

# IOM Submission to the Working Group on Arbitrary Detention

## APPENDIX A

**Amicus curiae submitted to the Inter-American Court of  
Human Rights by the International Organization for  
Migration (IOM)**

**Request for Advisory Opinion on Migrant Children**

CDH-OC-21/272



February 17<sup>th</sup>, 2012

**AMICUS CURIAE SUBMITTED TO THE INTER-AMERICAN COURT BY  
THE INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM)**

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## A. INTRODUCTION: IOM'S INTEREST IN PRESENTING AN AMICUS BRIEF BEFORE THIS COURT

1. The International Organization for Migration (IOM) is an intergovernmental organization established in 1951, committed to the principle that humane and orderly migration benefits migrants and society. Currently, IOM has 146 Member States and 98 observers around the world, with more than 440 field locations to implement the Organisation's activities.

2. As the leading international organisation for migration, IOM works to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems, to encourage social and economic development through migration, to uphold the human dignity and well-being of migrants and provide humanitarian assistance to migrants in need, be they refugees, displaced persons or other uprooted people. IOM works closely with governmental, intergovernmental and non-governmental partners.<sup>1</sup>

3. To accomplish this, IOM has established as its main strategic focus, *inter alia*, to be a primary reference point for migration information; research; best practices; data collection, compatibility and sharing; and to promote, facilitate and support regional and global debate and dialogue on migration so as to advance understanding of the opportunities and challenges it presents. We work on the identification and development of effective policies for addressing those challenges and to identify comprehensive approaches and measures for advancing international cooperation.

4. IOM works in four broad areas of migration management: migration and development, facilitating migration, regulating migration, and addressing forced migration. Cross-cutting activities include the promotion of international migration law, policy debate and guidance, protection of migrants' rights, migration health and the gender dimension of migration.

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<sup>1</sup> Partnerships include governments, international organisations, non-governmental organisations (NGOs), academic institutions, the private sector and migrant associations. These partnerships provide an important platform for advancing cooperation on migration. IOM plays a key role in supporting partnerships and the means to collaborate at national, regional, and global levels for better and more effective migration management. IOM promotes informal dialogues between States and cooperation among agencies, and involves various stakeholders, including civil society and migrants, as both subjects and agents of migration. In helping to develop and strengthen partnerships on migration, IOM provides substantive, expert and organisational assistance to governments and other institutions.

5. In sum, IOM's offices worldwide contribute to international good practice for the implementation of services to migrants and governments related to migration, while contributing to national capacity-building efforts and ensuring that the rights of migrants are respected, in accordance with applicable international and national standards.

6. In the context of its work, issues related to protection of human rights of the more vulnerable groups of migrant persons have had a special priority in the Organisation's agenda.<sup>2</sup> In this context, and based on its permanent work and investigation in relation to this groups, IOM has concluded that children and youth migrating – whether between or within countries and whether accompanied by their relatives or not – have become a recognised part of today's global and mixed migration flows. Nevertheless, in research and policy debates, the migration of children and youth is considered a new area of concern and focus. Information on children who are migrating is consequently little reflected in global debates on migration.<sup>3</sup>

7. As a consequence, IOM's the attention of the situation of migrant children has been of primary relevance for the establishment of procedures and coordination strategies that can guarantee the protection of their rights, with a sensitive approach depending on the stage of the migration process in which the child is at: origin, transit or destination.

8. Within the Americas, in the last decade IOM has focused its work with partners in the areas where migrant children's rights have been breached. The focus has taken into account situations where migrant children participate directly in the migration flows as part of a family unit or as non-accompanied and separated children<sup>4</sup>.

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<sup>2</sup> See IOM (2008) *International Migration Law. Human Rights of Migrant Children. No 15*. Geneva, Switzerland, (Annex 1) and *IML Information Note on the Protection of Unaccompanied Migrant Children*. January 2011 (Annex 2).

<sup>3</sup> See IOM (2011) *Unaccompanied Children on the Move. The Work of the International Organization for Migration* Geneva, Switzerland, p. 11. (Annex 3)

<sup>4</sup> For the definitions on the different categories of migrants and other concepts related to migration, see OIM. (2006) "Glosario sobre Migración". *Derecho Internacional sobre Migración*. No.7. Ginebra, Suiza. (Annex 4) and IOM (2011). "Glossary on Migration". 2<sup>nd</sup> edition. *International Migration Law. No.25*. Geneva, Switzerland. (Annex 5).

9. As a basic part of this approach within the region, IOM has promoted coordinated work and dialogue among child protection entities, migration authorities, consular offices, health and education officials, and in general entities with a specific mandate in child rights protection.

10. In this regard, IOM has collaborated with other intergovernmental organizations, such as the United Nations Children’s Fund (UNICEF),<sup>5</sup> United Nations High Commissioner for Refugees (UNHCR),<sup>6</sup> and the International Labour Organization (ILO),<sup>7</sup> among others, which has permitted the determination of necessary actions and the elaboration of guidelines to give precise and coordinated responses for more effective protection of vulnerable migrant children. IOM has subsequently developed and implemented national and regional projects with the objective of achieving a real application of those protocols and guidelines by the competent State actors in the different countries of the region.

11. The Organisation has work extensively, *inter alia*, in training programs with different authorities aiming to develop knowledge capacities on the appropriate treatment of vulnerable migrant children, how to take care of their specific needs in a sensitive manner, and finally facilitating the search of durable and sustainable solutions based on the children’s age and conditions.<sup>8</sup>

12. IOM has also participated in extensive investigations regarding child participation in the migration processes. Research has addressed why children move in an unaccompanied manner or why at some point of the migration process they end being unaccompanied, and their basic rights and needs in these

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<sup>5</sup> See UNICEF/IOM (2010) *A Framework and Recommendations for Action on Children Affected by Migration in the Caribbean*, Geneva-Washington DC. (Annex 6) or OIM Buenos Aires - UNICEF Argentina Informe sobre trabajo infantil en la recuperación y reciclaje de residuos en Argentina. 2005. (Annex 7).

<sup>6</sup> See FLACSO. Diagnóstico sobre la situación actual, tendencias y necesidades de protección y asistencia de las personas migrantes y refugiadas extracontinentales en México y América Central. 2011. Publication jointly required by IOM and UNHCR. (Annex 8) and OIM/Alto Comisionado de las Naciones Unidas para los Refugiados, ACNUR/ Red Regional de Organizaciones Civiles para las Migraciones, RROCM. “Memoria. Conferencia Regional sobre Migración (CRM) Seminario mujer y migración”. San Salvador, 2008. (Annex 9).

<sup>7</sup> See OIM/OIT (2009) “Migraciones con fines de empleo y trabajo infantil en América Latina”. Programa Internacional para la Erradicación del Trabajo Infantil (IPEC). Oficina Regional para América Latina y el Caribe. Lima, Perú (Annex 10).

<sup>8</sup> See for example OIM. (2010) *Niños, Niñas y Adolescentes Migrantes Centroamericanos en Poblaciones del Sur de México*, México. (Annex 11).

circumstances<sup>9</sup>. The information have allowed to reach conclusions about all types of migration with different specificities and challenges, as for example migration flows to developed countries or between developing countries, or about circular and temporary migration.

13. One of the Organisation's priorities in the region has been the response to human trafficking, as one of the most extreme situations migrant children are currently facing throughout the region. The main objective of the work addressing human trafficking is to strengthen the institutional capacities of states of origin, transit and destination to effectively respond to this crime through prevention actions and punishment of the perpetrators and giving safe and appropriate assistance to its victims.<sup>10</sup> The harmonisation and coordination of actions at the regional<sup>11</sup> and national<sup>12</sup> levels has been the main challenge regarding the issue of trafficking.

14. Moreover, in the context of a constant dialogue with governments, another important topic on IOM's agenda within the region addresses migrant children in an irregular migratory situation. The establishment of alternative measures to detention, regularisation processes and, more importantly, the strengthening of institutional responses by migratory authorities is a central part

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<sup>9</sup> See IOM (2011) *Unaccompanied Children on the Move. The Work of the International Organization for Migration (IOM)*. Geneva, Switzerland. *Op.cit.*, and OIM. (2011) Situación de niños, niñas y adolescentes que viajan no acompañados por la Región Centroamericana. San José. (Annex 12)

<sup>10</sup> See IOM (2007) *The IOM Handbook on Direct Assistance for Victims of Trafficking*. Geneva, Switzerland (Annex 13) and Guía de Intervención Psicosocial para la Asistencia directa con Personas Víctimas de Trata. 1ed. OIM-Oficina Regional para Centroamérica y México/Save the Children. San José, Costa Rica, 2007 (Annex 14).

<sup>11</sup> See OIM. (2011) "Manual para la detección del delito de trata de personas orientado a las autoridades migratorias". Oficina Regional para Centroamérica y México, San José. (Annex 15); OIM. "La experiencia de las mujeres víctimas de trata en América Central y República Dominicana y la actuación de las instituciones". 1st ed. See the guide for interviewing victims of trafficking in annex 5 of the document. San José, Costa Rica, 2008. (Annex 16) and OIM (2010) "Trata de Personas: Asistencia a víctimas de trata de personas. Experiencias en la Triple Frontera". (Argentina, Brasil, Paraguay). Buenos Aires, Argentina. (Annex 17).

<sup>12</sup> See OIM. "La trata de personas en México: Diagnóstico sobre la asistencia a víctimas". Hélène Le Goff y Thomas Lothar Weiss. México, Junio 2011 (Annex 18); OIM. "Manual de perfiles aplicados a la detección de víctimas y victimarios del delito de trata de personas". San José, 2011 (Annex 19); OIM y Ministerio Público Nacional. "Nuevo escenario en la lucha contra la trata de personas en la Argentina. Herramientas para la persecución del delito y asistencia a sus víctimas". 2009 (Annex 20) and OIM. "Panorama sobre la trata de personas, Desafíos y Respuestas: Colombia, Estados Unidos y República Dominicana". Bogotá. Febrero, 2006. (Annex 21).

of the Organisation's activity with governments. Recent efforts have been based on supporting training processes and on the development of specialised units dedicated to the assistance of vulnerable migrant children, including those with an irregular migratory condition.

15. Currently, IOM is working in partnership with the UNHCR in the analysis of possible applicable regional guidelines for the appropriate detection and referral of vulnerable migrants (with regular or irregular migratory status), including migrant children (specifically non-accompanied and separated), victims of trafficking, migrant women, extra-continental migrants and refugees, based on the approach of differentiated and individualised needs.<sup>13</sup> The necessary cooperation between States and other relevant actors has been placed at the centre of the discussion as one of the most important principles when referring to effective protection of migrants within the region.<sup>14</sup>

16. IOM's work on directly assisting migrant children has shown that in some circumstances, a voluntary return to their place of origin (after an evaluation of the best interest of the child)<sup>15</sup> is the best solution for their well-being and for an effective protection of their rights.<sup>16</sup> Based on that reality, IOM is the leader in programs targeting the assisted voluntary return of migrants – which in thousands of cases involve the return and reintegration of children – to their States of origin, working closely with governments and other actors, both in the regional<sup>17</sup> and national<sup>18</sup> spheres.

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<sup>13</sup> ACNUR/OEA/OIM. Conferencia Regional sobre Protección de Refugiados y Migración Internacional en las Américas Consideraciones de Protección en el contexto de la Migración Mixta. 2009. (Annex 22).

<sup>14</sup> *Ibid*, p. 18.

<sup>15</sup> IOM follows several internal guidelines that may be complied with in order for the Organisation to give direct assistance in the return process of a vulnerable migrant. In case of migrant children, the test that needs to be complied takes into account an evaluation of the child's best interest, and also if the minor is a victim of trafficking, a non-accompanied or separated children, if its was in detention before the return and reintegration process or if its well-being and development is at risk if it is returned to the State of origin or if it stays at the place of destination or transit.

<sup>16</sup> See IOM. (2010) *Managing Return Migration. Migration Policy and Research. No. 14*. Geneva, Switzerland. (Annex 23).

<sup>17</sup> See in this regard: Conferencia Regional sobre Migración (CRM) (with the technical support of IOM Office for North America, Central America and the Caribbean). "Lineamientos regionales para la atención de niños, niñas y adolescentes migrantes no acompañados en casos de repatriación". Guatemala, 2009 (Annex 24) and Conferencia Regional sobre Migración (CRM) (with the technical support of IOM Office for North America, Central America and the

17. Finally, IOM works on integration assistance programs in countries of origin and also for cases where the best solution for the vulnerable migrant is to stay at the place of destination or to resettle in a third country.<sup>19</sup> These programs help to reduce the risks that push many to migrate in irregular conditions.

18. The interest of IOM in presenting an Amicus Brief before this Honourable Court in its Advisory Opinion's procedure comes from the Organisation's permanent commitment to the protection of the human rights of migrants in the migration process throughout more than 60 years. This Court's judgment in its Advisory Opinion would greatly inform States on how to respond to the needs of migrant children in light of the protection standards given by its jurisprudence in the past and based on an evolving interpretation of the rights and guarantees established in the American Convention on Human Rights. The Advisory Opinion would be a cornerstone in the efforts to effectively ensure the rights of this vulnerable group within the region.

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Caribbean). "Lineamientos regionales para la protección especial en casos de repatriación de niños, niñas y adolescentes víctimas de trata de personas". New Orleans, 2007. (Annex 25)

<sup>18</sup> See for example: OIM/Ministerio de Relaciones Exteriores Estado Plurinacional de Bolivia. "Guía de Retorno para el Migrante Boliviano". Bolivia, 2011 (Annex 26) and OIM/Ministerio de Relaciones Exteriores Estado Plurinacional de Bolivia. "Lineamientos para el diseño de un plan de retorno y reintegración sostenible para migrantes bolivianos y bolivianas", Bolivia, 2011. (Annex 27).

<sup>19</sup> See for example IOM (2010) *Assisted Voluntary Return and Reintegration. Annual Report of Activities*. Geneva, Switzerland. (Annex 28) and IOM (2010) *International Migration Law. "Rights, Residence, Rehabilitation: A Comparative Study Assessing Residence Options for Trafficked Persons"*. No.24. Geneva, Switzerland. (Annex 29).



## B. QUESTIONS PRESENTED BEFORE THE COURT

### 1. PROCEEDINGS TO IDENTIFY THE NEEDS FOR INTERNATIONAL PROTECTION AND POTENTIAL SITUATIONS OF RISKS FOR THE RIGHTS OF MIGRANT CHILDREN.

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

19. The Core Human Rights Conventions are valid for all people, including, with very few exceptions, non-nationals on the territory of a State. This means that the human rights guaranteed in the core conventions are also guaranteed to non-national children. Importantly, the Committee on the Rights of the Child has stated that:

“State obligations under the Convention [the CRC] apply to each child within the State’s territory and to all children subject to its jurisdiction. These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.”<sup>20</sup>

20. Therefore, States have a clear obligation to respect and protect also non-national children within full compliance and implementation of all rights found in the CRC. The obligations deriving from the Convention (...) “apply to all branches of government (executive, legislative and judicial). They include the obligation to establish national legislation; administrative structures; and the

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<sup>20</sup> See, CRC, General Comment No. 6, *op.cit.* para. 12

necessary research, information, data compilation and comprehensive training activities to support such measures. Such legal obligations are both negative and positive in nature, requiring States not only to refrain from measures infringing on such children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination."<sup>21</sup>

21. The Committee has stressed the importance of the Guiding Principles of the CRC<sup>22</sup> (non-discrimination, best interest of the child as the primary concern in the search of short and long term solutions<sup>23</sup>, the right to life, survival and development,<sup>24</sup> evolving capacities of the child, participation), and the principle of *non-refoulement*, and of confidentiality.<sup>25</sup>

22. The Committee has, furthermore, developed a set of general principles applicable to the treatment of unaccompanied children outside their country of origin which function as a guide for mechanisms or procedures identifying and determining the protection of migrant children. All such mechanism and procedures being based on the abovementioned principles of the CRC.

23. The determination of protection needs for the individual child will have to be done on an assessment of the specific situation and best interests of the child in question. "This includes age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity..."<sup>26</sup>

24. The assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining

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<sup>21</sup> *Ibid*, para. 13

<sup>22</sup> *Ibid*, paras. 12-30.

<sup>23</sup> According to the General Comment, if the competent authorities have separated or unaccompanied minor in an institution "for purposes of care, protection or treatment of physical or mental health," the State recognizes the right of children to a "periodic review "treatment" and all the other circumstances of their placement"(para. 22).

<sup>24</sup> The General Comment states that "States shall not return the child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child. The risk assessment of such serious violations should be made taking into account age and gender and taking into account, for example, the particularly serious consequences for children of the insufficient food or health services"(para. 27).

<sup>25</sup> The General Comment states that "[c]are must be taken that the information sought and legitimately shared for one purpose is not inappropriately used for that of another" (para. 29).

<sup>26</sup> *Ibid*, para. 31

uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such; prompt registration by means of an initial interview conducted in an age-appropriate and gender-sensitive manner, in a language the child understands, by professionally qualified persons; in continuation of the registration process, the recording of further information in order to meet the specific needs of the child.<sup>27</sup>

25. Moreover, the assessment should consider particular vulnerabilities, including health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence, trafficking or trauma. All available information to determine the potential existence of international protection needs is based on article 1 A (2), of the 1951 Refugee Convention; article 1 (2), Convention Governing the Specific Aspects of Refugee Problems in Africa; and potential protection needs based on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT”) or the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) particularly Art 2.<sup>28</sup>

26. As emphasised by the Committee, States need to appoint a guardian or advisor, in addition to a legal representative to unaccompanied children. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered by *inter alia*, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child.<sup>29</sup>

27. In line with this, this Honourable Court, has underlined that during procedures concerning children, it is essential to take into account the duty of the States under Article 19 of the American Convention on Human Rights (hereinafter the “American Convention”) to appoint a guardian who can ensure

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid*, para. 33

care and responsibility for those children who migrate without parents or where the parents have failed to provide care and needs of the child.<sup>30</sup>

28. In addition, the Court has in its case law emphasised that States have a general obligation to ensure the creation of the conditions required to avoid violations of the rights established in the American Convention.<sup>31</sup> The Court has further noted the obligation of State authorities to prevent its agents and individuals from violating these rights, as well as protecting them and ensuring effective investigation and accountability if any of these rights are breached.<sup>32</sup>

29. As aforementioned, the Court has recognised that migrants often find themselves in vulnerable situations as subjects of human rights violations maintained by *de jure* (inequalities between national and foreigners in law) and *de facto* (structural inequalities) situations.<sup>33</sup> These must be added to the particular vulnerability of migrant children. Migrant children are therefore in special need of protection of the rights to life, integrity, freedom, personal security, effective judicial protection. Additionally, the right to seek and receive asylum from persecution abroad must be protected.

30. In relation to persons at risk of having their rights breached, appropriate measures have to be taken to prevent or reduce such a risk.<sup>34</sup> As noted by the Court, the particular needs of a person will depend on the circumstances and will differ for each particular situation.<sup>35</sup>

31. Accordingly, an individual determination of each case is crucial in order to ensure effective protection of the migrant child and successful implementation of international standards and obligations. An individual determination will make it possible to decide whether a child is a potential refugee, a victim of trafficking or has other specific characteristics which warrant particular attention in order to address *inter alia* vulnerabilities and situations of exploitation and/or abuse and

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<sup>30</sup> See, Advisory Opinion OC-17/02, *op.cit.* para. 90.

<sup>31</sup> Case *Sawhoyamaya Case v. Paraguay*. Reparations and Costs. Judgement of March 29, 2006. Series C No. 146, para. 151.

<sup>32</sup> Case of *the Pueblo Bello Slaughter v. Colombia*. Reparations and Costs. Judgement of January 31, 2006. Series C No. 140, para. 120.

<sup>33</sup> See, Advisory Opinion OC 18/03, *op.cit.* para. 112.

<sup>34</sup> Case *Yakye Axa v. Paraguay*. Merits, Reparations and Costs. Judgement June 17, 2005. Series C No. 125, para.162; see also, *Sawhoyamaya case. Op.cit.*, para. 170

<sup>35</sup> Case of the *Slaughter of Pueblo Bello. Op Cit*, para. 117.

to guarantee the protection and respect to which the child is entitled based on international and regional instruments.

32. However, whilst the categorisation of the different migrant groups may be a useful tool it is not decisive in itself and the persons who travel in mixed movements may have different needs and fit into various categories.<sup>36</sup> It is important to notice that also children who are not “categorised” as refugees or victims of trafficking may be at risk, or have been victimised, and that generally their specific situation as child non-nationals warrant specific attention.

33. Following the jurisprudence of the Court and Articles 8 and 25 of the American Convention, any process affecting the rights of the migrant must follow certain steps in order to ensure that the rights of the migrant are effectively protected and guaranteed.<sup>37</sup> The Court has stated that administrative mechanisms are not excluded from this duty.<sup>38</sup>

34. Both the Court and the Committee on the Rights of the Child have identified general guidelines which are to be applied to all administrative proceedings in which children are involved, namely;

- They must ensure the child’s participation during the procedures affecting the rights of the child. The level of participation will depend on the child’s level of physical and intellectual development and the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests;<sup>39</sup>
- They must respect the child’s right to consular assistance from the State of origin (with the exception of cases of refugees and asylum seekers

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<sup>36</sup> See, the UNHCR. *Refugee Protection and Mixed Migration: The 10-Point Plan of Action*, Ch.6. “Differentiated processes and procedures,” p 163 - “[f]or example, victims of trafficking and unaccompanied or separated may also have international protection needs as a result of persecution endangering his life, physical integrity or liberty, and in such cases can be carried out asylum procedures together with other processes, including providing assistance and services to meet immediate needs.”

<sup>37</sup> Advisory Opinion OC-17/02, *Op.cit.* para. 98.

<sup>38</sup> Case *Baena Ricardo and Others v. Panama*. Reparations and Costs. Judgement of February 2, 2001. Series C No. 72, para 124 and 125.

<sup>39</sup> Advisory Opinion OC-17/02, *Op.cit.* paras. 99-102.

who are entitled to confidentiality even before the authorities in the host countries).<sup>40</sup>

- They ought to provide information to the child about his or her legal situation and implement appropriate procedures adapted to their specific needs, ensuring legal aid and other measures according to their needs.<sup>41</sup>

- The adopted measures have to conform strictly to the law and should aim at reuniting the child with his or her family unless it would be against the best interest of the child.<sup>42</sup>

- The staff ought to be properly trained to care for them and the interview rooms have to be safe, non-intimidating and appropriate for a child.<sup>43</sup> In these scenarios, victim support is essential to provide security and an appropriate framework for the child to talk about the crimes committed against him or her which will be crucial for the investigation.<sup>44</sup>

- Ensure that children are not interviewed more times than necessary in order to avoid, as far as possible, revictimization or a traumatic impact,<sup>45</sup>

- Only make use of custodial sentences in exceptional cases and without the person's immigration status resulting in criminal penalties.<sup>46</sup>

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<sup>40</sup> See, Advisory Opinion OC-16/99 "The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law," October 1, 1999. Series A No. 16, para. 80.

<sup>41</sup> See, CRC General Comment No. 5 (2003) "General Measures of Implementation of the Convention on the Rights of the Child," para. 24; see also, CRC General Comment No. 12 (2009) "The Child's Right to be Heard," para. 64.

<sup>42</sup> Advisory Opinion OC-17/02, *Op.cit.* paras. 71-77.

<sup>43</sup> See, CRC General Comment 12, *Op.cit.*, paras. 21, 34 and 64.

<sup>44</sup> Case *Rosendo Cantú and another v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgement of August 31, 2010. Series C No. 216, para. 189.

<sup>45</sup> CRC General Comment 12, *Op.cit.* para. 24.

<sup>46</sup> See, Advisory Opinion 17/02, *Op.cit.*, para. 103; see also, case *Velez v. Panama Loo* Objections, Merits, Reparations and Costs. Judgement of November 23, 2010 Series C No. 218, para. 171.

35. Among the measures necessary to guarantee continued respect for children's rights are:

- As soon as possible, provide personal identity documents.
- In the case of unaccompanied or separated children, to immediately initiate an attempt to locate the family members as foreseen by Articles 22(2), 9(3) and 10(2) of the CRC.
- Furthermore, in relation to unaccompanied or separated children, it is essential to ensure care and accommodation, taking into account the particular vulnerabilities unaccompanied children face, not only from being disconnected from their family environment, but also from being outside their country of origin. It is also important to take into consideration the age, sex, ethnic origin, religion, language and culture of the child.<sup>47</sup>
- The access to education must be ensured at all stages of the displacement without any discrimination under Articles 28, 29(1)(c), 30, 32 of the CRC. It is also imperative to ensure that children with special needs, including children with disabilities, have a right to maintain their identity and cultural values, in particular in regard to their native language.
- Provide material assistance and support programs, particularly in relation to nutrition, clothing and housing (Article 27 of the CRC).
- Provide the same access to health care as that provided to nationals. It should be taken into account that unaccompanied minors who have been separated from their parents may experience, to varying degrees, loss, trauma, disruption, etc. To facilitate recovery and reintegration into society, it is important to make available mental health care which is culturally appropriate and sensitive to gender issues, and to offer professional counselling (Article 23, 24 and 39 of the CRC)
- Take necessary measures to prevent the recruitment of children as soldiers during armed conflicts. The same rule applies to former child soldiers against re-recruitment (Article 38-39 of the CRC).

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<sup>47</sup> Art. 20 and 22 of the CRC.

36. In the case of unaccompanied children, “all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views.”<sup>48</sup> Furthermore, “[l]ocal integration is the primary option if return to the country of origin is impossible on either legal or factual grounds. Local integration must be based on a secure legal status and be governed by the Convention rights that are fully applicable to all children who remain in the country, irrespective of whether this is due to their recognition as a refugee, other legal obstacles to return, or whether the best-interests-based balancing test has decided against return.”<sup>49</sup>

37. Specifically vulnerable groups include refugee children (see question 8) and victims of trafficking. In too many cases the victims of trafficking may be wrongly classified as irregular migrants (mistaken for smuggled migrants) and consequently deported or put in detention without being properly identified as victims. The failure to make this distinction must be avoided.<sup>50</sup>

38. Children who are victims of trafficking should not be detained, charged, or prosecuted for illegal entry into the country of residence or transit or for their involvement in unlawful activities to the extent that such participation is a result of their victimization.<sup>51</sup>

39. As noted by the UN High Commissioner for Human Rights “[w]hile the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.”<sup>52</sup>

40. Once detected as a victim of trafficking, it is important to establish appropriate procedures to address the child’s needs of protection and assistance. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons

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<sup>48</sup> *Ibid*, para. 81

<sup>49</sup> *Ibid*, para. 89.

<sup>50</sup> See, IOM, *Direct Assistance for Victims of Trafficking*, (2007) Ch.2, “Screening of Victims of Trafficking” and ch.3, “Referral and Reintegration Assistance”, p. 17

<sup>51</sup> See, Report of the High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Principle 7.

<sup>52</sup> *Ibid*, Guideline 2. “Identification of victims of trafficking and traffickers,” p. 6.



especially Women and Children (hereinafter “the Palermo Protocol”) contains the basic steps to comply in Article 6. Importantly, it must be underlined that the core human rights conventions – including the CRC are at all times valid and must be respected.

41. Children who are victims of trafficking often have immediate physiological and physical needs which need to be addressed urgently by relevant institutions and trained professionals in the field, using the procedures in effect. Besides being subject to physical or sexual abuse, the victims of trafficking may suffer from malnutrition, exhaustion from long days of work, lack of sleep, overcrowding, lack of hygiene and health care.<sup>53</sup>

42. Under Article 7 of the Palermo Protocol, States Parties should “[I]n addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases (...) give appropriate consideration to humanitarian and compassionate factors.”

43. Moreover, in line with what has been indicated by this Honourable Court,<sup>54</sup> the safety of the victims and the victims’ families must be part of the proceedings. The risk of revenge is always present during these types of crimes which frequently involve organised crime networks.<sup>55</sup>

44. For all non-national children the ultimate goal is to “identify a durable solution that addresses all their protection needs, takes into account the child’s view”<sup>56</sup>

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<sup>53</sup> *Ibid*, Guidelines 2 and 8 “Special measures for protection and assistance to child victims of trafficking,” p 13; *see also*, IOM, *Psychosocial Intervention Guide for Direct Assistance for Victims of Trafficking* (2007) Ch.4, “Consequences of trafficking in people’s lives,” paras. 55-57.

<sup>54</sup> Case *Myrna Mack Chang v. Guatemala*. Reparations and Costs. Judgement of November 25, 2003. Series C No. 101 para. 199.

<sup>55</sup> *See*, UN Office on Drugs and Crime *Manual for Combating Trafficking in Persons. Global Programme against Trafficking in Persons*. New York, 2007, page 92.

<sup>56</sup> CRC General Comment 6, *Op.cit*, para. 79.

## 2. SYSTEM OF DUE PROCESS GUARANTEES & 6. DUE PROCESS GUARANTEES BEFORE MEASURES THAT ENTAIL RESTRICTIONS ON THE PERSONAL FREEDOM OF CHILDREN BASED ON MIGRATORY REASONS

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

45. At an international level, the standards for due process are to be found in Articles 9, 14 and 15 of the ICCPR<sup>57</sup> and in Articles 7 and 10<sup>58</sup> of the Universal

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<sup>57</sup> ICCPR Art. 9; “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation; Art 14 “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have

Declaration of Human Rights. These standards include *inter alia* the access to court and the right to claim justice, as well as ensuring equality and fairness during proceedings. As stated by the Human Rights Committee “[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection.” Article 14 of the ICCRP “serves as a procedural means to safeguard the rule of law” and applies to everyone, irrespective of nationality or migration status, if in the territory or subject to the jurisdiction of a State Party to the ICCPR.<sup>59</sup>

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adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Art 15 “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. ”

<sup>58</sup> UDHR Art. 7 “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Art 10 “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

<sup>59</sup> See, Human Rights Committee, General Comment No. 32 (2007) “Article 14: Right to equality before courts and tribunals and to a fair trial,” CCPR/C/GC/32

46. As set out in international instruments<sup>60</sup>, the standards on due process apply in a non-discriminatory manner thus applicable to everyone, irrespective of their migration status. The guarantees provided for in Article 14 of the ICCPR must be respected by all States Parties, regardless of their legal traditions and domestic laws.<sup>61</sup> Although the principles provided by the ICCPR also apply to children, the CRC sets out further standards on due process specific to children.

47. Furthermore, it has been highlighted by the former UN Special Rapporteur on human rights for migrants, Jorge Bustamante, that States should apply an “age appropriate” due process of law which includes, *inter alia*, rights to a guardian, a legal representative, free legal aid, access to jurisdiction, effective remedy, an interpreter if necessary and to be heard.<sup>62</sup> When determining the exact age of an individual, in case of uncertainty, States shall accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.<sup>63</sup>

48. At a regional level, this Honourable Court has stated that due process has to be respected both in judicial and administrative proceedings where a decision is being made regarding a child’s right, thus due process is not only relevant in criminal proceedings.<sup>64</sup>

49. Closely linked to due process is the right to consular protection and assistance set out in the Vienna Convention on Consular Relations 1963 (hereinafter “The Vienna Convention”). Article 5(a) of the Vienna Convention provides that the consular in the receiving State shall, for the nationals of the sending State, *inter alia* protect and assist, safeguard the interests of and arrange appropriate representation for proceedings in the receiving State.<sup>65</sup> More

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<sup>60</sup> See, ICCPR Articles 9, 14 and 15.

<sup>61</sup> See, Human Rights Committee, General Comment No. 32 (2007) “Right to equality before courts and tribunals and to a fair trial,” para. 4.

<sup>62</sup> See, Report of the UN Special Rapporteur on the Human Rights of Migrants, A/HRC/11/7 (2009) para. 58.

<sup>63</sup> CRC General Comment No. 6 *Op.cit.* para. 31.

<sup>64</sup> Advisory Opinion OC-17/2002 *Op.cit.* para. 94.

<sup>65</sup> Art. 5(a) “protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law”; 5(e) “helping and assisting nationals, both individuals and bodies corporate, of the sending State”; 5(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State”; 5(i) “safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the

specifically to children, Article 5(h) of the Vienna Convention states that the consular shall safeguard the interests of minors, in particular where any guardianship or trusteeship is required. In the context of migration, Article 65(2) of the ICRMW provides that “States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.”

50. Furthermore, it is well-established that a non-national shall be free at any time to contact his or her consular in the receiving State.<sup>66</sup> This applies to everyone regardless of their migration status; however it has further been addressed specifically in relation to migrant workers and their families in Article 23 of the ICRMW.<sup>67</sup> Under Article 36 of the Vienna Convention and Article 23 of the ICRMW migrants have a right to be informed without delay on consular protection and assistance.

51. This is particularly important in relation to detention since the experience of being detained in a country, where the language and legal environment is different, can be extremely upsetting. Nonetheless, the right to have the relevant consular notified about an individual’s arrest or detention is enforceable by the individual and not the sending State, thus a migrant may expressly refuse that the consulate is informed about his or her whereabouts.<sup>68</sup> If the individual chooses to have his or her consulate notified, the State must respect the

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territory of the receiving State, in accordance with the laws and regulations of the receiving State”.

<sup>66</sup> Art. 36(a) of the VCCR “consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State”; see also, General Assembly Resolution 40/144, *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live*, 13 December 1985. art. 10 “Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.

<sup>67</sup> Art. 23 “Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.”

<sup>68</sup> Art. 36(c) of VCCR.

individual's right to communicate freely with the consular officer, including regular visits to the place of detention etc.<sup>69</sup>

52. Notably, although the Vienna Convention is not considered to be a human rights instrument, this Court has held the provisions on consular access as part of due process and as being within a human rights framework.<sup>70</sup> The access to consular services are of utmost important in relation to migrant children, in particular unaccompanied children, since children are generally more vulnerable than adults during the migration process and need all possible available assistance and guidance.<sup>71</sup>

53. As stated by the former UN Special Rapporteur on human rights for migrants, Jorge Bustamante, States should recognise and respect the important role played by consular offices in the protection of migrant children, and those offices should share good practices and strengthen cooperation.<sup>72</sup>

54. It should be emphasising that States Parties are required to provide special protection and assistance for children who have been deprived of his or her family environment under Article 20(1) of the CRC. This entails the importance of a prompt appointment of a guardian for unaccompanied or separated migrant children<sup>73</sup> which is further recognised in Article 18(2) of the CRC.<sup>74</sup>

55. States should appoint a guardian for children who are identified as unaccompanied or separated from their family as soon as possible and the guardianship will be applicable until the child reaches the age of maturity, usually at the age of 18, or when the child has left the State permanently.<sup>75</sup> The guardian ought to possess the necessary expertise in childcare in order to ensure that the best interest of the child is safeguarded. Moreover, the guardian has to function as a link between the child and the relevant agencies in order to make

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<sup>69</sup> *Ibid.*

<sup>70</sup> *See, Advisory Opinion OC-16/99 Op.cit.*

<sup>71</sup> *See, Report of the UN Special Rapporteur on the Human Rights of Migrants, A/HRC/11/7 (2009) para. 97.*

<sup>72</sup> *Ibid, para. 114.*

<sup>73</sup> *See, CRC General Comment No 6 Op.cit. para. 24.*

<sup>74</sup> Art 18(2) 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."

<sup>75</sup> *See, CRC General Comment No. 6 Op.cit. para. 33.*

sure that the child's legal, social, educational, health, psychological and material needs are covered.<sup>76</sup> The State or the relevant State agencies should consult and inform the guardian in all actions concerning the child, and the guardian should be present in all planning and decision making processes.<sup>77</sup>

56. It is recommended that States establish review mechanisms which can monitor the quality of the guardianship.<sup>78</sup> This has to be done in order to prevent abuse and ensure that the best interest of the child is being represented. In order for the guardianship to be in accordance with Article 3 of the CRC<sup>79</sup> and the child's best interests, the child must be promptly informed about his or her options and the child's views and opinions must be taken into consideration.<sup>80</sup> This information has to be provided in a manner that is suitable to the maturity and level of understanding of the child and since participation is dependent on trustworthy communication, interpreters should be made available at all stages of the procedure where necessary.<sup>81</sup>

57. Deeply embedded as part of due process and included as a minimum guarantee is the right to legal representation before courts and tribunals. This guarantee is to be found in Article 14 of the ICCPR and in Article 40 of the CRC. In addition to a guardian, as aforementioned, a child should be appointed a legal representative where necessary.<sup>82</sup>

58. At a regional level, the same guarantee is provided by Article 8(2)(d) of the American Convention. The Inter-American system has further recognised that minimum guarantees provided by Article 8 and 25 of the American Convention, also apply to administrative hearings thus include e.g. proceedings for asylum, expulsion etc.<sup>83</sup> The same minimum guarantees apply to children<sup>84</sup> and the access

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<sup>76</sup> *Ibid.*

<sup>77</sup> *See*, Report of the Special Rapporteur on the Human Rights of Migrants (2009) *Op.cit.* para. 34.

<sup>78</sup> *Ibid*, para. 35.

<sup>79</sup> Art. 3(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."

<sup>80</sup> CRC General Comment No. 6 *Op.cit.* para. 37; *See also*, Art 12(1) CRC "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."

<sup>81</sup> CRC General Comment No. 6 *Op.cit.* para. 25.

<sup>82</sup> *Ibid*, para. 34.

<sup>83</sup> *See*, Advisory Opinion OC-18/03 *Op.cit.* para. 124-127.

<sup>84</sup> *See*, Advisory Opinion OC-17/2002 *Op.cit.* para. 55.

to qualified legal representation, in particular in criminal proceeding or procedures for asylum, ought to be free of charge.<sup>85</sup> It is also important that States provide training for legal representatives working with unaccompanied or separated migrant children to ensure that the child's best interests is a primary consideration at all stages during the procedures.<sup>86</sup>

59. The right to legal representation is also protected by one of the fundamental principles of the CRC, namely the right to be heard, and Article 12(2) states "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".

60. As mentioned above, reliable communication is essential during the proceedings and as provided by Article 40(2)(vi) of the CRC, all children have a right to an interpreter during judicial proceedings if he or she does not speak the language. Additionally, all interviews and registration procedures of children, unaccompanied or migrating with family, have to be conducted in a language that the child understands and an interpreter has to be made available if needed.<sup>87</sup> The assistance of an interpreter is considered a minimum procedural guarantee and is essential in order for the child's right to be heard and for the best interests of the child to be a primary consideration.<sup>88</sup>

61. Stressing the importance of the non-detention of children, Article 37(b) of the CRC states that children may be deprived of their liberty only when it is a last measure of resort and for the shortest period of time possible. In compliance with the abovementioned article, the Committee on the Rights of the Child has recalled that "all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation"<sup>89</sup> (See questions 3 and 4).

62. However, it is essential that if any deprivation of a child's liberty is exercised, the child have a right to appropriate legal assistance, a right to

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<sup>85</sup> See, CRC General Comment No. 6 *Op.cit.* para. 69

<sup>86</sup> *Ibid*, para. 95.

<sup>87</sup> *Ibid.* para. 31(ii).

<sup>88</sup> *Ibid*, para 71.

<sup>89</sup> CRC General Comment No. 6, *Op.cit.*para. 61



challenge the legality of the deprivation before a court or other competent, impartial and independent authority.<sup>90</sup> The grounds leading to the deprivation must have been previously defined by law and provide adequate and effective remedies, including judicial review, in order to avoid arbitrary detention and guarantee access to legal services.<sup>91</sup>

63. This Court has affirmed that the same minimum guarantees provided in Article 8 of the American Convention must also apply to proceeding concerning the deprivation of liberty of migrants, including migrant children.<sup>92</sup>

64. In regard to the best interests principle, the Committee on the Rights of the Child has stated that a “determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.” Moreover, the assessment process has to take place in a “friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques”.<sup>93</sup>

65. Specifically to children, Article 19 of the American Convention requires States to provide protection to children in their particular condition as minors. The Court has indicated that the States Parties’ obligation to protect the best interests of the children during the proceedings of which they are a part, include *inter alia*:

“(i) to provide with information and to implement the appropriate procedures, adapting them to the child’s particular necessities, and guaranteeing that the child have legal and other assistance at all times, pursuant to their needs; (ii) in cases in which children have been victims of crimes such as sexual abuse or other mistreatment, assure that the exercise of their right to be heard is provided; ensuring full protection and that personnel are trained to address children and that the interview rooms are safe and not intimidating, hostile, insensitive; (iii) to ensure that children

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<sup>90</sup> See, Art. 37(d) CRC.

<sup>91</sup> See, Report of the Special Rapporteur on the Human Rights of Migrants (2009) *Op.cit.* para. 109.

<sup>92</sup> Case *Vélez Loo v. Panama Op.cit.* para. 108.

<sup>93</sup> CRC General Comment No. 6 “*Op.cit.* para. 20.

are not interrogated on several occasions to avoid, to the extent possible, the revictimization or traumatic effects of the child.”<sup>94</sup>

66. In the case of a potential expulsion of migrants, including children, there are several necessary procedural requirements which have to be complied with.<sup>95</sup>

67. First of all, the non-discriminatory principle extends to expulsions and no one can be expelled by simply belonging to one group of migrants.<sup>96</sup> Secondly, the Article 13 of the ICCPR states *inter alia* (i) that an individual may only be expelled from a State when the expulsion is in pursuance of a decision reached in accordance with law; (ii) that he or she is allowed to submit the reasons against his expulsion; and (iii) that legal representation is available.

68. Furthermore, although not explicitly mentioned, the Human Rights Committee has noted that an individual has a right to an appropriate hearing.<sup>97</sup> As mentioned above, the individual also has a right to consular protection and assistance as provided by Articles 36 and 38 of the Vienna Convention.

69. This Honourable Court has further recognised and applied the minimum guarantees provided in Article 8 to expulsion proceedings.<sup>98</sup> Specifically to children, the expulsion must be in accordance with the CRC, thus it must consider the best interests of a child, the child’s own views and opinions and make sure that the child is not separated from his or her parents. (See question 7).

70. At a regional level, in case a deportation is at risk of violating any human rights of the child, the European Court of Human Rights (hereinafter “ECtHR”) has held that the child must have access to an effective remedy before a national authority.<sup>99</sup> The same protection is available in the Inter-American System under

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<sup>94</sup> Case *Rosendo Cantú et al v. Mexico* (2010) *Op.cit.* para. 201.

<sup>95</sup> See, International Law Commission Memorandum on Expulsion of Aliens (2006) A/CN.4/565 para. 596.

<sup>96</sup> See, Human Rights Committee, General Comment No. 15 (1986) “The Position of Aliens under the Covenant” para. 10.

<sup>97</sup> See, Concluding observations of the Human Rights Committee: Sweden, 1 November 1995, A/51/40 (vol. 1) para. 88.

<sup>98</sup> Advisory Opinion OC-18/03 *Op.cit.* paras. 124-127.

<sup>99</sup> Art. 13 ECHR “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 25 of the American Convention and States Parties are obliged to ensure that such remedies are enforced when granted by the authorities.

71. Finally, as stated by the Inter-American Special Rapporteurship on Migrant Workers and Their Families: “[d]ecisions in the area of migration cannot be left to non-specialized administrative or police officials. Public officials responsible for such decisions must be accountable before the law, to superiors and to any horizontal control bodies charged with reviewing decisions. The process of appointing an adjudicator and the status of the office within the administrative structure of the state must guarantee impartiality and protection against any possible pressure or influence.”<sup>100</sup>

### **3. THE NON-DETENTION OF CHILDREN AND STANDARDS FOR THE APPLICATION OF PRECAUTIONARY MEASURES IN IMMIGRATION PROCEEDINGS**

*In what way should the principle of detention as a last resort precautionary measure be interpreted in the framework of immigration proceedings when children in the company of their parents are involved, and when there are children who are unaccompanied or separated from their parents in light of Arts. 1, 7, 8, 19 and 29 of the American Convention and Art. 25 of the American Declaration?*

72. International human rights legal instruments recognise that everyone has the fundamental right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention.<sup>101</sup> The right to liberty and security of

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*See,* <http://www.cidh.org/Migrantes/chap.62000beng.htm#VI.%20%20%20%20%20%20DUE%20PROC%20GUARANTEES> (accessed 22/12/2011)

<sup>101</sup> *See,* ICCPR, Art 9(1):“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.”; *see also* Human Rights Committee General Comment No. 8 (1982) “Humane treatment of persons deprived of their liberty” - The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.” *See also,* UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 1988 (Adopted by General Assembly resolution 43/173 of 9 December 1988) (“Body of Principles on Detention”) Principle 2, Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

person is established in the Article 7 of the American Convention and Article 1 of the American Declaration.

73. The presumption against detention applies equally to migrants, refugees, stateless persons and asylum seekers.<sup>102</sup> In particular, the Human Rights Committee has emphasized that the rights to liberty applies to every person regardless of their immigration status and “must be guaranteed without discrimination between citizens and aliens.”<sup>103</sup>

74. In principle, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort.<sup>104</sup> It has been further emphasized that violations of immigration laws and regulations shall not be considered criminal offenses. The Working Group on Arbitrary Detention holds the view that criminalising the irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary detention.<sup>105</sup> This Honourable Court has also shared this view.<sup>106</sup>

75. In the case of children, article 37 of the CRC extends specific protections to children deprived of their liberty and provides an authoritative guidance stating that the detention of a child must be “used only as a measure of last resort and for the shortest appropriate period of time.” This approach directly relates to the CRC general standards of care for children in all situations, extending to accompanied and unaccompanied children in immigration detention.

76. In the case of migrant children, the Committee on the Rights of the Child explicitly provides, in their General Comment No. 6, that:

“[d]etention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall [...] only be used as a measure of last resort and for the shortest

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<sup>102</sup> See, ICRMW Art. 16(1). See also, UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, (1999) Paragraph 1; the 1951 Geneva Convention Relating to the Status of Refugees Article 31(1).

<sup>103</sup> See, High Commissioner for Human Rights, General Comment No. 15, *Op.cit.* para 2.

<sup>104</sup> See, UN Working Group on Arbitrary Detention, Annual Report 2008, UN Doc. A/HRC/10/21, 16 February 2009, para. 67

<sup>105</sup> Report of the Working Group on Arbitrary Detention, E/CN.4/1999/63 of 18 December 1998.

<sup>106</sup> Case *Vélez Loor v. Panama Op.cit.* para. 171.

appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.”<sup>107</sup>

77. It is well documented that arrest and detention may have detrimental effects on the well-being of a child. According to the Committee on the Rights of the Child, "... the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society."<sup>108</sup> Although there is no exact definition of best interest of the child, this fundamental rule is based on "the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential."<sup>109</sup>

78. The unsuitability of detention for children has further been noted by the ECtHR in a case involving minor asylum seekers detained in a closed detention centre in wait for their expulsion. The ECtHR referred to Article 3 (best interest of the child), Article 22 (protection of minor asylum seekers), and Article 37 (detention as last resort) of the CRC as relevant human rights principles. Taking into account the young age of the children, their state of health and the duration of their detention, the Court concluded that their detention had violated Article 3 (prohibition against torture and cruel and inhumane treatment) of the European Convention on Human Rights.<sup>110</sup>

79. As this Court ruled in *Velez Loor v. Panamá*, in the context of migratory procedures it needs to be verified that in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary. If this evaluation does not respect and follow the minimum procedural guarantees to be applied in migratory

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<sup>107</sup> CRC, General Comment No. 6, *Op.cit.* para. 61. *See also*, Report of the Working Group on Arbitrary Detention on its visit to the UK on the issue of immigrants and asylum seekers), E/CN.4/1999/63/Add.3 para. 37 "Unaccompanied minors should never be detained."; Sub-Commission on the Promotion and Protection of Human Rights Resolution 2002/23, 'International Protection of Refugees', 2002 Paragraph 4 "[The Sub-Commission] encourages states to explore alternatives to detention and to ensure that children under 18 are not detained."; *See generally* para. 22 of the recommendations from the Berlin Conference (16-18 May 2001)

<sup>108</sup> CRC General Comment No. 10 (2007) "Children's Rights in Juvenile Justice" para. 11.

<sup>109</sup> CRC Art. 37; *see also* CRC Art. 6 ("Children have the right to live. Governments should ensure that children survive and develop healthily").

<sup>110</sup> Case *Muskhadzhiyeva and others v. Belgium*, 19 January 2010, ECtHR, 41442/07.

procedures (see questions 2 and 6), the detention of a migrant would be in contravention not only of the right to liberty but also the right to the judicial guarantees of the migrant under Article 8 of the American Convention.

80. In the case of victims of trafficking, the “Trafficking Principles and Guidelines” delivered by the High Commissioner for Human Rights “are explicit on the point that the detention of victims of trafficking is inappropriate and (implicitly) illegal. Under their provisions, States are required to ensure that trafficked persons are not, under any circumstances, held in immigration detention centres or other forms of custody”.<sup>111</sup>

81. Regarding the specific case of children that are in the company of parents that are involved in the framework of migratory proceedings, and based on article 19 of the American Convention and the jurisprudence of this Court thereof, the rule that the best interest of the child must be protected and that its detention should be seen as a last resort measure for migratory purposes prevails.

82. Under this framework, a complex legal question arises when States detain the parents or legal guardian of a non-citizen child for immigration purposes. In this regard, this Honourable Court has stated that “the child must remain in his or her household, unless there are determining reasons, based on the child’s best interests, to decide to separate him or her from the family”. In any case, the separation must be exceptional, short-term and preferably temporary”.<sup>112</sup>

83. Also, the Universal Declaration of Human Rights considers family “as the fundamental group unit of society” and accords it “the widest possible protection and assistance.”<sup>113</sup> The ICCPR also outlines specific guarantees for families. Article 23 states, “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>114</sup>

84. The CRC corroborates with the above principles. According to the Convention, the right to family life entails the right of children to parental care. This right governs the obligations of States to ensure that children are not

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<sup>111</sup> See, OHCHR’s *Recommended Principles and Guidelines on Human rights and human trafficking*. Commentary. (2010) p. 133, Guidelines 2.6, 6.1.

<sup>112</sup> See, Advisory Opinion OC-17/2002 *Op.cit.* para. 77.

<sup>113</sup> Universal Declaration of Human Rights, art. 16(3)

<sup>114</sup> ICCPR, art. 23

separated from their parents without due judicial process.<sup>115</sup> The preservation of the family unit is essential for the best interests of the child.

85. In light of this principle, a concerning trend in State migration management has been to interpret preservation of family unity and the best interests of the child as a justification for the detention of the child. Nonetheless, an appropriate analysis of the best of interests should take into consideration the enduring negative impacts of detention on children, along with the importance of family unity.

86. In addition, the former UN Special Rapporteur, Jorge Bustamante, has affirmed that the practice of detention cannot be based on family unity as it will never be in the best interest of the child to be detained.<sup>116</sup> Given that the child's best interest shall be the primary consideration, it is recommended that States implement alternatives to detention for the entire family.

87. This Court has stated that "According to Article 29(b) of the [American] Convention, if any laws of any State Party, or another international convention to which the said State is a party, grant greater protection or regulate more broadly the enjoyment and exercise of some right or freedom, the State shall apply the most favourable norm for the protection of human rights."<sup>117</sup>

88. Based on this approach, it has applied the principle of the most favourable norm to interpret the American Convention, so that the most favourable alternative for the protection of the human rights enshrined in this Convention should always be chosen.<sup>118</sup>

89. Furthermore, the UN Special Rapporteur on the Human Rights of Migrants has also firmly stated: "[f]amilies with children should not be held in prison-like facilities. All efforts should be made to release families with children from

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<sup>115</sup> CRC Art.16 "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation and the child has the right to the protection of the law against such interference or attacks."

<sup>116</sup> U.N. Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants (2009)*Op.cit.*, para. 62

<sup>117</sup> Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 180.

<sup>118</sup> *Ibid*, para.181.

detention and place them in alternative accommodation suitable for families with children.”<sup>119</sup>

90. As stated by the Court in *Velez Loo v. Panamá*, it is essential that States, as discussed elsewhere, have a catalogue of alternative measures<sup>120</sup>, which may be effective in achieving their legitimate immigration management purposes. (See question 4)

91. Therefore States should refrain from either separating the child from one or both parents or detaining the child since it will not be in the best interests of the child. Where exceptional circumstances necessitate detention, special measures shall be put in place so the child is deprived of his or her liberty in conditions that comply with human rights standards for detention of children<sup>121</sup> (see question 5), separated from its parents or legal guardian just in exceptional circumstances in the best interest of the child, for no longer time than absolutely necessary<sup>122</sup>, and with a duration strictly limited to the time required to organize the removal of the child into an adequate alternative situation.

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<sup>119</sup> See, U.N. Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America, A/HRC/7/12/Add.2, 2008

<sup>120</sup> *Ibid.* See also, UN, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development", Working Group on Arbitrary Detention, Report of the Group, A/HRC/10 / 21, February 16, 2009, para. 67.

<sup>121</sup> For example, "Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative". See, CRC, General Comment No. 6, *Op.cit.* para. 63.

<sup>122</sup> See, CRC Art.37 (b); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter 'Beijing Rules') Rule 19.



#### 4. MEASURES OF PROTECTION OF RIGHTS THAT DO NOT ENTAIL RESTRICTIONS ON FREEDOM

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

92. A distinction must be drawn between a deprivation of liberty, coming into account with respect to detention, and a simple restriction of movement, characterised as non-custodial measures. The European Court of Human Rights has affirmed that “the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.”<sup>123</sup>

93. As a consequence, “in order to determine whether someone has been ‘deprived of his liberty’ (...) the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.”<sup>124</sup>

94. For instance, restrictions of movement may be placed on a migrant within an international zone in an airport; however, if it is prolonged then a restriction of movement may turn into a deprivation of liberty.<sup>125</sup> The safeguards in place with respect to simple restrictions of liberty correspond in large part to those imposed upon States by international law in the case of deprivation of liberty. Moreover, if States exceed the limits of a lawful and non arbitrary restriction of liberty, the same may turn into a deprivation of liberty.<sup>126</sup>

95. Reaffirming that all deprivations of liberty must have a legitimate aim,<sup>127</sup> be proportionate to the aim pursued and have a fair balance struck between the conflicting interests.<sup>128</sup> The Working Group on Arbitrary Detention (hereinafter

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<sup>123</sup> Case *Amuur v. France*, judgement 25 June 1996, 17/1995/523/609 ECtHR para. 42.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, para. 43.

<sup>127</sup> See also, Case *Velez Loor v. Panama*, *Op.cit.* para. 162.

<sup>128</sup> Working Group on Arbitrary Detention, Report on the visit to Australia, 24 October 2002, U.N. Doc. E/CN.4/2003/8/Add.2, para. 12.

“the Working Group”) has affirmed that the detention of asylum seekers, refugees and migrants in an irregular situation is a measure of last resort<sup>129</sup> and that the necessity to have recourse to a detention measure must be evaluated in each individual case.<sup>130</sup>

96. According to the Working Group, all forms of mandatory or automatic detention must be considered arbitrary.<sup>131</sup> The conditions in which international law permits the use of detention are set out in Article 9 of the ICCPR. This provision prohibits arbitrary detention. It applies to all persons regardless of their status. Severe restrictions on freedom of movement which amount to a deprivation of liberty may come within the scope of Article 9. In order for detention not to infringe this provision it must: (a) be authorised by law; (b) be reasonable and necessary in all the circumstances (including proportionate and non-discriminatory); (c) be subject to periodic review; (d) be subject to judicial review.

97. The exceptional character of the detention of migrants, as repeatedly affirmed by different human rights bodies, entails the existence of an obligation on States to ensure the availability of non-custodial measures. *The Guiding Principles on Detention of Asylum Seekers and Irregular Migrants* adopted by the Parliamentary Assembly of the Council of Europe invite States to consider providing for a presumption in favour of liberty under national law.<sup>132</sup> Many States have established this presumption in their national laws or in their immigration policies or practices.<sup>133</sup>

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<sup>129</sup> See the Opinions adopted by the Working Group on Arbitrary Detention, 2 March 2010, U.N. Doc. A/HRC/13/30/Add.1 and in particular the Opinion No. 5/2009 (Lebanon), p. 280, para. 12.

<sup>130</sup> The Working Group on Arbitrary Detention, in fact, considers that “Arbitrariness must be assessed in the light of all the relevant circumstances of a given detention”, Annual report, 1 December 2004, U.N. Doc. E/CN.4/2005/6 at para 54. The same principle was reiterated by the Court in *Velez Looor v. Panama*, *op.cit.* para. 171. See also, more recently European Court of Justice, Judgement 28 April 2011 (Reference for a preliminary ruling), *M. El Dridi*, case n. C-61/11 PPU, para. 39.

<sup>131</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, *op. cit.*, para. 62. and Working Group on Arbitrary Detention, Report on the visit to Australia, 24 October 2002, *op. cit.*, para. 12. See also, *Velez Looor v. Panama*, *op. cit.* para. 171.

<sup>132</sup> Parliamentary Assembly, *Detention of asylum seekers and irregular migrants in Europe*, Resolution 1707 (2010), para. 9.3.1.

<sup>133</sup> R. Sampson, G. Mitchell and L. Bowring, *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne: The International Detention Coalition, 2011 at p. 21 quote the following States: Argentina, Venezuela, Peru, Uruguay, Brazil, Austria, Germany, Denmark, the Netherlands, Slovenia and the United Kingdom.

98. The Working Group has recommended that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.”<sup>134</sup> In addition, the Working Group made the following statement that: “the Working Group is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should gradually be abolished.”<sup>135</sup>

99. The Human Rights Committee has also recognized the existence of an obligation for States to provide non-custodial measures when the latter is no longer justified in light of the passage of time, of intervening circumstances such as the hardship of prolonged detention<sup>136</sup> or in consideration of the particular conditions of the person detained.<sup>137</sup>

100. Non-custodial measures must be in accordance, in law and in practice, with international law and human rights standards.<sup>138</sup> Some of the international legal standards applicable to detention should also be respected when having recourse to non-custodial measures. In particular, the former UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, clarified that “recourse to alternative measures should be based on an individual assessment of the migrant’s particular circumstances and be available in practice without discrimination.”

101. Additionally, the measure chosen must be “the least intrusive and restrictive in order to attain the same objectives of immigration-related

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<sup>134</sup> Working Group on Arbitrary Detention, Report on the visit to the United Kingdom on the issue of immigrants and asylum seekers, 18 December 1998, UN. Doc. E/CN.4/1999/63/Add.3, para. 33. *See also*, Special Rapporteur on the human rights of migrants, Report to the General Assembly, (2010) para. 90. The European Court of Justice recognised that even the recourse to alternative measures should be justified by the particular circumstances of the case, such as the risk of absconding. *See* European Court of Justice, judgment 29 April 2011, *Mr. El Dridi, op. cit.* para. 37.

<sup>135</sup> Working Group on Arbitrary Detention, Annual Report of 15 January 2010, U.N. Doc. A/HCR/13/30, para. 58.

<sup>136</sup> Human Rights Committee (HRC), *Mr. Baban v. Australia, op. cit.*, para. 7.2.

<sup>137</sup> HRC, *Mr. C. v. Australia, op. cit.*, para. 8.2.

<sup>138</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, *op. cit.* para. 90.

detention.”<sup>139</sup> Non-custodial measures should also always be accompanied by the following safeguards:

- the measure should be established by law;
- full compliance with the principle of non-discrimination in the choice and application of the measure must be ensured;
- the measure should be subject to legal review and migrants should be granted the possibility of challenging them before a judicial or other competent and independent authority or body;
- migrants must have access to legal counsel.<sup>140</sup>

102. Recalling that the CRC provides that “[i]n 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.” This means that, even where the criteria in Article 9 of the ICCPR and Article 37(b) of the CRC are met, the issue of whether the best interests of the child have been a primary consideration must be taken into account in determining whether the detention is lawful.

103. Furthermore, the principle of the best interest of a child must be systematically considered by every legislative, administrative and judicial body or institution when a child is directly or indirectly affected by their acts.<sup>141</sup> For that reason, the best interest of the child must be a primary consideration even when the detention does not directly affect the child and should additionally be considered in regard to the detention of a child’s parents.

104. In line with international human rights standards, for the administrative detention of a child to be lawful, it must be shown that no less restrictive measure would suffice.<sup>142</sup> This requires that all possible alternatives, including unconditional release, must be reviewed prior to a final determination on a full

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<sup>139</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, *op. cit.* para. 92 (a).

<sup>140</sup> Special Rapporteur on the human rights of migrants, Report to the General Assembly, 4 August 2010, *op. cit.* para. 92 (b) and 95.

<sup>141</sup> See, CRC, General Comment No. 5 *op.cit.* art. 3(1).

<sup>142</sup> CRC Article 37 (b) promotes the use of any appropriate measures to reduce detention of children. This includes alternatives; See inter alia American Convention, Art. 17.

deprivation of liberty. These provisions are not limited to unaccompanied or separated minors, but apply to all children irrespective of their migration status.

105. In other words, States must use and make available alternative measures both in law and in practice, and give consideration to less invasive means of achieving the same ends.<sup>143</sup> Alternative measures, such as reporting requirements, sureties or other conditions, should always be considered before detention and must take into account the particular circumstances of the individual.

106. The Working Group and the UN Human Rights Committee have repeatedly underlined States' obligations to ensure that alternatives to detention are thoroughly considered when assessing the necessity, proportionality and appropriateness of detaining an individual,<sup>144</sup> particularly in the context of immigration detention.<sup>145</sup>

107. The Working Group stated in 2010 that “[g]iven the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in Article 37 (b) [of the CRC] according to which detention can be used only as a measure of last resort.” At a regional level, this Honourable Court has stated that whenever there is a possibility to do so, States have to find an alternative to detention,<sup>146</sup> in particular in relation to minors.<sup>147</sup>

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<sup>143</sup> HRC *C. v. Australia* (2002) para. 8.2. (The case considered the necessity and proportionality of using detention against an asylum-seeker).

<sup>144</sup> See, a recent UNHCR study, *Alternatives to Detention of Asylum Seekers and Refugees*, describing the system in several Nordic States, Switzerland, New Zealand and Lithuania, recognised that best practice requires legislation which establishes a sliding scale of measures from least to most restrictive, allowing for an analysis of proportionality and necessity of every measure (United Nations High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, POLAS/2006/03). The study concludes that, where detention is one extreme end of a range of measures, with unconditional release at the other, States are more likely to ensure the application of alternatives in practice.

<sup>145</sup> HRC *Ali Aqzar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, 2003, para. 9.3. The case concerned a complaint of arbitrary detention made by an Afghan asylum-seeker and her young children, where a mother and her two children were detained over two years and ten months on the basis of their unlawful presence in Australia. The Committee concluded that since less intrusive measures were not considered, the detention of the complainant and her children without appropriate justification was found to be arbitrary and contrary to Article 9(1) of the ICCPR. See also *Omar Sharif v. Australia*, HRC, U.N. Doc. CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2; *C. v. Australia*, 2002, para. 8.2.

<sup>146</sup> See, *Vélez Loor V. Panamá*, No. 218 (2010) para. 171.

108. The primary obligation of States is to design policies to ensure the protection of the rights of children without detaining them<sup>148</sup> or resorting to judicial proceedings.<sup>149</sup> Moreover, in light of Article 25 of the American Declaration, any alternative to detention for the protection of the rights of the child must not only be established in law, and ordered in accordance with the procedures set out in domestic law, but it must also not unlawfully deprive a child of his or her liberty.<sup>150</sup>

109. The CRC provides that “a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”<sup>151</sup>

110. These provisions, as set out in Article 40 (4) CRC, should be read in conjunction with the principle of best interests of the child<sup>152</sup> since the principle is the primary factor when determining the method of implementing detention alternatives.<sup>153</sup> The alternatives to detention and deprivation of liberty listed in CRC Article 40(4) are non-exhaustive<sup>154</sup> Furthermore, under Article 12 of the CRC, a child has the right to be heard in all matters affecting him or her, and the

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<sup>147</sup> See generally, Guidelines for Action on Children in the Criminal Justice System (Annex to UN Resolution 1997/30 – Administrative of Juvenile Justice (‘Vienna Guidelines’)) (1997) (“States should ensure that alternative measures comply with the Convention [on the Rights of the Child], the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice ... with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention.”)

<sup>148</sup> See, CRC, General Comment No. 10, Children’s Rights in Juvenile Justice, para. 25 (2007) (... [T]he obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies...”); see also CRC Article 37 (b).

<sup>149</sup> See, CRC Art. 40 (3) (b); See also Committee on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, para. 25 (2007); Committee on the Rights of the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, para. 26 (2007).

<sup>150</sup> See, UNICEF, “Administrative detention of children: A global report, Discussion Paper, Prof. Carolyn Hamilton, et. al., Children’s Legal Centre, University of Essex, p. 8.

<sup>151</sup> CRC Art. 40 (4).

<sup>152</sup> See, CRC, General Comment No. 10, *op.cit.*, para. 3 (2007).

<sup>153</sup> *Ibid.* para. 10.

<sup>154</sup> *Ibid.* para 70.

child's views and opinions must be considered when deciding on alternatives to detention.<sup>155</sup>

111. In accordance with international obligations national legislation must provide the judiciary a wide variety of options besides administrative detention.<sup>156</sup> At the regional level, this is also in line with Article 2 of the American Convention which authorises Member States to adopt legislation in accordance with its provisions to provide and give effect to the rights and freedoms entitled to all persons<sup>157</sup>.

112. In accordance with the above, a child should be always placed with his or her family unless it is not in the best interests of the child.<sup>158</sup> In addition, when a child is accompanied by his or her family and they are facing detention, then in accordance with the best interests of the child, families who are not found to be a security risk should be released; less punitive alternatives to detention centres, such as shelters should be considered.

113. As noted by the former UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, it is important to point out that detention can never be justified on grounds of maintaining the family unity.<sup>159</sup>

114. A continuum of immigration control measures exists in the legislation of many States. They create a range of more or less restrictive alternatives to detention. The most typical measures include: release on bail, bond or surety;<sup>160</sup> release to NGO supervision; reporting requirements;<sup>161</sup> directed residence;

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<sup>155</sup> CRC, General Comment No. 12, Right of the Child to be Heard, para. 59 (2009).

<sup>156</sup> See, CRC, General Comment No. 10, *op.cit.*, para. 70.

<sup>157</sup> Art. 2 American Convention – Domestic Legal Effects.

<sup>158</sup> See CRC Art. 9, See also CRC Art. 3, 4.

<sup>159</sup> See, Report from the Special Rapporteur on the Human Rights of Migrants (A/HRC/11/7) para. 62, (2009).

<sup>160</sup> The availability of this is often limited by lack of knowledge of and access to legal procedures, as well as the limited financial means of detainees. In Canada, the government funded Toronto bail programme tries to make bail more accessible by offering to supervise those who have no family or other eligible guarantors or sureties able to offer bonds. See United Nations High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, para. 94.

<sup>161</sup> *Ibid.*

residence in open centres; residence in semi-closed centres;<sup>162</sup> electronic monitoring.<sup>163</sup> As such, they may include:

- Open or semi-open facilities: this is one of the most common non-custodial measures, often used for asylum seekers. In these types of centres, migrants are allowed to leave the facility during the day but have to return at night. These centres must fully respect the human rights of the persons placed in their confines recognised by international law and, in particular, their right to liberty and freedom of movement.<sup>164</sup>
- Release with registration requirements: this measure entails the release from detention but with an obligation to register the individual's place of residence with the responsible authorities. Permission is required for all changes of address. Sometimes the migrant is also provided with official registration documents. The production of identity documents may be required as well.<sup>165</sup>
- Reporting requirements: this measure imposes on migrants the duty to report regularly, in person or over the telephone or in writing at the police, immigration office or other special agency.<sup>166</sup> The frequency of

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<sup>162</sup> Open centres, semi-open centres, directed residence, and restrictions to a specified district are already used by many States, particularly in Europe, for asylum-seekers during the processing of their claim. The nature of the centres and the restrictions placed on freedom of movement vary greatly. In some countries, movement is restricted in practice as asylum-seekers have to report to or stay in their accommodation centres at certain times. In other countries asylum-seekers are not allowed to choose their place of residence, but may do so under certain conditions or at a certain stage of the asylum procedure. In some countries, asylum-seekers are free to leave their place of residence without any authorisation or by submitting a formal request which is routinely accepted. Others have a more stringent system of limited days of absence, reporting obligations or virtually no possibility of leaving apart from in exceptional circumstances. European Commission, Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum-seekers, COM/2007/0745, Brussels, 26 November 2007, Section 3.4.1.

<sup>163</sup> Electronic monitoring covers a range of different forms of surveillance, which vary in intensity and the degree to which they limit an individual's freedom of movement, liberty or privacy. For example, Global Positioning System GPS 'electronic tracking' allows continuous tracking of an individual. See Amnesty International, - Irregular Migrants and Asylum-Seekers – Alternatives to Immigration Detention', April 2009.

<sup>164</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe of the Committee on Migration, Refugees and Population of the Council of Europe, *op. cit.* para. 43.

<sup>165</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, Report April 2009, p. 11.

<sup>166</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, *op. cit.*, para. 44.



such reporting can vary from daily to weekly or less frequently.<sup>167</sup> This measure is widely used. However, it is important for the State authorities to ensure that it is necessary and proportionate and that it does not impose an excessive burden on the individual in terms of time and financial resources (*i.e.* for the commuting when the individual has to report in person).<sup>168</sup> Reporting requirements should be tailored to the particular situation of the individual.

- Release with the duty to reside in a specific administrative area or municipality:<sup>169</sup> migrants can be released from detention with the duty to reside in a specific area or at a specific address. This measure can also be an effective tool to ensure the burden sharing of the different regions of a given country.

- Release on bail, bond or surety:<sup>170</sup> this type of measure requires the pledge of a sum of money in order to ensure the individual's appearance at an official appointment or hearing, organized in the context of processing the case of a migrant by competent authorities. A "bail" is a deposit of a sum of money to guarantee the individual's future compliance with immigration procedures. A "bond" is a written agreement with the authorities where the individual promises to fulfil his or her duties. Sometimes it requires the deposit of a sum of money by the individual or a third person. A "surety" is the guarantee given by a third person that the individual will comply with the immigration procedures; to this end, the third person agrees to pay a set amount of money if the individual absconds. The possibility for individuals to avail themselves of these measures is often limited due to difficulties finding a third person willing to pay a sum of money or to provide a guarantee for the migrant. When these measures are applied, it is important to take into account the family ties available and the economic situation of those concerned.<sup>171</sup>

- Controlled release: an individual may be released under the supervision of other persons like family members, relatives or members of non-governmental, religious or community organizations. The guarantors

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<sup>167</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, *op. cit.* p. 12.

<sup>168</sup> *Ibid.*

<sup>169</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, *op. cit.*, para. 46.

<sup>170</sup> See, Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, *op. cit.* p. 13.

<sup>171</sup> Report of the Rapporteur on the detention of asylum seekers and irregular migrants in Europe, *op. cit.*, para. 47.

can be required to pay a penalty if the individual does not comply with his or her obligation under the relevant immigration law. This measure has been largely used in Canada and has a 92 per cent success rate.<sup>172</sup>

- Electronic monitoring: is a system whereby an electronic magnetic device is attached to a person's wrist or ankle.<sup>173</sup> It is one of the most sensitive non-custodial measures as its use risks impinging on the individual's right to freedom of movement, liberty and respect of his or her privacy.<sup>174</sup> Accordingly, the use of this measure should be carefully verified against the principles of necessity and proportionality, should be applied in a non-discriminatory manner and be subject to judicial review.<sup>175</sup> The authorities should also pay full attention to the need to respect the dignity of the individual concerned.

115. In addition to offering alternative forms of detentions, States should provide both healthcare and legal services and education to migrant children at all times.

116. Equal access to health care has to be guaranteed to detainees regardless of their legal status. In detention or reception centres throughout the world, numerous children or young adults have committed suicide and countless others have harmed themselves. The neglect of medical and mental health needs has been cited as a contributory factor to these tragedies. Health assessments would also allow the State to check for health issues, including communicable and contagious diseases, and accordingly treat them to protect the migrant children as well as general public health.<sup>176</sup>

117. In regard to education, a child should have full access to education, irrespective of his or her migration status and States are also under an obligation to provide quality education for children with special needs or disabilities.<sup>177</sup>

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<sup>172</sup> *Ibid.*, para. 48.

<sup>173</sup> O. Field, *Non-custodial measures of Asylum seekers and Refugees, Legal & Protection Policy Research Series*, POLAS/2006/03, UNHCR, April 2006, para. 127.

<sup>174</sup> See Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, *op. cit.*, p. 15.

<sup>175</sup> *Ibid.*

<sup>176</sup> *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, pg. 23 (2011).

<sup>177</sup> See CRC, General Comment No. 6: *op.cit.* para. 61

118. Moreover, the right to legal representation and assistance is important in order to ensure that the migrant child has the opportunity to be properly informed when determining the “appropriateness and desirability” of his or her alternatives to detention and it will be essential as to allow the child to express his or her views and opinions on the matter.<sup>178</sup>

## 5. STATE OBLIGATIONS IN CASES OF CUSTODY OF CHILDREN BASED ON MIGRATORY REASONS

*What are the basic conditions that should fill the accommodation of children/migrants, and what are the main obligations of States regarding children (alone or accompanied) who are under state custody for immigration reasons the light of Articles 1, 2, 4.1, 5, 7, 17 and 19 of the American Convention and Articles 1 and 25 of the American Declaration?*

119. Detention of children apprehended for noncompliance with immigration laws by themselves or their families should as a general rule only be used in exceptional circumstances, as a last resort,<sup>179</sup> and for the shortest period possible, pursuant to Article 37 of the CRC and the principle of the child’s best interests. Therefore, it follows that migrant children should not, as a general rule, be detained. The specific vulnerabilities of children call for additional safeguards against arbitrary deprivations of liberty. As the ECtHR noted in *Muskhadzhiyeva v. Belgium*,<sup>180</sup> the extreme vulnerability of a child takes precedence over the status of an irregular migrant

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<sup>178</sup> CRC, General Comment No. 12, *op.cit.* para. 59.

<sup>179</sup> For adults *see* Questions 3 and 4 and *inter alia* Detention is only permissible when a case specific evaluation concludes that the measure is essential in order to serve a legitimate interest of the State and to ensure that the subject reports for the proceeding to determine his or her immigration status and possible removal. *Rafael Ferrer-Mazorra et al.* (United States). *See also C. v. Australia*, HRC, Communication No 900/1999: Australia. 13/11/2002 CCPR/C/76/D/900/1999, on detention of vulnerable persons. ‘C’, an Iranian asylum-seeker, was detained after his arrival in Australia and subsequent asylum claim pending determination of his entitlement to asylum under Australian law. The author complained *inter alia* of a breach of article 7 of the ICCPR. The Committee concluded that the author’s psychiatric illness developed as a result of the protracted period of immigration detention. In the Committee’s view, the continued detention of the author when the State party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under article 7 of the Covenant [ICCPR].

<sup>180</sup> *See, Muskhadzhiyeva and others v. Belgium*, No. 41442/07, 19 January 2010, ECtHR

120. The United Nations Committee on the Rights of the Child has stated in General Comment 10 on Children's rights in juvenile justice, U.N. Doc. CRC/C/GC/10 (2007) that The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily. The Committee has noted with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available, for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pre-trial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pre-trial detention.

121. Use of pre-trial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pre-trial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pre-trial detention should be limited by law and be subject to regular review. These statements on pre-trial detention can clearly be applied analogously on administrative migration detention

122. International Human Rights Instruments, notably the ICCPR and UN Convention Against Torture, contain clear and specific provisions on protection against torture and cruel and inhumane treatment. The ICCPR in Article 7 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and Article 10(1) states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

123. CAT states in Article 2 (1) that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Article 2(2) states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a

justification of torture. Article 2(3) affirms that an order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>181</sup>

124. If it is impossible to avoid detention, international standards must be met and applied with specific focus on the needs and rights of the child. As mentioned above, Article 10(1) of the ICCPR establishes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Furthermore, the ICRMW Article 17(1) states that migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.<sup>182</sup>

125. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, but also that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs.

126. According to Article 17(3), any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

127. Under Article 17(7), migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

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<sup>181</sup> See, In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (the *Tabitha case*) 12 October 2006, the ECtHR found a violation of Article 3 of the European Convention on Human Rights on account of Tabitha's detention. (The then 5-year-old Congolese girl Tabitha was underway from her native Congo to Canada to visit her mother. She was accompanied by her uncle. The aim was to make a stop in Brussels International Airport in Zaventem before continuing to the Netherlands to get the plane to Canada there. Upon their arrival at Zaventem, the uncle was unable to provide the Belgian authorities with a legal permit to allow Tabitha to enter the country. Tabitha was brought to a detention centre for illegal immigrants, while her uncle travelled to the Netherlands.)

<sup>182</sup> See also, art. 10 of ICCPR, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

128. In its General Comment No. 15, the Human Rights Committee, underlined that “if lawfully deprived of their liberty, [non-nationals] shall be treated with humanity and with respect for the inherent dignity of their person.”<sup>183</sup>

129. Taking into account the principle of non-discrimination, the general applicable principle clearly also applies to migrants, thus to conditions of migrants in detention.<sup>184</sup>

130. Moreover, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by... (i) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law...; (ii) Providing training to authorities with the power to detain on psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law.<sup>185</sup>

131. The above provisions are complimented and extended, in the case of detention of children, by the protection found in the CRC. In addition to the principle of the best interest of the child, the CRC addresses the issue of detention of children in a precise language in article 37.

132. Moreover, the CRC provides that *inter alia* children should not be held with adults, and that their enumerated right to education, health care, participation, full development, and all other specific rights in the CRC all are applicable when a state, in conformity with international obligations to avoid unlawful or arbitrary detention deems it absolutely necessary to detain a child.

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<sup>183</sup> See, CCPR General Comment No. 15 (1986) “The Position of Aliens under the Covenant,” para 7.

<sup>184</sup> See, Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85 Paragraph 54 stating that administrative detention should never be of a punitive nature.

<sup>185</sup> See, Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85 para. 75

133. In exceptional circumstances where children are detained for immigration purposes, it has been clearly established that detention should be held in conditions that are non-punitive and non-penal, and that take into account a child's needs and status as administrative, not criminal, detainee.<sup>186</sup>

134. The Committee on the Rights of the Child has more specifically stated that in the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37 (a) and (c) of the CRC and other international obligations.<sup>187</sup> Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Indeed, the underlying approach to such a programme should be "care" and not "detention".

135. Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary.<sup>188</sup>

136. In regard to education enshrined in Article 28 of the CRC; Article 5(e)(v) of the International Convention on the Elimination of all forms of Racial

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<sup>186</sup> Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante Recapitulation of main thematic issues (irregular migration and criminalization of migrants; protection of children in the migration process; the right to housing and health of migrants); [A/HRC/17/33](#), 2011, and Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante Protection of children in the context of migration, [A/HRC/11/7](#), 2009 para. 29 "[T]he criminalization of irregular migration addressed by the Special Rapporteur in a previous report (A/HRC/7/12) has proven to be at the origin of ill-treatment and other human rights abuses. This is of particular concern in the case of children, especially those unaccompanied and undocumented, in countries of transit and destination where irregular migration is sanctioned with imprisonment, particularly when migration management policies are yet to mainstream a child rights approach."; See also U.N. Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America, [A/HRC/7/12/Add.2](#), 2008, para. 28 "[t]he conditions and terms of their detention are often prison-like: freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting."

<sup>187</sup>See, CRC General Comment 6. Furthermore CESCR General Comment No. 13, on the right to education UN Doc. E/C.12/1999/10, 8 December 1999, para. 63

<sup>188</sup> *Ibid.*

Discrimination (hereinafter “ICERD”); Article 13 of International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”), and CRC General Comment 6<sup>189</sup> states that during their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release.

137. They also have the right to recreation and play as provided for in article 31 of the CRC. In order to effectively secure the rights provided by article 37(d) of the CRC, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.

138. From a State’s initial contact with migrant children, law enforcement agencies shall recognise the vulnerabilities of the child, while also providing due care, preventing additional harm, and considering the special needs of each individual child. Law enforcement agencies should also use their initial discretion to prevent migrant children from entering the judicial process and formal hearings in the first place by working with non-governmental organisations to provide the child with alternative choices as discussed previously.<sup>190</sup>

139. The Committee on the Rights of the Child has underlined that Article 39 of the CRC requires States to 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”.<sup>191</sup>

140. Corporal punishment and other degrading forms of punishment may inflict serious damage to the physical, psychological and social development of children, requiring appropriate health and other care and treatment. This must take place in an environment that fosters the integral health, self-respect and dignity of the child, and be extended as appropriate to the child’s family group. There should be an interdisciplinary approach to planning and providing care

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<sup>189</sup> *Ibid*, in para. 34 “confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status.”

<sup>190</sup> See, in particular, the Beijing Rules, Rule 10.3 (1985).

<sup>191</sup> See, CRC General Comment No. 8 (2006) 2 March 2007, U.N. Doc. CRC/C/GC/8.on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, para. 37



and treatment, with specialised training of the professionals involved. The child's views should be given due weight concerning all aspects of their treatment and in reviewing it.

141. Every child deprived of liberty shall be separated from adults. A child deprived of his or her liberty shall not be placed in an adult prison or other facilities for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37(c) of the CRC, "unless it is considered in the child's best interests not to do so," should be interpreted narrowly; and the child's best interests does not entail the convenience of the States Parties. States Parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

142. Every child deprived of liberty has the right to maintain contact with his or her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.<sup>192</sup>

143. The Committee on the Right of the Child has drawn the attention of States Parties to the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urged the States Parties to fully implement these rules, while also taking into account as far as relevant the *Standard Minimum Rules for the Treatment of Prisoners* (see also rule 9 of the Beijing Rules).

144. In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice. Below are some examples of the principles and rules which need to be observed in all cases of deprivation of liberty:

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<sup>192</sup> See Committee on the Rights of the Child, General Comment No. 10, *op.cit.*

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- 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;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
- 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;
- 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;

- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- 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.

145. Further recommendations are provided by UNICEF's *White Paper on Administrative Detention of Children: A Global Report*:

- Any place of administrative detention should operate a child-centred and therapeutic regime.
- All States should develop and implement minimum quality standards covering the conditions of detention and the care of children.
- All States should ensure that the right to education is implemented by establishing schools in all administrative detention settings.
- States should be required to develop and implement regular independent inspection and monitoring mechanisms. All detention centres should be inspected regularly to ensure that all children are detained legally and that conditions meet minimum quality standards.
- Child protection approaches should be at the core of the goals and functions of detention centres, and include the realisation of such rights as education, health care, recreation, consular assistance, guardian protection and legal representation, among others.

146. According to the Inter-American Commission (hereinafter "the Commission"), based on the principle of non-discrimination and equality before the law, in the particular cases of detention of minors the protection of the

integrity of persons in custody of the State must include all minors who are deprived of liberty, irrespective of their membership to any particular group – which would include non-nationals<sup>193</sup>

147. During the period of detention, any person has the right to live in detention conditions compatible with their personal dignity and the State must guarantee the right to life and personal integrity<sup>194</sup> or due process.<sup>195</sup> In the case of persons deprived of liberty, the State is in a special position of guarantor, since the authorities have strong control or dominance over people who are under their custody.<sup>196</sup>

148. In this regard, the Court has stated:

“Thus, there is a special relationship and interaction between the subject person in custody and the State, particularly characterized by the intensity with which the state can regulate their rights and obligations and the circumstances of confinement, where the prisoner is prevented from meeting their own account a series of basic needs that are essential for the development of a decent life.”<sup>197</sup>

149. Echoing the ECtHR,<sup>198</sup> this Honourable Court adopts the principle that States must "ensure that a person is detained in conditions that are compatible with respect for human dignity, that the manner and method of execution of the measure do not subject him to distress or difficulty exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and welfare are adequately insured, providing, among other things, required medical assistance."<sup>199</sup>

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<sup>193</sup> IACHR. Report “Juvenile Justice and Human Rights” (2011) para. 435.

<sup>194</sup> Case *Bulacio*, paras. 126 and 138; Case of *Hilaire, Constantine and Benjamin et al.* Judgement of June 21, 2002. Series C No. 94, para. 165; and *Cantoral Benavides*. Judgement of August 18, 2000. Series C No. 69, para. 87.

<sup>195</sup> Case *Children’s Rehabilitation Institute v. Paraguay.*, Para 155.

<sup>196</sup> View Case of the *Gómez Paquiyauri*, para.98; Case of *Juan Humberto Sánchez*. Judgement of June 7, 2003. Series C No. 99, para. 111, and *Case Bulacio*, para. 138

<sup>197</sup> Case *Children’s Rehabilitation Institute v. Paraguay*, *op.cit.* para 152.

<sup>198</sup> Case *Kudla v. Poland*, Judgement of 26 October 2000, ECtHR no. 30210/96, para. 93-94.

<sup>199</sup> Case *Children’s Rehabilitation Institute v. Paraguay*, *op.cit.* para 159.

150. The Court has further stressed the importance of each person, including migrant children, having access to prompt and simple recourse such as *habeas corpus* or any other action to challenge unlawful detention.<sup>200</sup>

151. According to the Court, "*habeas corpus* represents the ideal means of guaranteeing liberty, controlling respect for the life and integrity of a person, and preventing his disappearance or the indetermination of his place of detention, and also to protect the individual from torture or other to cruel, inhuman or degrading punishment or treatment".<sup>201</sup> Furthermore, the Court has stated that this right is inherent in Article 25 of the American Convention and may not be suspended or set aside, even in emergency situations.<sup>202</sup>

152. In addition to the obligations to any person, an obligation under Article 19 of the American Convention and the principle of best interest of the child under CRC, the state must assume the special position of guarantor with greater care and responsibility in cases of children in detention, and should take special measures in the best interest of the child.<sup>203</sup>

153. In this regard, States that have custody of a minor must ensure to the maximum extent possible the survival and development,<sup>204</sup> concepts that the Child Rights Committee has interpreted in a comprehensive, holistic, encompassing physical, mental, spiritual, moral, psychological and social.<sup>205</sup>

154. According to the Court "[A] State has, for children in custody and, therefore, custody, an obligation, *inter alia*, provide them health care and education in order to ensure that the detention to which children are subjected to not destroy their life projects".<sup>206</sup> Failure to meet this normative standard will have even more serious consequences because when minors come from

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<sup>200</sup> See, Advisory Opinion OC-17/02 *op.cit.* para. 122

<sup>201</sup> Case of *Bamaca-Velasques v. Guatemala*, Merits, Judgement of November 25, 2000. Series C. No70, para. 192

<sup>202</sup> See, Advisory Opinion OC-17/02, *op.cit.* para. 122

<sup>203</sup> Case of the *Gómez Paquiyauri*, paras. 124, 163-164, and 171; *Bulacio*, paras. 126 and 134, and Case of the "*Street Children*" (*Villagran Morales et al*), paras. 146 and 191. In the same sense, Advisory Opinion OC-17/02 *supra* note 150, paras. 56 and 60.

<sup>204</sup> Case *Children's Rehabilitation Institute v. Paraguay*, para 161.

<sup>205</sup> CRC General Comment No. 5 *op.cit.* para. 12.

<sup>206</sup> Advisory Opinion OC-17/02, *op.cit.* paras. 80-81, 84, and 86-88; Case of the "*Street Children*" (*Villagran Morales et al*), *supra* note 152, para. 196, and Rule 13.5 of Beijing Rules adopted by the General Assembly in its resolution 40/33 of November 28, 1985.

marginalized sectors of society, because it limits their chances of effective reintegration into society.<sup>207</sup>

155. The Court has suggested that conditions of detention inhumane and degrading as overpopulation, overcrowding, poor nutrition, lack of opportunities for exercise or recreation and medical care, dental and psychological adequate and timely as well as exposure to a climate of violence, insecurity, abuse, corruption, mistrust and promiscuity, which lay down the law of the strongest, implies necessarily an affectation on their mental health, adversely impacting on the mental development of his life and personal integrity.<sup>208</sup>

156. The Commission has expanded the subject and noted that the space for imprisonment must have adequate infrastructure in terms of area, ventilation, access to natural and artificial light, water and supplies and services hygiene.<sup>209</sup> It has also noted the importance of ensuring respect for other rights such as free exercise of religion and culture in the context of ensuring their full development.<sup>210</sup>

157. The Commission has underlined the importance of taking measures to protect migrant detainees belonging to vulnerable populations such as pregnant women, but also the detainees' physical or mental disabilities.<sup>211</sup> The special needs and situations of children make such considerations and measures equally important in the exceptional case of detention of migrant children.

158. Moreover, the Commission observes that the arrest of persons for immigration purposes requires strict separation of detainees based on their categories: In particular, we have the separation of women and men, children and adults, young adults, older people, tried and convicted, and persons deprived of liberty because civil and criminal grounds. In cases of detention of asylum seekers or refugees, and in other similar cases, children should not be separated from their parents. Applicants for asylum or refugee status and persons deprived of liberty because of infraction of the provisions relating to

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<sup>207</sup> Case *Children's Rehabilitation Institute v. Paraguay*, para 174.

<sup>208</sup> *Ibid.* paras 166 and 170.

<sup>209</sup> IACHR. Report "Juvenile Justice and Human Rights," para. 473.

<sup>210</sup> *Ibid.* para. 473.

<sup>211</sup> IACHR, Report on "U.S. Immigration: Detention and Due Process" (2010) para. 66

migration should not be detained in facilities designed for persons convicted or accused of criminal offenses.<sup>212</sup>

159. The Commission has recommended that there are separate centres for children and that the facilities should have staff specially trained to meet their special needs".<sup>213</sup> Also, according to the Court, detaining minors with adults exposes children "to circumstances that are highly prejudicial to their development and makes them vulnerable to other parties that, for quality adult can abuse their superiority".<sup>214</sup>

160. At this point it is important to note the point made by the Commission regarding minors who turn 18 whilst in custody. The Commission, taking up the decision of the Committee on the Rights of the Child states that a person under such circumstances "should be able to remain in the juvenile facility if that is in the interests of the child and not contrary to the best interests of children younger age in the facility".<sup>215</sup> This is consistent with the duty of states to interpret the rules of the American Convention in the manner most favourable to the person.

161. The Court has insisted that it is of utmost importance to separate those detained for violating immigration laws and those arrested, either as defendants or convicted of criminal offenses. In the event that the State does not have such facilities, the provision of other places shall not include prisons.<sup>216</sup>

162. As noted briefly in previous sections, the Court has dealt with the standard that States, according to the principle of exceptionality, should safeguard the prominent role of the family in child protection and assistance to minors by measures to promote family unity.<sup>217</sup> (Also see question 9) Thus, when minors are arrested, they should not be separated from their parents, and

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<sup>212</sup> *Ibid.* para.76; *See also* UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 8; Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 8 (c).

<sup>213</sup> IACHR. Report "Juvenile Justice and Human Rights", *op.cit.* para.422.

<sup>214</sup> Case *Children's Rehabilitation Institute v. Paraguay*, para 175.

<sup>215</sup> IACHR. Report "Juvenile Justice and Human Rights", para. 427. *See* CRC, General Comment No. 10, *op.cit.*

<sup>216</sup> Case *Vélez Loor*, *op.cit.*, para. 208.

<sup>217</sup> Advisory Opinion OC-17/02 *op.cit.* paras. 77 and 88.

detention must be a decisive reason in the best interest of the former and should preferably be temporary.<sup>218</sup>

163. In this regard, the Commission has indicated that contact with family, friends and community is particularly relevant at the time to ensure the social integration of children who have been deprived of their liberty, so that in the execution of measures depriving liberty must respect their right to stay in touch with family, friends and community.<sup>219</sup> This contact can be developed through the ability to receive mail and access to the permitted outlets or regular and frequent visits.<sup>220</sup>

164. A crucial point which has been raised by the Commission in its decisions is that when the detention of migrants is necessary, they should be kept in custody where the staff have received appropriate training regarding psychological aspects related to the detention, cultural sensitivity and human rights and also that the administrative detention of immigrants should not be administered by private companies or private staff, unless they are appropriately trained and facilities are subject to regular public scrutiny.<sup>221</sup>

## **7. THE PRINCIPLE OF NON-REFOULEMENT IN RELATION TO MIGRANT CHILDREN**

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

165. The power of a State to expel a migrant from its territory when the continuing presence of this human being is contrary to the interests of that State, although an inherent attribute of its sovereignty, must be exercised within the substantive and procedural limitations under contemporary international

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<sup>218</sup> *Ibid.*

<sup>219</sup> IACHR. Report "Juvenile Justice and Human Rights", para. 390

<sup>220</sup> *Ibid.* See also CRC, art. 37 (c) Havana Rules, rules 32 and 60, the Beijing Rules, rule 26.5, Guidelines for Action on Children in the criminal justice system, as recommended by resolution 1997/30 of the Economic and Social Council on 21 July 1997, guideline 20.

<sup>221</sup> IACHR, Report on U.S. Immigration: Detention and Due Process, para. 83



migration law. Therefore, the power, also called right, to expel is not as “nearly unlimited” as it was once considered to be.<sup>222</sup>

166. There are various human rights which may be relevant in the determination of the lawfulness of an expulsion, such as the rights of the family, the rights of the child, including the child’s best interests, freedom of expression, trade union rights, property rights, the right to enter one’s own country, procedural guarantees, the right to life and the right to physical integrity, the right to humane treatment, and the prohibition against torture.<sup>223</sup> These human rights have been addressed in a number of treaties and declarations adopted within the framework of the United Nations<sup>224</sup> as well as regional organizations<sup>225</sup>.

167. Among the guarantees surrounding expulsion, States have an obligation under international law, not to send, expel, return, or otherwise transfer a person to a country where he or she is at risk of being subjected to torture or other cruel and inhuman treatment or other serious human rights violations. This principle

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<sup>222</sup> See, the Memorandum on Expulsion of Aliens of 2006 by the United Nations International Law Commission (ILC) Secretariat that refers to: Karl Doehring, “Aliens, Expulsion and Deportation”, in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier Science Publishers, vol. 1, 1992, pp. 109-112, at pp. 110-111; “Since 1914 most states have claimed wide powers of deportation.” Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th rev. ed., London/New York, Routledge, 1997, p. 261; Rainer Arnold, “Aliens”, in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 1, 1992, pp. 102-107, at p. 104; Fifth report by F. V. García Amador, Special Rapporteur (Responsibility of the State for injuries caused in its territory to the person or property of aliens – Measures affecting acquired rights (*continued*) and constituent elements of international responsibility), *Yearbook of the International Law Commission*, 1960, vol. II, A/CN.4/125, paras. 76 and 77.

<sup>223</sup> See, R.C. Changani, “Expulsion of Benin Nationals and International Law”, *Indian Journal of International Law*, vol. 20, 1980, pp. 149-154, at p. 151. See also Parts VII.B, VII.C, VIII.B and IX.B.

<sup>224</sup> See, in particular, Charter of the United Nations, Arts 1(3), 13(1), 55, 56, 62(2) and 76; Resolution 217 (III), International Bill of Human Rights: Universal Declaration of Human Rights, 10 December 1948; and International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 4668, p. 171, p. 171.

<sup>225</sup> See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, *European Treaty Series*, No. 5; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, note 55 above; American Convention on Human Rights, “Pact of San José, Costa Rica”, San José (Costa Rica), 22 November 1969, United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123; African Charter on Human and Peoples’ Rights, Nairobi, 27 June 1981, United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, *European Treaty Series*, No. 117.

of *non-refoulement*, firstly enshrined in refugee law<sup>226</sup> and then elaborated further in particular in human rights law at the international and regional level<sup>227</sup>, is now considered customary international law and therefore legally binding upon all States.<sup>228</sup>

168. Although the principle, as aforementioned, was initially elaborated for refugees, it is now considered to apply to all those who migrate, including migrants in an irregular situation.<sup>229</sup> Although illegal entry, which means crossing borders without complying with the necessary requirements for legal entry into the receiving State<sup>230</sup>, is a valid ground for expulsion, as the former UN Special Rapporteur on the rights of non-citizens, David Weissbrodt, stressed, “migrants in an irregular status should not be treated as criminals”.<sup>231</sup> This is also valid for the more frequent cases in which migrants breach conditions for their continuing presence in the destination country. The latter case of irregular status

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<sup>226</sup> Art. 33 of the 1951 Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, Treaty Series, vol. 189, No. 2545, page 150; see also *Ibid*, the ILC Memorandum, A/CN.4/565, page 175.

<sup>227</sup> See, Arts 2 and 7 of the I ICCPR as interpreted by the HRC General Comments No.31 and No. 20, Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984) (hereinafter, “CAT”) as per guidelines adopted with respect to the implementation of this Article in the Committee against Torture General Comment No. 1, Committee on the Elimination of All Forms of Racial Discrimination General Recommendation XXX on discrimination against non citizens (the latter contains pronouncements on expulsion), Art. 16 of the International Convention for the Protection of All Persons from Enforced Disappearance. See, for the Americas, also Art. 22.8 and 25 of the American Convention, Art. 13(4) Inter-American Convention to Prevent and Punish Torture (adopted on 9 December 1985), and Arts 1, 25 and 27 of the American Declaration on the Rights and Duties of Man.

<sup>228</sup> Lauterpacht & Bethlehem, *The Principle of Non-Refoulement* (2001), paras. 196–216.

<sup>229</sup> See, CAT Art. 3; *Soering v. United Kingdom*, ECtHR, paras. 87, 90 (1989) ( see also, Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement (Opinion), 20 July 2001, para. 132, available from the website of the UN High Commissioner for Refugees, Global Consultations, Second track, expert meetings, at <http://www.unhcr.ch>; Non-Refoulement Under Threat, Proceedings of a Seminar Held Jointly By The Redress Trust (REDRESS) And The Immigration Law Practitioners’ Association (ILPA) (November 2006).

<sup>230</sup> Art. 3, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25 of 15 November 2000.

<sup>231</sup> The rights of non-citizens, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council Decision 2000/283, E/CN.4/Sub.2/2003/23, 26 May 2003, para. 29.

of the migrant can be a valid ground for expulsion clearly only if the guarantees surrounding expulsion are respected.

169. International courts have applied the principle of *non-refoulement* to violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the right to life, and flagrant denial of fair trial and arbitrary detention.<sup>232</sup> *Non-refoulement* has also been expanded, as aforesaid, to include the prohibition of the most serious violations of other human rights. The ECtHR has held that the principle of *non-refoulement* protects “the fundamental values of democratic societies”<sup>233</sup> amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to life,<sup>234</sup> and fundamental aspects of the rights to a fair trial<sup>235</sup> and to liberty.<sup>236</sup>

170. A migrant can request for protection under the principle of *non-refoulement* when the risk faced on return is real, which means that the risk is a foreseeable consequence for the particular migrant claiming the *non-refoulement* protection.<sup>237</sup>

171. An important question arises under human rights law whether returning persons to countries where they may not have access to adequate health services constitutes inhuman or degrading treatment. These issues have been examined in a variety of cases in one region by the ECtHR. The ECtHR has held that persons with life-threatening medical conditions or terminal illness who cannot continue treatment in their country of origin may not be returned, as this would

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<sup>232</sup> See generally *Saadi v. Italy*, ECtHR, op. cit., fn. 308, para. 127; *Chahal v. the United Kingdom*, ECtHR, op. cit., fn. 43, para.; See also American Convention, Art. 4.1, 5, 7.

<sup>233</sup> *Saadi v. Italy*, ECtHR, op. cit., fn. 308, para. 127; *Chahal v. the United Kingdom*, ECtHR, op. cit., fn. 43, para. 79.

<sup>234</sup> *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48 (finding that deportation of the applicant to face execution would violate Article 2 of the ECHR as well as Article 3 of the ECHR).

<sup>235</sup> *Al-Moayad v. Germany*, ECtHR, Application No.35865/03, Admissibility Decision, 20 February 2007, paras. 100-102.

<sup>236</sup> See, for example, *Z and T v. United Kingdom*, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006.

<sup>237</sup> CCPR, General Comment No. 31, op. cit., fn. 46, para. 12; *Na v. United Kingdom*, ECtHR, Application No. 25904/07, Judgment of 17 July 2008, paras. 109, 113; *Saadi v. Italy*, ECtHR, GC, Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Nnyanzi v. United Kingdom*, ECtHR, Application No. 21878/06, Judgment of 8 April 2008, para. 51; *Cruz Varas and Others v. Sweden*, ECtHR, Plenary, Application No. 15576/89, Judgment of 20 March 1991, para. 69; *Chahal v. United Kingdom*, ECtHR, op. cit., fn. 43, para. 74; *Soering v. United Kingdom*, ECtHR, op. cit., fn. 294, paras. 85-91.

hasten death in distressing circumstances, a form of inhumane treatment contrary to Article 3 of the European Convention on Human Rights.<sup>238</sup>

172. In another case, the Court extended the reach of Article 3 of the European Convention (the right to be free from torture, inhumane and degrading treatment or punishment) to cases of severe mental illness.<sup>239</sup> However, the most recent jurisprudence of the Court appears to suggest that this principle applies only exceptionally.<sup>240</sup>

173. Therefore, a case-by-case consideration of factors such as the availability and the physical and economic accessibility of treatment in the country of origin, as well as the presence of family members or other support networks, must be taken into account in order to determine the legality of expulsion. Furthermore, some national courts have held that aliens suffering from severe medical conditions cannot be expelled where such an expulsion would constitute a violation of human rights.<sup>241</sup>

174. International bodies and experts mostly agree that the *non-refoulement* principle, in its various applications, applies beyond the twelve nautical mile zone of a State's territorial sea. However, some national courts, focusing on the location of the rescue or interdiction, ruled against the extra-territorial applicability of this principle. The location of the sea operation is not a decisive factor: the State's obligations are triggered by the relationship between the State and the migrants.

175. Once the migrants are brought under the State's effective control, the State is responsible for ensuring that no individual, and not only those entitled to international protection, is returned to a place where he or she risks being

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<sup>238</sup> *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, available at: <http://www.unhcr.org/refworld/docid/46deb3452.html>. See also *BB v France*, 9 March 1998, RJD 1998-V.

<sup>239</sup> *Bensaid v. The United Kingdom*, Appl. No. 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001, available at: <http://www.unhcr.org/refworld/docid/3deb8a1e4.html>.

<sup>240</sup> See *Karara v Finland* Application No 40900/98, 29 May 1998, *SCC v Sweden* Application No. 46553/99, 15 February 2000, *Henao v the Netherlands* Application No. 13669/03, 24 June 2003, *Ndangoya v Sweden* Application No. 17868/03, 22 June 2004, and *Amegnigan v the Netherlands* Application No. 25629/04, 25 November 2004. In all cases, the applications were found to be inadmissible.

<sup>241</sup> *Ibid*; See also PICUM, *Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe*. Brussels, Platform for International Co-operation on Undocumented Migrants, 2009.

submitted to treatment contrary to the prohibition of torture or of inhumane and degrading treatments.

176. The individual's need for protection gives rise to an obligation of *non-refoulement*, regardless of where the rescue or interdiction took place. If the *non-refoulement* principle's applicability was contingent on geographic location, protection against torture and inhumane and degrading treatments could end up depending on the ability to circumvent border controls which would be absolutely incongruous.

177. Children enjoy the rights provided to all persons, in addition to those directed towards them specifically. According to the Committee on the Rights of the Child:

“[i]n affording proper treatment of unaccompanied or separated children, States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law ... [while also] fulfilling obligations under the Convention [CRC], States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention [CRC], either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.”<sup>242</sup>

178. The expulsion of children, particularly those who are unaccompanied, has raised serious concerns in the international community. The expulsion of such aliens may be prohibited, or permitted only on very limited grounds.<sup>243</sup> The former UN Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro, expressed her “concern about cases of detention and expulsion of unaccompanied minors and the obstacles to family reunification encountered by such children”.<sup>244</sup>

179. In connection with the expulsion of long-term residents, the Parliamentary Assembly of the Council of Europe expressed the view that “[u]nder no

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<sup>242</sup> CRC General Comment No. 6 *Op.cit.* para 26, 27.

<sup>243</sup> See the ILC Secretariat Memorandum, pp. 485-486.

<sup>244</sup> Commission on Human Rights, Report on the human rights of migrants, submitted by Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 2002/62, which was adopted by the Economic and Social Council in decision 2002/266, A/57/292, 9 August 2002, para. 65.

circumstances should expulsion be applied to [...] under-age children.”<sup>245</sup> The Parliamentary Assembly recommended that the Committee of Ministers of the Council of Europe invite the governments of member States: “h) to guarantee that migrants who were born or raised in the host country and their under-age children cannot be expelled under any circumstances”.<sup>246</sup>

180. The Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, dealing with the expulsion of citizens of the European Union in its Preambular paragraph 24 of indicates:

“[t]he greater the degree of integration of [European] Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.”

181. The Directive allows the expulsion of a minor child only if such a decision is based on “imperative grounds of public security” or is “necessary for the best interests of the child”.<sup>247</sup>

182. More broadly, as in all other instances in the migration process of children, the CRC principle of best interests must be taken into account; therefore, the return of a child to his or her country of origin shall in principle only be arranged if such return is in the best interests of the child.<sup>248</sup>

183. Such a determination shall, *inter alia*, take into account many determining factors. Although not exhaustive, these factors include the safety, security and other conditions, including socioeconomic conditions (in both the host country

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<sup>245</sup> Council of Europe, Parliamentary Assembly, Recommendation 1504 (2001): Non-expulsion of long-termimmigrants, 14 March 2001, para. 7.

<sup>246</sup> *Ibid.*, para. 11, (ii).

<sup>247</sup> Art. 28, para. 3 (b).

<sup>248</sup> See CRC Arts 3, 6, 37.

and country of origin), awaiting the child upon return;<sup>249</sup> the “desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”;<sup>250</sup> the child’s age, sex, emotional state, educational and family background;<sup>251</sup> the availability of primary care arrangements for that particular child;<sup>252</sup> the views of the child expressed in exercise of his or her right to do so under Article 12 and those of the caretakers;<sup>253</sup> the child’s level of integration in the host country and the duration of absence from the home country;<sup>254</sup> the continuity/discontinuity of care in the host country;<sup>255</sup> the child’s right “to preserve his or her identity, including nationality, name and family relations”;<sup>256</sup> the right of the child to preserve his or her family relations<sup>257</sup> and related short, medium and long term possibilities of family reunion either in the home, host, or resettlement (emigration) country;<sup>258</sup> and the envisaged duration of legal or other obstacles to a child’s return to his or her home country.<sup>259</sup>

184. To further elaborate, in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.<sup>260</sup>

185. Exceptionally, a return to the home country may only be arranged in circumstances after careful balancing of the child’s best interests with other considerations, such as the interest of the State; where the latter significantly overrides the former.<sup>261</sup>

186. It is recognized that such may be the case in situations which the child constitutes a serious risk to the security of the State or to the society; however, these cases must also be embedded within national legislation. Non-rights based

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<sup>249</sup> CRC General Comment No. 6 *Op.cit.* para. 84.

<sup>250</sup> CRC Art. 20.

<sup>251</sup> CRC General Comment No. 6 *Op.cit.* para. 93.

<sup>252</sup> *Ibid.*, at para. 84.

<sup>253</sup> *Ibid.*,

<sup>254</sup> *Ibid.*,

<sup>255</sup> *Ibid* at para. 93.

<sup>256</sup> *Ibid.*, at para. 84.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*, at para. 93.

<sup>259</sup> *Ibid.*

<sup>260</sup> CRC General Comment No. 6 *Op.cit.* para. 86.

<sup>261</sup> *Ibid.* at 86.

arguments such as those relating to general migration control, cannot override best interests considerations.<sup>262</sup>

187. On the other hand, when a State has wrongfully transferred a child, or any other persons, with regards to the principle of *non-refoulement*, they must take effective measures to remedy and restore the situation. For instance, the Human Rights Committee in *Jiminez Vaca v. Columbia*, addressing the involuntary exile of the applicant due to threats to his life in Colombia, required the State, as a remedial measure, to allow the applicant to return safely to Columbia.<sup>263</sup>

188. The UN Committee Against Torture established in *Dar v. Norway* that, by facilitating the safe return of the applicant and granting him a residence permit, Norway had remedied the breach of Convention Against Torture entailed in its *refoulement* of the applicant contrary to a request for interim measures by the Committee.<sup>264</sup>

189. Furthermore, resettlement (emigration) to a third country may offer a durable solution for an accompanied or separated child who cannot return to the country of origin and for whom no durable solution can be envisaged in the host country.

190. The Committee on the Rights of the Child explains that “the decision to resettle an unaccompanied or separated child must be based on an updated, comprehensive and thorough best interests assessment, taking into account, in particular, ongoing international and other protection needs.”<sup>265</sup> Resettlement (emigration) is particularly called for if such is the only means to effectively and sustainably protect a child against *refoulement* or against persecution or other serious human rights violations in the country of stay.<sup>266</sup> Resettlement (emigration) is also in the best interests of the unaccompanied or separated child if it serves family reunification in the resettlement country.<sup>267</sup> Unaccompanied or separated children should never be resettled to a third country if this would undermine or seriously hamper future reunion with their family.<sup>268</sup>

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<sup>262</sup> *Ibid.*

<sup>263</sup> HRC Communication: Colombia CCPR/C/74/D/859/1999 (2002).

<sup>264</sup> CAT Communication: Norway CAT/C/38/D/249/2004 (2007).

<sup>265</sup> CRC General Comment No. 6 *Op.cit.* para. 92

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*



191. The assessment of the risk of serious violations, regardless of whether a child is to be returned to their country of origin or resettled in a third country, should be conducted in an age and gender sensitive manner. In all cases return and resettlement measures must be conducted in a safe, child appropriate and gender sensitive manner.<sup>269</sup>

192. Whatever is the final determination in terms of best interests of the child, bearing in mind that among the option there might also be local integration in the country of destination, it is important to carry out a serious in-depth assessment that involves the family left behind.

## **8. PROCEDURE TO IDENTIFY REFUGEES' NEEDS FOR INTERNATIONAL PROTECTION**

*What are the characteristics that the procedures to be used when identifying a potential request for asylum or for recognition of the refugee status of a migrant child should have in light of Article 22.7 of American Convention and Article 27 of the American Declaration?*

193. Before examining the specific legal framework for refugee children, it is essential to remember that States should protect and respect the human rights of all migrant children, including unaccompanied children or children migrating with family, and irrespective of the intention for migrating, during the migration process.<sup>270</sup>

194. Many children, unaccompanied or with family, migrate to another State in order to seek international protection. Refugee status is governed by the UN Convention relating to the Status of Refugees (Hereinafter "the Refugee Convention") and its Additional Protocol of 1967. These two international instruments are applicable to persons who are refugees as therein defined. In regard to children, Article 22(1) of the CRC requires States Parties to provide appropriate protection and humanitarian assistance for children who have acquired refugee status and to those who seek to do so. Additionally, Article 3(1) of CRC state that all actions concerning children, including the act of deciding on refugee status, should have the best interests of the child as a primary consideration.

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<sup>269</sup> *Ibid* at 87.

<sup>270</sup> Report of the Special Rapporteur on the human rights of migrants, A/HRC/11/7, (2009) para. 27

195. The principle of the child's best interests applies to all children, irrespective of their migration status, and "in the case of a displaced child, the principle must be respected during all stages of the displacement cycle."<sup>271</sup> The term "concerning" a child has to be interpreted broadly, for example it may include the asylum claims of a child's parents and does not only apply to acts which affect the child directly.<sup>272</sup>

196. A person is a refugee under Article 1A.2 of the Refugee Convention and its protocol as someone who:

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country".

197. This definition has been broadened in regional instruments such as the Cartagena Declaration which adopted the definition from the Refugee Convention and added – "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".<sup>273</sup> The list of reasons for persecution set out in the Refugee Convention is not exhaustive and it has been widely acknowledged that a person can be persecuted on other grounds e.g. gender and sexual orientation.<sup>274</sup>

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<sup>271</sup> CRC General Comment No. 6 (2005), *op.cit.* para. 19.

<sup>272</sup> See, The Australian High Court case *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 C.L.R. 273, paragraph 30 "A broad reading and application of the provisions in Art.3, one which gives to the word "concerning" a wide-ranging application, is more likely to achieve the objects of the Convention."

<sup>273</sup> See, the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, (1984) art. 3. See also, the definition from OAU Convention governing the specific refugee problems in Africa, Art 1(2) "The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

<sup>274</sup> See, the UNHCR guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002); and "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)

198. It is of utmost significance that the refugee definition in the Refugee Convention is interpreted in an age and gender-sensitive manner, taking into account the particular forms persecution experienced by children e.g. under-age recruitment; trafficking etc.<sup>275</sup> For example, in relation to girls, the risk of being subject to genital mutilation has been recognised as ground for refugee status under national definitions.<sup>276</sup>

199. Under Article 33(1) of the Refugee Convention States Parties shall not expel or return someone who falls within the definition under Article 1A.2 if a return would threaten the person's life or freedom on account of his or her race, religion, nationality, membership of a particular social group or political opinion. This is referred to as the principle of *non-refoulement*<sup>277</sup> and in regard to children it is vital that States do not return a child to a country where there are "substantial grounds for believing that there is a real risk of irreparable harm to the child."<sup>278</sup> (See Question 7.)

200. One group of migrant children that is important to mention in relation to the principle of *non-refoulement* are children who are victims of trafficking. Both the Committee on the Rights of a Child and the High Commissioner for Human Rights have stated that it is of greatest importance that a child who has been a victim of trafficking is not returned to a country if such a return would constitute any danger to the child or his or her family.<sup>279</sup>

201. The Refugee Convention does not specifically mention persecution based on the status of a trafficking victim, however, several other instruments provide protection for children against a return which could result in them being re-trafficked.

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<sup>275</sup> CRC General Comment No. 6 (2005), *op.cit.* para. 74.

<sup>276</sup> See, e.g. English case *K (FC) & Fornah (FC) v. Secretary of State for the Home Department* [2006] UKHL 46; *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00, Austrian Federal Refugee Council, Independent Federal Asylum Senate, 21 March 2002; *Re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, (1996).

<sup>277</sup> Also see, Article 3(1) of the Convention against Torture (1984) "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"

<sup>278</sup> CRC General Comment No. 6 (2005), *op.cit.* para. 27.

<sup>279</sup> See, CRC General Comment No. 6 (2005), *op.cit.* para. 53; OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking, principle 11 and guideline 8(5).

202. For example, Article 9(b) of the aforementioned Palermo Protocol obliges States Parties to protect victims of trafficking from revictimization and under Article 14 of the Protocol, there seems to be a possibility for victims of trafficking to fall under the definition of a refugee under the Refugee Convention.<sup>280</sup> Furthermore, Article 3 of the CRC and some regional instruments e.g. the Intra-American Convention on International Trafficking in Minors (1994) stresses the importance of considering the child's best interests in the event of a return.

203. In addition to above mentioned obligations, it is essential that the States provide adequate protection and assistance for a child who is a victim of trafficking, taking into account the special needs of the child, such as appropriate housing, legal counselling, medical and psychological assistance, and education etc.<sup>281</sup>

204. The element of "a well-founded fear," set out in Article 1A.2 of the Refugee Convention, contains a subjective and an objective element and in determining whether well-founded fear exists, both elements must be taken into consideration.<sup>282</sup> It is essential to take into account the personal and family background of the individual, his or her membership of a particular racial, religious, national, social or political group, personal experiences, and his or her own interpretation of the situation.<sup>283</sup>

205. As mentioned above, it is essential that the assessment is carried out in a child sensitive manner and in accordance with the rights set out in CRC.<sup>284</sup> When assessing the proof for "a well-founded fear" it is important that States give a

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<sup>280</sup> See, Art 14(1) of the Trafficking Protocol (2000) "Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein;" See also, CRC General Comment No. 6 (2005) paragraph 53 "Some trafficked children may be eligible for refugee status under the 1951 Convention, and States should ensure that separated and unaccompanied trafficked children who wish to seek asylum or in relation to whom there is otherwise indication that international protection needs exist, have access to asylum procedures."

<sup>281</sup> See, Art 6(3) & 6(4) of the Trafficking Protocol; see also, See, Report of the Special Rapporteur on the human rights of migrants, A/HRC/11/7, (2009) para. 125

<sup>282</sup> See, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992) para. 38.

<sup>283</sup> *Ibid*, para. 41.

<sup>284</sup> In particular, art 2(non-discrimination), art 3(best interest), art 12(right to be heard).

child the benefit of the doubt, thus the burden of proof should not be placed on the child.<sup>285</sup>

206. The right to seek asylum was first stated in Article 14(1) of the Universal Declaration of Human Rights and it is protected by several regional instruments *inter alia* Article 22.7 of the American Convention, Article 27 of the American Declaration and Article 12.3 of the African Charter on Human and Peoples' Rights.<sup>286</sup> Under the Refugee Convention, States shall not penalise illegal entry into the state for individuals who seek asylum and protection. At a regional level, the Inter-American Commission has affirmed that States have to make available procedures for individuals to seek and receive asylum.<sup>287</sup>

207. This Honourable Court has further stated that the rules of due process and the right to a fair trial, as set out in Article 8 of the American Convention, apply to all proceedings conducted by the State, thus they also apply to asylum proceedings.<sup>288</sup>

208. In relation to asylum-seeking children, if the facts during the identification and registration process indicate that the child may have a well-founded fear or, even if unable to explicitly articulate a concrete fear, the child may objectively be at risk of persecution for reasons set out in the Refugee Convention, or otherwise being in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law.<sup>289</sup>

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<sup>285</sup> See, UNHCR Refugee Children – Guidelines on Protection and Care (2001) *op.cit.* page 101.

<sup>286</sup> See, Art. 14(1) UDHR 1948, "Everyone has the right to seek and to enjoy in other countries asylum from persecution;" Art. 22.7 of the American Convention (1969) "every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes;" Art. XXVII of the American Declaration (1948) "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements;" and Art. 12.3 of the African Charter (1981) "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions"

<sup>287</sup> See, Report Eport N<sup>o</sup> 6/02 concerning petition 12.071 to the Inter-American Commission on Human Rights (2002)

<sup>288</sup> See, Advisory Opinion OC-17/2002, *op.cit.* para. 117.

<sup>289</sup> CRC General Comment No. 6 (2005), *op.cit.* para. 66

209. However, if a child shows no indication of being in need of international protection he or she should not automatically, or otherwise, be referred to asylum procedures, but should be protected in accordance with other relevant child protection mechanisms such as those provided under youth welfare legislation.<sup>290</sup>

210. In addition to the requirements that all procedures concerning children have to be carried out in a non-discriminatory manner, consider the best interests of the child, and allow the child to be heard under CRC, it is also important that the procedures and the assistance are carried out in a culturally sensitive manner.<sup>291</sup> Additional protection for asylum-seeking children is also recognised in Article 19 of the American Convention since it states that every minor has the right to measures of protection.<sup>292</sup>

211. In regard to detention and asylum-seekers, Article 31(2) of the Refugee Convention provides that States Parties should not restrict the movements of refugees unless it is necessary and it should only be available until their status is regularised. Furthermore, the guidelines on detention from UNHCR state that as a general principle asylum-seekers should not be detained.<sup>293</sup>

212. There are only four justifications for the detention of asylum-seekers; (a) to verify the identity; (b) to determine the elements on which the claim for refugee status or asylum is based; (c) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (d) to protect national security and public order.<sup>294</sup>

213. If an asylum-seeker is detained, the detention must be exercised in a non-discriminatory manner and it must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the

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<sup>290</sup> *Ibid*, para. 67.

<sup>291</sup> *See*, CRC General Comment No 11, (2009) "Indigenous children and their rights under the Convention" para. 68

<sup>292</sup> Art. 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".

<sup>293</sup> *See*, UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (2009) guideline 2, page 3.

<sup>294</sup> *Ibid*.

possibility of release where no grounds for its continuation exist.<sup>295</sup> Detention should not be available as an option where the asylum-seeker is a minor.<sup>296</sup> All measures concerning children have to be in accordance with the CRC and Article 37(b) states that detention of children is only available as a measure of last resort and must be of the shortest time possible. (See questions 3, 5 and 4.)

214. The Executive Committee of the Programme of the UNHCR has recognized, in its Conclusion No. 7 (XXVIII) that the expulsion of refugees should only be permitted in exceptional circumstances.<sup>297</sup> The Convention relating to the Status of Refugees provides special protection to refugees lawfully present<sup>298</sup> in the territory of a State by restricting the possible grounds for their expulsion to those related to national security or public order.

215. The UNHCR Sub-Committee of the Whole on International Protection has provided a restrictive interpretation of the concepts of “national security” and “public order” and emphasized that expulsion should only be resorted to when it is the only means for protecting the legitimate interest of the State: “The concept of “national security or public order” may be difficult to apply in a particular case. The *travaux préparatoires* to the provision argue in favour of a restrictive interpretation in the sense that a refugee should only be expelled as a last resort and as the only practicable means of protecting the legitimate interests of the State.”<sup>299</sup>

216. The aforementioned Sub-Committee has indicated that considerations related to family life should be taken into account in the expulsion of a refugee. The same Committee has indicated that the expulsion of a refugee should take into consideration the admissibility of the refugee to a State other than the State of origin. Clearly very important is the abovementioned principle of *non-refoulement*, ex Article 33 of the Refugee Convention, “applies not only in respect of the country of origin but to any country where a person has reason to fear persecution”. In addition, it covers not only the transfer of an individual to a State where he or she would face a risk of persecution, but also to a third country

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<sup>295</sup> *Ibid*, para. 5; see also, views of the HRC on Communication No. 560/1993, 59th Session, CCPR/C/D/560/1993.

<sup>296</sup> *Ibid*, guideline 6, page 7.

<sup>297</sup> Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 32 and 33)*, 1963, published by Division of International Protection of the UNHCR, (1997)

<sup>298</sup> Art. 32(1).

<sup>299</sup> See, UNHCR, Note on expulsion of refugees, Sub-Committee of the Whole on International Protection, 24 August 1977, EC/SCP/3, para. 4.

which will then transfer the refugee to a State in which such a risk exists. Article 33 also covers refugees who are unlawfully present in the territory of the State.

217. In several of its Conclusions, the Executive Committee of the Programme of the UNHCR has interpreted the principle of *non-refoulement* with respect to refugees as encompassing both the prohibition set forth in Article 33 of the Refugees Convention and the prohibition contained in Article 3, paragraph 1, of the CAT (see Question 7). The Refugee Convention sets forth certain procedural requirements for the expulsion of a refugee who is lawfully present in the territory of a State.

218. In regard to refugee children and their right to family unity, Article 23(1) of the ICCPR states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” This principle applies irrespective of nationality and migration status thus includes the protection of a refugee’s family. In circumstances where a refugee child has been separated from his or family it is of utmost importance that efforts to trace the family are carried out as soon as possible.<sup>300</sup>

219. It should generally be presumed that family reunification will be in the best interest of the child unless there is evidence to the contrary.<sup>301</sup> For example, it will not be in the best interest of the child to send him or her back the State of origin in order to facilitate family reunification when there is a “reasonable risk” that such a return would lead to a violation of fundamental human rights of the child.<sup>302</sup>

220. If a family reunification in the country of origin is not possible, the obligations under Articles 9 and 10 of the CRC come into effect and should govern the host country’s decisions on family reunification therein.<sup>303</sup> Under Article 9, the States Parties shall ensure that a child is not separated from his or her parents unless a separation would be in accordance with the best interest principle. Article 10 governs the rules on family reunification providing that family reunification has to be dealt with in a positive, humane and expeditious manner.

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<sup>300</sup> See, UNHCR’s Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009) para. 68.

<sup>301</sup> See, UNHCR Guidelines on Determining the Best Interests of the Child (2008) page 31.

<sup>302</sup> CRC General Comment No. 6 (2005), paragraph 82.

<sup>303</sup> *Ibid*, para. 83.



## 9. RIGHT TO A FAMILY LIFE OF THE CHILDREN WHEN THEIR PARENTS ARE REMOVED DUE TO MIGRATORY REASONS

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

221. International human rights instruments recognise the family as one of the most important groups in society and States are obliged to provide protection and assistance to the family unit under international law.<sup>304</sup> The right to marry and found a family applies to everyone of age without any discrimination based on race, nationality or religion.<sup>305</sup>

222. Thus the element of non-discrimination further extends to migrants and their families. The same principles are enshrined in regional instruments such as Article 17 of the American Convention and Article 6 of the American Declaration.<sup>306</sup> One example of the protection of the family in relation to migrants is the right to family reunification. Most States provide the legal framework for family reunification within their national legislation; however, family reunification is also addressed on an international and regional level.<sup>307</sup>

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304 *See*, the Universal Declaration of Human Rights art. 16(3) and the ICCPR art. 23(1) “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”; The CRC states in its Preamble “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community” and “Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”;

305 *See*, UDHR, 1948 Article 16(1) “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution;

306 *See*, the American Declaration art. 6 “Every person has the right to establish a family, the basic element of society, and to receive protection therefor”; the American Convention art. 17(1) “Every person has the right to establish a family, the basic element of society, and to receive protection therefor”; art. 17(2) “The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”

307 *See*, ICRMW art.44(1) “States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take

223. The CRC states that, in order to ensure the well being of a child it is important that all actions concerning the rights of a child include consideration as to the best interest of the child.<sup>308</sup> As aforementioned, the principle of best interests is a fundamental one in international human rights law and it is recognized as part of international customary law.<sup>309</sup>

224. In order to determine the best interest it is vital to include the opinion and perspective of the affected child. This is acknowledged as one of the general principles of the CRC, namely the child's right to be heard.<sup>310</sup> A child's right to be heard applies to all judicial and administrative proceedings and does therefore also apply to proceedings of deportation, separation from parents, asylum etc.<sup>311</sup>

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appropriate measures to ensure the protection of the unity of the families of migrant workers;" and art. 44(2) "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children;" See also, CRC, art. 9(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;" and art. 10(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;" The European Union Directive 2003/86/EC on the Right to Family Reunification provides guidelines on who is a family member for the purpose of family reunification. See also, *Ngambi and Nébol v. France*, CCPR, Communication No. 1179/2003, where the Human Rights Committee found that the right to family reunification was protected under Article 23 ICCPR.

308 See, CRC, art. 3(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."

309 See, case *Beharry v. Reno*, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002), where a district court in the United States held that even if U.S was not a party to CRC, they had to consider the customary international law principle of a child's best interest.

310 See, CRC, art. 12(2) "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;" General Comment No.12 *op.cit.*, the Committee points out in the introduction paragraph 2. that "the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention"

311 See, CRC General Comment No.12 (2009), para. 32 "The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes,

225. The degree of consideration given to the child's opinion will depend on the child's level of maturity which is not exclusively based on the age of the child but his or her capacity to express the views on issues in a reasonable and independent manner.<sup>312</sup>

226. Under international law, a child has a right to be cared for by his or her family and States have obligations towards the child to not interfere with his or her family in an unlawful or arbitrary manner.<sup>313</sup> The same principles are embedded in the regional instruments and apply equally to citizens and non-citizens of the State.<sup>314</sup> States are also under an obligation not to separate a child from his or her family unless such a separation would be in the best interests of the child.<sup>315</sup> There may be situations where a separation of a child from his or her parents is necessary, however, the separation must not be contrary to the best

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health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration."

<sup>312</sup> See, CRC General Comment No.12 (2009), paras.29 "Children's levels of understanding are not uniformly linked to their biological age;" and 30 "Maturity is difficult to define; in the context of art. 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. 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."

<sup>313</sup> See, CRC, 1989, art. 7 "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents;" and 16(1) "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation."

<sup>314</sup> See, the American Convention art. 11(2) "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 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8 "here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>315</sup> See, CRC, art. 9(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."

interest of the child and the child has a right to be heard in relation to the separation.<sup>316</sup>

227. In regard to deportation of children and their families it is important that the expulsion procedures comply with certain due process guarantees. It is stated in international and regional instruments that non-nationals who are lawfully on the territory of another state may only be expelled if certain conditions are met.<sup>317</sup>

228. These conditions require that the expulsion is in accordance with law,<sup>318</sup> that the person can submit reasons against his or her expulsion,<sup>319</sup> that legal representation is available,<sup>320</sup> and that there is access to appeal before an independent authority.<sup>321</sup> It is also clear from Article 2(1) of the ICCPR that an expulsion order must be non-discriminatory in its application.

229. In addition, this Honourable Court has recognised that the principles of fair trial in criminal procedures also apply to expulsion proceedings.<sup>322</sup> It is

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316 See, CRC General Comment No.12 (2009), para. 53 “Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child.” 54 “The 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.”

317 See ICCPR, 1966, Article 13 ; Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1.

318 See, *Maroufidou v. Sweden*, CCPR, Communication No. 58/1979, Views of 8 April 1981.

319 See, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986,

320 See, HRC Consideration of reports submitted by States parties under article 40 of the Covenant [ICCPR] concluding observations of the Human Rights Committee: Japan, 18 December 2008, CCPR/C/JPN/CO/5, para. 25. “ensure that all asylum-seekers have access to counsel, legal aid and an interpreter, as well as to adequate State-funded social assistance or employment during the entire length of proceedings.”

321 See, HCR Report No. 40 (A/51/40) para. 96 “The right to have a case reviewed by a competent authority should be available for all decisions of detention, expulsion and refusal of immigration or asylum.”

322 Advisory Opinion OC-18/03 *op.cit.* para. 124 “the list of minimum guarantees of due legal process applies when determining rights and obligations of “civil, labor, fiscal or any other nature. This shows that due process affects all these areas and not only criminal matters;” Para. 125 “ It is a human right to obtain all the guarantees which make it possible to arrive at fair decisions, and the administration is not exempt from its duty to comply with this obligation. The minimum guarantees must be observed in administrative processes whose decision may affect the rights of persons.” See also, *Habal and son v. Argentina* (2008) IACHR. Para.58 “The

reasonable to assume that the same principles of fair trial apply to children as well as their families and as previously mentioned, under Article 3 of the CRC, all actions and proceedings have to consider the best interest of the child.<sup>323</sup> Moreover, as mentioned above, it has been suggested that there should be an “age appropriate” due process applicable in proceedings concerning children.<sup>324</sup>

230. In the case of detention, international and regional instruments state that everyone has the right to liberty and security and no one should be subject to arbitrary or unlawful detention.<sup>325</sup> The principles apply in a non-discriminatory manner and in regard to children the CRC requires not only that the principles above also applies to children but that any detention of children must be a last measure of resort and the duration must be of the shortest time possible.<sup>326</sup> If a family is detained it must therefore conform with the same principles if it involves children. It is important to recall that detention will never be in the best interests of the child and detention can never be justified on the grounds of family unity.<sup>327</sup>

231. It is well-known that detention can have a negative impact on children’s human rights and it is essential that States consider alternatives to detention when children are involved.<sup>328</sup> States should also respect Article 9(1) of the CRC in case of detention of the parents and refrain from separating the child from his or her parents unless it is in the best interest of the child. However, if one or both parents are detained and separated from the child, it is important to consider the

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Commission deems that if these acts are prove to have occurred, they could constitute a violation of the right of a foreigner residing legally within the territory of a State party to be expelled from this territory only in compliance with a decision made according to law, as established in Article 22 of the Convention.”

<sup>323</sup> See, the Australian case *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) stated that the best interest of a child must be considered at all administrative proceedings including those of deportation.

<sup>324</sup> See, Report to the Human Rights Council of the Special Rapporteur on the human rights of migrants (2009) A/HRC/11/7, para.58 (family reunification) “within these procedures, States should fulfil “age appropriate” due process of law, including, inter alia, rights to a guardian, a legal representative, free legal aid, access to jurisdiction, effective remedy, an interpreter if necessary and to be heard.”

<sup>325</sup> See, ICCPR, 1966, Art. 9(1); ADRDM 1948, Art. 25; ACHR 1969, Art.7; ECHR 1950 Art. 5.

<sup>326</sup> See, CRC 1989, Art. 37(b). See questions 3 & 5 for more information.

<sup>327</sup> See, Report to the Human Rights Council of the Special Rapporteur on the human rights of migrants (2009) A/HRC/11/7, para. 62.

<sup>328</sup> See, HRC, Human rights of migrants: migration and the human rights of the child, A/HRC/12/L.16, 02/10/2009, para. 4(a);

child's perspective on the matter and the responsibility for special protection and assistance for the child lies with the state.<sup>329</sup> (See questions 3 and 5).

232. In regard to deportation of a child's parents there are several aspects which need to be considered. First of all, as previously mentioned, Article 9 of the CRC requires that States Parties refrain from separating children from their parents unless such a separation is in the best interest of the child due to abuse or neglect by the parents.

233. Furthermore, all children, including migrant children and children with migrant parents, have a right to be with their families and the states should protect the family and facilitate a reunification.<sup>330</sup> Secondly, States are obliged to ensure that no fundamental rights of the child are violated and in case of a deportation, all fundamental principles and human rights have to be considered, for example the principle of *non-refoulement*.<sup>331</sup> Thirdly, in case a separation is in the best interest of the child, it must be authorized by a competent authority and subject to judicial review.<sup>332</sup>

234. There is a risk that deportation measures against one or both of the parents will conflict with the rights of the child, in particular if the child is a citizen of the State that is issuing the expulsion order. As to the deportation of unaccompanied children it is recommended that a deportation is only executed when its nature is protective rather than punitive and that it is necessary for the purpose of family reunification.<sup>333</sup>

235. The former UN Rapporteur on human rights of migrants, Jorge Bustamante, has further recommended to States that mechanisms are needed to ensure that the rights and perspectives of children are included within the deportation procedures of their parents.<sup>334</sup>

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<sup>329</sup> CRC art. 12

<sup>330</sup> . General Assembly Resolution 59/194, Protection of Migrants (2005) para. 18.

<sup>331</sup> CRC General Comment 6, *Op.cit.*, para. 82

<sup>332</sup> CRC art. 9(1) and art. 20(1).

<sup>333</sup> *See*, Report to the Human Rights Council of the Special Rapporteur on the human rights of migrants (2011) A/HRC/17/33, para. 29 "Children should be repatriated only if it is in their best interest, namely, for the purpose of family reunification and after due process of law."

<sup>334</sup> *See*, Report to the Human Rights Council of the Special Rapporteur on the human rights of migrants (2009) A/HRC/11/7, para. 59

236. As previously stated, “all matters” concerning the rights of a child must consider the views and opinions of the child and it is therefore of utmost importance that the child’s right to be heard is included in case of a deportation of his or her family.<sup>335</sup>

237. At the ECtHR, in for instance *Keles v. Germany*<sup>336</sup> and *Amrollahi v. Denmark*<sup>337</sup> it has further been declared that, in regard to children with migrant parents, it would be a violation of Article 8 (Right to respect for private and family life) of the European Convention to deport the parent if the child was expected to encounter difficulties if he or she followed the parent.<sup>338</sup>

238. In the case of a separation of child and parents, the State is responsible to provide special protection and assistance for that child under Article 20(1) of the CRC. In addition, the State assumes certain obligations regarding the child’s continuing relationship with the separated parent under Article 9(3) of the CRC which states that “States Parties shall respect the right of the child 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.”

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<sup>335</sup> See, CRC General Comment No.12 (2009) para. 27 “States parties must assure that the child is able to express her or his views “in all matters affecting” her or him. This represents a second qualification of this right: the child must be heard if the matter under discussion affects the child. This basic condition has to be respected and understood broadly.”

<sup>336</sup> *Keles v. Germany* (2005) ECtHR, paragraph 69, in this case the difficulties the children would encounter was in regard to education;

<sup>337</sup> *Amrollahi v. Denmark* (2002) ECtHR, where the court held that the father’s deportation to Iran would separate him from his children since they would face serious difficulties if they came with him to Iran.

<sup>338</sup> See also, *Madafferi v Australia* (2004) CCPR, where HRC stated that a deportation of a father would be an interference with his family since the rest of the family would have to choose whether to stay without the father or go with him to a country where they did not know the language or the culture.

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