iv) the development of administrative and judicial procedures adapted to the particular circumstances that imply decisions made based on identifying what the best interests of a child in each specific situation are, including, to that end, adjustments made to the process in order to contemplate the participation and views of the child, his or her parents and other relevant individuals in making such determination.[239]

203. In this regard, the Court has taken the following position:

> 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

[239] See, specifically, Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation for the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44),* CRC/GC/2003/5, November 27, 2003, Thirty-fourth session; Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, of September 20, 2006, Fortieth session; and Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, April 25, 2007, Forty-fourth session.

must have all the necessary elements to safeguard the best interests of the child.[240]

204. The Commission considers the principles of specialization and professionalization to be essential for the effective protection of the rights of children and fulfillment of the mandate contained in the American Convention and the American Declaration. The Commission thus believes that the prerequisite of specialization requires that there be specific laws, procedures, and institutions in place to serve children, in addition to requiring appropriate training for all individuals who work directly with them. These specialization and professionalization requirements apply to the entire child protection system.[241]

205. Applicable procedures should also be adjusted in their structure, intervening actors, and duration, as well as be conceived toward achieving the objective of preserving and restoring rights and safeguarding the best interests of the child. It is important to note that procedures related to guardianship, custody, and measures related to parental care differ from other procedures, due to their nature and aims especially geared toward identifying those arrangements that would best serve the best interests of the child, instead of being conceived as procedures based on a structure that is typically adversarial for the parties involved.

206. The intervening administrative and judicial authorities, in order to familiarize themselves with situations, evaluate them, make decisions, and monitor their implementation, must be specialized on children's issues and have both the knowledge and the abilities necessary for this work; "[d]ecisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights."[242] The same is true for the multidisciplinary teams that share their technical expertise with the authorities in order to provide advice on the making of decisions and on monitoring their implementation.

207. Given the protection needs that are specific to each child based on his or her environment and circumstances, and bearing in mind the diverse range of protection measures and the content each may adopt for providing individualized attention to the child and the child's family, the Commission observes that the norm itself allows certain flexibility on the part of the authorities as to the course of action to be taken at different stages of the process –decisions having to do with initiating the process, provisional protection measures while the process is underway, determinations

[240] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 78.

[241] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 79, and *Mutatis mutandis*, IACHR, *Juvenile Justice and Human Rights in the Americas*, paragraph 85.

[242] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17, paragraph 79.

as to the form of protection measure to be taken and its specific content, monitoring of the measure, as well as decisions regarding whether a measure is to be amended, replaced, or lifted. The Commission understands that the of flexibility which the intervening authorities have is consistent with the acknowledgement that decisions made regarding the guardianship, care, and protection of a child should consider their own particularities, as well as to identify what response may best serve the child. A balance must be struck between both these elements via a process specially developed and adapted to the matter for which it was conceived, as well as by ensuring the involvement of professionals with the appropriate knowledge and training to promote the effective protection of a child's rights, in order to ensure that the measures to be taken in each case are suitable, necessary, and proportional.[243]

208. The Commission notes that legislations in countries of the region capture the principle of specialization with regard to administrative and judicial authorities that intervene in matters related to the protection of children's rights. The Commission nonetheless observes that that does not, per se, necessarily mean they truly are specialized. In the Commission's view, efforts must be increased to ensure that the authorities involved in processes to determine, implement, monitor, and review special measures of protection have the necessary knowledge and training on children's rights. The Commission stresses the importance of having States strengthen or develop systematic and comprehensive training plans that emphasize protection for children without parental care or at risk of losing such care, aimed at judges, public prosecutor offices, public defenders, multidisciplinary technical teams, and the competent administrative authorities in this area.[244] The Commission likewise notes that access to these specialized and duly trained authorities should be effectively guaranteed throughout the territory.[245]

209. Public and private residential care centers that are involved in the application of a special measure of protection must also be governed by the principles of specialty and professionalization. The applicability of these principles presupposes the existence of specialized centers dedicated to the care and well-being of children who lack parental care. This implies that their structure, personnel, and functioning are conceived to attend to the special protection needs of children in these circumstances. It therefore implies not only that the physical installations are adequate to care for the children, but also that the functioning logic and its intervention program are driven by the objective of protection and re-establishment of the children's rights in the shortest possible time, and, especially, their right to live and grow up in a safe and protective family setting. This leads to aspects that will be timely developed in subsequent sections

[243] *Mutatis mutandis,* "The Beijing Rules," Rule No. 6.

[244] Committee on the Rights of the Child Day of General Discussion on Children without Parental Care,' 2005, Report of the Fortieth session of the Committee on the Rights of the Child, CRC/C/153, para. 677.

[245] Similar observations were made with respect to another specialized system like that of juvenile justice; in its report on *Juvenile Justice and Human Rights in the Americas*, the IACHR made observations and recommendations regarding the need to deepen specialization in public entities and ensure adequate geographic coverage. IACHR, *Juvenile Justice and Human Rights in the Americas*, paragraphs 84 and 89.

of this report, but it should be noted here that this implies, as a minimum, that the residential care center should have enough duly trained professional specialists to ensure the enjoyment of all the rights of the children, and also have individual care plans for each child that contemplate her or his particular requirements and needs, promote their life project, and anticipate the process of reunification with their family, or the placement in a foster family, adoption, or transition to independent life if they are approaching their coming of legal age.

210. In addition, just as the Committee on the Rights of the Child has noted, every National System for the Promotion and Protection of the Rights of the Child must adhere to the principles of specialization and professionalization, and be designed and operated in a comprehensive and holistic manner, which implies adequate coordination and complementarity among the various policies, programs, and services.[246] In this sense, with respect to the topic we are analyzing, it is necessary to highlight the importance of an early detection of situations of possible lack of protection. To identify possible situations of lack of protection, the persons and professionals in direct contact with the children must have the necessary information and training to make this identification and be able to pass their knowledge on the matter on to competent authorities. It is therefore especially important that personnel in the sector of health, education, or police, among others, are adecuately competent to do this.[247]

211. Police forces have preeminence in regard to identifying children who may eventually find themselves in these types of situations. Information received by the Commission indicates that according to legislation and practice in many States in the Hemisphere, police are assigned to intervene both in the case of violations of the criminal law and in cases where the lack of protection of the child is identified.

212. To that effect, the Commission has found that in some states, such as Uruguay, legislation assigns to the police force the task of detecting situations of children whose rights have been violated.[248] As a result, the Commission has noted a high incidence of police involvement in the selection of cases that reach the protection system, accounting for 53% of the cases in 2005 and 2006, 44% in 2007, and reaching

[246] Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003, Thirty-fourth session, paras. 53, 54 and 55.

[247] In the same sense see the U.N. Guidelines for the Alternative Care of Children, Guideline 46: "Specific training should be provided to teachers and others working with children in order to help them to identify situations of abuse, neglect, exploitation or risk of abandonment and to refer such situations to competent bodies." Day of General Discussion of the Committee on the Rights of the Child on children without parental care, 2005, Report of the Fortieth Session of the Committee on the Rights of the Child, CRC/C/153, para. 676.

[248] Code of Children and Adolescents [Código de la Niñez y la Adolescencia de la República Oriental del Uruguay], Art. 126. Law No. 18.315 of July 5 2008 on police procedures [Ley No. 18.315 de 5 de julio de 2008 de Procedimientos Policiales], Article 5 section (b).

49% in 2008.[249] In addition, the Commission has received information from Guatemala on the existence of so-called "rescue" operations in which various officials, especially police, take street children to residential care facilities immediately. This type of practice is quite widespread in the region. For example, in 2011, in Rio de Janeiro, in the context of a procedure called a "collection" 245 street children and adolescents were collected, of whom 82 remained in a compulsory shelter regime.[250] The Commission has received information on similar practices in Paraguay[251] The Commission has also received petitions related to these procedures.

213. The IACHR recognizes that the action of police forces in relation to these matters entails all the risks that the Commission analyzed in its report on Juvenile Justice and Human Rights in the Americas, [252] among them the remaining of children in police facilities with adolescents who have committed crimes, and even with adults, and the existence of arbitrary detentions in the context of systematic operations to detain children who are on the street. [253] The Commission is concerned that the relevance of police involvement in these procedures reveals a view on social control of the intervened population, instead of the focus of protection and restitution of rights.

214. However without disregard to the aforementioned, in cases where police must intervene, such as cases of violence or abuse, it is necessary that police action be carried out in a legal framework following international human rights standards and through units especially trained to intervene in situations involving persons under the age of 18 years. These units must be composed of people with proper training in the rights of children and in how to conduct themselves in situations of this type; also these should incorporate protocols of intervention, referral criteria, and a network articulation together with other public institutions and civil society organizations in order to provide an adequate multidisciplinary approach.[254]

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[249] Judicial System Observatory, "Judicial Protection of Rights: Reality, perspectives, and changes in the framework of application of the Code of Children and Adolescents. in Maldonado, Montevideo, Paysandú, and Salto", Fundación Justicia y Derecho, Montevideo [Observatorio del Sistema Judicial, La protección judicial de derechos. Realidad, perspectivas y cambios en el marco de la aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo, Paysandú y Salto, Fundación Justicia y Derecho], 2010.

[250] RELAF - Latin American Foster Care Network, "Institutionalized children and adolescents: appearance of serious human rights violations." Series: Publications on children without parental care in Latin America: Context, causes and responses, 2011.

[251] IACHR, *Report No. 16/08, Case 12.359, Admissibility, Cristina Aguayo Ortiz et al, Paraguay*, March 6, 2008. The Commission has considered previous cases involving similar procedures.

[252] IACHR, *Juvenile Justice and Human Rights in the Americas*.

[253] IACHR, *Report No. 41/99, Case 11.491 Detained Minors, Honduras*, March 10, 1999; IACHR, *Third Report on the Situation of Human Rights in Colombia 1999*, Chapter XIII, paras. 41 ff.; IACHR, *Report No. 9/00, Case 11.598, Alonso Eugénio Da Silva, Brazil*, February 24, 2000; IACHR, *Justice and Social Inclusion: The Challenges to Democracy in Guatemala* 2003, para. 366. I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 79.

[254] IACHR*, Report on Citizen Security and Human Rights,* OEA/Ser.L/V/II., doc. 57, December 31, 2009, para. 89.

6. Differentiation with punitive interventions

215. The Commission emphasizes that the objective of special measures of protection cannot be other than the protection of the child and the preservation and restoration of his/her rights. Special measures of protection cannot be considered, in their design or implementation, as a sanction on the parents in the exercise of their parental responsibilities; nor can they be considered as a corrective measure for those children who are deemed to have behavioural difficulties, or are labeled "rebels" or considered to have behavioral or social adaptation problems. Based on the logic of the irregular situation doctrine or the tutelary protection paradigm that prevailed before the entry into force of the United Nations Convention on the Rights of the Child, this perspective was accepted in the legal systems of the region and assumed that, in certain contexts, children who were considered to have behavioral, adaptation or disciplinary difficulties would be placed in residential s, even on the initiative of their own parents. This logic is not in accordance with the comprehensive protection doctrine established in the Convention on the Rights of the Child and with the respect for children's human rights, their dignity and their right to special protection based on their condition of development.

216. The Commission and the Court have expressed their opinion with regard to the placement of children in residential institutions that, in practice, were equivalent to quasi-punitive measures or to forms of disciplinary correction that restricted the right to freedom of certain groups of children, who were considered "at risk" or in a situation of "social danger." Both organs have been very clear that the children regards to whom protection measures are taken must not be subjected to punitive treatment. On the contrary, what is needed is the timely and careful intervention of welfare institutions with the financial resources and qualified staff to solve those problems or allay their consequences.[255]

217. Based on the information gathered, this type of situations are a concern in some Caribbean States, such as Bahamas[256], Belize[257] and Jamaica[258], as well as in States of other sub-regions such as Guatemala.[259] The Commissionconsiders thatinstitutionalization based on these grounds could cover up a punitive response,

[255] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, concluding paragraph No. 112; IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 70.

[256] Committee on the Rights of the Child, analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Bahamas, CRC/C/15/Add.253, March 31, 2005, para. 37.

[257] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Belize, CRC/C/15/Add.252, March 31, 2005, para. 42.

[258] Information gathered in the consultation for the Caribbean region, Trinidad & Tobago, 2011.

[259] RELAF - Latin American Foster Care Network, "Institutionalized children and adolescents: evidence of serious human rights violations." Series: Publications on children without parental care in Latin America: Contexts, causes and answers, 2011.

which would be against the principles, rights and guarantees of the juvenile justice systems.[260] Along the same lines, and placing limits on the scope of the penal system and of public policies on the protection of rights, the Committee on the Rights of the Child has considered that "[…] behavior such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behavior."[261]

218. Another cause for concern is the situation in which children, who are below the minimum age of criminal responsibility and have engaged in conduct established in such legislation, are, as a result of that conduct, placed in residential institutions.[262] Admission to a residential institution must not cover up a punitive response on the margin of the guarantees of juvenile justice system, under the guise of protecting the child. The Commission agrees with the Committee on the Rights of the Child that States have a responsibility to ensure that all children who have not reached the minimum age of criminal responsibility but have broken criminal laws are treated by civil or administrative authorities in accordance with the Convention and international law; specifically, to ensure that they have access to socio-educational measures and that they are not deprived of their liberty or institutionalized as a form of criminal punishment .[263]

219. The Court and the Commission have also issued opinions with regard to situations in which children and adolescents who require an intervention of protection are processed in the juvenile justice system. Therefore, the Court ruled, in order to make it clear that certain types of conduct have no place in the juvenile justice

[260] In that regard see: IACHR*, Report on Juvenile Justice and Human Rights in the Americas*. Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, CRC/C/GC/10, April 25, 2007, 44th Regular Session, para.8.

[261] Committee on the Rights of the Child, General Comment No. 10, *Children's Rights in Juvenile Justice*, CRC/C/GC/10, April 25, 2007, paragraph 9. Also see: IACHR, *Report No. 41/99 Case 11.491, Minors in detention against Honduras*, March 10, 1999, paragraphs 109 and 110.

[262] IACHR, *Report on Juvenile Justice and Human Rights in the Americas*, para. 51.

[263] IACHR Report, *Juvenile Justice and Human Rights in the Americas*, paragraph 70. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para.113. Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, April 25, 2007, 44th Regular Session, para. 31; Committee on the Rights of the Child, General Comment No. 7, *Implementing children's rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, para. 36(i); Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Ecuador, CRC/C/ECU/CO/4, January 29, 2008, para. 79(g)

system and that they should be addressed within the framework of national systems for the promotion and protection of children's rights:

> It is unacceptable to include in this hypothesis [criminal response] the situation of minors who have not incurred in conduct defined by law as a crime, but who are at risk or endangered, due to destitution, abandonment, extreme poverty or disease, and even less so those others who simply behave differently from how the majority does, those who differ from the generally accepted patterns of behavior, who are involved in conflicts regarding adaptation to the family, school, or social milieu, generally, or who alienate themselves from the customs and values of their society. The concept of crime committed by children or juvenile crime can only be applied to those who fall under the first aforementioned situation, that is, those who incur in conduct legally defined as a crime, not to those who are in the other situations.[264]

220. In that regard, the Commission has clearly established the difference in the treatment to be provided to children who find themselves in vulnerable or unprotected situations and that provided to children who are in conflict with the law because they have engaged in criminal conduct as established by law:

> The Commission considers that the practice of incarcerating a minor, not because he committed a criminalized offense but simply because he was abandoned by society or was at risk, or is an orphan or a vagrant, poses a grave threat to children. […].The State cannot deprive of their freedom children who have committed no crime, without incurring international responsibility for the violation of their right to personal liberty (Article 7 of the Convention). Depriving a minor of his liberty unlawfully, even if it be for a criminalized offense, is a serious violation of human rights. The State cannot argue the need to protect the child as grounds for depriving him of his liberty or of any other rights inherent in his person. Minors cannot be punished because they are at risk, that is to say, that because they need to work to earn a living, or because they have no home and thus have to live on the streets. Far from punishing minors for their supposed vagrancy, the State has a duty to prevent and rehabilitate and an obligation to provide them with adequate means for growth and self-fulfillment."[265]

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[264] I/A Court H.R., *Juridical Condition and Human Rights of the child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 110. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 69.

[265] IACHR, *Report No. 41/99, Case 11.491, Admissibility and Merits. Minors in detention, Honduras*, March 10, 1999, paras. 109 and 110. IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 66 and 73.

221. The Commission has also stated that children and adolescents in situation of poverty, abuse or abandonment as well as those with disabilities, health problems or that have educational or learning difficulties, "should not be deprived of liberty or subject to juvenile justice system when they have not infringed criminal laws".[266]

222. Furthermore, the Commission reminds the States that they may not submit children to the juvenile justice system who have engaged in behavior that would not constitute violations of criminal law if committed by an adult. In particular, "States must avoid 'status offenses' that label certain children and adolescents as 'delinquent,' 'incorrigible,' or 'unmanageable,' on the basis of petitions , even by their own parents, that the children be disciplined and supervised due to behavioral or attitude problems that do not constitute criminal conduct."[267]

7. Due process guarantees and judicial protection

223. Decisions taken regarding temporary separation of children from their parents must be the result of a proceeding in which, as prescribed by the American Convention, all guarantees applicable to infringement of rights are respected.[268] The Court and the Commission have stated several times that those proceedings in which children participate, or that discuss one of their rights, must be governed by the guarantees established in Articles 8 and 25 of the Convention,[269] equally recognized to

[266] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 73.

[267] IACHR, *Juvenile Justice and Human Rights in the Americas*, paragraph 73. See also: U.N. Study on Violence Against Children, p. 209. Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, April 25, 2007, Forty-fourth session, paragraph 31.

[268] I/A Court H.R., *Juridical status and human rights of the child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 114.

[269] Article 8. Right to a fair trial: (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court. (3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. (4) An accused person acquitted by a no appealable judgment shall not be subjected to a new trial for the same cause. (5) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

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all persons. Considering moreover that children participate in these proceedings and which will affect their rights, the guarantees set forth in Articles 8 and 25 must be correlated with the specific rights established in Article 19, which incorporates the corpus juris of this subject, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.[270] On this matter the Court has stated:

> It is evident that a child participates in proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings."[271] "Finally, while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.[272]

224. These considerations must be reflected in regulation of the judicial or administrative proceedings where decisions are resolved regarding children's rights.[273] In this respect, although Article 8(1) of the Convention alludes to the right of every person to a hearing by a "competent tribunal" for the "determination of his rights," this

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…continuation

"Article 8 of the American Convention establishes the standards of due process of law, which consists of a series of requirements that must be observed by the procedural instances, so that every person may defend his rights adequately when faced with any type of act of the State that may affect them." I/A Court H.R., *Case of Barbani Duarte et al v. Uruguay*. Merits, Reparations, and Costs. Judgment of October 13, 2011. Series C No. 234. para. 116.

Article 25(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. (2) The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

[270] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. paras. 95 and 96.

[271] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. para. 96, and IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75.

[272] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. para. 98, and IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75.

[273] I/A Court H.R., *Juridical status and human rights of the child.* Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. paras. 94, 103, and 117.

Article also applies to situations in which a public non judicial authority issues resolutions that affect the determination of such rights.[274]

225. The Commission expresses its concern over the persistence of problems in the region with respect to the strict observance of the guarantees contained in Articles 8 and 25 of the American Convention when making decisions on separation of children from their parents and their internment in a protection and care, and that, in many countries in the region, there are children institutionalized without the intervention or knowledge of authorities. By way of example, a report prepared in 2011 by Peru's Ombudsman noted that many children living in care institutions do not have a resolution ordering them to be there, even though the country's legislation stipulates that this protective measure should be taken by the competent authority in the framework of a tutelary protection proceeding with due guarantees. This same report finds that the due process guarantees were not always observed by the competent authority.[275] As reported to the Commission, in some States in the region, such as Haiti, children are still sent to institutions directly by their families, by any other authority, and even by the organizations that run the institutions when they find the children "abandoned," without any judicial or administrative proceeding[276]. A similar situation has been reported in connection with some institutions for children with and without disabilities in Mexico.[277]

226. The Commission is also concerned that in several countries of the region, inspite of having legislation which establishes a procedure for decision making that affects children's rights, practices contrary to these persist. The deficiencies observed by the Commission in the regulation of the authorization , registration, standards of operation, and supervision of public and private residential care establishments contributes to the problem, as it is not always possible to have access to the complete registers of the number of children in these institutions in a given country, to know the circumstances of their admission, and to have access to the resolution adopted by the competent authority to order that admission.

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[274] I/A Court H.R., *Case of Ivcher Bronstein v. Peru*. Merits, Reparations, and Costs. Judgment of February 6, 2001. Series C No. 74, para. 105; I/A Court H.R., *Case of the Constitutional Court v. Peru.* Merits, Reparations, and Costs. Judgment of January 31, 2001. Series C No. 71, paras. 69 to 71.

[275] Office of the Ombudsman of the State of Peru, Advocacy Report No. 153, "Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención" [Abandoned Children and Adolescents: Input for a New Care Model], Lima, 2011, p. 15.

[276] Sub-regional consultation made in the framework of this report for the Caribbean, Trinidad & Tobago.

[277] Disability Rights International, response to the questionnaire, 2011. Disability Rights International and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, "Abandonados y Desaparecidos: "Segregación y Abuso de Niños y Adultos con Discapacidad en México" Printed versión from June 2011. Available at http://www.disabilityrightsintl.org/wordpress/wp-content/uploads/1._Informe_final_Abandonmados_y_Desaparecidos_merged.pdf

227. The Commission notes that the United Nations Guidelines for the Alternative Care of Children has established in Guideline 57 that:

> Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians. To this end, all concerned should be provided with the necessary information on which to base their opinion. Melba gimenez

228. The Commission underscores that the proceedings to determine children's rights must respect the right of due process. In addition, it must be ensured that they are accessible and age-appropriate for the child, in order to guarantee the children's right to understand and participate in proceedings that affect them, and also ensure the availability of representation and legal counsel to defend the interests and rights of the child effectively. Thus, within the framework of the proceeding, the child and parents or guardians must be informed of the scope of the intervention and have an opportunity to participate in the process. The proceedings must be rapid, processed with diligence, and adapted to and ed on the child's needs and rights. The guarantees described in this section must be respected in the framework of decision making procedures on the application of protective measures, its periodic review, and any decision that separates children from their parents.

a. Procedure established by law and competent authority

229. The principle of legality governs the regulation of proceedings that make decisions affecting children's rights. The Court and Commission have indicated that judicial or administrative proceedings to determine rights must be regulated by law and ensure the procedural rights and standards recognized in the American Convention.[278]

230. In the case of children without adequate parental care, the determination of circumstances that justify the adoption of alternative care measures must be made by the competent authority in accordance with the law and applicable proceedings, with strict respect for due process guarantees, in order to meet the

[278] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 103, and, I/A Court H.R., *Case of Barbani Duarte et al v. Uruguay*. Merits, Reparations, and Costs. Judgment of October 13, 2011. Series C No. 234, paras. 116 to 119.

requirements of Article 11(2) of the Convention and V of the Declaration, which prohibit arbitrary or abusive interference with family life.[279]

231. It is relevant to note the existence of a doctrinal debate and the emergence of a trend that advocates "dejudicialization" of certain interventions by public authorities in the context of proceedings for protection of children lacking parental care. In this regard, the Court and the Commission have stated that:

> International standards seek to exclude or reduce "judicialization" of social problems that affect children, which can and must be resolved, in many cases, through various types of measures, pursuant to Article 19 of the American Convention, but without altering or diminishing the rights of individual persons. In this regard, alternative means to solve controversies are fully admissible, insofar as they allow equitable decisions to be reached without detriment to individuals' rights. Therefore, it is necessary to regulate use of alternative means in an especially careful manner in those cases where the interests of minors are at stake.[280]

232. A growing part of specialized doctrine advocates that the responsible authority for analyzing the timeliness and appropriateness of a special protective measure must be of an administrative nature, and a specialized and multidisciplinary character. The argument is based on the understanding that it is best to avoid judicialization of underlying social problems leading to the infringement of rights when these problems can be addressed more efficiently and adequately by social policies of protection and family support, particularly when the underlying cause of many of the protection measures is poverty, social exclusion, and their impact on the families. This view is especially advocated with respect to decisions involving protective measures that do not involve the separation of the child from his or her parents and extended family, but rather entail interventions towards supporting the family.

233. This trend is reflected in legislation in the region, which has led several countries to establish administrative proceedings for protection, although judicial intervention is required in cases of separation of the child from parents or extended family. The Commission notes that various legal systems in the region call for involvement of both administrative and judicial authorities in dual form; in that way, in

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[279] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 113. IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 110; I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, paras. 116 and 117. See Day of General Discussion of the Committee on the Rights of the Child on children without parental care, 2005, Report of the Fortieth Session of the Committee on the Rights of the Child, CRC/C/153, para.655.

[280] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 135.

some countries the proceedings are initiated and processed by the administrative authority, and the decision is made or reviewed judicially.

234. The Commission emphasizes that regardless of whether the authority with competence to promote the adoption of protective measures be of administrative or judicial nature, the authorities must be established by law, specializing in children's matters, with multidisciplinary teams to provide technical assistance, and in the framework of the proceeding, criteria must be applied for determination and execution of the protective measures in accordance with legislation, as also with due respect for procedural guarantees, including the child's participation in the proceeding and the legal defense of his/her rights.[281]

235. In addition to what has just been mentioned, the Convention on the Rights of the Child establishes in Article 9 that: "a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." The Commission notes that when the protective measure involves separation of the child from his or her parents or family, the measure must be subject to judicial review in order to satisfy Article 11(2) of the American Convention, Article V of the American Declaration and Article 9 of the Convention on the Rights of the Child. This is also stated by the United Nations Guidelines for the Alternative Care of Children.[282]

236. The Commission highlights that decisions on the protection, custody, and care of children must be justified. The Commission concurs with the Court's opinion that "[a]ny action that affects them [the children] must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy."[283] Therefore, the justification must be objective, relevant, and sufficient, based on the child's best interests. As indicated above, the principles of specialty and professionalization are relevant for determination of the elements of necessity and appropriateness of the measure, therefore it is crucial that multidisciplinary technical teams participate in the

[281] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, para. 103.

[282] The 47th directive sets that: "Any decision to remove a child against the will of his/her parents must be made by competent authorities, in accordance with applicable law and procedures and subject to judicial review, the parents being assured the right of appeal and access to appropriate legal representation."."

[283] I/A Court H.R., *Juridical status on Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Serie A No. 17, para. 113. In the same sense, the Guideline 57 of the United Nations Guidelines for the Alternative Care of Children establishes that: "Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings."

proceeding, with issuing of pertinent reports and expert opinions for adecuate justification of the measure.

b. Reasonableness of the time

237. Within the procedural guarantees prescribed in Article 8 of the American Convention, every person has the right to a hearing "within a reasonable time." The Court and the Commission have linked the element of reasonable time in Article 8 to the right of every person to have his or her rights determined by a competent authority within a reasonable time.[284] According to the Court, the absence of reasonableness in the time frame constitutes, in itself, a violation of judicial guarantees.[285] The Court considers the following elements to determine the reasonableness of the time:[286] (a) the complexity of the matter; (b) the procedural activities of the interested party; (c) the conduct of the judicial authorities; and (d) the effects on the legal situation of the individual involved in the proceedings.

238. Regarding the first element, the Court has ruled in cases involving the custody, protection, and care of children, and has found, in general terms, that "These issues, even though they are of enormous relevance and require special care, are being heard in specific proceedings that are not particularly complex and that are not unusual for States."[287] Regarding the second and third elements, and also in cases involving custody and care of children, the Court noted that because of the obligation to provide special protection to children owing to their condition, the responsibility for accelerating the proceedings falls on the administrative or judicial authorities, which should promote these by their own initiative, "motu propio".[288] The Court has paid special attention to the effects that time has on the rights of the child and his or her parents, to establish that authorities have a reinforced duty to deal with the proceedings with exceptional diligence, which translates into the promotion of the proceeding by State initiative, as well as the obligation to accelerate the proceeding.[289]

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[284] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 66.

[285] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242. para. 66, and I/A Court H.R., *Case of González Medina and family v. Dominican Republic*, Preliminary objections, Merits, Reparations, and Costs. Judgment of February 27, 2012 Series C No. 240, para. 257

[286] I/A Court H.R., *Case of Fornerón and daughter v. Argentina.* Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 66; I/A Court H.R., *Case of Genie Lacayo V. Nicaragua*. Merits, Reparations, and Costs. Judgment of January 29, 1997. Series C No. 30, para. 77, and I/A Court H.R., *Case of González Medina and family v. Dominican Republic*, Preliminary objections, Merits, Reparations, and Costs. Judgment of February 27, 2012 Series C No. 240, para. 255.

[287] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 67

[288] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 69.

[289] IA Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, paras. 69 and 70.

239. With respect to the fourth element, the Court has held that "in view of the importance of the interests at stake, the administrative and judicial proceedings relating to the protection of the human rights of the child, particularly those judicial proceedings concerning the adoption, guardianship, and custody of boys and girls in early childhood, must be handled by the authorities with exceptional diligence and celerity."[290] Court has emphasized that "the simple passage of time may constitute a factor that encourages the creation of ties with the foster family or the family that has the child. Consequently, the greater the delay in the proceedings, irrespective of any decision on the determination of the child's rights, could determine the irreversible or irreparable nature of the *de facto* situation and make any decision in this regard null and prejudicial for the interests of the child and, if applicable, of the biological parents, whatever the corresponding decision taken."[291] The continued stay of children in alternative care centers and institutions also interferes with the establishment and maintenance of natural bonds of affection between children and their parents created by living together, and therefore is a serious and perhaps irreparable infringement on the right to personal integrity and comprehensive development of the children and their right to a family and identity.[292]

240. Concerning the reasonableness of the time for proceedings f of special measures of protection for custody, care, and alternative placement of children, the Court has found that there is an exceptional duty to exercise diligence to accelerate the proceedings in view of the effect that these situations could have on the children and the grave, irreversible, and irreparable damage they could cause to their rights, and the rights of their parents and family. [293]

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[290] Inter-American Court of Human Rights Order of July 1, 2011, Provisional Measures with Respect to Paraguay, Matter of L.M., "Considering that", para. 16; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 127. In similar contexts to those of the present case, the European Court has established that in cases involving civil status, the nature of the rights discussed, and the consequences that excessive delay may have, especially as regards the right to a family, require the Courts to act with exceptional diligence in determining those rights. The same Court has established the obligation of Courts to act with exceptional diligence in processing cases where the subject is child custody. (European Court of Human Rights, *Case of V.A.M. v. Serbia*, Judgment March 13, 2007, paras. 99 and 101). The European Court of Human Rights has ruled that cases that could affect the enjoyment of rights related to respect for family life, should be handled with exceptional diligence and relevant consideration, so that States should organize their judicial systems so that they can comply with the requirements of due process, including the obligation to hear cases in a reasonable time.

[291] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 52, and Inter-American Court of Human Rights Order of July 1, 2011, *Provisional Measures with Respect to Paraguay, Matter of L.M.,* Considerative paragraph. 18.

[292] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 123, and Inter-American Court of Human Rights Order of July 1, 2011, *Provisional Measures with Respect to Paraguay, Matter of L.M.,* Consideratie paras. 16 and 19.

[293] In I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, the Inter-American Court concluded that judicial authorities in charge of the custody proceeding failed to exercise due diligence and therefore the State violated the rights to judicial guarantees established in Article 8(1) of the American Convention, in relation to Articles 17(1) and 1(1)

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241. Finally, the Court has underlined that it is not possible to argue domestic obstacles, such as the lack of infrastructure or personnel to conduct judicial proceedings, in order to be relieved of an international obligation.[294] On the contrary, the Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, the proceedings must advance more rapidly so that the case is decided as soon as possible.[295] States have the obligation to make the necessary arrangements to ensure that despite the challenges that administrative and judicial systems may face in terms of material capacity and personnel they provide an adequate, diligent, and timely response in cases involving the guardianship, custody, and care of children.

242. The Commission thus applauds the fact that some States have taken particularly seriously their obligations that derive from the duty of reasonableness of the time and exceptional diligence in the handling of matters related to the rights of children by introducing specific time frames for the competent authorities to complete the necessary procedures and make decisions. The Commission wishes to point out, however, that merely introducing into legislation specific time frames for completing procedures may not be enough, and may even be unrealistic, in terms of satisfying the principle of diligence and celerity in the proceedings if the foregoing is not accompanied by the resources, particularly human resources, needed to meet the requirements of the time frames of the proceedings. By the same token, meeting the brief time frames for making decisions and the celerity with which procedures are handled should in no case work to the detriment of other procedural guarantees, specifically the right of the parents and of the child to be heard and to assert their interests in the framework of the process, or the issuance of reports by the multidisciplinary technical teams.

c. Review of the special measures of protection

243. As noted above, special measures of protection seek to restore the rights of the child, which implies that they should be conceived to fulfill this objective. This also implies a periodic review of the measure in order to determine whether it is still necessary and appropriate, should be modified, or even discontinued, in a brief

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of the same instrument, to the detriment of the father and daughter, and in relation to Article 19 of the Convention with respect to the latter.

[294] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242. para. 74; I/A Court H.R., *Case of Garibaldi v. Brazil.* Preliminary objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203, para. 137. In a similar vein, the European Court of Human Rights has concluded that a chronic backlog of cases it not a justification for excessive delay. *ECHR Case of Probstmeier v. Germany* (No. 20950/92), Judgment of July 1, 1997, para. 64, and *Case of Samardžić and AD Plastika v. Serbia* (No. 2844/05), Judgment of July 17, 2007, para. 41.

[295] I/A Court H.R., *Case of Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012 Series C No. 242, para. 75; I/A Court H.R., *Case of Valle Jaramillo et al v. Colombia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C. No. 192, para. 155; and, I/A Court H.R.,*Case of Kawas Fernández v. Honduras*. Merits, Reparations, and Costs. Judgment of April 3, 2009, Series C No. 196, para. 115.

timeframe established by law. The review of the measure must be conducted with all the procedural guarantees and be adopted by the competent authority. If the review of the special measure of protection calls for maintaining the child separated from his or her family, according to the requirement in Article 9 of the Convention on the Rights of the Child, this should remain subject for review by competent judicial authority.

244. As in the case with decisions made concerning children's custody, care, and well-being, decisions made when reviewing the protection measure must also be justified. The review must be based on technical evaluations presented by the multidisciplinary teams, and the justification must be objective, appropriate, and sufficient, based on the child's best interests. It is also necessary to take into account the opinion of the child, his or her parents, family, and other persons who are important in the life of the child with respect to the conditions of application, maintenance, modification, or termination of the protective measures.

245. The Commission wishes to emphasize the importance of reviewing the special protective measures in order to give fulfillment to the specific rights contained in Articles 19, 17(1), and 11(2) of the American Convention and Articles V, VI and VII of the American Declaration. For that reason, when a lawmaker regulates the review of special measures of protection that involve the separation of children from their parents, he must consider the necessary procedural guarantees to satisfy the requirements derived from Article 8(1) of the Convention and XXVI of the Declaration.

246. With regard to the need for periodic review, Article 25 of the CRC gives special emphasis to the need to ensure the periodic review of special measures of protection in relation to children under alternative residential care, due to the need to limit their permanence in such centers or institutions to the time strictly necessary, in order to ensure that the measure diligently serves the objective of family reintegration whenever possible and in the best interests of the child:

> States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

d. The child's right to be heard

247. The Court and the Commission have observed that Article 8(1) of the American Convention and XXVI of the American Declaration guarantee the right to be heard held by all persons, including children, in proceedings to determine their rights. They have also established that: "[t]his right must be interpreted in light of Article 12 of the Convention on the Rights of the Child, which contains appropriate stipulations on the child's right to be heard, for the purpose of facilitating the child's intervention according to his age and maturity and ensuring that it does not harm his genuine

interest."[296] The provisions of Articles 8 and XXVI, including the right to be heard, are applicable to judicial and administrative proceedings that determine persons' rights,[297] and imply that timely measures are taken in the proceedings to facilitate adecuate participation of the child, [298] i.e., so the child can effectively express her or his opinions in a way that will influence the decision. In proceedings on custody, care, and protection of the child, the child has the right to be heard in order to determine the most suitable protection measure, its review, modification, termination, or any other decision about it.

248. Article 12 of the Convention on the Rights of the Child states:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

249. The right of all children to be heard and that his or views be given due weight is "one of the four general principles of the Convention, (…) which highlights the fact that this Article establishes not only a right in itself, but should also be taken into account when interpreting and enforcing respect of all other rights."[299] In the Committee's opinion "[A]rticle 12 as a general principle provides that States parties should strive to ensure that the interpretation and implementation of all other rights incorporated in the Convention are guided by it (Article 12 of the Convention)."

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[296] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. para. 196; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 228; and I/A Court H.R., *Juridical status and human rights of the child.* Advisory Opinion OC-17/02 of August 28, 2002, series A No. 17, para. 99.

[297] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 94 and 117. On the same matter, United Nations, Committee on the Rights of the Child, General Comment No. 12 (2009). *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 32.

[298] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. paras. 96 and 98. IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75.

[299] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 2.

Moreover, the Committee has expressly underlined the existent relation between the child's best interests and its right to be heard.[300]

250. According to the Committee, Article 12 of the Convention on the Rights of the Child implies that the States parties have the obligation to adopt all necessary measures to ensure that there are mechanisms, in the administrative and judicial proceedings, to obtain in an adequate and timely manner, the child's opinions on matters that affect him or her and are the subject of analysis and decision in the framework of these proceedings.[301]

251. Therefore, "States parties shall assure the right to be heard to every child *capable of forming his or her own views*." Such terms should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."[302]. Following this logic, The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[303]

252. The special nature of age-appropriate communication with children, and the special requirements and support that they may need in order to form and express an informed opinion, must not constitute in practice an impediment or obstacle for ensuring the children's right to be heard in the framework of decision-making proceedings. On the contrary, deriving from Article 8(1) of the American Convention, in relation to the special duty of protection in Article 19 of that instrument, and related to Article 12 of the Convention on the Rights of the Child, States have additional obligations to regulate the proceedings so as to guarantee the children's effective participation. It is therefore necessary to adapt communication methodologies used to facilitate the expression of opinions of all children, especially to meet the requirements of children who have greater difficulties or barriers to express themselves, because of their young age and consequent limits on verbalization of opinions, or because of the

[300] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paragraphs 17 and 74.

[301] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard,* CRC/C/GC/12, July 20, 2009, para. 19.

[302] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 20.

[303] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 21.

existence of any form of disability[304] or other impediment. Linguistic and cultural aspects that may be present must also be taken into account when choosing the medium that will permit and facilitate the expression of the child's opinion.[305] The Commission considers that in light of the guarantee of Article 8(1) of the American Convention, in relation to its Article 19, free assistence services of an interpreter and other specialized personnel, for example for working with small children or those with disabilities, must be provided as needed.

253. States have to ensure that the child receives all necessary information and advice to make a decision in favor of her or his best interests.[306] In this regard, States must encourage every child to form a free view, without undue influence, and offer an adecuate environment in order for the child to feel safe and respected, creating conditions allowing him or her to exercise the right to be heard.[307] This means that the child must be informed about the matters under consideration, options and possible decisions that could be made, and their consequences. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the vital precondition for the existence of clear decisions on behalf of the child; the information must be accessible to the child and appropriate.[308] Even so, it is not necessary that the child have an exhaustive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.[309] The Committee on the Rights of the Child and the Court have stated that the child has the right not to exercise that right: "[f]or the child, expression

[304] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 229; Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities,* CRC/C/GC/9, 27 February 2007, Forty-third session, para. 32: "It is essential that children with disabilities be heard in all procedures affecting them and that their views be respected in accordance with their evolving capacities," and para. 48:"[t]he Committee is concerned at the fact that children with disabilities are not often heard in separation and placement processes. In general, decision-making processes do not attach enough weight to children as partners even though these decisions have a far-reaching impact on the child's life and future. Therefore, the Committee recommends that States parties continue and strengthen their efforts to take into consideration the views of children with disabilities and facilitate their participation in all matters affecting them within the evaluation, separation and placement process in out-of-home care, and during the transition process. The Committee also emphasizes that children should be heard throughout the protection measure process, before making the decision as well as during and after its implementation.' In the same sense, Articles 5, 12, and 13 of the United Nations Convention on the Rights of Persons with Disabilities.

[305] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard,* CRC/C/GC/12, July 20, 2009, para. 21.

[306] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 16.

[307] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard,* CRC/C/GC/12, July 20, 2009, paras. 11, 22, and 23.

[308] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard,* CRC/C/GC/12, July 20, 2009, para. 25.

[309] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 21.

of views is a choice, not an obligation."[310] In addition, children must be informed of their right to be heard directly or through a representative, if so they wish.

254. In addition to the foregoing, the Commission emphasizes the importance of proper training for administrative and judicial authorities on the child's right to be heard, and the existence of specialized personnel to provide the necessary support so that children can adequately understand all aspects of their participation in a given proceeding, thereby adequately ensuring their right to be heard.

255. The environment in which children will be heard must be safe, favorable, and trustworthy, so that the child may freely express his or her opinion without constraint or feeling frightened or mistrustful. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be accessible, appropriate, and comprehensible for the children. Elements related to the solemnity and formality of the proceeding that might intimidate the child, such as the court room, the clothing of the judges and lawyers, the language, and other elements, must be taken into consideration to make the atmosphere as conducive as possible for the children to exercise their right to be heard.[311]

256. Furthermore, it is important that "States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child,"[312] and, given the circumstances of the case and the child's best interests, it should be preferably under conditions of confidentiality.[313] No child should be interviewed more often than necessary,

[310] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 16; and I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 198.

[311] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 34.

[312] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 21.

[313] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 43. Concerning children who have been victims or witnesses of crime, see "Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime," approved by the Economic and Social Council in Resolution 2005/20 and included as Appendix III. 1. Especially see Guideline 23, which states: "[In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions."

particularly when disturbing events are investigated or when the process may cause traumatic effects in the child,[314] and re-victimization must be avoided.[315]

257. The Court has considered in a case that it is not necessary to hold a new hearing in the context of a decision on a possible appeal of a prior decision, if there is already evidence in the file reflecting the child's wishes[316]:

> However, the fact that a judicial authority is not required to gather the testimony of a child once again in the context of a judicial proceeding, does not release it from the obligation to duly consider and assess, in one way or another, the views expressed by the child in the lower courts, according to the child's age and maturity. If appropriate, the respective judicial authority must argue specifically why it will not take into account the child's views.[317]

258. The Committee has stated that, "[b]y requiring that due weight be given in accordance with age and maturity, Article 12 makes it clear that age alone cannot determine the significance of a child's views. Children's levels of understanding are not uniformly linked to their biological age. (…) For this reason, the views of the child have to be assessed on a case-by-case examination."[318] In addition, the Committee indicates that "[m]aturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child. "[319]

259. The Court has held that children exercise their rights progressively as they develop a greater degree of personal autonomy.[320] Consistent with the content of General Comment number 12 of the Committee on the Rights of the Child, the Court

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[314] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 24.

[315] Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, approved by the Economic and Social Council in Resolution 2005/20. Guideline 23.

[316] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. para. 205.

[317] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 206.

[318] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 29.

[319] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 30.

[320] Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*. CRC/C/GC/7/Rev.1, of 20 September 2006, Fortieth session, para. 17. I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 199.

has ruled that those responsible for application of the law, whether in the administrative or judiciary sphere, must take into account the specific conditions of the child and his or her best interests to decide on the child's participation, as appropriate, in establishing her or his rights. This consideration will seek as much access as possible by the child to examination of his or her own case.[321]

260. In addition, the Committee on the Rights of the Child has said that Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity.[322] Simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views; for this reason, the views of the child have to be assessed on a case-by-case examination.[323] If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.[324] For that reason, in the context of judicial decisions made on protection, custody, and care of the child, these must guarantee his or her right to be heard by the decision makers.[325] The same applies to adoption proceedings and those for the application and review of special measures of protection for temporary removal of the child from parental care and placement to alternative care.[326]

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[321] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17. para. 102; I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. para. 199.

[322] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 15. I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 200; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 230.

[323] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 28 and 29. I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 200; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 230.

[324] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 44. I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 200; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 230.

[325] Committee on the Rights of the Child, General Comment No. 12. *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 28 and 29. I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 200; I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 230.

[326] Day of General Discussion of the Committee on the Rights of the Child on children without parental care, 2005, Report of the Fortieth Session of the Committee on the Rights of the Child, CRC/C/153, paras. 663 and 664.

261. The child's opinion, his or her preferences, and how it was evaluated and taken into consideration by the authority for adoption of the respective decision must be duly documented to justify the relationship between the content of the decision and the child's wishes expressed.[327] If the decision-maker does not follow the child's wishes, it must be justified, because the child's views cannot be automatically disregarded without offering serious and profound arguments.[328]

262. The abovementioned right of the child to be heard must be incorporated in all actions in the context of a special measure of protection, i.e., the decision to apply a special protective measure, the content of the measure, its review, modification, and termination.

263. Among the procedural guarantees established in Article 8(1) of the American Convention, the Commission and the Court have established the obligation to guarantee the participation of the biological parents as well as the child in the proceeding, because their right to family life could be affected, and to include other family members and persons with a direct connection to the child who could help the competent authority discern the most adequate and appropriate measures for the child's well-being and best interests.[329] The parents' right to be heard and to participate in the proceeding must be duly guaranteed.

264. The Commission has gathered information on compliance with children's right to be heard in the framework of proceedings for special measures of

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[327] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 208.

[328] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 206, see also para. 207 and the opinion of the expert cited in the Court's decision: "[There is] an obligation [on the part of the state authorities] to consider their opinion in deliberations that lead to a decision that affects children. […] [T]he adults responsible for the decision must not decide arbitrarily when the child says something relevant to the decision […].If the children are sufficiently developed in their opinions and points of view, these must prevail in matters affecting them, unless there are very serious reasons against them. This means that if the children's opinions are well-based, precise, with sufficient knowledge of the facts and the consequences they imply, they must prima facie prevail over other arguments to determine the decision that will affect the child in what refers to the facts and states that involve him. This priority is demanded by the principle of the best interest of the child of Article 3 of the [Convention on the Rights of the Child]. The foregoing does not mean that the determination of the child's best interest is always going to coincide in the specific case with the child's opinions, even when the child has the required age and maturity to have his own opinion […] The judge or person responsible for the proceedings must reasonably assess the weight of the child's opinions, in relation to their consequences for the totality of their fundamental rights, as well as with regard to the level of maturity of the child, but this assessment […] demands a superior argumentative burden for the decision that is different from the child's opinion."

[329] In the same sense Article 9(2) of the Convention on the Rights of the Child has this to say regarding proceedings for separation of children from their parents: "In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known." Day of General Discussion of the Committee on the Rights of the Child on children without parental care, 2005, Report of the Fortieth Session of the Committee on the Rights of the Child, CRC/C/153, paras. 663 and 664

protection on custody and care, which shows that there is a need for greater effort to guarantee children's right to be heard in proceedings of this type. In this regard, the Commission notes that legislation in most States in the region formally recognizes children's right to be heard. Although the Commission welcomes this recognition by the law, it has identified some regulatory limitations on that right, such as establishing a minimum age for it.[330] The Commission is also concerned that despite the express legal provisions, some research shows that there is a high percentage of cases in which the regulations are not followed in proceedings on custody and alternative care.[331] The Commission also observes that limited information is available on compliance with the right to be heard of children with disabilities. This absence of information could be an indication, just as the Committee on the Rights of the Child has noted, that children with disabilities are often not heard in the judicial and administrative proceedings that affect them.[332] In summary, based on the available information, the Commission notes that this right is not adequately guaranteed in practice and urges the States to redouble their efforts in this regard.

e. The right to legal representation and counsel

265. The Inter-American Court has made some considerations on facilitating effective access to justice for children and others persons who are especially vulnerable in exercising their rights. In this regard the Court understands that States Parties shall ensure effective access to justice for children on an equal basis with other persons, including through the provision of procedural and age-appropriate accommodations to facilitate their access and participation in the proceedings.[333] In addition, the Court has established that the participation of State institutions and bodies is essential so that they can assist in the judicial proceedings in order to ensure that the rights of such persons are effectively protected and defended.[334]

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[330] As is the case reported by Grenada in its reply to the questionnaire, views of children aged 12 years and over are sought and taken into account.

[331] Office of the Ombudsman of the State of Peru, Ombudsman's Report No. 153, "Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención" [Neglected Children and Adolescents: Input for a New Care Model], Lima, 2011,[Abandoned children and adolescents: contributions for a new model of care], Lima. 2011, p. 158. Judicial System Observatory, "Judicial Protection of Rights: Reality, perspectives, and changes in the framework of applicaton of the Code of Children and Adolescents. in Maldonado, Montevideo, Paysandú, and Salto", Fundación Justicia y Derecho, Montevideo, 2010 [Observatorio del Sistema Judicial, La protección judicial de derechos. Realidad, perspectivas y cambios en el marco de la aplicación del Código de la Niñez y la Adolescencia en Maldonado, Montevideo, Paysandú y Salto, Fundación Justicia y Derecho].

[332] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, Forty-third session, para. 48.

[333] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 241

[334] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 241

266. The Court has made several clarifications with respect to the representation of the interests of each child in the framework of a given administrative or judicial proceeding: (i) children exercise their rights autonomously in a progressive manner as they attain a higher level of personal autonomy and maturity,[335] (ii) children should be informed of their right to be heard directly, or through a representative, if they so wish, based on their age and maturity, [336] (iii) in certain proceedings, based on their objective , the position of the mother and/or father may not necessarily represent the child's interests [337] so the State must guarantee that the child's interests are represented by someone outside said conflict,[338] and (iv) the child has the right to suitable legal counsel throughout the proceeding that decides on her or his rights.[339]

267. The Commission considers that legislation should provide necessary guarantees for the child's adequate representation and counsel in order to comply with Article 8(1) of the American Convention. This is particularly necessary in proceedings such as those mentioned, which decide on protective measures that involve the separation of children from their family and their placement in alternative care, which entails an exercise of public power and has effects on their basic rights.

268. The Commission notes that according to most of the legislations in the hemisphere, persons under the age of 18 who are not yet emancipated are represented in principle by their parents, guardians, or other type of legal representatives, and in some cases by the Public Prosecutor's Office or other form of State body. It should be noted that the Convention on the Rights of the Child stipulates in Article 5 the right of the child to exercise her or his rights autonomously in a manner consistent with the child's "evolving capacities." It is therefore preferable for the children to participate directly, unless that is not appropriate in some special situations considering their best interests.

269. The Court reiterates that while procedural rights and their related guarantees apply to all persons, in the case of children the exercise of those rights requires, due to their special status as children, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.[340] The types of

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[335] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 68.

[336] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 199.

[337] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 67.

[338] I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 199.

[339] *Mutatis mutandi* I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, paras. 234 to 243

[340] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 242 I/A Court H.R., *Juridical*

Continues…

specific measures are determined by each State Party and may include direct or joint representation [341] of the child, according to each case, in order to reinforce the guarantee of the principle of the best interests of the child and the effective exercise of her or his material and procedural rights. Generally speaking, the Court considers that in cases of vulnerability of certain persons, it will be required for that individual to receive the counsel or intervention of a public official to ensure the effective protection of his or her rights.[342]

270. On this subject the Committee on the Rights of the Child has said "States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences."[343]

271. The Commission observes that children should have the right to their own legal counsel and representation on their own behalf , especially in proceedings where there is, or could be a conflict of interest between the child and her or his father and/or mother or other involved parties.[344] In cases where there are conflicting interests between a child and his or her father and/or mother, the competent authority should appoint either a "guardian ad litem" or another independent representative to represent the views and interests of the child in the proceeding.[345] The Commission

…continuation
Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para.98

[341] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 242, and, *mutatis mutandi*, I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, para. 199. See also the "Brasilia Regulations Regarding Access to Justice for Vulnerable People," which expand on the principles included in the "Charter of Rights of the People before the Judiciary in the Ibero-American Judicial Space" (Cancun, 2002).

[342] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 242.

[343] Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*. CRC/C/GC/7/Rev.1, of 20 September 2006, Fortieth session, para. 13 a).

[344] In the same sense, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies. Version edited May 31, 2011, Guideline 37. Available as an Annex in the document "Childhood and Justice: A Matter of Rights, children in the justice administration in Spain." Save the Children, Noviembre de 2012, p. 135 http://plataformadeinfancia.org/system /files/informe_infancia_y_justicia.pdf Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 90 and 96.

[345] In the same sense, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies. Version edited May 31, 2011, Guideline 42. Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 90 and 96.

underscores that it is important for children to have access to quality, specialized, and free legal aid in proceedings of the type mentioned, in order to ensure the effective exercise of their material and procedural rights,[346] taking into account that their basic rights are affected. To the extent possible given the children's age and maturity, therepresentation of a child in the context of a proceeding that affects their rights should be done by their representatives in accordance with their wishes.[347]

272. In addition, States should adopt appropriate provisions to ensure that lawyers who represent children *ad litem* and serve as their legal counsel are specially trained in and knowledgeable on children's rights and related issues, and receive ongoing and in-depth training, which, among other things, equips them to communicate with children at their different levels of understanding.[348] Lawyers should provide the child with all necessary information and explanations concerning the proceeding, its possible consequences, and the effect that the child's views and opinions may have.[349]

273. From the information gathered, the Commission notes that several countries in the region have these procedural guarantees in their legislation. For example, in Venezuela the Organic Law for the Protection of Children and Adolescents (Ley Orgánica para la Protección de Niños, Niñas y Adolescentes, LOPNNA) expressly provides a special legal defense service for children and adolescents. Bolivia, in its response to the questionnaire, also refers to free legal aid for children.[350] In Argentina, the Commission has noted that Article 27 of Law No. 26.061 recognizes the right of children and adolescents to be assisted by legal counsel, preferably specialized in dealing with children and adolescents, from the start of the judicial or administrative proceeding; for persons of limited means, the State must assign counsel at its expense. However, the Commission has noted many times deficiencies in the access to a defense, and also to a quality defense.

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[346] In the same sense, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies. Version edited May 31, 2011, Guideline 38. Committee on the Rights of the Child, General comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras.90 and 96.

[347] Committee on the Rights of the Child, General Comment 12, *The right of the child to be heard,* Doc. CRC/C/GC12 July 20th, 2009, paras. 36 and 37. In para. 37 the Committee says the representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons, and codes of conduct should be developed for representatives who are appointed to represent the child's views. Committee on the Rights of the Child, General comment No. 14 (2013*), The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 90 and 96.

[348] In the same sense, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies. Version edited May 31, 2011, Guideline 39.

[349] In the same sense, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies. Version edited May 31, 2011, Guidelines 40 and 41.

[350] In the case of Bolivia see Law No. 2026 of October 27, 1999, Articles 196 and 216.

274. However, not all States provide so clearly for the technical defense of children and adolescents in protection proceedings in accordance with the standards indicated by the Commission. In Colombia, for example, as stated in response to the questionnaire, legal counsel can be provided by the interdisciplinary technical team of the institution providing care to the child in accordance with the required specialization. The Commission considers that a child should have impartial counsel services and legal defense that is not related to the residential care institution.

275. In light of the foregoing, in order to ensure the right to representation and counsel of children in protection proceedings, the Commission recommends that States regulate the participation of defenders in the proceedings, ensure the availability of free specialized public defender service throughout their territory, and establish standards of quality for the service.

276. Likewise, given the effect of this type of proceeding on basic rights and the impact in terms of the seriousness and irreversibility of possible effects on those rights, and with the purpose of providing adequate protection for the child's interests, the Commission recommends that States ensure access to free, specialized, and quality legal aid for parents and family members who seek custody of the child, and need free aid because of their socioeconomic status, in proceedings related to the application of a special measure of protection, and in proceedings for review of such decisions.[351] The Commission understands that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. The limitations that given persons may have in access to quality legal aid and defense owing to their socioeconomic or personal conditions constitute in practice a barrier to access to justice and the right to judicial protection on an equal basis for these persons, and therefore to the defense of their rights.[352]

277. In particular, throughout the preparation of this report, the Commission has noted that many of the families involved in proceedings regarding custody and care of a child for protection reasons, are composed of especially vulnerable people who have difficulties in the exercise of their full rights. Conditions such as poverty, or personal situations such as disability, or belonging to groups that are traditionally excluded or discriminated, are aspects that the Commission has found present in a high percentage of the cases in which children are separated from their families.

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[351] In the same sense, U.N. Guidelines for the Alternative Care of Children, Guideline 47.

[352] Human Rights Committee of the United Nations, General Comment No. 32. *Article 14. Right to equality before Courts and Tribunals and to a Fair Trial* CCPR/C/GC/32, August 23, 2007, Ninetieth, para. 10: "The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While Article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so."

278. As noted above, the Court and the Commission have recognized the States' obligation to adopt the necessary measures to ensure effective access to justice and judicial protection in equality of conditions for all persons.[353] Both organs of the inter-American system have also recognized that vulnerable persons require special measures to guarantee the possibility of an effective defense of their rights vis-à-vis administrative and judicial authorities.[354]

279. In addition, the special conditions of these persons may make it necessary not only to provide legal aid and defense to guarantee their material and procedural rights, but also to give them another type of technical assistance adapted to their needs to facilitate their effective and meaningful comprehension and participation in the proceedings;[355] for example, this might be a translator, a sign language interpreter, a psychologist, a social worker, and others who could help the person properly understand their participation in a proceeding and its potential implications and consequences for them and their rights.

280. In the same sense, within the Organization of American States, the General Assembly has recognized the importance of guaranteeing access to justice on an equal basis, paying special attention to situations of vulnerability of some persons that affects their ability to exercise their rights. On this matter, the General Assembly has adopted resolutions on guarantees for access to justice: "Guarantees for Access to Justice: The role of official public defenders,"[356] and "Official Public Defenders as a

[353] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 95, 96, and 98. IACHR, *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75, I/A Court H.R*., Case of Furlan and Family vs. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, paras. 196, 241, and 242

[354] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 95, 96, and 98. IACHR *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75. I/A Court H.R., *Case of Furlan and Family vs. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, paras. 196, 241, and 242.

[355] I/A Court H.R., *Juridical status and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paras. 95, 96, and 98. IACHR *Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina*, November 29, 2010, para. 75; I/A Court H.R., *Case of Furlan and Family vs. Argentina*. Preliminary objections, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, paras. 196 and 241. In this sense see also the United Nations Convention on Persons with Disabilities, which has a specific Article on the scope of the right of access to justice that says States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants. See Article 13 of the Convention on Persons with Disabilities.

[356] Resolution of the OAS, AG/RES 2656 (XLI-O/11), "Guarantees for Access to Justice: The role of official public defenders," adopted at the forty-first regular session on June 7, 2011; and Resolution of the OAS, AG/RES. 2714 (XLII-O/12), "Official Public Defenders as a Guarantee of Access to Justice for Persons in Situations of Vulnerability," (Adopted at the second plenary session, on June 4, 2012).

Guarantee of Access to Justice for Persons in Situations of Vulnerability."[357] Both resolutions of the OAS General Assembly emphasize access to justice in accordance with the Charter of the Organization of American States, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and all applicable international human rights law provisions. In addition, the XIV Ibero-American Judicial Summit, held in Brasilia on March 6 to 8, 2008, adopted the "Brasilia Regulations Regarding Access to Justice for Vulnerable People", which aim to guarantee effective access to justice for vulnerable people, without discrimination, in particular by guaranteeing the gratuity of quality technical legal assistance. The "Brasilia Regulations" expand on the principles included in the "Charter of Rights of the People before the Judiciary in the Ibero-American Judicial Space" (Cancun, 2002).

V. FAMILY CARE

A. Extended family and foster care

281. Based on the various rights involved in the best interests of the child and applicable principles in this area, the implementation of special measures of protection that do not imply the separation of the child from her or his parents, but instead an intervention that looks after the needs of protection of the child while allowing her or him to remain in the care of his/her family, should be the priority. In order to comply with the objective of preservation and restitution of rights within the framework of the respective protection measure, it will be necessary to determine and implement various family support and strengthening actions to resolve the causes that led to that situation. Therefore, the specific content of the measure should fit the particular circumstances facing the family and the child, and could consist of, among others: i) support, guidance and follow up of the family by experts in family support; ii) direct material assistance or other type of assistance, allocations or benefits for the family to strengthen their standard of living and the enjoyment of the rights of the child; and iii) access to programs, social services or other type of suitable assistance to strengthen the capacity of the family to provide for the protection, care and upbringing of the child without separating her or him from the family.

282. States must also consider those cases in which the parents, even with support and assistance, cannot or will not effectively care for their children, or if it would not serve the best interests of the child to remain with her or his parents, and, therefore, special measures of protection must be implemented that imply the temporary separation of the child from her/his family setting. In these cases, and to the extent possible, every effort shall be made to try to place the child under the care of his/her extended family. Only in cases in which the extended family is not able to take care of the child either, does not want to do it, or if the situation would not serve the best interests of the child, will the State then place that child under the care and

[357] Resolution of the General Assembly of the OAS AG/RES. 2714 (XLII-O/12), "Official Public Defenders as a Guarantee of Access to Justice for Persons in Situations of Vulnerability," (Adopted at the second plenary session, on June 4, 2012).

safeguard of a foster family.[358] It should be pointed out that the care and custody of the child within his extended family is consistent with the right to family and the identity of that child, and facilitates her/his future return to family life with her/his biological parents, which is the objective of the temporary special protective measures.

283. In cases where the extended family does assume the responsibility for the care of the child, the appropriate social services can be required to provide direct support to those family members providing the care. This is done to ensure that the new environment is conducive to providing the child the care and protection she or he needs. These measures to provide support to the extended family are similar to those that would be provided to biological parents to help them carry out their parental duties. This form of special measures of protection must be accompanied also by support and accompaniment for parents with the goal of improving the conditions of the family nucleus and, thus, increasing the possibilities of reintegrating the child to the care of his or her parents.

284. States must also regulate other types of special protective measures of a temporary nature for those cases in which neither the parent nor the child's extended family can assume responsibility for the child's care, or when this was against the child's best interests. In order to provide an appropriate response to the immediate care and protection needs of the child, one of the types of special measures of protection is the temporary placement of the child with a foster family, while the conditions and circumstances that led to the situation of vulnerability are resolved, or, permanent protection measures are identified if it is not possible to return the child to her or his family.[359]

285. In accordance with the United Nations Guidelines for the Alternative Care of Children, the IACHR points out certain criteria to take into account when determining the type of protection measure. In that regard, the IACHR reiterates the fundamental role of the best interests of the child as the basic tenet guiding the determination and implementation of special measures of protection. Furthermore, the Commission underscores the importance of preventing the distancing of the child from her or his family, social and educational environments, which imposes the need to

[358] U.N. Guidelines for the Alternative Care of Children, Guideline 14: "Removal of a child from the care of the family should be seen as a measure of last resort (…)"

[359] The purpose of this report is not to analyze the types of special measures of protection that imply the placement of the child with a foster family, but, rather, it focuses on those measures that imply the admission of the child in alternative residential care, in residential alternative care centers or residential institutions. However, the obligations imposed upon the State, especially with regard to regulation, control and oversight, including setting minimum standards of care, also apply in the case of foster families.

Guideline 14 of the Riyadh Guidelines establishes that: Where a stable and settled family environment is lacking and when community efforts to assist parents in this regard have failed and the extended family cannot fulfil this role, alternative placements, including foster care and adoption, should be considered. Such placements should replicate, to the extent possible, a stable and settled family environment,while, at the same time, establishing a sense of permanency for children, thus avoiding problems associated with "foster drift."

implement the protection measure in a place near where the child lives and to make every possible effort to maintain the bond with the family, including keeping siblings together when implementing a protection measure that affects them all. The Commission further points out the importance of ensuring the continuity and stability of a protection measure that implies alternative child care, either with the extended family or with a foster family, while the protection measure remains in force. Frequent changes of the care setting are detrimental to the development of the child and his/her ability to form attachments, and, therefore, it should be avoided.[360] Thus, Guideline 12 establishes that:

> Decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal.

286. Proximity to the child's normal environment, maintaining ties to parents and extended family and community, as well as the importance of taking into account the child's cultural and religious identity, are all elements emphasized by the Committee on the Rights of the Child and must be considered when making decisions regarding the separation of the child from his/her parents:

> Children feel better in their own environment and this should be taken into consideration when they are placed into out-of-home care. The basic premise is that children should be kept in their own distinctive communities. For instance, indigenous communities often have a very close family system and the child protection system should take into consideration both indigenous culture, values and the child's right to indigenous identity. The importance of the local level and local authorities should not be neglected in providing basic protection for children.[361]

287. There are some specific aspects to consider in relation to making decisions to guarantee the rights and well-being of siblings who become orphans or are left without the protection and care of both parents. In these situations and, under the provisions of Articles 17(1) and 11(2) of the ACHR, in connection with Article 19 of the ACHR, and bearing in mind the primary consideration of the best interests of children who find themselves in these situations, siblings must be provided the opportunity and support, if they so desire, to maintain the nucleus of the family and family living even if

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[360] See U.N. Guidelines for the Alternative Care of Children, Guideline 60.

[361] Day of General Discussion of the Committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Regular Session of the Committee on the Rights of the Child, CRC/C/153, para. 673. Also see Committee on the Rights of the Child, General Comment No. 11, *Indigenous children and their rights under the Convention*, CRC/C/GC/11 of February 12, 2009, 50th Regular Session, paras. 46 to 48.

the parents are no longer present. In these cases, the type of special measure of protection may consist of maintaining the existing family nucleus, formed by the siblings, with the support of expert professionals and the appropriate social services to ensure their well-being in case they decide to remain at home. In addition, this measure would imply the appointment of a legal guardian to assume responsibility for the siblings' well-being and protect their rights and interests. The Commission recalls that, along the same lines, Guideline 37 of the United Nations Guidelines for the Alternative Care of Children, establishes that:

> Support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head. States should ensure, including through the appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian, […] that such households benefit from mandatory protection from all forms of exploitation and abuse, and supervision and support on the part of the local community and its competent services, such as social workers, with particular concern for the children's health, housing, education and inheritance rights. Special attention should be given to ensuring the head of such a household retains all rights inherent to his/her child status, including access to education and leisure, in addition to his/her rights as a household head.

B. Pre-adoption foster care

288. As mentioned in the preceding paragraphs, the legal structure of protective measures and their implementation are based on and guided by the objective of restoring the rights of the child and his or her ties to biological parents and family, once the situation of that created the vulnerability of the child and the need for the measure has been resolved. Therefore, it is important to draw a distinction between this type of measure and other measures such as pre-adoption foster care, whose objective differs from that of measures of a temporary nature. Pre-adoption foster care, considered and regulated by legal systems as a phase in the adoption process, is a measure designed to help the child, whose condition of adoptability has already been determined, develop ties with his/her future adoptive family which has been selected by competent authorities, as a pre-requisite to the legalization of the adoption. The objective of the pre-adoption measure is to give the child an opportunity to adapt to his/her new environment and determine the suitability of the family to become the child's adoptive family, all before the legal adoption is finalized. The law has to be clear in drawing a distinction between the special measures of protection of a temporary nature which assume the transitory separation of the child from hi/hers family, and other types of measures, in particular, pre-adoption foster care or other similar measures. This is especially relevant in ensuring that the implementation of protection measures and their contents are suitable to fully achieving their objective and that every effort made is conducive to restoring to the child the right to reintegrate his/her family.

289. The consideration of the child's best interests may justify that the law exceptionally allows for the foster family to ask for the adoption of the child, as long as there is a strict fulfillment of the guarantees established to protect the child's rights and his/her biological parents. Some legal systems in the region allow the foster family, in the context of a temporary special measure of protection, to later express its interest in adopting the child they have cared for under the foster care arrangement. The Commission emphasizes the need for the law to clearly define and regulate the various legal figures, the rights they protect, their objectives, and the principles that must regulate their implementation. The contradiction of objectives and the contrasting interests of the various individuals involved in the special measures of protection and in the pre-adoption foster care figure must be given special attention by Member States when establishing regulations for both figures. The Commission underscores that the law must establish due guarantees that the rights of the biological parents and the child will not be violated in the event that the law, as an exception, allows for that possibility. In that sense, the regulation of the pre-adoptive care must not constitute a possibility to be used to violate the legislation applicable to adoption and all the guarantees legally established.

290. In connection to the preceding, it should be noted that the Committee has often expressed its concern with existing evidence of cases related to the sale of or trafficking in children, with no family or separated from their family, for various purposes. With regard to children in the younger-age groups, the purpose may be adoption.[362] Although this is not the place to analyze the problem of sale of or trafficking in children, it is important to point out the various infringement of children's rights that could potentially arise due to situations in which weaknesses in the response National Systems for the Promotion and Protection of Children´s Rights offer with regard to providing appropriate support to families , as well as possible shortcomings in the regulation, implementation and oversight of special measures of protection and of the adoption figure . The Commission joins the Committee on the Rights of the Child in pointing out the importance in that the States ratify and implement domestically the "Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography," the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children", which supplements the "United Nations Convention against Transnational Organized Crime," and the "Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption" of 1993, which provide a framework to prevent the violation of children's rights.[363]

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[362] Committee on the Rights of the Child, General Comment No.7, *Implementing the child's rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, para. 36.

[363] These international instruments help States make progress in complying with the obligations contained, specially, in Articles 35 and 36 of the CRC and others of similar scope.

Article 35 of the CRC establishes that: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

Article 36 of the CRC establishes that: "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."

C. Informal care

291. Lastly, it bears mentioning that situations of informal care exist in which children live without their parents unbeknownst to and without any intervention by public authorities. Although a thorough analysis of informal care falls outside the scope of this report, it is important to make some brief comments thereon, given the Commission has found there to be a considerable number of children in the region who are not being cared for by their parents and who have been taken in informally by relatives or other individuals. The protection needs of this group of children may be very similar to those of children protected by special measures of protection adopted and monitored by the competent public authorities.

292. Informal care infers specific arrangements made at the initiative of parents, the child, a child's relatives, or other individuals, by means of which the child is then cared for and raised by a third party, unbeknownst to or without any intervention by public authorities. The causes that give rise to informal care and the circumstances behind them may be quite diverse and vary considerably.[364] Studies show that the reasons may include: (i) the death of both parents; such cases have been specifically identified in the context of the consequences of HIV-AIDS; (ii) the absence of both parents, for example in the context of migration; (iii) the existence of material limitations on the part of the parents when it comes to being able to provide basic care to the child; (iv) other causes have also been identified, such as wanting to facilitate access to education for the child, and arrangements that involve support for the child and meeting of his or her needs in exchange for the child performing domestic work or other types of chores; these latter arrangements come closer to being methods of family survival, or as a means of generating opportunities. The people who take charge of the child may be relatives with a direct link to him or her, such as grandparents, or rather individuals or other families who are not necessarily related, or do not have direct and prior ties, to the child and his or her family. Some informal care arrangements are not risk free towards the rights of children.

293. Reality has shown that the situations and contexts in which children live and are cared for by persons other than their parents can differ from each other and vary considerably. They can range from situations in which grandparents or other close relatives assume responsibility for the care and raising of the children when their parents are absent or face limitations, to situations in which parents turn their children over to the care of another family to facilitate access to education and other opportunities for them, often at a location far from where the parents reside. Such situations are also conditioned by social or cultural practices that may afford greater social acceptance of certain models or arrangements related to the raising of the children.[365]

[364] For a definition, see the U.N. Guidelines for the Alternative Care of Children, Guideline 29(b)(i).

[365] "Children in informal alternative care," Jini L. Roby. UNICEF, Child Protection Section, New York, 2011. One of the proposals the study makes is that the State should provide incentives for formalizing these private arrangements in order to have an accounting thereof that makes it possible to monitor and adopt

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294. In some of these situations, the people who effectively, or informally, assume responsibility for caring for and raising the child may require support or assistance similar to that which would be provided if the State interceded and issued a special protective measure –for example, in the case of grandparents who assume responsibility for raising their grandchildren due to the absence or death of the parents, or to any other circumstance that entails a lack of parental care. Situations in which the grandparents are poor or face material and even physical limitations that prevent them from adequately caring for their grandchildren could warrant protection-based interventions aimed at ensuring the welfare and best interests of the child and, as a result, prompt support and assistance to be provided to the grandparents in caring for the children.

295. In other respects, some of these arrangements may turn out to constitute a risk to or violation of the rights of the child, and in some cases may go so far as to amount to a form of exploitation and even a type of modern servitude. The Commission is concerned about the exploitation to which these children could be exposed when they are being informally cared for within a family nucleus that is not their own and such care is contingent upon their performing domestic work or other chores.[366]

296. The removal of a child from his or her family and community, as well as social and even physical isolation when the child spends all the time in the house, place the child in a context that makes him or her particularly vulnerable to violations of their rights, such as different types of violence, sexual abuse, and labor-related exploitation. Such a situation seriously endangers the child's health and development, in addition to jeopardizing other rights such as education, given that the evidence shows that the children involved often do not attend school.

297. In this cases, the Commission and the Committee on the Rights of the Child have expressed the concern they have about some practices that might constitute a risk to the personal integrity of the child and the rest of the child's rights such as, for example, in the case of the "Restavèks" in Haiti[367] and the "criaditas" in Peru[368] and

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special measures of protection where necessary, with the child's best interests and respect for the child's rights always being the priority whenever any type of decision is made by the State. This study is available in: http://www.unicef.org/protection/Informal care discussion paper final.pdf

[366] Along the same lines, the U.N. Guidelines for the Alternative Care of Children state that: "States should devise special and appropriate measures designed to protect children in informal care from abuse, neglect, child labour, and all other forms of exploitation, with particular attention to informal care provided by non-relatives, or by relatives previously unknown to the children or living far from the children's habitual place of residence", Guideline 79.

[367] IACHR, *2010 Annual Report*, Chapter V, paragraphs 52 to 56. The Special Rapporteur on contemporary forms of slavery affirms that most of the between 150,000 and 500,000 Restavèk children of Haiti are allegedly being exploited in domestic servitude, often working long hours with no type of remuneration, denied education, medical care, and adequate food or accommodation and they are often physically and sexually abused. Report of the Special Rapporteur on contemporary forms of slavery, including

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Paraguay,[369] the "kweekjes" in Suriname[370], although similar phenomena can be identified to a greater or lesser extent in many countries in the region.[371]

298. The United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences (hereinafter, the Special Rapporteur on contemporary forms of slavery), defines domestic servitude as a global human rights concern and observes that a large number of people, the vast majority of them women and girls, are deprived of their dignity due to domestic work. The Special Rapporteur is particularly concerned about the large number of children employed in domestic service since the exploitation of children in domestic work may be equivalent to domestic servitude.[372]

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its causes and consequences, Mrs. Gulnara Shahinian, Report on Domestic Servitude, A/HRC/15/20, June 28, 2010, Human Rights Council, Fifteenth session, paragraph 38. See also, A/HRC/12/21/Add.1, September 4, 2009, Human Rights Council, Twelfth session, Mission to Haiti.

[368] Report of the Special Rapporteur on contemporary forms of slavery, Mrs. Gulnara Shahinian, A/HRC/18/30/Add.2, August 15, 2011, Human Rights Council, Eighteenth session, Mission to Peru. Based on a recent census conducted among Peruvian households, the number of domestic workers is estimated at 300,000, of whom, 110,000 are said to be girls under 18, Instituto Nacional de Estadística e Información [National Institute of Statistics and Data], 2011 census, see paragraph 44.

[369] Committee on the Rights of the Child. Consideration of the Reports Submitted by the States Party Under Article 44 of the Convention. Concluding observations: Paraguay, CRC/C/15/Add.166, November 6, 2001, paragraph 47.

[370] Committee on the Rights of the Child, Consideration of the Reports submitted by the States Party under Article 44 of the Convention. Concluding observations: Suriname, CRC/C/SUR/CO/2, June 18th 2007, para. 42. Committee on the Rights of the Child, Consideration of the Reports submitted by the States Party under Article 44 of the Convention. Concluding observations: Suriname, CRC/C/15/Add.130, June 28th 2000, paras. 37 and 38.

[371] According to the ILO, 175,000 children under 18 work in domestic service in Central America– 38,000 children between the ages of 5 and 7 in Guatemala. See ILO, "Domestic labour: Global facts and figures in brief." Available at: http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm.

[372] Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Mrs. Gulnara Shahinian, Report on Domestic Servitude, A/HRC/15/20, June 28, 2010, Human Rights Council, Fifteenth session, paragraph 35, see specifically paragraphs 35 to 42. The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery specifically bans "[a]ny institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour." (Article(1)(d)). See also, Convention 182 of the International Labour Organization (ILO): the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, adopted by the General Conference of the International Labour Organization at its Eighty-seventh Session, which was held in Geneva and adjourned on June 17, 1999.

299. The U.N. Guidelines for the Alternative Care of Children also refer to "informal care", as well as highlighting the fact that it is not an uncommon situation, and is one that is even highly prevalent in some countries, noting:

> Recognizing that, in most countries, the majority of children without parental care are looked after informally by relatives or others, States should seek to devise appropriate means, consistent with the present Guidelines, to ensure their welfare and protection while in such informal care arrangements, with due respect for cultural, economic, gender, and religious differences and practices that do not conflict with the rights and best interests of the child.[373]

The U.N. Guidelines further recommend:

> With regard to informal care arrangements for the child, whether within the extended family, with friends or with other parties, States should, where appropriate, encourage such carers to notify the competent authorities accordingly so that they and the child may receive any necessary financial and other support that would promote the child's welfare and protection. Where possible and appropriate, States should encourage and enable informal caregivers, with the consent of the child and parents concerned, to formalize the care arrangement after a suitable lapse of time, to the extent that the arrangement has proved to be in the best interests of the child to date and is expected to continue in the foreseeable future.[374]

300. Regarding "informal care," the Commission recalls that, in any event, States continue to have the duty to provide special protection, as stipulated under Article 19 of ACHR and VII of the ADRDM, in particular, in identifying those situations and phenomena in which children's rights may be exposed. Furthermore, the duty also remains to adopt appropriate measures in specific situations to effectively protect children from having their rights violated by third parties. States have diverse mechanisms at their disposal to make this type of identification, specifically vis-à-vis the information on these situations that education and healthcare systems possess thanks to the direct contact they have with children and families.

301. When "informal care" goes hand in hand with social or cultural practices, States must endeavor to conduct a thorough analysis of the phenomenon, its causes, and the consequences and impact thereof on children's rights. Regarding the prevalence of these practices, States access relevant information, for example, through tools such as family surveys, censuses, or other national data collection mechanisms. Based on the data compiled and studies conducted in an effort to understand the scope

[373] Guideline 18.

[374] Guideline 56.

of the phenomenon,[375] States should consider, at a minimum, the following aspects: (i) redoubling their efforts to create conditions that will enable the child's biological family to assume responsibility for raising the child, specifically through social policies aimed at strengthening families; (ii) developing education campaigns targeting society and children themselves in order to raise awareness about violations of children's rights that can result from certain practices; (iii) creating accessible, reliable, confidential, and effective reporting mechanisms that make it possible to inform public authorities about concrete situations in which children's rights might be being violated; such mechanisms should also be accessible to children; (iv) boosting free access to basic public services, in particular, healthcare and education, for families that are more vulnerable and in those areas of the country with more limited access to these services; (v) adopting effective legislative measures to prohibit all forms of violence, abuse, neglect, and exploitation against children, or any other type of infringement of their rights, as well as offering care and recovery services for children whose rights may have been violated; (vi) adequately regulating the different types of care and alternative care in foster care families, bearing in mind existing cultural and social practices, and thereby effectively ensuring the rights, protection, and well-being of children within the setting of foster carers ; and (vii) encouraging families to formalize informal care arrangements so they may access whatever support that the foster carers might need to ensure the optimal well-being of the child, and so children may have the possibility of always having a legal guardian close to them.[376]

VI. RESIDENTIAL CARE

A. Measure of last resort

302. Among the mechanisms to provide protection to children without appropriate parental care is the option of residential care in care centers adapted to the attention and care of children. Article 20(3) of the Convention on the Rights of the Child refers to this type of special protective measures but as a secondary measure, relegating

[375] With regard to the importance of having statistical data and reliable information on hand when developing public policies to effectively protect children not being cared for by their parents, see the U.N. Guidelines for the Alternative Care of Children, Guideline 69.

[376] See also the U.N. Guidelines for the Alternative Care of Children:

> Guideline 76: "With a view to ensuring that appropriate conditions of care are met in informal care provided by individuals or families, States should recognize the role played by this type of care and take adequate measures to support its optimal provision on the basis of an assessment of which particular settings may require special assistance or oversight."
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> Guideline 77: "Competent authorities should, where appropriate, encourage informal carers to notify the care arrangement and should seek to ensure their access to all available services and benefits likely to assist them in discharging their duty to care for and protect the child."
>
> Guideline 78: "The State should recognize the de facto responsibility of informal carers for the child."

it to the category of last resort while giving priority to the options that provide care in a family setting. In this sense, Guideline 21 of the United Nations Guidelines for the Alternative Care of Children establishes that:

> "Use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests." Meanwhile Guideline 125 establishes that: "The competent national or local authority should establish rigorous screening procedures to ensure that only appropriate admissions to such facilities are made."

303. Article 23(5) of the United Nations Convention on the Rights of Persons with Disabilities also gives priority to the care of children in a family setting:

> States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

304. The Committee on the Rights of the Child has emphasized on several occasions the exceptional and subsidiary nature of measures that imply the institutionalization of children, and has established that, in general terms, the admission of a child to an alternative care center should be considered "as a last resort, with the exclusive objective of protecting the best interests of the child,"[377] when the implementation of any other type of special measure of protection is impossible or inappropriate. The justification for this general order of priorities is based on the right of the child to grow , develop and be cared for in a family setting that is conducive, appropriate and safe and which provides the child the affection, attention and care necessary for his/her comprehensive development. When the child's parents or extended family are temporarily unable to provide those conditions, foster carers should play a role in providing a safe and caring environment in a family setting.

305. The ample evidence collected during the past decades regarding the negative impact residential institutions have on children, sparked a position of criticism on the suitability of this type of protection measure. Probable negative consequences, although not always automatic, are particularly manifest in large institutions with little capacity for individualized attention. The World Health Organization, for instance, has stated that residential care institutions have a negative impact on the health and development of children and that they must be substituted by other mechanisms able

[377] Committee on the Rights of the Child, General Comment No. 13, *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 47 (d) (iii). Day of General Discussion of the committee on the Rights of the Child on the topic of Children without parental care, 2005, Report of the 40th Regular Session of the Committee on the Rights of the Child, CRC/C/153, paragraphs 654, 665 and 666.

to provide high quality care.[378] According to the Independent Expert for the U.N. Study on Violence against Children, "[t]he overuse of institutions for children exacts enormous costs on children, their families, and society. Extensive research in child development has shown that the effects of institutionalization can include poor physical health, severe developmental delays, disability, and potentially irreversible psychological damage. The negative effects are more severe the longer a child remains in an institution and in instances where the conditions of the institution are poor."[379] The possible long-term detrimental impact on children living in those institutions is attributed to several factors, among them, the absence of a primary caregiver with whom the child can develop a positive and relevant emotional tie, lack of stimulation and constructive activities, limited access to basic services, and isolation from the family of origin and the community.

306. Other of the main effects is the situation of vulnerability in which children in institutions are exposed to risks of suffering different forms of violence or exploitation. The Study carried out by the Independent Expert clearly showed an abundance of evidence from all regions of the world that indicates that children and adolescents living in institutions are generally exposed to a type of structural violence that is the result of the operating conditions of care in these institutions. According to the aforementioned U.N. Study, violence in the institutions is the result of a number of factors associated with the normal operation of these institutions, such as the precariousness in sanitary and security conditions of the facilities, overcrowding, insufficient staff to provide adequate care to the children, social isolation and limited access to services, the implementation of disciplinary or control measures that involve violence, the use of force or treatments that, themselves, constitute a form of violence, such as unnecessary psychiatric medications, among others.[380] The U.N. Study has documented that violence in residential institutions is six times more frequent than in foster homes, and that children in institutions are four times more likely of being the victims of sexual abuse than children who have access to alternative care in a family setting.[381] That is why the Independent Expert strongly recommends that placement in residential institutions be used as a last resort and only in those cases in which it is the most appropriate measure, in addition to recommending a series of actions to overcome the problems detected and improve the quality of care in residential care centers and institutions. [382]

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[378] World Health Organization, Regional Office for Europe, "Better health, better lives: children and young people with intellectual disabilities and their families. Transfer care from institutions to the community", EUR/51298/17/PP/3, 8 November 2010. http://www.euro.who.int/__data/assets/pdf_file/0008/126566/e94426.pdf

[379] U.N. Study on Violence against Children, page 189.

[380] See Chapter 5, Violence against children in care and justice institutions of the cited U.N. Study on Violence against Children, available at: http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1(1).pdf.

[381] See: U.N. Study on Violence against Children. Available at http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1(1).pdf Pages 183 and 189.

[382] U.N. Study on Violence against Children.

307. With regard to the cost of institutional care compared to other types of care, research conducted in the United States showed that institution-provided care could be between two and ten times more costly than care provided in family-based settings.[383]

308. Based on the preceding, the Commission concludes that full-time placement in a residential should be reserved for those cases in which it is determined that it is the most suitable measure to meet the child's specific needs for protection and care, taking into account the particular circumstances of the child,[384] as well as following established legal criteria and procedures for admission to those s, and implementing the measure for the shortest possible period of time. Furthermore, residential centers must be structured and operated in a way that it ensures the effective protection of the rights of the children placed under their care. Based on existing evidence, and just as it will be adressed more in-depth in a subsequent moment, the model of care in large residential institutions must be substituted by a residential care model based on smaller care centers with placement of fewer children, and which are able to provide children with quality and individualized care.

309. The information and data available to the Commission show that a high percentage of children involved in protection proceedings are placed full-time in residential institutions.

310. Thus, in most of the countries in the region there is a high use of institutionalization of children for protection reasons, even though it should be used

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[383] Barth, Richard P., "Institutions vs. foster homes: The empirical base for the second century of debate", Chapel Hill, NC: UNC, School of Social Work, Jordan Institute for Families, 2002, p. ii. Available at: http://www.dbhds.virginia.gov/documents/cFS/cfs1-9refDocs-rPBarth-vs-FosterHome.pdf. See also Commission to Promote Sustainable Child Welfare Canada, "Strengthening Family-Based Care in a Sustainable Child Welfare System. Final Report and Recommendations. June 29, 2012", p. 10, 11 y 12. The document can be consulted at: http://www.sustainingchildwelfare.ca/assets/CPSCW_SFBC-Final-Report-Recommendations_FINAL_ENGLISH.pdf Report of the Independent Expert for the U.N. Study on Violence against Children, August 29, 2006, A/61/299. Likewise, the U.N Study on Violence against Children found that, depending on the particular cases, institutional care can be between six and one hundred times more expensive than family-based alternative care in the community, see page 184, http://www.unviolencestudy.org/spanish/index.html. UNICEF, "The framework for the protection, care and support of orphans and vulnerable children living in a world with HIV and AIDS", July 2004, p. 37. International Save the Children Alliance, "A Last Resort. The growing concern about children in residential care, London, 2003, pp. 9 et seq.. Save the Children, Keeping Children Out of Harmful Institutions Why we should be investing in family-based care", London, 2009. World Health Organization, Regional Office for Europe, "Better health, better lives: children and young people with intellectual disabilities and their families. Transfer care from institutions to the community", EUR/51298/17/PP/3, 8 November 2010. Children's Rights (USA), "What Works in Child Welfare reform: Reducing Reliance on congregate care in Tennessee", July 2011.

[384] CRC Article 20(3). The Committee on the Rights of the Child has expressed its opinion in several decisions regarding the placement of children in institutions as a form of alternative care, as a measure of last resort. In that regard see, General Comment No. 13*, The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 47(d)(iii), and Committee on the Rights of the Child, General Comment No. 3on *HIV/AIDS and the Rights of the Child*, Doc. CRC/GC/2003/3 (2003), March 17, 2003, paras. 34 and 35.

only as an exceptional measure. In addition, in the majority of cases it is difficult to establish precisely the number of children who live in that situation given the lack of data on the various institutions. Several countries in the region lack accurate and updated information. As a result, it is difficult to determine with any degree of accuracy and reliability whether there has been advancement or decline in the number of children being placed in institutions, due to the fact that in many of the countries in the region, that kind of systematic monitoring is also not being done.

311. Although there are no precise and exact numbers, based on the information that is effectively available, the Commission is concerned with the number of children in the region who are under special measures of protection that imply admission to residential institutions. For instance, a recent survey conducted in Argentina by the National Secretariat for Children Adolescents and Family (Secretaría Nacional de Niñez, Adolescencia y Familia, "SENNAF") together with UNICEF, found that there were 14,675 children in the country in alternative care, most of whom were in institutions; more precisely, 71% of the children (10,488) were institutionalized, while, according to the data, only 29% (4,187) of the children in alternative care have been placed with foster families.[385] In Grenada, according to the information provided in response to the questionnaire, aproximately 197 children and adolescents lived in residential institutions, while 91 were placed in alternative family programs or whose families receive support from State. Meanwhile the information available shows that in Brazil, 36,929 children were placed in residential institutions and only 932 were in foster care programs.[386]

312. On this subject, the Committee on the Rights of the Child has expressed its opinion with regard to the situation in several States in the region and recommended the return of children who are living in institutions to their families as soon as possible, or that they be placed in some form of family-based care, as is the cases; in Bolivia[387], Costa Rica[388], Ecuador[389],

[385] "Situación de Niños, Niñas y Adolescentes sin Cuidados Parentales en la República Argentina. Relevamiento Nacional y Propuestas para la Promoción y el Fortalecimiento del Derecho a la Convivencia Familiar y Comunitaria." Secretaría Nacional de Niñez, Adolescencia y Familia de la SENNAF y Fondo de las Naciones Unidas para la Infancia (UNICEF) [Situation of Children and Adolescents without Parental Care in Argentina. National Survey and Proposals for the Promotion and Strengthening of the Right to Family and Community Living. National Secretariat for Children, Adolescents and Family (SENNAF) and the United Nations Children's Fund (UNICEF)]. June 2012. Document available at: http://www.unicef.org/argentina/spanish/C_Parentales_final.pdf

[386] Secretaria Nacional de Assistência Social, Ministério de Desenvolvimiento Social – Fundação Oswaldo Cruz, "Levantamento Nacional das Crianças e Adolescentes em Serviços de Acolhimento" [National Social Assistance Secretariat, Ministry of Social Development – Oswaldo Cruz Foundation, National Survey of Children and Adolescents in Alternative Care], 2010.

[387] Committee on the Rights of the Child, Analysis of the Reports presented by States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, October 16, 2009, para. 46.

[388] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Costa Rica, CRC/C/CRI/CO/4, June 17, 2011, para. 50.

[389] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Ecuador, CRC/C/ECU/CO/4, January 29, 2008, para. 51.

Guatemala[390], Nicaragua[391], Paraguay[392] and Saint Lucia.[393] The Committee on the Rights of the Child has also made several recommendations to various States in the region several times, as in the case of Bolivia[394], Brazil[395], El Salvador[396], Guatemala[397], Nicaragua[398], Peru[399], Dominican Republic[400] and Uruguay,[401] with regard to the excessive utilization of institutionalization of children. In certain cases, such as in Chile, the Commission took note of the efforts being made to improve the foster care system, and of the small reduction in the number of children in institutions.[402] Likewise, as a way to confront this phenomenon, the Committee has recommended that certain States, such as Nicaragua, develop "public awareness campaigns on the negative impact of institutionalization in the development of the child."[403]

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[390] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, October 25, 2010, para. 55.

[391] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, October 1, 2010, para. 55.

[392] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Paraguay, CRC/C/PRY/CO/3, February 10, 2010, para. 41.

[393] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Saint Lucia, CRC/C/15/Add.258, September 21, 2005, para. 44.

[394] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, October 16, 2009, para. 45.

[395] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, November 3, 2004, para. 44.

[396] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: El Salvador, CRC/C/SLV/CO/3-4, February 17, 2010, para. 48.

[397] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, October 25, 2010, para. 58.

[398] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, October 1, 2010, para. 54.

[399] Committee on the Rights of the Child, Analysis of the Reports Presented by States parties under Article 44 of the Convention. Concluding Observations: Peru, CRC/C/PER/CO/3, March 14, 2006, para. 37.

[400] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Dominican Republic, CRC/C/DOM/CO/2, February 1, 2008, para. 52.

[401] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Uruguay, CRC/C/URY/CO/2, July 5, 2007, para. 40.

[402] Committee on the Rights of the Child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Chile, CRC/C/CHL/CO/3, April 23, 2007, para. 44.

[403] Committee on the Rights of the child, Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, October 1, 2010, para.55.

313. In brief, although admission to residential care arrangements should be a measure of last resort, the information gathered by the Commission shows that the numbers of children and adolescents entering residential alternative care remain disproportionately high. In addition, children stay long time in some of these institutions, although their stay should be for the shortest time necessary. Moreover, the material and operating conditions in which the placement occurs is of concern in all countries of the region. This part of the report will address the alternative care arrangements of residential character and how to organize this form of alternative care to adequately serve its purpose and give satisfaction to the protection of human rights of children and adolescents deprived of parental care.

B. Early Childhood

314. In addition to what has already been said, the Committee on the Rights of the Child has expressed special concern in regard to the placement of very young children in residential institutions due to the amount of care and attention those children need according to their young age, for their proper physical and psychological development.[404] This same concern was expressed by the Independent Expert for the U.N. Study on Violence against Children.[405] In the case of children younger than 3 years of age, the U.N. Guidelines for the Alternative Care of Children underscore the importance of their placement in family settings and avoiding residential institutions, due to their special needs and requirements given their age and condition:

> In accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings. Exceptions to this principle may be warranted in order to prevent the separation of siblings and in cases where the placement is of an emergency nature or is for a predetermined and very limited duration, with planned family reintegration or other appropriate long-term care solution as its outcome.[406]

315. The aforementioned limitation of access to information in general, and to data disaggregated by age groups in particular, makes the study of the problem of institutionalization of children at an early age difficult. Nevertheless, the information gathered by the Commission on that subject is not favorable, finding a significant

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[404] Committee on the Rights of the Child, General Comment No. 7, *Implementing child's rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, paragraphs 6, 8 and 36. Specifically para. 36(b): "[R]esearch suggests that low-quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long-term social adjustment, especially for children under 3 but also for children under 5 years old. To the extent that alternative care is required, early placement in family-based or family-like care is more likely to produce positive outcomes for young children."

[405] U.N. Study on Violence against Children, paragraphs 189 and 190.

[406] Guideline 22.

number on infants living in institutions. For instance, in Guatemala, according to the Registry of Institutions, of the 4,666 children in private residential institutions, 555 are younger than 4 years of age.[407] Likewise, in Brazil, children between the ages of 0 and 5 account for 24.7% of the children in residential institutions.[408] In Uruguay, data from the Children's Information System, [Sistema de Información para la Infancia] indicates that as of August 22, 2011, 236 children younger than 3 years of age were in residential institutions.[409] In the case of Chile, according to the data for July 2011, the number of young children in residential institutions is broken down as follows: between 0 and 1 year of age, 206 children; between 1 and 3 years of age, 674 children; and the total number of children between 0 and 3 years of age living in residential institutions is 880.[410]

316. The Commission is pleased to note that certain States, as is the case of Uruguay, have adopted legislation establishing the maximum period of time young children can in residential institutions; according to the provisions of Law No. 18.590, children between the ages of 0 and 2, may not remain in an institution longer than 45 days. For children between the ages of 2 and 7, the law establishes a maximum stay of 90 days. The Court and the Commission have expressed the view that age and the passage of time are crucial to the development of emotional bonds, family ties, personality and also shaping the identity of the child, especially in the early years, and, therefore, there is a duty of exceptional diligence since the time factor may cause irreparable damage to the child.[411]

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[407] Presentation by Byron Velásquez Acosta, Director of the Central Registry Authority of Institutionalized Children, National Council on Adoptions, [Director de la Autoridad Central del Registro de niñez institucionalizada, Consejo Nacional de Adopciones], during the sub-regional consultation for the report on the situation of institutionalized children and adolescents in the Americas of the IACHR jointly with UNICEF, Guatemala City, July 25, 2011. This situation has been addressed specifically by the Committee on the Rights of the Child (Analysis of the Reports Presented by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, October 25, 2010, para. 55).

[408] Secretaria Nacional de Assistência Social, Ministério de Desenvolvimiento Social – Fundação Oswaldo Cruz, "Levantamento Nacional das Crianças e Adolescentes em Serviços de Acolhimento" [National Secretariat for Social Assistance, Ministry of Social Development – Oswaldo Cruz Foundation, National Survey of Children and Adolescents in Alternative Care], 2010.

[409] RELAF - Latin American Foster Care Network, "Institutionalized children and adolescents: evidence of serious human rights violations." Series: Publications on children without parental care in Latin America: Contexts, causes and answers, 2011.

[410] Boletín estadístico Nacional de Protección de Derechos y Primera Infancia. Segundo trimestre año 2011 [National Statistical Report on the Protection of Rights and Early Childhood. Second Quarter of 2011] Available at: http://www.sename.cl/wsename/estructuras.php?name=Content&pa=showpage&pid=153

[411] I/A Court H.R., *Case Fornerón and daughter v. Argentina*. Merits, Reparations and Costs. Sentence of April 27, 2012 Series C No. 242. para. 51; I/A Court H.R., *Order of the Inter-American Court of Human Rights of July 1, 2011. Matter of L.M. Provisional Measures with regard to Paraguay,* . Considerative paragraph 16; I/A Court H.R., *Case Furlan and Relatives vs. Argentina*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of August 31, 2012. Series C No. 246, para. 127. In a similar sense, Committee on the Rights of the Child, General Comment No. 7*, Implementing child's rights in early childhood*, CRC/C/GC/7/Rev.1, September 20, 2006, 40th Regular Session, para. 18.

317. Based on all existing evidence regarding the negative impact of institutionalization on children, during early childhood, especially during the first years of life, with serious and long-lasting consequences for their physical and mental health, the Commission recommends that States limit the institutionalization of very young children to cases in which it is strictly necessary according to the following : the placement is made for a short period of time in response to an emergency situation; the return to the family or to care in a family-based setting is expected in the short term; and when there is a group of siblings in order to keep them together if there is no form of foster care available that would make it possible for them to remain together. In addition, the Commission urges States to develop a strategy to de-institutionalize young children who are living in residential institutions, implementing appropriate measures for the care of children that respect their rights. In that regard, the Commission has learned of certain promising initiatives as, for instance, in Paraguay, where the National Secretariat for Children and Adolescents [Secretaría Nacional de la Niñez y la Adolescencia] has initiated a strategy to de-institutionalize young children.[412]

318. The Commission recommends that States take all appropriate measures to prevent situations that require or lead to the separation of the child from the family, and, in addition, ensure the applicability of the principle of exceptionality in regard to protection measures implemented that imply placement and stay in institutions. States Parties are encouraged to invest in foster family programs and to provide them the appropriate support as a measure to address those cases in which the child's family is temporarily unable to care for the child.[413]

319. These indications do not contradict the fact that, in certain circumstances, admission of a child to a residential care center may be the most appropriate and suitable measure given the particular needs for protection and care of the child as well as serving his/her bests interests. In certain circumstances, the child's medical condition, the need for specialized treatment, recovery in cases of victims of violence, the urgent need to separate the child from his/her family environment in order to protect his/her personal integrity, the need to keep large groups of siblings together, or other particular circumstances, placing the child in a residential that is structured to provide appropriate care may be the option that serves best his or her interests. This, however, does not eliminate the principle of temporal determination, instead every effort must be made to ensure that placement of the child in a residential is for the shortest period of time possible, pursueing the return of the child to his/her nuclear, extended or foster family or, if reintegration is not possible, seek another solution of a permanent nature.

[412] In the context of this process, a "nursery home" called "Hogarcito" was closed and the 22 babies who were there were placed with foster families and the process of returning them to their biological families or identifying adoptive families in cases where return to biological families was not possible was initiated.

[413] The U.N. Guidelines for the Alternative Care of Children make a similar recommendation in Guideline 8: "States should develop and implement comprehensive child welfare and protection policies within the framework of their overall social and human development policy, with attention to the improvement of existing alternative care provision, reflecting the principles contained in the present Guidelines."

C. Terminology

320. As was noted above, the Commission uses the term "residential care centers" and the term "institution" or "residential institutions", to refer to two different non family-based forms of alternative care.[414] The difference in terms reflects two models of attention and care, which are organized and function differently from one another. While the concept of "residential care" describes a type of alternative care, while non family-based, it takes place, however, in settings that function similarly to a family unit, with individualized attention and a lower number of children living at each facility. Whereas, the term "institution" is used to refer to larger facilities, which provide simultaneous care to large groups of children; they are not organized nor do they function in such a way that enables them to provide personalized care and attention to the child in similar circumstances as that of a family-; and they are usually operated under a closed system, or in which children have restricted contact and integration with their surroundings and the community. In this section of the report, referred to the residential care, the references include both residential care centers as well as institutions, although in particular, it makes more references to institutions that, even though they should disappear, continue to exist in the region and present the main difficulties in the protection of the rights of children admitted to them. Precisely, one of the recommendations put forth in this report is to discontinue the model of institutionalization due to the evidence of it being incompatible with protecting the rights of children.

321. In preparing this part of the report, the Commission identified an absence of sufficient quantitative and qualitative data on the number, characteristics and operating conditions of residential care centers and residential institutions in the region. This is often because such establishments are, on the one hand, quite diverse in nature and, on the other hand, there are no common definitions and shared classification criteria to enable identification, analysis and comparison. The other major difficulty the Commission has encountered in preparing this report stems from countries' limited and unequal compliance with the obligation to regulate the establishment and functioning of this type of establishments, particularly when they are privately owned and operated, which makes it difficult to gain access to the full range of information required to shed light on the existence and operating conditions of these facilities and institutions.

322. In this section of the report, the Commission addresses the need to turn this situation around by clearly establishing the duty of States to regulate the establishment and functioning of public and private residential care facilities and

[414] See Guideline 23 of the U.N. Guidelines for the Alternative Care of Children. Additionally, references to the terms used under the U.N. Guidelines for the Alternative Care of Children can be found in "Moving Forward: Implementing the Guidelines for Alternative Care of Children," Centre for Excellence for Looked After Children in Scotland (CELCIS) of the University of Strathclyde; International Social Services (ISS); Oak Foundation; SOS Children's Villages International; and the United Nations Children's Fund (UNICEF) 2012, pages 34 and 35.

institutions, looking to standardize the licensing and authorization thereof throughout States' territory, to set minimum conditions and standards for their operation , mechanisms of oversight and monitoring of all facilities and institutions, sactions in the event of failure to comply, as well as obligations to register and inform the authorities about all children living at a care facility or institution.

D. The duty to regulate: public and private centers and institutions

323. States have the obligation to ensure adequate protection of children who lack parental care and, consequently, are receiving care and protection at an alternative care facility or institution. As a result of the obligation to respect and ensure rights recognized in Article 1(1) of the ACHR, and the obligation to adopt adequate legislation for this purpose under Article 2 of the ACHR, in connection with the duty to provide special protection to children under Article 19 of this same instrument, and article VII of the Declaration, the Commission finds that the States of the region have the duty to regulate and oversee the establishment and functioning of all the residential care centers and institutions.

324. The Commission and the Court have held that under Article 19 of the ACHR and Article VII of the ADRDM, the right to protection, wellbeing and comprehensive development of children and adolescents is a matter of public interest and that, as such, it entails the duty of the State to adequately regulate these residential care facilities and institutions, which provide several basic and essential services of care to children, directly linked to respect for their rights.[415]

325. Additionally, the Commission finds that because this involves children under the custody of a residential care facility or institution as a result of a decision of a State authority, based on the dictate of special measures of protection, the State has a heightened duty as a guarantor of these children, precisely in light of the context of regime of subordination or special relationship in which the State has placed the child.

326. The Commission notes that residential care centers and institutions that shelter children without parental care in the region are public, private or a combination of both. Public care centers and institutions as part of the national system of protection are state-run and financed and, based on the particular country, may be dependent of public agencies or territorial entities (states, provinces, counties, etc.) with varying degrees of decentralization. The Commission also notes that generally speaking, in the different countries of the region, there are a high number of private care centers and institutions, which are managed by private individuals or entities. There are also care centers or institutions of a mixed nature, which although under private ownership, they receive public funding for part or all of their operations, and as a result of this allocation of resources, are subject to certain norms and public controls, content of which vary from country to country.

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[415] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17.

327. Effective and timely protection of the rights of the child requires that care be provided by duly qualified specialized professional services, having appropriate and sufficient trained staff and adecuate facilities, in addition to a suitable organizational and operational system to serve the purpose of ensuring applicability and restoration of rights.[416] This must apply to the activity of all public and private residential care centers and institutions, which must organize and discharge their duties taking into account both the very nature of the special measures of protection, in general, as well as the best interests of the child, specifically.[417]

328. The Commission, therefore, considers that States parties have the duty to regulate and oversee the establishment and functioning of all residential care centers and institutions. The Commission underscores that these obligations to regulate and oversee are fundamentally important when they involve services provided by public and private centers and institutions in charge of the protection, custody and care of children, who have been separated from their families, in as much as both the duty of special protection for the child under Article 19 of the Convention and the particular protection needs of these children are applicable. In such circumstances, the State has a heightened duty as guarantor in light of the situation of vulnerability, which children separated from their families are in, and this means, as the Court has recalled, that the State "must assume a special position of guarantor with greater care and responsibility, and must take measures especially oriented in the principle of the best interests of the child."[418] In this regard:

> The Inter-American Court considers that any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights. The Court reaffirms that not only should the States refrain from violating such rights, but also adopt positive measures, to be determined according to the specific

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[416] I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 August 28, 2002, series A No. 17, para. 78 and resolutive para. 6.

[417] I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 79.

[418] I/A Court H.R., *Case of Chitay Nech et al v. Guatemala*. Preliminary Objections. Merits, Reparations and Costs. Judgment May 25, 2010. Series C No. 212, para. 164. Also see, I/A Court of H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 August 28, 2002, Series A No. 17, paras. 56 and 60. See also, I/A Court H.R., *Decision of January 27, 2009 with regard to the Request for an Advisory Opinion made by the Inter-American Commission on Human Rights*. Available at: http://www.corteidh.or.cr/docs/asuntos/opinion.pdf 'considering' clause 14; I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 196; I/A Court H.R., *Case of Bulacio v. Argentina*, Merits, Reparations, and Costs. Judgment of September 18, 2003. Series C No. 100, paras. 126 and 134; I/A Court H.R.,*Case of the Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, paras. 124, 163 and 164; and I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment September 2, 2004. Series C No. 112, para. 160.

> needs of protection of the legal person, either because of his personal condition or the specific situation he is in (…)[419].

Additionally, as has been discussed above, Article 2 of the American Convention sets forth:

> Where the exercise of any of the rights and freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

329. The aforementioned duties of State to regulate and supervise residential care centers and institutions of protection and care are applicable irrespective of their nature as public, private or a combination thereof. In this regard, the legal precedents of the Inter-American Court clearly establish that States must regulate and supervise the provision of services of a public interest, also when these services are provided by private individuals.[420] The Court has specifically found that States are responsible both for the acts of public entities as well as private ones, who provide services that have a bearing on the lives and personal integrity of persons.[421] Concretely, the Court has held that "States must regulate and supervise […] as a special duty to protect life and personal integrity regardless of the public or private nature […], since under the America Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them."[422]

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[419] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paras. 103 and 88. See also *Case of Baldeón-García v. Peru*, Merits, Reparations and Costs, Judgment of April 6, 2006, series 147*,* para. 81*;* I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment March 29, 2006, para. 154; and the *Case of the Pueblo Bello Massacre v. Colombia,* Merits, Reparations and Costs, Judgment of January 31, 2006, para. 111.

[420] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 94, 96, 99. I/A Court H.R., *Case of Albán Cornejo et al v. Ecuador*. Merits Reparations and Costs. Judgment November 22, 2007. Series C No. 171, para. 119. Also see IACHR, *Report on corporal punishment and human rights of children and adolescents*, para. 69.

[421] I/A Court H.R., Decision of January 27, 2009 with regard to the Request for an Advisory Opinion made by the Inter-American Commission on Human Rights. "Considering clause" 13; I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 146; I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 89 and 90.

[422] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 89 and 90. IA Court of HR, Decision of January 27, 2009 with regard to the Request for an Advisory Opinion made by the Inter-American Commission on Human Rights. *Considering* clause 13. I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paragraphs 146 and 147.

330. The Court has clarified the content of said obligations of the State to regulate and inspect in a case pertaining to services provided at a psychiatric centre in a residential care regime, establishing that:

> [T]he Court considers that States are responsible for regulating and supervising at all times the rendering of services and of the implementation of national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment. They must, *inter alia,* create the proper mechanisms to carry out inspections at psychiatric institutions, submit, investigate and solve complaints and take the appropriate disciplinary or judicial actions regarding cases of professional misconduct of the violation of the patients' rights.[423]

331. Similar to the holdings of the Commission and the Court, the Convention on the Rights of the Child provides the following in paragraph 3 of Article 3:

> 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.

332. Additionally, the CRC expressly refers to the duty of the State to guarantee the necessary conditions to provide adequate protection and assistance to any children who require care at a facility of a residential nature.[424] Article 39 of the CRC, however, refers more generally to the duty of the State to organize and promote, either directly or through third parties, the services of protection, recovery and reintegration of any children that so require them. Thus, the Article states:

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

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[423] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraph 99.

[424] Article 20 of the CRC, cited earlier in this report, establishes that: (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. (2) States Parties shall in accordance with their national laws ensure alternative care for such a child. (3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children (…)."

333. The U.N. Guidelines for the Alternative Care of Children also provide for the duty of regulation and supervision of the State with regard to alternative care centers operating in the territory of a State. In this regard, it states under several Guidelines:

> […] It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided.[425]
>
> States should ensure that all entities and individuals engaged in the provision of alternative care for children receive due authorization to do so from a competent authority and are subject to regular monitoring and review by the latter in keeping with the present Guidelines. To this end, these authorities should develop appropriate criteria for assessing the professional and ethical fitness of care providers and for their accreditation, monitoring and supervision."[426]

334. The Commission notes that the general duty of regulating the requirements and standards for the establishment and functioning of public and private care facilities, must include: i) qualification requirements and procedures for getting an authorization for operating, licensing and registry of care s, ii) period of validity of the authorization, renewal and extension thereof, iii) grounds for revocation of authorization, iv) requirements and procedure for admission of a placement and authorizing the departure of a child, as well as the mandatory registration of the children cared for therein, v) supervision, control and inspection of the facilities, vi) mechanisms for complaints, reports and petitions, vii) civil, administrative and criminal sanctions, as appropriate, in the event of breach of the conditions for the provision of service and/or violations of rights, and viii) minimum standards of quality for the provision and functioning of services, taking into account the overriding nature and the objective of the special measures of protection and respect for and guarantee of the rights of the children.

335. According to information received by the Commission, in many countries in the region a high percentage of residential care centers and institutions are private, and a great number of them are not properly accredited or licensed to operate as a result of an absence of laws, policies or rules adequately governing the establishment and operation thereof. The Commission urges the States of the region which still have not done so to adopt standards to regulate the establishment and functioning of public and private residential care facilities and, where necessary, adjust

[425] U.N. Guidelines for the Alternative Care of Children, Guideline 5.

[426] U.N. Guidelines for the Alternative Care of Children, Guideline 55.

current regulations in order to bring them into line with the obligations of States emanating from international human rights law on the subject matter.

336. The obligation of States to regulate is not restricted to public care facilities, which directly provide the public service, but rather encompasses any care facility or institution that protects children without adequate parental care. As was done by the Court, the Commission recalls that failure in the duty to regulate and supervise private care facilities and institutions generates international liability, since under the American Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them.[427]

E. Residential care centers and institutions of public, private or mixed nature

337. The State may decide to provide the service of residential care and protection to children without parental care directly, through facilities managed by public entities. However, private initiative may also provide these services of residential protection and care under state regulations on the subject matter. The Commission has noted that in several countries of the region, there are a considerable number of private establishments, which provide services of residential alternative care and protection to children without parental care, and that the number very well may surpass the number of public establishments providing this service. The Commission has also learned that most States in the region opt for entering into contracts or agreements with a certain number of private care centers or institutions providing these services, which are generally known as facilities of a mixed public/private nature.

338. In Chile, for example, according to the response to the questionnaire, there are 332 privately managed facilities, known as "collaborating agencies" [*organismos colaboradores*], while 10, which are directly under public agencies. Likewise, based on the information provided, in El Salvador there are 13 public facilities, 65 private ones and 6 of a mixed nature.[428] Also, in Paraguay, it has been reported that 6 care facilities are public, while 63 are exclusively run by private organizations. Similar situations have been reported in Argentina,[429] Costa Rica, Ecuador, Guyana, Honduras, Jamaica and the Dominican Republic. Additionally, according to the information gathered in the sub-regional consultation process, in some States like Haiti, all residential alternative care institutions are run by private organizations.

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[427] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, para. 90.

[428] The entities of mixed nature being defined, according to the questionnaire response, as those receiving a subsidy from the State.

[429] In Argentina, for example, the city of Buenos Aires residential care facilities are 95% managed by non governmental organizations (NGOs) and therefore by private entities. Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011), [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], p. 31.

339. Regarding the aspect of procurement or entering into contracts for the financing and provision of the service by private entities , differences between countries are evident; in some States such as Argentina,[430] Brazil, Chile, Uruguay or Saint Vincent, the vast majority of facilities receive public funding. While in other cases, such as Venezuela, financing of most care facilities is private, with the presence of religious organizations and non-governmental organizations being particularly significant.

340. Likewise, based on the information received by the Commission, it can be surmised that in some instances, even though States have a number of public residential care centers in place, when specialized care is required, they resort to specialized private facilities or institutions, such as the case of institutions for children with disabilities in Colombia and Honduras, or institutions for the treatment of adolescents with addictions in Uruguay.

341. As for the provision of public services linked to the guarantee and applicability of fundamental rights, the Court has held that:

> Rendering public services implies the protection of public interests, which is one of the objectives of the State. Though the States my delegate the rendering of such services through the so-called outsourcing, they continue being responsible for providing such public services and for protecting the public interest concerned. Delegating the performance of such services to private institutions requires as an essential element the responsibility of the States to supervise their performance in order to guarantee the effective protection of the human rights of the individuals under the jurisdiction thereof and the rendering of such services to the population on the basis of non-discrimination and as effectively as possible.[431]

342. In the Commission's view the fact that the private sector is in charge of care centers and institutions does not diminish in any way the obligation of the State to ensure recognition and full enjoyment of all rights of children and adolescents under the State's jurisdiction. Accordingly, the Committee has recommended that a permanent mechanism or process of supervision be put into place to make sure that all public and private service providers respect the applicable norms, irrespective of the existence of a contract or agreement for the provision of the service and/or its public financing.

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[430] As an example of the arrangement of State financing of private residential care centers and institutions, the fee and payment structure can be viewed in, Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011), [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pp. 34-37.

[431] I/A Court H.R. *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraph 96.

343. The Committee on the Rights of the Child has held forth, with regard to the provision of services by private parties, that States:

> […] have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-State providers operate in accordance with its provisions.[432]

344. As for provision of the service by the so-called facilities of a mixed nature , which are private but receive public funding for operation of their establishment, the Commission specifically sets forth that, even though the provision of the service is governed in these instances by service provision contracts or agreements, the Commission finds that this is insufficient when it is not accompanied by an adequate regulation of the operations of these establishments , which must be consistent with the objective of the protection of the rights of the child. In this regard, based on the information that has been submitted to the Commission, in some instances, the regulation of the service is reportedly confined to administrative and financial requirements; however, aspects pertaining to quality and standards of service and compliance thereof , are not sufficiently taken into account.

345. Lastly, the Commission is concerned that there may be forms of financing that provide incentives for the holding or prolonged stay of children in alternative residential care centers or institutions longer than necessary. In this regard, it urges States to establish a legal framework and conduct adequate oversight to make sure that no child will be placed or held needlessly at a facility or institution.[433]

F. Requirements and procedures for admission and departure of children from residential care centers and institutions

346. As part of the aforementioned obligation of the States of the region to regulate all residential care facilities that are located in their territory, the Commission recalls that this obligation extends to regulation of the requirements and procedures for admission and departure of a child or adolescent from care centers or institutions.

347. The State must establish in its regulatory framework the requirements and the procedure under which the admission of a child to an alternative residential

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[432] The Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44), CRC/GC/2003/5, November 27, 2003, para. 43. Also see: Committee on the Rights of the Child, Report on the 31st session, September to October 2002, Day of General Debate on "The private sector as service provider and its function in the fulfillment of the rights of the child," paras. 630-653. Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, September 20, 2006, fortieth session, para. 32.

[433] Likewise, see Guideline 108 of the U.N. Guidelines for Alternative Care of Children: "The forms of financing care provision should never be such as to encourage a child's unnecessary placement or prolonged stay in care arrangements organized or provided by an agency or facility."

care facility or institution is to take place. Generally speaking, the admission of a child to a facility of these characteristics ought to be the consequence of a special measure of protection issued by the competent authority, setting forth the reasons why it was issued and the content thereof.

348. In addition, the Commission considers that standards instituted by the State to regulate the establishment and functioning of care centers and residential institutions should prohibit recruitment of children by the facilities themselves. The foregoing is under the principles of international human rights law as applied to children without parental care, particularly the principle of necessity and of the exceptional and temporary nature of the separation of children from their families, as well as precedence of the best interests of the child in applying measures of protection and care, . As was discussed above, placement of a child deprived of parental care in a care facility must be in response to the implementation of a measure of special protection issued by the competent authority. For this purpose, the regulations must clearly set forth the requirements and procedures for admission and departure of children at residential care facility, so that no child is cared for at a residential centerwithout it being strictly necessary and suitable, nor that he or she remains at such a facility unnecessarily. Guideline 127 of the UN Guidelines for the Alternative Care of Children puts forth a similar recommendation in stating that:

> […] Laws, policies and regulations should prohibit the recruitment and solicitation of children for placement in residential care by agencies, facilities or individuals.

349. The Commission, nonetheless, notes that cases arise in which the parents themselves or the family of the child give the child over to an institution to care for him or her, be it for a short period of time or in a definite manner. The regulations must cover such instances when children are placed in institutions by their parents or family members themselves, because they are unable or refuse to take charge of them. These cases must be promptly brought to the attention of the public authorities with competence for child affairs in order to provide support to the parents through existing family support social services, to investigate whether other relatives might be able to take charge of the child or, otherwise, determine what measure of temporary or permanent alternative care would be most suitable for the child, in light of his or her individual situation and best interests. Additionally, these regulations must address other situations that have also been detected in the region, which lead to the admission of the child in an institution, such as abandonment of children by their families at these institutions. It was recently reported to the Commission that this type of situation takes place without the public authorities even being aware of it.

350. The Commission is concerned that the admission of children to alternative residential care centers or institutions without a measure of special protection being issued by the competent authority for this purpose, and without the public authorities responsible for child affairs being advised immediately, does not adequately ensure their rights, in addition to placing them at risk of sale and trafficking in children, generally for purposes of adoption, but also for exploitation.

351. The Commission highlights that States have the responsibility at all times to know the exact number of children without parental care who, as a result of this situation, are living at a residential care center or institution. Therefore, as part of the duty to regulate, the legal framework must impose the obligation on all alternative care center and institutions to keep a registry containing all of the personal information of all children living at them, as well as record in the registry the decision issued by the competent authority under which a measure of protection entailing alternative care of a residential nature was decided and the justification for the suitability of such a measure.

352. Accordingly, children and adolescents who are admitted to an alternative residential care facility or institution must be immediately entered into the facility's registry and a personal dossier or file of the child must be opened for him/her at that time. These registries must be made available to the mechanisms of control and oversight during monitoring and inspection visits to the facilities and institutions. Additionally, immediately after being admitted, the child is entitled to a medical examination conducted by specialized personnel and to the recording of the medical examination report in the personal file of the child.[434] The Commission attaches great importance to this medical examination at the time of admission in the facility or institution, inasmuch as it finds it necessary to be able to provide any immediate medical care that the child may require, including psychological recovery and rehabilitation,[435] as well as to exert subsequent oversight over possible forms of violence or neglect to which the child may be exposed at the facility and which affect his or her health and personal integrity.[436]

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[434] Similar to adolescents at facilities for deprivation of liberty; see, Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, April 25, 2007, 44th Session, para. 89; IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 543; Havana Rules, Rule 50: "Every child has the right to be examined by a physician upon admission to a detention/correctional facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention."

[435] It must be taken into account that children and adolescents who are placed in an alternative residential care facility as a result of a special measure of protection have been subjected to situations that seriously jeopardize their rights, including their personal integrity and health; for example, they may have been victims of intra-family violence, abuse or exploitation, been neglected by their family or other situations that may have had an adverse effect on their health and wellbeing.

[436] Similarly, the IACHR *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle IX (3) establishes that: "All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture." Additionally, the Commission has referred to the medical examination in relation to persons deprived of liberty in its Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II., Doc. 64, December 31st, 2011, paragraph 163: "The initial medical examination of a person deprived of liberty constitutes an important safeguard for determining whether the detainee has be subjected to torture or ill-treatment during arrest or detention and, in the case of persons admitted to penitentiaries, for detecting whether they have suffered ill-treatment of that kind during their prior stay in temporary deprivation of liberty s. The initial medical examination of people who are deprived of their liberty is a way to

Continues…

353. In this regard, the U.N. Guidelines for the Alternative Care of Children concur in asserting the duty of States to regulate the procedures under which the admission of children into residential care centers take place. Guideline 125 establishes that:

> The competent national or local authority should establish rigorous screening procedures to ensure that only appropriate admissions to such facilities are made.

354. Likewise, States have the obligation to regulate the requirements that must be met for the departure of children and adolescents from alternative residential care centers and institutions, and the procedures governing this process. The professional staff at these facilities must create adequate conditions so that the child may leave the care center or institution in the shortest time possible; regular evaluations must be carried out in order to monitor interventions applied for this purpose and developments achieved. Accordingly, once the conditions of the situation are given in order for the child to depart the facility, this situation must be reported promptly to the appropriate authority, in order to vacate the special measure of protection and order the departure of the child from the residential facility or institution in order to become reunited with his or her family or to begin an independent living arrangement as an adult, should he or she have reached adult age; in other instances, as has been explained, the appropriate thing to do is for the competent authority to open proceedings to revoke parental authority in a definite manner, and find the child eligible for adoption, when evidence proves that it is impossible to reunite the child with his or her family of origin.

355. Based on the information it has received, the Commission views with concern that only a few States have reported that a departure procedure is in place for the departure of children and adolescents from residential centers and institutions, particularly, the fact that children are able to leave these establishments without any formal procedure for this purpose being involved. In Chile, for example, information has been provided indicating that, in 2010, out of a total of 18,977 children admitted, 1,131 left the institutions informally, which represents 5.96% of all admissions. This type of situation is especially serious in light of the cases of trafficking in children linked to alternative residential care centers and institutions. According to information gathered by the Commission, in the Federal District of Mexico (Mexico City) alone, three institutions have been identified by the authorities as being implicated in alleged disappearances and exploitation of children and adolescents.[437]

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prevent torture; it represents the ideal way of evaluation of their state of health, the type of medical care they may need, (…)."

[437] See: Special Rapporteur on trafficking in persons, especially women and children, Promotion and Protection of all Human rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Addendum, Communications to and from Governments, U.N. Doc. A/HRC/14/32/Add.1. May 31, 2010.

356. In addition to regulating requirements for admission and departure, States must require alternative residential care centers and institutions to keep up-to-date registries and dossiers or personal history files on all children and adolescents living in their establishment, as will be addressed in greater detail in a subsequent section of this report. In light of the concerns raised by the Commission pertaining to admissions and s departures from institutions, the Commission urges the States to possess , as soon as possible, the completely up-to-date information on all children who are living in the custody of a public, private or a mixed public/private residential care facility or institution in the country.

G. Licensing, authorization to operate, and administrative registration

357. The duty of the State to regulate includes instituting a procedure for the licensing and authorization to operate of public, private, and mixed nature residential care centers. The purpose of the licensing and authorization procedure is to ensure compliance with the standards of the provision of the service and proper operation of alternative residential care centers and, consequently, make sure as well that these facilities are qualified to serve the purpose of guaranteeing applicability and restoration of children's rights. The special nature of the activities performed by these facilities means that the State's duty as a guarantor is heightened and, therefore, the Commission holds that such establishments may not operate without prior authorization, issued by the competent public authorities in order to engage in this activity.

358. In order to license and authorize to operate, the State must first establish, by means of a regulation or other legal provision, the technical criteria and standards that will be used to evaluate the characteristics and operating conditions of alternative care centers. The technical criteria to open and operate a residential care facility must be established in keeping with the objective of protecting and restoring the rights of the children requiring alternative care. Consequently, at minimum the following aspects must be taken into account : i) the type and characteristics of the physical premises and infrastructure in order to adequately serve the children, ii) the standards of care, iii) the profile and qualifications of the staff and specialized professionals linked to the facility, iv) the care program and objectives governing operation of the facility, v) specialized services provided at the facility, such as medical-psychiatric care, or any other type of care that requires special authorization, vi) the registries, files, accounting ledgers and other documentation that must be kept at the licensed facilities. Minimum requirements with regard to each of these aspects listed above are explained in detail in subsequent sections of this report.

359. In order to be granted a license and authorization to operate, the requirements listed in the foregoing paragraph apply, notwithstanding fulfillment of other requirements such as certifications pertaining to the physical safety of the instalation and to security and emergency protocols in the event of disasters, or other specific certification as required under other applicable regulations, in addition to complying with renewal prior to expiration of such certificates.

360. Regulations must also identify the authority in charge of granting licenses and authorization to operate. The Commission finds that based on the principle of specialization and professionalization, the competent authority must be specialized in the subject of the rights of the child and have adequate staffing available to it in order to carry out the necessary evaluations to grant licenses, as well as perform subsequent oversight and supervision duties. Evaluations must include an on-site inspection visit of the premises, in addition to a review of the requisite documentation.

361. The obligations of the State is not exhausted at the moment of licensing and authorization for operation of the residential care center, but is extended throughout the time of functioning and delivery of service of the facility. To this end and for the purpose of fulfilling the duty to supervise, public and private alternative care facilities, regardless of whether or not they receive public funding, must be entered into a specific registry of entities providing services of protection of a residential nature to children without parental care. The facilities must inform the authorities of any change or modification in their characteristics or operations from the time when they were originally licensed and registered.

362. The Commission notes that it is the duty of the State to make sure that residential care centers comply at all times with the regulations governing service provision conditions, and the criteria and standards set forth therein. In view of the type of duties performed by these facilities, and the direct bearing that it has on the rights of the child, the Commission considers that adequate compliance with the aforementioned obligation implies that authorizations to operate be in effect for a limited time period, at the end of which they must be renewed. Additionally, the duty to supervise this type of residential facilities means that the competent authorities must conduct regular inspection and control visits to evaluate compliance with operating requirements. The regulations must also provide for sanctions in those instances when such facilities operate without the respective license or authorization to operate or without being recorded in the registry.

363. On this score, the U.N. Guidelines for the Alternative Care of Children establish:

> All providers should be appropriately qualified or approved in accordance with legal requirements to provide alternative care services.[438]
>
> Legislation should stipulate that all agencies and facilities must be registered and authorized to operate by social welfare services or another competent authority, and that failure to comply with such legislation constitutes an offence punishable by law. Authorization should be granted and be regularly reviewed by the competent authorities on the basis of standard criteria covering, at a minimum,

[438] Guideline 73.

> the agency's or facility's objectives, functioning, staff recruitment and qualifications, conditions of care and financial resource management.[439]

364. Notwithstanding the existence of variation among the States in the region regarding procedures for facility registration and licensing, the Commission has received reports on instances of shortcomings in the licensing and authorization and oversight processes for residential care facilities.

365. In this regard, the Commission notes that several States of the region are in the process of adopting or revising the legislative framework for operation of this type of facilities and implementing a single registry thereof. This implies that not all residential care centers and institutions that are currently operating have been licensed to do so by the public authority. This type of situation has been reported in Chile, Colombia, El Salvador, Nicaragua and Paraguay, among other States. When the survey was being conducted, in Bolivia for example, based on the information reported by the State, it is estimated that 60% of the centers and institutions are accredited, while 40% were in the process of applying for accreditation. The Commission received information in the context of the sub-regional consultations with regard to Guatemala; even though a registry of facilities, mostly private, has recently begun to be implemented in that country, not all of these establishments have completed the accreditation process because many are facilities that are not in compliance with the standards in force.[440]

366. The Commission notes with concern that, in many instances, the mechanisms of licensing and registration are linked exclusively to State funded private residential care facilities. As was discussed above, this is especially problematic because in many States of the region a significant percentage of alternative care centers and institutions are private, which, because they do not receive public funding, could fall outside the control and supervision of the regulating authorities.

367. Another difficulty reported to the Commission is that some specific registries exist, but do not include all type of alternative residential care facilities and institutions, as well as the existence of very general registries which list a broad range of social organizations without specifically distinguishing the organizations that are running care facilities and institutions for children without parental care. For example, in Uruguay, even though a public registry of non-governmental organizations exists, it is a general registry for every type of organization and not a specific registry of residential care facilities.

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[439] Guideline 105.

[440] RELAF - Latin American Foster Care Network, *Niñez y adolescencia institucionalizada: visibilización de graves violaciones de DDHH* [Institutionalized Childhood and Adolescence: spotlighting gross human rights violations]. Series: Publicaciones sobre niñez sin cuidados parentales en América Latina: Contextos, causas y respuestas [Publications on children without parental care in Latin America: Contexts, causes and responses], 2011.

368. Additionally, for purposes of ensuring transparency in the system and the oversight thereof, the Commission recommends making public and periodically updating the full roster of accredited facilities, the maximum capacity at each one and the actual occupation ratio in each facility. The occupation of a facility over its maximum capacity shall be prohibited by law.[441]

369. The Commission urges the States of the region that have still not done so, to regulate as soon as possible the criteria and minimum requirements for operation of residential care centers in accordance with the standards prescribed in international human rights law and in keeping with the objective of protection and restoration of the rights of the child; and also to regulate the procedure for granting licenses and for the corresponding registration.

370. As a complement to the foregoing, in view of the fact that protection of children without parental care is a service in the public interest, the Commission finds that it is the duty of States to engage in adequate planning of the alternative care services, providing in said context, as a complementary to thefamily-based care, for the alternative care in small centers of personalized care for the boys and girls that so require. Specifically, pursuant to the objective of the special measures of protection, States should consider implementing a decentralized, small facility-based model, which can provide individualized quality care to the child, nearby and culturally adapted, in order to facilitate maintaining family and community ties and reuniting the child with his or her family.

371. Being that a high number of both public and private residential care centers and institutions currently functioning in the region, that started operating prior to the coming into effect of a regulatory legislation framework in line with the principles and standards of international human rights law, the Commission recommends that States consider reviewing the existent centers and institutions and the conditions in which provide services to children and adolescents, particularly large institutions serving a high number of children. In those instances where the State's available alternative residential care facilities do not conform to the aforementioned principles and standards, the Commission concurs with the recommendations put forth by the Committee on the Rights of the Child and the Independent Expert for the U.N. Study on Violence against Children, that a deinstitutionalization strategy for children living in such institutions must be pursued.[442]

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[441] This criterion is analogous to the one stated above by the IACHR in: *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.131, Doc. 38, March 13, 2008 (hereinafter "*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*"), Principle XVII.

[442] The U.N. Guidelines for the Alternative Care of Children also recommend that States undertake a process of de-institutionalization of children who are living in a large-scale residential care institution or establishment, which serve a high number of children and are unable to provide individualized care in a family-like setting. See Guideline 23.

372. Deinstitutionalization strategies must be based on adequate planning and go hand in hand with an effort to strengthen family support programs and services in order to create favourable conditionsfor reintegration into the family, when possible and in the best interests of the child. In addition, it must be accompanied by an increase in the availability of family-based alternative care, or in facilities of small dimensions with a functioning similar to that of a family, for any children requiring alternative care.[443] The success of deinstitutionalization plans must not just be measured in terms of a reduction in the total number of children living at institutions but must also measure, among other indicators, the quality of life of the children who have been transferred from the institutions, and the effects that process of deinstitutionalization has on them.[444] In this sense, it is fundamental that these measures are adopted within a comprehensive policy of protection, to avoid possible collateral damages that can derive from deinstitutionalization without planification.

373. In that regard, review of the legislative framework and of the current operation of residential institutions in the countries of the region represents a unique opportunity for States to redesign national plans and policies for the protection of children at risk of losing parental care and bring these plans and policies in line with the principles and standards of international human rights law. Accordingly, the Commission encourages States to take advantage of the opportunity to reinforce programs and services aimed at strengthening families in order to get them to fulfill their parental functions, as well as promoting family-based care alternatives, when it is not an option for the child to remain within his or her family, ensuring that care at residential centers is used as a last resort and only when it is the most favorable and positive measure for the child.

H. Duty to supervise and inspect

374. The Court has held that States must supervise and oversee the provision of services in the public interest, whether these services are provided by both public and private entities.[445] Similarly, the Commission has held that this obligation to supervise is of the utmost importance when it involves the supervision of services provided by public or private facilities in charge of the protection, guardianship, care and education of children.[446] The States Parties, therefore, have obligations of

[443] See the report of the Independent Expert for the U.N. Study on Violence against Children, paragraph 112 a). and Guideline 23 of the U.N. Guidelines for the Alternative Care of Children.

[444] Also see: European Commission, Daphne Programme, De-Institutionalising and Transforming Children's Services. A guide to good practice, University of Birmingham, July 2007, pgs. 120 et seq.

[445] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 94, 96, 99, 141 and 146. I/A Court H.R., *Case of Albán Cornejo et al. v. Ecuador*. Merits Reparations and Costs. Judgment November 22, 2007. Series C No. 171, paragraph 119.

[446] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135, Aug 5, 2009, para. 69. I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 August 28, 2002, Series A No. 17. This obligation can be inferred from paragraphs 78 and 79.

monitoring, supervision and inspection of public and private facilities, in order to ensure that all fundamental rights of children are respected and guaranteed and that they comply with the objective of restoring rights, pursuant to the special measure to protect.

375. By the same token, Article 3(3) of the Convention on the Rights of the Child, cited above, is very clear in establishing the obligation of States to submit centers and institutions to adequate procedures of supervision.

376. The Commission views that the content of the duty to supervise and inspect residential care centers and institutions has specific characteristics derived from the very activity that is performed by these centers and institutions, as well as from the special conditions of vulnerability of children living in such establishments. Regarding the conditions of vulnerability, the Commission underscores that several different factors have a direct bearing on vulnerability while the child is in an alternative care facility or residential institution: the absence of parents, family members or persons close to the child; the age and degree of the child's individual development and his or her dependency on adults; and, the child's lack or limitation of knowledge on his or her rights and how to assert them.

377. Based on the foregoing and in order to adequately comply with the aforementioned obligation, the Commission believes that normative regulations must clearly establish the following aspects as a minimum: i) the authority to carry out supervision and inspection of the facilities, ii) the minimum frequency with which the competent authority must conduct oversight visits, iii) the way in which such visits are to be carried out, including interviewing the children cared for at the facility as well as the staff, iv) the elements to be inspected, v) applicable evaluation criteria for the conditions and operation of the facilities, and vi) procedures and methods to document the visit and the conclusions and recommendations put forward. The Commission finds that adequate compliance with the obligation to supervise and inspect requires on-site visits to be conducted to all public and private residential care facilities, within the territory of the State, and not be limited to a representative sampling of just a few selected facilities. The Commission also recommends that the report and the findings of the visits be made public and accessible.

378. Consequently, States have the obligation to establish mechanisms of regular supervision, specifically with regard to the conditions of operation of these facilities, service quality, and compliance with measures of protection for the child, in keeping with applicable human rights principles. Supervision must address the physical and material conditions of the service, the number and suitability of the professionals engaged to serve the children, as well as programmatic aspects followed by the facility and the implementation by the same of individualized care plans to meet the protection needs of each child and to help maintain family ties and reintegrate the child back into the family. The Commission deems it absolutely essential for the State to have available to it at all times, at a minimum, complete and up-to-date information on how many residential care centers exist in its territory, types of facilities and specific descriptions, and the amount of children living therein.

379. As to the way in which supervision must be conducted, the Commission concurs with the provisions of Guideline 128 of the U.N. Guidelines for the Alternative Care of Children, which establishes that there must be "frequent inspections comprising both scheduled and unannounced visits, involving discussion with and observation of the staff and the children."[447]

380. Regulations must clearly establish the consequences that may arise, in the event that in the context of one of these facility inspections, situations contrary to the criteria and standards of operation, or violations of the rights of the children living at the facility, are detected. In the event that deficient conditions in which the children and adolescents are living are serious and jeopardized their comprehensive development or safety, States must have the option to void the license of the center or institution and decide to close it down, notwithstanding the conducting of investigations of the case to determine liability and sanctions.

381. In the context of fulfilling the obligation of supervision and oversight, authorities may issue recommendations to the care facilities when irregularities are detected, and set a deadline to rectify them, in order to improve the conditions of operation and care provided to the children, in keeping with the criteria established under the normative framework.

382. Information received by the Commission enables it to identify several issues pertaining to the functioning of mechanisms of supervision in the States of the region. In most instances, even though States have delegated the legal authority to specific bodies to carry out the tasks of oversight, monitoring and supervision of residential care facilities, limitations as to the functioning thereof has been brought to the attention of the Commission.[448] Often, supervision and inspection visits are not carried out on a regular basis, and do not usually cover all facilities. For example, in Paraguay, based on the responses to the questionnaire, the authority that performs these tasks inspected 21 institutions in 2010 of the total of 67 that are reported to exist.

383. The Commission shares the concern of the Committee on the Rights of the Child as to the absence, in some instances, and the shortcomings, in others, of the

[447] See in this regard: Council of Europe, Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the rights of children living in residential institutions, adopted by the Committee of Ministers on 16 March 2005 at the 919th meeting of the Ministers' Deputies. Also see: Council of Europe, Rights of Children in Institutions Report on the implementation of the Council of Europe Recommendation Rec (2005)5 on the rights of children living in residential institutions, August 2008. Also See U.N. Guidelines for the Alternative Care of Children, Guideline 128: "Agencies, facilities and professionals involved in care provision should be accountable to a specific public authority, which should ensure, inter alia, frequent inspections comprising both scheduled and unannounced visits, involving discussion with and observation of the staff and the children."

[448] See, for example: Jamaicans For Justice, "Report on The Situation of Children in The Care of The Jamaican State", submitted to the IACHR in November 2009, p.11. Children's Rights (USA), "Overview of Institutional Care in the United States", Documents submitted for the Day of General Discussion 16 September 2005: Children Without Parental Care (Committee on the Rights of the Child), pp. 4 and 5.

supervision systems over private care facilities in several States of the region such as Brazil,[449] Chile,[450] Guatemala,[451] Guyana,[452] Santa Lucia,[453] Trinidad and Tobago,[454] and Uruguay.[455] The Commission views as very positive that some States of the region, after receiving the above-cited observations, have begun to implement changes aimed at bringing standards and practices in line with the recommendations received by them.[456]

384. According to information received by the Commission regarding several States, such as Chile, Colombia or Uruguay, mechanisms of supervision are closely linked to compliance with the conditions established in the framework of contracts and agreements under which the alternative care centers receive public funding. The Commission notes that in some of these cases, supervision is basically of an administrative and financial nature, and does not thoroughly address aspects pertaining to the conditions in which the residential care is provided. In the view of the Commission, with regard to private facilities that are publically funded, not only should the mechanisms of supervision address administrative and financial aspects of the facilities, but also compliance with regulations establishing the minimum standards of quality of service and the objectives in pursuit of which facilities' efforts should be geared towards. For this purpose, States must establish appropriate evaluation and supervision criteria.[457] For example, based on a UNICEF study, in some States, such as Saint Lucia or Saint Vincent, there is no specific legislation in place regulating residential institutions, and, therefore, supervision thereof cannot be carried out adequately.[458]

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[449] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, November 3, 2004, para. 44.

[450] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Chile, CRC/C/CHL/CO/3, April 23, 2007, para. 45.

[451] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, October 25, 2010, para. 58.

[452] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Guyana, CRC/C/15/Add.224, February 26, 2004, para. 35.

[453] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Santa Lucia, CRC/C/15/Add.258, September 21, 2005, para. 44.

[454] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, March 17, para. 43.

[455] Committee on the Rights of the Child, Examination of Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Uruguay, CRC/C/URY/CO/2, July 5, 2007, para. 41.

[456] According to the information received in the response to the questionnaire.

[457] U.N. Guidelines for the Alternative Care of Children, Guideline 55.

[458] UNICEF Office for Barbados and the Eastern Caribbean, "A study of child vulnerability in Barbados, St. Lucia and St. Vincent & the Grenadines", Barbados, 2006, p. 18.

385. Meanwhile, in other countries, regulations do establish minimum frequency of inspections, how inspections must be conducted, what elements or aspects are subject to inspection, in addition to establishing that inspections must be conducted on every center and institution in the territory. In Chile, for example, based on its response to the questionnaire, a supervision mechanism is in place for public and private facilities, which functions on a region-by-region basis and can be described as systematic and, among other items, covers programmatic aspects of the facilities. This system prescribes visits to facilities at least every two months for establishments located closest to the main office of the inspection team, and every three months for the more distant facilities. In the context of these supervision visits, interviews with the children and adolescents may be conducted in conditions which allow them to freely express themselves, in addition to responding to a survey on the care they receive. None of the aforementioned precludes visits and investigations that may be ordered by the authorities in response to complaints or when inspection visits detect breaches of the commitments set forth in the agreements between private facilities and said authority. Additionally, a national support team has been formed to assist regional teams; this team visits all regions at least twice per year. This mechanism also establishes deadlines for the submission of supervision reports and a procedure under which individuals in charge of residential care centers may have input or participate in the process.

386. Additionally, in keeping with consistent positions held by the Court and the Commission on the special obligations of the State with regard to persons in a particularly vulnerable situation,[459] the Commission infers that the aforementioned obligations to oversee and supervise must be taken into particular account in facilities where children with some type of disability, either physical, mental, sensorial or intellectual, are living.[460] The Commission expresses concern that the level of quality of services provided at residential care centers and institutions to children with some type of disability requiring special treatment is often quite inferior to the standards of care needed by them. The Commission notes that this is either because of a lack of defined standards in this area or non-compliance with standards, but often it is also the result of a failure to adequately oversee the implementation of these standards, as well as for no having assigned sufficient human and material resources. The Commission agrees with the Committee on the Rights of the Child in urging States to draft "national standards

[459] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 103 and 88; I/A Court H.R., *Case of Baldeón- García vs. Peru*, Merits, Reparations and Costs, Judgment of April 6, 2006, series 147, para. 81; I/A Court of HR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment March 29, 2006, para. 154; and I/A Court H.R., *Case of the Pueblo Bello Massacre vs Colombia*, Merits, Reparations and Costs, Judgment of January 31, 2006, para. 111.

[460] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, paragraphs 96 and 99. Paragraph 108 of the judgment provides that: "[…] States have the duty to supervise and guarantee that in all psychiatric institutions, either public or private, the patients' right to receive a worthy, human, and professional treatment be preserved and that patients be protected against exploitation, abuse and degradation." See, European Court of Human Rights, *Case of Storck v. Germany,* Application No. 61603/00, judgment June 16, 2005, p. 103.

for care in institutions and establishing rigorous screening and monitoring procedures to ensure effective implementation of these standards."[461]

387. The Commission was also advised that, in some instances, in light of deficiencies in the systems of monitoring and supervision by authorities, several private organizations that manage residential care centers have set up their own internal monitoring and supervision system.[462] The Commission welcomes the incorporation of said practices, but reaffirms that it is an obligation of States to perform the duties of supervision and monitoring of care facilities.

I. Independent monitoring mechanism

388. Notwithstanding the mechanisms of monitoring and supervision that are conducted by administrative authorities over the operation of residential care centers and institutions, the Commission deems it important to establish an additional, periodic system of inspection conducted through an independent monitoring mechanism. The existence and functioning of an independent monitoring mechanism ensures that supervision is conducted as well by an entity other than the very administrative authority to which the inspected services belong or fall under. The Commission finds that a mechanism of this type provides a necessary additional guarantee of supervision over for the adequate protection and care of the children in a care center or institution. For this purpose, this independent monitoring mechanism must oversee on a regular basis the conditions in which the children at said facilities are living. Similarly, Guideline 130 of the U.N. Guidelines for the Alternative Care of Children asserts that States should be encouraged to "ensure that an independent monitoring mechanism is in place."[463]

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[461] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, February 27, 2007, 43rd session, para. 47.

[462] Specifically, these situations have been reported with respect to Aldeas Infantiles in Peru, in the context of a sub-regional consultation that was conducted in said State for the preparation of the instant report. The Commission, however, has also gathered information on this situation in Surinam and Trinidad and Tobago (Lim Ah Ken, Patricia, Children without parental care in the Caribbean. Systems of protection, November 2007).

[463] The Independent Expert for the U.N. Study on Violence against Children took a similar position in the aforementioned Study and in the report to the General Assembly emanating from it, A/61/299, August 29, 2006, paragraph 112, e). The Commission deems it fitting in this subject matter to consider General Comment Number 2 of the United Nations Committee on the Rights of the Child, *The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC/GC/2002/2, November 5, 2002; the content of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution approved by the General Assembly based on the report of the Third Commission (A/57/556/Add.1), A/RES/57/199, 57th session, January 9, 2003; as well as, United Nation Rules for the Projection of Juveniles Deprived of their Liberty, also known as the Havana Rules, approved by the General Assembly in resolution 45/113, December 14, 1990, particularly Rules 14, and 72-78:

> Rule 14: "The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international laws and

Continues…

389. The State should take steps to create this type of mechanism through legislation and clearly empower it with legal authority to inspect and monitor in the broadest sense possible. In the judgment of the Commission, in establishing independent monitoring and supervision mechanisms, States Parties are to fully take into account the Principles relating to the status of national institutions for the promotion and protection of human rights[464] (also known as the Paris Principles), in order to ensure a mandate based on adequate guarantees of independence.[465]

390. In order that this type mechanism can serve its purpose of independent monitoring and supervision, it is of the utmost importance that it be empowered with competency to conduct visits to public and private residential centers and institutions, at any time, without any restrictions on access thereto or on contact with children or staff, in addition to having adequate legal authority to conduct investigations into any alleged violation of the rights of children in these settings, either in response to a complaint or on its own initiative.[466]

391. Additionally, States must make sure that these agencies are able to gain unrestricted access to all areas of the facility and review all existing documentation

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…continuation

> regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility."

[464] *Principles relating to the status of national human rights promotion and protection institutions* (the "Paris Principles"), resolution 48/134 of the General Assembly, December 20, 1993, annex.

[465] The Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment also recommends taking into consideration the aforementioned principles in regulating national independent mechanisms for the prevention of torture.

[466] U.N. Guidelines for the Alternative Care of Children, Guideline 130.

Also see: Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 101:

> "Strong investigative powers are vital to the effectiveness of IHRICs and their ability to respond to complaints. These include the power to compel witnesses to testify and request evidence. To be effective, these need to be included in relevant legislation and be enforceable by tribunals in case of non-compliance."

Likewise, see the Havana Rules:

> Rule 72. "Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facilities where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities."

Also see, General Comment number 2 of the Committee on the Rights of the Child cited above*, The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC/GC/2002/2, November 5, 2002, particularly paragraphs 9, 13 and 15.

and records.[467] The Commission reaffirms that visits conducted by independent supervision and monitoring agencies should be performed on a regular basis and with no advance notice.[468] The teams should be made up of professionals from different disciplines and should specifically include a qualified physician, capable of assessing the physical setting, medical services, and all other aspects, which have a bearing on the physical and mental health of the children.[469] In the judgment of the Commission, an expert in child psychology and child communication should be a part of the team in order to provide technical expertise, particularly in light of the fact that the children may want to bring to the attention of the team certain concerns, complaints, or reports during the course of inspection visits; it is a valuable asset to have a professional available, who can facilitate this communication and help to gauge the significance of the statements and views of the child, given that the use of language and the exercise of communication is different in children than in adults. The element of gender should be taken into account in the make up of the team, so that both boys and girls can trust and feel comfortable enough to be able speak with the male and female members of the team. In addition to the foregoing, the conclusions of supervision and monitoring actions by independent agencies should be made public and a procedure should be in place for follow-up on its recommendations.[470]

392. In broad terms, with regard to the legal authority to supervise facilities of confinement or deprivation of liberty , the Commission has made concrete recommendations that are set forth in the document Principles and Best Practices on the Protection of the Persons Deprived of Liberty in the Americas;[471]

> In accordance with national legislation and international law, regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights.
>
> As a minimum, such inspections shall be carried out with full access to places of deprivation of liberty and their installations, access to the information and documentation relating to the institution and the persons deprived of liberty therein; and the possibility of conducting

[467] Havana Rules, Rule 72. U.N. Guidelines for the Alternative Care of Children, Guidelines 128 and 129. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 599.

[468] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 599.

[469] Havana Rules, Rule 73. U.N. Guidelines for the Alternative Care of Children, Guideline 129. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 599.

[470] Havana Rules, Rule 74. U.N. Guidelines for the Alternative Care of Children, Guideline 130 b); IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 599.

[471] Document approved by the Commission at the 131st regular session, held March 3-14, 2008.

> private and confidential interviews with persons deprived of liberty and personnel.[472]

393. Similar to the position of the Commission, the Committee on the Rights of the Child has voiced its view on independent monitoring mechanisms, particularly when children are deprived of liberty:

> Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.[473]

394. This independent supervision mechanism should be readily accessible to the children, their parents or those responsible for them. The authority and functions assigned to the mechanism should include safely, privately and confidentially conducting interviews of the children and adolescents and of officials of the centers and institutions. The Commission recalls that ensuring the safety of the child entails among other things, avoiding any harm, intimidation, retaliation or re-victimization.[474]

395. The absence of regular independent monitoring mechanisms in the majority of the Member States was evidenced, based on the responses countries gave to the questionnaire submitted to them by the Commission and on the information provided during the sub-regional consultations, and the Committee on the Rights of the Child has also called attention to this fact in several countries of the region.[475] In most instances, States mentioned that mechanisms were in place, but that they simply did not conform to the aforementioned requirements, either due to the fact that they were not independent from the executive agency under which residential centers function, that their legal authority was restricted, that they did not cover the entire territory of the State, that they did not conduct inspection visits on a regular basis, or that they were simply not endowed with the manpower and budget needed to be able to perform

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[472] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXIV.

[473] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, April 25, 2007, 44th session, para. 89; Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other forms of cruel and degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among other ones),* CRC/C/GC/8, August 21, 2006, para. 43.

[474] Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 101.

[475] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Grenada, CRC/C/GRD/CO/2, June 22, 2010, paras. 37 and 38. Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, March 17, 2006, para. 44.

the aforementioned competencies. In many instances, in responding to the question on the questionnaire regarding mechanisms of monitoring and supervision by independent institutions, specific reference would be made to general mechanisms of supervision provided by administrative authorities in charge of the facilities themselves, either directly or through contracts with private organizations or facilities, as was the case in Chile and Colombia.

396. Notwithstanding the aforesaid, the Commission does view as positive some efforts in this area, which although they may not completely conform to the abovementioned standards, they do help to perform an important job. For example, in Argentina, the Office of the Child Custody Affairs (Asesoría General Tutelar), which is part of the Judiciary of the Autonomous City of Buenos Aires, is in charge of supervising, monitoring and overseeing alternative care centers and institutions providing shelter to children, with regard to habitability and proper operations as well as monitoring of placement of children therein. In the same way, in Argentina, the procedures and protocols for the monitoring and supervision of these centers and institutions were approved by means of an administrative resolution, and this instrument contributed a great deal to standardizing and instituting objective criteria pertaining to the duties of monitoring and supervision.[476] The same can be said about the duty performed by the Office of the Ombudsman of the State of Peru, which has released two reports addressing issues of alternative care and residential care facilities.[477] In some States, such as Bolivia or El Salvador, the legal authority to conduct weekly inspection visits to police holding facilities, detention and penitentiary facilities and establishments used for the protection and care of children has been expressly given to the judiciary. In some instances, this type of legal authority is shared with the administrative authorities themselves.

397. As for the ability of civil society organizations to conduct visits and inspections in order to monitor the situation in which children are living at residential care centers and institutions, the Commission has noticed in general that very few of this type of organization actually engage in this type of work in the region and, furthermore, those which do, have noted that they face significant barriers to gain

[476] In this regard, see the document by Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)", [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], which includes as annexes the aforementioned regulations and the regulatory framework applicable to this subject matter.

[477] Office of the Ombudsman of the State of Peru, Ombudsman's Report No. 153, "Niños, niñas y adolescentes en abandono: aportes para un nuevo modelo de atención" [Neglected Children and Adolescents: Input for a New Care Model], Lima, 2011, Lima. 2011. Ombudsman's Report No. 150, Office of the Ombudsman of the State of Peru, Ombudsman's Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010.

access to said institutions, especially when attempting to make unannounced visits or hold private interviews with institutionalized children.[478]

398. The Commission finds it absolutely essential for independent mechanisms of supervision and monitoring of children's and adolescents' situation at all care centers and residential institutions to be functioning effectively. This type of independent monitoring system, along with mechanisms for the registry of reliable information on the institutions and the children, are invaluable tools for conducting periodic evaluation of the s' and institutions' functioning and curing any issue that may constitute a violation of the children's rights.

399. States' noncompliance of the obligation to monitor, supervise and inspect may lead to impunity for a number of human rights violations taking place at residential care centers and institutions. As was highlighted in the U.N. Study on Violence against Children, in settings of residential institutions, violence still exists as a result of structural conditions of care at these institutions.[479] In such contexts, children may become victims of abuse, mistreatment, cruel, inhuman or degrading treatment, and even torture and trafficking.

400. In addition to national mechanisms, and in view of the existence of international monitoring mechanisms with competency over the centers and institutions that are the subject of this report, the Commission urges States to ratify the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[480] which creates the Subcommittee

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[478] With regard to the monitoring role of non-governmental organizations, the Court has held that:

> "[…] the State must protect and respect the functions that can be exercised by non-governmental organizations and other groups or individuals defending the human rights and fundamental liberties of the people deprived of liberty, as these constitute a positive and supplementary contribution to the efforts made by the State."

I/A Court H.R., *Matter of the Children and Adolescents Deprived of Liberty at the "Tatuape Complex" of FEBEM. Provisional Measures.* Resolution of the Inter-American Court of Human Rights, July 4, 2006, '*whereas'* clause 17. Also, IACHR, *Juvenile Justice and Human Rights in the America*, para. 591.

[479] See Chapter 5 *Violence against children in care and justice institutions* of the aforementioned U.N. Study,. http://www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf

[480] Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution approved by the General Assembly based on the Report of the Third Commission (A/57/556/Add.1), A/RES/57/199, 57th session, January 9, 2003. The objective of the present Protocol is "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment." The Protocol provides that "Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism) (Article 3) The Protocol directs that "Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in Article 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these

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on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, in addition to call for the creation of National Torture Prevention Mechanisms.[481]

401. The Commission welcomes the creation in several countries of the region of independent national human rights institutions -Ombudspersons- with the specific mandate to promote, in general, the protection and guarantee of the rights of children and adolescents.[482] Similar positions have been taken as well by the United Nations Committee on the Rights of the Child, the United Nations Secretary-General's Special Representative on Violence against Children, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. Particularly, the Committee on the Rights of the Child has recommended for these human rights institutions to be established systematically and empowered to monitor the respect for the rights of children, examine individual complaints and conduct the appropriate investigation, in addition to making sure that children have effective remedies when any of their rights are violated.[483] National human rights institutions should be established in accordance with the Paris Principles. These minimum standards provide guidance on creating such institutions, legal authority, powers and composition, as well as guarantees of pluralism and independence, types of functioning , and the quasi- jurisdictional activities of such national bodies.

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persons against torture and other cruel, inhuman or degrading treatment or punishment." (Article 4(1)) For the purposes of the present Protocol, 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" (Article 4(2)).

[481] In this regard, as an example of an independent monitoring mechanism applicable to residential care facilities, the United Nations Committee on the Rights of Persons with Disability has recommended to the State of Paraguay that National Mechanism for the Prevention of Torture include under its mandate the supervision of "psychiatric hospitals and shelters" for children, in order to evaluate the conditions of persons with psychosocial disability placed at such establishments. Committee on the Rights of Persons with Disability, Concluding Observations to the State of Paraguay, 9th period of sessions, CRPD/C/PRY/CO/1, May 15, 2013, see paras. 37 and 38.

[482] While both adults and children require independent national institutions to protect their human rights, there are additional reasons to make sure that special care is afforded to the exercise of the human rights of children. These reasons include the fact that their stage of development makes them particularly vulnerable to human rights violations; rarely are their opinions taken into account; most children do not have the right to vote and cannot play a meaningful role in the political process to shape government's response to human rights issues; children run into serious roadblocks when resorting to the judicial system in order to protect their rights or ask for reparation for violations of their rights; and children's access to organizations that can protect their rights is for the most part restricted.

[483] Committee on the Rights of the Child, General Comment No. 2, *The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC/GC/2002/2, November 15, 2002, para. 47, among other paragraphs. Also see: Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, April 25, 2007, 44th session, para. 89, which states that independent inspectors should be empowered to conduct "inspections on a regular basis […] unannounced on their own initiative;" Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, among others sections),* CRC/C/GC/8, August 21, 2006, para. 43; Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 41.j).

J. Submission of complaints, claims, and petitions

402. States must ensure that children placed in residential centers and institutions are able to bring complaints, claims, and petitions with regard to implementation of protection measures, quality of services and the treatment and care received by them, before the appropriate authorities with the legal authority to settle the issues that may be raised. All children and adolescents at residential care centers and institutions, either public or private, have the right to submit complaints, claims, or petitions.

403. The Commission deems it necessary for the State to establish mechanisms of the submission of complaints, claims, and petitions, which are accessible, safe, trustworthy and effective in dealing with issues raised by the children regarding the conditions in which they live and how they are treated at within residential centers and institutions. The aforementioned mechanisms must enable the children to voice their concern or petition , engage in consultations and dispel any doubts they may have on their rights while, at the same time, provide for the filing of formal complaints or claims.

404. In order for these mechanisms to be effectively accessible to all of the children, they must be simple, widely known by the children themselves, and be designed as child-friendly and child-sensitive.[484] These mechanisms and procedures must be adapted to the needs of all children and be available in language children from different age groups and degrees of maturity can understand, taking young children and children with disabilities into particular consideration,[485] in addition to adequately providing for cultural differences and language barriers.[486] Furthermore, as has been stated earlier, the Commission deems it very important for a gender perspective to be

[484] With regard to approved standards and recommendations on requirements for notification, reporting and complaint procedures pertaining to children affected by violence, see: Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011. Committee on the Rights of the Child, General Comment 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 46 and 120. Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (Article 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, para. 24. Report of the Independent Expert for the U.N. Study on Violence against children, A/61/299, August 29, 2006, para. 112, d). Additionally, see IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 604.

[485] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, February 27, 2007, 43rd session, para. 43. Report of the Independent Expert for the U.N. Study on Violence against Children, A/61/299, August 29, 2006, paragraph 112, e). Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 19.

[486] Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 11.

taken in order to help make both boys and girls feel comfortable and in confidence to communicate their complaints, concerns or claims.[487]

405. The Commission underscores that children must know their rights. In order to exercise and defend their rights, they must first be aware of and understand them. Much of the violence perpetrated against children goes unchallenged because certain forms of abusive behavior are viewed by children as accepted social practices and because of a failure to put child-friendly reporting mechanisms into place.[488] Consequently, in order to adequately protect children, especially those placed in particularly vulnerable situations, such as children in alternative residential care, the Commission views that States must make sure that they are aware of and have access to information regarding their rights.[489] Accordingly, the Commission recommends that, in residential centers and institutions, such information should be provided to the children and adolescents and that they should be educated about their rights, in general, and informed of complaint and reporting mechanisms available to them, specifically. When a child is admitted to the center or institution, he or she should be provided a document outlining his or her rights as well as standards governing operations of the facility, the objectives and organizational structure of the institution, the code of conduct and proper interpersonal relations, disciplinary procedures and any other relevant information, in clear language the child can understand. The United Nations Rules for the protection of Juveniles Deprived of their Liberty,[490] also known as the Havana Rules, are similar in this regard in setting forth that:

> All juveniles should be helped to understand the regulations governing the internal organization of the facility, the goals and methodology of the care provided, the disciplinary requirements and procedures, other authorized methods of seeking information and of making complaints and all such other matters as are necessary to enable them to understand fully their rights and obligations during detention."[491]

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[487] For example, the Commission finds that this is particularly important when a boy or a girl has a concern, wants to ask a question, or bring a complaint or report some type of sexual harassment, abuse or other form of sexual violence. The fact that the person whom he or she must address to put forward his or her concern, complaint or charge is a man or woman, may represent a barrier to the girl or boy in terms of trusting enough to voice her or his concern or explain to them the facts supporting the complaint or charge.

[488] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 120.

[489] The Committee on the Rights of the Child has taken a similar position in several General Comments, particularly, see General Comment number 5, *General measures of implementation of the Convention on the Rights of the Child (Article 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, paragraphs 53, 66 and 68, and General Comment number 13, *Right of the child to freedom of all forms of violence*, CRC/C/GC/13, April 18, 2011, paragraph 48.

[490] United Nations' Rules for the Protection of Juveniles Deprived of their Liberty, Havana Rules, approved by the General Assembly in resolution 45/113, December 14, 1990.

[491] Havana Rules, Rule 25. Also see Rule 24.

Additionally, the U.N. Guidelines for the Alternative Care of Children provide that:

> In each country, the competent authorities should draw up a document setting out the rights of children in alternative care in keeping with the present Guidelines. Children in alternative care should be enabled to understand fully the rules, regulations and objectives of the care setting and their rights and obligations therein.[492]

406. Children should be able to address a readily accessible person, whose duty it is to help them bring their complaints, claims and petitions, as well as advise them on the rights they are entitled to and provide guidance to them. The children, as well as their parents, family members, or other individuals with ties to the child, must know who these persons are and how to access them.[493] The persons in charge of taking and following up on the children's complaints, claims and petitions must have received role-specific and comprehensive training in matters pertaining to the rights of the children, as well as to on how to undertake this type of procedure.[494] Children, and their family members or representatives, must have immediate and confidential access to child-sensitive advice, including legal asistence to pursue action before the competent administrative or judicial authorities, as appropriate, as well as other assistance.[495] The complaint or reporting claims processes shall ensure the children's right to be heard and to receive legal counsel.[496]

407. The Commission considers that under the principle of the best interests of the child and the duty of special protection laid out in Article 19 of the ACHR, in connection with Article 25 of the ACHR, the ability to submit complaints or claims must be extensive stakeholders. In that way, said ability to report complaints or claims may not be restricted to particular persons, the very staff members of the facility or institution, the child's family members, civil society organizations, as well as any other person who becomes aware of a situation that warrants doing so, should be able to do so . There should also not be any restrictions either on what type of issues can be subject to complaints or reporting of claims, and mechanisms must be in place to allow anonymous reporting of petitions or complaints.[497]

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[492] U.N. Guidelines for the Alternative Care of Children. Guideline 72.

[493] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard,* CRC/C/GC/12, July 20, 2009, para. 46.

[494] Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom of all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 51.

[495] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, among other ones),* CRC/C/GC/8, August 21, 2006, para. 43.

[496] Havana Rules, Rules 25 and 78. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 604.

[497] IACHR, Report on *Juvenile Justice and Human Rights in the Americas*, para. 604.

408. Moreover, the staff of the centers and institutions must be obligated to report any instances or circumstances that come to their attention, which may entail an infringement of children's rights in the context of the care received by them at the center or institution, as well as setting forth the appropriate disciplinary or other sanctions in the legislation, when noncompliance of this obligation is proven.[498] As for the mandatory requirement of center or institution staff to report misconduct, the Havana Rules, which address protection of children deprived of their liberty, state that "[a]ll personnel … [who] have reason to believe that a serious violation of the present Rules has occurred or is about to occur should report the matter to their superior authorities or organs vested with reviewing or remedial power."[499] Furthermore, the U.N. Guidelines for the Alternative Care of Children provides that all agencies and services for children requiring alternative care "should develop a staff code of conduct, consistent with the present Guidelines, that defines the role of each professional and of the carers in particular and includes clear reporting procedures on allegations of misconduct by any team member."[500] The Commission considers that standards establishing the obligation to report actual instances, suspicion or risk of violence, or any other violations of the rights of the child should be incorporated into the rules or regulations of conduct of all agencies or institutions that deal on a regular basis with children.[501] Reporting this type of situation is particularly relevant to people who provide medical or psychological assistance at residential centers and institutions, because they are in the best position to identify incidents of violence, abuse and neglect; the failure of such personnel to report evidence of violent treatment contributes to creating an atmosphere of impunity, which can easily lead to a persistent pattern of violence.[502] Normatives on the confidentiality of information regarding professionals working with children should not become an obstacle to reporting cases of violence or neglect.[503] The Commission also notes that reporting by professionals who work with very young children and children with mental or intellectual disability, is especially important, because these children are at risk of being victims of different

[498] As to establishing mandatory reporting mechanisms, also see: Committee on the Rights of the Child, General Comment No. 13, *Right of the child to be free of all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 49. In this regard, also see: Havana Rules, Rule 87. U.N. Guidelines for the Alternative Care of Children, uideline 107. Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 55.

[499] Havana Rules, Rule 87 c).

[500] U.N. Guidelines for the Alternative Care of Children, Guideline 107.

[501] The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children issued the same recommendation in their joint report A/HRC/16/56, March 7, 2011, paras. 55 and 60.

[502] Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 58.

[503] Also see Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 12, paragraphs 1 and 2.

forms of violence, abuse and neglect; also they are more defenseless in these instances, and not capable, or else face major barriers, to voice complaints or report such misconduct. [504] When reports are made in good faith, processes must be in place to ensure the protection of the professional making the report. [505]

409. Alternative care centers and institutions must have clear and widely publicized protocols in place regarding reporting and complaint mechanisms and procedures. All communications, complaints and claims should be registered and be accessible to public authorities responsible for supervision of the facilities, as well as being subject to review by the independent monitoring mechanisms. The registry should include the course of action taken to adequately address the complaints and communications, in addition to the outcome of the action undertaken. Furthermore, the decision taken with regard to the complaint must be reasoned and well founded and complainants must have the chance to appeal that decision before an independent and impartial authority.[506] In any case, claims, complaints or petitions made by children must be taken into account seriously and rigorously; review of all reports or complaints must be mandatory.[507]

410. The person who responds to the child's communication should have received clear instructions and explanation on the timing and way in which the matter should be referred to the competent administrative or judicial authority, to adequately address the complaint or claim and conduct whatever type of investigation appropriate to the situation.

411. For children to feel safe to make a complaint or report an incident, it is necessary that they perceive the mechanisms as safe and trustworthy; otherwise, it is very unlikely that they will feel enough trust to talk about such incidents. The Commission considers that it is not enough for States to simply ensure the possibility of petitioning, complaining and reporting claims to the staff of the center or institution itself, or to the management thereof. Being that children cared for at a residential institution are placed in a situation of heavy dependence on their caretakers, who at the same time may be the offenders of violence against the children, it is advisable that external and independent complaint and reporting mechanisms be created, such as 24-

[504] In the same demonstration of concern over this aspect in particular, several bodies of the United Nations have expressed their views, as can be reviewed in the Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 54.

[505] Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, March 7, 2011, para. 49.

[506] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 604.

[507] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other forms of cruel or degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among other ones),* CRC/C/GC/8, August 21, 2006, para. 43.

hour toll-free hot lines.[508] Likewise, the importance of independent monitoring and supervision mechanisms has been underscored, under which the opportunity to make a complaint, report misconduct or put forward any other aspect of concern should exist.

412. The above-mentioned mechanisms and procedures should take into consideration the privacy of the child and the confidential nature of some of the communications, in addition to ensuring in all instances that the child will be protected and that he or she will not be subjected to retaliation for having submitted a complaint, reported an incident or petition with regard to the operations of the facility or institution and about the treatment received by him or her.[509] The child must be informed about the scope and limits of confidentiality each time he or she makes a complaint. The child's safety and guarantying that the best interests of the child are served should take precedence over everything else,[510] and when necessary, the child should be moved to another location other than the center or institution. The child may not be subjected to discriminatory treatment, punishment or any other form of retaliation as a result of making a complaint, claim or petition; likewise, care must be taken so that the child is not re-victimized in the context of the investigation proceedings of the complaint or report.

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[508] In several countries, special telephone lines have been set up, which can be dialed toll free and anonymously in order to ask for advice with regard to incidents of violence. These 'hot lines' can be used by the victims of violence or by other persons who suspect instances of violence. Some telephone assistance lines provide information and advice on where to go and what the authorities are able to do. Others informally provide emergency psychological support. Others even forward the information provided by the caller to entities able to do something about it. Because of the situation faced by children in residential care, the Commission views that it is particularly significant that these hot lines convey the information to the competent authority to investigate the incidents. In the United Nations' Global Survey on Violence against Children, it was recommended that mechanisms such as telephone assistance lines be set up so children could be able to report mistreatment, speak in confidence with a qualified counselor, and request support and advice, A/61/299, August 29, 2006, paragraph 104. Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 49; Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (Article 4 and 42 and paragraph 6 of Article 44)*, CRC/GC/2003/5, November 27, 2003, para. 24; Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 120. Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary General on Violence against Children, A/HRC/16/56, Human Rights Council 16th session, March 7, 2011, para. 2.

[509] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other forms of cruel or degrading punishment (Article 19, paragraph 2 of Article 28 and Article 37, among other ones)*, CRC/C/GC/8, August 21, 2006, para. 43, in fine. Also see the Guidelines on Justice in Matters concerning Children Victim and Witness or Crimes, approved by the United Nations Economic and Social Council under resolution 2005/20 and included as Annex III., in particular para. d). In addition, see Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, para. 120.:

> "the reporting procedures must provide a sound mechanisms to ensure that the child trusts that in using them, he or she is not placing himself or herself at risk of violence or punishment."

[510] Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 51.

413. The Commission considers that the complaint or claim reporting procedure must be expeditious and conducted with celerity and due diligence. Moreover, in order for these procedures to be considered effective, they must also involve serious investigation into the complaint and, where appropriate, criminal, civil or administrative responsibilities should be established.[511] Additionally, the child should be advised promptly of the reply to his or her request and the status of the processing of his or her complaint, claim or petition. When it is proven that rights have been violated, appropriate reparation must be provided, including compensation, and, when appropriate, the adoption of measures to promote the physical and psychological recovery, rehabilitation and reintegration, as provided under Article 39 of the Convention on the Rights of the Child.[512]

414. In the judgment of the Commission, the children's and adolescents' opinion on how well the complaint, petition and claim mechanisms are working, should be heard and taken into account, in order to improve these mechanisms and make them more accessible and child-friendly.

415. The Committee on the Rights of the Child has repeatedly pronounced on the obligation of States to ensure the availability of complaint and reporting mechanisms regarding the conditions in which children are treated in the sphere of the institutions in charge of or in contact with them, such as in schools, detention and penitentiary facilities, and residential institutions, among other places.[513] Other human rights bodies of the United Nations system have voiced similar opinions on this topic, such as the Independent Expert for the U.N. Study on Violence against Children in the conclusions of the U.N. Study cited above,[514] the Special Representative of the U.N.

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[511] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 604.

[512] Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (Article 4 and 42 and paragraph 6 of Article 44),* CRC/GC/2003/5, November 27, 2003, para. 24. Article 39 of the CRC establishes:

> "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recover and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

[513] Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, July 20, 2009, para. 46. Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from any form of violence*, CRC/C/GC/13, April 18, 2011, paras. 48-53; Committee on the Rights of the Child, General Comment No. 5, *General measures for the implementation of the Convention on the Rights of the Child (Articles 4 and 42 and paragraph 6 of Article 44),* CRC/GC/2003/5, November 27, 2003, para. 24.

[514] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, para. 104:

> "I recommend that States should establish safe, well-publicized, confidential and accessible mechanisms for children, their representatives and others to report violence against children.

Continues…

Secretary General on Violence against Children[515] and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. Accordingly, the Committee on the Rights of the Child has recommended emphatically and repeatedly that:

> all States parties develop safe, well-publicized, confidential and accessible support mechanisms for children, their representatives and others to report violence (…). The establishment of reporting mechanisms includes: (a) providing appropriate information to facilitate the making of complaints; b) participation in investigations and court proceedings; c) developing protocols which are appropriate for different circumstances and made widely known to children and the general public; d) establishing related support services for children and families; and e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems. Reporting mechanisms must be coupled with, and should present themselves as help-oriented services offering public health and social support (…). Children's right to be heard and to have their views taken seriously must be respected."[516]

416. Pursuant to Guideline 99 of the U.N. Guidelines for the Alternative Care of Children:

> Children in care should have access to a known, effective and impartial mechanism whereby they can notify complaints or concerns regarding their treatment or conditions of placement. Such mechanisms should include initial consultation, feedback, implementation and further consultation. (…) This process should be conducted by competent persons trained to work with children and young people.

417. Information gathered by the Commission indicates that most States of the region do not have complaint, claim, and petition mechanisms in place, which meet the aforementioned requirements. Based on the States' responses to the questionnaire, very few have evaluated how sensitive complaint and reporting procedures are to the special needs of children. For the most part, the only procedure States mention when

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…continuation

> All children, including those in care and justice institutions, should be aware of the existence of mechanisms of complaint. Mechanisms such as telephone hotlines, through which children can report abuse, speak to a trained counselor in confidence and ask for support and advice, should be established and the creation of other ways of reporting violence through new technologies should be considered."

[515] See the reports of the Special Representative of the U.N. Secretary General on Violence against Children and the Joint Report of this Special Representative and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, A/HRC/16/56, Human Rights Council 16th Session, March 7, 2011.

[516] Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from any form of violence*, CRC/C/GC/13, April 18, 2011, para. 49.

answering the questionnaire on complaint and claim procedures pertains to the supervision system of institutions by the regulatory agencies in charge of the monitoring thereof. In many instances, no explicit mention is made about what concrete measures are taken to ensure the privacy and the safety of children and adolescents. However, in a few instances, mention is made of the requirement to inform those responsible of the institutions about any eventual child rights violations. States such as Chile have provided information on the amount of supervision but not about the amount of complaints or investigations opened as a result of documented reports of such situations in the context of said visits.

418. Consistent with the position of the Commission, the Committee on the Rights of the Child expressed its concern and made specific recommendations as to the failure of several States of the region, such as, Bolivia[517], Ecuador[518], El Salvador[519], Nicaragua[520] and Peru,[521] to create complaint and reporting mechanisms for children that are respectful of the right of children to privacy and confidentiality. The Commission joins the Committee on the Rights of the Child in its satisfaction at the fact that the new Law on the Office of Child Protection of Trinidad and Tobago, provides for the creation of a body in charge of taking complains from children living in community residences, foster care homes and special child care institutions.[522] In some States, legislation recognizes, in general, the right of the child to file complaints with public authorities, such as in Costa Rica, Paraguay or Uruguay, albeit the effectiveness of that legislation is strictly connected to access of children to information and the level of confidence and safety provided to the children by the mechanism.

419. The Commission also views as positive that some States, such as Chile, Colombia or Honduras have established some mechanism to become aware of the opinion of children and adolescents regarding the treatment and services they receive at the institution, such as a "suggestion mailbox" or "satisfaction surveys." But said

[517] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, October 16, 2009, para. 46.

[518] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Ecuador, CRC/C/ECU/CO/4, January 29, 2008, paras. 50 and 51.

[519] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: El Salvador, CRC/C/SLV/CO/3-4, February 17, 2010, para. 49.

[520] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, October 1, 2010, para. 55.

[521] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Peru, CRC/C/PER/CO/3, March 14, 2006, para. 22.

[522] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, March 17, 2006, para. 43.

instruments do not constitute complaint or reporting mechanisms that meet the aforementioned standards. Furthermore, the Commission deems it insufficient that the only mechanism provided for to submit complaints or claims is confined to doing so before the very same staff of the institutions that the complaints and reporting are about, or a specific staff member or to the management, without any opportunity to readily gain access to another mechanism, as was reported by several States.

420. The Commission concurs with the findings of the Independent Expert for the U.N. Study on Violence against Children, where he asserts that there is still a persistent "culture of impunity and tolerance of violence against children"[523] at residential institutions. A key indicator of the effectiveness of reporting claims and complaint mechanisms is whether or not they lead to legal action or another type of adequate measure. Unfortunately, we are still facing great difficulties in this regard, as information distinguishing between the number of incidents reported and number of cases heard by the courts or other competent authorities, and the outcomes of such proceedings, is chronically absent.

421. In light of the foregoing, the IACHR reaffirms the obligation of States to ensure the opportunity of children living in care facilities and institutions to make complaints, claims and petitions regarding the treatment they receive, before the authorities vested with power to settle any issues that are raised by them. This type of mechanism must be accessible, safe, effective, and respectful of the right of children to privacy and confidentiality.

K. Prevention, investigation, punishment and reparation for rights violations

422. In addition to the investigations and punishments triggered by the independent supervision mechanism or the complaint mechanisms referred to in this report, it is necessary to reaffirm the obligation of States to act *ex officio* to prevent, investigate, prosecute, punish and redress any human rights violations of children in residential care centers or institutions.[524] As for the duty to prevent and investigate, the Court has held that "the duty to guarantee the rights enshrined in the Convention is not limited to the existence of a legal system designed to allow the fulfillment of such duty, but also entails the need to adopt government policies which ensure the effective guarantee for the free and full exercise of human rights," and that, in that regard, "one of the conditions to effectively guarantee the right to life and personal integrity is the compliance with the duty to investigate the violation of such rights, which is derived

[523] Report of the Independent Expert for the United Nations Study on Violence against Children, A/61/299, August 29, 2006, paragraph 54.

[524] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4, para. 176 and I/A Court H.R., *Case of Kawas Fernández v. Honduras*, Merits, Reparations, and Costs. Judgment of April 3, 2009, Series C No. 196, para. 76. Also see IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 608.

from Article 1(1) of the Convention, in conjunction with the substantive right which should be preserved, protected or guaranteed."[525]

423. Consequently, it is the duty of the State to commence ex officio and without delay, a serious, fair and effective investigation; this investigation should be carried out with all available legal means and be aimed at establishing the truth, and the investigation, prosecution and punishment of all persons who are liable for the acts, particularly when State officials are or may be involved ,[526] and persons acting on behalf of or in the performance of duties belonging to the State, such as the case of residential care centers and institutions for children separated from their parents.

424. All instances of infringement or violations of children's rights at residential centers or institutions must be brought to the attention of the competent authorities so a timely investigation may be carried through and, when so required, the determination of responsabilites and imposition of appropriate sanctions: criminal; civil , including those for damages or injunctive relief; administrative (such as revoking licenses, imposing fines or closing the facility or institution); professional sanctions (e.g. a note in an employee's personnel file, dismissal, being barred from working with children), as well as other actions designed to order changes in the facility or Institution.[527] The sanctions set forth under legislation must be appropriate and take into account the seriousness of the misconduct.

425. Additionally, the Commission has stated that pursuant to the general guarantees set forth in Articles 1(1) and 2 of the American Convention, States must not only refrain from carrying out practices that are in violation of human rights, but must also take positive measures to protect and preserve those rights. The Commission deems it fitting to stress that States must focus their efforts on avoiding the repetition of reported incidents, which may entail taking administrative measures with regard to the alternative care center or institution, and the way it functions, in order to make sure that similar incidents do not occur again, as well as conducting adequate supervision.

426. The Commission recalls the obligation to ensure the immediate protection of the child, in particular, taking into consideration that the child is living in the custody and care of an alternative care center or institution in a setting that has given rise to a violation of his or her rights. Accordingly, all adequate measures must be

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[525] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, para. 147. I/A Court H.R., *Case of Baldeón- García v. Peru*, Merits, Reparations and Costs, Judgment of April 6, 2006, series 147, para. 92; I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*, Merits, Reparations and Costs, Judgment of January 31, 2006, para. 142; and I/A Court H.R., *Case of the Massacre of Mapiripán v. Colombia*, Judgment of September 15, 2005. Series C No. 134, para. 233.

[526] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment July 4, 2006. Series C No. 149, para. 148. I/A Court H.R., *Case of Baldeón- García v. Peru*, Merits, Reparations and Costs, Judgment of April 6, 2006, series 147, para. 94.

[527] U.N. Study on Violence against Children, p. 213, also see the Independent Expert's Report A/61/299, August 29, 2006, paragraph 105.

taken to make sure that the violation of rights ceases with respect to the child that has reported it, as well as with respect to other children who may have been exposed to a similar situation. Concurrently, measures must also be taken to ensure that the child is not subjected to stigmatization, harassment or retaliation as a consequence of his or her complaint. Decisions must be made with the greatest alacrity possible and investigation procedures must adequately take into consideration the best interests of the child, in particular, extreme care must be taken to avoid subjecting the child to further harm or re-victimization through the process of investigation or by placing the child's safety at risk. Towards this end, all parties are obliged to invite and give due weight to the child's views.[528] In this regard, it is recommended that States take into consideration the content of the United Nations "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime."[529]

427. Such investigations must be conducted by qualified professionals who have received role-specific and comprehensive training for this purpose, and in a particularly expeditious and diligent manner in order to successfully gather and not render meaningless any relevant evidence for the investigation. The Commission stresses that rigorous, but child-sensitive, investigation procedures and protocols must be put into place, in order to help properly identify instances of violence and help provide evidence for administrative or judicial proceedings, as the case may be.[530] The Commission recommends States to adopt an adequate gender approach, in particular, when conducting investigations into acts of sexual violence.

428. In keeping with the consistent legal precedents of the Court and the Commission, States must attempt to restore, when possible, the violated right and provide reparation for the damage caused by it.[531] Particularly, children who have been victims of violence or of violations of their human rights must receive the appropriate care, support and compensation. The Commission highlights the obligation to ensure the suitable measures of recovery and rehabilitation required for the child who has been a victim of violence or any other violation of rights.[532] As was noted by the

[528] Committee on the Rights of the Child, General comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 51.

[529] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, approved by the United Nations Economic and Social Council under resolution 2005/20, July 22, 2005, and included as Annex III.

[530] Committee on the Rights of the Child, General comment No. 13, *Right of the child to freedom from all forms of violence,* CRC/C/GC/13, April 18, 2011, para. 51.

[531] I/A Court H.R*., Case of Velásquez Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4, para. 176, and I/A Cour H.R., *Case of Kawas Fernández v. Honduras*, Merits, Reparations, and Costs. Judgment of April 3, 2009, Series C No. 196, para. 76. Also see IACHR, *Juvenile Justice and Human Rights in the Americas,* para. 608.

[532] See Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence,* CRC/C/GC/13, April 18, 2011, para. 52, the Report of the Independent Expert for the U.N. Study on Violence against Children, A/61/299, August 29, 2006, paragraph 112, d), and Article 39 of the Convention on the Rights of the Child.

Independent Expert for the U.N. Study on Violence against Children, legislation usually focusses on the regulation of sanctions and penalties, while recovery, reintegration and redress receive much less attention.[533] In the view of the Commission, this is a concerning fact and it finds that States must make every effort possible to ensure adequate assistance and recovery for children who have been victims of violence, or whose rights have been violated, at a residential care center or institution. The consecuences of violence, neglect, or other violations of the rights of a child in care have a negative bearing on the child, which can remain for life, should he or she not receive adequate attention.

429. The Commission also recalls that in instances where children belong to minorities, such as indigenous children, whose rights have been systematically denied to them, it may be necessary to provide collective forms of reparation, particularly when these practices have been the result of government policies.[534]

430. The Commission stresses as well that States must ensure access to justice and due process of the law within the framework of proceedings for cases of human rights violations of children, which take place in alternative care center and institution settings.

431. The Commission recalls the right of children to participate and to be heard in any proceeding affecting them, including those pertaining to the prosecution of the individuals responsible for violations of their rights in the context of the care received by them at a residential center or institution. Toward this end, the right of the child to be heard and to have a qualified attorney to provide legal assistance must be respected in the framework of administrative or judicial proceedings, as was raised in similar points made above in this report.

432. The Commission notes with concern that only a few States have provided statistics on the existence and number of sanctions linked to investigations for violations of rights taking place at alternative care centers or institutions; and that some States, such as El Salvador, reported that said information is not available. The State of Chile, for example, for 2010 has reported 10 situations of sexual abuse between peers and 2 by staff themselves; while another 16 instances involved situations of mistreatment. According to the response of the State, in all of these instances, investigations were conducted and the case file was brought to the attention of the judicial agency, “as appropriate;” it reported that, as a consequence of the outcome of the investigation, the officials were removed by the authority from their position.

433. In short, States must act in keeping with their duty to prevent, diligently investigate and punish any violation of the human rights recognized by the Convention and domestic law, as well as attempt, when possible, to restore the violated

[533] Report of the Independent Expert for the U.N. Study on Violence against Children, A/61/299, August 29, 2006, paragraph 86.

[534] IACHR, Report on *Juvenile Justice and Human Rights in the Americas*.

right and, as warranted, provide reparation for the damages resulting from the violation.[535] These obligations are especially relevant under the provisions of Article 19 of the American Convention, Article VII of the American Declaration and all other provisions of the international *corpus juris*.

L. The establishment of minimum standards for the delivery of services in residential care

434. The guarantee of suitable and timely protection of children placed in an alternative residential care centers entails the duty of the State to develop adequate regulation over these facilities. As has been expressed, the Commission finds that alternative residential centers provide basic and essential care to children; these services are directly linked to the guarantee and applicability of the rights of a subgroup of children who are placed in a particular condition of vulnerability, inasmuch as they lack parental care. Consequently, there is a public interest in the way that these services are organized and provided, as well as in setting minimum standards of service provision and operation thereof. The Commission also regards that the minimum standards for the provision of the service must apply to both public and private facilities, which provide this type of service to children without parental care.

435. The Commission notes that even though most States of the region set forth the rights of children and adolescents in general, only a few have expressly regulated the rights of children living in care centers or institutions, either private or public, and set minimum standards of quality for said facilities. The U.N. Guidelines for the Alternative Care of Children also set forth an opinion similar to that of the Commission, and have provided that:

> […] States should establish care standards to ensure the quality and conditions that are conducive to the child's development, such as individualized and small-group care, and should evaluate existing facilities against these standards.[536]

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[535] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*, Merits, Judgment July 29, 1988. Series C No. 4, para. 166.

[536] U.N. Guidelines for the Alternative Care of Children, Guideline 23. With regard to the requirement of establishing minimum national standards for care at residential facilities also see: Council of Europe, Recommendation Rec(2005)5 of the Committee of Ministers to Member States on the rights of children living in residential institutions, adopted by the Committee of Ministers on 16 March 2005 at the 919th meeting of the Ministers' Deputies. Also, see: Council of Europe, Rights of Children in Institutions Report on the implementation of the Council of Europe Recommendation Rec(2005)5 on the rights of children living in residential institutions, August 2008. Additionally, see, "Quality4Children. Standards for the care of children away from biological family in Europe," FICE (Fédération Internationale des Communautés Educatives), IFCO (International Foster Care Organization) SOS Children's Villages; and also, "Moving Forward: Implementing the Guidelines for the Alterative Care of Children," Centre for Excellence for Looked After Children in Scotland (CELCIS) of the University of Strathclyde; International Social Service (ISS); Oak Foundation; SOS Children's Villages International; and the United Nations Children's Fund (UNICEF) 2012.

436. Accordingly, the Committee on the Rights of the Child has expressed its concern over the absence of rules regulating the minimum standards of care required at residential care centers in several States of the Region,[537] and the failure to place special emphasis in this regard on facilities where children with disabilities are placed[538] in light of the additional attention required by them as a result of their condition with regard to treatment and care. The Committee has recommended evaluating the quality of services and the living conditions of children at residential centers and institutions, as well as approving clear norms to regulate operations in several States of the hemisphere such as Bolivia[539], Costa Rica[540], Ecuador[541], El Salvador[542] and Paraguay.[543] Additionally, a study conducted on ten States of the Caribbean has concluded that only Belize, Jamaica, Grenada and Barbados had approved legal norms to govern residential care institutions.[544] The voids and challenges regarding this type of nationwide regulation have also been evident with regard to the United States.[545]

437. The Commission agrees with the Committee on the Rights of the Child in the need for States to clearly regulate the operations of alternative residential care s, and takes note that some States such as Brazil, after receiving the comments and

[537] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, November 3, 2004, para. 44. Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Guyana, CRC/C/15/Add.224, February 26, 2004, para. 35.

[538] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disability*, CRC/C/GC/9, February 27, 2007, 43rd session, para. 47.

[539] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, October 16, 2009, para. 46.

[540] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Costa Rica, CRC/C/CRI/CO/4, June 17, 2011, para. 50.

[541] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Ecuador, CRC/C/ECU/CO/4, January 29, 2008, para. 51.

[542] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: El Salvador, CRC/C/SLV/CO/3-4, February 17, 2010, para. 49.

[543] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Paraguay, CRC/C/PRY/CO/3, February 10, 2010, para. 41.

[544] Lim Ah Ken, Patricia, Children without parental care in the Caribbean. Systems of protection, November 2007. http://www.unicef.org/barbados/cao_resources_children_without_parental_care.pdf

[545] Children's Rights (USA), Overview of Institutional Care in the United States, Documents submitted for the Day of General Discussion 16 September 2005: Children Without Parental Care (Committee on the Rights of the Child), p. 4 and 5.

recommendations as referenced above,[546] have approved technical guidance documents to regulate different aspects of the care provided by residential centers in keeping with international standards.[547]

438. The Commission considers that the regulatory duty required of the State with regard to operational and service-providing criteria and standards of residential alternative care centers must take into account the objective of the protection and restoration of the rights involved in special measures of protection, as well as the exceptional and temporary nature of such measures. All regulation should take into consideration every aspect necessary to ensure effective respect and full enjoyment of all of the rights of each child, including the right to a full personal development and to realize an autonomous and individual life project. The objectives and program of the facilities and their proposed interventions must be designed to maintain the child's ties to the family and community, and seek family reintegration, when and if conditions are suitable for doing so and provided that it is in the best interests of the child.[548]

439. Complementarily, the Commission deems that adequate regulation of the operations of residential centers requires that the norm obliges them to produce an intervention program, which is a document explicitly laying out the theoretical and practical criteria of the operation of the facility, based on the criteria and standards prescribed in national and international regulatory norms. In these documents, the intervention aims, plans and methods of alternative residential care centers must be established in detail. In this regard, the U.N. Guidelines for the Alternative Care of Children establishes that:

> All agencies and facilities should have written policy and practice statements, consistent with the present Guidelines, setting out clearly their aims, policies, methods and the standards applied for the recruitment, monitoring, supervision and evaluation of qualified and suitable carers to ensure that those aims are met.[549]

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[546] Committee on the Rights of the Child, Examination of the Reports Submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, November 3, 2004, para. 45.

[547] "Technical Guidance: Foster Care Services for Children and Adolescents" [Orientações Técnicas: Serviços de Acolhimento para Crianças e Adolescentes] of the government of Brazil. Brasilia, July 2009. Some organizations have crafted documents that can be taken into account in drafting minimum domestic standards and guidance, see for example: FICE (Fédération Internationale des Communautés Educatives), IFCO (International Foster Care Organisation) and SOS Children's Villages, Quality4Children, Standards for the care of children outside of their biological family in Europe, 2007.

[548] It is fitting to mention that, as was asserted by the Commission in the preceding sections of this report, when reintegration into the child's nuclear or extended family of origin is not possible or should it not be in the interest of the child, the competent public authorities may resort to another permanent solution for the child, provided that it serves his or her best interests, including adoption.

[549] U.N. Guidelines for the Alternative Care of Children, Guideline 106.

440. Additionally, the Commission views that State regulation of the standards of operation and service provision is absolutely essential to ensure that children living at a residential center are not subjected to restrictions on their freedom, their conduct and the exercise of the rest of their rights that may be unreasonable or disproportionate and, therefore, not strictly necessary to ensure the safety and effective protection of the child.[550]

441. The existence of these criteria and standards of operation will also help the competent authorities and independent monitoring mechanisms to adequately supervise residential s.

442. Regulations should provide for the right of the children and adolescents living at facilities to gain access, in a manner they understand and adapted to their level, to the content of said programmatic documents and to the rules of operation of the facilities. This will help the children to become aware of their rights and the way the facility organizes its operations to provide them with adequate protection and care. Knowing these items will be useful to the child in understanding and identifying potential violations of rights or breach of the conditions of service and, consequently, be able to report them. Complaint, claim and petition mechanisms should also be explained suitably in a document that is provided to the child.

443. In the following sections, the Commission identifies what it views as the minimum standards that States should adhere to in regulating residential care s. This is the minimum criteria and, as such, States may, to the end of attaining the highest standard possible of care and protection for children, establish through their own norm, any other requirements and criteria that they deem appropriate and, in so doing, raise the quality of service.

1. System of operation

444. As has been mentioned above, the Commission recalls that States must ensure that the exercise of the rights of children and adolescents living in residential care centers or institutions is not restricted without being justified, with the exception of any limitations or restrictions that are strictly necessary to ensure the protection and safety of the child or adolescent. In particular, placement in a residential care center or institution should not entail unreasonable limitations on their liberty and conduct in comparison with other children who are not in these alternative care facilities. The Commission finds that any restriction or limitation on the rights of children in residential centers should pursue a legitimate purpose of protecting the child; such measures must be necessary, suitable and must also be proportional to the intended purpose.

445. Residential institutions are commonly cited for operating under a closed operating system, under which many of these function, particularly those of

[550] Also see Guidelines 92 and 93.

large-scale dimensions where a high number of children and adolescents are cared for. In this type of closed system of operation of the facility, the child is practically held in similar conditions to those of inmates deprived of their liberty, and these conditions cannot be justified in a system of protection of the rights of the child. The Commission considers that, in regulating the conditions of operation of these institutions, States should make sure that the system of operation of these be in line with the children's rights, ensuring full applicability and exercise thereof. Additionally, security and control measures at such institutions should be as minimal as possible and be no more than what is strictly necessary to ensure the protection and safety of the children.[551]

446. Regarding this aspect, the Commission agrees with the United Nations Guidelines for the Alternative Care of Children:

> […] Measures aimed at protecting children in care should be in conformity with the law and should not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community.[552]
>
> […] All alternative care settings should provide adequate protection to children from abduction, trafficking, sale and all other forms of exploitation. Any consequent constraints on their liberty and conduct should be no more than are strictly necessary to ensure their effective protection from such acts.[553]

447. Accordingly, the system of visits of family and friends, as well as the system of leaving the facility to visit family and community, must adequately respect the rights of the children and their opinion, while at the same time take into consideration factors pertaining to the child's security and safety, based on individual circumstances. For example, visits not only from their next-of-kin but also from their extended family and friends should be encouraged, and unnecessary constraints hindering such visits should be done away with, such as very limited visitation hours, without consulting family members, unless this goes against the best interests of the child and his or her wishes. When restrictions are placed on the visitation system, an explicit reason should be provided for doing so, and a record of it should be made in the child's file.

448. Additionally, integration of the child into the community, through access to a variety of services and activities taking place therein, helps to reduce social isolation and the stigmatizing effect that children placed in residential institutions can be subjected to,[554] and helps to pave the way for his or her subsequent social

[551] Havana Rules, Rule 30.

[552] U.N. Guidelines for the Alternative Care of Children, Guideline 92.

[553] U.N. Guidelines for the Alternative Care of Children, Guideline 93.

[554] On this topic, in the U.N. Guidelines for the Alternative Care of Children, the concern is also raised as to stigmatization and social isolation to which children placed in residential institutions can be subjected, for example, in Guideline 95.

reintegration and an independent adult life. Accordingly, the Commission deems that a high priority should be attached to the ability of children living in institutions to be given access to education, health, recreation, culture and occupational training and other types of services in a community setting and, when possible, in his or her own community.[555] Maintaining ties to the community is important in order to preserve the right to identity of the child, particularly his or her cultural and religious identity, especially when children come from minority groups.

449. The U.N. Study on Violence against Children also found ample and sufficient evidence to recognize that "large, closed institutions could not support physical, social, emotional and cognitive development in any way comparable to that in a family setting."[556] Consequently, in the opinion of the Commission, an institution operating under an unnecessarily restrictive system of contact of children with the outside world, is inconsistent with respect for the human rights of children and adolescents, including the right to maintain ties to their family, to full and comprehensive development of their personality, the right to identity and the right to personal liberty.

2. Location and dimensions

450. In the judgment of the Commission, States must make sure that children living in alternative residential care centers are placed in establishments in close proximity to their family and community. This is essential in order to effectively ensure that ties with the family are maintained and prevent the child's ties and connections with his or her environment and community from severing, in addition to contributing to supporting the reintegration of the child into his or her family when conditions are given for so doing, in keeping with the best interests of the child.[557] The Commission emphasizes that the child is entitled to maintain ties with the nuclear and extended family, unless a competent authority, in the framework of a proceeding conducted under every guarantee of due process of the law, has determined that, based on the specific circumstances of the case, it would not serve the best interests of the child.

451. The Commission deems it appropriate that alternative care centers be physically located in places with ready access to public transportation and to services of education, health, leisure and recreation, as well as employment, depending on the age

[555] Similarly, with regard to children in conflict with the criminal law deprived of their liberty, the Commission has taken positions, which echo this view, see IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 390, 395, 401, 402 and 405. Havana Rules, Rules 59-62.

[556] U.N. Study on Violence against Children, pp. 180 and 205.

[557] The U.N. Guidelines for the Alternative Care of Children are similar, Guideline 81: "When a child is placed in alternative care, contact with his/her family, as well as with other persons close to him or her, such as friends, neighbors and previous carers, should be encouraged and facilitated, in keeping with the child's protection and best interests. The child should have access to information on the situation of his/her family members in the absence of contact with them."

of the adolescent. Toward this end, it is essential for States to set up decentralized, preferably small, facilities, located nearby the home communities of the children. In this regard, Guideline 11 of the Guidelines for the Alternative Care of Children provides that:

> […] All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.[558]

452. According to information received by the Commission, in some Member States authorization has been given in the past for residential institutions to operate far from the urban centers where the children's families reside and their community is located. For example, in Nicaragua, a number of institutions are found in locations inconveniently accessible from the community; these institutions are located in places with limited access to the premises, which increases the cost of transportation to those who wish to visit them. Nonetheless, the Commission notes with satisfaction that in this same country, positive initiatives are being taken with regard to the regulation of this type of establishment; as has been reported to the Commission in the responses to the questionnaire, several standards have been changed to regulate the physical conditions of institutions, including their location, the physical premises and their maximum capacity. The Commission points to the existence of this type of domestic regulation in other States of the region as well, such as in Brazil and Chile.

453. The size of institutions and the number of children and adolescents living therein, as well as the density of the population, are factors that must also be brought in line with the objective of meeting the needs of protection and care of children and adolescents deprived of parental care. In particular, the size of the institutions and the concentration of a specific number of children and adolescents at them has a bearing on several aspects that are relevant to adequate care and the exercise of their rights: i) the ability to provide individualized care to the child and adolescent based on individual circumstances and needs, ii) development and implementation of an individual care plan for each child in order to restore his/her rights and encourage the process of family reintegration, iii) the ability to operate more similarly to how a nuclear family does, thus providing the child with the opportunity to create and have interpersonal ties and experiences, which positively contributes to the development and formation of his/her personality, and iv) operating under conditions that do not endanger the safety of the child or violate his/her rights, such as the right to health and life, and to intimacy and privacy.[559]

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[558] With respect to children in juvenile justice system institutions, Rule 30 of the Havana Rules similarly establishes that: "[…] The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community."

[559] The U.N. Study on Violence against Children found that "[…]conditions in many residential institutions are often so poor that they put the health and lives of children at risk. Institutions are often

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454. With regard to the foregoing point, the Commission is especially concerned about the situation of overcrowding, insanitary conditions and precariousness of means, as described in the U.N. Study on Violence against Children, which comports with some of the information to which the Commission has gained access through the regional consultation process, which has served as input for the preparation of this report, and through the system of petitions and cases, precautionary measures and hearings with regard to some institutions. The Independent Expert for the U.N. Study on Violence against Children laid out his findings as follows:

> […] conditions in many residential institutions are often so poor that they put the health and lives of children at risk. Institutions are often overcrowded, unsanitary, and lacking in both staff and resources, leading to increased mortality rates among these children compared to their peers in family environments.[560]

455. The Commission is also particularly concerned about phenomena of violence to which children and adolescents are exposed at residential institutions. In this regard, sufficient evidence exists that the large scale of institutions and high density of children concentrated therein, in and of itself, poses a general risk to children of facing situations of violence and other violations of their rights and, at the same time, is an obstacle to early identification by professionals of these potential rights violations.[561] Additionally, the Commission finds that the physical space of institutions and their size must be aimed at ensuring conditions of protection, sanitation and privacy, which are consistent with the protection of the rights of children.[562]

456. As for recommendations to States on the size of institutions, Guideline 123 of the U.N. Guidelines for the Alternative Care of Children, provides that:

> Facilities providing residential care should be small and be organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation. Their objective should generally be to provide temporary care and to contribute actively to the child's family reintegration […].

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overcrowded, unsanitary, and lacking in both staff and resources, leading to increased mortality rates among these children compared to their peers in family environments."

[560] United Nations Study on Violence against Children, pgs. 188 and 189.

[561] The U.N. Study on Violence against Children identified that children living in large residential care institutions are exposed to a higher risk of violence compared to their peers living under the protection and custody of their family members, a foster family or a facility with a family-like setting, pp. 183 and 189.

[562] United Nations Convention on the Rights of the Persons with Disability, Article 22. U.N. Guidelines for the Alternative Care of Children, Guideline 89: "All adults responsible for children should respect and promote the right to privacy, including appropriate facilities for hygiene and sanitary needs, respecting gender differences and interaction, and adequate, secure and accessible storage space for personal possessions."

457. In the same way and with respect to institutions housing children with disability, the Committee on the Rights of the Children has recommended "transforming existing institutions, with a focus on small residential care centers organized around the rights and needs of the child."[563]

458. Specifically, Guideline 23 of the U.N. Guidelines for the Alternative Care of Children establishes that where large-scale residential institutions remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination,[564] and the replacement of these institutions with measures of alternative care that are more respectful of children's rights.

459. The Commission views with concern the existence of this type of large-scale institution in the States of the region, which because of their size and the attendant consequences pertaining to institutional care quality, is hardly able to adequately guarantee the rights of the children and adolescents living therein. The Commission also finds that, as has been stated above, residential institutions, particularly those of large-scale housing a large number of children within their instalations, generally expose children and adolescents to structural violence stemming from the very conditions of care existing at these institutions.[565]

460. The Commission has received information in the context of preparing this report regarding the operations of very large institutions, which should be progressively eliminated and replaced by other types of alternative care. States where these large institutions remain include, for instance, El Salvador,[566] Honduras,[567]

[563] Committee on the Rights of the Child, *General Comment No. 9*, The rights of children with disability, CRC/C/GC/9, February 27, 2007, 43rd session, para. 47.

[564] U.N. Guidelines for the Alternative Care of Children, Guideline 23.

[565] See Chapter 5 *Violence against Children in Care and Justice Institutions*, of the above-cited U.N. Study, http://www.unviolencestudy.org/spanish/index.html

[566] In El Salvador, at the time of the response to the questionnaire, two institutions provided care to more than 100 children and adolescents and five provided care to more than 120. It was reported that the "Casa Sagrada Familia" is made up of three facilities with a capacity for 600 and has an occupancy rate of 450 children.

[567] At the time of the drafting of this report, the Commission was informed about Hogar Nuestros Pequeños Hermanos, with 492 individuals living in it, whose age range broadly from 0 to 30 years old. Other institutions, according to information received: "Orfanatorio Enmanuel" cares for 344 children, "Casa Hogar María Mazarello" provides care to 340 female children and adolescents, "Hogar Nazareth" to 190 children, "Hogar de Niños El Buen Pastor" to 175 children, as well as other institutions which provide care to around 100 children each.

Guatemala,[568] Peru,[569] as well as Nicaragua,[570] Paraguay,[571] Dominican Republic[572] and Mexico.[573]

461. In this regard, the Commission views as positive that some States of the region have instituted in their standards for residential care the maximum number of children that can be cared for at this type of institution, under the general recommendation that it be the lowest number possible. For example, the Province of Misiones in Argentina has established a maximum of 20 children per institution, while in Brazil the national standard has also set the maximum number at 20 children.[574]

462. In short, States must ensure that the location of the institution, its size and system of operation, are consistent with its purposes, with the exercise of the rights of children and with the implementation of individualized intervention plans within the institution, and are especially focused on meeting the protection needs of the children and adolescents living therein.

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[568] In Guatemala, in July 2011, there were 774 children of all ages housed at "Hogar Solidario." According to the information received on a survey conducted of 114 institutions, 22 of the respondent institutions housed from 80 to 330 children (Red Latinoamericana de Acogimiento Familiar - RELAF, Niñez y adolescencia institucionalizada: visibilización de graves violaciones de DDHH [RELAF - Latin American Network of Family Care, "Institutionalized Children and Adolescents: bringing gross human right violations to light", 2011].

[569] Based on the information released to the public by the Office of the Ombudsman of the State of Peru, Ombudsman's Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 300, identifies the care institution "Hogar Sagrada Familia", located in the Province of Callao, housing a total of 830 children and "Puericultorio Pérez Aranibar", located in the Province of Lima, which houses some 800 children with a maximum capacity of 1200.

[570] Based on the information received thus far as of the date of the drafting of this report: "Padre Watson – NPH", provides care to 181 children, among other institutions.

[571] According to the information received as of the date of the drafting of this report, there are several institutions with higher-than-desired number of children cared for in them, and it would be advisable to reduce the number of children served at establishments, such as: "Unidos por Cristo" with 199 children, among other ones.

[572] Based on the information received as of the date of the drafting of this report: "Hogar Escuela Rosa Duarte" provides care to 123 children; "Hogar Santo Domingo Savio" to 148 children; "Hogar Escuela Armando Rosemberg" to 106 children; "Aldeas Infantiles SOS – Santiago" to 136 children, "Fundación de Niños y Niñas para Cristo" to 140 children; "Fundación Hogar Nuestros Pequeños Hermanos" to 200 children, among other institutions that do so as well. (Government of the Dominican Republic, Report III, IV and V, to the Committee on the Rights of the Child, in compliance with Article 44 of the CRC. – Dominican Republic, July 2010).

[573] According to the information received: "CNMAIC Casa Hogar" which provides care to 150 girls and adolescents from 9 to 18 years of age and "CNMAIC Casa Cuna Tiaplan" which provides care to 110 children from 0 to 5 years old.

[574] Orientações Técnicas: Serviços de Acolhimento para Crianças e Adolescentes [Technical Guidance: "Care Services for Children and Adolescents"] of the Government of Brazil. Brasilia, July 2009.

3. Physical space and infrastructure

463. One of the main obligations of States with regard to the conditions in which alternative residential care is provided is linked to the physical space of centers and institutions, which must be adequate.[575] The development of children and adolescents is heavily conditioned upon the environment in which they live and, therefore, care facilities must in every instance be a safe and appropriate environment.[576]

464. The physical living space of care facilities must respect the dignity and health of the children living in them.[577] The physical environment and accomodations must serve the purpose of residential alternative care, which is the restoration and protection of the rights of children and adolescents, taking into proper account their needs regarding the comprehensive development of their personality. Toward this end, the physical premises must support the realization of s' intervention plans, with regard to individualized and group work with the resident children, as well as their education, recreation, and engagement in sports, adequate rest and family visits, among other things. In particular, residential institutions must properly take into account the children's need for privacy, sensorial stimuli and opportunities to associate with their peers and to participate in sports, physical exercise, in arts, and leisure time activities, as well as having in place the security, evacuation and emergency measures required to safeguard the rights of the children.[578]

465. The Commission deems it necessary to reiterate, as it has done with regard to the minimum conditions required in juvenile justice institutions, that in residential alternative care as well, the residential institutions "must have the proper infrastructure in terms of surface area, ventilation, access to natural and artificial lighting, drinking water and hygiene facilities and supplies," and that children and adolescents "must have easy access to sanitary facilities that are hygienic and private."[579]

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[575] With regard to the principles and minimum standards governing protection of children deprived of their liberty, the Havana Rules, approved by the United Nations, provide minimum elements to be taken into consideration in regulating minimum standards of protection and care for children deprived of parental care placed in residential institutions. In this regard, as to physical environment and accommodations, see Rules 31 to 37.

[576] See: Committee on the Rights of the Child, General Comment No. 4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, July 21, 2003, para. 14.

[577] Havana Rules, Rules 12, 13 and 87, subsection. f; Beijing Rules, Rule 27. Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, April 25, 2007, 44th session, para. 89.

[578] Similar to what has been said here, Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, April 25, 2007, para. 89.

[579] IACHR, Report on *Juvenile Justice and Human Rights in the Americas*. See, specifically: U.N. Guidelines for the Alternative Care of Children, Guideline 89. Havana Rules, Rule 31.

466. The Commission notes with concern that in many instances, residential institutions do not respect the minimum requirements listed above, with children remaining in them for protracted periods of time in conditions that are not conducive to ensuring their rights and, in some instances, with extremely precarious infrastructure and material resources in general. The Committee on the Rights of the Child has expressed its concern with regard to precarious living conditions at institutions, specifically, the lack of sufficient technical, financial and human resources at some facilities in several States of the region such as Bolivia,[580] Brazil,[581] Chile,[582] Guyana,[583] Nicaragua,[584] Peru,[585] Trinidad and Tobago,[586] and Uruguay.[587] The Commission views that the shortcomings noted in the above-listed States cannot necessarily be extrapolated to all facilities in the country, but it is an indicator revealing the need to adequately regulate and supervise all institutions and alternative care centers in the territory of the States.

467. The Commission finds that, for purposes of creating proper safety and hygienic conditions, institutions must be licensed by the appropriate authorities with regard to the building structure, accident prevention measures and any other type of critical situation or emergency that could arise. Strict compliance with these requirements should be taken into account by States when granting an institution its license and in the context of subsequent review. Additionally, facility staff must receive

[580] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, October 16, 2009, para. 45.

[581] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, November 3, 2004, para. 44.

[582] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Chile, CRC/C/CHL/CO/3, April 23, 2007, para. 45.

[583] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Guyana, CRC/C/15/Add.224, February 26, 2004, para. 35.

[584] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, October 1, 2010, para. 54.

[585] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Peru, CRC/C/PER/CO/3, March 14, 2006, para. 37.

[586] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, March 17, 2006, para. 43.

[587] Committee on the Rights of the Child, Examination of the Reports submitted by the States Parties under Article 44 of the Convention. Concluding Observations: Uruguay, CRC/C/URY/CO/2, July 5, 2007, para. 41.

instruction on risk prevention and response, training for the use of fire extinguishers and basic health procedures.

468. Information on compliance with these requirements is scarce, but some surveys, the results of which have been seen by the Commission, report concerning situations that warrant prompt and urgent correction. For example, it has been reported to the Commission that there still are institutions operating without fire extinguishers and that emergency exits are not marked to allow for timely evacuation in case of emergency.

469. Facilities must also be readily adaptable to the characteristics of the population group receiving care in them, especially taking into account, for example, the situation of children with disabilities, any form of medical condition, or that of very young children.

470. The Commission takes note of some of the positive initiatives in the area of regulation of institutions. Notwithstanding, the information received by the Commission indicates that in many instances, the physical instalations of the institutions are not appropriate for fulfillment of the purposes laid out by them. The absence of areas for games and recreation, the failure to provide any place for children to be able to keep their personal belongings, typify many of these institutions.[588] In many instances, the institutions do not have an adequate physical structure or building designed to the operation of residential institutions for children. Consequently, they lack the proper safety and leisure conditions, among other necessary elements to provide adequate care.

471. No institution should surpass its installed capacity and every institution or facility should accommodate a reasonable number of children in keeping with its dimensions, avoiding the threshold of overcrowding and respecting the privacy of the children.

472. The Commission considers that the conditions of care of the children depend to a great extent on the resources and material elements available to care centers and institutions. Those in charge of the care of children and adolescents must have the means available and be able to gain access to services in order to avoid any type of neglect or negligent treatment.[589] The absence of this type of means is especially serious in some situations such as at health-care institutions, facilities caring

[588] For example, in a recent survey, the Office of the Ombudsman of Peru found that 56.8% of all institutions did not provide their own private space to the children to keep their personal belongings (Report No. 150, El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, pp. 305 and 306).

[589] Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from any form of violence*, CRC/C/GC/13, April 18, 2011, para. 20.

for very young children, those working with children with some disability, as well as any other condition requiring specific infrastructure and assistive devices.[590]

4. Individualized attention and stable bonds

473. The individualized attention that should be given to all children and adolescents located in residential care centers and institutions is not, in the opinion of the Commission, achieved simply by regulating the size of these centers; the States must also ensure that the human resources employed at those centers and institutions reasonably provide this attention. Individualized attention also involves the steps taken by the institution and its professional staff to care for and meet the individual needs of each child and to foster the restitution of all his/her rights, including the right to rejoin his/her family when that becomes possible. This entails the design and proper implementation of an individualized care plan that takes into account all the specific characteristics of the child and the evolution of his/her personal circumstances.[591] Information received within the framework of sub-regional consultations regarding this aspect of care shows that many institutions lack the conditions that would allow them to draw up and follow a plan for individualized attention for each child that enters the institution. In these cases it is felt that the shortage of technical professionals is the main cause leading to this type of situation.

474. Lack of attention due to a shortage of staff is one of the characteristics of some residential facilities that is a matter of concern to the Commission. Deficient conditions for care place the health and lives of the children at risk, especially in the case of children requiring special care and attention. The Commission has already mentioned the contact and stimulation that are essential for young children, for example, or for children requiring rehabilitation or who have other needs and who could suffer serious physical, mental and psychological harm without the proper care and attention.[592]

475. The U.N. Guidelines for the Alternative Care of Children also emphasize individualized care for children in the following terms:

> States should ensure that there are sufficient carers in residential care settings to allow individualized attention and to give the child, where

[590] United Nations Convention on the Rights of Persons with Disability, Article 26(3): "States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation."

[591] The requirement for personalized care using an individual care plan is provided for in a number of international instruments. U.N. Guidelines for the Alternative Care of Children, Guideline 126. Havana Rules, Rule 27.

[592] The Independent Expert for the United Nations Study on Violence against Children remarked that he was especially concerned in the case of institutions that house children with disabilities: "In many facilities for children with disabilities, there is no access to education, recreation, rehabilitation or other programmes. Children with disabilities are often left in their beds or cribs for long periods without human contact or stimulation," para. 58.

> appropriate, the opportunity to bond with a specific carer. Carers should also be deployed within the care setting in such a way as to implement effectively its aims and objectives and ensure child protection.[593]

476. The Commission also points out that the personal or individualized nature of the attention should not lead to confusion concerning the nature of the relationship between the staff and the children and adolescents housed there given that this is not a family-type relationship in the strict sense of the word. The Commission has noted with concern that one problem associated with long stays at institutions is that the staff tends to take on the role of substitute for the children's families of origin. The role and duties of the staff must be clearly defined and differentiated from those of the child's parents or family. The need to avoid any such confusion must not, however, end up ignoring the subjective and emotional facet of the child and the importance of allowing him/her to create positive bonds of trust with his/her carers through close and humane treatment. Attention must not be focused solely on satisfying basic needs and the protection of his/her physical safety, as was found in some surveys.[594]

477. In addition, the Commission considers that, despite the obligation to ensure that stays at a center or institution are temporary by means of a system of periodic reviews of the measures, decisions must take into account the importance of ensuring a stable setting for the children and satisfying their basic need for continuous and safe bonding with the setting where they are being cared for and the people directly responsible for their care. The Commission feels that, in order to achieve a balance between the two criteria, it is necessary to keep changes and transfers to a minimum, always providing for the establishment of adaptation processes that ensure the participation of the children and adolescents and taking their best interests into consideration.[595] The periodic evaluations must be conscientious and thorough in order to honor the child's right to be reunited with his/her family when conditions so allow, and based on his/her best interests; premature decisions or those not backed by the suitable professionals and services needed to support the re-bonding may be very harmful to the child and must be avoided.

478. The States must ensure that the way in which alternative residential care is organized, most especially the carers' bonds with the child, are aimed at guaranteeing the rights of the children and adolescents living there. Most specifically, the Commission considers that the system for organizing the work of the centers and institutions must strive, among other aspects, to avoid frequent changes of carers, or

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[593] U.N. Guidelines for the Alternative Care of Children, Guideline 126.

[594] Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 51.

[595] U.N. Guidelines for the Alternative Care of Children, Guideline 12.

transfers from one institution to another, that fail to take the emotional situation of the children into account, for merely administrative reasons.[596]

479. The Commission notes with concern that the practice of transferring children and adolescents from one institution to another for a variety of administrative reasons is not infrequent. In Paraguay, for example, there are reports of frequent admissions, departures and transfers from one institution to another that, in most cases, are not reported to the competent authorities. Furthermore, according to the answers to the questionnaire, only a small percentage of the institutions keep records of their population and their movements.

5. Individual care plan

480. The design and implementation of a individual care plan for the child , one that takes into account his/ her personal circumstances and those that caused his/her separation from the family, is part of the very purpose of the special measures of protection. The individual care plan is the tool used by the team of professionals caring for the child at the center or institution in order to be able to properly monitor the child's development, his/her requirements and needs, keep a record of and justify any treatment or courses of action considered appropriate, actions taken to foster the re-attachment with the family and community, and medical conditions, among other items.[597] The norm must regulate the mandatory requirement for the multidisciplinary teams at all care centers or institutions to create a record and individualized care plan for each and every child or adolescent entering the center or institution; it must also regulate the purpose, the minimum content and periodic updating of the plan.[598]

481. The individualized plan must gather all pertinent information that will enable the professionals in charge of the child to make appropriate and well-informed decisions regarding the care of the child, in addition to providing a record of all actions taken in connection with the child. Most especially, the Plan must provide for the procedures and actions to be taken to reconnect the child with his/her family or, in the case of children who reach adult age while in alternative care, the type of support required to enable him/her to lead an independent life outside the residential care center or institution.

482. Therefore, the plan is not circumscribed to the child and his/her care, but must also include all aspects related with re-attachment to his/her family; for example the evaluations of the child's family and environment, interventions with the family and recommendations concerning the course of action to be taken with the family and the child.

[596] U.N. Guidelines for the Alternative Care of Children, Guidelines 60 and 90.

[597] U.N. Guidelines for the Alternative Care of Children, Guideline 59.

[598] U.N. Guidelines for the Alternative Care of Children, Guideline 63.

483. The periodic review of the special measures of protection to be carried out by the competent authority must take the child's individualized care plan into account as part of the information that is important for the evaluation of the current situation of the child and the family for the purpose of reaching a decision regarding continuation, modification or cessation of the special measure of protection.

6. Aspects pertaining to staff

484. The Court has determined, in general, that there is a need for child-protection institutions to have appropriate staff to properly meet the care and protection needs of the children and adolescents.[599] As already aforementioned, the system for the protection of children's rights in general, and for protection of children lacking parental care in particular, must be guided by the principle of specialization and professionalization. In this regard, the Commission agrees with Guideline 71 of the U.N. Guidelines for the Alternative Care of Children in that special attention must be paid to the quality of the care provided, most especially as regard professional skills, selection, training and supervision of the personnel at care centers and institutions.[600]

485. To this end, the States must determine the basic staffing criteria to be required of care centers and institutions, both public and private. In this regard, the Commission understands that legislation must contain proper regulations regarding, at the very least, the following aspects: i) the number of staff members required based on the number of children being cared for in each care center or institution, their ages and special needs (staff/child ratio), ii) the professional profiles required at all alternative care centers and institutions to properly achieve the goals assigned to these centers under the regulatory norms , iii) consideration of the specific professional profiles that might be required when the centers provide certain specialized services, iv) the basic duties to be performed by the various professionals assigned to the centers and institutions, and v) the minimum qualifications required, in addition to the requirement of appropriate and updated knowledge concerning children's human rights, child-youth development and psychology, child protection, and non-violent disciplinary measures, among other items required to foster appropriate and quality care for children.[601]

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[599] I/A Court H.R., *Judicial Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of 28 August 2002, series A No. 17, para. 112.

[600] Guideline 71: "Special attention should be paid to the quality of alternative care provision, both in residential and in family-based care, in particular with regard to the professional skills, selection, training and supervision of carers. Their role and functions should be clearly defined and clarified with respect to those of the child's parents or legal guardians". The Havana Rules are very similar in this regard, most especially see Rules 81 through 87. U.N. Study on Violence against Children, pp. 211 and 212..

[601] The United Nations Committee on the Rights of the Child has stressed the requirement that staff and professionals who work with children must have the proper training and skills to be able to perform their duties properly. To this end the States must properly regulate the minimum professional requirements and skills being demanded. The Committee has also placed emphasis on fostering systematic, ongoing and comprehensive training procedures and programs for all people working in these institutions, organizing official certification systems for regulation and recognition of this training, and ensure that awareness of the CRC becomes part of the education history of all professionals working with children. See Committee on the

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486. The procedures for selection and employment must be carefully implemented for all personnel in all categories, as the proper functioning of centers and institutions depends on the staff's skills, integrity and professional competence for dealing with children. Therefore the references and professional background of the candidates must be taken into account in the procedures of selection and employment, most especially those of the people who are in direct contact with the children and adolescents, in order to be able to rule out a background involving cases of abuse, neglect or any other form of violence or violation of the rights of children. The Commission agrees with the U.N. Guidelines for the Alternative Care of Children in considering that "all agencies and facilities should systematically ensure that, prior to employment, carers and other staff in direct contact with children undergo an appropriate and comprehensive assessment of their suitability to work with children."[602]

487. Supplementing the above, the Commission considers it essential, so as to guarantee the rights of children, that the States, within the framework of the procedures for licensing and supervision, determine whether the centers or institutions have sufficient, properly qualified staff to allow the children to receive individualized attention and suitable care. Legislation must also provide for the appropriate sanctions for those centers or institutions that fail to comply with the regulations governing staff, which may entail fines or, even, the closing down of the center or institution.

488. The Commission was able to gather little information regarding the number of staff at the institutions and, in those cases in which information was provided, it was varied. The Commission finds that some States fail to regulate this matter and others have no information regarding the same. There are cases in which the States have established rules in their regulatory norms concerning the ratio of carers, professionals or educators per child or adolescent. For example, the Chilean regulation calls for one professional for every 20 to 25 children, and 8 to 10 children per carer[603]. Whereas the regulations in Peru call for one psychologist, one social worker and one educator for every 20 children and, in the 6 to 11 year age range, one carer for every 10 children[604]. In Costa Rica, according to the answer in the questionnaire, the

…continuation
Rights of the Child, General Comment No. 13, *Right of the Child to Freedom from all Forms of Violence*, CRC/C/GC/13, 18 April 2011, para. 44 d). U.N. Study on Violence against Children, pp. 211 and 212.

[602] Guideline 113. Similar statements are found in the U.N. Study on Violence against Children, pgs. 211 and 212, and Havana Rules, Rule 82.

[603] "Lineamientos técnicos específicos. Modalidad Residencias de protección para Lactantes y Pre-escolares". [Specific technical guidelines. Residences mode protection for Infants and Pre-scholars] SENAME, Chile, August 2007.

[604] "Manual de Acreditación y supervisión para centros de atención residencial de niñas, niños y adolescentes de la Dirección General de la Familia y la Comunidad, Dirección de Niños, Niñas y Adolescentes del Ministerio de la Mujer y Desarrollo Social." [Accreditation and supervision manual for residential care of children and adolescents of the General Direction of Family and Community, Department of Children and Adolescents of the Ministry of Women and Social Development].

ratio varies depending on institutional demand, and there are some 70 children per technical professional and two direct-care staff for every 15 children; nevertheless, on weekends, just one staff may remain in place. Meanwhile, in El Salvador, based on the information provided when answering the questionnaire, the ratio of staff per child or adolescent is 1 to 10. Then again, in some States, such as Paraguay, the report stated that, based on inspections carried out by the Alternative Care for Children and Adolescents Unit of the National Secretariat for Children and Adolescents [Unidad de Cuidado Alternativo de Niños, Niñas y Adolescentes de la Secretaría Nacional de la Niñez y la Adolescencia], findings showed that many institutions have no record of the staff providing services at these institutions that would allow for proper supervision.

489. The IACHR received information showing that the employment of staff working in these systems has not always been based on their professional profile, experience and skills. This has been due, in some cases, to the lack of clear-cut criteria for the employment of personnel at both government and private institutions, whereas in other cases the lack of supervision has meant that the States lack knowledge concerning the human resources serving in residential institutions, the latter being especially true in the case of the staffs at private institutions[605]. The Commission views with concern that the criteria for selection of personnel may lie exclusively in the hands of the institutions themselves. The above statements notwithstanding, the Commission has received information regarding the existence of technical guidelines in several States in the region, drawn up by the authorities in charge regulating the employment of personnel at the institutions and the skills required. Reports of this type of requirement have been received, for example, in the cases of Chile, Colombia, Costa Rica and El Salvador.

490. In several States, such as Bolivia and Saint Vincent, the Commission has been advised of the existence of major difficulties for the employment of staff , most particularly professionals and specialists, given that they do not feel motivated to work in these institutions or be trained to work with children, a situation that has to do with the low salaries paid for these positions. According to the sub-regional consultations carried out for purposes of this report, the situation is the same in most of the countries in the region, even in those States that have developed technical guidelines regulating the employment of staff . Thus, in Canada, for example, a national survey carried out by the Canadian Association of Social Workers found problems such as lack of motivation, a shortage of social workers and a high rate of attrition.[606]

491. In this regard, the Commission agrees with the U.N. Guidelines for the Alternative Care of Children and with the U.N. Study on Violence against Children on stressing the importance of ensuring that working conditions and remuneration paid to

[605] For example see: Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding observations: Ecuador, CRC/C/ECU/CO/4, 29 January 2008, para. 50.

[606] Canadian Association of Social Workers, "Child Welfare Project: Creating conditions for good practice", 2003, p. 3.

the personnel working in residential institutions be in line with their responsibilities so as to maximize retaining of suitable and skilled staff, their motivation, job satisfaction and continuity.[607]

492. In addition, the Commission stresses that it is important for the States to ensure the existence and availability of training plans and courses for ongoing professional training for people employed at residential care centers and institutions, including professional and technical staff, as well as administrative and services staff; moreover, the States should implement suitable measures to ensure, insofar as possible, that this training is properly recognized during the recruitment processes and in terms of remuneration.[608] One of the aspects to be covered as part of the ongoing training programs for all personnel working at the residential care centers and institutions should be aimed at fostering non-violent forms of discipline and education[609], as well as at dealing with challenging behavior, including techniques for conflict resolution and means for preventing children from harming themselves or others.[610] Furthermore, the U.N. Guidelines for the Alternative Care of Children provide that this training should specifically include sensitization concerning issues such as the situation of "children without parental care and on the specific vulnerability of children, in particularly difficult situations, such as emergency placements or placements outside their area of habitual residence. Cultural, social, gender and religious sensitization should also be assured."[611]

493. Despite the existence of some positive initiatives, the Commission is concerned that in many States in the region staff working in these institutions is not usually required to have any specific training, skills or suitability for working with children. For example, when answering the questionnaire, Paraguay reported to the Commission that inspections carried out by the National Secretariat for Children and Adolescents found that most institutions do not have appropriate professionals to care for the children and adolescents living there, and that there are no training requirements for the people directly in charge of caring for the children and adolescents. Similar situations were also reported to the Commission in the case of some institutions in Jamaica, among other States.[612]

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[607] U.N. Study on Violence against Children, p. 212. Havana Rules, Rule 83. Guideline 114 of the U.N. Guidelines for the Alternative Care of Children, guideline 114: "Conditions of work, including remuneration, for carers employed by agencies and facilities should be such as to maximize motivation, job satisfaction and continuity, and hence their disposition to fulfil their role in the most appropriate and effective manner."

[608] U.N. Guidelines for the Alternative Care of Children, Guideline 115. Havana Rules, Rule 85.

[609] Committee on the Rights of the Child, General Comment No. 8, *The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia),* CRC/C/GC/8, 21 August 2006, paras. 44 and 48.

[610] U.N. Guidelines for the Alternative Care of Children, Guideline 116.

[611] U.N. Guidelines for the Alternative Care of Children, Guideline 115.

[612] Jamaicans For Justice, Report on "The Situation of Children in The Care of The Jamaican State", presented to the IACHR in November 2009, p.13.

494. The problem of proper and systematic training for the personnel at institutions has prompted the Committee on the Rights of the Child to make several specific comments and recommendations regarding some States in the region, as is the case, for example, of Grenada[613], Nicaragua[614], Dominican Republic[615] and Trinidad and Tobago.[616]

495. The Commission most especially stresses the importance of including the professional profiles necessary based on the characteristics of the children and adolescents being cared for in the residential centers and institutions. Requirements for employment and training of staff must be taken into account, most especially in the case of staff working with small children[617], children from indigenous populations[618], as well as children living with HIV/AIDS or with other chronic diseases, and children with disabilities.[619]

496. In addition, the Commission considers it advisable for the States to establish in codes of conduct for staff working at residential centers and institutions as part of their domestic regulations.[620] These regulations must define the standards for workplace conduct and the manner in which all the staff must behave and treat children. It is also necessary to include clear reporting procedures on allegations of

[613] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Grenada, CRC/C/GRD/CO/2, 22 June 2010, para. 22.

[614] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, 1 October 2010, para. 27.

[615] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Dominican Republic, CRC/C/DOM/CO/2, 1 February 2008, para. 53.

[616] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 23.

[617] Committee on the Rights of the Child, General Comment No. 7, *Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, paras. 23 and 32.

[618] Committee on the Rights of the Child, General Comment No. 9, *The Rights of Children with Disabilities*, CRC/C/GC/9, 27 February 2007, 43rd Session, para. 48.

[619] Committee on the Rights of the Child, General Comment No. 9, *The Rights of Children with Disabilities*, CRC/C/GC/9, 27 February 2007, 43rd Session, para. 43. U.N. Guidelines for the Alternative Care of Children, Guideline 117.

[620] Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights to the Child (Articles 4 and 42 and paragraph 6 of Article 44),* CRC/GC/2003/5, 27 November 2003, para. 53. U.N. Guidelines for the Alternative Care of Children, Guideline 107.

misconduct by any person working there. It is especially advisable to provide procedures to be followed in the cases of violence or abuse at the centers or institutions.[621]

497. With regard to codes of conduct, the Commission notes that, according to information received, although some States in the region have developed this sort of instrument, as a general rule the existence of such regulations in not common. Thus, some States, such as Colombia, El Salvador and Mexico, for example, mentioned the existence of the Code of Ethics that is mandatory for all care institutions. The Commission notes that the Codes of Conduct must be specific in format as they are to be used to favor implementation and compliance with the rules governing the functioning of child protection and care services in residential institutions.

498. In addition, the Commission has found that the lack of proper supervision of staff can also pose a problem.[622] In this regard the Commission finds that it is necessary that the director of the institution be properly qualified to perform his/her duties in the direction and management of an institution of this kind. Moreover, it must be made explicitly clear to the directing staff at the institutions that they are responsible for ensuring the proper operation of the institution in accordance with the rules and regulations in force, and for ensuring that all staff members properly perform their duties, in addition to their obligation to take proper measures for prevention and for response in the event of any irregularity. The Commission considers that, in order to ensure the greatest possible protection of children while they are in the care of care centers and institutions, the laws must provide for sanctions that hold the directing personnel duly responsible in the event of evidence of a lack of due diligence in ensuring the proper functioning of these care centers and institutions and protection of the rights of the children and adolescents.

499. As for the State's obligation to regulate aspects pertaining to the staff at these institutions, the Commission emphasizes the findings of the U.N. Study on Violence against Children, which showed an obvious link between violence towards children and adolescents at alternative care institutions, found to reach alarming levels, and the shortcomings involving the number and suitability of the staff working at these institutions:

> Unqualified and poorly remunerated staff are widely recognized as a key factor linked to violence within institutions. Low pay and status frequently result in poorly motivated employees and rapid staff turnover, and under-staffing is a serious problem. For example, in a number of countries it has been documented that staffing ratios in institutions for children with disabilities may be as high as one hundred children for each staff member. Under such conditions,

[621] Joint report of the Special Rapporteur on the sale of children, child prostitution and child pornography and the Special Representative of the Secretary-General on Violence against Children, A/HRC/16/56, 7 March 2011, para. 112.

[622] See, U.N. Study on Violence against Children, p. 182.

> children are often left unattended for long periods, and overnight entire wards are unattended or padlocked, with only a skeleton night shift. Physical and sexual abuse in such instances is rife. Relatively few staff in care institutions receive any special training in child development or rights, or information about issues of violence. In institutions for children with disabilities, inadequately trained staff can be quick to lash out at the children. Overwhelmed staff may resort to violent measures to maintain discipline, particularly when supervision is lacking. Staff 'burnout' results in increasingly negative attitudes towards children and in patterns of physical and impulsive responses to confrontation. Individuals with histories of violence against children, including sexual abuse and exploitation, may seek out jobs that allow them easy access to children. Rigorous background checks on personnel are still rare, allowing an employee who has been dismissed from one institution to be hired by another and to continue a pattern of abuse.[623]

500. All staff members must be clearly identified to make it easy for the children, their relatives, and visitors, and for monitoring and supervision mechanisms, to identify individuals, their behavior and how they perform their duties.

501. Lastly, the Commission considers it very important that the States bear in mind the demands for gender-related protection. This, in the opinion of the Commission, entails that, at the very least, the care centers and institutions employ enough staff members of both sexes to properly meet the needs of the children and adolescents at those centers and institutions. Suitable guarantees must be provided for aspects such as ensuring proper privacy for the children and adolescents as part of the s' rules, in the design of the instalations, and codes of conduct governing the actions and behavior of staff members of both sexes.

502. The Commission reiterates the need for and obligation to regulate basic aspects, such as the minimum number of staff members, their different professional profiles as well as their duties, as required to provide the attention and care services that the children placed in residential alternative care need, giving proper consideration to the special needs that specific groups of children may have. Furthermore, the Commission recommends that the professional skills of all staff be reinforced and developed on a regular basis by means of programs for training and education.

7. Separation based on age and on protection and care needs

503. The Commission has established, as it did in the case of children deprived of their liberty within the juvenile justice system, that arising from the obligations to guarantee the rights of the child, there is the obligation to keep children

[623] See, U.N. Study on Violence against Children, p. 181.

separate from adults, both at centers where they are deprived of liberty[624] and at residential care centers and institutions.[625]

504. Proper placement of children and adolescents is also required inside the facilities, where issues of age, sex, treatment needs and requirements, and other relevant conditions of the various children and adolescents are taken into account.[626] The Commission has also spoken out, on a number of occasions, regarding the inadmissibility of situations where children and adolescents in conflict with criminal laws are kept together with children and adolescents in need of protection and care.[627]

505. The Commission has become aware of situations where children of different ages shared instalations and services with adults admitted to the same center; this type of situation has been found most especially at residential facilities that care for people who have some type of disability or medical condition.[628] This situation has been reported in the case of Guatemala, Mexico, Paraguay and Uruguay, among other States. In the case of Uruguay, for example, it has been reported that there is an institution that houses more than 80 people with disabilities of all ages; most enter the facility when they are children or adolescents, yet remain there even when they become adults given the unlikelihood that they can be reintegrated with family and community. In this regard, the Commission is emphatic concerning the need for sections that specialize in the treatment and care of children and adolescents, and that be separated from the instalations for adults.

506. The Commission notes that there are States in the region with a predominance of residential care centers and institutions that operate on the basis of age ranges, sex or special-care requirements, where children and adolescents are admitted; whereas in other States, most are mixed residential facilities housing a population of both sexes and different ages, although they do have separate areas for specific groups.

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[624] See IACHR, *Juvenile Justice and Human Rights in the Americas*, especially paras. 249, 264, 305 and 306, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XIX, Havana Rules, Rule 29.

[625] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XIX. The exception to the principle of separating children from adults applies in those cases when entry is to an institution for protection and care adapted to receive the child together with one of his/her parents or relatives such as, for example, the case of homes for the protection of women and children subjected to intra-family violence. Nevertheless, these cases would not involve one of the situations covered in this report given that the child would remain in the care of one of his/her parents or of a relative, not the situation of alternative care because the child is not being cared for by parents or relatives.

[626] IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 422 and 426, Havana Rules, Rule 28.

[627] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 406.

[628] For example, the Commission has recently become aware of a situation of violence against children interned with adults in a residential care facility through its system of precautionary measures, MC 370/12 – 334 patients at the Federico Mora Hospital, Guatemala, 20 November 2012.

507. Nevertheless, based on the information gathered, the Commission notes that, at large residential institutions where children and adolescents of different ages live together, children and adolescents are not always properly separated on the basis of age, sex and other conditions requiring special care. In the opinion of the Commission, the above does not necessarily mean doing away with areas and contexts where all the children and adolescents are able to socialize colectively. Nevertheless, the design and organization of the institution must properly take into account the different protection needs of each child and adolescent to as to prevent any form of violence against them or any other infringement of their rights. Therefore, it is appropriate for residential institutions to have separate areas, such as, for example, bedrooms, sanitary services, among others, for the different groups of children and adolescents and, at the same time, common areas for socialization and community life under the proper supervision of the staff.

508. The Commission has found that the criteria regarding separation of children based on age, sex or other protection needs may have the undesired effect of separating brothers and sisters who are in institutional care, if they were to be placed in different centers because of age or sex. In order to prevent this separation of siblings, and unless it were against their wishes or best interests, the authorities deciding where children being placed in care are to be located must choose the most appropriate means for keeping sibling together and avoid an additional disruption of family bonds. The U.N. Guidelines for the Alternative Care of Children also provide similar advice to the States when it comes to adopting regulations for determining the type of alternative care:

> Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests.[629]

509. In this regard, the Commission notes that several countries in the region pay special attention to this aspect. In Colombia, according to the answers to the questionnaire, one of the fundamental guidelines followed by the competent authority is maintaining family unity and, for that reason, groups of siblings are placed in the same institution. The Commission has also identified other States, as in the case of Chile, where there are regulatory norms and technical guidelines providing that siblings should not be separated, or, in any case, that reasonable efforts should be made to prevent this from occurring; this is also the case in the United States. To prevent this from happening, these States foster incorporation in mixed residences if the siblings are of different sexes, or an effort is made to place them in a foster family program. In Brazil, according to some surveys, 66.4% of the institutions surveyed stated that they assign priority to keeping or reconstruction of sibling groups.[630] Other States, such as Mexico,

[629] U.N. Guidelines for the Alternative Care of Children, Guideline 17.

[630] Instituto de Pesquisa Económica Aplicada (Ipea), Levantamento nacional de abrigos para crianças e adolescentes da rede SAC, 2003, p. 2.

for example, have reported that in order to prevent siblings from being separated, they have a Subprogram called "Fraternal Ties" [Lazos Fraternos], that is used in care centers and is aimed at fostering weekly reunions for children who have siblings at other s. The Commission is of the opinion that everything possible should be done to ensure that siblings can remain together and that, if separation is unavoidable, to enable them to remain in contact unless this were to be contrary to their wishes or best interests.

510. The Commission stresses that, in order to prevent infringement of rights, proper measures and precautions must be taken with regard to conditions for privacy offered by the facilities and services used by children and adolescents, most especially to prevent acts of sexual violence or that threaten the personal integrity and safety of the children and adolescents. The Commission considers that the bedrooms and services of hygiene for the children must be clearly separated from those used by staff members at the institution. Furthermore, in the case of institutions working with a mixed population, bedrooms and services of hygiene must be clearly differentiated.

511. In this regard, the Commission is most concerned by the risk of the different forms of violence to which children and adolescents in these circumstances may be exposed. The Court has also made specific mention of this concern, pointing out that the lack of separation fosters an environment of insecurity, tension and violence at these s.[631] Furthermore, the U.N. Study on Violence against Children also found situations such as those mentioned above, where children shared instalations with adults, as well as situations where there were small children living together with adolescents, small girls with adolescent boys, or children with severe mental disabilities with adolescents, all situations that were found to pose a risk and expose the children to the possibility of becoming victims of peer-on-peer violence. According to the U.N. Study:

> Many facilities fail to segregate vulnerable children from dangerous peers. Children who are vulnerable to violence because of age, size, sex or other characteristics are often housed together with older children with a history of violent behavior.[632]
>
> Children in residential care are vulnerable to violence from their peers, particularly when conditions and staff supervision are poor. Lack of privacy and respect for cultural identity, frustration, overcrowding, and a failure to separate particularly vulnerable children from older, more aggressive children often lead to peer-on-peer violence. Staff may sanction or encourage peer abuse amongst children – either to maintain control or simply for amusement.[633]

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[631] I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merit, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 169.

[632] U.N. Study on Violence against Children, p. 182.

[633] U.N. Study on Violence against Children, p. 189.

> The violence suffered by children in institutions can be exacerbated when they are housed with adults or older children; this may lead to physical and sexual victimization by other older children and adult inmates.[634]

512. In this regard, several States have expressly regulated issues involving the separation of children from the adults working in the institutions, especially in the case of bedrooms and the use of services of personal hygiene. In Chile, for example, according to the answers to the questionnaire, the regulations provide that staff members' bedrooms at these institutions may not be in areas shared with children and adolescents.

513. The Commission considers it important that the States, when setting the minimum standards for the organization and operations of residential institutions, take into consideration the need to separate children from adults, and to separate the different groups of children and adolescents based on different characteristics important for their protection, in addition to considering the physical requirements for the instalations and the code of conduct for staff members.

8. Maintaining records , personal files and other documentation

514. As already mentioned, the regulatory norms must provide for the obligation of all residential centers and institutions to keep complete and updated records of all the children housed there. The record must be linked to detailed files on each child.

515. With regard to the content of these files, the Commission considers it essential that they include information regarding the admission and departure of each child at the center or institution, including, the date, form, content and details of each child's care placement; they must also include a copy of the decision issued by the competent authority who ordered admission into the institution for protection, as well as the appropriate identity documents and other personal information. The records of children in care centers and institutions must be complete, up to date, confidential and secure. The child's file must include information concerning his/her family, as well as evaluations and their complete reports performed when the protection measure began. In addition, the child's file must include periodic follow-up evaluations by a multidisciplinary team in order to determine whether the measure is still appropriate, needs to be changed or should be lifted, and all information concerning the re-attachment with his/her family and community, with the individual care plan of the child as major component of the file. Medical and psychological records, as well as

[634] U.N. Study on Violence against Children, p. 176. Much the same is stated in Guideline 124 of the U.N. Guidelines for the Alternative Care of Children: "Measures should be taken so that, where necessary and appropriate, a child solely in need of protection and alternative care may be accommodated separately from children who are subject to the criminal justice system."

information regarding treatments of any kind and the child's evolution must also be included in the file, together with information on his/her education and training. This record should follow the child throughout the period he/she is in alternative care and be consulted by duly authorized professionals , responsible for his/her current care.[635]

516. These records should be made available to the child and to his/her parents or guardians as well, within the limits of the child's right to privacy and confidentiality, as appropriate. Proper counseling should be provided to the child and his/her family before, during and after consulting the file.[636] These records and files must be available at all times at the center or institution to be consulted by the competent authorities and by independent inspection and monitoring mechanisms.

517. In addition, the Commission stresses the importance of having the norms governing the operation of alternative care facilities include the necessary provisions to guarantee the confidentiality of the information on each child and the proper handling of the same by all the professionals working with the children. These rules must be included in the code of conduct in order to ensure that all staff members at these institutions are aware of and comply with of the same.[637]

518. The information gathered by the Commission regarding this issue shows that the situation varies in the different States on the continent. Whereas, based on the answers to questionnaire, in some States such as Chile, El Salvador or Nicaragua, for example, all institutions, both public and private, must include the information concerning the children and adolescents being cared for in a database managed by the State; in other States, such as Paraguay and Peru, the records found at the institutions are incomplete and, in the case of some children, there are no medical or family histories pertaining to them.

519. The Commission considers that in order to achieve the goal of restoring and protecting rights that meet the needs for protection and care of every child individually, it is essential that all institutions keep complete files on all the children so as to allow for timely, appropriate and thorough care by the professionals in charge of the child. The analysis of the child's records is also a tool to be used in the monitoring and oversight of the various institutions by different bodies, given that it shows all actions taken, the characteristics of the care provided for the child based on his/her needs, and the diligence shown in taking the actions needed for the child for re-attachment with his/her family.

520. In addition, and also with regard to the kind of information that, as a bare minimum, must be included in the institutions' records, residential institutions

[635] U.N. Guidelines for the Alternative Care of Children, Guideline 110. Also see Havana Rules, 21 through 23.

[636] U.N. Guidelines for the Alternative Care of Children, Guideline 111.

[637] U.N. Guidelines for the Alternative Care of Children, Guideline 112.

must keep a record of the staff employed at all times and of their duties and responsibilities.[638] Also, for the purpose of the monitoring, oversight and inspections by the competent authorities, institutions must keep records of financial transactions, proper account books, as well as a record of complaints and claims and how these were handled.

9. Mechanisms for participation

521. The Commission understands that children and adolescents have the right to voice their opinions, and for these be taken into account for purposes of the organization and operation of the services provided to them by the center or institution. Considering that the organization and rendering of the service is closely tied to the applicability and full exercise of the children's rights, the child's right to be heard is especially important, as recognized in Article 12 of the Convention on the Rights of the Child.[639] The proper guarantee of this right means that the State, when regulating residential alternative care, must stipulate that these centers and institutions must create properly adapted and effective mechanisms and procedures to ensure the participation of the children in the organization and the manner in which services are provided within the center or institution.[640]

522. In this regard, the Commission recommends that residential centers and institutions have participative structures and mechanisms that allow the children to express their opinions and views concerning the operations, the activities and how they are treated at the , and to make suggestions. The participation and opinions of the children themselves will help improve the environment at these institutions and becomes an important factor in reducing discrimination and violence by providing formal and permanent channels for the children to express themselves and share their concerns as to how the center operates.

523. In terms quite similar to the opinion held by the Commission, the Committee on the Rights of the Child has stated:

> Mechanisms must be introduced to ensure that children in all forms of alternative care, including in institutions, are able to express their views and that those views be given due weight in matters of their

[638] U.N. Guidelines for the Alternative Care of Children, Guideline 109.

[639] Also see Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, which is specific regarding the content and scope of Article 12, making it easier to understand and apply.

[640] The U.N. Guidelines for the Alternative Care of Children contain similar provisions recognizing the child's right to be heard and to have his/her opinions be taken into account with regard to all aspects of alternative care. Guideline 6 states: "All decisions, initiatives and approaches falling within the scope of the present Guidelines should be made (...) respect[ing] fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information. Every effort should be made to enable such consultation and information provision to be carried out in the child's preferred language."

> placement, the regulations of care in foster families or homes and their daily lives.[641]

524. In addition, the Commission considers it important to apply the recommendations made by the Committee on the Rights of the Child on the issue of children's participation in schools, to the context of residential care centers and institutions, making whatever changes or adjustments may be necessary. In this regard the Committee stated:

> Children's participation is indispensable for the creation of a social climate in the classroom, which stimulates cooperation and mutual support needed for child-ed interactive learning. Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures. The Committee welcomes the expansion of peer education and peer counseling.[642]

> Steady participation of children in decision-making processes should be achieved through, inter alia, class councils, student councils and student representation on school boards and committees, where they can freely express their views on the development and implementation of school policies and codes of behavior. These rights need to be enshrined in legislation, rather than relying on the goodwill of authorities, schools and head teachers to implement them.[643]

525. The Commission is also of the opinion that by fostering and facilitating the children's participation in all decisions affecting them, help prepare them to make responsible decisions on their own as they gain maturity. This, therefore, becomes part of the process of personal development and maturity that the residential care center must promote and support in the children.

526. The Commission, therefore, recommends that the Member States take measures to foster opportunities for the children to express their opinions and for these opinions to be taken into account as part of the day-to-day operations of the care centers or institutions.

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[641] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 97.

[642] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 2009, para. 109

[643] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 110.

10. Regulation of disciplinary systems and the use of force

527. The Commission basis its comments on the understanding that the rules governing behavior, community life and discipline applied in care centers must be positive and constructive so as to instill in the children, at all times, a sense of responsibility, respect for others,, and awareness of the existence of rules of conduct that must be obeyed for the proper exercise of one's rights and the rights of others. The Commission feels, as does the Committee on the Rights of the Child, that the idea of comprehensive education is important for children, as part of their human, civic and social training[644]; based on this, the Commission understands that passing on the values for life in community and rules of conduct respectful of others are training and educational tools that the institutions must offer the children in a positive, constructive, participatory and non-discriminatory manner in line with human rights. The disciplinary rules applicable to children in the case of behavior that is contrary to the rules of conduct and community life in the institution must take these goals and principles into account; as stated in its *Report on corporal punishment and human rights of children and adolescents*, the Commission feels that discipline must always be administered in a respectful manner consistent with the human rights of children and adolescents, their dignity and personal integrity.[645]

528. Nevertheless, information gathered in a number of investigations shows that the violence and the use of force to which children and adolescents are exposed in residential institutions also stems from the application of certain disciplinary measures or methods used to control the children at those centers.[646]

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[644] Committee on the Rights of the Child, General Comment No. 1, "*Article 29(1): The Aims of Education*", CRC/GC/2001/1, 17 April 2001; General Comment No. 8 of Committee on the Rights of the Child, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, inter alia)*, RC/C/GC/8, 21 August 2006, accepts forms of positive discipline that are consistent with the children's human rights and dignity. The Havana Rules contain similar provisions, most especially Rule 66: "Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person."

[645] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, OEA/Ser.L/V/II.135., doc. 14, 5 August 2009, most especially para. 97.

[646] The Report of the Independent Expert for the U.N. Study on Violence against Children found that: Violence by institutional staff for the purpose of "disciplining children, includes beatings with hands, sticks and hoses, and hitting children's heads against the wall, restraining children in cloth sacks, tethering them to furniture, locking them in freezing rooms for days at a time and leaving them to lie in their own excrement." (paragraph 56 of the report). According to the U.N. Study on Violence against Children, which provides more detailed information concerning findings around the world: "Violence against children in care and justice systems is legitimized by long-held attitudes and behaviors, and failures in both law and its implementation. At the time when the establishment of care institutions for children in disadvantaged and marginal groups was a preferred social policy, corporal punishment was almost universally endorsed for the discipline and control of unruly children. This effectively meant that institutionalized children were exposed to a brutal regime and to frequent violence. In all regions, by omission or commission, this situation still prevails." (page 180); the report found that "Children in detention are frequently subjected to violence by the staff, as a form of control or punishment, and often for minor infractions," (page 197), and stresses concern over the fact that "[v]iolent forms of discipline remain legal and socially accepted in many States, despite the

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529. The Commission deems it important to stress that, although the use of certain disciplinary measures or measures for controlling the behavior of children may be acceptable, these measures must be applied under specific circumstances, especially for the purpose of preventing more serious consequences –for example in order to keep the child safe and protect him/her or other children from harm, and to maintain order and safety-- within specific limits, strictly respecting human rights. The Court and the Commission have extensively developed the obligations of the State to protect people from mistreatment and, most especially, have spoken out in connection with people deprived of their liberty.[647]

530. The Commission considers it necessary for the States to use their legislation to set clear limits to the disciplinary systems at these institutions and for them to acknowledge that all measures involving cruel, inhuman or degrading treatment, or any form of physical or mental abuse or harm, such as corporal or humiliating punishment, placement in a dark cell, solitary confinement, restraint or immobilization as punishment, reduction of food or limiting or denying the child contact with family members, or any other measure that could jeopardize the child's personal integrity or his/her mental or physical health, his/her right to education and to contact with members of his/her family, are strictly forbidden.[648] All collective disciplinary

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consistent interpretation of the CRC and other human rights instruments as requiring their prohibition and elimination. Most recently, this has been underlined by the Committee's General Comment No. 8, 2006 on *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, inter alia),* RC/C/GC/8, 21 August 2006.

[647] Court decisions that can be consulted include, *Resolution of the Inter-American Court of Human Rights dated 27 January 2009, Petition for Opinion filed by the Inter-American Commission on Human Rights*, resolution para. 14. I/A Court H.R., *Case of Caesar v. Trinidad and Tobago.* Merits, Reparations and Costs. Judgment of 11 March 2005. Series C No. 123. I/A Court H.R., Case Bámaca Velásquez v. Guatemala. Merits. Judgment of 25 November 2000. Series C No. 70, para. 150; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al*, para. 164; and I/A Court H.R., *Case of Maritza Urrutia v. Guatemala.* Merit, Reparations and Costs. Judgment of 27 November 2003. Series C No. 103, para. 87. As for the position of the Commission, see reports on specific subjects, IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 547 to 570; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 371 to 418.

[648] See Havana Rules, Rule 67; Riyadh Guidelines, Guideline 54; IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII; IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 547 to 570; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 371 to 418; Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, inter alia),* RC/C/GC/8, 21 August 2006; Committee on the Rights of the Child, General Comment No. 10, *Children's rights in Juvenile Justice*, CRC/C/GC/10, 44th session, 25 April 2007. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, dated 5 August 2011, 66th session.

See the Convention on the Rights of the Child, especially Article 19 already mentioned above and Article 37:

> Article 19(1) "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

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measures and sanctions must be expressly forbidden as must multiple sanctions for the same infraction.[649]

531. The Committee on the Rights of the Child, in turn, has referred to disciplinary procedures in the following terms:

> Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of Article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned.[650]

532. In this regard, Guideline 96 of the U.N. Guidelines for the Alternative Care of Children stipulates that :

> All disciplinary measures and behavior management constituting torture, cruel, inhuman or degrading treatment, including closed or solitary confinement or any other forms of physical or psychological violence that are likely to compromise the physical or mental health of the child, must be strictly prohibited in conformity with international human rights law. States must take all necessary measures to prevent such practices and ensure that they are punishable by law. Restriction of contact with members of the child's family and other persons of special importance to the child should never be used as a sanction.

533. The Commission understands that state legislation regarding the operation of residential care centers and institutions must require that these facilities adopt disciplinary measures that are in strict compliance with the law and respect the human rights of the children and adolescents. Most especially, the law must require that disciplinary rules adopted by the institutions include the following: a) the behavior that is considered a breach of discipline b) the nature and duration of the disciplinary sanctions that may be imposed; c) the competent authority in charge of imposing the

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> including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."
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> Article 37(a): "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

[649] Havana Rules, Rule 67. With regard to the prohibition of collective sanctions, see IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII.4.

[650] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in Juvenile Justice*, CRC/C/GC/10, 25 April 2007, 44th session, para. 89.

sanctions; d) the competent authority to whom an appeal against the sanction is to be addressed[651] or to whom a complaint or accusation should be presented; in addition, the rules must be in writing and be displayed in areas of the center where they are visible, and be available in language appropriate for children so as to ensure that every person knows and understands them. Each child should receive a copy of the disciplinary rules upon his/her arrival at the center; this document must clearly state that violence is banned as form of discipline. Children accused of committing disciplinary infractions must be informed of the fact without delay and in such a way that they understand the infraction they are accused of having committed and the applicable punishment.[652] In general, the Commission considers that disciplinary measures and the procedures for their application are justified provided they are stipulated in the rules, have a legitimate purpose from the standpoint of the best interests of the child and the goals of the special measures of protection, and that they are appropriate, necessary and proportional, and are strictly in keeping with human rights.[653] Insofar as the legitimate purposes of disciplinary measures are concerned, the Commission understands that they are intended to protect children, and maintain order and safety at the care s. In addition, enforcement must take the child's upbringing into account regarding the values of respect, living in community and civic-mindedness.

534. As stated in its *Report on the Human Rights of Persons Deprived of Liberty in the* Americas, the Commission considers that:

> Prison authorities should make sure disciplinary procedures are used on an exceptional basis, and only resort to them when other means prove to be inadequate to maintain proper order. Only behavior that constitutes a threat to the order and safety should be defined as offenses warranting disciplinary action.[654]
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> In the end, disciplinary systems will be effective to the extent that they are suitable for fulfilling their objectives by striking a balance between human dignity and proper order; and by promoting an overall climate of respect in which inmates develop a sense of responsibility toward complying with the rules.[655]

[651] Havana Rule number 68: "Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles: (a) Conduct constituting a disciplinary offence; (b) Type and duration of disciplinary sanctions that may be inflicted; (c) The authority competent to impose such sanctions; (d) The authority competent to consider appeals."

[652] Havana Rules, Rule 70.

[653] IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 570.

[654] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 372.

[655] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 374.

535. Nevertheless, the Commission views with concern that in several States' answers to the questionnaire, they reported the lack of any regulated disciplinary processes or stated that there are no disciplinary measures in the institution, yet at the same time they report a number of measures that range from loss of "privileges," such as watching television, to others restricting the children's freedom and include suspension of outings for recreational activities, or the assignment of work at the center itself; some reports also speak of punishments consisting, for example, of kneeling for one hour or four hours, or standing still, physical and humiliating punishments, taking away food, not being allowed to attend classes or depriving them of visits by family members or visits to the family home.[656] Moreover, when the rules of the center include a description of behavior constituting an infraction, the Commission notes that the categories tend to be quite broad, leaving a great deal of discretionary power in the hands of staff members when it comes to imposing punishment[657]; this, in the opinion of the Commission, is contrary to to the possibility for the children to be aware of and understand what behavior is forbidden and the possible punishment involved; this can lead to abuse, arbitrary decisions, violations of the child's right to personal integrity, the use of violence, and the infringement of other rights such the right to an education, to maintain family ties, and, moreover, lead the child to feel that this type of punishment is permissible.

536. Based on the information gathered by Commission for the preparation of this report, it was found that serious challenges remain in connection with this issue. In the case of Guyana, for example, the information gathered by the Commission shows that only 16% of the institutions have written disciplinary rules that are made available for the children's knowledge; moreover, 55% of the institutions allow corporal punishment as a form of punishment, and only 70% of the institutions in Guyana expressly forbid placing children in isolation as a disciplinary measure.[658]

537. In addition, the Commission has also spoken out several times concerning the importance of having properly trained and qualified staff to attend to the children and adolescents being cared for at these institutions, that they be cognizant of human rights and the limits to disciplinary measures and the use of force. In addition, staff should also have the skills needed to deal with tension and inter-personal conflicts

[656] Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, pgs. 68 and 357. In this regard, see: Report of the Independent Expert for the United Nations Study on Violence against Children, 29 August 2006, A/61/299, paras. 56 and 62.

[657] Mexico. DIF, Reglamento interno de los centros nacionales modelo de atención, investigación y capacitación casa hogar para niñas - casa hogar para varones [internal rules of functioning of national residential care s, research and training, Shelter for girls – Shelter for boys].

[658] Ministry of Labour, Human Services and Social Security, Assessment of procedural and physical standards in children's residential care institutions in Guyana. Summary and Recommendations, August 2006, p. 14.

that may arise without resorting to disciplinary sanctions.[659] Although the Commission was not made aware during the drafting of this report of any specific situations in which control over discipline, activities involving custody and surveillance and the taking of disciplinary measures had been delegated to the adolescents themselves at these institution, the Commission deems it advisable to reiterate that this practice is contrary to international rules governing human rights.[660]

538. On the issue of corporal punishment, the Commission has stated that it is forbidden as a disciplinary punishment as it is considered contrary to the dignity of the child and is a violation of Articles 5(1) and 5(2) of the American Convention.[661] The Commission is of the opinion that neither should disciplinary measures be humiliating or degrading for the children subject to them,[662] since the purpose is to maintain order and safety in the institution. In particular, the Commission already expressed its concerning regarding the situation found in the region on the matter of imposing physical and humiliating punishments at care centers and institutions, and emphatically recommended that all States that have not yet done so, include in their legislation a clear and express prohibition, that leaves no room for doubt, of the use of this form of violence against children as a disciplinary measure.[663] Nevertheless, the Commission notes with concern that not all the States in the region have prohibited all forms of physical punishment or humiliating treatment as a form of discipline in the context of alternative care in centers and institutions, or continue to follow the practice, with corporal punishment and humiliation as one of the commonly imposed forms of punishment. The Commission agrees with the Court in reminding the States that the adoption of legislation and measures of other kinds become even more necessary when

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[659] The Commission said much the same in the *Report on the Human Rights of Persons Deprived of Liberty in the Americas,* para. 375. For general information, see, Penal Reform International (PRI), Handbook on Good Prison Practice: Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 2002, pp. 37 and 38.

[660] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* (Principle XXII.5): "Persons deprived of liberty shall not be responsible for the execution of disciplinary measures, or for custody or surveillance activities, not excluding their right to take part in educational, religious, sporting, and other similar activities, with the participation of the community, non-governmental organizations, and other private institutions.". IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 393. Havana Rules, Rule 71.

[661] IACHR. *Report on corporal punishment and human rights of children and adolescents*, OEA/Ser.L/V/II.135, 5 August 2009. The IACHR embraces the Committee on the Rights of the Child's definition of corporal punishment as any punishment in which physical force is used and is intended to cause some degree of pain or discomfort, however light, United Nations Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*, CRC/C/GC/8, 21 August 2006, 42nd session, para. 11. The position of the Committee on the Rights of the Child on this issue is the same as that of the Commission. In its report, the Commission stated that the "that States are obliged to eradicate the use of corporal punishment as a way of disciplining children and adolescents in all areas of their lives." para. 65.

[662] Along these same lines, European rules for juvenile offenders subject to sanctions or measures, Rule 7: "Sanctions or measures shall not humiliate or degrade the juveniles subject to them."

[663] IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents*, most especially paras. 34, 35, 116, 119, and section VII.

there is evidence of practices of any kind that are contrary to the American Convention.[664] The Committee on the Rights of the Child, in turn, repeatedly recommends that in their legislation the States prohibit corporal punishment at institutions; this has occurred, for example in the case of the Bahamas[665], Belize[666], Chile[667], Cuba[668], Dominica[669], Guatemala[670], Saint Lucia[671] and Trinidad and Tobago[672], among other States in the region. In some cases the prohibition of corporal punishment has been found in regulatory norms, as in the case of Paraguay[673].

539. The information received by the Commission shows that some institutions persist in the use of practices contrary to the aforementioned rules banning corporal and humiliating punishment, such as: the use of sticks to keep order, leaving children in the sun without food when they have disobeyed, or application of substances that hurt the child's skin on naked bodies.[674] There have also been reports of

[664] I/A Court H.R., *Resolution of the Inter-American Court of Human Rights of 27 January 2009, Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, resolution para. 12.

[665] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Bahamas, CRC/C/15/Add.253, 31 March 2005, para. 36.

[666] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Belize, CRC/C/15/Add.252, 31 March 2005, para. 41.

[667] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile, CRC/C/CHL/CO/3, 23 April 2007, para. 40.

[668] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Cuba, CRC/C/CUB/CO/2, 20 June 2011, para. 36.

[669] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Dominica, CRC/C/15/Add.238, 30 June 2004, para. 29.

[670] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, 25 October 2010, para. 54.

[671] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Saint Lucia, CRC/C/15/Add.258, 21 September 2005, para. 35.

[672] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 39.

[673] Article 26 of Resolution 25/06, Reglamento para la Habilitación y Funcionamiento de Hogares de Abrigo para Niños, Niñas y Adolescentes en el Sistema de Protección Especial [Regulation for Habilitation and Operation of Shelters for Children and Adolescents in the System Special Protection] provides: "(…) medidas no permitidas: ningún niño/a o adolescente podrá ser sometido a castigos o emocionales o ser amenazado (…) ["...measures that are not allowed include: no child or adolescent may be subjected to emotional punishment or be threatened...."].

[674] RELAF - Latin American Foster Care Network, "Niñez y adolescencia institucionalizada: visibilización de graves violaciones de DDHH". [Institutionalized Childhood and Adolescence: spotlighting gross human rights violations]. Series: Publicaciones sobre niñez sin cuidados parentales en América Latina:

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the existence of cells for the punishment of those who have committed violent acts. These practices are even more serious in the case of mentally or intellectually disabled children and adolescents due to the impact it has on them.[675]

540. With regard to the use of force, restraint and other measures of control over children, these should be completely forbidden, except when strictly necessary to prevent physical or psychological harm to the child or others, and be used when no other method is possible, pursuant to law, in a manner that is reasonable, proportional and respectful of the child's fundamental rights.[676] This means ruling out, without any exceptions whatsoever, the deliberate and punitive use of force to cause pain or humiliation as control measure. In this regard, the Commission agrees with the Committee on the Rights of the Child in its statements regarding the use of force, the circumstances under which its use may be justified, and the conditions and limits for its use, namely that:

> (...) there are exceptional circumstances in which teachers and others, e.g. those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behavior which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.[677]

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Contextos, causas y respuestas [Publications on children without parental care in Latin America: Contexts, causes and responses], 2011.

[675] On the matter of the effects that the use of force or violence has on mentally disabled persons given their special vulnerabiltiy, see, Inter-American Court of Human Rights, *Case of Ximenes Lópes vs. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 127. Also, Disability Rights International, answer to the questionnaire. Disability Rights International and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos "Abandonados y Desaparecidos: Segregación y Abuso de Niños y Adultos con Discapacidad en México". [Disability Rights International and the Mexican Commission for the Defense and Promotion of Human Rights of Abandoned and Disappeared Persons: Segregation and Abuse of Children and Adults with Disabilities in Mexico]. Printed Edition updated to June 2011.

[676] Report of the Independent Expert for the U.N. Study on Violence against Children, 29 August 2006, A/61/299, para. 54. U.N. Guidelines for the Alternative Care of Children, Guideline 97:

> "Use of force and restraints of whatever nature should not be authorized unless strictly necessary for safeguarding the child's or others' physical or psychological integrity, in conformity with the law and in a reasonable and proportionate manner and with respect for the fundamental rights of the child (…)."

[677] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia),* CRC/C/GC/8, 2 March 2007, para. 15.

> Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately.[678]

541. In many States in the region there is a strong tendency to administer psychiatric medications to children who are in care institutions as a means for achieving control and submission. Based on information received by the Commission, these medications are generally prescribed by the medical staff at these institutions, with dosage depending on the behavior of the specific individuals, without any diagnosis of psychiatric pathologies or complex psychological afflictions that would justify medical treatment with these drugs. The use of drugs, not as part of a therapeutic treatment, but as a way of controlling children, is a violation of their personal integrity, health and dignity. As reported to the Commission, children and adolescents are being medicated with psychiatric drugs to help them manage to "tolerate" the institution.[679]

542. According to information received by the Commission, in some States, such as Argentina, psychiatric medication is administered at 68% of institutions providing all types of care[680]. The problem of the high level of psychiatric medication used is not limited to any one specific type of care, rather it is widespread and found in institutions of all kinds. In some types of care, the percentage is as high as 93% of the institutions, as is the case of specialized care.[681] The Commission stresses that the use of drugs and medication as a form of restraint or control must be expressly forbidden[682]; use of these should only be allowed for medical and therapeutic reasons and they should be prescribed by authorized specialists.

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[678] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in Juvenile Justice*, CRC/C/GC/10, 44th session, 25 April 2007, para. 89.

[679] Paper presented as part of the sub-regional consultation for preparation of this report in Peru.

[680] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)" [Indoors. The Institutionalization of Children and Adolescents in the City of Buenos Aires], pgs. 45 and 46. Depending of the specific type of care provided at the institution, the percentages range from 42% to 93% of centers administering psychiatric medication.

[681] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)", [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pP. 45 and 46.

[682] U.N. Guidelines for the Alternative Care of Children, Guideline 97: "(...) Restraint by means of drugs and medication should be based on therapeutic needs and should never be employed without evaluation and prescription by a specialist."

543. As for solitary confinement or isolation, international human rights law[683] considers that solitary confinement measures are strictly forbidden in the case of children and adolescents, be it as a disciplinary measure or as a so-called "form of protection"[684] for the child. The Commission distinguishes the exceptional use and justified means of control over the child, under the parameters already exposed, from solitary confinement or isolation. The position of the Commission in this regard is in line with the position of the Committee on the Rights of the Child and the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who emphatically stated:

> "... the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates Article 7 of the International Covenant on Civil and Political Rights and Article 16 of the Convention against Torture."[685] And in his recommendations he states that: "States should abolish the use of solitary confinement for juveniles and persons with mental disabilities. Regarding disciplinary measures for juveniles, the Special Rapporteur recommends that States should take other measures that do not involve the use of solitary confinement."[686]

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683 In its General Comment 10, *Children's Rights in Juvenile Justice*, CRC/C/GC/10, April 25, 2007, the Committee on the Rights of the Child stressed that punishment involving isolation and solitary confinement in cells must be strictly forbidden, paragraph 89; moreover, the Committee has urged the States Parties to forbid and abolish the use of isolation in children (see as examples: CRC/C/15/Add.151, paragraph 41; CRC/C/15/Add.220, paragraph 45 d); and CRC/C/15add.232, paragraph 36.a)). Also see Havana Rules, Rule 67. Rapporteur on Torture A/66/268, paragraphs 29, 33, 42, 66, 67, 77, 81 and86. The Committee against Torture recommended that people under 18 years of age not be subjected to isolation (CAT/C/MAC/CO/4, paragraph 8). The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment repeated that prolonged isolation can be a form of torture or other cruel, inhuman or degrading treatment and recommended that isolation not be used against people under 18 years of age nor for persons with mental disabilities (CAT/OP/PRY/1, paragraph 185, Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007 at the International Psychological Trauma Symposium).

Under the umbrella of the Inter-American Human Rights System see: IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 14, 262, and 548. IACHR Principles and *Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, IACHR Report on the human rights of persons deprived of liberty in the Americas, paragraphs 397 to 418. As for judgments by the Inter-American Court on the general subject of solitary confinement, see, Velazquez-Rodríguez v. Honduras, Judgment of 29 July 1988, series C, numb. 4, paragraph 156,; I/A Court H.R., Loayza-Tamyo v. Peru, Judgment of 27 November 1998, series C, number 33, paragraph 58; I/A Court H.R., Cantoral-Benavides v. Peru, Judgment of 18 August 2000, series C, num. 69; I/A Court H.R., Suárez-Rosero v. Ecuador, Judgment of 12 November 1997, series C, number 35; I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of 29 March 2006.

[684] The Rapporteur on torture found that the isolation system was also used to segregate vulnerable persons, including children, persons with disabilities, as well as lesbians, gays, bisexuals and transsexuals, for their own protection. They may be isolated at their own request or as decided by officials. A/66/268, para. 42.

[685] Report of the Rapporteur on Torture A/66/268, para. 77.

[686] Report of the Rapporteur on Torture A/66/268, para. 86.

544. As part of the sub-regional consultations undertaken for the preparation of this report, the Commission has been informed on the use of solitary confinement measures in several of the States on this continent. In some cases, evidence of this type of situation has prompted the intervention of the judiciary and caused the administrative authorities to begin monitoring the institutions.[687] The Committee on the Rights of the Child has also expressed its concern at the use of solitary confinement as a disciplinary measure at institutions.[688] The Commission finds that disciplinary measures involving isolation have not been abolished in many of the Member States and that, even where they are prohibited, in actual practice they continue to be used. Furthermore, the use of euphemisms has also been found to be common practice, when referring to solitary confinement, with terms such as "reflections rooms" and "separation from the group," among others. Regardless of the name used, the Commission reiterates, as already stated in its report on Juvenile Justice, that under international human rights law this type of punishment is strictly forbidden in the case of children and adolescents.[689]

545. Therefore, the States must expressly prohibit disciplinary measures and behavior-control measures that violate the dignity and personal integrity of the child or any measures that violate international human rights law. In addition, the law must regulate the use of force at residential care centers and institutions, following the principles of exceptional use and of the minimum use necessary, for the shortest period of time possible, and only when strictly necessary for the protection of the child or others; moreover, their use must be under the direct supervision of a specialist in medicine or psychology.

546. In addition, the States Parties must regulate criminal and disciplinary sanctions, or those of any other kind, as appropriate, to be used against staff responsible for failure to comply with the above-mentioned limitations involving disciplinary systems at residential care facilities institutions; moreover, these aspects must be taken into account when reviewing the authorization and licensing of institutions as part of the States' ongoing duties of supervision. It is also essential that the prohibition of all cruel, inhuman, humiliating and degrading forms of punishment, as

[687] This occurred in Peru in the aftermath of episodes discovered at the Ermelinda Carrera Home for young girls and adolescents. In 2006 an adolescent reported the existence of a punishment cell at the home where girls were locked up for bad behavior. The cell was a "very small room, 1.20 high by 1.50 wide, dark, dirty and foul smelling, with insects and spiders (...). In the cell –it is not known how long it had been in use – adolescents who misbehaved were locked up for days or weeks for them to 'reflect on their misbehavior.'" RELAF - Latin American Foster Care Network "Niñez y adolescencia institucionalizada: visibilización de graves violaciones de DDHH" [Institutionalized Childhood and Adolescence: Raising the Profile of Serious Human Rights Violations]. Series: Publications on childhood without parental care in Latin America: Contexts, causes, and responses, 2011.

[688] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 43.

[689] IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 559 and 563.

well as the sanctions that can be imposed on staff in the event of violations, be widely disseminated among the children and those working at the institution.[690]

547. So as to ensure that in actual practice the application of sanctions at institutions does not violate the principles and limitations mentioned above, the authorities at institutions must keep standardized records of the disciplinary measures applied, identifying the child, the punishment given , the duration and the authority/ staff who ordered it. Furthermore, in compliance with the obligation to supervise, both the regulations governing the disciplinary system at institutions as well as actual application of the system, must be reviewed periodically by higher-level authorities that can objectively assess their suitability and effectiveness, and identify possible patterns of abuse or arbitrariness in the application thereof.[691]

548. Lastly, the Commission considers it essential that the institutions have specialized technical personnel trained to work with children and that in-house rules of functioning, protocols for action and professional codes be drawn to ensure the proper functioning of the institutions, a good community life and safety in the facilities, so that the lives and personal integrity of the children are not at risk.

11. Re-attachment to family and social reintegration

549. The team of professionals at the institutions must orient their intervention, from the very beginning, towards the child's re-attachment to the family and his/her social integration, for the purpose of facilitating the child's departure from the institution in as short a time as possible.[692] The individualized care plan drawn up for each child includes the route for achieving the goal of family reintegration, provided this is not contrary to the best interest of the child. Preparations for family reintegration should be made as soon as possible and, in any case, long before the child leaves the care facility[693]; the child him/herself and the family must take part in the planning of this process, thus contributing to a more effective intervention.[694] Therefore, the work of the professional team at the center means that actions cannot be carried out with the child alone, but must include the family.

550. The regulations drawn up by the States concerning the operation of the alternative care centers must clearly and unequivocally state that the purpose of these centers and institutions is to promote the protection of the child and the re-establishment of his/her family ties. This means that the entire organization and the

[690] Committee on the Rights of the Child, General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Article 19, paragraph 2 of Article 28 and Article 37, inter alia),* CRC/C/GC/8, 21 August 2006, para. 43.

[691] IACHR*, Report on the Human Rights of Persons Deprived of Liberty in the Americas,* para. 381.

[692] U.N. Guidelines for the Alternative Care of Children, Guideline 131.

[693] U.N. Guidelines for the Alternative Care of Children, Guideline 134.

[694] U.N. Guidelines for the Alternative Care of Children, Guideline 132.

institutional program must aim at the achievement of this goal. Moreover, the process for family reintegration means that the team of professionals at the institution caring for the child and his/her family must work in joint articulation with the social services and programs in the community to ensure that the support needed for family reintegration to occur and continue are available to the child and his/her family.

551. In the case of children who transition to adult age while in an alternative care center or institution, the institutional program must provide them with proposals for intervention that prepare them for independent adult life, *inter alia* with programs that provide vocational training and prepare them for the jobs that will enable them to earn income and live their life in dignity, to have access to proper housing and health services, among other social programs of assistance to young people who leave alternative care to live their lives outside the institution.[695] The Commission warns that if sufficient efforts are not made in this regard, the children moving into adulthood run the risk of finding themselves in situations where they are exploited or their rights are violated.

552. Children with special requirements, such as children with disabilities, must have access to an appropriate social assistance system or programs that will, among other things, allow them to avoid unnecessary institutionalization.[696] Children with some type of disability are the ones who may remain institutionalized for the longest period of time due to the lack of policies and social services in the community to support the family's ability to care for them or their chances of independent living without having to resort to institutionalization.

553. The Commission affirms that the States are under the obligation, as part of their national protection systems, to create services that will allow children who were in residential institutions to reintegrate with the community. Much the same has been stated by the Committee on the Rights of the Child with regard to several States in the region when recommending the strengthening of strategies that will allow reintegration with the family, as in the cases of Belize[697], Bolivia[698], Guatemala[699],

[695] U.N. Guidelines for the Alternative Care of Children, Guidelines 135 and 136.

[696] Committee on the Rights of the Child, General Comment No. 9, *The Rights of Children with Disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 49. Also see: U.N. Guidelines for the Alternative Care of Children, Guideline 132.

[697] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Belize, CRC/C/15/Add.252, 31 March 2005, para. 43.

[698] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Bolivia, CRC/C/BOL/CO/4, 16 October 2009, para. 46.

[699] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, 25 October 2010, para. 12.

Nicaragua[700] and Uruguay.[701] These programs and services must, moreover, receive adequate financing from the States to be properly implemented. The Commission also emphasizes that any program or service designed for reintegration of children who have been in residential care into the community must endeavor to combat the discrimination and stigma to which these children are often subject for having been in care institutions.

12. Data and information gathering and analysis systems

554. The Commission considers it essential that the States, for the purpose of complying with their obligations for the protection of the rights of children in alternative care, seek to draw up indicators and produce information concerning the national systems for promotion and protection of rights of the child, most specifically with regard to the operations of the residential care facilities and institutions.[702] An information and data gathering system would allow the States to determine the degree of compliance with the rules and regulations, to improve their management and facilitate proper supervision. Furthermore, one issue of concern to which the States should assign priority has to do with having complete and updated information concerning the number of children who are in the care centers and institutions, their ages, how long they have been there, the kind of care they receive and any special requirements or needs they might have.

555. When setting up an information gathering and analysis system and construction of indicators, the Commission recommends that the states bear in mind the standards of international human rights law on this subject. These systems must allow the States to assess at least the following aspects: i) the effectiveness of family protection policies, ii) analyze the causes underlying the decision to separate the child from his/her family, iii) the availability and use of different types of alternative care, iv) the extent to which care in a residential institution is used as a measure for protection, v) the main characteristics of the facilities providing residential alternative care, vi) information concerning the operation and quality of the care provided in these

[700] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Nicaragua, CRC/C/NIC/CO/4, 1 October 2010, para. 54.

[701] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Uruguay, CRC/C/URY/CO/2, 5 July 2007, para. 41.

[702] As regards the importance of having data gathering and analysis systems for the purpose of designing laws and regulations and for policy-making, also see General Recommendation 11 in the Report of the Independent Expert for the U.N. Study on Violence against Children (see paragraph 107). Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003, 34th session, paras. 48 to 50.

institutions, and vii) the success of family reattachment actions and other measures that offer a permanent solution for the child.[703]

556. The information gathered within the framework of this report has enabled the Commission to identify the efforts made by some States to produce this type of information concerning residential care facilities, as is the case, for example, in Argentina and the Dominican Republic, where initiatives of this kind were found.[704] While not failing to recognize the positive side of these initiatives in several States of the region, the Commission feels that they do not always entail the consolidation of a centralized and permanent system for gathering information aimed at policy-making and -revision on a national scale in the countries. The fact that there are federative States or States where competency over children's rights is decentralized should not stand in the way of the creation of information management systems that would allow the State to properly meet the protection needs of the children in its territory. The comprehensive, holistic, complementary and multisectoral characteristics that should prevail for public policies dealing with the protection of children and families justify the collaboration that should exist among the various administrations and territories.

557. In Argentina, for example, according to the State's answer to the questionnaire, each province has its own system for recording and organizing data on children without parental care and the operation of the care centers and institutions. There is, however, no agency at the national level in charge of producing overall statistical data that would make it possible to design comprehensive and complementary public policies. Recently a joint initiative by the Argentine State and UNICEF aimed at gathering information, called "Situation of children and adolescents without parental care in the Argentine Republic. National survey and proposals for promoting and strengthening the right to family and community," has been used as a diagnostic tool for laying the foundations for the creation of a single statistical record. In this context it has been found that very few administrations do this work systematically and continuously. One fact to be pointed out is the existence of records and programs aimed at producing statistics in the province of Buenos Aires (R.E.U.N.A) and the computerized database of the City of Buenos Aires.[705]

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[703] We recommend consulting: UNICEF - Better Care Network, Manual for the Measurement of Indicators for Children in Formal Care, January 2009. Available at: http://www.unicef.org/protection/Formal_Care20Guide20FINAL(1).pdf , as well as the Manual for implementation of the United Nations Guidelines for the Alternative Care of Children, "Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'", Centre for Excellence for Looked After Children in Scotland (CELCIS) of the University of Strathclyde; International Social Service (ISS); Oak Foundation; SOS Children's Villages International; and the United Nations Children's Fund (UNICEF) 2012.

[704] National Census of Children and Adolescents Institutionalized in Governmental and Non-Governmental facilities, conducted in 2010. Government of Dominican Republic, Answer to the Questionnaire, 2011. Government of Dominican Republic, State's Periodic Report on the implementation of the Convention on the Rights of the Child, delivered to the Committee on the Rights of the Child, 2010.

[705] The survey in question was completed in June 2012 by the Secretaría Nacional de Niñez, Adolescencia y Familia (SENAME), with the backing of the UNICEF office in Argentina.

558. In conclusion, based on the replies to the questionnaires sent for purposes of this report, the Commission has become aware of major problems on the matter of information concerning alternative care centers and institutions in the region, involving both the lack of information in many answers given by the States, as well as problems voiced by civil society regarding the dispersion and the lack of organization and updating of the information that does exist.

559. The Commission calls upon the States to strengthen their systems for producing information, providing for the appropriate participation of the children and adolescents themselves,[706] regarding the protection systems and, most specifically, on how residential care facilities are run, with a view to assessing the extent of compliance with the rules and regulations, improving management of the facilities, allowing proper supervision, and designing more effective public policies for the protection of the rights of children and adolescents. The participation of children and adolescents in the mechanisms for gathering information and in assessing how the residential institutions operate must be handled with respect for the children's right to privacy.

M. Applicability of the rights of boys, girls and adolescents

1. Right to life and personal integrity

560. The right to life is the most fundamental of human rights provided for in the instruments of the Inter-American human and other human rights systems, since without full respect for this right it is impossible to guarantee or effectively enjoy any of the other human rights or freedom.[707] The enjoyment of this right is a prerequisite for enjoyment of all other human rights as, if it is not respected, the others lack meaning[708] because the bearer of those rights ceases to exist.[709] The right to personal integrity, the

[706] Committee on the Rights of the Child, General Comment No. 12*, The right of the child to be heard*, CRC/C/GC/12, 20 July 2009.

[707] I/A Court H.R., *Case of the Gómez Paquiyauri* Brother v. Peru, Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, para. 128; I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of 25 November 2003. Series C No. 101, para. 152; and I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of 7 June 2003. Series C No. 99, para. 110. IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paragraph 266. IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 81.

[708] I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144. IACHR*, Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 266.

[709] I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Judgment of 2 September 2004. Series C No. 112, para. 156. IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paragraph 266. See also, I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru.* Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, para. 128; I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of 25 November 2003. Series C No. 101, para. 152; and I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 7 June 2003. Series C No. 99, para. 110.

same as the right to life, is a fundamental and basic human right for the exercise of all other rights. Both are essential minimums for the exercise of any other right.[710]

561. The American Convention clearly recognizes the right to life as well as every person's right that his/her physical, psychological and moral integrity be respected and to not be subjected to torture or to cruel, inhuman or degrading treatment[711]; these are rights that cannot be suspended during states of emergency.[712] The Court has also repeatedly stated that the right to life and the right to personal integrity require not only that the State must respect these rights (negative duty), but that the State must adopt all appropriate measures to guarantee these rights (positive duty) in compliance with its general duty as set forth in Article 1(1) of the American Convention.[713] The Court and the Commission consider that, when it comes to children deprived of parental care and in alternative care , it is not only the prohibitions provided for in Article 4 and 5 of the American Convention that apply, but also the duty to provide the measures necessary for life to develop under decent conditions .[714]

562. It is also necessary to remember that when the State is in the presence of a child, in addition to the duties specified for every person, there are the additional duties under Article 19 of the American Convention and Article VII of the American Declaration. By virtue thereof, the State must assume its special status as guarantor with greater care and responsibility because a child is involved, and must adopt special measures guided by the principle of the child's best interest.[715] Additionally, however, because it is a matter of children under the care of an institution by virtue of a decision made by an authority of the State, the State is in an even more heightened position of guarantor of the life and personal integrity of these children, precisely because they are

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[710] IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 328. IACHR, *Democracy and Human Rights in Venezuela*, Cap. VI, para. 667.

[711] American Convention, Articles 4(1), 5(1) y 5(2).

[712] American Convention, Articles 5 and 27.

[713] I/A Court H.R., *Case of Juvenile Re-education Institute v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 158; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, para. 129; I/A Court H.R., *Case of 19 Merchants v. Colombia*, Merits, Reparations and Costs, Judgment of July 5, 2004, para. 153; *and Case of Myrna Mack Chang v. Guatemala,* Merits, Reparations and Costs. Judgment of 25 November 2003. Series C No. 101, para. 153; IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 455.

[714] I/A Court H.R., *Judicial Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of 28 August 2002, series A No. 17, para. 80; and I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144.

[715] I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, paras. 124, 163, 164, and 171; I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations and Costs. Judgment of 18 September 2003. Series C No. 100, paras. 126 y 134; and I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 146 and 191. In this same sense, I/A Court H.R., *Judicial Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of 28 August 2002. Series A No. 17, paras. 56 and 60. IACHR, *Juvenile Justice and Human Rights in the Americas*, para. 456.

under costudy of the State – in a regime of subordination or special relationship [716] imposed on the child by the State. Arising from this status, the State is under a stricter obligation to prevent any situations that could, by action or by omission, lead to the infringement or violation of these rights. Given the unique relationship and interaction of subordination of the child because of a special measure of protection, the Commission is of the opinion that the State must show special concern for the circumstances in which the child is living so long as he/she is subject to the special measure of protection and in residential care, whether in a public or private institution, guaranteeing conditions compatible with his/her human dignity.[717] Additionally, it is necessary to remember that the very purpose of the special measures of protection demands that the State make sure that the proper conditions exist within the context of the institution for the child to enjoy his/her rights in conditions of dignity.

563. As for the right to life, protection of the child's life requires that the State guarantee, as already stated, that the child has access to the conditions needed to develop life in dignity while under the alternative care. In this regard, the Court has referred to Articles 6 and 27 of the Convention on the Rights of the Child and the interpretation of these Articles by the Committee on the Rights of the Child; Article 6 of the CRC recognizes the right to life, which includes the State's duty to ensure "to the maximum extent possible the survival and development of the child," and the Committee has interpreted the term "development" in broad, holistic terms to embrace the child's physical, mental, spiritual, psychological and social development, in such a way that this can only be achieved by enjoyment of all the other rights, most especially the rights to health, to proper nutrition, to a healthy and safe environment, to education to recreation and play.[718] Therefore the Court understands, as does the Commission, that the States must ensure that children in residential care have access for the exercise of all their rights in order to be able to consider that the conditions for a

[716] For more on the special guarantor status that the State assumes in the case of people under a system of special subjection, see *mutatis mutandi* Inter-American Court of Human Rights, *Case of the "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, paras. 152 and 153.

[717] *Mutatis mutandi*, Inter-American Court of Human Rights, *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, paras. 159 and 160.

[718] The interpretation of the Committee on the Rights of the Child, linking the right to life with the idea of "comprehensive development" and "a decent life" can be found in the Committee on the Rights of the Child, General Comment No. 5 *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003, 34th session, para. 12 and Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, 40th session, paragraph 10. In the case of case law of the Inter-American Court of Human Rights that include these concepts as developed by the Committee on the Rights of the Child, see: I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 144 and 191; I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 May 2010. Series C No. 212. para. 169; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, paras. 161, 172 and 176. Also see I/A Court H.R., *Judicial Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of 28 August 2002, series A No. 17. paras. 67, 80, 84 and 86.

decent life and the overall and harmonious development of the child exist. These conditions are of fundamental importance given that children are at a crucial stage in their development and that will impact their life plan.[719] In the event these conditions are not met, the Court has attributed international responsibility to the State for breach of Articles 4(1), 5(1), and 5(2) of the American Convention, jointly with Article 1(1) of that Convention, viewed in light of Article 19, also of the American Convention, and of the corpus iuris of international law of the rights of the child.[720]

564. In the opinion of the Commission, for purposes of guaranteeing the right to life and to personal integrity of the children in institutions, it is essential that the efforts made by the States be aimed at prohibiting violence and preventing situations that involve violation of the physical safety of the children in the setting of residential alternative care, regardless of whom the perpetrator may be, whether a member of the staff at the institution or the result of peer-on-peer violence. As already stated by the Commission, the State's duty to protect does not end with prevention of violence by its agents, it must also prevent violence of any kind coming from third parties, including peer-on-peer violence among children.[721]

565. In the case of staff members at the institutions, it is the duty of the State to take all appropriate measures to prevent them from using violence against the children; in this regard, mention has already been made of the need for a strict ban on the use of any form of physical or psychological violence, such as humiliating, cruel, inhuman and degrading treatment, or torture, as measures for disciplining or controlling the children; and, with regard to the use of force for protection it must be strictly subject to the principles of last resort, the minimum degree necessary and for the shortest time possible, under the supervision of proper medical personnel. In particular, the Commission reiterates that respect of children's right to life and personal integrity requires the adoption of all appropriate and necessary measures, be they legislative, educational, social, economic or of any other kind,[722] to prevent all forms of violence within the settings of residential alternative care.

566. In addition, the guarantee of the right to life and to personal integrity of the child means that the states must adopt all measures necessary to avoid neglect,

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[719] I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 172.

[720] I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 176.

[721] I/A Court H.R., *Case of Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of January 31, 2006, para. 113; I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005. Series C No. 134, para. 111; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of 17 September 2003. Series A No. 18, para. 141. IACHR, *Report on Corporal Punishment and Human Rights of Children and Adolescents,* paragraph 74.

[722] In general, with regard to the various types of measures and specific actions that can be taken for the purpose of preventing violence in different settings or contexts, including residential institutions, see Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011, paragraphs 38 to 58.

lack of attention or negligent attention to the children's physical and psychological needs.[723] As stated earlier, neglect in caring for the child in satisfying his/her physical, psychological and emotional needs, the lack of stimulation and the deficiency of close, human care, have a very negative impact on a child's physical and psychological health and on his/her person as a whole, and may cause serious and irreversible harm, to the extent of endangering his/her life.[724] Children with a physical, mental, sensory or intellectual disability, and very small children, are the ones most exposed to suffering serious negative effects as a result of neglect or negligent treatment and, therefore, it is the duty of the State to take every possible measure to prevent neglect or negligent treatment.[725]

567. The Commission has already expressed its concerns over the many evidences indicating that children and adolescents in residential institutions are generally exposed to structural violence stemming from the very conditions found at these institutions. Mention has also been made before of the States' duties involving regulation, permanent oversight, investigation and sanction as measures needed to avoid the spread of situations that constitute structural violence in residential institutions for alternative care. Additionally, the Commission considers that the States have a duty to act with greater diligence given that they have been made aware of the quite widespread existence of violence in residential institutions; the situations that give rise to concern have been documented and the States must act without delay in taking the necessary actions to revert those situations that could violate the children's right to life and personal integrity.[726]

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[723] The General Comment No. 13, of the Committee on the Rights of the Child defines the concept of "neglect or negligent treatment" covered in Article 19 of the CRC as a form of violence against children. See Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011, paragraphs 4 and 20 and Article 19 of the CRC; Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 42.

[724] U.N. Study on Violence against Children, pgs. 187, 188 and 189.

[725] The Independent Expert for the U.N. Study on Violence against Children stated that "[i]n rehabilitation centers for children with mental disabilities bedridden children emaciated from starvation and dehydration have been found. Bottles of food were provided by staff, but children who were unable to pick up the bottles due to their disability got no nourishment. In many facilities for children with disabilities, the children have no access to education, recreation, rehabilitation or other programmes. They are often left in their beds or cribs for long periods without human contact or stimulation. Such deprivation often leads to severe negative physical, mental and psychological damage, and in many instances to death", U.N. Study p. 189.

[726] The Court has reminded the States that the adoption of legislative measures and measures of other kinds becomes even more necessary when there is evidence of practices that are contrary to the American Convention on any matter: See Inter-American Court of Human Rights *Resolution dated 27 January 2009, Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, resolution 12. The Special Rapporteur on Torture expressed the same opinion when saying that "[e]nsuring special protection of minority and marginalized groups and individuals is a critical component of the obligation to prevent torture and ill-treatment. Both the Committee against Torture and the Inter-American Court of Human Rights have confirmed that States have a heightened obligation to protect vulnerable and/or marginalized individuals from torture, as such individuals are generally more at risk of experiencing torture and ill-treatment," A/HRC/22/53, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman of Degrading Treatment , paragraph 26. Committee against Torture, General Comment No. 2, *Implementation of*

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568. Furthermore, given the fact that we are dealing with persons in development , the Court and the Commission have understood that this circumstance requires applying the highest standard , in classifying the actions that are a threat to the child's right to life and to his/her physical, psychological and moral safety. Specifically, the Court has said that the States must consider their status as children when classifying the treatment received by the child as cruel, inhuman or degrading.[727] The Court and the Commission have also taken the personal circumstances of the individual into account when several conditions of vulnerability are present, such as the fact of being a child and having a disability.[728] In this regard, the Commission has stated:

> [...] in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity.[729]

In this same regard the Court has stated:

> [...] the fact that the alleged victims were children requires applying the highest standard in determining the seriousness of actions that violate their right to humane treatment.[730]

569. In addition, the Court has held that the threat of resorting to violence, whether it involves physical and humiliating punishment or cruel, inhuman or degrading treatment, when sufficiently real and imminent, creates a climate of permanent tension that affects the right of the children in care to a decent life. The Court has so said, stating that:

> [...] the mere threat of conduct prohibited by Article 5 of the American Convention, when sufficiently real and imminent, can itself be in conflict with that Article. In other words, creating a threatening

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Article 2 by States parties, CAT/C/GC/2, 24 January 2008, para. 21; I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 103.

[727] I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, para. 170.

[728] I/A Court H.R., *Case of Furlan and Family v. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 269.

[729] IACHR, *Report No. 33/04, Case 11.634, Merits, Jailton Neri Da Fonseca, Brazil*, 11 March 2004, para. 64.

[730] I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru.* Merits, Reparations and Costs. Judgment of 8 July 2004. Series C No. 110, para. 170.

situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment.[731]

570. The Commission considers it advisable for the States to bear in mind that children with disabilities and small children are more vulnerable to all types of abuse, whether, mental, physical or sexual, as well as to neglect and negligent treatment, in all settings, including care facilities. The Committee on the Rights of the Child has pointed out that frequent mention has been made of the fact that children with disabilities are five times more likely to be the victims of abuse.[732] Children with disabilities and small children face additional risk by virtue of their condition and their limited capacity to put up resistance to the acts committed against them; they also face greater barriers when it comes to identifying a violation to their rights and to reporting it or informing a person who could protect them.[733] The Commission agrees with the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary-General on Violence against Children in considering that ratification of the United Nations Convention on the Rights of Persons with Disabilities is an essential step for protecting these children from violence,[734] as is the effective implementation of mechanisms for supervision and inspection.

571. The Inter-American Court understands that "[r]egarding the safeguard of life and personal integrity, it is necessary to consider that the persons with

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[731] I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merit, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 167; I/A Court H.R., Case of 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment of July 5, 2004, para. 149; and I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 165. See also European. Court. H. R, *Campbell and Cosans,* judgment of 25 February 1982, Series A, no. 48, p 26.

[732] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 42.

[733] In this regard the Committee on the Rights of the Child considers that "[t]heir particular vulnerability may be explained *inter alia* by the following main reasons: a) Their inability to hear, move, and dress, toilet, and bath independently increases their vulnerability to intrusive personal care or abuse; b) Living in isolation from parents, siblings, extended family and friends increases the likelihood of abuse; c) Should they have communication or intellectual impairments, they may be ignored, disbelieved or misunderstood should they complain about abuse; d) Parents or others taking care of the child may be under considerable pressure or stress because of physical, financial and emotional issues in caring for their child. Studies indicate that those under stress may be more likely to commit abuse; e) Children with disabilities are often wrongly perceived as being non-sexual and not having an understanding of their own bodies and, therefore, they can be targets of abusive people, particularly those who base abuse on sexuality." Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 42.

In the case of small children, the Committee has stated that when it comes to violence and abuse, they "are least able to avoid or resist, least able to comprehend what is happening and least able to seek the protection of others." Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, 40th session, para. 36.a), also see 36.b)

[734] Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary-General on Violence against Children, A/HRC/16/56, 7 March 2011, para. 112.

disabilities, who live in psychiatric institutions or are undergoing treatment there, are particularly vulnerable to torture and other types of cruel, inhuman or degrading treatment. The vulnerability inherent to people with mental disabilities is compounded by the high degree of intimacy which is typical of the treatment of psychiatric illnesses, which makes these persons more susceptible to mistreatment when they are hospitalized."[735] In institutional settings, be they hospitals, both public and private, the medical personnel in charge of the care of patients exercise strong control or dominance over the persons who are under their custody. This intrinsic imbalance in power between hospitalized patients and the persons having authority over them is many times greater in psychiatric institutions.[736] In the opinion of the Commission and the Court, all these circumstances mean that these establishments require strict oversight. The States have the duty to supervise and ensure that the rights of persons to receive dignified, humane and professional treatment, and to be protected from exploitation, abuse and degradation, are preserved at all psychiatric institutions, both public and private.[737]

572. The Commission is concerned regarding information received that children with disabilities are sometimes kept locked up, immobilized and, even, in isolation in some institutions instead of being given the proper medical or psychiatric care, or because of a lack of other institutional care more suited to their conditions. These children are often considered a disruption to the operation of the center and for the staff[738]; the lack of sufficient staff to look after children with special needs for care and attention, the absence of appropriate facilities and equipment, or the shortage of medical personnel are other factors often mentioned as the cause of these situations.

573. Investigations have shown that, in the case of persons with mental disabilities, isolation often causes serious exacerbation of previously existing mental disabilities. People with mental or intellectual disabilities deteriorate dramatically in isolation; some may go to the extreme of committing acts of self-mutilation or, even, suicide. In the case of children, this situation is even more pronounced as there is a combination of two circumstances that make it more likely that they will suffer serious or very serious harm.[739] The Commission points out that international human rights law expressly prohibits solitary confinement for children and for persons with a mental disability. The Special Rapporteur on Torture has stated that physical separation of persons with mental disabilities may be necessary in some exceptional cases, when due

[735] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 106.

[736] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 107.

[737] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 108.

[738] Report of the Rapporteur on Torture, A/66/268, para. 67.

[739] See Report of the Rapporteur on Torture, A/66/268, para. 68. Also see American Civil Liberties Union, "Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement" (2011).

to the pressing need to protect his/her safety[740] or that of others, but that it must be for the shortest time possible and be monitored by appropriate medical personnel. Solitary confinement, as pointed out by the Special Rapporteur on Torture, when used on persons with disabilities and children, is cruel, inhuman or degrading treatment and could be considered torture.[741]

574. In general terms, despite the clear obligation of the States to guarantee the right to life and to the personal integrity of all children and adolescents in care centers and institutions, both public and private, violations of these rights have been reported on many occasions in States in the region; those most commonly found involve negligence and serious neglect, overcrowding, in addition to different forms of violence involving ill-treatment, as well as physical and psychological abuse, either by staff members of between peers, as well as situations involving cruel, inhuman or degrading treatment, even torture; furthermore, other situations harmful to the health and personal integrity of the child have been reported to the Commission, such as failure to provide proper treatment or rehabilitation.[742] There are also descriptions of cases of sexual violence at institutions, by members of the staff or by other children, in addition to documented cases of sexual exploitation, trafficking and sale of children.[743]

575. Some situations, although only occasional, reported to the Commission, involve the use of lobotomies, psychosurgery[744] and electroshock. There have also been reports of high levels of medication used on children,[745] sometimes for

[740] Report of the Rapporteur on Torture, A/66/268, para. 68 and 69.

[741] Report of the Rapporteur on Torture, A/66/268, para. 63.

[742] Mental Disability Rights International, "Vidas arrasadas, La segregación de las personas en los asilos psiquiátricos argentinos", 1a ed., Siglo XXI Eds., Buenos Aires, 2008, pgs. 15 to 21, available at; http://www.cels.org.ar/common/documentos/vidas_sxxi.pdf; Disability Rights International and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, "*Abandonados y desaparecidos: Segregación y abuso de niños y adultos con discapacidad en Mexico"*, 2010, pgs. 18 to 21.

[743] Disability Rights International and Comisión Mexicana de Defensa y Promoción de los Human rights, "*Abandonados y desaparecidos: Segregación y abuso de niños y adultos con discapacidad en Mexico"*, 2010, pp. 27 and 28. Available at: http://www.disabilityrightsintl.org/wordpress/wp-content/uploads/1._Informe_final_Abandonmados_y_Desaparecidos_merged.pdf

The Communication presented by the United Nations Special Rapporteur on Trafficking in Persons, Specially Women and Children to the Government of Mexico regarding children who disappeared from a care center can be found at: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, presented before the Human Rights Council, Fourteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Addendum, Communications to and from Governments, U.N. Doc. A/HRC/14/32/Add.1 (May 31, 2010) (by Joy NgoziEzeilo), para. 41-54

[744] Disability Rights International and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, "*Abandonados y desaparecidos: Segregación y abuso de niños y adultos con discapacidad en Mexico"*, 2010, pp. 19 and 20. Available at: http://www.disabilityrightsintl.org/wordpress/wp-content/uploads/1._Informe_final_Abandonmados_y_Desaparecidos_merged.pdf.

[745] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)", [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pp. 42 to 48.

no therapeutic purpose whatsoever, simply to control behavior. Similar findings have been reported by the Independent Expert for the U.N. Study on Violence against Children:

> In residential institutions, children with disabilities may be subject to violence in the guise of treatment. In some cases, children as young as nine are subjected to electroconvulsive treatment (ECT) without the use of muscle relaxants or anesthesia. Electric shocks may also be used as "aversion treatment" to control children's behavior. Drugs may be used to control children's behavior and make them more 'compliant', leaving them less able to defend themselves against violence.[746]

576. The Commission finds that similar situations have also been found in the case of those belonging to other vulnerable groups at risk of becoming victims of violence and exclusion, for example, those with a drug dependence of some kind. This situation of special vulnerability exacerbates the effects of violations to the child's physical integrity.

577. The Commission considers this information concerning different violations to the right to life and personal integrity of children in residential institutions to be extremely serious. The Committee on the Rights of the Child has also expressed its concern regarding situations of ill-treatment and abuse at these institutions on a number of occasions.[747]

578. The Commission finds that in those cases where positive measures have been taken in the rules and regulations, to prevent violence, in practice cases of violations of these rules have been found. For example, in the case of Peru, Article 9 of the Regulations to Law No. 29.174 provides that, within 24 hours, all children entering care institutions must undergo a medical evaluation to determine their physical and mental condition, the needs for attention of each child that must be covered by the health services, to be used also to identify any future injuries the child may suffer while in the institution. Nevertheless, medical records were found in only 57.6% of the centers where the Ombudsman's Office inspected the files.[748]

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[746] Report of the Independent Expert presented to the General Assembly, A/61/299, of 29 of August, 2006, para. 57.

[747] The Committee on the Rights of the Child has spoken out regarding the situation found in several States through the Consideration of Reports Submitted by States Parties under Article 44 of the Convention. In some cases this has led the State to take steps and the situation has improved in some institutions, for example, Concluding Observations: El Salvador, CRC/C/SLV/CO/3-4, 17 February 2010, para. 48. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Brazil, CRC/C/15/Add.241, 3 November 2004, paras. 44-45. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile, CRC/C/CHL/CO/3, 23 April 2007, paras. 48-49.

[748] Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del

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579. The Commission views with concern the lack of detailed statistical information concerning episodes of deaths or injuries sustained at care centers and institutions, and the failure to record some of these events.[749] In this regard, for example, in their answers to the questionnaire, only some States reported the rate of deaths in institutions or the existence of situations where children in care had been injured.[750]

580. Therefore, the Commission urges the States to foster implementation of violence-prevention plans, within the framework of the residential care facilities, that take the different vulnerabilities into account, and that include systematic and ongoing training of staff working at these. Among other prevention measures, the Commission considers it advisable to have the regulations include the obligation to perform an initial medical examination when the children arrive at the institutions, and to keep a record of illnesses, injuries and accidents occurring to the children during the entire period they are in institutional care. The Commission also reminds the States of the duty to inform the government authorities of violations to children's right to life and to personal integrity, as well as the duty to diligently investigate, prosecute and punish those responsible.

2. Right to personal liberty

581. The American Convention recognizes the right to personal liberty of all people and provides that "[n]o 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."[751] The Convention on the Rights of the Child, in turn, states that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily," and that, in any case, any restrictions to freedom "shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[752] Supplementing this, with regard to children in a situation in which their rights have been violated, the Court and the Commission have repeatedly stated that they require appropriate protection measures aimed at the protection and reinstatement of their rights, and that they may not be subjected to treatment that implies a further unjustified limitation or restriction to their rights.

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Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 331. See: Havana Rules, Rule 50.

[749] The U.N. Study on Violence against Children also mentioned the requirement that a record be kept of any incident involving violence occurring at a protection and care, p. 204.

[750] Jamaicans For Justice, Report on "The Situation of Children in The Care of The Jamaican State", delivered to the IACHR in November 2009, p.13.

[751] Article 7 of the ACHR.

[752] Article 37(b) of the CRC.

582. One of the Commission's main concerns with regard to the protection measures that involve placing the child in a residential institution is that, in many cases, these imply , inpractice and in a regular manner , that the children and adolescents are deprived of their personal liberty or face unreasonable or disproportionate restrictions to that right. According to information gathered by the Commission, although the States' legislation usually explicitly stipulates that these protection measures cannot constitute deprivation of liberty, in many cases the children and adolescents in the region living in these residential institutions are subject to systems that are similar to the deprivation of their personal liberty or unnecessarily restrict their right to personal liberty.[753] It is usual for many of these institutions to be noted for having security elements similar to those used at centers for deprivation of liberty, and for being institutions with a closed system that only allows the child to have limited contact with his/her family and community.

583. In the case of special measures of protection that involve alternative residential care, the Commission points out that the States must guarantee that the child is placed in the setting that is least restrictive for each child, taking his/her individual situation into account. The Commission considers that in some situations it is possible to determine, within reasonable parameters that care in residential institutions will lead to certain restrictions to the freedom of the children and adolescents. In general terms, pursuant to Article 7(1) of the American Convention, respect for personal liberty and safety means that measures for deprivation of or restrictions to liberty, even those used within the framework of institutions for alternative residential care, therapy or hospitals, will only be considered legitimate when carried out pursuant to law and respecting the principles and guarantees provided for in international human rights law, and when the measures are not arbitrary.[754]

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[753] The Commission has defined the meaning of the term deprivation of liberty: "[…]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 similar institution the purpose of which is to deprive persons of their liberty." IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, para. 38.

In a similar vein, the Havana Rules state: "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.." Havana Rules, Rule 11. b).

[754] I/A Court H.R., *Case of Gangaram Panday v. Suriname*. Merit, Reparations and Costs. Judgment of 21 January 1994. Series C No. 16, para. 47; I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 131; I/A Court H.R., *Case of Durand and Ugarte v. Peru*. Merits. Judgment of 16 August 2000. Series C No. 68, para. 85; I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of 25 November 2000. Series C No. 70, para. 139; I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merit, Reparations and Costs. Judgment of 7 June 2003. Series C No. 99, para. 78; I/A Court H.R., *Case of Bulacio v. Argentina*. Merit, Continues…

584. Specifically, with regard to the application of a special measure of protection, it should not entail limitations or restrictions to the child's rights, most especially his/her right to physical liberty and personal autonomy to make decisions affecting him/her, other than those that are strictly necessary to ensure the protection and safety of the child and justified based on the child's best interests, explained clearly and individually. In this regard, the Commission has already mentioned the need for the States to ensure, by means of the regulations governing the operations of the residential institutions, that the children will not face unjustified restrictions to the exercise of their rights, including their personal liberty while they remain in these institutions. More specifically, the Commission recommends that, in general terms, the regulations provide for an open system at the residential centers that will allow the children to stay in contact with the outside, take part in the social life and keep up his/her ties with the community and the family. The system of the child's outings from the institution must be adapted to the personal circumstances and conditions of each child, following a timely individualized evaluation of the child and his/her environment, in keeping with his/her best interests and well-being, and with any specific protection and care need that he/she might have.

585. On this matter, the Commission finds with special concern that as part of their in-house rules, some institutions restrict, without any justification whatsoever, the access of children living there to the services provided by the community, such as education, health services, areas for recreation and culture, among others.

586. In addition, the Commission considers it important to stress that the content of the right to personal liberty is not limited to a person's physical freedom, but must be understood in broad terms to mean every person's right to decide on aspects affecting his/her life and the exercise of his/her rights. Each individual's opportunity to lead his/her life as he/she wishes, to make his/her own choices regarding his/her actions are, in the opinion of the Commission, aspects inherent to personal liberty and the inalienable dignity of every person. Thus, the States' duty to guarantee personal liberty means, on the one hand, that people cannot be deprived of their freedom illegally and without justification (negative duty) and, on the other, it entails the positive duty of the States to ensure the conditions that will enable people to act autonomously and be allowed to carry out their own life plan . The concept of human dignity, and the freedom every person has to do as he/she wishes and create his/her own life plan, are inextricably linked to each other. In this regard, according to the Inter-American Court, the concept of a "life plan" "…is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural

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Reparations and Costs. Judgment of 18 September 2003. Series C No. 100, para. 125; and I/A Court H.R., *Case of "Juvenile Re-education Institute" v. Paraguay*. Preliminary Objections, Merit, Reparations and Costs. Judgment of 2 September 2004. Series C No. 112, para. 224.

conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this court cannot disregard."[755]

587. Therefore, with regard to the situation of the children and adolescents who are in residential institutions, the States have the obligation under Article 7(1) jointly with Article 1(1) of the American Convention, to ensure that these institutions comply with the conditions necessary for a decent life and for the children to be able to move forward with their own life plan.[756]. The participation of the child in an extremely regulated institutional model where he/she is not entitled to any decision-making of his/her own, especially in connection with the exercise of his/her rights or actions that directly affect him/her, would not in the opinion of the Commission, allow the child to develop his/her autonomy, personality and life plan.

588. The Commission agrees with the Committee on the Rights of the Child in recognizing the progressive personal autonomy of the child and the possibility of making decisions that affect him/her as he/she acquires the degree of maturity necessary to understand reality and the consequences of these decisions. The persons and institutions in charge of caring for the child must take into account the child's level of maturity and personal autonomy at all times in order to modulate the degree of assistance provided for him/her to exercise his/her rights. This opinion is included in several Articles of the Convention on the Rights of the Child and involves recognition of the child's capacity to exercise his/her rights in a progressive manner. In this regard, the Committee on the Rights of the Child has stated:

> Article 5 [of the CRC] contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression and which have traditionally been justified by pointing to children's relative immaturity and their need for socialization. Parents (and others)

[755] I/A Court H.R., *Case of Loayza Tamayo v. Peru*, Judgment on Reparation and Costs of 27 November 1998, Series C, No. 42, paragraph 148.

[756] I/A Court H.R.*, Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, para. 172; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 160; I/A Court H.R.*, Judicial Status and Human Rights of the Child*, para. 80, 81, 84, and 86-88, I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 196.

> should be encouraged to offer 'direction and guidance' in a child-ed way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (Art. 12) and their right to freedom of thought (Art. 14) […].[757]

589. The Commission considers that the duty to respect and guarantee the personal autonomy of the child in making decisions that affect him/her, bearing in mind his/her age and degree of maturity, must be considered in the legislation governing residential care centers and institutions, and internal rules adopted by them. At the same time, while guaranteeing protection and safety of the children in alternative care systems, it will also be necessary to allow for the possibility that the children may make informed decisions, bearing in mind acceptable risk and the age and maturity of the child, as occurs in the case of children living with their families. In this same regard, in the case of the United Nations Guidelines for the Alternative Care of Children, Guideline 94, provides that:

> All carers should promote and encourage children and young people to develop and exercise informed choices, taking account of acceptable risks and the child's age, and according to his/her evolving capacities.

590. In addition, the Commission agrees with the Committee on the Rights of the Child that, notwithstanding the comments made regarding the evolution of the child's capacity and his/her gradual personal autonomy, the child has the right to have a legal guardian:

> [d]efinition of 'caregivers' which under Article 19, paragraph 1[of the CRC], as 'parent(s), legal guardian(s) or any other person who has the care of the child', covers those with clear, recognized legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child, [as would be the case of] institutional personnel (governmental or non-governmental) in the position of caregivers - for example responsible adults in health-care, juvenile-justice and drop-in and residential-care settings[…][758]

591. With regard to children and adolescents who are in residential care centers or institutions, they may, in no case whatsoever, be deprived of the support and protection of a legal guardian or other recognized, responsible adult or a competent

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[757] Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, 40th session, para. 17.

[758] Committee on the Rights of the Child, General Comment No. 13, *Right of the child to freedom from all forms of violence,* CRC/C/GC/13, 18 April 2011, para. 33.

government agency.[759] Therefore, in those cases in which the competent authorities have ordered or authorized the child to be placed in alternative residential care, the competent agency appointed must be vested with the right and given the legal responsibility to make certain decision in place of the parents or the legal guardians, in full consultation with the child and taking his/her opinions into account.[760] This legal responsibility should be attributed by the competent authorities and be supervised directly by them or through formally accredited entities.[761]

592. Most especially, the Commission points out that the guarantees described above must also be considered in the case of children with a disability and especially at psychiatric institutions and institutions that care for children with mental or intellectual disabilities. The Commission has found that children with any disability, especially a mental disability, are subjected to greater restrictions on their right to personal liberty than other children under protection, although in general this does not seem to be justified based on their best interests.[762] The lack of sufficient personnel for personalized attention to accompany the child's social and family reintegration, together with the lack of or limited coverage provided by family support programs and services for the care of children with a disability mean that these children are more likely to remain in a residential institution indefinitely, and do so in conditions of social isolation that do not respect their right to comprehensive development of their personality, their personal liberty and dignity.

593. The Convention on the Rights of the Child, in turn, makes specific mention of the rights of children with disabilities, recognizing their right to "enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."[763] The Committee on the Rights of

[759] In addition to the authorized opinion of the United Nations Committee on the Rights of the Child, see U.N. Guidelines for the Alternative Care of Children, Guideline 19: "No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at any time."

[760] U.N. Guidelines for the Alternative Care of Children, Guideline 101.

[761] U.N. Guidelines for the Alternative Care of Children, Guideline 102.

[762] Also, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, A/HRC/22/53, paragraphs 68 and 69: The Committee on Rights of Persons with Disabilities has been most explicit in its call for prohibiting the deprivation of liberty due to disabilities, in other words the forcible non-penal commitment, forcible commitment or deprivation of liberty due to a disability. It establishes that community living, with support, is no longer a favorable policy development but an internationally recognized right. "(...) Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent (…)" (para. 68). Deprivation of liberty on grounds of mental illness is unjustified if its basis is discrimination or prejudice against persons with disabilities (…)." The Special Rapporteur believes that the severity of the mental illness is not by itself sufficient to justify detention; the State must also show that detention is necessary to protect the safety of the person or of others (para. 69).

[763] CRC Article 23.

the Child has stated that segregation and institutionalization can never be justified on grounds of disability, and urged the States to "to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child,"[764] expressly recommending that the States "prevent the use of placement in institution merely with the goal of limiting the child's liberty or freedom of movement […]".[765] The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities[766] and the United Nations Convention on the Rights of Persons with Disabilities also contain very similar standpoints.[767]

594. The Commission considers that the States must adopt all measures necessary to promote care and support for persons with disabilities in the context of their community by means of access to family support services and programs that will allow these children to live with dignity and autonomy, in the context of their family and community; placement of a child with a disability in a residential institution may only occur when it is the best alternative based on his/her best interests, is done in accordance with the law and with all guarantees, and is for the shortest time possible with an effort made for family and social reintegration as soon as possible by means of suitable programs and services.

3. Right to physical and mental health

595. Access to the right to physical and mental health is essential for the child to remain in good condition and for his/her personal integrity. The Court and the Commission have referred to the child's right to physical and mental health as a right that is closely tied to the child's personal development and to the conditions necessary for the child to be able to live a decent life.[768] The States must ensure that the residential care centers and institutions respect and promote the right to health, this being understood to mean enjoyment of the highest possible level of physical, mental and social well-being, paying special attention to the specific needs of the children and

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[764] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 47; Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, 14 May 2013, para. 15.

[765] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 47.

[766] Article IV. 2. b) Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.

[767] Especially the provision found in Article 14 of the Convention of the Rights of Persons with Disabilities regarding a person's right to liberty and safety, which stipulates that the States must ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that that the existence of a disability shall in no case justify a deprivation of liberty.

[768] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, para. 167. For the opinion of the Commission see, para. 157.e).

adolescents, depending on the stage of their growth and development.[769] In addition, the Court has considered the right to health as indivisible and interdependent with regard to the other fundamental rights of children. In this regard the Court stated:

> Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity.[770]

596. As stated before, the State is in a reinforced position to act as a guarantor for children in the custody of a residential care center or institution. As a result, the State has the duty to ensure and guarantee effective access to physical and mental health services that the child needs given his/her condition, under appropriate conditions.

597. As an initial comment, the Commission considers it advisable to reiterate that the States must guarantee, in the case of children and adolescents who are in care centers or institutions, the right to health in keeping with the basic general principles set by the Committee on Economic, Social and Cultural Rights[771] and the Committee on the Rights of the Child[772], applicable to all children:

> Availability. States should ensure that there are functioning health centers, goods, and health care programs and services for children and adolescents that take into account their specific needs based on their stage in life, in sufficient quantity.
>
> Accessibility. The element of accessibility has four dimensions: i) non-discrimination, ensuring access for all children and adolescents;

[769] Article 24(1) of the Convention on the Rights of the Child provides that: "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." According to the Constitution of the World Health Organization "[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". Also see, Committee on the Rights of the Child, General Comment No. 4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 21 July 2003, 33rd session; Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, 14 May 2013.

[770] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, para. 167.

[771] Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, 11 August 2000.

[772] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, 14 May 2013, paras. 112 a 115.

> ii) physical accessibility, meaning proximity of the services and proper access for persons with a disability; iii) economic accessibility (affordability), meaning that enjoyment of this right is not hindered by the lack of financial resources; and iv) information accessibility in a format and in language that is clearly understandeable to children and adolescents.
>
> Acceptability. This means ensuring that it is respectful of medical ethics and sensitive to cultural factors, age and gender.
>
> Quality. Health services and treatments must be scientifically and medically appropriate, and of good quality. Quality assurance requires, at the very least, that: i) treatments, procedures and medications be based on the best scientific evidence available, ii) qualified medical personnel trained in children's and young people's health and in the rights of children, iii) scientifically approved hospital equipment appropriate for children, iv) medications that are scientifically approved, not expired, and appropriate for children, and, v) periodic quality evaluations of medical s.

598. Considering that children are at a stage of continued growth and development, periodic medical examinations and the standard treatment appropriate for their age will be required. Access to a quality medical service means that it is appropriate for the specific needs and requirements of children and adolescents of different ages. Thus, small children, children with a disability, and adolescents going through puberty, children with a chronic disease, as well as all other groups having special requirements or needs will require health and medical care services appropriate for their condition.[773] With regard to the scope of these duties the Committee on the Rights of the Child has stated that:

> Children are entitled to quality health services, including prevention, promotion, treatment, rehabilitation and palliative care services.[774]
>
> Rule 49 of the Havana Rules, states:
>
> [e]very juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated.[775]

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[773] U.N. Guidelines for the Alternative Care of Children, Guidelines 84 and 87.

[774] Committee on the Rights of the Child, General Comment No. 15, The right of the child to the enjoyment of the highest attainable standard of health (Article 24), CRC/C/GC/15, de 14 May 2013, para. 25.

[775] Havana Rules, Rule 49. Also with regard to the scope of health care, see: IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* Principle X.

599. The Commission considers that access to health services and medical care must be provided to children and adolescents using appropriate health services and facilities within the community where the institution is located, provided this were possible and in the child's best interests. Access to health services provided within the environment of the community fosters access to quality health services and also helps prevent the child from being stigmatized or segregated, facilitating contact and ties to the community and social inclusion when he/she leaves the institution.[776]

600. Institutions must ensure, especially by virtue of their location, immediate access to proper medical instalations and equipment based on the number and needs of their residents, and to personnel trained to provide preventive health care and deal with medical emergencies. When a child is sick, complains of feeling ill or has physical, mental, sensory or intellectual symptoms, he/she must be quickly examined by a health care professional.[777]

601. Notwithstanding the foregoing, when a child enters a residential care institution because of a need to receive treatment or specialized care from trained medical personnel, the care and rehabilitation of the child's physical and mental health is usually provided within the context of the same institution and by its staff. Nevertheless, the Commission has found in several States in the region that there is a shortage of institutions with specialized programs aimed at dealing with the specific cause that brought the child into the institution. In the opinion of the Commission, notwithstanding the need to set up general health services, institutions receiving children under special measures of protection who require specialized care, such as assistance and physical and psycho-social rehabilitation for children who have been the victims of violence, for example, must have access to suitable programs in order to provide the type of specialized care needed.[778]

602. In those cases in which the existence of specialized institutions has been reported to the Commission, what are usually found are institutions that are exclusively for small children; children with disabilities; adolescent mothers; children who use psychoactive substances; children who are the victims of violence, sexual violence, abuse, exploitation and trafficking.[779] In the case of institutions of this kind, it

[776] Havana Rules, Rule 49.

[777] Havana Rules, Rule 51.

[778] See for example: Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Guatemala, CRC/C/GTM/CO/3-4, 25 October 2010, para. 59, b).

[779] One of the reasons leading to specific and specialized care is when the child is the victim of violence. Based on information gathered by the Commission, in most of the States on this continent a situation involving violence, mistreatment and abuse within the family is one of the main reasons underlying institutionalization. This fact has led several States to establish institutions specifically for children and adolescents who are victims of this type of situation. In Nicaragua, for example, there are 10 shelters managed by non-governmental organizations for victims of domestic abuse and rape, three of them specifically for children and adolescents. Amnesty International, "Escucha sus voces y actúa. No más violación y violencia sexual contra niñas en Nicaragua", 2010, pag.22.

is essential to strengthen the quality of the institutional specialized-care program to ensure that it properly meets the protection needs that brought the child or adolescent to the institution. The Commission considers that specialized care, with diagnostic, therapeutic and specific procedures, is essential to guarantee that the measure aims at re-establishing the rights that prompted this care, ensuring the temporary nature thereof and the return of the children and adolescents to a family and community environment as soon as possible.

603. The Commission considers that the principle of the child's best interests should govern all decisions made in connection with the child's health, after listening to and taking into account the opinion of the child him/herself depending on his/her age and maturity. The Committee on the Rights of the Child has also emphasized the importance of basing decisions on providing, continuing and ending a specific treatment for the child, on the best interests of the child, in addition to stressing the child's right to take part in decisions affecting his/her health, depending on his/her age and maturity.[780] In addition to considerations involving the evolution of the child's faculties and his progressive personal autonomy, the Commission has also already mentioned the child's right to have a legal guardian to watch over his/her rights, with legal responsibility for the safety, health, development and well-being of the child.

604. The Commission considers that the health service provided should include: the right of the child to receive health-related information in a manner that makes it clear, accessible, fitting and appropriate for his/her age[781]; the right to informed consent for medical treatments[782]; and the confidentiality of the medical information[783]. The States must ensure that children and adolescents who are in residential care facilities will not be subjected to medical experiments or treatments that lack necessary scientific and medical backing.[784]

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[780] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, paras. 12, 14 and 19.

[781] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24),* CRC/C/GC/15, 14 May 2013, para. 58; Committee on the Rights of the Child, General Comment No. 12*, The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 103.

[782] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 59; IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle X.

[783] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24),* CRC/C/GC/15, 14 May 2013, paras. 21, 31 and 52.

[784] Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/2000/4, 11 August 2000, para. 8.

605. On the matter of access to health-related information, the States must guarantee the right of the child and adolescent to receive information as well as proper and relevant advice concerning health-related issues and aspects, and to be helped to understand this information. Children and adolescents need health-related information, advice and education that is understandable and appropriate for their age for the purpose of making informed decisions regarding a healthy life style, as well as access to the various health services. This information must include telling the child how and where he/she can find information and access health services.[785]

606. Furthermore, the right to informed consent is also part of the right to health, provided for in many international treaties on human rights, and guarantees that health practices respect the principle of non-discrimination, autonomy and every person's personal freedom to decide, their physical and psychological integrity and dignity. Access to the pertinent information and an understanding thereof is required to be able to give informed consent for a medical treatment.[786] As stated by the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (hereinafter, the Special Rapporteur on the Right to Health), what informed consent involves is not just accepting a medical procedure, it must be a voluntary and sufficiently informed decision. Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination, and human dignity, in an appropriate continuum of voluntary health-care services.[787]

607. As recognized by the Special Rapporteur on the Right to Health, although national laws and regulations provide for informed consent, in many instances it is not guaranteed in actual practice. Structural inequalities, such as the power imbalance inherent in doctor-patient relationships, exacerbated by the stigma and discrimination whereby certain groups of people are, disproportionately, being unable to exercise their right to informed consent.[788]

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[785] Committee on the Rights of the Child, General Comment No. 15*, The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, 14 May 2013, paras. 58 and 59.

[786] In the case of medical treatment, the information a person must receive in order to decide whether or not to accept treatment must cover: the diagnosis and its evaluation; the purpose, the method, probable duration and benefits expected from the proposed treatment; other possible methods of treatment, including those that cause the fewest alterations; possible pain and discomfort as well as the risks and aftereffects of the proposed treatment; information may not be withheld from the person based on the excuse that this could negatively affect outcome of the treatment. The process of informed consent must always begin before the treatment being offered and must be continuous throughout the duration of the treatment, allowing the person to withdraw his/her consent for the treatment at any time.

[787] Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009, para. 18.

[788] Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009, para. 92.

608. In the case of children and adolescents, the main hurdle they face for the exercise of their right to health and to informed consent lies in the consideration, maintained, enshrined in the laws and in practice, that children and adolescents in general lack the capacity that would allow them to have access to information and take part in decisions affecting their health. The Commission feels that, as stated by the Committee on the Rights of the Child, it should be assumed in principle that the children are capable of expressing their opinions regarding issues that affect them, recognizing their right to express their views; their opinions must be duly taken into account based on their age and maturity.[789] In this regard, the Committee on the Rights of the Child has stated;

> [t]he Committee recognizes that children's evolving capacities have a bearing on their independent decision-making on their health issues. It also notes that there are often serious discrepancies regarding such autonomous decision-making, with children who are particularly vulnerable to discrimination often less able to exercise this autonomy. It is therefore essential that supportive policies are in place and that children, parents and health workers have adequate rights-based guidance on consent, assent and confidentiality.[790]

609. The Commission considers that children and adolescents, according to their evolving capacities and their personal autonomy, have the right to access to health-related information, even confidentially and without the presence or consent of the parents or adults who are their legal guardians. Furthermore, children and adolescents can and should take part in decisions affecting their health, unless they lack the level of maturity or understanding to do so.[791]

610. Precisely one of the problem issues reported to the Commission during the drafting of this report concerns the shortcomings found in requesting and applying the informed consent of the child for therapeutic medical treatment necessary for the child's health, as well as the difficulties the child experiences in gaining access to

[789] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, paras. 20 y 21. In paragraph 20 the Committee says that "States Parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States Parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."

[790] Committee on the Rights of the Child, General Comment No. 15*, The right of the child to the enjoyment of the highest attainable standard of health (Article 24),* CRC/C/GC/15, 14 May 2013, para. 21.

[791] Committee on the Rights of the Child, General Comment No. 15*, The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 31, also see para. 24.

health information and services. In this regard the Commission agrees with the statement made by the Committee on the Rights of the Child:

> The Committee welcomes the introduction in some countries of a fixed age at which the right to consent transfers to the child, and encourages States parties to give consideration to the introduction of such legislation. Thus, children above that age have an entitlement to give consent without the requirement for any individual professional assessment of capacity after consultation with an independent and competent expert. However, the Committee strongly recommends that States parties ensure that, where a younger child can demonstrate capacity to express an informed view on her or his treatment, this view is given due weight.[792]

611. In addition, the Commission recommends, as does the Committee, that the States draw up procedures and criteria for providing clear guidelines for medical and health-care personnel for proper practices that respect the rights of children and adolescents.[793]

612. As already pointed out, the high level of psychiatric medication administered to children in residential institutions is one aspect that has stood out in several investigations in the region. The heavy use of medication, including psychiatric medication, is not only for therapeutic purposes; on occasions they are administered as a method for control, due generally to the lack of sufficient staff members. Children are given psychiatric medication even if not required for the child as part of a diagnosed and monitored medical treatment.[794] In addition, some investigations have shown that the high level of psychiatric medications is tied to another situation: the use of medication as the main approach to psychotherapeutic treatment of children and adolescents.[795] Another issue of concern for the Commission involves the lack of control and supervision by the competent medical authorities on matters involving treatments and medications administered to children in residential institutions, which can pose a risk to the health and personal integrity of the child.

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[792] Committee on the Rights of the Child, General Comment No. 12*, The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, para. 102

[793] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 12.

[794] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)", [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pgs. 45 to 48.

[795] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)", [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pgs. 45 to 48.

613. Children and adolescents with physical, mental, sensory or intellectual disabilities have the right to health and to suitable medical care for their needs and requirements that will guarantee that they achieve the greatest possible degree of personal development and autonomy, personal integrity and dignity.[796] The Court has spoken out expressly regarding the duty of the States to ensure that persons with mental disabilities receive effective medical care, meaning that "[t]he States have the duty to guarantee the provision of effective health care services to all persons with mental illness... the promotion of mental health, the provision of such services in the least restrictive possible way, and the prevention of mental illness."[797]

614. The Commission agrees with Committee on the Rights of the Child in stating "[t]he importance of community-based assistance and rehabilitation strategies should be emphasized when providing health services for children with disabilities,"[798] instead of resorting to the institutionalization of the children, unless placement in a residential institution were to be in the child's best interests. The States Parties must ensure that the health professionals working with children with disabilities have the best possible training.[799]

615. Most especially, when children with disabilities are in institutions, the latter must ensure that there are health-care programs in place designed to meet the specific needs and requirements of the children with disabilities, whether physical, mental, sensory or intellectual. In general, health policies must be broad in scope and cover early detection of the disability, early intervention, especially psychological and physical treatment, rehabilitation, including physical apparatus --for example prostheses for limbs, articles for mobility and devices for hearing and sight,[800] among others-- so as to provide the children with disabilities with a health service that will allow them personal autonomy and, thus, help avoid institutionalization or facilitate their departure. As for access to mental-health care, evidence shows that timely, efficient and effective health measures help prevent or delay the onset of a chronic mental illness.[801]

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[796] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 109.

[797] I/A Court H.R., *Case of Ximenes Lopes v. Brazil*. Merit, Reparations and Costs. Judgment of 4 July 2006, Series C No. 149, para. 128. Also see: The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, Article III(2); United Nations Convention on the Rights of Persons with Disabilities, most especially Articles 17 and 25.

[798] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 52; See also Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 38.

[799] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 52.

[800] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 51.

[801] WHO Child and Adolescent Mental Health Policies and Plans, 2005.

616. The Court considers that "any health treatment administered to persons with mental illness should aim at achieving the patient's welfare and the respect for his or her dignity as a human person, which is translated into the duty to adopt the respect for the intimacy and autonomy of persons as guiding principles for administering psychiatric treatment."[802], although the Court concedes that " the foregoing principle is not absolute, since the patients needs themselves may sometimes require the adoption of measures without their consent. Notwithstanding, mental illnesses should not be understood as a disability for determination and the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail."[803] When it is evident that the patient is unable to give his/her consent, his/her family members, legal guardians or the competent authority will be responsible for giving the consent for the treatment to be used.[804] The Commission understands that these principles pointed out by the Court must be applied to all persons with disabilities, noting that persons with mental disabilities or intellectual disabilities are the ones who are more exposedto endure violation of their rights as stated by the Court.

617. With regard to treatments and medical procedures, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (hereinafter, the Rapporteur on Torture) has warned that "medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned."[805] In this regard, the Rapporteur gave the example

[802] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 130.

[803] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 130. One of the basic principles of the United Nations Convention on the Rights of Persons with Disabilities is "[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons" (Art. 3). As interpreted by the Committee on the Rights of Persons with Disabilities the basic requirement in Article 12 (equal recognition before the law) means replacing the system of substitution of decision-making with assistance in decision-making that respects the autonomy, wishes and preferences of the person. Committee on the Rights of Persons with Disabilities Sixth Period of Sessions, Examination of the Reports presented by the States Members under Article 35 of the Convention, Concluding Observations of the Committee on the Rights of Persons with Disabilities CRPD/C/ESP/CO/1, para. 34. In this same vein, also see the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, Article III(2).

[804] I/A Court H.R., *Case of Ximenes Lópes v. Brazil*. Judgment of 4 July 2006. Series C No. 149, para. 130. Also, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, with regard to medical s, para. 66: "(...) criteria that determine the grounds upon which treatment can be administered in the absence of free and informed consent should be clarified in the law, and no distinction between persons with or without disabilities should be made. Only in a life-threatening emergency in which there is no disagreement regarding absence of legal capacity may a health-care provider proceed without informed consent to perform a life-saving procedure."

[805] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013. Paragraph 80: "In the case of children in health-care settings, an actual or perceived disability may diminish the weight given to the child's views in determining their best interests, or may be taken as the basis of substitution of determination and decision-making by parents, guardians, carers or public authorities."

"involuntary sterilization is often claimed as being a necessary treatment for the so-called best interest of the person concerned."[806] In the United States, for example, 15 States have laws that fail to protect women with disabilities from involuntary sterilization.[807] The Rapporteur is aware, with great concern, of cases in which "intrusive and irreversible, non-consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity."[808] What has been said is also applicable to children and adolescents in residential institutions and alternative care.

618. The States must also adopt the measures necessary to facilitate the access of indigenous children in institutions to health services that respect the child's cultural identity and that, insofar as possible, are planned and organized at the community level and managed in cooperation with the peoples concerned.[809] In this regard, the Committee on the Rights of the Child, has stated:

> [s]pecial consideration should be given to ensure that health care services are culturally sensitive and that information about these is available in indigenous languages. (...) States parties should furthermore pay special attention to the needs of indigenous children with disabilities and ensure that relevant programmes and policies are culturally sensitive.[810]

619. With regard to adolescents' right to access to health information, in its Report on "Access to Information on Reproductive Health from a Human Rights Perspective,"[811] the Commission has spoken of the importance of respecting adolescents' access to information on sexual and reproductive health; this includes the duty to ensure that they receive timely, complete, accessible, reliable and sanctioned

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[806] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, paras. 32 and 64. In these cases, the Rapporteur states, questionable reasons claiming medical necessity are usually used to justify invasive and irreversible procedures carried out on patients without their full, free and informed consent. He stresses that "[t]he doctrine of medical necessity continues to be an obstacle to protection from arbitrary abuses in health-care settings," contrary to the provisions of the United Nations Convention on the Rights of Persons with Disabilities, paras. 34 and 35.

[807] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, para. 80.

[808] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, para. 32 and 64

[809] ILO Convention No. 169, Art. 25(1) and (2).

[810] Committee on the Rights of the Child, General Comment No. 11*, Indigenous children and their rights under the Convention,* CRC/C/GC/11, 12 February 2009, para. 51.

[811] IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc. 61, 22 November 2011. See specially paras. 32, 38, 48, 59, 60, 90, and 91. Also see IACHR, *Report No. 21/07, Petition 161/02, Friendly Settlement, Paulina del Carmen Ramírez Jacinto (Mexico),* 9 March 2007.

information regarding sexual and reproductive health.[812] The Committee on the Rights of the Child has also spoken of adolescents' right to access to sexual and reproductive health information and services in two general comments interpreting the scope of the right to health recognized in the Convention on the Rights of the Child.[813] The Commission and the Committee on the Rights of the Child found that one problem closely linked to this issue involved the high rate of adolescent pregnancies in the region and the risk these pose for their health and personal integrity. In this regard, they have stressed that early pregnancy poses a whole set of problems for the adolescents affected, among others a greater risk of abortions in unsafe conditions, dropping out of school and contagion of sexually-transmitted diseases that could be avoided.[814] The Commission has emphasized that the right to access to information is especially important in the area of sexual and reproductive rights in that it enables everybody to be in a position to take free, basic and responsible decisions regarding their health.[815] Furthermore, the possibility of affecting other rights, such as the right to life and personal integrity, makes it even more important that States ensure that these rights are respected and guaranteed. In this line, the Commission feels that the rights of access to information of adolescents in residential care should not be restricted in comparison with the rights of non-institutionalized adolescents, especially for those who are in

[812] Special attention has also been paid to this subject by the Committee on the Rights of the Child in its General Comments and in the Concluding Observations to the States. In the case of the General Comments, see: Committee on the Rights of the Child, General Comment No. 4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 21 July 2003, paras. 16, 20, 26, 28, 30, 31 and 35; Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24),* CRC/C/GC/15, 14 May 2013, most especially paras. 24, 31, 56, 59, 60 and 70. In the case of the Concluding Observations of the Committee on the Rights of the Child, in its Concluding Observations to the Peruvian State for 2000 and 2006, the Committee voiced its concern at the "high rate of teenage pregnancies and at the number of teenage girls dying as a result of abortions. Furthermore, the Committee is concerned about the lack of adequate sexual and reproductive health services" and recommends that the Peruvian State "ensure access to reproductive health services to all adolescents and conduct awareness-raising campaigns to fully inform adolescents of reproductive health rights, including prevention of Sexually Transmittable Diseases (STDs) and early pregnancies," Committee on the Rights of the Child, Concluding Observations on Peru, Examination of the Reports Submitted by the States Members under Article 44 of the Convention, CRC/C/PER/CO/3, May 14th 2006, 41o Period of Sessions. Additionally, the United Nations Committee on the Elimination of Discrimination against Women, General Recommendation 24, Women and Health, para. 28 .

[813] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, 14 May 2013, paras. 24, 31, 56, 59, 60 and 70. Committee on the Rights of the Child, General Comment 4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 21 July 2003, 33rd session, paras. 26 and 28.

[814] In this regard the Commission has already mentioned that early pregnancy poses a number of risks: in addition to health problems, a greater risk of abortions in unsafe conditions and the interruption of education. The Commission has stressed that the States must ensure that adolescents be in a position to receive information on such issues as, *inter alia*, the dangers of early pregnancy, family planning and contraceptives, prevention of venereal diseases such as HIV/AIDS, and proper sexual health and reproduction services. IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective,* OEA/Ser.L/V/II. Doc. 61, 22 November 2011. Paras. 32 and 38.

[815] IACHR Report *Access to Information on Reproductive Health from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc. 61, 22 November 2011.

religious residential care centers or institutions, which might limit this right in keeping with the institution's religious orientation.[816]

620. The Commission agrees with the Committee on the Rights of the Child[817] and with the Committee on Economic, Social and Cultural Rights that children and adolescents must be given the opportunity to play an active role in planning and programming their own health:

> […] States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.[818]

621. The Commission notes that, in their answers to the questionnaire, the States mentioned different mechanisms for guaranteeing access to health services for children and adolescents who are in residential care centers or institutions. In most cases, reference is made to the public health system. In Costa Rica, for example, according to the answer to the questionnaire, , all residential institutions must provide a Costa Rican Social Security ID card giving them access to any health-care service they might need, including services involving medical specialists. In Peru, the regulations require that all children entering a residential institution be enrolled in the health insurance system; during a recent survey, the Ombudsman's Office found that compliance with this obligation was high.[819] In other cases, such as El Salvador or Honduras, for example, the Commission was told that doctors from the Ministry of Health are available at the institutions and that it is they who provide care for persons

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[816] The nature and profile of private care centers vary from country to country. In Brazil, for example, 67.2% of the private organizations in charge of care institutions are religious organizations. Instituto de Pesquisa Econômica Aplicada (Ipea), Levantamento nacional de abrigos para crianças e adolescentes da rede SAC, 2003, p. 2. The document can be accessed in Portuguese at http://www.mp.sp.gov.br/portal/pls/portal/docs/1/1665238.PDF

[817] Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, CRC/C/GC/12, July 20, 2009, paras. 99 and 100. Committee on the Rights of the Child, General Comment No. 15, The right of the child to the enjoyment of the highest attainable standard of health (Aarticle 24), CRC/C/CGC/15, 14 May 2013.

[818] Committee on Economic, Social and Cultural Rights, General Comment No. 14*, The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/2000/4, 11 August 2000, para. 23.

[819] Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010 pp. 335 to 338.

under institutional care; if more specialized care is required, the children are referred to outside medical s. The Commission views with concern that in some States, such as Brazil, only one third (34.1%) of the residential institutions surveyed used outside health-care services available in the communities.[820]

622. The Commission has also been informed of problems in the health systems, such as the time involved and manner of access to hospital appointments, delays in medical care and in supplying medication, lack of specialists at local health centers and limits to the system's health insurance coverage of certain diseases, among others.[821] All in all, the situations reported vary not only from one State to the other, but also among different residential care centers and institutions within each State in the region.

623. As regard informed consent of children and adolescents to health treatments, although very little information is available, the Commission has had access to investigations that show a failure to achieve the standards mentioned above. For example, information received in the case of Argentina shows that of the institutions surveyed by the City of Buenos Aires' Ministerio Público Tutelar, approximately 40% stated that they do not follow the principle of informed consent.[822]

624. To guarantee the right to health of the children who are in residential care centers and institutions, these centers must ensure access to properly equipped medical and health facilities, with trained medical personnel, and report the different services and specific care that the persons in the institution require. They must ensure that the children have access to the services available in the community, can play an active role in their own health-care planning, complying with the guarantees provided for in international human rights law, especially on the issue of informed consent. The institutions must keep records of all medical treatments and all medications

[820] Instituto de Pesquisa Econômica Aplicada (Ipea), Levantamento nacional de abrigos para crianças e adolescentes da rede SAC, 2003, p. 13.

[821] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "La institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires" [The Institutionalization of Children and Adolescents in the City of Buenos Aires], March 2010, p. 14. The document is available at: http://asesoria.jusbaires.gob.ar/sites/default/files/DT%20N%C2%BA1_0.pdf; Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 338.

[822] Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)" [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pages 48 to 50. In the same token, Ministerio Público Tutelar de la Ciudad Autónoma de Buenos Aires, "La institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires", March 201) [The Institutionalization of Children and Adolescents in the City of Buenos Aires].

administered to the children. They must also ensure access to mental health services to properly meet the children's needs and requirements.[823]

4. Right to food

625. The Commission has stated that, given that children are still in the process of developing, the right to adequate and sufficient food is vitally important and the States are under the obligation to guarantee this right by means of appropriate regulations and supervision within the context of residential care centers and institutions.[824] In the case of very small children, nutrition appropriate for their age is essential for their health and growth; inappropriate or insufficient nutrition can place the life of the child at risk or cause serious, irreversible harm to the child's health a to his/her physical and mental condition.[825]

626. In this regard, the Commission deems it advisable to mention the existence of rules stressing the importance of food during the early years of a child's life, such as Articles VII and XI of the American Declaration and Article 15(3)(b) of the Protocol of San Salvador, whereby the States have undertaken to "guarantee adequate nutrition for children at the nursing stage and during school attendance years," among other relevant provisions. Within the framework of the United Nations there are World Health Organization resolutions concerning criteria on the proper feeding of nursing babies and small children.[826]

627. Furthermore, the issue of the right to food has been taken up by the Commission both in general terms and in connection with certain States or certain groups specifically, as is the case of children from indigenous groups. The Court has also spoken of the importance of the right to food, mentioning quantity, variety and quality of food as a condition for ensuring that children enjoy the minimum conditions necessary for a decent life.[827]

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[823] With regard to the obligation of access to mental health services, see: IACHR, *Report 63/99, Case 11.427. Víctor Rosario Congo. Ecuador*, 13 April 1999, paras. 63-69.

[824] IACHR, *Report on Juvenile Justice and Human Rights in the Americas*, para. 469.

[825] Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood,* CRC/C/GC/7/Rev.1, 20 September 2006, 40th session, para. 27; Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 45.

[826] World Health Organization, Resolution 54.2 of the 2001 World Health Assembly, document available at http://www.who.int/nutrition/topics/WHA54.2_iycn_sp.pdf Also see: 55th World Health Assembly, WHA55.25, Agenda Item 13.10 for 18 May 2002, Infant and Young Children Nutrition, document available at http://www.who.int/nutrition/topics/WHA55.25_iycn_sp.pdf.

Most specifically, the Commission has borne in mind the indicator for breastfeeding exclusively up to the age of four months and up to the sixth month when proposing guidelines for preparing indicators regarding progress on Economic, Social and Cultural Rights in the Americas (OEA/Ser.L/V/II.132, Doc. 14 rev. 1, 19 July 2008).

[827] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, series C, No. 125.

628. The Convention on the Rights of the Child, in turn, provides that the States Parties must ensure that all children have the greatest possible access to health through adequate nutrition, among other means (Article 24). Meanwhile, the Committee on the Rights of the Child has stated that "[m]alnutrition and disease have long-term impacts on children's physical health and development. They affect children's mental state, inhibiting learning and social participation and reducing prospects for realizing their potential. The same applies to obesity and unhealthy lifestyles."[828]

629. According to Guideline 83 of the U.N. Guidelines for the Alternative Care of Children:

> Carers should ensure that children receive adequate amounts of wholesome and nutritious food in accordance with local dietary habits and relevant dietary standards as well as with the children's religious beliefs. Appropriate nutritional supplementation should also be provided when necessary. [829]

630. According to information gathered while drawing up this report, the States face problems in guaranteeing this right in the framework of the functioning of residential care facilities. The first problem has to do with the lack of information that the authorities have concerning the conditions in which care is provided at the institutions, especially in the case of private institutions. In the same way, the Committee on the Rights of the Child, has expressed its concern regarding the lack of information concerning the operation of these institutions in several States in the region. Another one of the problems found has to do with the lack of technical standards concerning the right to food, for example on the issue of nutritionists at these institutions.

631. The Commission considers it important to reiterate that the children and adolescents who are in institutions have the right to receive, with regularity appropriate for their age, sufficient nutritious food, properly prepared, served in sanitary conditions, bearing in mind their nutritional requirements, religion and culture, as well as their needs and wishes, in addition to receiving a sufficient quantity of clean drinking water.[830]

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[828] Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, 40th session, para. 27.a).

[829] See also U.N. Guidelines for the Alternative Care of Children, Guideline 87, regarding the specific nutritional and other needs of babies, small children and those with special needs. Rule 37 of the Havana Rules contains similar provisions.

[830] Committee on the Rights of the Child, General Comment No. 15, *The right of the child to the enjoyment of the highest attainable standard of health (Article 24)*, CRC/C/GC/15, de 14 May 2013, para. 43; See also Committee on Economic, Social and Cultural Rights, General Comment No. 12, *on the right of adequate food*, E/C.12/1999/5 of May 12th 1999.

5. Right to education and recreation

632. Access to a quality education will prepare the child to enjoy his/her other rights by providing him/her with the knowledge, skills and ability to do so, while preparing him/her to lead a full, satisfactory and responsible life in a free society.[831] The Court has spoken of children's right to education in the following terms:

> [...] the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention.[832]

633. The children and adolescents subject of a special measure of protection that entails care in a residential care center or institution have a recognized right to a quality education and, priority should be given to ensuring that they receive it within the framework of the educational services in the community, in other words in the formal education system, so as to allow the child to take part in educational and recreational activities with children who are not institutionalized.[833] According to the Committee on the Rights of the Child, the education to which the every child is entitled is not limited to providing him/her with technical knowledge but must also prepare him/her for every-day life, strengthen his/her social skills and instill in the child the values of human rights, of respect and life in community.[834] Educational and recreational activities help the child interact with other children and builds interpersonal bonds that are essential for his/her life. Therefore, to the extent possible and provided the location of the institution so allows, the child's education in his/her usual environment should not be interrupted, allowing him/her to maintain relations with people from outside the institution. The continuation and stability of these relationships are fundamental for the process of re-bonding with the family and social reintegration once the child leaves the care facility.

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[831] The Convention on the Rights of the Child dedicates Article 28 to recognition of children's right to education, and Article 29 to describing the aims and goals that education should have. With regard to the aims and goals of education: Committee on the Rights of the Child, General Comment No. 1, *"Article 29(1): The Aims of Education"*, CRC/GC/2001/1, 17 April 2001.

[832] I/A Court H.R*., Judicial Status and Human Rights of the Child*. Advisory Opinion OC-17/02 de 28 August 2002. Series A No. 17, para. 84.

[833] Much the same is found in the Havana Rules with regard to the right to education of children in detention as part of the juvenile justice system, where Rule 38 states that: "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education."

[834] Committee on the Rights of the Child, General Comment No. 1, *"Article 29(1): The aims of education"*, CRC/GC/2001/1, 17 April 2001, para. 2.

634. Children and adolescents in residential care centers and institutions also have the right to access to recreational, cultural and leisure activities that contribute to their comprehensive development, in conditions of equality with other children who are not in a residential care facility.[835] The instalations at residential institutions must be provided with and have areas for recreation, leisure, culture and play for the children and adolescents, and must also adapt these areas and the activities for the different ages of children and adolescents.[836] As stated with regard to education, the Commission understands that the possibility of taking part in leisure and cultural activities within the community is vitally important for the child to maintain his/her ties to the community and promote his/her social interaction with people outside the institution, the environment to which the child will return in the future. Furthermore, for children from a specific group with its own traditions, culture or language, access to education and to the recreational and cultural activities in the community is essential for maintaining his/her culture and identity.

635. In this regard and according to the U.N. Guidelines for the Alternative Care of Children:

> Children should have access to formal, non-formal and vocational education in accordance with their rights, to the maximum extent possible in educational facilities in the local community.[837]
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> Carers should ensure that the right of every child, including children with disabilities, living with or affected by HIV/AIDS or having any other special needs, to develop through play and leisure activities is respected and that opportunities for such activities are created within and outside the care setting. Contact with the children and others in the local community should be encouraged and facilitated.[838]

636. In addition to mandatory formal schooling, the Commission considers it important to guarantee vocational and job training for children and adolescents, based on their age, especially when they will soon become adults and leave the

[835] The Convention on the Rights of the Child recognizes children's right to recreation, culture, play and leisure activity in Article 31, which states: "1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity." In addition, the Committee on the Rights of the Child has adopted General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Art. 31), Adopted by the Committee at its sixty-second session (14 January – 1 February 2013). CRC/C/GC/17.

[836] For example, see Havana Rules, Rule No. 41.

[837] U.N. Guidelines for the Alternative Care of Children, Guideline 85.

[838] U.N. Guidelines for the Alternative Care of Children, Guideline 86.

institution.[839] Vocational and job training are part of the actions inherent in the individualized care plans that prepare the child for independent life once he/she leaves the institution. The Commission has already mentioned its concern at the fact that children who leave institutions once they are of adult age are more likely to be especially vulnerable insofar as their rights are concerned and exposed to different forms of exploitation if they lack access to the minimum means for life.[840]

637. Education and training programs must respect the right to equality between men and women, as well as cultural and linguistic particularities of the child. For example, in the case of children belonging to indigenous peoples, among other features, the programs must be respectful of the language of these children, for which they must have adequate staff and written materials[841].

638. Children with disabilities have the right to be guaranteed access to an education adapted to enable them to exercise their right, as well as access to culture, recreation and to accessible and adapted vocational training programs. The Committee on the Rights of the Child has voiced its concern on a number of occasions at the fact that the effects of discrimination based on disabilities has been especially serious in the areas of education and vocational training[842]; moreover, the Committee has expressed concern regarding the cycle of discrimination, marginalization and segregation that children with disabilities face:

> "[d]iscrimination in service provision excludes them from education (...). The lack of appropriate education and vocational training

[839] Havana Rules, Rules 38 to 48. Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, 44th session, para. 89, "Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment."

[840] The Havana Rules include similar recommendations for adolescents who are in a juvenile justice facility, namely: Rule 39: "Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes (...)." Ruel 42:"Every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment (...)." Rule 45: "Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour, if possible within the local community, as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities. The type of work should be such as to provide appropriate training that will be of benefit to the juveniles following release. The organization and methods of work offered in detention facilities should resemble as closely as possible those of similar work in the community, so as to prepare juveniles for the conditions of normal occupational life."

[841] For example, in Peru, according to surveys conducted by the Office of the Ombudsman in protection institutions, 9.5% of the total residents expressed in maternal language other than Spanish. Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 238.

[842] Committee on the Rights of the Child, General Comment No. 9*, The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 2.

> discriminates against them by denying them job opportunities in the future. Social stigma, fears, overprotection, negative attitudes, misbeliefs and prevailing prejudices against children with disabilities remain strong in many communities and lead to the marginalization and alienation of children with disabilities."[843] Unless guaranteed their right to adapted education and training for an autonomous life within their community, it is unlikely that children and adolescents with disabilities will achieve their life plan and leave the institution.

639. In order to fully exercise their right to education, many children with disabilities require special education services or personal assistance, most especially teachers trained in the appropriate methods and language for teaching children, using teaching strategies that focus on the child and his/her skills, with appropriate teaching materials.[844] The Committee on the Rights of the Child has stated that inclusive education should, in general terms, be the aim for educating children with disabilities, and that the form and procedures for inclusion are to be determined based on the child's individual educational needs and requirements, given that the education of some children with disabilities requires the type of support not easily found in the general teaching system.[845] Children with disabilities have the right not to be excluded from the general education system because of their disabilities, and to receive the necessary support within the general education system to facilitate effective training for them. Nevertheless, the extent of inclusion within the general education system may vary. In those cases in which a fully inclusive education is not feasible, options must remain to allow the child access to an education adapted to his/her learning needs.[846] Institutions that care for children with disabilities must guarantee these children's right to an appropriate education, endeavoring insofar as possible to have the child take part in the community education system and in recreational, leisure and cultural activities.

640. As reported to the Commission in the answers to the questionnaire submitted within the framework of this report, a significant number of children in institutions have access to education programs that operate inside the institutions themselves. The Commission views with great concern the very limited access to education within the community education system in the case of children with disabilities. In Brazil, according to some studies, more than 40% of children with mental disabilities do not attend the formal education system on a regular basis[847]; the same

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[843] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 8.

[844] Committee on the Rights of the Child, General Comment No. 9*, The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 65.

[845] Committee on the Rights of the Child, General Comment No. 9*, The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 66.

[846] Committee on the Rights of the Child, General Comment No. 9, *The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, 43rd session, para. 66.

[847] Rizzini, Irene; Diniz de Menezes, Cristiane, "Crianças e adolescentes com deficiência mental no Brazil: um panorama da literatura e dos dados demográficos", CIESPI: PUC-Rio, Rio de Janeiro, 2010, p. 67.

type of situation has been found in Peru.[848] As regards access to the right to education for children without disabilities who are in care, States such as El Salvador report that the institutions have formal educational programs with flexible modalities, handled by the Ministry of Education, and that, in the case of institutions that do not have these programs, children attend schools within the community or location, where they receive their formal education. In Honduras, as reported to the Commission, protective care homes managed by non-governmental organizations provide education using two different systems: external, at the nearest education s, and internal, at a school that operates inside the institution. Similar situations have been reported in the case of institutions in Argentina, Nicaragua and Paraguay.

641. In other cases, such as Costa Rica or Uruguay, every child in a residential care center or institution who is capable of attending an education center is guaranteed the right to do so at education establishments close to where they live.

642. Some of the main problems reported to the Commission with regard to fulfilling the right to education within the general education system, have to do with the impossibility of complying with some of the document-related requirements for the enrollment of children in education centers, or continuation in them, such as: i) lack of openings in these education centers; ii) that the school year was already underway when the child entered the center and there are no specific mechanisms for his/her integration; as well as iii) some situations where the children have been the victims of discrimination in the education center because they come from residential care centers or institutions.[849] The Commission notes with concern that, according to surveys carried out in Argentina[850] and Peru[851], there are children who do not have access to formal education.

[848] Mental Disability Rights International/Asociación Pro Derechos Humanos, "Derechos Humanos & Salud Mental en el Perú", Lima, 2004. In the same vein: Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, p. 345.

[849] Some of the problems encountered regarding enjoyment of the right to education are described in, Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 201,0 pgs. 344 to 346; and, Ministerio Público Tutelar de la Ciudad de Buenos Aires, "La institucionalización de niños y adolescentes en la Ciudad de Buenos Aires", [The Institutionalization of Children and Adolescents in the City of Buenos Aires], March, l 2010, p. 15.

[850] Público Tutelar de la Ciudad Autónoma de Buenos Aires, "Puertas adentro. La política de institucionalización de niños, niñas y adolescentes en la Ciudad de Buenos Aires (2007-2011)" [Indoors. The Policy of Institutionalization of Children and Adolescents in the City of Buenos Aires], pgs. 50 to 52

[851] Office of the Ombudsman of Peru, Report No. 150, "El derecho de los niños, niñas y adolescentes a vivir en una familia: la situación de los Centros de Atención Residencial estatales desde la mirada de la Defensoría del Pueblo" [The Right of Children and Adolescents to Live in a Family: The Status of State Residential Care Centers from the Viewpoint of the Office of the Ombudsman], Lima, 2010, pp. 344 to 346

643. According to some of the answers to the Commission, some residential institutions implement programs aimed at motivating the families of the children to become involved in the education process, school reinforcement programs and programs to prepare for examinations for later reincorporation in educational establishments. There have also been reports of cases of programs for vocational workshops, job-training programs and non-formal education. The Commission considers that implementation of many of these programs, especially the job-training programs, is essential for the ensuring that the intervention achieves the goal of preparing the children, adolescents especially, to be able to cope positively with the challenges of everyday life and their departure from the institution.

644. The Commission considers that the States must ensure that, except in very exceptional cases, children and adolescents who are in residential care facilities have access to the community's education centers. When the children attend education programs inside the institution, the education and vocational training they receive should be recognized by the general education system and operate in close coordination with the latter.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Strengthening families y their parental functions. States have the duty to support and assist families. In this respect, the IACHR makes the following recommendations to the States:

1. Create the appropriate legal framework, and institutions needed to strengthen the families' capacities as a primary care setting for protection and care for girls and boys. In this sense, the Commission stresses the importance of States to consider their obligations relating to the duty of special protection to children.

2. Design and implement public policies, programs and services of universal scope and of focalized scope, aimed at favoring, in the broadest possible way, the development and strengthening of the capacities of families to adequately fulfill their parental responsibilities, and guarantee the right of the child to live with and be cared for by his or her family of origin.

3. Design and implement policies, programs and services that can asses the results obtained in relation to the objectives that were set forth by public policies. This should include: having available data and complete, reliable information for diagnosis and planning; setting clear objectives, results and indicators that allow a measurable monitoring; making a suitable and sufficient allocation of resources; establishing realistic timeframes; conducting periodic assessments so that corrections can be introduced as necessary in policies, programs and services; conducting public accountability initiatives; providing for citizens' participation in design, monitoring and evaluation of public policies, programs and services; and, promoting "active transparency" and access to understandable information, among others.

4. Ensure coherence, complementarity and integrality among the various policies, programs and services relating to children, and guarantee the availability, accessibility, adaptability and quality of services.

5. Identify and take into adequate consideration the social, cultural and economic constraints underlying the capacity of families to bring up and care for their children. In particular, States must address, through appropriate public policies, the main causes that lead to the adoption of a special measure of protection which entails the separation of the child from his or her family, including: i) the material conditions of families to provide basic care for children, ii) violence within the family setting, and iii) the relinquishment of custody and abandonment of the child.

6. Adopt appropriate measures to enable families to harmonize parental responsibilities and the care of children with working life. Among these measures, take into consideration the existence of services such as day care centers and full-time schools, and ensure families access to these services in equal conditions.

7. Design policies, programs and services oriented to ensuring that every child will have access, under equal opportunities, to an adequate standard of living for their personal integral development, as well as to ensure their right to live with and be raised by his or her family of origin, and not to be separated from his or her family based only on material reasons. The Commission recommends, among other measures, to introduce benefits or direct material assistance to families exposed to poverty, in order to ensure an adequate standard of living and dignity for the family and the child.

8. Adopt all necessary measures to promote care and support for persons with disabilities in the context of their families and communities, through access to family support services and programs which enable these children to lead a life with dignity and autonomy, and avoid unnecessary institutionalization.

9. Adopt legislation that expressly prohibits all forms of violence against boys, girls and adolescents. Adapt the legal framework, policies, programs and services to protect boys and girls from all forms of violence in the home setting. To this end, the Commission recommends States to redouble their efforts to ban corporal punishment and all forms of violence against children, in addition to creating counselling programs and parenting courses for families considering children's rights and positive childrearing without violence.

10. Create programs and services to provide counselling and support to future parents, especially adolescents, in order to offer them the possibility to exercise their parental functions in conditions of dignity and avoid being induced to relinquish their child or give the child in adoption because of their personal situation, family pressures, or because of conditions of vulnerability or discrimination they may face.

11. Develop actions to ensure that pregnant adolescents and teenage mothers have the support necessary to continue their studies, and that these situations do not adversely impact upon their right to education.

12. Design and implement programs and services that inform and prepare adolescents so that they can make informed decisions regarding their

sexual and reproductive health, and to assume their responsibilities in this regard.

13. Make available free legal advisory services for cases where parents indicate their willingness to relinquish their parental rights, in order to inform them about the legal implications of their decision to relinquish the custody and care of their child, as well as information about programs and services to support families in their parental responsibilities.

14. Ensure that in situations in which one parent relinquishes the child, authorities make every reasonable effort to try to locate the other parent, or the extended family, in order to determine whether there are family members who wish to take responsibility for the child, before proceeding to take temporary or permanent decisions related to the child care.

B. Regulation of alternative care: family-based care and residential care.

1. Regulate the various forms of alternative care based on the principles of necessity, exceptionality and temporality, prioritizing the placement of the child in his/her extended family and, when this is not possible or is not in the child's best interests, in a foster family. Residential alternative care should be considered exceptional.

2. Identify which form is the most appropriate in order to keep siblings together and thus prevent further breakdown of family ties.

3. Adopt all the necessary measures, including budgetary measures, to ensure the proper functioning of the various alternative care programs that do not involve institutionalization of the child, throughout the territory of the country.

4. Include in the regulation the objective of the special measures of protection involving the temporal separation of children from their families. Avoid the use in practice of the family-based alternative care as a mean to evade applicable regulations on adoption, such as using it as pre-adoptive care.

5. Design strategies for identifying situations in which the child is in informal care, in order to ensure that the child receives the care and attention needed for his/her well-being and development, and is not exposed to any form of abuse or exploitation.

6. Ensure the exceptionality of measures involving the placement of a child in residential alternative care, applying them exclusively when it

is accredited that it is the most appropriate measure for the best interests of the child, after considering other alternatives, as well as being limited to the shortest period of time strictly needed. For this purpose, it should be required to justify, objectively and reasonably, the motives and circumstances for which it is considered to be the best choice in the individual case.

7. Regulate under residential alternative care the functioning of care centers that enable personalized and quality care to children. The centers should preferably have a small size and operate in a setting similar to that of a family, promoting the contact of the child with his or her social environment.

C. Measures towards deinstitutionalization. The large dimensions of institutions and the high concentration of children in them generally constitute risk factors for the protection of children and expose them to structural violence, derived from the care conditions in which many of these institutions operate. Accordingly, the Commission recommends that States the following:

1. Develop strategies for deinstitutionalization of children who are in residential institutions. The deinstitutionalization strategies should be based on proper planning and be accompanied by the strengthening of programs and services to support families so as to promote the reintegration of the child to his or her family in the cases in which this is possible, in addition to increasing the provision of family-based alternative care options for those children who require alternative care. As part of this strategy, the Commission recommends to promote a plan of progressive substitution of large scale residential institutions for residential care centers of smaller dimensions that allow individual attention, more in accordance with children's rights.

2. Act with special diligence in the context of structural violence identified in the residential institutions. The situations of concern have been documented and States must act without delay to take all the necessary actions to reverse those situations that create a risk of serious violations of children's rights.

3. Avoid institutionalization of very young children, particularly those under the age of three, with the exception of certain circumstances such as: when the placement is made for a short period of time in response to an emergency situation; when the reintegration to the family or other care in a family-based setting is expected in the short term; and when there are groups of siblings in order to keep them together if there is no family-based setting available that would make it possible for them to remain together.

D. Decision-making on alternative care: applicable principles and due process guarantees.

1. The Commission urges States to review the regulation and the application of the clauses that allow for the separation of children from their families, and remembers that these clauses should be contained in a formal law, have a legitimate purpose, and be objective, reasonable and predictable.

2. The proceedings for the determination of a measure of alternative care must be taken by the competent authority, according to the law and the procedures applicable, with strict respect to due process and procedural guarantees, and be subjected to judicial review. The proceedings that are followed related to the care and guardianship of the child must be conducted in accordance to the principle of exceptional diligence.

3. The law must explicitly set forth the obligation to periodically review the alternative care measure, setting a brief time limit to do so. The revision of the care measure must be taken by the competent authority established by law, be justified objectively and subjected to judicial review.

4. The State must implement training programs so that the administrative authorities and judges, as well as other persons involved in the assessment and the decision–making process on the alternative care of a child , understand the negative effects that the institutionalization bring upon children, and the benefits of keeping children under a family-based environment or a similar environment.

5. The Commission recommends States to regulate the intervention of multidisciplinary technical teams in the process of evaluating a situation lacking protection, as well as in the determination of the measure most suitable for the child in each individual case. The multidisciplinary team must be integrated by professionals trained for the detection of situations of vulnerability for the child and to determine the most suitable measures to his or her care. The multidisciplinary team's evaluation must also be required in the periodical review of the protective measure.

6. The multidisciplinary team's evaluations must be done through the application of objective technical criteria, in order to avoid subjective or arbitrary interpretations on the vulnerability situation of the child; the evaluation report must contribute to build a justified and well-founded decision by the competent authority.

7. The State must guarantee effective child participation in the proceedings followed for the determination of a special measure of protection that may lead to the separation of a child from his/her family, and its revision; child participation must take place in a safe environment, friendly, accessible and appropriate. The regulation should not set a minimum age for the child to participate and be heard in the proceedings where a decision on his or her rights is being made; in addition, support for the correct understanding by the child on the proceedings and possible consequences must be provided. The law must foresee that the child's opinion will be taken into consideration, according to his or her age and maturity, and in the case that the authority decides in opposition to the child's will, the child's best interests must explicitly be presented to justify the decision.

8. The child must be provided with representation and quality legal counselling, that is free of charge and adapted to each particular child, in proceedings which decide on the possible separation of the child from his or her parents based on protective reasons.

9. The child´s parents or guardians, family, and other relevant persons for the child, must participate in protection proceedings that may result in the removal of the child from his or her family.

10. The principles of exceptionality, necessity and temporality should rule the application of special protective measures involving the separation of the child from his/her family. The aim of the special measure of protection is the preservation and restitution of the child's rights, primarily the restoration of family life in his or her family of origin, in the case that it is not contrary to the interests of the child.

E. Specific recommendations related to the residential care

1. Regulatory duty: States have the obligation to regulate and supervise the functioning of the residential alternative care centers, both public and private. In this regard, the Commission recommends:

a. Guarantee that the general principles of comprehensive protection and best interests of the child inspire all legislation, and all policy, program or practice regarding children under a special measure of protection that implies alternative care.

b. Ensure that the regulation governing care centers is primarily guided to guarantee the full applicability and enjoyment of every child's rights and to respond to the objective of the special measures of protection, namely, the restitution of rights and family reintegration, the later provided it is not contrary to the child's best interests. The centers' organization and its intervention program must strive to this objective.

2. Licensing, authorization to operate and administrative registration. States have the duty to:

a. Regulate the process and the requirements for licensing and authorization to operate of the residential alternative care centers, both public and private, as well as for their administrative registration. The residential alternative care centers can only operate with previous State authorization, when they meet the requirements set by the regulation.

b. Identify the authority in charge of granting licenses and authorization to operate. Based on the principle of specialization and professionalization, the competent authority must be specialized in the subject of the rights of the child and have adequate staffing available to it in order to carry out the necessary evaluations , as well as perform subsequent oversight and supervision duties. Evaluations must include an on-site inspection visit of the premises, in addition to a review of the requisite documentation.

c. Create, when not existing, a specific register of residential care facilities, in which all residential alternative care centers that operate in the territory must be entered; only those centers that comply with the rules on the conditions for licensing and authorization should be entered into the registry.

d. Establish in the regulatory framework the specific time period for the duration of applicability of the authorization, the authorization review process, and the requirements for authorization extension. Any change or modification in the centers' features or functioning should immediately be informed to the competent authority.

e. Review management and financing systems of the care facilities and residential institutions with the aim to overcome those models that encourage unnecessary retention of children in institutions.

3. Requirements and procedures for admission and departure in a residential care facility

The procedures for admission and departure of children into these centers should be established by law, with the objective that no child is admitted into a care center without being strictly necessary and appropriate, nor remain in it for an unnecessary time. Generally, the admission of a child without parental care into a residential care center must respond to the application of a special

measure of protection issued by the competent authority, unless it is an emergency situation, in which the competent authority should be informed immediately for its revision. In this regard, the Commission recommends:

a. Regulate the requirements that must be met in order for a center or an institution to allow for the admission and departure of children and adolescents, and the procedure thereof to be followed.

b. Consider the treatment of cases in which children were placed into residential institutions by their parents or relatives, not being able or not willing to care for them; these cases should be promptly informed to the competent public authority in the subject of children to the effect of providing support to parents through existing social services that support families, or to analyze if there are other relatives who could care for the child or, alternatively, consider which temporary or permanent alternative care measure would be the most suitable for the child, considering his or her personal situation and best interests.

c. Ensure that the work of professionals in the residential alternative care centers is oriented from the beginning to create the right conditions for the child to leave the residential in the shortest period of time.

d. Clearly regulate that in the moment that the necessary circumstances for the departure of a child from the alternative care center concur, this situation should be communicated in a timely manner, to the competent authority, in order that the same may issue the cessation of special measure of protection and the child's departure from the residential facility.

e. Establish the obligation that all residential alternative care centers and institutions keep a complete and up-to-date record of all children living in them. The record should be linked to detailed files of each child. States should have the completely current information of children under the custody of a residential care center or institution, public or private.

4. Duty to supervise, monitor and inspect

Relating to the States duty to supervise, oversee and inspect the residential care centers, public and private, the Commission recommends specifically the following:

a. Set forth in the norm the regular monitoring mechanisms and the specialized authority in charge for the supervision and monitoring of the residential care centers and institutions.

b. Establish protocols of visitation that include the way inspection visits should be conducted, the minimum frequency of inspections -which should be frequent, and comprise both scheduled and unannounced visits-, the elements or aspects to be inspected as well as the requirement that inspections visits should be conducted to all centers and institutions located within the territory of the State.

c. Guarantee that supervision contemplates, specifically, the operating conditions of these centers, the quality of services, and compliance with the protection measures to the child, in accordance with applicable human rights principles.

d. Ensure that inspections include the encounter with the facilities' staff as well as children and adolescents, and interviews with them in a safe, private and confidential manner. Interviews with parents of children in care should also be included.

e. Regulate the composition of inspection teams ensuring that are integrated by professionals from different disciplines trained in for that, and should specifically include a qualified physician, capable of assessing the physical setting, the medical services and all other aspects that have a bearing on the physical and mental health of children. Furthermore, the team should be integrated by a psychologist expert in child psychology and child communication. Gender should be taken into account in the make up of the team, as well as linguistic and communicational aspects, and the cultural element when children in care belong to ethnic groups.

f. Issue recommendations to the centers when irregularities are detected, setting a deadline for their compliance. Order the closing down of the center or institution in the event of serious incompliances established in the regulatory framework.

5. Independent monitoring mechanisms

In addition to the mechanisms of control and supervision performed by the administrative authorities, the Commission recommends the creation of an independent supervision to conduct periodic visits. Independent monitoring mechanisms must be established through legislation, and be given, in a clear manner, faculties of inspection and supervision in the broades sense possible. In this regard, the Commission specifically recommends:

a. Confer a clear mandate of supervision of the residential care centers and institutions to national independent institutions of human rights.

b. Guarantee that independent monitoring mechanisms may, at any time and without prior notice, conduct a visit to public and private

alternative care centers, with unrestricted access to their facilities and to children and staff, as well as to records and files. Furthermore, grant adequate legal authority to conduct investigations into any alleged violation of the rights of children in these settings, either in response to a complaint or on its own initiative.

c. Establish that the conclusions of supervision and monitoring actions by independent agencies should be made public and a procedure should be in place for follow-up on its recommendations.

d. Exhort States to ratify the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which creates the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, in addition to call for the creation of National Torture Prevention Mechanisms.

6. Complaint, claim and petition mechanisms

The legislation should establish complaint, claim and petition mechanisms that are accessible, safe, reliable and effective for children who are in care centers and residential institutions, public or private. In this regard the Commission recommends:

a. Ensure that all centers and institutions have clear and well-publicized protocols about complaintand reporting claims mechanisms and procedures.

b. Provide that these mechanisms and procedures be adapted to the characteristics of all children, and be understandable and accessible for the different ages and stages of maturity, as well as for children with disabilities. Additionally, the information must be in the language of the children in care.

c. Guarantee that the residential care centers and institutions provide information and educate children about their rights, in general, and inform about the existing complaint and reporting claims mechanisms in particular. Specifically, when a child is admitted to the center or institution, he or she should be provided a document outlining his or her rights as well as standards governing operations of the facility, the objectives and organizational structure of the institution, the code of conduct and proper interpersonal relations, disciplinary norms and any other relevant information, in clear language the child can understand.

d. Ensure that children can meet and address a readily accessible person, whose duty it is to process complaints, claims and petitions, as well as advise them on the rights they are entitled to and provide guidance to them. The persons in charge of receiving and processing the children's complaints, claims and petitions must have received role-specific and comprehensive training in matters pertaining to the rights of the children, as well as to on how to undertake this type of procedure.

e. Establish the duty for the staff at the centers and institutions to report any instances or circumstances that come to their attention, which may entail a violation of children's rights in the context of the care received by them at the center or institution; also, appropriate disciplinary or other types of sanctions must be regulated, when breaches of this obligation on the part of staff are proven.

f. Provide for the obligation of register by the residential institution or center of all communications, complaints and claims. Record of communications, complaints and claims must be accessible to the public authorities responsible for the supervision of the center, as well as to the independent monitoring mechanisms. The registry should include the course of action taken to adequately address the complaints and communications, in addition to the outcome of the actions undertaken.

g. Establish that the decision taken with regard to the complaint must be reasoned and well founded and complainants must have the chance to appeal that decision before an independent and impartial authority. Effective access to justice for children must be guaranteed. In any case, reports, complaints or petitions made by children must be taken into account seriously and rigorously; review of all reports or complaints must be mandatory.

h. Introduce external and independent complaint and reporting mechanism, including 24-hours toll-free hot lines.

i. Guarantee the ample possibility to voice complaints or report misconduct, without limiting it to particular persons or to specific matters. For example, the family members of the child, civil society organizations, as well as any other person who becomes aware of a situation that warrants doing so, may voice a complaint or report improper conduct. Mechanisms must be in place to allow anonymous complaints or petitions.

j. Take into consideration the privacy of the child and the confidential nature of some communications. The child must be informed about the scope and limits of confidentiality each time he or she makes a complaint.

k. Assure that the child will not be subjected to discriminatory treatment, punishment or any other form of retaliation as a result of making a complaint, claim or petition; likewise, care must be taken so that the child is not re-victimized in the context of the investigation or complaint proceedings. Child's safety and best interests should take precedence over everything else, and when necessary, the child should be moved to another location outside the center or institution.

l. Consider that the complaint or reporting procedure must be expeditious and conducted promptly with due diligence. Moreover, criminal, civil or administrative responsibilities should be established, where appropriate. The child should be advised promptly of the reply to his or her request and the status of the processing of his or her complaint, report or petition, as well as of its result. When it is proven that rights have been violated, appropriate reparation must be provided, including compensation, and, when appropriate, the adoption of measures to promote the physical and psychological recovery, rehabilitation and reintegration.

7. Duty of prevention, investigation, sanction and reparation

Take the necessary measures to assure the prevention, investigation, sanction and reparation in relation to a violation of rights in any alternative care center or residential institution. On that effect, the Commission recommends to the States:

a. To determine the obligations of the public authorities to act ex oficio in order to prevent, investigate, prosecute, punish and redress any human rights violation of human rights of children in residential care centers or institutions. In this regard, determine the obligation of the public authorities to initiate *ex officio* and with no delay, a serious, impartial and effective investigation when become aware of any possible violation to the rights of a child in alternative residential care; this investigation must be conducted through all legal means available and be aimed at finding out the truth and the investigation, prosecution and punishment of all persons responsible for the acts.

b. Establish in the legislation the duty to inform public authorities of any violation to the right to life and to personal integrity of a child which occur in alternative residential facilities, and of any other violation to his or her rights.

c. Give adecuate consideration to the best interests of the child in all investigation procedures, in particular, consider the need to avoid subjecting the child to a re-victimizing process or place the child's safety at risk; in this regard, the child's opinion should be obtained and be given due weight. Such investigations must be conducted by

qualified professionals who have received role-specific and comprehensive training for this purpose.

d. Regulate appropriate sanctions for those responsible, which may be of administrative, criminal and/or civil nature, taking into account the seriousness of the misconduct. In addition, States must focus their efforts on avoiding the repetition of reported incidents, which may entail taking administrative measures with regard to the alternative care center or institution, as well as conducting an adequate supervision afterwards.

e. Strive to restore the violated right as well as provide reparation for the damage caused. The Commission highlights the obligation to ensure the suitable measures of recovery and rehabilitation required for the child who has been a victim of violence or any other violation of rights.

8. Minimum standards of operation

The Commission urges the States of the region which still have not done so to adopt, in the shortest time possible, the criteria, requirements and minimum standards of operation of residential care facilities in accordance with the standards set in the international human rights law and attending to the objective of protection and restitution of rights of the child. The requirements and minimum standards of operation f must be applied to public and private centers. Regarding this matter, the Commission recommends:

a. Consider in the regulatory frameworK at minimum the following aspects: i) the type and the characteristics of the installations and equipment, ii) standards of care, iii) staff employment , iv) the care program and objectives governing operation of the facility, v) in the case of specialized care centers, include the characteristics of the additional services that this type of centers are obligated to have, for example, medical-psychiatric attention, or any other that requires special authorization, and vi) the records , files, accounting books and any other documentation that each licensed care facility should have.

b. Take in special consideration the objective of protection and restitution of rights that the special measures of protection have, when regulating the criteria and standards of f operation and the provision of services in residential care centers.

c. Require that all alternative care centers produce an intervention program, document in which the theoretical and practical operational criteria of the facility, as well as the plans and methods of intervention, are explicitly laid out.

d. Guarantee that children and adolescents in residential alternative care will not be unreasonably restricted in the exercise of their rights, except for any limitations or restrictions that are strictly necessary to ensure the protection and safety of the child or adolescent. The Commission considers that the operation of an institution under a closed system, which unnecessarily restricts contact of children with the outside world, is inconsistent with respect for the human rights of children and adolescents, including the right to maintain ties to their family, to the full and comprehensive development of their personality, the right to identity and the right to personal liberty.

e. The system for receiving visits as well as for leaving the center , must be adapted to the personal circumstances and conditions of each child, after having conducted an appropriate, individualized evaluation of the child and his/her environment, taking into account his/her best interests, the child's particular protection and care needs, and also considering the child's opinion.

f. Ensure that the physical space of institutions and their size are aimed at ensuring conditions of protection, safety, sanitation and privacy, which are consistent with the protection of the rights of children, as well as allowing for the exercise and enjoyment of children's rights and for conducting age-appropriate activities. Provide the centers and institutions with sufficient equipment and technical, human and financial resources. Strict compliance with these conditions must be taken into consideration by States when granting a license and authorization for operation, as well as within the framework of subsequent reviews.

g. Ensure that residential institutions have separate areas, such as, for example, bedrooms, hygienic services, among others, for the different groups of children and adolescents and, at the same time, common areas for socialization and community life under the proper supervision of the staff. Areas for the staff have to be clearly marked and separated from those of the children.

h. Contemplate that the facilities are perfectly adapted to the profile of the population group receiving care in them, and that the staff have the adequate experience and training required to attend the protection and care needs of the children, taking into especially taking into account the situation of the most vulnerable children, like children with disabilities, with a medical condition or special requirement, and very young children.

i. The Commission recommends the residential care centers to be of such dimensions that allow for an individualized attention and care, and be organized according to the rights and needs of children, in an

environment as similar as possible to a family, and with a reduced group of children. The objective should be, in general, to provide temporary care to the child and to actively contribute to his/her reintegration into his/her family.

j. Determine the maximum number of children that can be cared for in this type of s, being recommended that the number should be as l low as possible. No institution should surpass its installed capacity and every institution or facility should accommodate a reasonable number of children in keeping with its dimensions, avoiding the threshold of overcrowding, and observing conditions that allow respect for the privacy of the children.

k. Garantee that residential care centers are located in establishments in such a way that ensures close proximity to the habitual residence of the child and to his/her family and community. This is essential in order to effectively ensure that ties with the family are maintained and prevent the child's ties and connections with his or her environment and community from severing, in addition to contributing to support the reintegration of the child into his or her family when conditions are given for so doing. In the case of indigenous children, or belonging to to other groups, it must be ensured that the child will be able to keep his or her cultural identity and ties with his or her community.

l. Ensure that alternative care centers are physically located in places with ready access to public transportation and to services of education, health, leisure, recreation and cultural activities, as well as employment, depending on the age of the adolescent.

m. Ensure a stable setting for the children and satisfy their basic need for continuous and safe bonding with the setting where they are being cared for and the people directly responsible for their care; avoiding unnecessary transfers or those that are motivated by mere administrative reasons.

n. Establish in the regulation that it must be mandatory to create a record or file and draw up an individualized care plan for each and every child or adolescent entering a residential care center or institution. The files of children in care centers and institutions must be complete, up-to-date, confidential and secure. The child's file must include information concerning his/her family, as well as reports and complete evaluations performed when the protection measure began, together with periodic follow-up evaluations, with the individual care plan for the care of the child as a major component of the record.

o. Establish that medical and psychological records, as well as information regarding treatments of any kind and its evolution must also be included in the record, together with information on his/her education and training. This record should follow the child throughout the period he/she is in alternative care and be consulted by duly authorized professionals , responsible for his/her current care.

p. Contemplate within the norm, the purpose which the individualized care plan must have, its minimum content and the need for its periodic updating. The individualized plan must gather all pertinent information that will enable the professionals in charge of the child to make appropriate and well-informed decisions regarding the care of the child, in addition to providing a record of all actions taken with regard to the child. The plan is not circumscribed to the child and his/her care, but must also include all aspects related with reattachment to his/her family; for example the evaluations of the child's family and environment, interventions with the family and recommendations concerning the course of action to be taken with the family and the child. The child and his family must participate in this planning, unless that is against the child's best interests.

q. Establish the obligation that in the periodic reviews of the special measures of protection, to be carried out by the competent authority, the child's individualized care plan must be taken into due consideration as part of the information that is important for the evaluation of the current situation of the child and the family, for the purpose of reaching a decision regarding continuation, modification or cessation of the special measure of protection.

r. Regulate the basic staffing and employment criteria to be required of centers and institutions, both public and private. In this regard, the legislation must contain, at the very least: i) the staff/child ratio, ii) the professional profiles required, iii) the basic duties to be performed by the various professionals, and v) the minimum qualifications and knowledge required.

s. Ensure that in the procedures for selection and employment of staff, the references and professional background of the candidates are taken into account, most especially those of the people who are in direct contact with the children and adolescents, in order to be able to rule out a background involving cases of abuse, neglect or any other form of violence or infringement of the rights of the children.

t. Make sure that working conditions and remuneration paid to the staff working in residential institutions and care centers be in line with their responsibilities so as to maximize retaining of suitable and skilled staff.

u. Take into consideration the existence and availability of training plans and courses for ongoing professional training for people employed at residential care centers and institutions. Implement suitable measures to ensure, insofar as possible, that this training is properly recognized.

v. Regulate codes of conduct for staff working at residential care centers and institutions. These rules must define the standards for workplace conduct and the manner in which all the staff must adjust their behavior and treatment towards children. Include clear-cut procedures for filing complaints and reports concerning improper behavior on the part of any person working there. It is especially advisable to provide procedures to be followed in the cases of violence or abuse at the centers or institutions.

w. Ensure physical separation of children from adults, and proper placement of children and adolescents inside the instalations of the centers, where issues of age, sex, treatment needs and requirements, and other relevant conditions of the various children and adolescents must be taken into account. The Commission also stresses the inadmissibility of situations where children and adolescents in conflict with criminal laws are kept together with children and adolescents in need of protection and care.

x. Regulate mechanisms and procedures properly adapted and effective to ensure that the opinion of the children about the organization and the manner in which services are provided within the center or institution can be heard and is given due consideration.

y. Design and implement violence-prevention plans, within the framework of the residential care centers and institutions, that take the different vulnerabilities of children into account, and that include systematic and ongoing training of staff working at these centers. Among other prevention measures, the Commission considers it advisable to have the regulations include the obligation to perform an initial medical examination when the children arrive at the institutions, and to keep a record of illnesses, injuries and accidents occurring to the children during the entire period they are in institutional care.

9. Disciplinary systems and the use of force

With regard to the regulation of disciplinary systems, the Commission basis its understanding on the understanding that the rules governing behavior, community life and discipline applied in care centers and institutions must be positive and constructive. Discipline must always be administered in a respectful manner consistent with the human rights of children and

adolescents, their dignity and personal integrity. In addition, the Commission recommends:

a. Prohibit all disciplinary actions involving cruel, inhuman or degrading treatment, or any form of physical or mental abuse or harm, such as corporal or humiliating punishment, placement in a dark cell, solitary confinement, restraint or immobilization as punishment, reduction of food or limiting or denying the child contact with family members, or any other measure that could jeopardize the child's personal integrity or his/her mental or physical health, his/her right to education and to contact with members of his/her family. All collective disciplinary measures and multiple sanctions for the same infraction must also be expressly forbidden.

b. Require, by means of State legislation regarding the operation of residential care centers and institutions, that these facilities adopt disciplinary measures that are in strict compliance with the law and respect the human rights of the children and adolescents. These rules must be in writing and be displayed in areas of the center where they are visible, and be available in language appropriate for children so as to ensure that every person knows and understands them. Each child should receive a copy of the disciplinary rules upon his/her arrival at the center. Children accused of committing disciplinary infractions must be informed of the fact without delay and in such a way that they understand the infraction they are accused of having committed and the applicable punishment.

c. In general, the Commission considers that disciplinary measures and the procedures for their application are justified provided they are stipulated in the rules, have a legitimate purpose according to the best interests of the child and the goals of the special measures of protection, and that they are appropriate, necessary and proportional, and are strictly in keeping with human rights. Insofar as the legitimate purposes of disciplinary measures are concerned, the Commission understands that they are intended to protect children, and maintain order and safety at the centers, and that are exceptional in character.

d. Consider the importance of preparation and training for the staff in human rights and the limits to disciplinary measures and the use of force. In addition, staff should have the skills needed to deal with tension and inter-personal conflicts that may arise without resorting to disciplinary sanctions.

e. Prohibit the use of force, restraint and other measures of control over children, except when strictly necessary to prevent physical or psychological harm to the child or others, and be used when no other method is possible, pursuant to law, in a manner that is reasonable,

proportional and respectful of the child's fundamental rights. The law must regulate the use of force at residential care centers and institutions, following the principles of exceptionality , use of the minimum force necessary, and for the shortest period of time possible, only when strictly necessary for the protection of the child or others. Rule out, without any exceptions whatsoever, the deliberate and punitive use of force to cause pain or humiliation as control measure. The legitimate use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment.

f. Prohibit, in general, the use of psychiatric medications to children who are in residential care centers or institutions without any diagnosis of psychiatric pathologies or complex psychological afflictions that justify medical treatment with these drugs. The administration of drugs, not as part of a therapeutic treatment, but as a way of controlling children, is a violation of their personal integrity, health and dignity.

g. Prohibit solitary confinement or isolation in the case of children and adolescents, be it as a disciplinary measure or as a so-called "form of protection" for the child. The Commission distinguishes the exceptional use and justified means of control over the child, under the parameters already exposed, from solitary confinement or isolation.

h. Disseminate widely, among the children and staff working with children , the prohibition of all cruel, inhuman, humiliating and degrading treatment or forms of punishment, , as well as the sanctions that can be imposed on staff in the event of violations to this prohibition.

i. Keep standardized records of the disciplinary measures applied, identifying the child, the punishment imposed, the duration and the authority/ staff who ordered it. Furthermore, in compliance with the obligation to supervise, both the regulations governing the disciplinary system at institutions, as well as actual application of the system, must be reviewed periodically higher-level authorities that can objectively assess their suitability and effectiveness, and identify possible patterns of abuse or arbitrariness in the application thereof.

10. Systems for the production and analysis of information

States must strengthen the systems for the production of information concerning the systems for protection, specifically with regard to the operations of the residential care centers and institutions, in order to determine the degree of compliance with the rules and regulations, to improve

the delivery of the service, and to formulate more effective public policies to protect the rights of children and adolescents. The systems for the production of information must include the participation of children and adolescents, while respecting the right to privacy of children. These systems should also allow the States to assess the effectiveness of family protection policies, analyze the causes underlying the decision to separate the child from his/her family, the availability and use of different types of alternative care, and the success of family reintegration actions and other measures that offer a permanent solution for the child.

F. Duty to respect and guarantee rights

States must ensure all human rights of children who are in residential care centers and institutions, as well as a dignified treatment, in addition to taking into account the specific situation of certain groups of children in consideration of their special requirements or their special situation of vulnerability. To this end, the Commission specially recommends the following:

1. Adopt the necessary measures to respect the cultural identity of indigenous children and other ethnic groups, in particular providing access to health and education services that are respectful of the cultural identity of the child and that, insofar possible, are planned and organized at the community level and managed in cooperation with the peoples concerned.

2. Ensure the possibility that children who live in residential care centers or institutions can access the services in the areas of education, health, recreation, culture, occupational training and other services, within their community, unless this goes against the child's best interests and is properly justified in each individual case.

3. Introduce in the legislation governing residential care centers and institutions the duty to respect and guarantee the personal autonomy of the child in making decisions that affect him/her, or in the exercise of his/her rights, bearing in mind his/her age and degree of maturity. It will also be necessary to allow for the possibility that the children may make informed decisions, bearing in mind acceptable risks and the age and maturity of the child, in a manner similar to the in the case of children living with their families.

4. Guarantee children with disabilities the full enjoyment of all their rights. In particular, provide the necessary measures to ensure that children with any disability, especially a mental or intellectual disability, are not subjected to greater restrictions on their right to personal liberty than other children under protection, unless there is a justification based on their protection and best interests.

5. Children with disabilities have the right to be guaranteed access to an adapted and inclusive education that enables them to exercise their right, as well as access to culture, recreation and vocational training programs that are accessible and adapted.

6. Ensure access to quality health services, tailored to the particular needs and requirements of children and adolescents, according to their age, disability, illness or medical condition, or other special requirements. When a child is sick, complains of feeling ill or has physical, mental, sensory or intellectual symptoms, he/she must be quickly examined by a health care professional.

7. Ensure that institutions receiving children under special measures of protection who require specialized care, such as assistance and physical and psycho-social rehabilitation for children who have been victims of violence, for example, must have access to suitable programs in order to provide the type of specialized care needed.

8. Prohibit children and adolescents who are in residential institutions or care centers to be subjected to intrusive and irreversible medical treatments that do not have therapeutic purposes, as well as medical experiments or treatments that lack necessary scientific and medical backing. The principle of the child's best interests should govern all decisions made in connection with the child's health, after listening to and taking into account the opinion of the child him/herself based on his/her age and maturity.

9. Respect and adequately guarantee the right of the child to participate in the planning of his o her health, in particular to ensure access to information and the right to informed consent, in a manner that is appropriate to the age and maturity of the child. The Commission recommends that States draw up procedures and criteria for providing clear guidelines for medical and health-care personnel for proper practices that are respectful of the rights of children and adolescents.

ANNEX

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

IACHR 50 years defending HUMAN RIGHTS

QUESTIONNAIRE

THEMATIC REPORT ON THE SITUATION OF CHILDREN AND ADOLESCENTS LIVING IN CARE AND PROTECTION INSTITUTIONS IN THE AMERICAS

INTRODUCTION

This questionnaire has been prepared as part of the Work Plan of the Office of the Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the IACHR"), in cooperation with the regional office of the United Nations Children's Fund (UNICEF), and is to serve as input in the process of drafting a report on the situation of children and adolescents, who have been placed in residential care and protection institutions in the Americas (hereinafter "the Report"). The Latin American Regional Office of the United Nations High Commissioner for Human Rights and the United Nations Special Representative of the Secretary-General on Violence against Children will be providing support for this endeavor.

In an effort to prevent the different forms of violence perpetrated against children and adolescents, the IACHR and the Commission's Office of the Rapporteur on the Rights of the Child are focusing on the rights of this population. Since its creation in 1998, this rapporteurship has been instrumental in helping the IACHR to fulfill its task of protecting the rights of children and adolescents, by releasing thematic studies to the public, providing assistance in setting new legal precedents on this subject matter within the individual case system, supporting investigations relating to a broader range of issues that affect the rights of this population in specific countries of the region, and by conducting country visits and releasing country reports.

The Report will offer an analysis of the situation of children and adolescents living in either public, private or joint public/private institutions, under State supervision, highlighting the successes achieved and challenges faced by States in abiding by and implementing international human rights standards. The Report will encompass some of the types of institutions, which are responsible for the full-time care and protection of children and adolescents under order of any public authority. Specifically, it refers to the following types of child care and protection institutions: i) psychiatric institutions and hospitals; ii) orphanages and "children's homes" (*casas hogar*); iii) migrant holding centers; and iv) any residential care centers, where children and adolescents have been permanently placed, as well as other types of institutions. Additionally, when the questionnaire refers to the deprivation of liberty of children and adolescents, the term is understood to mean "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.[852]"

This questionnaire seeks information for 2011; however, should specific information for that year not be available, please provide the latest available information, indicating year it is from. When the State has additional information, which may be relevant to the drafting of this report, in addition to the information specifically requested in this questionnaire, we would be most grateful if it would be forwarded to the Commission as an attachment to the responses.

Personal information on the children and adolescents mentioned in the responses to the questionnaire shall be kept confidential and remain protected at all times.

Responses to this questionnaire should be submitted no later than June 30, 2011, to:

Inter-American Commission on Human Rights
Organization of American States
1889 F Street, NW
Washington, DC 20006
cidhdenuncias@oas.org

[852] United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Rules of Havana"), adopted by the United Nations General Assembly in Resolution 45/113, December 14, 1990.

QUESTIONNAIRE

Date: …… State: ……

I. BASIC INFORMATION

1. State what government offices and institutions were involved in completing the questionnaire.

2. State the number and percentage of your country's population that is under 18 years of age. Please break down this information into the following categories:

- Age or age brackets (0-3, 4-7, 8-13, 14-18)
- Gender
- Geographic setting: urban – rural
- Ethnic group
- Percentage of child population living under the poverty line stating the standard used to identify the population living under that line.
- Disability
- Orphaned children and adolescents

3. If no information is available that is broken down by age group, then just state the total population that is 18 years of age and under, and older than that age.

II. PENAL INSTITUTIONS

4. How many penal or juvenile justice institutions for children and adolescents are there in your country?

- State how many of these institutions only house children and adolescents exclusively for correctional reasons and how many of these institutions also house children and adolescents for reasons of protection or other reasons (such as children living in these types of institution with their mothers).

III. INFORMATION ON CHILD CARE AND PROTECTION INSTITUTIONS[853]

A. DESCRIPTION OF THE LEGAL FRAMEWORK OF CHILD/ADOLESCENT CARE AND PROTECTION INSTITUTIONS

5. Indicate whether your State has adopted legislative or other measures to bring domestic laws and practices into line with international and regional standards of children's rights protection. Attach copies of the respective statutes and regulations.

[853] When the questionnaire requests legislation, all applicable legislation should be included to the extent possible, whether it is national or belongs to a different level of government of a federal State.

6. What are the grounds for residential placement in child/adolescent care and protection institutions as provided by national legislation? (Please attach copies of either the national or federal legislation.)

7. What type of authorities (judicial, administrative or some other type) orders the full time residential placement of children and adolescents in institutions and what are the purposes of care or protection to justify the placement (therapeutic, educational purposes; disciplinary reasons; among others)?

8. How does the law ensure respect for children's and adolescents' right to be heard and for their opinions to be properly taken into consideration within the institutionalization proceeding?

9. Does legislation provide for free legal assistance in proceedings to determine whether children or adolescents will be institutionalized for purposes of protection, therapy and for other purposes? How is this assistance actually provided and what does it involve?

10. How do the parents and/or caretakers of children and adolescents take part in the proceedings or cases to determine whether or not the latter will be separated from the former and to decide whether the children/adolescents will be institutionalized for purposes of protection, care, etc.? How is effective participation of the parents and/or caretakers of children/adolescents ensured as well as parents and/or caretakers receiving advisory services within the context of said proceedings or cases?

11. Up until what age can children and adolescents be placed in care and protection institutions?

12. Can institutionalization for reasons of care or protection give rise to the deprivation of liberty? Under what conditions and rationale? Does legislation set a maximum period of time for this type of measure?

B. DESCRIPTION OF CHILD/ADOLESCENT CARE AND PROTECTION INSTITUTIONS

13. How many full time child/adolescent care and protection institutions are there in your country (including, but not limited to, therapeutic or psychiatric institutions and hospitals and "children's homes", migrant holding and full time residential placement centers)?

- State where the institutions are located and what ministry/office or organization they are under or what ministry/office or organization oversees them.

- What is the maximum capacity of each institution and what is the total number of children and adolescents living in each one?

- Describe the type of each institution (for example: psychiatric; orphanage or children's home; migrant holding center; and comprehensive care residential placement centers).

14. Do specific institutions only take children and adolescents who have been institutionalized for one particular reason? (For example, only street children, children without parental care.)

15. How many institutions are exclusively public (State-run and owned), how many are exclusively private (regardless of being under State control or oversight) and how many are a combination of both?

- Describe the nature of each one and state what percentage of the total institutionalized children/adolescent population is living at each type of these institutions.

- Are there any specific mechanisms in place for monitoring and oversight of the private or joint private/public institutions? If so, describe said mechanisms in detail.

16. In how many child/adolescent care and protection institutions are juvenile residents placed in the same quarters as the adults?

- How many institutions place children/adolescents in quarters separate from adults, but adults share some spaces with juvenile residents, such as exercise areas, bathrooms or eating areas? How many institutions house children/adolescents in an exclusive area?

17. Is any public office responsible for keeping statistics on the operations of the institutions? Since when have statistics been kept?

18. Is there a public office in charge of registering and licensing institutions? What requirements must the institutions fulfill for this office to license them? How many institutions have been licensed by the authorities? Please break them down by type of institution.

19. How are children/adolescents registered and individually identified at the time of placement at the institution? State specifically whether said registration includes:

-the grounds for placement;
-the entity or agency that ordered and handed over the children/adolescents for placement;
-the name; age; gender; special condition and suggested treatment; clinical history;
-please include any additional categories of information that are registered at the time of placement of children/adolescents.
-if no records are available, please state the percentage of institutions that do not keep a registry and why they were unable to do so.

20. What is the average age of placement at these institutions and what is the average age of release from these institutions?

21. What is the average length of stay and the maximum stay at the institutions?

22. How many children/adolescents were placed at care and protection institutions in 2010?

23. How many were allowed to leave or were released from care and protection institutions in 2010?

24. State whether children/adolescents living at the different types of care and protection are separated by gender.

- Please specify the total number of children/adolescents who are not separated by gender.

25. How much of the State's budget is allocated for operation of child/adolescent care and protection institutions? Please break the total budget down by type of institution.

- How has resource allocation trended over the past five years?

26. What type of training is required of those who work on a permanent basis at child/adolescent care and protection institutions? How is staff selected? Please break staff down by type of professionals.

27. Please attach the code of conduct for the staff or the rules governing the powers and duties of staff, should such a code exist.

28. How many employees work at care and protection institutions and what is the ratio of employees to children/adolescents? Please break employees down by position.

C. SITUATION OF CHILDREN/ADOLESCENTS AT CARE AND PROTECTION INSTITUTIONS

29. By what means is contact of institutionalized children/adolescents with their family and community ensured?

- Are children/adolescents able to leave the premises to visit family?
-How regularly are the children/adolescents allowed to be visited and for how long?
-What measures are taken to prevent separation of siblings?

30. Are formal schooling and/or job training programs offered? What specific programs are offered and how many residents are covered?

31. Are any other type of non-formal education and/or socio-educational programs offered at child/adolescent care and protection institutions? What specific programs are offered and how many residents are covered?

32. By what means is access to health services in general ensured for children/adolescents living in care and protection institutions? What is covered by these services and describe what they are?

33. How is mental health and therapeutic service ensured at the different types of institution?

34. Are there specific institutions and/or specialized assistance for specific groups of children/adolescents? For which groups and what does the specialized assistance involve?

35. In what situations is the decision made to transfer a child/adolescent from a care and protection institution to a psychiatric institution? Who makes this decision?

36. Are children/adolescents with mental disabilities placed in the same institutions as the rest of the general population who are institutionalized for reasons of protection? Specifically mention whether children/adolescents with mental disabilities are at the same institutions as children/adolescents with physical disabilities, and/or at the same institutions as adults with mental disabilities.

37. Are there specialized full time care programs for children/adolescents with a physical disability? What do these types of programs involve?

38 Are there specialized residential care programs for children/adolescents who use drugs?

39. Is specialized assistance for institutionalized girls provided (such as gynecological care, infant care assistance, parenting counseling, caring for infants facilities)? Specifically describe this specialized assistance.

40. Specify what disciplinary measures are taken with children/adolescents living at protection, therapeutic, psychiatric institutions, as well as the behavior that triggers a disciplinary measure. Describe the disciplinary process and attach the rules and regulations on this subject matter.

41. Is corporal punishment specifically prohibited? If so, attach the rule. If not, state in what circumstances is it allowed and submit the relevant rules or regulation.

42. Specify the number of children/adolescents that have passed away or have been injured at institutions in 2010. Specify the causes and the circumstances of the deaths. Specify how many instances were self-inflicted injuries, injuries caused by other institutionalized children/adolescents and injuries inflicted by institution employees.

43. Report the number of children/adolescents that have been injured at institutions in 2010. Specify the causes and the circumstances of the injuries. Specify how many instances were self-inflicted injuries, injuries caused by other institutionalized children/adolescents and injuries inflicted by institution employees.

44. Specify the number of children/adolescents who have escaped or disappeared from institutions in 2010. State the causes or circumstances.

45. Do the institutions practice voluntary or involuntary sterilization of children/adolescents? If so, state how many cases have been registered at each institution breaking them down by age and gender of the children/adolescents and by type of institution where this procedure has been performed.

46 Are consensual or non-consensual abortions performed on girls at the institutions? If so, please state how many cases have been registered at each institution breaking them down by the age of the girls/young women and by the type of institution where these procedures have been performed.

D. MECHANISMS OF OVERSIGHT AND CONTROL OF CHILD/ADOLESCENT CARE AND PROTECTION INSTITUTIONS

47. State whether mechanisms are in place to ensure periodical review of the suitability of the type of institutionalization that has been prescribed. Describe the review process and attach the rules on this subject.

48. Are any mechanisms in place to ensure the regular and independent oversight of child/adolescent care and protection institutions? Describe the oversight process and attach the rules on this subject. If such mechanisms are in place, specify:

- How many inspections were conducted under this control mechanism last year?

- How many of these institutions were inspected under this mechanism last year?

Attach the reports on the findings of these inspections.

49. State whether or not a human rights violation complaint process is in place for children/adolescents at institutions. Describe the process and attach the rules on this subject.

50. How many complaints have been filed in 2010?

- How has the number of complaints trended over the past years?

- How many complaints have lead to a finding of responsibility of employees? What type of complaints have been filed? What type of punishment was given and who decided the punishment?

E. PUBLIC POLICIES ON CHILD/ADLOLESCENT CARE AND PROTECTION INSTITUTIONS

51. Are there policies in place to support the institution of the family?

- What services help to ensure that the children/adolescents can be cared for by their own families (preventing separation from family and supporting reintegration into their families)? What do these policies involve? State how far these policies go and how much budget has been allocated to implement them.

52. Does any program offer an alternative to the placement in a care and protection institution (such as foster families, extended family, halfway houses, family support)?

53. Are there plans and/or strategies for the de-institutionalization of the child or adolescent population? What are those plans?

F. BEST PRACTICES

54. Describe best practices used in your country for children and adolescents living full time at different types of residential care and protection institutions. If the practice is documented, attach the relevant documents.

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISION INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

CONCEPTUAL PAPER

STUDY ON THE SITUATION OF CHILDREN AND ADOLESCENTS LIVING IN CARE AND PROTECTION INSTITUTIONS IN THE AMERICAS

I. BACKGROUND AND INTRODUCTION

1. The past few decades have witnessed sweeping changes in public policies on children and families, as well as in how social services are provided to them, in the States of the Americas. The incorporation of human rights standards into the legislation and programs of the hemisphere has given rise to a process of change that is at risk, in many instances, of going no further than the paper it is all written on, if effective implementation of these standards is not approached from a human rights perspective. Despite some progress in this regard, the hemisphere is still home to States whose legislation has not been brought into line with the principles and standards required by international human rights law, particularly the United Nations Convention on the Rights of the Child (hereinafter "the "CRC"), in connection with the rights and obligations set forth in Article 19 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Article VII of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration").

2. The situation of children and adolescents in residential care and protection institutions has been the subject of growing interest both in the universal system, particularly at the United Nations Children's Fund (hereinafter "UNICEF") and to the Special Representative of the Secretary-General on Violence against Children (hereinafter "SRSG"), as well as in the Inter-American System of Human Rights Promotion and Protection (hereinafter "the Inter-American System").

3. The World Report on Violence against Children (hereinafter "the World Report")[854] identified violence against children in residential care and protection institutions as a priority area for further investigation, particularly in light of the paucity

[854] The World Report on Violence against Children was prepared by Inter-American Commission on Human Rights (hereinafter "The Commission" or "IACHR") Commissioner Paulo Sergio Pinheiro, who is also the Rapporteur on the Rights of the Child of this same institution, during his prior position as Independent Expert appointed by the UN Secretary General for the Study of Violence against Children. See http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1(1).pdf

of statistics and information on this phenomenon. The United Nations system has also recently added the Guidelines on Alternative Care for Children to the plethora of standards pertaining to juvenile justice systems.[855]

4. This topic has also been a priority of the Inter-American System. The advisory opinions issued and legal precedents set by the Inter-American Court of Human Rights (hereinafter "The Inter-American Court" or "the IA Ct. of HR) on the rights of the child stand as a testament to the importance attached to these issues in this system.

5. Recently, the Inter-American Commission on Human Rights (hereinafter "the Commission") addressed the issue of violence in different settings, during thematic hearings as part of its system of petitions, and as a primary or related subject of several important reports: *Report on Corporal Punishment and Human Rights of Children and Adolescents,*[856] the soon to be released *Report on Juvenile Justice and Human Rights in the Americas,* as well as the *Report on Citizen Security and Human Rights*.[857]

6. In order to build on these steps forward, help to bring about effective implementation and compliance, and continue to raise the standards that have been developed heretofore, the Commission has decided to issue a report on the situation of children and adolescents placed in residential care and protection institutions in the Americas (hereinafter "the Report"). This report shall be prepared in conjunction with UNICEF, with the support of the Latin American Regional Office of the United Nations High Commissioner for Human Rights and the United Nations Special Representative of the Secretary-General on Violence against Children.

7. The Report will put forth an analysis of the situation of children and adolescents living in either public, private or jointly-run public/private institutions, which are under State supervision, highlighting the successes achieved and challenges faced by States in abiding by and implementing international human rights standards. The Report will encompass some of the types of institutions, which are responsible for full-time care and protection of children and adolescents and the state role in this endeavor. Specifically, it will cover the following types of child care and protection institutions: i) psychiatric institutions and hospitals; ii) orphanages and "children's homes" (*casas hogar*); iii) migrant holding centers; and iv) any residential care centers, where children and adolescents have been permanently placed, as well as other types

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[855] United Nations Guidelines on Alternative Care for Children, adopted at the United Nations General Assembly on November 20, 2009. The universal system features a number of international instruments pertaining to the topic under examination in this paper, such as the reports of the Special Rapporteur on the Right to Health (E/CN.4/2005/51) or General Comment No 21 on Humane Treatment of Persons Deprived of Liberty, adopted by the Human Rights Committee.

[856] Report on Corporal Punishment and Human Rights of Children and Adolescents, OAS/Ser.L/V/II.135, doc. 14, August 5, 2009. Available at: http://www.cidh.org/ninez/castigocorporal2009/castigocorporal.indice.htm

[857] Report on Citizen Security and Human Rights. OAS/Ser.L/V/II, doc. 57, December 31, 2009. Available at: http://www.cidh.org/countryrep/Seguridad/seguridadindice.sp.htm

of institutions. Learning about the practices and operating procedures of child/adolescent care and protection institutions will shed light on the ones that have eluded the public eye. Furthermore, raising greater awareness in this field will make it possible to bring the human rights approach to the models of child and family care and protection into the discussion. This will have repercussions on institutional management, by reaffirming the duties of the State, including prevention of certain practices, which is the responsibility of society as the guarantor of the rights of children and adolescents.

8. The Report will provide information on patterns of action that are both consistent with, and in violation of, the international standards set forth in the American Convention, the American Declaration of the Rights and Duties of Man, the United Nations Convention on the Rights of the Child, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Guidelines for the Prevention of Juvenile Delinquency, the United Nations Guidelines on Alternative Care for Children, as well as the recommendations set forth in the United Nations Common Approach to Justice for Children, and several other international instruments, the comments of the United Nations Committee on the Rights of the Child, the Reports of the IACHR and the decisions of the Inter-American Court, without prejudice to any changes that may arise, which benefit the rights of children.

II. BASIC CONCEPTS

II.1. *Corpus juris* on the human rights of children and adolescents

9. In keeping with international treaty law interpretation, the CRC is part of a body of interrelated rules or *corpus juris* on the protection of the human rights of children that must be taken into consideration in interpreting the meaning of Article 19 of the American Convention or Article VII of the American Declaration. Both of these articles ensure the right of children to measures of care and protection and special assistance, which States and, indirectly, society are required to provide them because of their condition as developing subjects. Article 19 of the American Convention, which is the most important provision of the Inter-American system with regard to the rights of the child, provides that:

> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

10. The IA Ct. of HR has addressed interpretation of this article explicitly mentioning the idea of the existence of a *corpus juris* of human rights of the child and

adolescents.[858] The Inter-American Commission has referred to this concept finding that:

> For an interpretation of a State's obligations vis-a-vis minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere.[859]

11. This means that there is indeed a substantive connection between these instruments, thus making their joint application mandatory.[860] Recognition of this *corpus juris* entails a reconceptualization of the duty of special protection. Children, therefore, possess all rights to which human beings are entitled and, additionally, have special rights stemming from their condition as minors. It is the correlative duty of the State and, indirectly, of the society to which they belong to respect and ensure these special rights, in other words, to take special measures of protection.[861] Article 19 of the Convention, as interpreted in the jurisprudence of the IA Ct. of HR, must be construed as an added and complementary right, which the treaty establishes for beings who, because of their physical and emotional development, require special protection.[862]

12. Moreover, in the view of the IA Court of HR, any case involving the rights of children must take into consideration the best interests of the child, which is viewed as

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[858] IA Ct. Of HR. *Case of the "Street Children" (Villagrán Morales et al), Guatemala*. Merits. Judgment November 19, 1999. Series C No. 63, par. 194.

[859] IACHR, Report No. 41/99, Case 11.491, Admissibility and Merits. *Minors in Detention.* Honduras, March 10, 1999, par. 72.

[860] *Also see:* IA Ct. of HR. *Case of Juvenile Reeducation v. Paraguay.* Preliminary Objections, Merits, Reparation and Costs. Judgment September 2, 2004. Series C no. 112, par. 148; and the *Case of the Gomez Paquiyauri Brothers v. Peru.* Merits, Reparation and Costs. Judgment July 8, 2004. Series C No. 110, par. 166. It reads verbatim:

> Both the American Convention and the Convention on the Rights of the Child are part of a broad international *corpus juris* for protection of children that aids this Court in establishing the content and scope of the general provision defined in Article 19 of the American Convention.

[861] IA Ct. of HR. *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 August 28, 2002. Series A No. 17, par. 62. It reads verbatim:

> Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong.

[862] IA Court of HR. *Case of the Juvenile Reeducation Institute v. Paraguay.* Preliminary Objections, Merits, Reparation and Costs. Judgment of September 2, 2004. Series C No. 112, par. 147 and the *Case of Servellon Garcia et al v. Honduras.* Merits, Reparation and Costs. Judgment September 21, 2006. Series C No. 152, par. 113.

a reference point to ensure effective realization of all rights contained in the CRC, the observance of which will allow for the child to fully develop his or her potential.[863] The IA Court of HR has held that "the prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children."[864]

13. In short, the Inter-American Court has held that the rights of children must be safeguarded because of their status as human beings, as well as because of the special situation in which children find themselves and, therefore, it is necessary to adopt measures of special protection.[865] This additional obligation of protection[866] and these special duties of protection, which stem from the need for protection of the subject of law,[867] have specific consequences vis-à-vis the situation of institutionalized children and adolescents.

14. Furthermore, the Court has found that "the ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights."[868]

II.2. Children and Adolescents Placed in Care and Protection Institutions

15. For the purposes of the Report, institutionalized children and adolescents are defined as those who live full time, under administrative, judicial order or another type of decision, for reasons of protection and care.

16. Interventions for reasons of child welfare or protection and care are a common practice in the hemisphere and this entails some degree of intrusion, if not a violation of

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[863] IA Ct. of HR. *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 August 28, 2002. Series A No. 17, par. 59.

[864] IA Ct. Of HR. *Case of the Yean and Bosico Girls v. Dominican Republic.* Preliminary Objections, Merits, Reparation and Costs. Judgment of September 8, 2005. Series C No. 130, par. 134. Corte IDH.

[865] The legal basis for this type of special measure is rooted in the principle of equality and non-discrimination as set forth in the Court's own Advisory Opinion OC-17/2002. IA Ct. of HR. *Juridical Status and Human Rights of the Child.* OC-17/02 of August 28, 2002. Series A No. 17, par. 55.

[866] IA Court of HR. *Case of the Juvenile Reeducation Institute v. Paraguay.* Preliminary Objections, Merits, Reparation and Costs. Judgment of September 2, 2004. Series C No. 112, par. 160; *Case of the Gomez Paquiyauri Brothers v. Peru.* Merits, Reparation and Costs. Judgment July 8, 2004. Series C No. 110, pars. 124,163-164 and 171; *Case of Bulacio v. Argentina.* Merits, Reparation and Costs. Judgment of September 18, 2003. Series C No.100 pars. 126 and 134; and IA Ct. Of HR. *Case of the "Street Children" (Villagrán Morales et al), Guatemala*. Merits. Judgment November 19, 1999. Series C No. 63, pars. 146 and 191. Additionally, *Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, pars. 56 and 60.

[867] *Cfr*. IA Ct. Of HR. *Case of Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 154. Corte IDH.

[868] IA Ct. of HR. *Juridical Status and Human Rights of the Child*. OC-17/02 of August 28, 2002. Series A No. 17, par. 53.

a child's right to live with his or her family,[869] or fails to preserve the family bond by temporarily interfering and then directing efforts toward the reintegration of the child with his or her family and community, provided that it is not contrary to the child's best interests.[870] The *corpus juris* on the human rights of children and adolescents, which includes the United Nations Guidelines on Alternative Care for Children, sets forth several minimum standards to be taken into account with regard to this type of public policies. These instruments place a high priority on the duty of States to safeguard stable and settled family environments, and to develop policies of support and services to serve the best interests of the child to greatest extent possible.[871]

II.3. Preventing All Types of Violence against Children and Adolescents

17. The Report is a response to the need to take a closer look at this type of institution from a human rights perspective, which has been laid out in the World Report and in IACHR reports such as the Report on Corporal Punishment and Human Rights and the soon to published Report on Juvenile Justice and Human Rights.

18. The high risk of children and adolescents living in institutions becoming victims of violence is a consequence of several different factors and can be even higher in certain circumstances, such as in the case of girls or, having a different type of capacity

19. These situations of violence can arise in the course of performance of the duties of care and protection by institution officials or in imposing disciplinary measures. The use of physical punishment or other forms of violence in these institutions is still not expressly prohibited in most States of the hemisphere.[872] All children and adolescents living in these institutions also run the risk of being subjected to a variety of forms of violence as a consequence of their treatment, including the use of medical procedures and medications as an instrument of control or a form of medical coercion.

20. The very conditions in which institutionalized children and adolescents live could be viewed as a practice of violence. Negligence, confinement to overcrowded living conditions, isolation or solitary confinement, a failure to provide education programs or recreation or health or medical care are just a few examples of these forms

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[869] IA Ct. of HR. *Juridical Status and Human Rights of the Child*. OC-17/02 of August 28, 2002. Series A No. 17, par. 71.

> 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, [...]

[870] IA Ct. of HR. *Juridical Status and Human Rights of the Child*. OC-17/02 of August 28, 2002. Series A No. 17, pars. 75 and 77.

[871] *Cf. United Nations Guidelines for the Prevention of Juvenile Delinquency.* Adopted under resolution 45/112 of the United Nations General Assembly, December 14, 1990, guideline 13.

[872] *See IACHR, Report on Corporal Punishment and Human Rights of Children and Adolescents,* OAS/Ser.L/V/II.135., doc. 14, August 5, 2009.

of institutional violence. In addition to all of these potential sources of violence, these children and teenagers can face serious situations of violence between one another, particularly in the context of deficient institutional oversight and control of institutions.

21. The State's obligation does not stop at merely preventing violence perpetrated by its own agents, but also involves the prevention of any form of violence committed by third parties. In order to determine the extent to which a State exerts control over institutions of a private or private/public nature, one must look at how zealously it plays its role as a guarantor of the rights of children entrusted to the protection and care or treatment in these institutions in keeping with international human rights law.

III. OBJECTIVES

22. The general objective of the Report is to contribute to the improvement of the situation of children and adolescents living in institutions in the Americas, by identifying and documenting institutional practices,[873] as well as drafting recommendations regarding the legislation, policies and practices governing these institutions as they pertain to respect for the human rights of children and adolescents.

23. Specifically, the Report will yield information on the situation of children and adolescents at care and protection institutions and will identify possible violations of children's and adolescent's rights within these institutions, including the situation of migrant children and adolescents, victims of sexual exploitation, trafficking and other types of violence. It is also hoped that the Report will help to promote a greater degree of interdisciplinary collaboration and comparative research.

24. Another pertinent objective of the Report is to determine the degree of control exerted by States over these institutions. In order to assess the appropriate level of oversight and the duty of prevention of the State, the particular type of institution must be taken into account and, for this purpose, a distinction must be drawn between the following types of institution: 1) State-run institutions- psychiatric institutions or public or quasi-public hospitals, among others; 2) private or joint private/public institutions overseen directly by State-orphanages, and residential homes with state financing or under concession by the State, among others; 3) private institutions overseen indirectly by the State- run by authorized churches; orphanages, residential care facilities or private hospitals among others.

[873] Other aspects to be addressed include those pertaining to the legal framework, application of the measure of institutionalization as a last resort, human resources available to institutions, counseling mechanisms, complaints on and reporting of alleged human rights violations of persons under 18 years of age at institutions, and reliable statistics thereon.

IV. METHODOLOGICAL STRATEGY

IV.1. Proposal

25. The proposed methodological strategy includes several complementary techniques. In addition to gathering existing information, requesting information from the States and a variety of civil society organizations by means of a questionnaire, and holding regional consultations, we plan for the Report process to include a survey to be completed by the institutionalized children and adolescents themselves, discussion groups and case studies. Additionally, we will look into forming a group of experts for ongoing consultation throughout the process of drafting the regional Report.

IV.2. Gathering existing information

26. Gathering existing information involves a review of any available information, investigations/research, studies and reports on the subject matter, including the output of international or academic organizations, governmental institutions and non-governmental organizations. Examining existing information makes it possible to determine weaknesses and identify issues to be included on the investigation agenda. The Report will also examine the legal framework, current statutes and regulations and the principles, legal precedents and the international human rights instruments that are most relevant to these issues. The guidelines for interpretation of international law are rooted in the American Convention (Article 29), the principles of the CRC and the 1969 Vienna Convention on the Law of Treaties (Articles 31, 32, and 33).

IV. 3. Requesting information from States and civil society organizations by means of a questionnaire

27. The Report will also draw on information gleaned from the responses to the questionnaires, which will be given to and completed by the States, UNICEF offices, human rights and civil society organizations that work on issues pertaining to the rights of the child.

28. The information received through this questionnaire shall serve as input for the preparation of working materials, which shall be made available for use at regional meetings.

IV. 4. Regional consultation meetings

29. As part of the Report drafting process, regional consultation meetings will be held with experts on the subject matter, regional representatives of human rights groups, organizations that work on the subject matter, state authorities, among other key actors, in order to gather additional information on institutional practices, technical aspects of these issues, as well as to discuss the conceptual framework of the report.

30. The consultations will be held in coordination with UNICEF offices and will take into account the experience of consultations that were held in the context of

preparation of the soon to be published report on Juvenile Justice and Human Rights, and care will be taken to include efforts made prior to the consultations in order to ensure the quality of contributions.

IV. 5. Surveys and group discussions of children and adolescents

31. It would be a disservice for this Report to leave out the very children and adolescents, who are at the center of the different types of interventions. Therefore, the methodological strategy includes surveys to be completed by the children and adolescents, as well as group discussions with their participation.

32. The Report preparation process will include a still undetermined number of surveys of institutionalized children and adolescents. The process will also have a still undetermined number of group discussions of adolescents deprived of their liberty. The group segmentation criteria will be designed to detect groups of children who are victims of discrimination or are particularly vulnerable either within the institutions or under the legislation of the particular State involved.

33. A survey form will be used to gather the opinions of institutionalized children and adolescents regarding certain dimensions and variables that are considered important. The methodology will adhere to the standards and requirements developed by the United Nations Committee on the Right of the Child in General Comment Nº 12 on children's right to be heard, particularly with regard to the creation of mechanisms to ensure that children are able to adequately express their opinions in light of their special situation of vulnerability and making sure that participating in the survey does not place them at risk of further victimization.

IV. 6. Case studies

34. As part of the Report drafting process, case studies will be used to help to achieve a more in-depth analysis of the subject at hand. These studies shall be based on working guidelines and a standardized methodology.

35. The use of case studies is an effective method to conduct in-depth examination of specific situations, as well as to produce detailed descriptions of such situations, including their context and principal components. Case studies, as a method for analysis of a particular public policy (or of a public policy mechanism, such as the institutions that are the subject of this study) are a valuable tool for identifying managerial and administrative practices, organizational structures, budget performance, context of application, and interaction of agents involved.

V. ANTICIPATED RESULTS

36. In order to achieve these objectives, the Report must yield quantitative information, such as the number of children and adolescents in the Americas who are not living with their family, information on the types of existing child/adolescent care and protection institutions or information on the budget allocated by States for the operation of these types of institutions. The Report is expected to highlight the

importance of devising indicators to measure and evaluate the impact of institutional mechanisms, laws and public policies in this field, especially the impact of reforms and innovations carried out over the past decades after ratification of the CRC by the States of the region and the progressive development of the *corpus juris* in the field of the rights of children and adolescents.

37. In addition to increasing the availability of descriptive statistics on children and adolescents and the types of institutions in which they are placed, the Report will help to identify who they are and the reasons for their placement. It will also help to shed light on their demographic characteristics and profile of victimization, such as what percentage of institutionalized children and adolescents are afro-descendants, indigenous, from low-income families, and victims of abuse, violence and exploitation (such as child labor or sexual exploitation). A gender perspective will be used in analyzing the information and any institutional practices that disregard this perspective will be identified.

38. In the context of the drafting of the Report, a study and assessment will be conducted on the human rights standards that must be upheld at either public or private facilities where children and adolescents are institutionalized. The Report will identify the specific human rights standards that apply to the institutional mechanisms addressed in the study.

39. The Report will address the variety of challenges faced by state systems to bring their child care institutions into line with international human rights standards, and will make specific recommendations. In identifying the challenges and issues, the Report will recommend strategies to confront the challenges. Both the regional and national levels will be taken into account in the Report, as well as diversity and challenges that are unique to particular groups, including the gender or ethno-racial perspective, the situation of migrants and of religious, social and political minorities, and of low-income groups. Accordingly, the Report will address deficiencies at these care and protection institutions, such as the lack of trained staff, underfunding, overcrowding, lack of socio-educational programs, the failure to provide tailored responses to particular individuals and groups, the State subcontracting or being supplanted by private or faith-based institutions, which are often not subject to effective oversight or control.

40. The Report will put forth recommendations to the States, international organizations and organized civil society on how to effectively apply international standards and principles of human rights to the institutions and laws, policies and practices at issue, in order to improve the situation of children and adolescents who are subjected to this type of regime.