

BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

EXPERT OPINION BY

**THE UNITED NATIONS SPECIAL RAPPOREUR
ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN**

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RAMÍREZ BROTHERS AND FAMILY VS. GUATEMALA

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1. THE CONCEPT OF AND LEGAL ELEMENTS THAT CONSTITUTE THE SALE OF AND TRAFFICKING IN CHILDREN FOR THE PURPOSE OF ADOPTION ACCORDING TO INTERNATIONAL NORMS AND STANDARDS

The sale of and trafficking in children, though similar, are different crimes. States tend to identify sale of children with trafficking in children. For instance, article 202 (ter) of the Penal Code in Guatemala considers the sale of persons as a form of trafficking. According to this provision, the crime of trafficking in persons includes, among others, sale of persons, illegal adoption, and irregular adoption proceedings. Many States have legislation prohibiting trafficking in persons but lack legislation specifically prohibiting the sale of children. However, article 35 of the Convention on the Rights of the Child obliges States Parties to take measures to prevent both. The Committee on the Rights of the Child often reminds States Parties to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography that their legislation must satisfy its obligations with regard to the sale of children.¹

This section describes the concepts and legal elements of sale of children and trafficking in children for the purpose adoption according to international norms and standards.

Sale of children

The sale of children is defined in article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter “Optional Protocol”) as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” The crime of sale of children involves two elements, namely the *transfer* of a child from one person or group of persons to another, and some form of *remuneration* or any other consideration. The purpose of the transfer is irrelevant, in accordance also with article 35 of the Convention on the Rights of the Child, which refers to the obligation of States to take all appropriate measures “to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

Article 3 (1) (a) of the Optional Protocol contains a non-exhaustive list of acts and activities that States must, as a minimum, criminalise - both domestically and transnationally - as sale of children. In respect to adoption, such act or activity refers

¹ See, for instance, Concluding Observations of the Committee on the Rights of the Child regarding Colombia (CRC/C/OPSC/COL/CO/1, para.7), , Mexico (CRC/C/OPSC/MEX/CO/1, 7 April 2011, para.10), Peru (CRC/C/OPSC/PER/CO/1, 7 March 2016, para.24), USA (CRC/C/OPSC/USA/CO/2, 2 July 2013, para.10.a), and Venezuela (CRC/C/OPSC/VEN/CO/1, 3 November 2014, para.10). See also: https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf

to “improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”² This provision is understood as containing one example of acts or activities that constitute sale of children for the purpose of adoption which must be criminalised by States parties.³

Article 3 (5) of the Optional Protocol requires States to take “all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.” Together with the Optional Protocol, the Convention on the Rights of the Child and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter “1993 Hague Convention”) constitute the core international legal instruments applicable to adoption.

Article 21 of the Convention on the Rights of the Child sets the best interests of the child as the paramount consideration in all matters related to adoption. It obliges States to ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary. In addition, in respect to intercountry adoptions, article 21 establishes the principle of subsidiarity and the prohibition of improper financial gain for those involved in the adoption process. It also establishes that the same level of safeguards and standards for domestic adoptions apply in the context of intercountry adoptions.⁴

The 1993 Hague Convention creates safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights. It sets a system of cooperation among the contracting States to ensure that those safeguards are respected as a means to prevent the abduction, sale of and trafficking in children.⁵ To achieve its purposes, the 1993 Hague Convention requires each State party to establish a highly regulated system for intercountry adoptions and to designate a Central Authority with overall responsibility for intercountry adoptions.

The 1993 Hague Convention states that, before a child can be placed for intercountry adoption, the Central Authority in the child’s country of origin must, *inter alia*: (i) determine that the child is adoptable; (ii) first give due consideration to in-

² Article 3 (1) (a) (ii) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

³ See the report on illegal adoptions of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/34/55, at para.24.

⁴ *Id.* para.18.

⁵ Article 1 of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

country placement options, and then determine that the intercountry adoption is in the child's best interests; (iii) ensure that persons, institutions and authorities whose consent is required have given their free and informed consent in writing, and that if the mother's consent is required, it is given only after the child's birth; (iv) ensure that these consents "have not been induced by payment or compensation of any kind"; (v) ensure, taking into account the "age and degree of maturity of the child," that "consideration has been given to the child's wishes and opinions" and that, if the child's consent is required, such consent has been given on a free and informed basis and "has not been induced by payment or compensation of any kind."⁶

The prohibition of improper financial gain in intercountry adoptions is also regulated in the 1993 Hague Convention. Article 8 requires Central Authorities to "take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption." In addition, article 32 (1) states that "No one shall derive improper financial or other gain from an activity related to an intercountry adoption." Article 32 (2) further specifies that "[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid." Lastly, it states that any remuneration received by "directors, administrators and employees of bodies involved in an adoption" must not be "unreasonably high in relation to services rendered."⁷

In conclusion, the sale of children involves two elements, namely the transfer of a child and some form of remuneration (i.e. a transaction); the purpose of the transfer is irrelevant. In the context of adoptions, the commission of acts or activities in violation of applicable international norms and standards - such as the principle of the best interests of the child, the prohibition of improper financial gain and the principle of subsidiarity – lead to illegal adoptions and can also constitute sale of children.⁸

Trafficking in children

The crime of trafficking is defined by the 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter "Palermo Protocol"), supplementing the United Nations Convention against Transnational Organized Crime. According to article 3 (a) of the Palermo Protocol, "Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a

⁶ Article 4 of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁷ Article 32(3) of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁸ Report on illegal adoptions of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/34/55, para.25.

position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” In any case, the consent of a victim of trafficking is irrelevant.⁹

Under the definition of the Palermo Protocol, “trafficking in persons” has three elements: an act (“the recruitment, transportation, transfer, harbouring or receipt of persons”), a means (“the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”), and a purpose (“for the purpose of exploitation”). However, with respect to children, according to article 3 (c) of the Palermo Protocol, “trafficking” only has two required elements: an act and a purpose. Due to their particular vulnerability, the means used to accomplish the act of trafficking are considered irrelevant when the victims are children.

Even though the Palermo Protocol requires the element of “purpose of exploitation” for trafficking to exist, it does not define the term “exploitation.” Instead, it provides a non-exhaustive list of certain forms of exploitation that are encompassed by the term, from which it is inferred that other forms may also constitute exploitation.

The issue of adoption as a form of exploitation, not mentioned in the Palermo Protocol, is explicitly addressed by the *travaux préparatoires* of the Palermo Protocol: “Where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the protocol.”¹⁰ Article 1(d) of the aforementioned Supplementary Convention includes among institutions and practices similar to slavery, any institution or practice whereby a child is delivered by his/her parent(s) or guardian(s) to another person, “with a view to the exploitation of the child or young person or of his labour.” Hence, the *travaux préparatoires* indicate that adoption meets the purpose of exploitation requirement when it amounts to a practice similar to slavery. This also suggests that, where there is an intention to exploit the child, illegal adoption can amount to trafficking in children.

Beyond the interpretative note contained in the *travaux préparatoires*, it should be noted that the object and purpose of the Palermo Protocol call for a broader interpretation of the term “exploitation”. Indeed, there exist emerging and new forms of exploitation that, whether or not they fit into the rubric of practices similar to

⁹ Article 3 (b) of the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

¹⁰ A/55/383/Add.1, paras. 63-68.

slavery mentioned by the *travaux préparatoires*, must be considered as falling within the “purpose of exploitation” requirement. As stated by the Working Group on Trafficking in Persons of the Conference of the Parties to the Palermo Convention in relation to the forms of exploitation not specifically mentioned in the Palermo Protocol, “there are forms of exploitation that the [latter] does not explicitly mention and that may be difficult to subsume under the concepts of forced labour and services, servitude or practices similar to slavery.”¹¹ The Working Group acknowledges that there are “emerging forms of exploitation that warrant further discussion in international forums of the relevant applicable concepts, including trafficking in persons”,¹² and concludes that the definition of trafficking also covers other behaviour such as illegal adoption or forced marriage “in so far as they fulfil the constitutive elements of trafficking in human beings.”¹³ The Working Group also refers to “the challenges that some States are facing in the context of forms of exploitation not mentioned explicitly in the [Palermo] Protocol, such as [...] illegal adoption for exploitative purposes; forced giving up of an offspring; illegal adoption of any child; and sale of babies/infants, among others.”¹⁴

Hence the question is whether illegal adoption meets the “purpose of exploitation” requirement for the crime of trafficking to exist, when the form of exploitation involved is different from a practice similar to slavery (as established by the *travaux préparatoires*), and the answer in these cases should be yes. As some scholars have argued, obtaining children illicitly for purposes of an adoption can be exploitative since the child’s capacity and need to love and bond is exploited as part of an illicit process whereby the child is made to emotionally attach to strangers in the place of the child’s original parents and family. This would constitute a profound exploitation of the inherent character, vulnerability, and developmental needs of children.¹⁵

Hence, apart from exploiting their needs, illegal adoptions exploit the particular vulnerability and poverty of the adopted children, thus triggering a series of child rights violations such as the right to know and be cared for by their parents, and the rights to preserve their identify, including family relations. Illegal adoptions also reflect the failure of States (by commission or omission) of their obligations to support families in their child-rearing responsibilities and in protecting the rights of the child. Similarly, it has also been argued that the original parents of children obtained illicitly for adoption are being exploited, at least in many child laundering

¹¹ Id. para.18.

¹² Id. para.19.

¹³ Id. para. 32.

¹⁴ CTOC/COP/WG.4/2013/5 at para.58.

¹⁵ See David M. Smolin, *Child Laundering as Exploitation, Applying Anti-Trafficking Norms to Intercountry Adoption under the Coming Hague Regime*, 32 VT. L. REV. (2007).

scenarios, where biological parents are in vulnerable situations due to poverty, discrimination, and lack of sufficient State support.¹⁶

While in the previous paragraphs it has been shown that illegal adoptions can meet the purpose of exploitation requirement established by the Palermo Protocol for the crime of trafficking to exist, there have been developments at the national and regional level which do not require the element of exploitation for trafficking to exist.¹⁷

The Inter-American Convention on International Traffic in Minors (1994) is an example in this regard. Its article 2 (b) states that "International traffic in minors" means the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means. The term "unlawful purpose" is explained by article 2 (c) as including, "among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located." Article 2 (d) states that "Unlawful means" includes, among others, kidnaping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located." Consequently, under the Inter-American Convention there are two elements to "international traffic in minors." The first element is an act (the actual or attempted abduction, removal or retention of a minor). The second element can then be satisfied in either of two ways: the act must have been committed either "for unlawful purposes" or "by unlawful means."

Instead of the Palermo Protocol's absolute requirement of an exploitative purpose, the second element of the Inter-American Convention on International Traffic in Minors provides two options ("for unlawful purposes" or "by unlawful means"). Moreover, the "unlawful purpose" need not be "exploitation." Rather, "unlawful purposes" include any purpose that is unlawful either in the child's State of habitual residence or in the State Party where the child is presently located. In the context of illegal adoptions, all cases are likely to satisfy the "by unlawful means" requirement. Some may, as well, be unlawful in either the child's habitual State of residence or the State Party in which the child is presently located, thus satisfying the "for unlawful purposes" element as well.

Even though the Inter-American Court's jurisprudence directs the Court to interpret the rights of children under the American Convention on Human Rights "in light of

¹⁶ See Jini L. Roby & Taylor Brown, *Birth Parents as Victims of Trafficking in Intercountry Adoption*, in "The Intercountry Adoption Debate: Dialogues across Disciplines," Robert L. Ballard, Naomi H. Goodno, Robert F. Cochran, Jr. & Jay A. Milbrandt eds., 2015.

¹⁷ For developments at the national level see, for instance, the Department of State (2016), *Trafficking in Persons Report*, which cites a series of countries in the Latin American region that have adopted a broader interpretation of trafficking to cover illegal adoption cases without the purpose for exploitation requirement. <http://www.state.gov/documents/organization/258879.pdf>

the international *corpus juris* for the protection of children,”¹⁸ the Inter-American Court’s “guidelines for interpretation of international provisions that do not appear in the American Convention” specify that “the interpretation of other international instruments cannot be used to limit the enjoyment and exercise of a right; . . . it must contribute to the most favourable application of the provision to be interpreted.”¹⁹ Therefore, the more expansive protection against and definition of trafficking provided in the Inter-American Convention on International Traffic in Minors should be applied.

Another regional human rights instrument, the African Charter on the Rights and Welfare of the Child (1990), contains two provisions relating to “trafficking in children” in relation to adoption. Article 24 (d) requires States Parties to “take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child.” Article 29 (a) requires States Parties to “take measures to prevent the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child.”

UN human rights monitoring mechanisms have also established that illegal adoption can constitute trafficking in children. The Committee on the Rights of the Child has frequently made such statements, and the Human Rights Committee has done so on at least one occasion.²⁰ UN Special Rapporteurs on the sale of children, child prostitution and child pornography have also referred to the trafficking of children in the context of illegal adoption.²¹

The Office of the High Commissioner for Human Rights has noted that illegal adoption can be a form of trafficking while emphasizing the “open-ended” nature of the Palermo Protocol’s list of exploitative practices and acknowledging that new or additional exploitative purposes may be identified in the future. OHCHR considers that, under the “international legal understanding” of trafficking, “the range of

¹⁸ Case of Fornerón and Daughter v. Argentina. Inter-Am. Ct. H.R. (ser. C) No. 242, ¶ 44 (Apr. 27, 2012). *See also* Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. ¶¶ 21-24;

¹⁹ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. ¶ 21.

²⁰ Committee on the Rights of the Child, General Comment No. 7, *Implementing child rights in early childhood* (2005), UN Doc CRC/C/GC/7/Rev.1, para.36(h); Committee on the Rights of the Child, General Comment No. 13, *The right of the child to freedom from all forms of violence* (2011), UN Doc CRC/C/GC/13, para.76; Committee on the Rights of the Child, Consideration of reports submitted by States Parties under article 44 of the Convention, Concluding Observations: Guatemala, UN Doc CRC/C/15/Add.154 (2001), paras.35 & 60; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of China, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013), UN Doc CRC/C/CHN/CO/3-4 (2013), para.56; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of India, UN Doc CRC/C/IND/CO/3-4 (2014), para.85; Human Rights Committee, Concluding observations on the second periodic report of Kyrgyzstan, UN Doc CCPR/C/KGZ/CO/2 (2014), para.12.

²¹ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography on her visit to Armenia, A/HRC/31/58/Add.2, para.23; Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Mission to Greece (8-15 November 2005), E/CN.4/2006/67/Add.3, para.14.

potentially exploitative practices linked to trafficking is very wide.”²² Similarly, UNICEF has characterized illicit adoption as a form of trafficking, emphasizing the breadth of the definition of “exploitation.” Noting that “all different forms of exploitation should be considered within the definition,” UNICEF includes illicit adoption within its extensive list of forms of exploitation.²³

In conclusion, according to international norms and standards, illegal adoption can constitute trafficking. The “purpose of exploitation” requirement under the Palermo Protocol is open-ended and must be interpreted from a human rights perspective, thus ensuring that norms are construed to give rights practical effect, to protect vulnerable groups of people such as children, and to adjust to developing circumstances. From this perspective, “purpose of exploitation” should be construed to reach illegal adoptions. Moreover, the Inter-American Convention on Traffic in Minors does not establish the absolute requirement of an exploitative purpose for trafficking in children to exist but provides two optional elements instead (“for unlawful purposes” or “by unlawful means”), which are met in illegal adoption cases. Lastly, as will be shown in the following section, the conclusion that illegal adoption can fall within the definition of “trafficking” is also consistent with the emerging view in international criminal law, which considers the sale of a human being as a prime indicator that the conduct at issue constitutes a form of slavery - and practices similar to slavery are within the definition of trafficking.

2. THE SCOPE OF THE PROHIBITION OF TRAFFICKING IN CHILDREN AS A CONTEMPORARY FORM OF SLAVERY UNDER INTERNATIONAL LAW

“Slavery” and “slave trade” are defined in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. The Slavery Convention had as its purpose the prevention and suppression of the slave trade and the “complete abolition of slavery in all its forms” (article 2). “Slavery” is defined in article 1 (1) as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Article 1 (2) states that “slave trade” “includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”

²² OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary (2010), UN Doc HR/PUB/10/2, at p.187; OHCHR Fact Sheet No. 36, Human Rights and Human Trafficking (2014), at p.3.

²³ UNICEF, Guidelines on the Protection of Child Victims of Trafficking, UNICEF Technical Notes (Sept. 2006), at p. 9.

The Supplementary Convention of 1956 retains, under article 7, the definitions of “slavery” and “slave trade” set out in the Slavery Convention. However, the Supplementary Convention also sought the abolition of “institutions and practices similar to slavery.” Thus, article 1 requires States Parties to take measures to bring about the abolition of a number of specified practices, “whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention.” Among these institutions and practices, it cites “Any 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.”²⁴ Thus, under the Supplementary Convention, the transfer of a child is an institution or practice similar to slavery only if the element of “exploitation” is present. The term “exploitation” is not, however, defined in the Supplementary Convention.

Article 3 (a) of the Worst Forms of Child Labour Convention includes among the worst forms of child labour “all forms of slavery or practices similar to slavery.” The Convention contains an illustrative list of slavery and slavery like practices “such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.” Hence, the sale of and trafficking in children are included among the forms of “slavery or practices similar to slavery.” As noted in the previous section, the Palermo Protocol also refers to “slavery or practices similar to slavery” in its non-exhaustive list of the forms of exploitation that can satisfy the “for the purpose of exploitation” element of the definition of “trafficking.”²⁵

According to article 7.1 c) of the Rome Statute of the International Criminal Court, the act of “Enslavement” can constitute, under certain circumstances, a crime against humanity.²⁶ In particular, article 7.2 c) states that [for the purpose of para.1 of the same article] ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” This definition utilizes the basic definition of slavery from the 1926 Slavery Convention, but adds an additional clause specifying that enslavement can occur in the context of trafficking in persons, particularly women and children, thus reflecting developments in international criminal law to protect vulnerable groups from new forms of enslavement. Furthermore, international criminal law has recognised that the sale of

²⁴ Article 1 (d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

²⁵ Article 3 (a) of the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

²⁶ It should be noted that not all acts of enslavement constitute the crime against humanity of enslavement. Enslavement is only a crime against humanity when the contextual element is satisfied. That is, the act of enslavement must have been “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Article 7(1) of the Rome Statute.

a human being is also a primary indicator that a course of conduct constitutes enslavement.²⁷

All regional human rights instruments prohibit slavery in all its forms. Article 6 (1) of the American Convention on Human Rights states that “No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.” Article 4 (1) of the European Convention on Human Rights and article 5 (1) of the Charter of Fundamental Rights of the European Union state that no one shall be held in slavery or servitude. In the African Charter on Human and Peoples’ Rights slavery and the slave trade are prohibited in Article 5.

The European Court of Human Rights has recognized, in its *Rantsev* decision,²⁸ that trafficking itself is a violation of Article 4 of the European Convention on Human Rights, regardless of whether it constitutes slavery, servitude or forced labour. The European Court noted that even though article 4 did not mention trafficking, that was not dispositive, as “[t]he Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.”²⁹ The Court reviewed the applicable principles of treaty interpretation, “emphasis[ing] in particular that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.”

Consequently, the European Court declared that “in assessing the scope of Article 4 of the Convention, sight should not be lost . . . of the fact that it is a living instrument which must be interpreted in the light of present-day conditions.”³⁰ Undertaking this examination, the Court observed that the International Criminal Tribunal for the Former Yugoslavia had recognized an evolution in the concept of slavery,³¹ and concluded that trafficking itself, within the meaning of Article 3 (a) of the Palermo

²⁷ See Elements of Crimes of the Rome Statute, article 7.1 c) *Crime against humanity of enslavement* (Element 1: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”). See also *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, ICTY Trial Ch., 22 Feb. 2001, *Prosecutor v. Kunarac Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1- A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002. See also *Prosecutor v. Brima*, SCSL Trial Chamber Judgement (2007), paras 14, 18, 1282; *Prosecutor v. Brima*, SCSL Appeals Chamber Judgement (2008), para 170; and *Prosecutor v. Brima*, SCSL-04-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006 (Trial Chamber).

²⁸ *Rantsev v. Cyprus and Russia*, 2010-I Eur. Ct. H.R. 65.

²⁹ *Id.* at ¶ 272-273.

³⁰ *Id.* at ¶ 277. The Court also noted the “increasingly high standards required” in the protection of human rights.”

³¹ See *id.* at ¶ 276 (referring to the Court’s use in *Siliadin* of the “classic definition of slavery”).

Protocol and Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings, falls within the scope of Article 4 of the European Convention.³²

Few cases of the Inter-American Court of Human Rights analyse, interpret or apply Article 6 of the American Convention on Human Rights. In particular, three merits decisions include an analysis of article 6 or of the concept of “slavery” under the American Convention, one of which involves illegal adoption.³³ The case of the *Río Negro Massacres v. Guatemala*³⁴ involved (in relevant part) seventeen children who were abducted following a massacre of their families and community. The Court recounted the general context referring to the exposure of children of indigenous communities to numerous violations of their rights during the internal armed conflict. This included “a pattern of separating children from their families after the massacres, and taking and retaining them illegally” by the military forces and illegal armed groups. “In some case, the separation of children from their families resulted in their sale or illegal adoption.”³⁵

Against this background, the Inter-American Court referred to the violations related to the case of the seventeen children abducted during the Río Negro massacre, and concluded that the children had been “submitted to conditions of slavery and servitude,”³⁶ quoting the prohibition of article 6(1).³⁷ The Court also discussed the children’s right to protection of the family (article 17) and their right to protection due to their status as children (article 19). Ultimately, the Court concluded that the State was responsible for the violation of article 5(1) on the children’s right to respect for their physical, mental, and moral integrity, in relation to articles 6, 17, 19 and 1(1).³⁸

The Inter-American Court of Human Rights has addressed the issue of illegal adoptions in a number of cases without allegations of abuse, mistreatment, forced labour or servitude. The case of *Gelman v. Uruguay*³⁹ involved a child whose parents were forcibly disappeared and killed during the period of the military juntas in Argentina and Uruguay. The child was placed with adoptive Uruguayan parents who were unable to have children and wanted a child.⁴⁰ Unlike in the *Río Negro Massacres* case, there were no allegations that the child was subjected to violence, forced labour, or similar abuses in her adoptive home. The Court found that in many

³² *Id.* at ¶¶ 281-82.

³³ The other cases are related to forced labour by adults (*Ituango Massacres v. Colombia*, Judgment of July 1, 2006) and recruitment of child soldiers (*Vargo-Areco v. Paraguay*, Judgment of Sept. 26, 2006).

³⁴ *Case of the Rio Negro Massacres v. Guatemala*, Judgment of Sept. 4, 2012 (*Preliminary Objections, Merits, Reparations and Costs*), http://www.corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf.

³⁵ *Id.* ¶ 60.

³⁶ *Id.* ¶ 128.

³⁷ *Id.* ¶ 141.

³⁸ *Id.* ¶¶ 150, 324(3).

³⁹ *Case of Gelman v. Uruguay*, Judgment of Feb. 24, 2011 (*Merits and Reparations*), http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf.

⁴⁰ *Id.* ¶ 89.

cases the clandestine operations involved the kidnapping and abduction of infants, many of whom were new-borns or born in captivity. Once the parents were executed, the children were handed over to families of the military or police.⁴¹ The Court characterized “the results achieved by the illegal kidnapping and abductions” as, among other things, “a form of trafficking for the irregular adoption of children.”⁴² The Court found violations of the rights of the child “to juridical personality, to life, to personal integrity, to personal liberty, to family, to a name, to the rights of the child, and to nationality, recognized in articles 3, 4, 5, 7, 17, 18, 19, and 20(3) of the Convention, in relation to articles 1(1) therein.”⁴³ Additionally, the Court found violations of the grandfather’s rights “to personal integrity and family.”⁴⁴

In the case of *Fornerón and Daughter v. Argentina*,⁴⁵ the day after the child was born the mother surrendered the child to an Argentine couple for temporary guardianship for the purpose of future adoption.⁴⁶ Upon learning of the birth, the father began efforts to confirm his paternity and to obtain custody of his daughter.⁴⁷ Although DNA testing confirmed his paternity, the guardianship and ultimately the adoption were approved due to a combination of factors including prejudice against single parenthood and a slow-moving judicial process that allowed bonding between the child and her adoptive parents.⁴⁸ The Inter-American Court of Human Rights noted that there were indications to support that the child was surrendered by her mother in exchange for money.⁴⁹ However, allegations of possible child trafficking were dropped on the ground that the law in Argentina did not (at the relevant time) criminalize trafficking in babies or the sale of children.⁵⁰ As a consequence, the Inter-American Court concluded that it lacked the necessary facts to say whether Mr. Fornerón’s child had, in fact, been relinquished in exchange for money.⁵¹

The Inter-American Court found that the failure of the State to criminalize the sale of children violated its article 2 obligation to adapt its domestic laws to guarantee the rights enshrined in the American Convention on Human Rights. The right to special protections for children contained in article 19 must, the Court said, be interpreted in light of the “very comprehensive international *corpus juris* for the protection of children, which this Court must use to establish the content and the scope of the

⁴¹ *Id.* ¶ 60.

⁴² *Id.* ¶ 63. Although the Court uses the term “trafficking” here, it does not define trafficking nor does it discuss the elements of trafficking.

⁴³ *Id.* ¶ 137.

⁴⁴ *Id.* ¶ 138.

⁴⁵ *Case of Fornerón and Daughter v. Argentina*, Judgment of April 27, 2012 (*Merits, Reparations, and Costs*), http://www.corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf.

⁴⁶ *Id.* ¶ 22.

⁴⁷ *Id.* ¶¶ 22-24.

⁴⁸ *Id.* ¶¶ 25-43.

⁴⁹ *Id.* ¶ 129.

⁵⁰ *Id.* ¶¶ 132-134.

⁵¹ *Id.* ¶ 129.

general provision defined in Article 19 of the American Convention.”⁵² The Convention on the Rights of the Child forms an important part of this *corpus juris*, and article 35 of the Convention requires States Parties to take “all appropriate . . . measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”⁵³ Accordingly, reading article 19 of the American Convention on Human Rights in light of article 35 of the Convention on the Rights of the Child, the Inter-American Court held that Argentina had an obligation to criminalize the sale of children.⁵⁴

Although the Inter-American Court did not consider *Gelman* or *Fornerón* under the rubric of Article 6 of the American Convention, it would be appropriate in cases of illegal adoption to do so, bearing in mind the numerous violations of the rights of the child which result from this practice. According to the jurisprudence of the Inter-American Court of Human Rights, children’s rights under the American Convention on Human Rights must be interpreted in light of the entire *corpus juris* of international human rights law, including the Convention on the Rights of the Child. Further, under the Court’s jurisprudence, the scope of rights guaranteed by the American Convention on Human Rights is not static, but rather must take into account the evolution of rights within the international system. In this respect, reference should be made to the above mentioned qualifications of illegal adoption (as sale, trafficking and slavery) at the global level by various international human rights monitoring and protection bodies, including the Committee on the Rights of the Child, and at the regional level by the Inter-American Convention on Traffic in Minors.

Trafficking in and sale of children for illegal adoption can constitute a practice similar to slavery based on article 1 (d) of the Supplementary Convention on the Abolition of Slavery, article 3 (a) of the Worst Forms of Child Labour Convention, the Rome Statute of the International Criminal Court, and international criminal law jurisprudence indicating that sale of a human being is a prime indicator of enslavement. Moreover, the sale of and trafficking in children for the purpose of illegal adoption can constitute a violation of article 6 of the American Convention on Human Rights, in line with the reasoning developed by the European Court of Human Rights in its *Rantsev* decision in respect of the analogous article 4 of the European Convention on Human Rights. Indeed, the European Court, following an evolutive approach, examined whether trafficking may be considered to run counter to the spirit and purpose of Article 4 so as to fall within the scope of the guarantees offered therein, irrespective of the treatment suffered by the victim.⁵⁵

⁵² *Id.* ¶ 13.

⁵³ *Id.* ¶¶ 137-138.

⁵⁴ *Id.* ¶¶ 139-140, 144.

⁵⁵ *Rantsev v. Cyprus and Russia*, 2010-I Eur. Ct. H.R. 279.

In the case of the American Convention of Human Rights, the prohibition of slavery under article 6 explicitly includes trafficking. A broad interpretative approach is required to cover emerging new forms of harm, violence and exploitation and to avoid protection gaps in relation to particular vulnerabilities of children. In this context, sale of and trafficking in children for the purpose of illegal adoption can constitute both a practice similar to slavery and an emerging form of exploitation that is properly seen as coming within the ambit of Article 6 of the American Convention on Human Rights. In conclusion, the sale of and trafficking in children for the purpose of illegal adoption can constitute a violation of article 6 of the American Convention on Human Rights, even in the absence of violence, abuse or forced labour at the end destination.

3. MAIN FINDINGS OF UNITED NATIONS HUMAN RIGHTS MONITORING MECHANISMS REGARDING GUATEMALA (2001–2013) AND IMPLEMENTATION OF RECOMMENDATIONS

Between 2001 and 2013 Guatemala has been monitored and reviewed by various UN human rights monitoring mechanisms and bodies regarding its compliance with international child rights norms and standards. This section highlights the main findings and recommendations of the UN Committee on the Rights of the Child, the Universal Periodic Review and the UN Special Rapporteur on the sale of children, child prostitution and child pornography.

UN Committee on the Rights of the Child

In its concluding observations of 2007 regarding the initial report of Guatemala on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,⁵⁶ the Committee on the Rights of the Child noted with appreciation the adoption of the Integral Law for the Protection of Children and Adolescents in 2003, the ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime in 2004, and the accession to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in 2003.⁵⁷

In its concluding observations of 2007, the Committee reiterated its serious concerns with regard to intercountry adoption, which had already prompted its previous recommendation to Guatemala - in the concluding observations of 2001 - to suspend adoptions. Among its main concerns regarding Guatemala, the Committee noted the following: (i) the national legislation regulating adoption practices remained inadequate; (ii) the continued existence of irregular practices driven by lucrative

⁵⁶ CRC/C/OPSC/GTM/CO/1, 6 July 2007.

⁵⁷ Id., para.4.

commercial interests in the administration of child adoption, especially in relation to the rising number of intercountry adoptions conducted by notaries; (iii) the widespread impunity for crimes relating to the sale of children for the purpose of adoption, especially as it implied considerable complicity by State authorities, and (iv) the social tolerance of these acts.⁵⁸

The Committee reiterated its recommendation that Guatemala suspend all intercountry adoptions and urgently undertake measures to comply with international norms and standards in this regard. It urged Guatemala to investigate and prosecute individuals responsible for the sale of children for the purpose of adoption, and suggested that Guatemala seek urgent technical assistance from the Hague Conference on Private International Law on the development of national legislation, as well as its practical application. Lastly, it also urged Guatemala to implement the recommendations of the 1999 mission report of the Special Rapporteur on the sale of children, child prostitution and child pornography (E/CN.4/2000/73/Add.2), since the majority of these recommendations had not been acted upon.⁵⁹

In respect to the principal areas of concern noted in 2001, the Committee on the Rights of the Child recommended that the country strengthen and consolidate coordination in the areas covered by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and ensure that it is incorporated in the National Plan of Action for Children adopted in 2004. The Committee also urged Guatemala to ensure that adequate financial and human resources are dedicated for these purposes and that the role of the *Secretaría de Bienestar Social* be strengthened. In addition, the Committee recommended that Guatemala strengthen systematic gender-sensitive education and training on the provisions of the Optional Protocol for all professional groups working with child victims of the abuses covered by the Optional Protocol, including police officers, public prosecutors, judges, border authorities and medical staff, with particular attention to staff of the *Procuraduría General de la Nación* and migration authorities.⁶⁰

In its last concluding observations on Guatemala of 2010 regarding the implementation of the Convention on the Rights of the Child,⁶¹ the Committee on the Rights of the Child welcomed the adoption of a series of measures such as: (i) the Adoption Act (2007) and the establishment of the National Adoption Council in 2008; (ii) the Act on Sexual Violence, Exploitation and Trafficking in persons (2009),⁶² the Early Warning System Law (2010), and the creation of the Secretariat on Sexual

⁵⁸ Id. para.25.

⁵⁹ Id. paras.26 and 28.

⁶⁰ Id. paras. 7 and 9.

⁶¹ CRC/C/GTM/CO/3-4, 25 October 2010.

⁶² The Act on Sexual Violence, Exploitation and Trafficking in persons set up a legal framework that included specific sanctions for the sale of children and for irregular adoptions, in line with recommendations by the Committee on the Rights of the Child and OHCHR. A/HRC/13/26/Add.1 at para.24.

Violence, Exploitation and Trafficking in persons in 2010; (iii) the PINA (Protección de la Niñez y Adolescencia) Law for the protection of children and adolescents (2003); (iv) the ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol (2009); and (v) the adoption of the National Plan of Action for Children 2004-2015.⁶³

In the context of adoption, the Committee on the Rights of the Child expressed concern about information that organized criminal networks which were active in the sale of children for international adoptions had not been dismantled. It also expressed concern about the fact that at the time there were 600 children ready for international adoption. Consequently, the Committee recommended that Guatemala ensure strict transparency and follow-up controls, and prosecute those involved in illegal adoptions and sale of children for adoption purposes. The Committee further recommended that Guatemala implement all recommendations made by the International Commission against Impunity in Guatemala in its report on actors involved in irregular adoptions in Guatemala since the entry into force of the Adoption Act, and take adequate measures to eliminate corruption and impunity, and prosecute and punish the perpetrators.⁶⁴

The Committee on the Rights of the Child welcomed the 2007 Adoption Act which established judicial adoption proceedings, eliminated notary adoption proceedings, and incorporated the Hague Convention (1993) provisions in domestic law. However, the Committee remained concerned at the persistence of private adoptions, and at the fact that the National Adoption Council was only present in the capital city, which made it difficult to provide an adequate response throughout the country. Consequently the Committee recommended that Guatemala decentralize the services of the National Adoption Council in order to make it accessible in all parts of the country, raise awareness among the population on the new adoption system in order to promote adoptions at national level, and continue suspension of international adoptions until child rights can be totally guaranteed in the adoption proceedings.⁶⁵

The Committee also remained concerned at the lack of an adequate mechanism to search for the origin of children deprived of their identity, especially those who had been subject to international adoption and whose rights to preserve their identity had been violated. Consequently the Committee recommended that Guatemala establish an adequate mechanism to deal with identification of children deprived of their identity in order to protect them from illegal adoptions and other human rights violations.⁶⁶

⁶³ Concluding observations of the combined third and fourth periodic report of Guatemala, CRC/C/GTM/CO/3-4 of 25 October 2010, paras. 4, 9 & 19.

⁶⁴ Id. paras.60-61.

⁶⁵ Id. paras.62-63.

⁶⁶ Id. paras.64-65.

Regarding special protection measures in relation to sexual exploitation and trafficking, while welcoming the 2009 Act on Sexual Violence, Exploitation and Trafficking in Persons, the Committee on the Rights of the Child remained concerned at the tolerance of trafficking, which had led to underreporting and impunity. The Committee recommended that Guatemala properly implement the Act on Sexual Violence, Exploitation and Trafficking, by investigating, prosecuting and punishing the perpetrators; allocate the necessary budgetary resources to operationalize the public policy against trafficking in persons; and publish and widely disseminate the report on the investigation carried out by the International Commission against Impunity in Guatemala regarding the impact of organized crime on children, encompassing trafficking, kidnapping and killing, including of girls, and implement all CICIG's recommendations in this regard.⁶⁷

Universal Periodic Review

In the course of the discussion of the 1st Universal Periodic Review of Guatemala in 2008,⁶⁸ the recommendations made to the country included the commitment to improve “the situation of indigenous children, in particular as concerned ill-treatment, trafficking, child labour, illegal adoptions and difficulty in accessing schools and health-care services”.⁶⁹ Guatemala stated that it would adopt a comprehensive national plan of action to follow-up on the recommendations made by various UN human rights monitoring bodies, including the specific recommendations made by OHCHR in Guatemala.⁷⁰

In the context of the 2nd cycle of the Universal Periodic Review of Guatemala in 2012,⁷¹ the State supported recommendations related to the prohibition of slavery and trafficking as well as the protection of the rights of the child, including the right to a family environment and protection from exploitation. In particular, Guatemala accepted to:

- (i) Continue increasing efforts countering the trafficking of persons including issuing an invitation to the Special Rapporteur on trafficking in persons, in particular women and children;⁷²
- (ii) Take additional measures to eliminate criminal networks involved in the sale of children, including for the purposes of illegal adoption;⁷³
- (iii) Enhance efforts in order to better serve the interests of the child on the issue of adoption.⁷⁴

⁶⁷ Id. paras.94-95.

⁶⁸ A/HRC/8/38 of 29 May 2008.

⁶⁹ Id. para. 89.13.

⁷⁰ A/HRC/8/52 of 1 September 2008 at para. 683.

⁷¹ A/HRC/22/8 of 31 December 2012.

⁷² Id. para. 99.54.

⁷³ Id. para.99.55.

⁷⁴ Id. para.99.72.

UN Special Rapporteur on the sale of children, child prostitution and child pornography

In August 2012, the UN Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Najat Maalla M'jid, conducted an official visit to Guatemala at the invitation of the Government. The purpose of the visit was to assess the situation of sale and sexual exploitation of children in the country, including illegal adoptions, and to issue recommendations to strengthen efforts to combat and prevent the phenomena and protect the rights of child victims.⁷⁵

In the report on her visit, the Special Rapporteur noted that prior to the 2007 Adoption Act, sale of children for international adoption was a main issue of concern in Guatemala. Despite the progress made since the implementation of the Adoption Act to control adoption processes, irregularities still remained. According to the UN-backed International Commission against Impunity in Guatemala, at least 70 per cent of international adoptions could be linked to crimes or serious irregularities. Problems such as corruption and impunity of State actors involved in the process, particularly notaries, judges for children and adolescents, medical professionals and registrar officials, and lack of proper investigation by an understaffed Solicitor General's Office persisted. While irregularities were found in about 60 per cent of the cases handled during the transition period from the previous system of private adoptions, the Solicitor General's Office ruled that the adoption could proceed in over 90 per cent of the cases. The Special Rapporteur expressed concern about the fate of Guatemalan children whose international adoptions, initiated prior to the enactment of the Adoption Act, were pending. While investigations on 80 such cases were ongoing, children stayed in shelters or with foster families who were sometimes their soon-to-be adoptive parents.⁷⁶

The Special Rapporteur noted that the underlying factors of the sale and sexual exploitation of children were multidimensional and linked to the political, institutional, legislative, socioeconomic and cultural context in Guatemala such as poverty, unequal access to social services, vulnerable and dysfunctional families, gender discrimination, impunity, and transnational trafficking networks. In respect to intercountry adoptions, she pointed at the demand for such adoptions among the key underlying factors.⁷⁷

The Special Rapporteur welcomed the creation of the National Adoption Council in compliance with the 1993 Hague Convention. This Council is tasked with protecting children who are in the process of adoption, ensuring that such processes are legal and transparent, in accordance with the best interests of the child and prioritizing national adoptions. The Special Rapporteur noted the importance of building the

⁷⁵ A/HRC/22/54/Add.1.

⁷⁶ Id. paras.16-17.

⁷⁷ Id. para.27.

capacity of the National Adoption Council through adequate administrative, policy and financial measures. Prior to the entry into force of the Adoption Act, adoptions were conducted through private processes, thus in violation of international child rights norms and standards applicable to adoptions.⁷⁸

The Special Rapporteur noted that all policies to address the sale and sexual exploitation of children adopted by Guatemala recognized the need for the provision of comprehensive assistance to victims of human trafficking and those awaiting adoption, including through an effective referral system, minimum standards for alternative and residential care, and a recovery/rehabilitation plan.⁷⁹

Lastly, in respect to prevention measures, the Special Rapporteur stressed the importance of providing a system of alternative care to support vulnerable families, in particular single teenage mothers, as part of the child protection system to prevent the sale of children through adoption. She also cited limited birth registration outside the capital as a factor facilitating illegal adoptions.⁸⁰

Status of implementation of recommendations

According to information received by my mandate, since the adoption of all the recommendations summarised above, Guatemala has made very little progress. Some steps have been taken to prosecute and sanction judges and staff of the *Procuraduría General de la Nación*, among others, involved in the sale of children and illegal adoptions. However, there still remain a number of persons, including high-ranking officials and former officials intending to return to public office, who have not been prosecuted, tried and convicted for their involvement in the sale of children and illegal adoptions. Guatemala must seriously enhance its efforts to investigate and prosecute members of criminal networks involved in the sale of and trafficking in children for the purpose of illegal adoption, and to dismantle such criminal networks, in order to combat impunity and ensure accountability. In respect to the recommendations contained in the report on actors involved in illegal adoptions published by the UN-backed International Commission against Impunity in Guatemala in 2010, the State has not created a body in charge of ensuring implementation and follow-up of the recommendations.

Since the entry into force of the Adoption Act of 2007, intercountry adoptions have been suspended and progress has been made in order to prioritise domestic adoptions.⁸¹ However, there is serious concern in respect to recent developments

⁷⁸ Adoption processes were reviewed by the Solicitor General's Office, which studied the documentation and issued favourable opinions in the adoptions processed by notaries. Id. para.54.

⁷⁹ Id. para.87.

⁸⁰ Id. para.94.

⁸¹ According to data of the National Adoption Council, since 2008 1,566 children have been declared adoptable and 859 domestic adoptions have been finalized. Note also that in the same period 106 adoptions of so-called "transition cases" have been finalised (data as of 17 April 2017).

from various conservative groups which are aimed at introducing changes to the Adoption Act. These groups argue that adoption processes carried out by the CNA should be expedited, and advocate for a return to the previous private adoption system, which is contrary to international norms and standards. If such groups succeed in their efforts, it would constitute a worrying setback in the important progress made by Guatemala in the protection of the rights of the child since the passing of the Adoption Act. A return to the previous private adoption system would constitute a violation of the international norms and standards by Guatemala.

In respect to the autonomy of the National Adoption Council (CNA in its Spanish acronym), namely the central authority in charge of regulating intercountry adoptions, challenges have been identified in the selection process of the members of its Executive Board, which is formed by representatives of the judiciary, the Ministry of Foreign Affairs and the *Secretaría de Bienestar Social*. The lack of transparency, publicity and objectivity in the selection process severely affects the effective functioning of the CNA.

Moreover, the Government of Guatemala has not made progress in respect to the decentralization of the services provided by the CNA, due mainly to the lack of budgetary allocations for this purpose. Apart from its headquarters in Guatemala City, the CNA only has two liaison offices in the departments of Quetzaltenango and Alta Verapaz.

The Government of Guatemala has not made any progress either in the establishment of a mechanism to identify children deprived of their identity as an effective means to prevent the sale of children and illegal adoptions. The limited efforts deployed in this area come exclusively from the civil society and NGOs. Particularly worrying is the situation of children placed in institutions without protection and identity.⁸²

It is also noted with concern that Guatemala lacks a central body in charge of ensuring the effective implementation of the national child protection system. In this regard, efforts to reform the PINA Law for the protection of children and adolescents with the purpose of creating such a central body should be welcomed.

Public policies to combat trafficking in persons, including children, have not been duly implemented, and weaknesses signalled by UNICEF, CICIG and international human rights monitoring mechanisms persist. In addition, the State has not implemented the recommendation to disseminate and raise awareness on the consequences and impact of organised crime on the protection and rights of children.

⁸² See “Informe preliminar, censo de NNA, albergados en hogares privados de protección y abrigo realizado de junio a septiembre 2016 por el Consejo Nacional de Adopciones de Guatemala.

Last but not least, Guatemala still lacks specific programmes targeted at supporting adolescent mothers. Even though the CNA runs a programme to assist 35-50 single mothers, it lacks specialised support targeted at adolescent mothers.

4. APPLICABLE INTERNATIONAL NORMS AND STANDARDS IN THE RAMÍREZ BROTHERS AND FAMILY VS. GUATEMALA CASE

According to the preamble of the Convention on the Rights of the Child, children should grow up in a family environment. Articles 7 and 8 of the Convention on the Rights of the Child establish that children have, as far as possible, the right to know and be cared for by their parents and the right to preserve their identity, including family relations. In addition, according to article 9, States must ensure that children shall not be separated from their parents against their will, except when it is in their best interests.⁸³

The Convention on the Rights of the Child provides in article 20 that 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. In this context, adoption should be understood as one possibility among several alternative child protection measures to provide a family environment to the child. Placement in institutions should only be used as a measure of last resort, when it is absolutely necessary and when it is in the best interests of the child.

Article 21 of the Convention sets the best interests of the child as the paramount consideration in all matters related to adoption.⁸⁴ In addition, its implementation obliges States to ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

In addition, in respect to intercountry adoptions, article 21 of the Convention on the Rights of the Child establishes the principle of subsidiarity and the prohibition of improper financial gain for those involved in the adoption process. It also establishes that the same level of safeguards and standards for domestic adoptions apply in the context of intercountry adoptions. Regarding the principle of subsidiarity, article 21

⁸³ Note that this section is widely based on the "International legal framework" of the report on illegal adoptions of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/34/55.

⁸⁴ See Committee on the Rights of the Child general comment No. 9 (2006) on the rights of children with disabilities, para. 47.

states that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption develops the principles set out in the Convention on the Rights of the Child, including the principle of subsidiarity. According to article 4 (b) of the 1993 Hague Convention, an adoption shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests. All appropriate national alternative care solutions must be given due consideration before resorting to intercountry adoption.

The subsidiarity principle must be applied in accordance with the Guidelines for the Alternative Care of Children, which involves supporting efforts to keep children in, or return them to, the care of their family or, failing that, to find another appropriate and permanent solution, including adoption. While looking for permanent solutions, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care have to be found.⁸⁵ States also have the duty, as set out in article 18 of the Convention on the Rights of the Child, to assist parents and legal guardians in the performance of their child-rearing responsibilities, and to ensure the development of institutions, facilities and services for the care of children.

The prohibition of improper financial or other gain applies to any activity related to an intercountry adoption. According to article 32 of the 1993 Hague Convention, only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid. In addition, the directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered. In line with articles 8 and 11 of the 1993 Hague Convention, central authorities must take all appropriate measures to prevent improper financial or other gain in connection with an adoption, and accredited bodies must pursue only non-profit objectives, have qualified staff with ethical standards and be supervised.⁸⁶ The prohibition of improper financial or other gain is also contained in the European Convention on the Adoption of Children (art. 17) and the African Charter on the Rights and Welfare of the Child (art. 24). That prohibition must lead to the criminalization of corruption at any stage of the adoption process, as corruption can lead to the sale of children and illegal adoptions.⁸⁷

⁸⁵ See General Assembly resolution 64/142, annex, paras. 2 (a) and 2 (b).

⁸⁶ The central authority is the office or body designated by a State party to the 1993 Hague Convention to perform certain mandatory functions in relation to adoption processes. An accredited body is an adoption agency that has been through a process of accreditation in accordance with the 1993 Hague Convention and that performs certain functions in the place of, or in conjunction with, the central authority.

⁸⁷ For offences related to corruption, see chapter III of the United Nations Convention against Corruption.

In addition, the 1993 Hague Convention creates safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights. It sets a system of cooperation among the contracting States to ensure that those safeguards are respected, thereby preventing the abduction and sale of and/or the trafficking in children. As at December 2016, 98 States were parties to the 1993 Hague Convention.

Guatemala acceded to the 1993 Hague Convention on 26 November 2002. However, the 1993 Hague Convention has not entered into force between Guatemala and a number of States (Canada, Germany, Netherlands, Spain and United Kingdom) which have raised an objection to the accession of Guatemala.⁸⁸ The objections of these States refer to the inability of the Government of Guatemala to meet the requirements imposed by the 1993 Hague Convention in order to guarantee that adoptions take place with due regard for the safeguards afforded by the Convention. Objections also refer to the need to allow the Government of Guatemala sufficient time to incorporate the standards and requirements of the Convention into its adoption procedures.⁸⁹

Article 3 (1) (a) (ii) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography establishes that, in the context of the sale of children, improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption must be criminalized both domestically and transnationally. As explained in section 1 above, article 3 of the Optional Protocol is understood as containing specific examples of illegal acts that lead to the sale of children, including in the form of illegal adoption. While the sale of children always includes some form of commercial transaction, illegal adoptions can be performed in violation of existing national laws without necessarily amounting to the sale of a child.⁹⁰

The Hague Conference on Private International Law defines illegal adoption as an adoption resulting from abuses, such as abduction, the sale of, traffic in and other

⁸⁸ <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=767&disp=type>

⁸⁹ According to the Netherlands, at the time of its objection in July 2003, Guatemala was taking measures to implement the 1993 Hague Convention. A Central Authority had been designated and organized, and further steps were under consideration. However, a series of measures were not yet in place: (i) to establish whether children are adoptable (article 4, paragraph 1(a) of the Convention); (ii) to determine that an intercountry adoption is in the child's best interests and whether possibilities for placement exist within the State of origin (Guatemala did not have a child protection system or a database of Guatemalan adoptive parents) (article 4, paragraph 1(b) of the Convention); (iii) to ensure that consent had been given properly by the parent or parents, and that they had been duly informed of the consequences of their consent (article 4, paragraph 1(c) of the Convention). Consequently, the Netherlands advocated suspending acceptance of Guatemala's accession until it has been established beyond doubt that the conditions of the 1993 Hague Convention can be fulfilled.

<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=767&disp=type>

⁹⁰ See <http://luxembourgguidelines.org>.

illegal or illicit activities against children.⁹¹ Based on the international norms and standards applicable to adoption described above, adoptions resulting from crimes such as abduction and sale of and trafficking in children, fraud in the declaration of adoptability, falsification of official documents or coercion, and any illicit activity or practice, such as lack of proper consent by biological parents, improper financial gain by intermediaries and related corruption, constitute illegal adoptions and must be prohibited, criminalized and sanctioned as such.

Illegal adoptions violate multiple child rights norms and principles, including the best interests of the child. That principle is breached when the purpose of an adoption is to find a child for adoptive parents rather than a family for the child. In that regard, it must be emphasized that international norms and standards do not establish the right to adopt a child or the right to be adopted.

5. THE SCOPE OF THE OBLIGATION OF STATES TO INVESTIGATE AND SANCTION ACTS THAT CONSTITUTE SALE OF AND TRAFFICKING IN CHILDREN ACCORDING TO INTERNATIONAL STANDARDS

According to international human rights norms and standards, States have the obligation to prosecute perpetrators and address the underlying causes that facilitate the sale of children. Article 35 of the Convention on the Rights of the Child provides that States parties shall take all appropriate measures to prevent the abductions of, the sale of or traffic in children for any purpose or in any form. Consequently, the duty to prevent creates an obligation for States to criminalize, inter alia, the sale of or traffic in children for any purpose or in any form.⁹²

The preambular paragraphs of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography emphasize that efforts to raise public awareness are needed to reduce consumer demand for the sale of children. The allusion to demand is further substantiated in the Optional Protocol with specific obligations, under articles 1 and 3, for States parties to prohibit and criminalize the sale of children, child prostitution and child pornography. Article 3 (2) and (3) is particularly important, as article 3 (2) covers intent and participation to commit such illegal activities. Article 3 (3) adds the obligation for States parties to ensure that penalties are appropriate and commensurate with the grave nature of the offences.

In addition, articles 4 to 6 of the Optional Protocol call for States parties to adopt extraterritorial jurisdiction. This is fundamental in order to deal adequately with the

⁹¹ See https://assets.hcch.net/upload/adoguide_e.pdf.

⁹² This section is based on relevant parts of ad hoc reports of the UN Special Rapporteur on the sale of children, child prostitution and child pornography on the issues of demand for sale and sexual exploitation of children (A/HRC/31/58) and the care and recovery of child victims (A/70/222).

often international nature of demand for the sale of children. Article 7 of the Optional Protocol adds further crucial elements to deal with the demand factor by requiring States parties to seize and confiscate assets and proceeds derived from the offences in question. That is complemented by article 9 (4), which obliges States to ensure that child victims have access to adequate procedures to seek compensation for damages from those legally responsible.

Another important instrument is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Article 9 (5) requires States parties to adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children. The basic principles on the right to an effective remedy for victims of trafficking in persons add the supplementary angle of guarantees of non-repetition, which require that perpetrators be effectively sanctioned and that the root causes of trafficking, such as poverty, gender inequality and discrimination, be addressed effectively.⁹³

Article 9 (3) of the Optional Protocol on the sale of children, child prostitution and child pornography indicates that States parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of sale of children, including their full social reintegration and their full physical and psychological recovery. The Optional Protocol also outlines the obligation of States parties to provide support services to child victims throughout the legal process (art. 8.1 (d)); to ensure appropriate training for the persons who work with child victims of sale (art. 8.4); and to ensure that child victims have access to adequate procedures to seek compensation (art. 9.4). The Optional Protocol further imposes an obligation on States parties to adopt measures to prevent the sale of children, giving particular attention to vulnerable children (art. 9.1), and to encourage the participation of children in information and education programmes about the measures to prevent and the harmful effects of the offence of sale of children (art. 9.2).

States have a duty to provide for care, recovery and reintegration of child victims. The Committee on the Rights of the Child, in its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, infers the responsibility of the State to “ensure the protection of child victims and witnesses and effective access to redress and reparation” (para. 41 (f)). Moreover, in its general comment No. 5 (2003) on general measures of implementation of the Convention, the Committee noted that for rights to have meaning there must be effective remedies that redress violations (para. 23). The Special Rapporteur on trafficking in persons, especially women and children, in the basic principles on the right to an effective remedy for victims of trafficking in persons and in her recommendations has

⁹³ See A/HRC/26/18, annex.

underlined the obligation of States to provide rehabilitation and recovery, with special consideration being given to child victims of trafficking.

6. MEASURES THAT THE STATE OF GUATEMALA SHOULD ADOPT TO ENSURE NON-REPETITION OF VIOLATIONS COMMITTED IN THE CASE OF RAMÍREZ BROTHERS AND FAMILY VS. GUATEMALA

In order to ensure the non-repetition of the violations committed in the case of Ramírez Brothers and Family vs. Guatemala, the State must implement all recommendations issued by UN human rights monitoring mechanisms (see section 3 above) in relation to Guatemala, especially those aimed at strengthening the national child protection system and preventing and combating illegal adoptions. Guatemala must also implement the recommendations issued by the UN-backed International Commission against Impunity in Guatemala in its report on “Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law” of 2010 in order to effectively combat illegal adoptions.⁹⁴

Based on my recent study on illegal adoptions presented at the Human Rights Council in March 2017,⁹⁵ the following are the comprehensive measures that Guatemala should adopt in order to ensure the non-repetition of the violations committed in the Ramírez Brothers and Family case.

In order to prevent illegal adoptions, Guatemala should:

- Adopt clear and comprehensive legislation that prohibits and criminalizes illegal adoption as a separate offence, as well as the sale of and trafficking in children that result in illegal adoptions, with sanctions that reflect the gravity of the crimes;
- Review national laws and regulations to ensure that they do not contribute to the creation or maintenance of an enabling environment for illegal adoptions;
- Ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure;
- Incorporate the 2009 Guidelines for the Alternative Care of Children into national legislation;
- Strengthen and invest more in effective national child protection systems, inter alia, by increasing support to vulnerable families, by providing alternative childcare measures in which adoptions respect the principle of subsidiarity

⁹⁴ http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_EN.pdf

⁹⁵ See A/HRC/34/55

and ensure the best interests of the child, and by establishing adequate birth registration mechanisms;

- Establish and implement a single, well-recognized process for adoption that includes a holistic assessment of the child's full range of rights, and prohibit private and independent adoptions;
- Adopt adequate regulation on procedures and safeguards in relation to adoptions, including in relation to the determination of adoptability, and establish effective and well-resourced mechanisms for overseeing adoption processes, especially with respect to strictly verifying the background of any child who is declared an orphan and his or her documents;
- Establish and implement standardized information systems to obtain and share accurate and reliable data on adoptions, on children subject to adoption, and on their family and background.

In order to ensure the rights of adoption triad members, namely adoptees, adoptive parents and biological parents, and in particular the rights of victims of illegal intercountry adoptions, Guatemala should:

- Establish mechanisms for addressing the concerns of adoptees, adoptive parents and biological parents about the circumstances of an adoption and for facilitating the search for origins and the request for reparations where appropriate, providing adequate psychosocial support when necessary;
- Ensure the right to information about one's origins and access to information about the rights of victims of illegal adoptions, and facilitate the work of victims' organizations in that respect, including in terms of helping them to trace biological parents and children;
- Ensure the right to truth, justice, reparation and guarantees of non-recurrence of victims of illegal adoptions, inter alia, by reforming institutions that were either involved in or incapable of preventing abuses, and guarantee the effective and meaningful participation of victims in the design and implementation of measures to obtain comprehensive redress.

In cases such as *Ramírez Brothers and Family vs. Guatemala*, the State should adopt measures to facilitate the identification and location of children of birth parents, in particular when the birth parents ask for it, even if this means trying to trace the children in countries where they may have been adopted; identify and locate birth parents of adoptees who come forward to ask for help in finding their families of origin; and arrange contact between adoptees who were illegally adopted and birth parents, providing psycho-social support to facilitate the creation of a bond between

the biological parents and the child. These measures should be adopted in complementarity with other measures to ensure the right to remedy and reparations of victims of illegal adoptions, including symbolic reparations and compensation.

In respect of intercountry adoptions, Guatemala must keep the current moratorium – established in 2007 as a response to the widespread abuses, violations and crimes committed in the context of intercountry adoption processes - until all recommendations mentioned above are implemented as a means to prevent illegal adoptions.

Moreover, as a State party to the 1993 Hague Convention, Guatemala should:

- Encourage the Hague Conference to compile good practices and lessons learned regarding moratoriums on intercountry adoptions;
- Recognize and encourage the expert group on the financial aspects of intercountry adoption and the working group on preventing and addressing illicit practices in intercountry adoption of the Hague Conference on Private International Law to develop concrete proposals for tackling the enabling environment in which illegal adoptions flourish;
- Enhance cooperation with receiving countries within the framework of the 1993 Hague Convention, the Convention on the Civil Aspects of International Child Abduction and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; and
- Support the establishment of an international body of experts on transitional justice and illegal adoptions to advise on and promote measures to provide redress to victims of large-scale illegal adoptions and prevent further abuses through adequate legal, policy and institutional reforms.

The priority of Guatemala should be to strengthen national processes and institutions in support of vulnerable families and alternative child care measures at the national level as an effective means to prevent illegal adoptions and comply with international child rights norms and standards.
