THE COURT

renders the following Advisory Opinion:

I. SUBMISSION OF THE REQUEST

1. On March 30, 2001 the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in view of the provisions of Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention", "the Convention" or "Pact of San José"), filed a request for an Advisory Opinion (hereinafter "the request") before the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") regarding interpretation of Articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in Article 19 of that same Convention establish "limits to the good judgment and discretion of the States" with respect to children, and it also requested that the Court express general and valid criteria on this matter in conformance to the framework of the American Convention.

2. According to the Inter-American Commission, the background for the request is that

[i]n various legal frameworks and practices of countries of the Americas, effective exercise of the rights and guarantees recognized by Articles 8 and 25 of the American Convention is not complete with respect to children as individuals and actors under criminal, civil and administrative jurisdictions, as there is the assumption that the obligation of the State to supplement the minors' lack of full discernment can make said guarantees occupy a secondary position. This involves abridgment or restriction of minors' right to fair trial and to judicial protection. Therefore, it also affects other recognized rights whose effective exercise depends on

effectiveness of the right to fair trial as well as the rights to humane treatment, to personal liberty, to privacy, and the rights of the family.

3. The Commission expressed that there are certain "interpretive premises" that State authorities apply when they adopt special protection measures in favor of minors, which tend to weaken their right to free trial. These measures are as follows:

a. Minors are incapable of full discernment of their acts and therefore their participation, whether personally or through their representatives, is reduced or annulled both in civil and in criminal proceedings.
b. This lack of discernment and legal capacity is presumed by the judicial or administrative officials who, in making decisions based on what they believe to be the "best interests of the child," attach less importance to those guarantees.
c. Conditions in the child's family milieu (economic situation and family cohesion, the family's lack of material resources, educational situation, etc.) become key decision-making factors with respect to treatment when a child or adolescent is placed under criminal or administrative jurisdiction to decide on his or her responsibility and situation in connection with an alleged offense, or to determine measures that affect rights such as the right to a family, right of abode, or right to liberty.
d. Considering that the minor is in an irregular situation (abandonment, dropping out of school, the family's lack of resources, and so forth) may be used to justify application of measures usually reserved for punishment of crimes applicable only under due process.

4 In its request, the Commission asked this Court to issue a specific ruling on the compatibility with Articles 8 and 25 of the American Convention of the following measures that some States adopt regarding minors:

a. separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
b. deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes[;]
c. the acceptance of confessions by minors in criminal matters without due guarantees;
d. judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor[; and]
e. determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

II. PROCEEDINGS BEFORE THE COURT

5. In its April 24, 2001 note, the Secretariat of the Court (hereinafter "the Secretariat"), in compliance with the provisions of Article 62(1) of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure") [FN1], forwarded the text of the request to the Member

States of the Organization of American States (hereinafter "OAS"), to the Inter-American Institute of Children, to the Permanent Council and, through the General Secretary of the OAS, to the bodies of the Organization that –due to their competence- might have an interest in the matter. Likewise, the Secretariat informed them that the President of the Court (hereinafter "the President"), in consultation with the other judges of the Court, ordered that the observations in writing and other significant documents regarding the request must be submitted to the Secretariat no later than October 31, 2001.

[FN1] Pursuant to the March 13, 2001 Order of the Court regarding Transitory Provisions in the Rules of Procedure of the Court, the instant Advisory Opinion is delivered in accordance with the terms of the Rules of Procedure adopted by the September 16, 1996 Order of the Court.

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6. On August 7, 2001 the Inter-American Institute of Children filed its written observations regarding the request for an Advisory Opinion.

7. Mexico and Costa Rica filed their observations in writing on October 31, 2001.

8. In accordance with the extension for filing of observations granted to the Inter-American Commission by the President, the Commission filed additional specific comments on November 8, 2001.

9. The following non-governmental organizations filed their briefs as amici curiae, between October 16 and 29, 2001:

- Coordinadora Nicaragüense de ONG's que trabajan con la Niñez y la Adolescencia (hereinafter "CODENI");
- Instituto Universitario de Derechos Humanos, A.C., of Mexico; and
- Fundación Rafael Preciado Hernández, A.C., of Mexico.

10. In his April 12, 2002 Order, the President convened a public hearing regarding the request, to be held at the seat of the Court on June 21, 2002, beginning at 10:00 a.m., and instructed the Secretariat to, in a timely manner, invite those who submitted their viewpoints to the Court in writing, to participate in the oral proceedings.

11. The following organizations filed their briefs as amici curiae, between June 18 and August 2, 2002:

- United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (hereinafter "ILANUD");
- Center for Justice and International Law (hereinafter "CEJIL"); and
- Comisión Colombiana de Juristas.

12. On June 21, 2002, before opening the public hearing convened by the President, the Secretariat gave the appearing parties the set of briefs with observations and documents submitted until then.

13. The following parties appeared at the public hearing:

on behalf of the Inter-American Commission on Human Rights:
Mary Ana Beloff.

on behalf of Mexico:
Ambassador Carlos Pujalte Piñeiro;
Ruth Villanueva Castilleja; and
José Ignacio Martín del Campo.

on behalf of Costa Rica:
Arnoldo Brenes Castro;
Adriana Murillo Ruin;
Norman Lizano Ortiz;
Rodolfo Vicente Salazar;
Mauricio Medrano Goebel; and
Isabel Gámez Páez.

on behalf of Instituto Universitario de Derechos Humanos, A.C., of Mexico:
María Engracia del Carmen Rodríguez Moreleón;
Enoc Escobar Ramos;
María Cristina Alcayaga Núñez; and
Silvia Oliva de Arce.

on behalf of Fundación Rafael Preciado Hernández, A.C, of Mexico:
Dilcya Samantha García Espinosa de los Monteros.

on behalf of the Center for Justice and International Law:
Juan Carlos Gutiérrez;
Luguely Cunillera; and
Lourdes Bascary.

on behalf of the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders:
Carlos Tiffer.

14. During the public hearing, the President pointed out to the participants that they could send additional observations until July 21 of this same year at the latest. On July 12 of this year he informed the intervening parties that the Court had scheduled deliberations on the request in the agenda of its LVI Regular Session, from August 26 to September 6, 2002. Mexico, the Commission, CEJIL and the Fundación Rafael Preciado Hernández, A.C., of Mexico filed their observations within the term granted to this end.

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15. The Court summarizes as follows the relevant part of the written observations of the Inter-American Institute of Children, the States participating in these proceedings, the Inter-American Commission, and the Non-Governmental Organizations: [FN2]

[FN2] The complete text of the written observations filed by the States, other bodies, institutions, and individuals participating in the proceedings will be published at the appropriate time in the "B" Series of official publications of the Court.

The Inter-American Institute of Children: In its August 7, 2001 brief, it stated:

Once the 1989 Convention on the Rights of the Child was adopted, the States of this hemisphere began a process of adapting their legislation in view of the doctrine of comprehensive protection, which considers the child fully as subject of rights, leaving behind the concept that the child is passively the object of protective measures. The latter involves a highly discriminating and non-inclusive jurisdiction, lacking in due process guarantees, and grants the judges broad discretionary powers regarding how to proceed in connection with the general situation of the children. There was thus a transition from a "protective repressive" system to one based on responsibilities and guarantees with respect to children, where special jurisdiction is set within the principle of lawfulness, where due process is respected, and where steps taken are "geared toward redressing the victim and reeducating the juvenile offender, while internment is restricted to those cases in which it is absolutely necessary."

The American Convention on Human Rights establishes that the rights set forth therein pertain to all human beings and, therefore, their full enjoyment and exercise by children are also guaranteed (Articles 3 and 1(2) of the American Convention). In this regard, the ability to enjoy rights, inherent to the human person and which is a ius cogens rule, must not be confused with the relative or absolute inability of children under 18 to exercise certain rights on their own.

Regarding the specific measures identified by the Inter-American Commission, it stated the following:

- Separation of minors from their parents because the authorities deem that the family cannot provide adequate conditions for their education and support: lack of material resources cannot be the only basis for the judicial or administrative decision to order separation from the family.To act in this way breaches rights such as, among others, legality of proceedings, inviolability of the right to proper defense, and humaneness of the measure. Such measures should be impugned and considered not valid;
- Internment of minors deemed abandoned or at risk, who have not committed any crimes: internment of youths who are in situations of social risk, applying the principles of the doctrine of the "irregular situation" that viewed them as objects of protection rather than subjects of rights, involves applying an undefined sanction, which breaches the principle of lawfulness of

punishment, aggravated by the fact that generally this is ordered without defining its duration. It is also contrary to the rules of due process.

- Acceptance of confessions by minors in criminal matters without respecting the right to fair trial: even though most legislation in this continent recognizes the right to fair trial, confessions of minors are generally taken without having followed adequate detainment procedures or without the presence of a legal representative of the child or of one of his next of kin, which should suffice for the procedure to be declared null;
- Administrative or judicial proceedings pertaining to fundamental rights of minors, conducted without respecting the right to fair trial and without considering their opinion or preferences: proceedings conducted in the manner described above violate fundamental guarantees such as the principles of guilt, lawfulness, and humane treatment, as well as procedural guarantees (jurisdictionality, the presence of both parties, inviolability of the right to proper defense, presumption of innocence, impugnation, legality of the proceeding, and public nature of the proceedings).

In view of the practices described above, the Institute determined the need to review the process of adjusting legislation of the States of the hemisphere to the principles of the Convention on the Rights of the Child and the American Convention, as today there are still countries that have not fully harmonized their laws to those principles, pursuant to Article 2 of the American Convention. The Institute concluded that Articles 8, 19 and 25 of the American Convention must constitute limits on States' discretionary power to issue special measures of protection with respect to children. Therefore, they must "adjust their domestic legislation and practices in accordance with those principles."

On the other hand, the Institute expressed, in its appendices, that reality shows that especially vulnerable sectors of society are deprived of protection of their human rights, which is contrary to the principle of universality of those same rights.

In this regard, the Institute pointed out that the perception of children as objects rather than subjects of rights considers "children" to be those whose basic needs are satisfied and "minors" to be those who are socially marginalized and cannot satisfy their basic needs. To address the situation of the latter, legislation has been enacted that considers children to be "objects of protection and control," and special jurisdictions are established, which exclude and discriminate, deny children their status as legal persons, and breach their fundamental guarantees. Such legislation also "judicializes" the psychosocial problems of children and establishes the Juvenile Court which, having broad discretionary powers, has the function of solving problems of this social group, in view of the lack of social protection policies by the State.

The aforementioned jurisdictions disregard the principle of lawfulness, the distinction between the abilities to exercise and to enjoy rights, as well as proportionality of punishment and due process. Likewise, the system does not respect the ages for various types of intervention, it is not inspired by policies for re-socialization or reeducation, and it is conducive to internment of children who are not offenders in an undifferentiated manner with minors who have broken the law. A study by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (hereinafter "ILANUD") showed that the profile of juvenile offenders is

in accordance with the following data: male, 4 years behind in terms of schooling, residents of marginal zones, conducting illegal activities to contribute to support their household, disintegrated families, or the father performing a low-income job or unemployed, and the mother working as a maid or as an unskilled worker.

The Convention on the Rights of the Child developed a new concept that establishes a distinction between abandonment and irregular conduct. The former requires administrative policies, while the latter requires jurisdictional decisions.

It also sets forth that children are immune from criminal prosecution, although those between 12 and 18 who break the law are subject to special jurisdiction that can apply sanctions consisting of socio-educational measures. This system of special justice, in addition to the basic features of all jurisdictional bodies, is based on the following principles:

a. responsibility for infractions: the sanctions contained in the new jurisdiction should only be applied to children older than 12 and under 18 who have broken a criminal law –due to immunity of minors under 18 from criminal prosecution- and the measures adopted can be appealed by the children themselves. The State must adopt a rehabilitation policy regarding these persons, so that adolescents who break the law "merit legal intervention" that is different from that foreseen for adults by the criminal code. Specifically, specialized jurisdictions should be established to hear offenses by children who have broken the law. In addition to fulfilling the common features of any jurisdiction (impartiality, independence, respect for the principle of lawfulness), they must safeguard the subjective rights of children, a task that does not fall under the competence of the administrative authorities.
b. decriminalization of the juvenile justice system: since sanctions under this special jurisdiction seek to rehabilitate rather than to repress, internment should be a measure of last resort. Other socio-educational measures should be considered first, such as family counseling, imposing rules of conduct, community service, obligation to redress damage, and supervised freedom with the obligation to attend educational programs. Measures must always be proportional and be based on the best interests of the child and his or her resettlement into the family and community;
c. separation of administrative and jurisdictional functions: a distinction must be made between social protection, which seeks to attain the conditions required for the child to develop his or her personality and fulfill his or her fundamental rights, and juridical protection, as a guarantee function with the aim of deciding on the subjective rights of children;
d. guarantee of rights: due process rights must be respected at three moments: i. at the time of detention, which must be based on a court order, except in cases of in fraganti situations, and it must be carried out by police staff trained for treatment of adolescent offenders, that is, special staff; ii. during the development of the judicial proceedings, both substantive (principles of guilt, of lawfulness, and of humane treatment), and procedural (principles of jurisdictionality, presence of both parties, inviolability of the right to proper defense, presumption of innocence, impugnation, lawfulness of the proceedings and public nature of the proceedings); and iii. during compliance with a re-educational or internment measure. This must be supervised by the competent body. In case of incarceration, the prohibition to intern children in establishments for adults must be respected, and also, in general, the rights of the child to know the regime he or she is subject to, to receive effective legal counsel, to continue his or her educational or professional

development, to carry out recreational activities, to know the procedure to file complaints, to be in an appropriate physical and hygienic environment, to receive sufficient medical attention, to be visited by next of kin, to remain in contact with the local community, and to gradually resettle into social normalcy.

e. community participation in policies on re-education and resettlement into family and society: this is an essential element of the new juvenile justice, as measures seek gradual and progressive resettlement of juvenile offenders into society.

Costa Rica:

In its written and oral observations, the State of Costa Rica expressed the following:

a. Regarding interpretation of Articles 8, 19 and 25 of the American Convention:

Guarantees set forth in Articles 8 and 25 of the American Convention, in connection with Article 19 of that same instrument, must be interpreted in two ways: one, in a negative sense, because said provisions do limit the good judgment of the States, as these cannot legislate to the detriment of those basic guarantees; and another, positive sense, which involves allowing their adequate exercise, taking into account that the aforementioned Articles do not hinder adoption of specific measures regarding children that expand the guarantees set forth therein.

Rights guaranteed by Articles 8 and 25 of the American Convention must be applied in light of the specialization recognized by the San José Covenant itself regarding childhood and adolescence, to "enhance protection of the rights of children," as occurs in other special situations such as those reflected in Articles 5(5) and 27 of the Convention. Therefore, they must be "read cross-cutting" –and applying broad interpretive criteria- together with the provisions of the Convention on the Rights of the Child. For this reason, application of said Articles must take into account the principles of the best interests of the child, comprehensive protection, specialized justice, presumption of minority, the principle of injuriousness, confidentiality and privacy, and comprehensive training and resettlement into family and society, as well as specification of the ways and conditions for children to have access to those judicial remedies, taking into account that their ability to act is not complete, "but rather linked to exercise of parental authority, and determined by their emotional maturity and discernment."

Article 19 of the American Convention obligates the States to develop legal norms to ensure protection measures required by children as such. Therefore, any legal development by the States regarding measures for protection of children must take into account that children are subjects of their own rights, which must be realized within a comprehensive protection concept. These positive measures "do not enshrine a discretionary power of the State" regarding this population group.

The rights recognized by Articles 8 and 25 of the Convention have been taken into account and developed in Article 40 of the Convention on the Rights of the Child. Furthermore, it added that Articles 3, 9, 12(2), 16, 19, 20, 25 and 37 of that same international instrument are significant for this request for an Advisory Opinion.

The Convention on the Rights of the Child recognizes the special protection that the State must provide to children, especially regarding administration of justice, and it recognizes that it is a high priority to solve conflicts in which children are involved, insofar as possible, without resorting to criminal proceedings; if it is necessary to resort to the latter, they must have the rights that adults have, as well as those that are specific to children. Said Convention also refers to other international instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

In Costa Rica, specifically, these international norms have been included at the administrative, judiciary, and penitentiary levels. There is also a Childhood and Adolescence Code (1998), which establishes a special process for protection in cases of action or omission by society or the State, by the parents or by those exercising custody, or of actions or omissions committed by the children to their own detriment. This process is entrusted to the institution called Patronato Nacional de la Infancia, as the first instance, and its decisions may be appealed through the judiciary. On the other hand, there is also the Juvenile Criminal Justice Law (1996), which establishes rigorous guarantees and measures of protection that are diverse in their nature and content, applicable to children who break the criminal law. Observance of said guarantees in the judiciary would require the "establishment of Juvenile Criminal Courts, of the Juvenile Criminal High Court, of Sentence Execution Courts, Juvenile Criminal Defense, a specialized Prosecutors' Office, [and] a Juvenile Judicial Police."

In connection with the concrete measures identified by the Commission, Costa Rica stated that said "situations cannot [be understood] as valid 'measures of protection' under the terms of Article 19 of the American Convention," as they respond to situations that existed in Costa Rica before entry into force of the current legislation, which is in accordance with the Convention on the Rights of the Child.

- Separation of youths from their parents because the authorities deem that their family cannot provide conditions for their education or support: this "would breach Article 19 of the American Convention, as well as Articles 8 and 25 [of that] same legal instrument and Articles 9, 12(2) and 40 of the Convention on the Rights of the Child." In Costa Rica there is a measure that can be applied, pursuant to the Childhood and Adolescence Code, respecting due process, and that is a provisional protection measure in substitute families, or temporary shelter in public or private institutions.
- Internment of minors in guardianship institutions because they are deemed abandoned or at risk or in a situation of illegality, without their having committed a crime: this measure reflects the doctrine that perceives children as objects rather subjects of rights, and therefore would breach Articles 7, 8, 19 and 25 of the American Convention, as well as Articles 25, 37 and 40 of the Convention on the Rights of the Child. In Costa Rica, when a measure such as the one described is involved, there is the possibility of an appeal through the judiciary, under the parameters of due process and hearing the opinion of the child.
- Acceptance of confessions of minors in criminal matters without due guarantees: this would breach Articles 19, 8(2) subparagraph g) and 8(3) of the American Convention, in

addition to the guarantee set forth in Article 40, subparagraph 2.b). Under Costa Rican legislation, the child has the right to abstain from rendering testimony.

- Administrative proceedings pertaining to the fundamental rights of the child, conducted without legal representation of the minor being guaranteed: this hypothesis would breach Articles 8, 19 and 25 of the San José Covenant, as well as Articles 12, subparagraph 2) and 40 of the Convention on the Rights of the Child. In Costa Rica, legislation has been adapted to the aforementioned international instruments.

The State concluded that the concept of children being "incomplete beings who must be the object of protection" has been left behind, from a technical standpoint; Articles 8 and 25 of the American Convention do not constitute limits to the activity of the State "insofar [...] as they do not hinder improvement of the standard of protection and guarantee by specifying these provisions with respect to children." Thus, "minors because they are minors can and must enjoy greater and special guarantees beyond those of adults, but in no case lesser guarantees nor a weakening of those guarantees under the pretext of a misconceived protection."

b. Regarding the Convention on the Rights of the Child:

The existence of a universal principle of protection of children has been recognized internationally, in view of the fact that they are in a position of "disadvantage and greater vulnerability" vis-à-vis other sectors of the population, and because they have specific needs. The Declaration on the Rights of the Child, adopted by the UN General Assembly in 1959, made a statement along these lines. However, it was not until 1989, with the Convention on the Rights of the Child, that there was "a true qualitative transformation of interpretation, understanding of and attention to minors, and therefore of their social and juridical condition." Said Convention includes a number of principles and provisions pertaining to the protection of children, and it is a paradigm that should provide guidance regarding this matter. Specifically, it dealt with the need to address the best interests of the child, the rule that children should not be separated from their parents against their will, and the possibility that the child be heard in all judicial or administrative proceedings that affect him or her; children who break the law must be treated "in such a manner as to foster their sense of dignity and the importance of promoting a constructive function in society."

c. Doctrine of comprehensive protection:

With the Convention on the Rights of the Child, the former doctrine that perceived children as objects rather than subjects of rights was left behind, as it considered the children incapable of assuming responsibility for their actions. Therefore, they were passive objects of the "protective" or repressive intervention of the State. That doctrine also established a distinction between "children", whose basic needs were covered, and "minors", who were members of the infantile population whose basic needs were not being satisfied, and who were therefore in an "irregular situation." For the latter group, the system tended to judicialize or institutionalize any problems pertaining to their status as minors, and the "wardship judge" was prominent as a way to compensate for what the child lacked.

This Convention, together with the other international instruments, reflected the doctrine of comprehensive protection, which recognizes that children are legal persons and granted them a major role in building their own destiny. With respect to criminal matters, specifically, it involved a change from protective jurisdiction to one that combines punitive measures and guarantees, where, among other measures, the rights and guarantees of children are fully recognized; they are considered responsible for their criminal acts; intervention of criminal justice is limited to the indispensable minimum; the range of sanctions is expanded, based on educational principles; and punishment through incarceration is minimized.

d. Development of childhood and adolescence Law:

The Convention on the Rights of the Child, among other international instruments, and the doctrine of comprehensive protection brought with them the development of childhood Law as a new juridical branch, based on three fundamental pillars: the best interests of the child, understood as the premise for interpretation, integration and application of laws pertaining to childhood and adolescence, and therefore a limitation to the discretion of authorities in adopting decisions regarding children; minors as legal persons, thus recognizing both their basic human rights and those that pertain to their status as children; and the exercise of fundamental rights and its ties to parental authority: since the only purpose of parental authority is to provide protection and indispensable care of the child to guarantee his or her complete development, it is a responsibility and a right of the parents, but also a fundamental right of the children to be protected and guided until they attain full autonomy. Therefore, exercise of authority must diminish as the child grows older.

Costa Rica concluded that “the provisions of Articles 8 and 25 of the American Convention on Human Rights are insufficient, in and of themselves, to ensure respect for minors of the guarantees and rights recognized by this instrument for all persons,” and therefore a series of principles and guarantees specifically pertaining to childhood must be taken into account. Thus, a fundamental nucleus regarding the rights of children takes shape that includes a principle of positive discrimination with the aim of attaining equity and compensating, “by means of recognition of greater and more specific guarantees, these situations of clear inequality that exist in reality.” For this, it argued, there is a need for all States to ratify the Convention on the Rights of the Child and to harmonize their legislation with respect to the principles set forth therein.

Mexico:

In its written and oral comments, Mexico stated:

Children must not be considered “objects of segregative protection”, but rather full legal persons who must receive comprehensive protection, and enjoy all the rights of adult persons, in addition to “a set of specific rights granted to them due to the particular property of children being in a process of development.”Not only must their rights be protected, but it is also necessary to adopt special measures of protection, pursuant to Article 19 of the American Convention and to a set of international instruments pertaining to childhood.

The two major principles that govern human rights are non-discrimination and equality before the law, and they must be recognized for all persons, "with no distinction as to whether the beneficiaries of these [rights is a child, a youth or an adult]." Therefore, the measures proposed by the Inter-American Commission in its request "would be related to issues of efficacy of the provisions of the Convention, rather than of compatibility of their respective scopes."

- Separation of youths from their parents because the authorities deem that the family cannot provide conditions for their education or support: the term "youths" is rejected due to its ambiguity, and instead the term "minors" is preferred, as it is refers more precisely to that sector of the population. The State also deems that a distinction should be made between "separation of the minor due to lack of conditions of the next of kin to provide for his or her education, and secondly, separation of the minor due to lack of conditions for his or her support. In this regard, undoubtedly in both cases the body with authority to reach said decision must always respect the rules of due legal process." Pursuant to Article 9 of the Convention on the Rights of the Child, separation of the child from his or her parents must be exceptional, limited to cases of mistreatment or abandonment, and decided to protect the best interests of the child.

In this regard, Articles 8 and 25 of the American Convention, "rather than constituting a limit on States' good judgment or discretion to issue special measures of protection pursuant to Article 19 of that Convention, are the necessary channel for such actions" to be considered in accordance with the obligations of the State derived from the Convention itself.

- Internment of minors in guardianship institutions because they are deemed to be abandoned or at risk or in a situation of illegality, even though they have not committed any crime: in all three hypotheses, abandonment, risk or illegality, the States have the responsibility of implementing social protection programs for the children. Said programs must include control bodies to oversee application and legality of the former, as well as adoption of appropriate measures to prevent or correct the situations in which children find themselves, as described by the Commission.

The State must adopt measures for protection and care of abandoned children, as they are a very vulnerable social sector, subject to even greater protection than the population at risk, pursuant to Article 19 of the American Convention, Articles 3(2) and 20 of the Convention on the Rights of the Child and Article 9 of the Riyadh Guidelines. Internment of children in guardianship institutions must be provisional and be considered "a measure that will help the child to adequately channel his or her life project." States must ensure that internment of children in guardianship or wardship institutions is preventive or provisional, and that its relevance and duration must be duly supported by specialized studies and be reviewed periodically by administrative or judicial authorities. In Mexico, abandonment of children is a crime.

Children who are at risk, or "street children" as they are called, must also be covered by preventive and protective measures. Pursuant to the terms set forth by this Court in the Villagrán Morales et al. Case, States must adopt legislative as well as institutional measures to protect and guarantee the rights of children who are at risk. These measures may include, as in the case of children who have been abandoned, internment in guardianship or wardship institutions, insofar as these fulfill the objective of "ensuring full and harmonious development of [the] personality [of the child]." These measures should be taken with due respect for relevant guarantees, having previously taken into account the viewpoint of the child, his or her age and maturity, and such measures must always be subject to appeal.

The State has the obligation to develop crime prevention programs. Internment of children who have not broken the law and without respecting due process would be a violation of Articles 7 and 8 of the American Convention, of Article 40 of the Convention on the Rights of the Child, of the Mexican Constitution, and of the fundamental principle of criminal Law, nulla poena sine lege.

In the hypothesis of incarceration of children, detention must be conducted in accordance with the law, during the briefest appropriate period and respecting the principles of exceptionality, temporal determination and last resort. Also, detainment of children "requires much more specific conditions in which it is impossible to solve the situation through any other measure."

- Confessions made by minors in criminal matters without due process: the State pointed out that all children should enjoy minimum guarantees when facing judicial proceedings against them, including: presumption of innocence, obligation of the authorities to advise the representatives of the child of any actions taken for or against him or her, the right to receive legal assistance and the right to tender evidence. Therefore, any statement in criminal courts that is obtained without minimum procedural guarantees must not be given probatory value.
- Administrative proceedings pertaining to fundamental rights, conducted without legal representation of the minor being guaranteed: children have the right to legal assistance in any proceedings brought against them. Development of administrative processes or proceedings against them without that guarantee breaches rights protected by Articles 8 and 25 of the American Convention.
- Establishment of the fundamental rights of minors in administrative or judicial proceedings without hearing the minor and taking into account his or her opinion: pursuant to the Convention on the Rights of the Child, the State must ensure conditions for children to develop their own judgment and express an opinion on matters affecting them. However, freedom to express an opinion is not unlimited; the authorities must assess it according to the possibility the child has of developing his or her own judgment, given his or her age and maturity, pursuant to Article 12 of the Convention on the Rights of the Child. Likewise, the right to be heard is a fundamental guarantee that must be respected in all administrative or judicial proceedings, as has been recognized by the inter-American system for the protection of human rights and by the Mexican legal system, both regarding legislation and case law.

Given the lack of an inter-American instrument that specifically regulates the rights of children, the Convention on the Rights of the Child is, as this Court has pointed out, part of the corpus iuris "that must serve the purpose of setting the content and scope of the general provision that was defined, precisely in the aforementioned Article 19."

Finally, the State pointed out that the child is a subject of rights, even before his or her birth, even though the ability to exercise them is acquired upon becoming an adult, in other words "whether a minor is a worker, a student, disabled, or an offender, he or she has the right to protection due to his or her special condition as a minor."

Inter-American Commission on Human Rights:

In its written and oral comments, the Inter-American Commission stated:

Adoption of the Convention on the Rights of the Child was "the culmination of a process during which the model or doctrine of comprehensive protection of the rights of the child, as it is called, was constructed." This new system has the following characteristics:

i. it recognizes children as subjects of rights and the need to provide special measures of protection for them, which must impede illegitimate interventions of the State that violate their rights, and provide positive benefits that allow them to effectively enjoy their rights;
ii. it arose from "the critical aspects" of the "irregular situation" model that perceived children as objects rather than subjects of rights, predominant in our region for over eighty years;
iii. it left behind the "judicialization" of exclusively social matters as well as internment of children or youths whose economic, social and cultural rights are breached;
iv. it avoids "euphemisms justified by the argument of protection," which hinder the use of due process mechanisms for protection of fundamental rights;
v. it provides differentiated treatment to children whose rights have been breached and to those who are charged with committing a crime;
vi. it adopts protection measures that promote the rights of the child and in no way must breach them, taking into account consent by the child and his or her next of kin;
vii. it develops universal as well as "focused and decentralized" public policies, which tend to make the rights of children effective; and
viii. it establishes a special responsibility system for adolescents, which respects all material and procedural guarantees.

With this new model, "the States undertake to transform their relations with children," leaving behind the concept of the child as one who is "incapable" and attaining respect for all his or her rights, as well as recognition of additional protection. Protection of the family is also emphasized as it is "the pre-eminent place to first make the rights of children and adolescents effective, where their opinions should be given a high priority in household decision-making." This protection of the family is based on the following principles:

a. Importance of the family as the "entity where children are raised and [...] their primary nucleus for socialization;"
b. The right of the child to have a family and to live with it, so as to avoid estrangement from his or her biological parents or extended family; if that were not possible, other "modes of family placement" should be sought or, finally, "community shelter entities"; and
c. "De-judicialization" of matters pertaining to socio-economic issues and adoption of social aid programs for the family group, taking into account that mere lack of resources by the State does not justify the lack of such policies.

Even though the Convention on the Rights of the Child is one of the international instruments that has the greatest number of ratifications, not all countries of this continent have harmonized their domestic legislation with the principles set forth in that Convention, and those that have done so face difficulties applying them.

The Convention on the Rights of the Child establishes two areas of protection: a) the human rights of children and adolescents in general, and b) the situation of children who have

committed a crime. In the latter area, children should not only have the same guarantees as adults, but also special protection.

The State, including the Judiciary, is under the obligation to apply international treaties. In this regard, the Commission recognizes that the Convention on the Rights of the Child, together with other international instruments, is an international corpus iuris for protection of children, which can serve as an "interpretive guide", in light of Article 29 of the American Convention, to analyze the content of Articles 8 and 25 and their relation to Article 19, of that same Convention.

Furthermore, those instruments –including the "Beijing Rules," the "Tokyo Rules" and the "Riyadh Guidelines"- develop comprehensive protection of children and adolescents. This involves considering the child fully as a subject of rights and recognizing the guarantees that he or she has in any proceedings that affect those rights. In the inter-American system, the child must enjoy certain specific guarantees "in any proceeding where his or her liberty or any other right is at stake. This includes any administrative proceedings," Articles 8 and 25 of the American Convention. Said guarantees must be observed, especially, when the proceedings involve the possibility of applying a measure that deprives the child of liberty (whether an "internment measure" or a "protective measure"). When applying measures that deprive the child of liberty, two principles must be taken into account: a) deprivation of liberty is the ultima ratio [FN3], and therefore other types of measures must be preferred, without resorting to the judiciary, whenever this is adequate; [FN4] and b) the best interests of the child must always be taken into account, and this involves recognizing that he or she is the subject of rights. This recognition requires that, in the case of children, special measures be considered that involve "greater rights than [those recognized for] all other persons."

[FN3] Article 37 (b) of the Convention on the Rights of the Child.
[FN4] Article 40(3)(b) of the Convention on the Rights of the Child.

Articles 8 and 25 of the American Convention, in combination with Article 40 of the Convention on the Rights of the Child, include guarantees that must be observed in any proceedings where the rights of a child are established, including:

a. Competent, independent and impartial court previously established by law: "Every person has the right to be tried by a competent, independent and impartial tribunal, previously established by law." In this regard, Article 5(5) of the American Convention states the need for proceedings regarding minors to be conducted by specialized tribunals. [FN5]

[FN5] The Commission stated that while the request for an advisory opinion is in connection with Articles 8, 25 and 19, the aforementioned provision of Article 5 of the Convention is related to the subject matter of the request for an advisory opinion.

Article 40 of the Convention on the Rights of the Child extends the guarantee of a competent, independent and impartial judge to situations involving State authorities other than jurisdictional bodies, or alternative, non-judicial mechanisms for conflict resolution.

b. Presumption of innocence: a person charged with a crime must not be treated as if he or she were guilty until his or her responsibility has effectively been established. This guarantee applies to children, whether chargeable or not.

With respect to children, Latin American legislation tends to consider that the criminal law system is based on the situation of the perpetrator rather than on the crime committed, which breaches presumption of innocence.

Before the entry into force of the Convention on the Rights of the Child, judges played a "protectionist" role which gave them the authority, when the child was at risk or in a vulnerable situation, to breach his or her rights and guarantees. The mere fact of being charged with a crime would suffice to assume that the child was at risk, which gave rise to measures such as internment. However, thanks to adoption of the Convention on the Rights of the Child, judges are now under the obligation to respect children's rights. They must "take into account investigation of and possible sanctions applicable to the child, based on the act committed and not on personal circumstances." Clearly, due process guarantees cannot be set aside for the best interests of the child. Therefore, when a child charged of a crime is brought before the Judge, and he or she is in a special state of vulnerability, there must be an "intervention by the mechanisms created by the State to address that particular situation," and the child must be treated as an innocent person, whatever his or her personal situation.

c. Right to legal defense: this includes several rights: to have the time and means to prepare his or her defense, to have an interpreter or translator, to be heard, to be informed of the charges and to examine and offer witnesses. This is also set forth in Article 40 of the Convention on the Rights of the Child.

The principle of presence of both parties underlies this guarantee, and it leaves behind the idea that a child needs no defense because the Judge undertakes defense of his or her interests.

The right of children to be heard addresses the opportunity to express their opinion in any proceedings where their rights are discussed, insofar as they are able to form their own judgment on the matter. This is a key element of due process for the child, for it to be "understood as an opportunity for dialogue, where the child's voice is taken into account, so as to consider his or her opinion regarding the problem he or she is involved in."

d. Right to appeal (Articles 8(2)h of the American Convention and 40(b)v of the Convention on the Rights of the Child): the child has the right for a court to review the measure imposed upon him or her, so as to control the punitive power of the authorities. Said guarantee must be in force in any proceedings where the rights of the child are established, and especially when measures that deprive the child of liberty are applied.

e. Non bis in idem: (Article 8(4) of the American Convention): the guarantee that a child who has been tried for certain facts cannot be tried again for those same facts, is set forth in Article 8(4) of the American Convention. There is no similar provision in the Convention on the Rights of the Child.

f. Public nature of the proceedings (Article 8(5) of the American Convention): this guarantee, linked to the democratic system of government, must take into account the privacy of the child, without diminishing the right of the parties to defense nor the transparency of judicial actions, to "avoid absolute secrecy of what occurs during the proceedings, especially with respect to the parties." There is no similar provision in the Convention on the Rights of the Child.

Due process guarantees, protected by Article 8 of the American Convention, have a double value: an intrinsic one, by means of which the person is considered a subject in the development of this dialog; and an instrumental one, as a means to attain a fair solution. In this regard, the Convention on the Rights of the Child "demands recognition of the child's autonomy and subjectivity and determines the weight that his or her opinion can and should have in the decisions of adults."

The right to effective remedy, set forth in Article 25 of the American Convention, involves not only the existence of a procedural instrument that protects the rights breached, but also the duty of the authorities to establish the grounds for a decision on the claim and the possibility of judicial review of the measure adopted.

The Commission concluded that the bodies of the inter-American system for protection of human rights must resort to the Convention on the Rights of the Child to interpret all provisions of the American Convention, in matters that involve children, and specifically with respect to interpretation and application of Article 19 of the American Convention. Application of the latter provision must also be "preceded and accompanied" by respect for the guarantees set forth in Articles 8 and 25 of the American Convention. Finally, the Commission stressed the importance of "States, and especially judges, complying with the obligation to apply international treaties, adapting their legislation, or issuing decisions that comply with the standards set forth in Human Rights treaties."

Instituto Universitario de Derechos Humanos, A.C., of Mexico, and other organizations in the field. [FN6]

[FN6] Consejo para la Defensa de los Derechos Humanos del Valle de México, Cadenas Humanas, El Ahora Juventud el Mañana Sabiduría, Centro de Monitoreo para la Defensa de los Derechos Humanos, Asociación de Guanajuatenses de México, Confederación de Jóvenes Mexicanos, which includes 500 youth organizations, Niño Fuente de Amor, Instituto Mexicano de Prevención del Delito e Investigación Penitenciaria, Centro de Estudios de Post Grado en Derecho, Compromiso por la Unidad Nacional, Consejo Nacional de la Juventud de México, A.C., Instituto Mexicano de Doctrina Social Cristiana, Colegio de Abogados y Penitenciaristas del Valle de México, Asociación Mexicana de Promoción y Cultura, Fundación León XIII,

Instituto de Ciencias Jurídicas de Abogados Egresados de la UNAM, Campus Aragón, Fundación Economía Solidaria, Colegio Mexicano de Licenciados en Trabajo Social, Centro de Alternativas Sociales, Colegio de Ciencias Jurídicas en el Estado de México, Fundación Mexicana de Reintegración Social e Instituto Nacional de Apoyo a Víctimas y Estudios en Criminalidad.

In its written and oral comments, it stated that:

The principles of non-discrimination, best interests of the child and equality are fundamental in all activities pertaining to children and in the respective legislation. Children's opinions should be taken into account in matters that concern them. Legal systems must establish childhood jurisdictions that favor prevention, as well as promote their rehabilitation and social resettlement, avoiding criminalization and deprivation of freedom insofar as possible. At the hearing, it argued that the various spheres of prevention should be taken into account: primary, in the family; secondary, in society; and tertiary, when the State must intervene by adopting a given measure.

- Separation of the youths from their parents because the authorities deem that the family cannot provide conditions for their education or support: the term "youth" should be rejected, because it includes persons older than as well as under 18. The term "minor" is juridical, and it takes into account assistance and protection that must be given to persons who, due to their age, are not capable of exercising their rights.

Separation of children from their parents must be decided following due legal process, "always favoring the best interests of the minor, which may be impaired by lack of conditions for their due comprehensive development." For this reason, in its role or promoting and protecting the rights of the child, the State can only decide such a separation in face of circumstances that place the child at risk of suffering violence, mistreatment, sexual exploitation and abuse, among other dangers.

- Internment of minors in guardianship institutions because they are deemed abandoned or at risk or in a situation of illegality, without their having committed a crime, but rather due to personal or circumstantial conditions of the minor: the State must adopt measures of protection, by means of legitimate intervention procedures and with due enforcement of the law, when children are in a real situation of abandonment by family or society, which translates into risk or into abridgement of the best interests of children. One such measure is internment of children in guardianship institutions that pursue the objective of ensuring their development and exercise of their rights. Being at risk and in a situation of illegality are not synonymous, as they seem to be in the proposed situation.
- Confessions made by minors in criminal matters without due process: children's confessions, meaning self-incriminating statements, must always be made with due guarantees and full respect for their rights. It is necessary to establish a special procedure for child justice, which does not necessarily entail the development of criminal proceedings.
- Administrative procedures pertaining to the fundamental rights of the minor, without due guarantees of legal representation of the minor: a distinction should be made between administrative procedures to deal with minors who are offenders and other proceedures pertaining to behaviors that are not characterized as offenses in criminal legislation. In the latter cases, absence of defense counsel does not connote violation of those rights.

- Establishment, in administrative or judicial proceedings, of fundamental rights of the minor without having heard him or her nor taken into account his or her opinion: a distinction should be made between the possibility of the child freely expressing his or her opinion, personally or through a representative, and the right pursuant to Article 12 of the Convention on the Rights of the Child. This involves "the need to analyze in depth the manner in which that right should be adopted, as the minor cannot express his or her opinion in an unlimited manner, since the specific conditions of each minor must be taken into account, in terms of his or her age and maturity."

Federación Coordinadora de ONG's que trabajan con la Niñez y la Adolescencia-CODENI, of Nicaragua:

In its October 16, 2001 brief, it stated that:

In Nicaragua, enactment of the Childhood and Adolescence Code, in 1998, has generated structural changes in treatment of adolescents who have broken the law. Nevertheless, these changes have not been substantial, due to lack of allocation of a specific budget for comprehensive application of the code.

In connection with this sector of the population, it is convenient to use the terminology "children and adolescents," to highlight their status as social subjects and as legal persons, a product of their juridical personality, and to leave behind the "irregular situation" policy that considered them objects rather than subjects of rights and that uses the term "minors" in a derogatory manner.

Immunity of children from prosecution should allow them to be identified and to provide treatment that is different from that for an alleged offender, since the "act committed [answers to] a particular situation and not necessarily [to] a premeditated or learned action as argued by the "irregular situation" doctrine that considers the child an object rather than a subject of rights."

The law must consider, when establishing the causes of a criminal act, the "biopsychosocial" study of the individual implemented in Nicaragua which shows that "almost 100% [of...] the criminal acts derive from circumstances outside their control or from specific situations of the [s]ystem itself," since the children who are inclined or prone to fall into situations of risk or illegality are the poor, the sons and daughters of prostitutes and criminals, among others.

There are principles that relate to due process, such as culpability, humane treatment, jurisdictionality, presence of both parties and inviolability of defense, that must be applied to children:

a) Principle of Culpability: publicity generated from the moment the crime was committed, not providing attention to the perpetrator and not providing specialized treatment by experts in the matter, causes "anticipatory culpability of children". The State is also under the obligation to have experts in childhood and adolescence in the Judiciary, the Public Attorneys' Office and the Legal Aid Program.

b) Principle of Humane treatment: the typology of crimes applied to adolescents must be different from that set forth in regular legislation; corrective measures must seek re-socialization of the perpetrator, rather than mere incarceration, as "it has been proven that said measure does not cause positive effects."
The law must also clearly define the conduct and consider the judicial proceedings as a means for "special protection" rather than an inquiry.
c) Principle of Jurisdictionality: the law must differentiate the sphere and role of each actor responsible. It is necessary to implement socio-educational measures that enable re-socialization of the child. The administrative authorities will oversee compliance with said measures.
d) Principle of the presence of both parties: the right to be heard relates to recognition of juridical personality, "insofar as both are not observed from the same direction, it will be difficult for an adult, inexperienced person to establish practical differences in the terminology."
e) Principle of inviolability of defense: Defense of children is not generally entrusted to specialists in childhood and adolescence. This does not contribute to respect for the rights of children. The role of the State and the family is fundamental, not as spectators nor as those who punish the individual, but "as alternatives to overcome the problem." The State is under the obligation to have psychosocial specialists to provide attention to the children and to correlate this action with the family.

Fundación Rafael Preciado Hernández, A.C, de Mexico:

In its oral and written comments:

The starting point for development of this subject is the 1989 United Nations Convention on the Rights of the Child, as the international instrument that initiated the doctrine of comprehensive protection that defines children as fully legal persons rather than as objects of protection. The requested interpretation of Articles 8, 19 and 25 of the American Convention on Human Rights should fully include the model presented and adopted in the Convention on the Rights of the Child.

Certain relevant guidelines for the proposed interpretation are highlighted:

a. Prohibition of separating children and adolescents from their family or community milieu due to purely material issues.

The current model for protection of children is based on joint responsibility of the State and the parents (or those responsible for the children). In accordance with the principle of solidarity, the former must not place children under its guardianship, denying them the exercise of their rights, especially the right to liberty, due to lack of minimal conditions for support or as a consequence of their special personal, social or cultural situation, and the parents must provide at least adequate living conditions. In other words, both the State and the family are jointly responsible for providing and ensuring the child minimum conditions for subsistence. This means that legislation developed in accordance with the principle of protection and which criminalizes poverty, stripping the management of legal conflicts of the most disadvantaged sectors of the population from the right to fair trial, must be reconsidered so as to adjust it to the current model and reality.

b. Separation of the administrative and jurisdictional spheres of action.

Jurisdictional matters pertaining to the rights of children and adolescents, whether under criminal, civil or family law, in light of the Convention, should be conducted by judges with full and specific capacity to settle juridical conflicts in the technical, impartial and independent manner inherent to their position, and limited by individual guarantees.

The Convention on the Rights of the Child, which is the main international instrument that has replaced the former protective laws, establishes the complementary nature of special protection mechanisms for children, which is not autonomous but rather based on general juridical protection (Article 41, Convention on the Rights of the Child) for which it also distinguishes clearly between assistential and penal matters.

From this standpoint, it states that all proceedings regarding children must respect the following principles:

1. Jurisdictionality: this involves respect for certain minimum characteristics of jurisdiction, such as intervention of the competent court previously established by law, as well as independence and impartiality of the body responsible for reaching the relevant decision.
2. Inviolability of defense: this requires the presence of the technical defense counsel in decisions affecting the child and in any proceedings in which he or she intervenes.
3. Lawfulness of the proceedings: all proceedings that involve the presence of a child or decisions that affect him or her must be previously determined by law, to avoid application of discretionary criteria and to ensure fair and equitable development of the individuals, thus ensuring that decisions are not based on the personal conditions of the child.
4. Presence of both parties: this involves the possibility of knowing the facts and the evidence submitted in the proceedings, as well as to face them with the respective legal assistance.
5. Impugnation: this presupposes the existence of a higher body before which the decision adopted can be appealed.
6. Public nature of the proceedings: this has two expressions; on the one hand, the possibility of having access to all procedural items to ensure adequate defense; and on the other hand, protection of the identity of the children to avoid their stigmatization.

c. Children as fully legal persons.

Article 3 of the American Convention on Human Rights recognizes the juridical personality of all persons and this, of course, includes children. Nevertheless, the former protective model only saw children as objects of protection and not as legal persons. Therefore, they did not enjoy recognition of their rights. Currently, the preamble of the Convention on the Rights of the Child and the principles of the United Nations Charter clearly state that children are legal persons, under conditions of equality and based on the inherent dignity of all human beings.

According to the comprehensive protection model that has been adopted, children have the right to participate in proceedings where decisions are reached that affect them, not only within the household but also regarding actions taking place before the competent authorities.

In light of these criteria, it is deemed relevant to urge the member countries of the OAS to adopt, in their domestic legislation, the guidelines set forth by international law regarding protection and wardship of children, so as to recognize them as persons entitled to rights and having obligations. This includes the right to due process.

In the case of Mexico, the protective model was clearly adopted. Legislation considers children to be immune from prosecution and legally disqualified, and they are thus treated in a similar manner to mentally disabled persons, denying them access to due process followed in jurisdictional decisions regarding adults.

According to Mexican legislation, children are subject to a non-jurisdictional process that takes place without the judicial guarantee of due process. That process involves a "treatment" consisting of deprivation of liberty, decided with no guarantees whatsoever, and which rather than contributing to protection of children brings with it a series of systematic violations of the rights and guarantees of children and adolescents.

Mexican legislation must adopt the protection model recognized by international instruments.

United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD):

In its written and oral arguments, ILANUD made the following remarks:

With respect to the first question raised by the Commission, regarding separation of youths from their families for reasons of education and support, the Institute determined that Articles 8 and 25 of the Convention constitute limits on States' good judgment and discretion to issue measures of protection pursuant to the provisions of Article 19 of that same instrument. "Separation of youths from their parents and/or families and without due process, because it is deemed that the families cannot offer conditions to provide them with education and support, breaches Article 2 of the Convention on the Rights of the Child, as well as principles established in International Law and Human Rights; the principle of equality and the right to non-discrimination."

With respect to the measure regarding suppression of liberty of minors, because it is deemed that they have been abandoned or are at risk or prone to illegal situations, the Institute stated "that the guarantees set forth in Articles 8 and 25 of the American Convention [...] constitute a limitation of the decisions of States Party on such special measures. The practice of deciding suppression of liberty taking into account special circumstances of the minors breaches the Right to Humane Treatment (Article 5) and the Right to Personal Liberty (Article7), both of the American Convention [...], as well as principles of International Law and Human Rights, such as the pro libertatis principle, and the pro homine principle. It would also clearly breach the principle of equality and non-discrimination."

With respect to admissions of guilt by minors in criminal matters without due process guarantees, the Institute stated "that the rights to fair trial and to judicial protection set forth in Articles 8 and 25 of the Convention, constitute limits and minimum rights that the States Parties must respect when they receive admissions of guilt or statements from any person, and especially from minors. To accept these special measures in a discretionary and unrestricted manner constitutes a violation of the principle of specialized justice for minors, set forth in Article 5(5) of the American Convention," as well as of due process.

Regarding the administrative proceedings where fundamental rights are established without the right to defense, the Institute pointed out that "this practice violates the right to fair trial set forth in Articles 8 and 25 of the American Convention, for which reason they do constitute limitations of the capacity and discretion of the States Party." It also deemed that said practices breach the right to legal representation set forth in Article 40, subparagraph 2, item ii of the Convention on the Rights of the Child. This right involves respect for all guarantees encompassed by the right to fair trial, such as the rights to be informed of the charges, to presumption of innocence, and to appeal, among others.

Finally, with respect to the question raised by the Inter-American Commission regarding establishment of rights and liberties in administrative or judicial proceedings without the right to be heard personally, as well as non-consideration of the opinion of the minor,

ii. the Institute argued that this would violate the provisions of Articles 8 and 25 of the American Convention, as these norms constitute limits to the good judgment and discretion of the States Parties "as minimum rights, which must be respected for all citizens and especially for children and adolescents." Furthermore, this situation would breach the provisions of Article 40 of the Convention on the Rights of the Child, "as well as internationally accepted and recognized legal principles such as: the principle of the best interests of the child, recognition of minors as legal persons, the principle of comprehensive protection, the principle of specialized jurisdiction, the principle of comprehensive training and resettlement into the family and society."

Since the Convention on the Rights of the Child was adopted, most Latin American legal systems began to change from the protective theory, usually applied in judiciary or administrative proceedings, depending on each State, to that of comprehensive protection set forth in the aforementioned international instrument. To this end, a legislative technique was used which could be called "[a]ll-encompassing codes, called childhood codes that regulate all types of situations both of omission of rights and of violations of criminal law."

Center for Justice and International Law:

In its brief and in its oral comments the Center made the following statements:

Convention on the Rights of the Child:

The main normative reaction to the system of the "irregular situation" was the adoption of the Convention on the Rights of the Child in 1989, which involved a change of paradigm to recognize minors as subjects of rights and to establish the principle of the "best interests of the

child" as a "form for resolution of conflicts among rights, and/or as a guide to evaluate laws, practices and policies pertaining to children," as well as principles such as respect for the opinion of the child, the principle of survival and development, and the principle of non-discrimination. The Convention on the Rights of the Child also legally codified the "doctrine of comprehensive protection," which delimited the role of the Judge to that of solving juridical conflicts, strengthened procedural guarantees, and determined obligations of the State to establish "comprehensive policies that respect the rights and guarantees protected" by the aforementioned Convention.

This impetus given to the doctrine of comprehensive protection has led to a number of modifications to legislation within the region; nevertheless, "practices in administration of justice and State policies have not yet adapted to the precepts of the Convention [on the Rights of the Child]." Likewise, in some countries there is a "less and less inclusive situation (socially and politically)" for minors and grave or systematic violations of human rights demonstrate non-fulfillment of the States' international obligations.

Current legislative situation:

Some countries in the region have developed new legislation to provide special protection to minors. However, lack of legislative reform directed toward "strengthening basic social policies" constitutes an obstacle to effective enjoyment of the rights recognized in the Convention on the Rights of the Child. Furthermore, there are countries that have not begun the process of adjusting their legislation, or where this process must be enhanced to "attain an effective adjustment of the law to precepts of the" Convention on the Rights of the Child, especially with respect to guarantees.

Furthermore, even in those countries where new legislation has been adopted, there are a number of deficiencies that must be corrected, such as creation of the necessary facilities to apply measures that involve internment under decent conditions, and moving legislation away from the old system based on the doctrine of the "irregular situation" that perceived children as objects rather than subjects of rights. Thus, the comprehensive protection doctrine has faced many obstacles of various types, such as:

- Economic obstacles: lack of budgetary allocations to adequately protect the rights of children;
- Political obstacles: social spending is not a priority for governments, and when it occurs its "execution is incoherent for lack of adequate planning;"
- Ideological obstacles: there is a need to promote greater sensitivity and commitment to the new requirements of children, especially in face of a "widespread authoritarian and repressive culture;"
- Institutional obstacles: there is a lack of training for juridical and social operators in this field, as they "do not understand the scope of their competence nor do they manage to fully separate this function from that of sanctioning" the juvenile offender.
- Obstacles regarding information: it is necessary to provide training to attorneys, due to their "special participation in terms of control and demands" vis-à-vis State institutions in charge of implementing protection measures;

- Legislative obstacles: progress in this field has been slow and formal in nature; and
- Obstacles in terms of training: despite attainments, there is not yet “a critical mass of professionals who are able to generate opinion” on this matter.

Current problems of children:

Millions of children in the region live in poverty and marginality, “the victims of an immense and unforgivable oblivion” and “the products of major structural flaws,” related to domestic and international policies. The following problems stand out:

a. Children in situations of armed conflict:

This type of conflicts have been associated with violations of human rights and of International Humanitarian Law to the detriment of children and adolescents in the region, with consequences for them that are even more intense and traumatic than for adults. Those conflicts also generate greater poverty as more resources are channeled toward those ends; furthermore, malnutrition increases due to low production of food, and obstacles hindering access to services increase too. In addition, children often face displacement and separation from their families, which deprives them of a safe environment.

In this regard, the existence of the Optional Protocol to the Convention on the Rights of the Child is important, as it refers to participation of children in armed conflicts as a means to complement the minimum obligations of the States, set forth in the Convention on the Rights of the Child with respect to children in armed conflicts such as, among other things, the minimum age for recruitment is raised from 15 to 18.

Likewise, even though many States recognize the existence of soldier children recruited by the armed forces and undertake to issue orders to avoid new recruitment, generally there are no provisions to facilitate demobilization of children currently recruited, which impedes their access to education, to family re-unification, or to food and shelter necessary for their resettlement in society. Furthermore, in connection with internal displacement of minors, “not giving the situation a legal framework, in the complete manner it requires, leaves children unprotected due to the lack of a specific legal remedy to address that situation,” to the detriment of the “right to not be displaced as a corollary of freedom of Movement and Residence.”

b. Refuge and Nationality:

To define the scope of the measures of protection set forth in Article 19 of the American Convention regarding refugee children or asylum-seeking children, it is essential to take into account the provisions and principles set forth in the Convention on the Rights of the Child and the 1951 Convention relating to the Status of Refugees. Therefore, protection measures must be considered in the course of determination of refugee status and in treatment of refugee and asylum-seeking children, especially when they have been separated from their parents or guardians.

International human rights obligations require that the rights set forth in the various treaties be ensured for all people, whatever their age. Therefore, age-based discrimination can only be accepted in certain circumstances, pursuant to the case law of the Court itself and when measures adopted are proportional. Furthermore, in the case of children, the States must adopt special measures to protect them, based on the principle of the best interests of the child.

The right to fair trial set forth in Article 8 of the American Convention, which covers all administrative or judicial proceedings where rights are determined, must be respected during the process of deciding on refugee status, as this mechanism permits determination of whether a person fulfills the requirements to enjoy the right to asylum and protection against refoulement. Likewise, the right to simple and effective remedy that protects against acts that breach fundamental rights, set forth in Article 25 of the American Convention, must be applied, with no discrimination, to all persons subject to the jurisdiction of the State, including all individuals who are not nationals of that State. Specifically, the following guarantees must be respected in the process of determining refugee status:

- the right to a hearing for the child to file his or her request for asylum and to freely express his or her opinion, within a reasonable term and before a competent, impartial and independent authority. This in turn presupposes protection against refoulement and return at the border. Likewise, to ensure the greatest possible participation by the child, the procedure must be adequately explained to him or her, together with decisions reached and their possible consequences; also, whenever it is appropriate, the State should guarantee that the child receives assistance from a legal representative who is prepared for this function;
- adoption of special measures that allow the asylum request of a child to be studied in a more flexible manner, taking into account that children generally experience persecution in a different manner from adults; these measures might include granting of the benefit of the doubt when analyzing the request, less rigid standards of evidence, and a more expedite procedure; and
- an assessment of the degree of mental development and maturity of the child by a specialist with the required training and experience; if the child is not sufficiently mature, more objective factors must be considered when analyzing his or her request, such as conditions in the country of origin and situation of his or her next of kin.

Likewise, protection of the family, as a basic social unit, is also set forth in international human rights treaties. Therefore, any State decision that affects the unity of the family must be adopted in accordance with the right to fair trial set forth in the American Convention. To respect unity of the family, the State must not only abstain from acts that involve separation of the members of the family, but must also take steps to keep the family united or to reunite them, if that were the case.

In this regard, there must be a presumption that remaining with his or her family, or rejoining it in case they have been separated, will be in the best interests of the child. However, there are circumstances in which said separation is more favorable to the child. Before reaching this decision, all parts involved must be heard. The State is also under the obligation not only to abstain from measures that might lead to separation of families, but also to take steps that will allow the family to remain united, or for its members to reunite if they have been separated.

Detention of asylum-seekers is also undesirable due to its negative consequences for their possibilities of participating in the asylum request proceedings and because it can be a traumatic experience. In this regard, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has stated that persons who request asylum and who have been admitted to determine refugee status in a country "should not be sanctioned or exposed to unfavorable treatment solely based on their presence in that country being deemed illegal." Thus, detainment of said persons –if necessary- must be for a brief period and must be exceptional in nature, and other options should be preferred. In addition, the specific situation of each person should be studied before ordering his or her detainment.

Therefore, this Committee has identified four hypothetical situations in which detainment of an individual might be considered "necessary":

i. to verify his or her identity;
ii. to establish the grounds on which the request for refugee status or asylum is based;
iii. to deal with cases in which those requesting refuge or asylum have destroyed their identification documents or have used fraudulent documentation to confuse the authorities; or
iv. to protect national security or public order.

When minors are involved, these criteria should be even more restrictive and, therefore, as a rule, children should not be detained and, instead, they should receive lodging and adequate supervision by State authorities in charge of the protection of children. If there are no other alternatives, detention must be an ultima ratio measure and one adopted for the shortest possible period; likewise, children should have at least the minimum procedural guarantees granted to adults.

On the other hand, children whose parents request asylum or receive refuge find themselves in an especially vulnerable situation with respect to restrictive migration control policies in the region, as "families are increasingly marginalized and vulnerable to abuse." Children are also liable to forced repatriation without minimum guarantees and safe conditions.

Likewise, existence of children without a nationality places them in an unprotected situation internationally, as they do not receive the benefits and rights enjoyed by citizens, and if the State also denies them their birth certificates when they are born in the country of refuge, this places them at "permanent risk of being arbitrarily expelled and therefore of being separated from their families," which very often leads to "children's loss of many other rights through the loss of this first one."

c. Cases where life and health are endangered:

When children suffer abuse, "this not only causes psychological, physical and moral damage to them, but also exposes them to sexually transmitted diseases, which worsens the danger to their lives." Unfortunately, these facts often remain within the household environment and in other cases the State does not act, even though it has the authority to exercise appropriate mechanisms to protect them. Furthermore, mechanisms to punish the perpetrators are often ineffective, thus denying access to justice and obstructing any idea of protecting children.

d. Cases of especially vulnerable children and adolescents:

When States do not provide adequate protection to children who are in a special situation due to any physical or mental disability, this places those children in a state of defenselessness, which worsens when they are subject to an internment system that does not have adequate resources for this purpose.

e. Cases of wardship or guardianship (adoption):

The problem of illegal adoptions, together with child pornography and prostitution, generates great concern internationally. This problem arises primarily when "there are legislative flaws that place no obstacle to this type of crimes." Especially in connection with adoption, judicial intervention should be ensured to control its implementation, because it is important that it be "an act geared toward the well-being of the child" and lack of control over it can lead to abuse and illegal actions.

f. Children and adolescents who do not have access to education:

All children have the right to education as a universally recognized right. However, there are millions of primary school-age children who cannot attend school, and they are therefore in a situation of denial of the right to education, in turn linked to violations of civil and political rights such as illegal work, detainment in prisons, and ethnic, religious, or other forms of discrimination, worsened in cases of children in especially difficult situations such as children who are members of ethnic minorities, orphans, refugees, or homosexuals.

Likewise, violence to maintain discipline in classrooms and to punish children with low academic performance are factors that, aside from the direct consequences they may cause, hinder access to education, which the States must undertake to remove.

Development of Article 19 of the American Convention:

Based on Article 19 of the American Convention, the child has the right to protection measures by the States, which must be granted without any discrimination. Implementation of this provision should take into account those of other international instruments, pursuant to the interpretive criterion of Article 29 of the American Convention that enshrines "the principle of applicability of the provision most favorable to the individual," as well as the provisions and principles of the Convention on the Rights of the Child, especially expressed in the principle of the "best interests of the child."

Special protection measures that must be granted to children "surpass the exclusive control of the State" and Article 19 of the American Convention requires of States the existence of "a comprehensive policy for protection of children" and adoption of all measures required to ensure full enjoyment of their rights.

Substantive and procedural guarantees pertaining to special protection enshrined in Article 19 of the American Convention:

Due process guarantees and judicial protection are fully applicable "when solving disputes that involve children and adolescents, as well as regarding proceedings or procedures to establish their rights or their situation."

A. Substantive guarantees:

The purpose of Articles 8 and 25 of the American Convention is to "ensure effective protection of rights, surrounding it with indispensable procedural and substantive safeguards" for realization of the rights of children. Three of these stand out:

i. Principle of culpability (nulla poena sine culpa):

This principle, recognized in various international treaties, consists of the "need for culpability to exist for there to be punishment." As it is currently conceived, the principle of presumption of innocence is considered a "probatory rule or trial rule" and a "rule for treatment of the accused."

With respect to the practices that the Commission proposes in its request, it is necessary to establish that guilt is closely associated to chargeability, so a person lacking in psychological or physical faculties, whether due to lack of sufficient maturity or because he or she has severe physical alterations, cannot be declared guilty and, therefore, cannot be criminally responsible for his or her acts, even if they are defined as crimes and are against the law. Thus, immunity from prosecution is "a limitation of criminal responsibility based on intellective and volitional capacity," as well as on other significant factors that must be taken into account to establish immunity from prosecution.

A judicial decision on chargeability must not involve any type of discrimination nor stigmatization against those who are immune from prosecution, as in the case of children, such as their being considered inferior or incapable, but rather that "they are simply persons in situations of inequality." Therefore, establishment of their "immunity from prosecution" must derive from "a socio-political and political-criminological decision, that reflects the obligation of the State to consider their special condition in society," so they must respond for their actions, but in a different way than adults. The principle of equality must then be applied in the sense that "those who are unequal must be treated differently, to make them equal."

With respect to children, recognition of their special needs should be taken into account when they are granted entitlement to their rights, as well as when responsibilities are demanded of them. Currently, "what is sought is not to extend immunity from prosecution to adolescents, but rather [...] to establish their criminal responsibility," so their acts, while not being deemed crimes, will have legal consequences, consistent with their condition as persons, their dignity, their rights, and the special characteristics of each child.

Therefore, it is deemed that children under 18 but older than 12 or 14 "should not be considered criminally chargeable, but criminally responsible," taking into account that, as a minor, he or she

is a person who is immune from prosecution and "has faced obstacles to participate on an equal basis in society and to satisfy his or her needs," and therefore the State must take into account these circumstances and foster conditions that facilitate their integration into society.

Principle of lawfulness (nullum crimen, nulla poena sine lege):

Understood as a procedural guarantee, this principle seeks to ensure that "all proceedings take place in accordance with the law," as well as to establish a framework for action by the authorities in charge of deciding matters pertaining to minors.

This principle has been developed in case law of the Court and is found in international instruments, and it establishes the impossibility of "punishing an act without a law having previously sanctioned it as a crime." It also establishes the obligation to recognize immunity of minors from prosecution as regards their criminal responsibility, both to set the limits where this cause of immunity from prosecution begins and ends, and also regarding "the time within which the re-socializing treatment of the juvenile offender must be imposed."

Sometimes the principle of lawfulness is "confronted by reality," as there is legislation with provisions that abridge rights of children, "based exclusively on their personal or circumstantial conditions."

Even though the Constitutions of the countries of the region forbid arbitrary deprivation of liberty, the authorities often breach this guarantee with regard to minors, as they do not have a court order to detain them, they do not bring the child before a competent judicial authority within 24 hours, and because of the very conditions of detainment, all of which threaten the minor with subsequent violations.

iii. Principle of humane treatment:

The purpose of this principle is to forbid abuse by the authorities while a child is institutionalized or an offender is serving a sentence. It has three main consequences: to explicitly forbid torture or cruel, inhuman or degrading treatment; to state the aim of re-education and social resettlement of the children to whom these measures are applied; and to forbid application of the death penalty to persons who were under 18 at the time of the facts. Therefore, a measure that deprives liberty "can in no case involve the loss of some of the rights that are compatible with it, and even those rights that are necessary for adequate re-socialization must be recognized."

Furthermore, many detention centers do not have appropriate infrastructure, nor human or professional resources able to develop the educational and work programs that will enable the re-education and social resettlement sought by these measures.

B. Procedural guarantees:

These are all guarantees that must be respected because they are necessary in any judicial situation where a controversy regarding a right must be decided in an equitable manner. Thus, procedural guarantees must be recognized not only in proceedings where criminal

responsibilities are decided, but also “in all judicial or administrative processes where a there is a direct or indirect discussion of a fundamental right” of the children.

i. Principle of jurisdictionality:

Administration of justice must be entrusted to a competent, independent and impartial judge, pursuant to Article 8 of the American Convention. Likewise, when deciding about controversies or situations that involve children and adolescents, efforts must be made to preserve specialization by the bodies entrusted with this task. Furthermore, in criminal matters, the authorities must be judicial, except when there is a “transfer of proceedings” to administrative jurisdiction, in cases in which this is better for the parties involved, especially the child. The authorities in charge of solving conflicts that involve minors must also receive training, as a fundamental requirement for their functions.

ii. Presence of both parties:

It is crucial to establish the parties involved in the proceedings, as well as to guarantee the rights protected by law. For this, it is necessary to “grant equal opportunities to the parties to argue and defend their claims” and to provide “due balance among the parties to the proceedings.” Efforts must also be made for “the proceedings to include an actor, plaintiff or claimant party who is clearly distinct from the judicial function in charge of reaching a decision.”

Adequate legal advice and participation of parents or guardians during the proceedings enables protection required by the child due to his or her special condition.

iii. Principle of inviolability of defense:

This principle means that every person must effectively enjoy the right to adequately prepare his or her defense, which requires being informed of the charges and of the evidence against him or her, as well as the right to suitable legal representation throughout the proceedings, which “cannot be substituted by parents, psychologists, social assistants.” Furthermore, this right involves not submitting the detainee to tortures to obtain an admission that he or she committed the criminal act.

iv. Principle of the public nature of the proceedings:

In accordance with this principle, all parties to the proceedings must be informed of and have access to the procedural actions as “a means to control the development of the proceedings and to avoid placing any of them in a position of defenselessness.” Likewise, when minors are involved, publicity must be limited to benefit their dignity or privacy, as well as in situations where debate of the case may have negative consequences or lead to stigmatization.

v. Principle of appeal or review:

All persons, including children, have the right to enjoy the possibility of review of a decision to determine whether the law was adequately applied and to assess the facts and evidence, in all

proceedings where decisions are reached regarding some of their fundamental rights. Also, "this right is always expanded with the possibility of resorting to expedite remedies (habeas corpus or similar actions) against decisions that involve deprivation of liberty or prolonging it."

Conclusions

During the last decade, a new doctrinal scenario developed, based on international human rights law, called the "doctrine of comprehensive protection." It was founded on the recognition of children as legal persons, which has made it possible to leave the "theory of the irregular situation" behind. In this regard, "the Convention on the Rights of the Child, [has constituted] the foundation and cornerstone for the new doctrine."
With respect to Article 19 of the American Convention, the Inter-American Court "has given life to the substantive content of that provision, incorporating –for its interpretation and application- the body of provisions and of doctrine that have enabled an expansion of standards regarding this matter." This phenomenon has been developed by the concept of the "best interests of the child." All of this has made possible "substantial progress in protection of the human rights of children and adolescents, ensuring them in a better and more complete manner exercise of their rights and guarantees."

Effective recognition of the rights of children requires a major social and cultural movement, more than an "appropriate legislative framework", where the various agents play a fundamental role: civil society, regarding education and fostering children's rights at all levels; non-governmental organizations, by denouncing, defending and demanding children's rights; States by "ensuring fulfillment of protection measures inferred from Article 19 of the American Convention […] in light of the best interests of the child, as well as the other ratified treaties on this matter;" the bodies of the inter-American system, with respect to the challenge of expanding recognition and demanding compliance by the States parties to the American Convention.

Regarding the practices identified by the Inter-American Commission, they conclude that "in each and every one of them, due process guarantees and effective judicial protection must be applied," which necessarily affects the discretion of the State to decide on matters where the fundamental rights of minors are discussed.

Comisión Colombiana de Juristas:

In its August 2, 2002 brief, the Colombian Commission of Jurists stated that:

To be able to realize the aspiration to a new set of international provisions for the protection of children's rights, it is imperative to modify certain legislation in the region, that was enacted to address problems of children but especially those of children who broke criminal laws. To attain that objective, it is relevant to point out that it is not sufficient to establish a specialized criminal jurisdiction for children, which seeks to put an end to the "irregular situation" system that views children as objects rather than subjects of rights. This only deepens the presence of irregularities, since it is quite the contrary of the model of comprehensive protection that must be adopted and is, therefore, not consistent with the rights of juvenile offenders.

Therefore, children must be exempted from any application of criminal law, even if it is considered to be special in nature. The State must seek to fully guarantee children's rights to prevent children from entering criminal life. It must also ensure full exercise of those rights and the possibility of receiving a complete education in accordance with human dignity and human rights principles, especially those of tolerance, liberty, equality, and solidarity.

In this regard, it is important to highlight that "for prevention of juvenile crime, policies that seek to prevent crimes being committed by children must be set within the framework of a social policy, the overall aim of which should be to promote children's well-being." The States must strive to provide sufficient conditions for decent sustenance of the family, as children need the means for their complete physical, mental, and social development.

Furthermore, all efforts must be made to avoid separation of children from their family environment, as this should be a measure of last resort that, in any case, must be adopted with due respect for jurisdictional guarantees and must anyhow be in accordance with human dignity and therefore "in no case should it involve a reduction of rights, especially the right to liberty."

With respect to observance of criteria set forth regarding legal capacity of persons being established as a limit and a criterion with respect to children, it should be stated that most legislation deems that given their physical and mental development, it is only at the age of 18 that they are sufficiently mature for adult attitudes and, therefore, all those below that age are to be considered children or adolescents. This involves applying all guarantees and rights set forth for them, realizing that from this standpoint, all persons under 18 are unable to adequately decide, which involves greater attention by the State and the family to provide them with guidance, support, and care.

On the other hand, it is necessary to highlight that any decision by the State regarding juvenile offenders has as its main and almost exclusive objective education of the child or adolescent, whose guidance must be set within the principles of protection and satisfaction of the children's needs. These criteria, per se, make it necessary to set aside any application of criminal law, even if the latter is special, to children because its purpose is not education of nor care for the perpetrator, but rather punishment for incurring in the crimes defined by law.

In light of the above, it concludes that:

1. the American Convention on Human Rights must be interpreted in such a way that it reaffirms the obligation of the State to protect children and guarantee their rights;
2. ensuring the necessary conditions for support of children is the best way to prevent crimes being committed by children and youths;
3. juvenile offenders must receive treatment in accordance with the respective guarantees, primarily seeking their education and completely outside the framework of criminal law. Every effort must be made to avoid deprivation of liberty, which should only be a measure of last resort;
4. systems to address children's needs must include educational programs for parents and teachers, and those in charge of assistance programs for children must be trained in the area of children's human rights; and

5. States must undertake to make every effort to prevent violations of the rights of children, and to investigate and punish whoever breaches those rights, as well as to restore the rights breached.

III. COMPETENCE

16. This request for an advisory opinion was filed before the Court by the Commission, exercising the authority granted by Article 64(1) of the Convention, which states that:

[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. [FN7]

[FN7] Chapter VIII of the Charter of the Organization of American States stipulates that the Inter-American Commission is one of the organs of the OAS.

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17. The aforementioned authority has been exercised in this case fulfilling the respective requirements as set forth in the Rules of Procedure: precise statement of the questions on which the opinion of the Court is being sought, identification of the provisions to be interpreted, and the name and address of the Delegate, and submission of the considerations giving rise to the request (Article 59 of the Rules of Procedure), as well as identification of the international instruments other than the American Convention on which an interpretation is also requested (Article 60(1)).

18. The Commission asked the Court to "interpret whether Articles 8 and 25 of the American Convention on Human Rights constitute limits to the good judment and discretion of the States to issue special measures of protection in accordance with Article 19 of the Convention," and for this it proposed five hypothetical practices for the Court to decide on their compatibility with the American Convention, as follows:

a) separation of young persons from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
b) deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
c) the acceptance of confessions by minors in criminal matters without due guarantees;
d) judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and
e) determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.

The Court was also asked to issue "valid general criteria" regarding these matters.

19. Fulfillment of the requirements set forth in the Rules of Procedure regarding submission of a request for an advisory opinion does not mean that the Court is under the obligation to respond to it. In this regard, the Court must take into account considerations that transcend merely formal aspects [FN8] and that are reflected in the generic limits that the Court has recognized in exercising its advisory function. [FN9] Said considerations are addressed in the following paragraphs.

[FN8] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 31; and Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No.15, para. 31.

[FN9] "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 13.

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20. The Commission requested a juridical interpretation of certain precepts of the American Convention, and subsequently expanded its proposal and requested the interpretation of other treaties, mainly the Convention on the Rights of the Child, insofar as these treaties might contribute to specify the scope of the American Convention. For this, the Court must first of all decide whether it is invested with the authority to interpret, by means of an advisory opinion, international treaties other than the American Convention [FN10], when their provisions contribute to specify the meaning and scope of provisions contained in the latter.

[FN10] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 32; and "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, para. 19. The Court, exercising its contentious jurisdiction, has gone beyond merely interpreting treaties other than the American Convention, as it has applied treaties such as the Inter-American Convention on Forced Disapperance of Persons to determine the international responsibility of States in a specific case. Cfr. Bámaca Velásquez Case. November 25, 2000 Judgment. Series C No. 70, para. 126 and 157; Cantoral Benavides Case. August 18, 2000 Judgment. Series C No. 69, para. 98, 100 and 101; Villagrán Morales et al. Case ("Street Children" Case). November 19, 1999 Judgment. Series C No. 63, chapter XIII; and Paniagua Morales et al. Case. March 8, 1998 Judgment. Series C No. 37, para. 133.

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21. The Court has set certain guidelines for interpretation of international provisions that do not appear in the American Convention. For this, it has resorted to the general provisions set forth in the Vienna Convention on the Law of Treaties, especially the principle of good faith to

ensure agreement of a norm with the object and purpose of the Convention. [FN11] This Court has also established that interpretation must take into account “the changes over time and present-day conditions,” [FN12] and that the interpretation of other international instruments cannot be used to limit the enjoyment and exercise of a right; also, it must contribute to the most favorable application of the provision to be interpreted.

[FN11] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 49.
[FN12] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, paras. 113-114.

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22. Likewise, this Court established that it could “interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system,” [FN13] even if said instrument did not issue from the same regional protection system, [FN14] and that

[n]o good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system. [FN15]

[FN13] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 36; Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 44; and "Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, para. 21.
[FN14] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 71 and 109; and “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, para. 38.
[FN15] “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, para. 48. Also see paras. 14, 31, 37, 40 and 41.

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23. The Court has also had the opportunity to refer specifically to the Convention on the Rights of the Child, to which the Commission refers in the instant request for an advisory opinion, through the analysis of Articles 8, 19 and 25 of the American Convention. In the “Street Children” Case (Villagrán Morales et al.), in which Article 19 of the American Convention was applied, the Court resorted to Article 1 of the Convention on the Rights of the Child as an instrument to define the scope of the concept of “child.” [FN16]

[FN16] Villagrán Morales et al. Case. November 19, 1999 Judgment. Series C No. 63, para. 188.

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24. In that case, the Court highlighted the existence of a "very comprehensive international corpus juris for the protection of the child" (which the Convention on the Rights of the Child and the American Convention are part of), which should be used as a source of law by the Court to establish "the content and scope" of the obligations undertaken by the State through Article 19 of the American Convention, specifically with respect to identification of the "measures of protection" to which the aforementioned precept refers. [FN17]

[FN17] Villagrán Morales et al. Case, supra note 10 para. 194.

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25. Children constitute a group to whom the international community has paid much attention. The first international instrument regarding them was the 1924 Geneva Declaration, adopted by the International Association for the Protection of Children. [FN18] This Declaration recognized that humanity must give children the best of itself, as a duty that is above all considerations of race, nationality, or creed.

[FN18] Declaration on the Rights of the Child, Geneva, 1924. Introduction.

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26. At least 80 international instruments adopted during the 20th century are applicable to children in various degrees. [FN19] Among them, the following stand out: the Declaration on the Rights of the Child, adopted by the General Assembly of the United Nations (1959), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), [FN20] the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990) [FN21] and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines, 1990). [FN22] This same circle of child protection includes Agreement 138 and Recommendation 146 of the International Labor Organization and the International Covenant on Civil and Political Rights.

[FN19] Inter alia, International Labor Convention Number 16 Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (1921), International Labor Convention Number 58 Fixing the Minimum Age for the Admission of Children to Employment at Sea (1936), Universal Declaration of Human Rights (1948), American Declaration of the Rights and Duties of Man (1948), International Labor Convention Number 90 Concerning the Night Work of Young Persons Employed in Industry (1948), Convention on the Prevention and Punishment of the Crime of Genocide (1948), Geneva Convention relative to the Protection of Civilian Persons in time of War (1949), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), Convention relating to the Status of Stateless Persons (1954), Convention on Recovery Abroad of

Maintenance (1956), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), International Labor Convention Number 112 Concerning the Minimum Age for Admission to Employment as Fishermen (1959), Declaration on the Rights of the Child (1959), Convention against Discrimination in Education (1960), Convention on the Reduction of Statelessness (1961), Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), International Labor Convention Number 123 Concerning the Minimum Age for Admission to Employment Underground in Mines (1965), International Labor Convention Number 124 Concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines (1965), Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples (1965), Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1965), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Declaration on the Elimination of All Forms of Discrimination against Women (1967), Declaration on Social Progress and Development (1969), American Convention on Human Rights (1969), Declaration on the Rights of Mentally Retarded Persons (1971), International Labor Convention Number 138 concerning Minimum Age for Admission to Employment (1973), Universal Declaration on the Eradication of Hunger and Malnutrition (1974), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), Declaration on the Rights of Disabled Persons (1975), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to Protection of Victims of International Armed Conflicts (Protocol I) (1977), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), Convention on the Elimination of All Forms of Discrimination against Women (1979), Declaration on Race and Racial Prejudice (1978), Convention on Civil Aspects of International Child Abduction (1980), Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981), Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (1984), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985), Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (1985), Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986), International Labor Convention Number 168 Concerning Employment Promotion and Protection against Unemployment (1988), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (1988), Inter-American Convention on Support Obligations (1989), and Inter-American Convention on the International Return of Children (1989), Convention on the Rights of the Child (1989), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Convention for the Protection of Minors and International Cooperation in Respect of Intercountry Adoption (1993), Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children (1990), World Declaration on the Survival, Protection and Development of Children (1990), United Nations Guidelines for the Prevention of Juvenile Delinquency (1990), United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1993), Resolution on the Instrumental Use of

Children in Criminal Activities (1990), Resolution on the Rights of the Child (1993), and Vienna Declaration and Plan of Action (1993).
[FN20] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter "Beijing Rules"). Adopted by the General Assembly of the United Nations in resolution 40/33, of November 29, 1985, Fifth Part, Institutional Treatment.
[FN21] United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter the "Tokyo Rules"). Adopted by the General Assembly in resolution 45/110, of December 14, 1990.
[FN22] United Nations Guidelines for the Prevention of Juvenile Delinquency (hereinafter "Riyadh Guidelines"). Adopted and proclaimed by the General Assembly in resolution 45/112, of December 14, 1990.
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27. As regards the inter-American system for the protection of human rights, it is necessary to take into consideration Principle 8 of the American Declaration of the Rights and Duties of Man (1948) and Article 19 of the American Convention, as well as Articles 13, 15 and 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"). [FN23]

[FN23] Signed at the General Assembly of the OAS, San Salvador, El Salvador, on November 17, 1998; it entered into force in November, 1999.
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28. With respect to the aforementioned Article 19 of the American Convention, it is worth highlighting that when it was drafted there was a concern for ensuring due protection of children, by means of State mechanisms directed toward this end. Today, this precept requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection.

29. The Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows a broad international consensus (opinio iuris comunis) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter. It should be highlighted that the various States of the hemisphere have adopted provisions in their legislation, both constitutional [FN24] and regular, [FN25] regarding the matter at hand; the Committee on the Rights of the Child has repeatedly referred to these provisions.

[FN24] Inter alia, Article 14, Constitution of Argentina, (May 1, 1853); Article 8(e) Constitution of Bolivia, (February 2, 1967); Article 42, Constitution of Colombia, (July 4, 1991); Articles 51, 52, 53, 54 and 55, Constitution of Costa Rica, (November 7, 1949); Articles 35-38, Constitution of Cuba, (February 24, 1976); Article 1(2) Constitution of Chile, (August 11, 1980); Articles 37 and 40, Constitution of Ecuador; Articles 32, 34, 35 and 36, Constitution of El Salvador, (San Salvador, December 15, 1983); Articles 20, 47, 50 and 51, Constitution of Guatemala, (May 31, 1985); Article 111, Constitution of Honduras, (January 11, 1982); Articles 35, 70, 71, 73, 75 and 76, Constitution of Mexico; Articles 35, 70, 71, 73, 75 and 76, Constitution of Nicaragua,

(November 19, 1986); Articles 35, 70, 71, 73, 75 and 76, Constitution of Panama, (October 11, 1972); Articles 49, 50, 53, 54, 55 and 56, Constitution of Paraguay, (June 20, 1992); Article 4, Constitution of Peru, (October 31, 1993); Articles 40, 41 and 43, Constitution of Uruguay, (August 24, 1966); and Article 75, Constitution of Venezuela, 1999.
[FN25] See, inter alia, Brazil: Federal Law 8069 of July 13, 1990; Costa Rica: Juvenile Criminal Justice Law of May 1, 1996 and Childhood and Adolescence Code of February 6, 1998; Ecuador: Juvenile Law of July 16, 1992; El Salvador: Law of Juvenile Offenders of October 1, 1994; Guatemala: Childhood and Adolescence Code, adopted on September 26, 1996; Honduras: Childhood and Adolescence Code of September 5, 1996; Nicaragua: Childhood and Adolescence Code of December 1, 1998; Venezuela: Organic Law for the Protection of Children and Adolescents, of 1999; Guatemala: decree 78/96 of 1996; Peru: Law No. 27337 of 2000; and Bolivia: Law No. 1403 of 1992.
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30. If this Court resorted to the Convention on the Rights of the Child to establish what is meant by child in the framework of a contentious case, all the more so can it resort to said Convention and to other international instruments on this matter when it exercises is advisory function, "relating not only to the interpretation of the Convention but also to 'other treaties concerning the protection of human rights in the American states."' [FN26]

[FN26] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 11 para. 34.
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31. Following its practice regarding advisory opinions, the Court must establish whether issuing an advisory opinion might "have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being." [FN27]

[FN27] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 43; and "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9; second opinion.
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32. The Court can use several parameters when it conducts this examination. One of them, which is consistent with most international case law on this subject matter, [FN28] is that it might be inconvenient for there to be a premature determination on a theme or issue that might subsequently be brought before the Court in the context of a contentious case. [FN29] However, this Court has stated that the existence of a controversy regarding interpretation of a provision is not, per se, an impediment to exercise its advisory function. [FN30]

[FN28] See: Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177, para. 29-36;

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 27-41; Western Sahara, Advisory Opinion, I.C.J. Reports 1975; Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15, para. 6 and 19); and I.C.J.: Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 68 (71, 72).

[FN29] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 45; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). November 13, 1985 Advisory Opinion OC-5/85. Series A No. 5, para. 22.

[FN30] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8 para. 45; Compatibility of Draft Legislation with Article 8(2)(h) American Convention on Human Rights. December 6, 1991 Advisory Opinion OC-12/91. Series A No. 12, para. 28; and Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 11, para. 38.

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33. When it exercises its advisory function, the Court is not called upon to decide on matters of fact, but rather to elucidate the meaning, purpose and reason of international human rights provisions. [FN31] The Court carries out its advisory function within this framework. [FN32] The Court has asserted the distinction between its advisory and contentious jurisdiction several times, by stating that

[t]he advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no “parties” involved in the advisory proceedings nor is there any dispute to be settled. The sole purpose of the advisory function is “the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” The fact that the Court’s advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.

[...] The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the “Member States”, which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure. [FN33]

[FN31] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 47; and International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). December 9, 1994 Advisory Opinion OC-14/94. Series A No. 14, para. 23.

[FN32] Cfr. The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8 para. 47; Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 11, para. 32; and I.C.J., Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, para. 65.
[FN33] Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), supra note 8, para. 25 and 26.
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34. As it affirms its competence regarding this matter, the Court recalls the broad scope of its advisory function, [FN34] unique in contemporary international law, [FN35] which enables it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations" [FN36] and to

assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. [FN37]

[FN34] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8 para. 64; Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica. January 19, 1984 Advisory Opinion OC-4/84. Series A No. 4, para. 28; and "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, para. 37.
[FN35] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 64; and Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 11, para. 43.
[FN36] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 64; and "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), supra note 9, No. 1, para. 39.
[FN37] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 11, para. 43.
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35. The Court deems that pointing out a few examples [FN38] serves the purpose of referring to a specific context [FN39] and of illustrating the various interpretations that may exist regarding the juridical issue that is the subject matter of the instant Advisory Opinion [FN40] being discussed, without this involving a juridical statement by the Court on the situation posed in said examples. [FN41] The latter also allow the Court to point out that its Advisory Opinion is not mere academic speculation and that its interest is justified due to the benefit it may bring to international protection of human rights. [FN42] In addressing the issue, the Court is acting in its role as a human rights tribunal, guided by the international instruments that govern its advisory jurisdiction, and it conducts a strictly juridical analysis of the questions posed to it.

[FN38] See Request for an Advisory Opinion; brief with additional comments by the Commission and appendices; second brief with additional comments by the Commission;

Transcript of the public hearing: Presentation by the Inter-American Commission; and briefs by the Federación Coordinadora Nicaragüense de ONGs que Trabajan con la Niñez y la Adolescencia, Fundación Rafael Preciado Hernández, of Mexico, Center for Justice and International Law, and State of Costa Rica.

[FN39] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 49; and Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Human Rights). October 6, 1987 Advisory Opinion OC-9/87. Series A No. 9, para. 16.

[FN40] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 49; and Restrictions to the Death Penalty (Arts. 4(2) and 4(4), American Convention on Human Rights), supra note 11, para. 44 in fine and 45.

[FN41] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 49; and International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2, American Convention on Human Rights), supra note 31, para. 27.

[FN42] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 49.

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36. Therefore the Court deems that it must examine the matters posed in the request that is now analyzed and it must issue the respective Advisory Opinion.

IV. STRUCTURE OF THE OPINION

37. It is inherent to the authority of the Court for it to have the authority to structure its pronouncements in the manner it deems most adequate for the interests of justice and for an advisory opinion. For this, the Court takes into account the basic issues that underlie the questions raised in the request for an advisory opinion and analyzes them to reach general conclusions that, in turn, may apply to the specific points mentioned in the request itself and to other related themes. In this instance, the Court has decided to address, first of all, the more substantive conceptual themes that will allow demarcation of the analysis and conclusions regarding specific, especially procedural matters submitted to it for consideration.

V. DEFINITION OF CHILD

38. Article 19 of the American Convention, which orders special measures of protection in favor of children, does not define this concept. Article 1 of the Convention on the Rights of the Child states that a "child [is] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." [FN43]

[FN43] Likewise, see Villagrán Morales et al. Case, supra note 10, para. 188.

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39. In the Beijing Rules, in the Tokyo Rules and in the Riyadh Guidelines, the terms “child” and “juvenile” are used to refer to the individuals to whom their provisions are directed. According to the Beijing Rules, a “juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.” [FN44] The Tokyo Rules do not state any exceptions to the age limit of 18 years.

[FN44] Rule 2.2a. Beijing Rules.

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40. At this time, the Court will not address the implications of the various expressions used to refer to the members of this population group under the age of 18. Some of the positions expressed by participants in the proceedings in connection with this Opinion noted the difference between a child and a minor, from certain perspectives. For the aims sought by this Advisory Opinion, the difference established between those over and under 18 will suffice.

41. Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person.

42. Finally, taking into account international norms and the criterion upheld by the Court in other cases, “child” refers to any person who has not yet turned 18 years of age. [FN45]

[FN45] The term child, obviously, encompasses boys, girls, and adolescents.

VI. EQUALITY

43. As both Mexico and Costa Rica, as well as the Inter-American Institute of Children, ILANUD and CEJIL noted, it is necessary to specify the meaning and scope of the principle of equality with respect to the matter of children. Previously, this Court has stated that Article 1(1) of the American Convention places the States under the obligation to respect and guarantee full and free exercise of the rights and liberties recognized therein, with no discrimination. Any treatment that can be considered discriminatory with respect to the rights protected by the Convention is, per se, incompatible with it. [FN46]

[FN46] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 53.

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44. In a more specific sense, Article 24 of the Convention protects the principle of equality before the law. Thus, the general prohibition of discrimination set forth in Article 1(1) “extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.” [FN47]

[FN47] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 54.

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45. In an Advisory Opinion, the Court noted that

[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character. [FN48]

[FN48] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 55.

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46. Now, when the Court examined the implications of differentiated treatment given to the beneficiaries of certain provisions, it established that “not all differences in treatment are in themselves offensive to human dignity.” [FN49] In this same sense, the European Court of Human Rights, based on “the principles that can be inferred from the juridical practice of a large number of democratic States,” warned that a distinction is only discriminatory when it “lacks objective and reasonable justification.” [FN50] There are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness in which they find themselves.

[FN49] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 55.

[FN50] Eur. Court H.R., Case of Willis v. The United Kingdom, Judgment of 11 June, 2002, para. 39; Eur. Court H.R., Case of Wessels-Bergervoet v. The Netherlands, Judgment of 4th June, 2002, para. 42; Eur. Court H.R., Case of Petrovic v. Austria, Judgment of 27th of March, 1998, Reports 1998-II, para. 30; Eur. Court H.R., Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, Judgment of 23rd July 1968, Series A 1968, para. 34.

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47. This Court also determined that:

[a]ccordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind. [FN51] (infra 97).

[FN51] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 57.

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48. The Inter-American Court itself has established that “it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.” [FN52]

[FN52] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, supra note 34, para. 56.

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49. At this point, it is appropriate to recall that Article 2 of the Convention on the Rights of the Child [FN53] provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. [FN54]

[FN53] Principle 1 of the Declaration on the Rights of the Child (1959) stated: The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.
[FN54] The principle of non-discrimination has been analyzed by the Committee on the Rights of the Child, which has stated its position several times; cfr., inter alia, Report of the Committee

on the Rights of the Child in Paraguay, 2001; Report of the Committee on the Rights of the Child in Guatemala, 2001; and Report of the Committee on the Rights of the Child in Belize, 1999.

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50. Likewise, the general principles of the Beijing Rules establish that

[they] shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

51. In its General Comment 17 on the International Covenant on Civil and Political Rights, the Human Rights Committee pointed out that Article 24(1) of that instrument recognizes the right of every child, with no discrimination, to the protection measures required by his or her condition as a child, both on the part of his or her family and on the part of society and the State. [FN55] Applying this provision involves adopting special measures for protection of children in addition to those that the States must adopt, pursuant to Article 2, to ensure that all persons enjoy the rights set forth in the Covenant. [FN56] The Committee pointed out that the rights set forth in Article 24 are not the only ones applicable to children: "as individuals, children benefit from all of the civil rights enunciated in the Covenant." [FN57]

[FN55] Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
[FN56] Human Rights Committee, General Comment 17, Rights of Child (Art. 24), 07/04/1989, CCPR/C/35, paras. 1 and 2.
[FN57] Human Rights Committee, General Comment 17, Rights of Child (Art. 24), 07/04/1989, CCPR/C/35, para. 2.

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52. The Committee also stated that

[t]he Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. In this connection, the Committee notes that, whereas non-discrimination in the enjoyment of the rights provided for in the Covenant also stems, in the case of children, from article 2 and their equality before the law from article 26, the non-discrimination clause contained in article 24 relates specifically to the measures of protection referred to in that provision. [FN58]

[FN58] Human Rights Committee, General Comment 17, Rights of Child (Art. 24), 07/04/1989, CCPR/C/35, para. 5.

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53. The ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights. It is

the responsibility of the State to specify the measures it will adopt to foster this development within its own sphere of competence and to support the family in performing its natural function of providing protection to the children who are members of the family. [FN59]

[FN59] By the same token, see Human Rights Committee, General Comment 17, Rights of Child (Art. 24), 07/04/1989, CCPR/C/35, p. 2.

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

55. It can be concluded that, due to the conditions in which children find themselves, differentiated treatment granted to adults and to minors is not discriminatory per se, in the sense forbidden by the Convention. Instead, it serves the purpose of allowing full exercise of the children's recognized rights. It is understood that, in light of Articles 1(1) and 24 of the Convention, the States cannot establish distinctions that lack an objective and reasonable justification and that do not have as their only objective, ultimately, exercise of the rights set forth in the Convention.

VII. BEST INTERESTS OF THE CHILD

56. This regulating principle regarding children's rights is based on the very dignity of the human being, [FN60] on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.

[FN60] By the same token, see the preamble of the American Convention.

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57. In this regard, principle 2 of the Declaration on the Rights of the Child (1959) sets forth:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. (Not underlined in the original text)

58. The aforementioned principle is reiterated and developed in Article 3 of the Convention on the Rights of the Child, which states:

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. (Not underlined in the original text) [FN61]
[…]

[FN61] The Committee on the Rights of the Child has established the need for inclusion in legislation or to implement legal provisions, as one of the main recommendations to address the best interests of the child; inter alia, Report of the Committee on the Rights of the Child in Paraguay, 2001; Report of the Committee on the Rights of the Child in Guatemala, 2001; Report of the Committee on the Rights of the Child in the Dominican Republic, 2001; Report of the Committee on the Rights of the Child in Surinam, 2000; Report of the Committee on the Rights of the Child in Venezuela, 1999; Report of the Committee on the Rights of the Child in Honduras, 1999; Report of the Committee on the Rights of the Child in Nicaragua, 1999; Report of the Committee on the Rights of the Child in Belize, 1999; Report of the Committee on the Rights of the Child in Ecuador, 1999; and Report of the Committee on the Rights of the Child in Bolivia, 1998.

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59. This matter is linked to those discussed in previous paragraphs, if we take into account that the Convention on the Rights of the Child refers to the best interests of the child (Articles 3, 9, 18, 20, 21, 37 and 40) as a reference point to ensure effective realization of all rights contained in that instrument. Their observance will allow the subject to fully develop his or her potential. [FN62] Actions of the State and of society regarding protection of children and promotion and preservation of their rights should follow this criterion.

[FN62] Likewise, principle 7 of the Declaration on the Rights of the Child (1959) set forth:
The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
Principle 10 of the International Conference on Population and Development, adopted from September 5 to 13, 1994 in Cairo, Egypt (1994), also states:
[…]
The best interests of the child shall be the guiding principle of those responsible for his or her education and guidance; that responsibility lies in the first place with the parents.
[…]

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60. By the same token, it should be noted that the preamble of the Convention on the Rights of the Child [FN63] establishes that children require “special care,” and Article 19 of the American Convention states that they must receive “special measures of protection.” In both cases, the need to adopt these measures or care originates from the specific situation of children, taking into account their weakness, immaturity or inexperience.

[FN63] The need to provide special protection to children has been stated in the 1924 Geneva Declaration on the Rights of the Child and in the Declaration on the Rights of the Child adopted by the General Assembly on November 20, 1959, and has been recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (especially in Articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (especially in Article 10) and in the relevant statutes and instruments of specialized bodies and of international organizations interested in the well-being of children. The Declaration on the Rights of the Child states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

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61. In conclusion, it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.

VIII. DUTIES OF THE FAMILY, SOCIETY, AND THE STATE

The family as a focal point for protection

62. Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong. In this regard, Article 16 of the San Salvador Protocol states that:

[e]very child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

63. By the same token, Article 3 of the Convention on the Rights of the Child has established that:

[…]
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

64. In addition to the above, is necessary to faithfully comply with the obligations set forth in Article 4 of the Convention on the Rights of the Child, which states that

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

65. To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter.

66. In principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, "[r]ecognition of the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a fundamental principle of International Human Rights Law, enshrined in Articles 16(3) of the Universal Declaration, [FN64] VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights [FN65] and 17(1) of the American Convention. [FN66]

[FN64] The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
[FN65] The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
[FN66] The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

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67. The Riyadh Guidelines have stated that "the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children [...]" (twelfth paragraph). The State must also safeguard stability of the household, facilitating, through its policies, provision of adequate services for the families, [FN67] ensuring conditions that enable attainment of a decent life (infra 86).

[FN67] Riyadh Guideline No. 13 provides that:
Governments should establish policies that are conducive to the bringing up of children in stable and settled family environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services.

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68. Article 4 of the Declaration on Social Progress and Development (1969), proclaimed by the General Assembly of the United Nations in resolution 2542 (XXIV), of December 11, 1969, declared:

The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.

69. The Human Rights Committee of the United Nations referred to entitlement to the rights protected by Articles 17 and 23 of the International Covenant on Civil and Political Rights. [FN68] It is important to take into account the scope of the concept of family to base the rights and powers we are referring to. The European Court of Human Rights has repeatedly stated that the concept of family life “is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage.” [FN69]

[FN68] Aumeeruddy-Cziffaand others v. Mauritius Case 09/04/81, CCPR/C/12/D/35/1978, para. 92 (b).
[FN69] Eur. Court H.R., Keegan v. Ireland, Judgment of 26 May 1994, Series A no. 290, para. 44; and Eur. Court H.R., Case of Kroon and Others v. The Netherlands, Judgment 27th October, 1994, Series A no. 297-C, para. 30.

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70. The Inter-American Court has addressed this point from the perspective of the next of kin of the victim of a human rights violation. In this regard, the Court deems that the term “next of kin” must be understood in a broad sense that encompasses al persons linked by close kinship. [FN70]

[FN70] Cfr. Trujillo Oroza Case. Reparations (Art. 63(1) American Convention on Human Rights). February 27, 2002 Judment. Series C No. 92, para. 57; Bámaca Velásquez Case. Reparations (Art. 63(1) American Convention on Human Rights). February 22, 2002 Judment. Series C No. 91, para. 34; and Villagrán Morales et al. Case. Reparations (Art. 63(1) American Convention on Human Rights). May 26, 2001 Judgment. Series C No. 77, para. 68.

Exceptional separation of the child from his or her family

71. The child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs. Every person’s right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights, [FN71] V of the American Declaration of the Rights and Duties of Man, [FN72] 17 of the International Covenant on Civil and Political Rights, [FN73] 11(2) of the American Convention on Human Rights, [FN74] and 8 of the European Human Rights Convention. [FN75] These provisions are especially significant when separation of a child from his or her family is being analyzed.

[FN71] No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
[FN72] Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.
[FN73] No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
[FN74] 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.
3. Everyone has the right to the protection of the law against such interference or attacks.
[FN75] In this regard, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that
1.- Everyone has the right to respect for his private and family life, his home and his correspondence.
2.- There 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.

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72. The European Court has established that mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life; [FN76] and that even when the parents are separated, harmonious family relations must be ensured. [FN77] Measures that impede this enjoyment are an interference with the right protected by Article 8 of the Convention. [FN78] The Court itself has pointed out that the essential content of this precept is protection of the individual in face of arbitrary action by public authorities. One of the most grave interferences is that which leads to division of a family.

[FN76] Eur. Court H.R., Case of Buchberger v. Austria, Judgment of 20 December 2001, para. 35; Eur. Court H.R., Case of T and K v. Finland, Judgment of 12 July 2001, para. 151; Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 43; Eur. Court H.R., Case of Bronda v. Italy, Judgment of 9 June 1998, Reports 1998-IV, para. 51; and Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-IV, para. 52.
[FN77] Eur. Court H.R., Case of Ahmut v. the Netherlands, Judgment of 27 November 1996, Reports 1996-VI, para. 60; Eur. Court H.R., Case of Gül v. Switzerland, Judgment of 19 February 1996, Reports 1996-I, para. 32; and Eur. Court H.R, Case of Berrehab v. the Netherlands, Judgment of 21 June 1988, Series A no. 138, para. 21.
[FN78] inter alia, Eur. Court H.R., Case of Buchberger v. Austria, Judgment of 20 November 2001, para. 35; Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 43; Eur. Court H.R., Case Bronda v. Italy, Judgment of 9 June 1998, Reports 1998-IV, para. 51; and Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-III, para 52.

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73. Any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child. [FN79] In this regard, Riyadh Guideline 14 set forth that:

[w]here a stable and settled family environment is lacking and when community efforts to assist parents in this regard have failed and the extended family cannot fulfill this role, alternative placements, including foster care and adoption, should be considered. Such placements should replicate, to the extent possible, a stable and settled family environment, while, at the same time, establishing a sense of permanency for children, thus avoiding problems associated with "foster drift".

[FN79] Eur. Court H.R., Case of T and K v. Finland, Judgment of 12 July 2001, para. 168; Eur. Court H.R., Case of Scozzari and Giunta v. Italy, Judgment of 11 July 2000, para. 148; and Eur. Court H.R., Case of Olsson v. Sweden (no. 1), Judgment of 24 March 1988, Series A no. 130, para. 72.

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74. The European Court itself has shown that in certain cases the authorities have very broad powers to decide what is in the best interest of the child. [FN80] However, one must not lose sight of existing limitations in several areas, such as access by the parents to the minor. Some of these measures endanger family relations. There must be a fair balance between the interests of the individual and those of the community, as well as between those of the minor and of his or her parents. [FN81] Recognition of the authority of the family does not mean that the family can arbitrarily control the child, in a manner that would entail damage to the minor’s health and development. [FN82] These and other associated concerns determine the content of various precepts of the Convention on the Rights of the Child (Articles 5, 9, 19 and 20, inter alia).

[FN80] Eur. Court H.R., Case of Buchberger v. Austria, Judgment of 20 November 2001, para. 38; Eur. Court H.R., Case of K and T v. Finland, Judgment of 12 July 2001, para. 154; Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 48; Eur. Court H.R., Case of Scozzari and Giunta, Judgment of 11 July 2000, para. 148; Eur. Court H.R., Case of Bronda v. Italy, Judgment of 9 June 1998, Reports 1998-IV, para. 59; Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-III, para. 64; and Eur. Court H.R., Case of Olsson v. Sweden (no. 2), Judgment of 27 November 1992, Series A no. 250, para. 90.

[FN81] inter alia, Eur. Court. H.R., Case of Buchberger v. Austria, Judgment of 20 November 2001, para. 40; Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 50; Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-III, para 78; and Eur. Court H.R., Case of Olsson v. Sweden (no. 2), Judgment of 27 November 1992, Series A no. 250, para. 90.

[FN82] Eur. Court. H.R., Case of Buchberger v. Austria, Judgment of 20 December 2001, para. 40; Eur. Court H.R., Case of Scozzari and Giunta v. Italy, Judgment of 11 July 2000, para. 169;

and Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 50; and Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-IV, para. 78.
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75. This Court highlights the travaux préparatoires of the Convention on the Rights of the Child, which considered the need for separations of children from their family nucleus to be duly justified and preferably temporary, and for the child to be returned to his or her parents as soon as circumstances allow. The Beijing Rules (17, 18 and 46) made a similar statement.

76. Lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family, and the resulting deprivation of other rights protected by the Convention.

77. In conclusion, the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary.

Institutions and staff

78. Effective and timely protection of the interests of the child and the family must be provided through intervention by duly qualified institutions, with appropriate staff, adequate facilities, suitable means and proven experience in this type of tasks. In brief, it is not enough for there to be jurisdictional or administrative bodies involved; they must have all the necessary elements to safeguard the best interests of the child. In this regard, the third paragraph of Article 3 of the Convention on the Rights of the Child stipulates that:

[…]
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. [FN83]

[FN83] Likewise, the Beijing Rules have dealt with several important aspects of an effective, fair and humanitarian administration of juvenile justice set within adequate professional expertise and training of experts as a valuable means to ensure judicious use of discretionary powers regarding juvenile crime. (See rules 1.6, 2.2, 6.1, 6.2 and 6.3.)
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79. This must permeate the activity of all persons intervening in the proceedings, who must discharge their respective duties taking into account both the nature of these, in general, and the bests interests of the child vis-à-vis the family, society, and the State itself, specifically. Decisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights. [FN84]

[FN84] Training of officials in charge of childhood and adolescence (Report of the Committee on the Rights of the Child in Costa Rica, 2000; and Report of the Committee on the Rights of the Child in Saint Kitts and Nevis, 1999).

Living conditions and education of the child

80. Regarding conditions for care of children, the right to life that is enshrined in Article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also the obligation to provide the measures required for life to develop under decent conditions. [FN85] The concept of a decent life, developed by this Court, relates to the norm set forth in the Convention on the Rights of the Child, Article 23(1) of which states the following, with reference to children who suffer some type of disability:

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

[FN85] Villagrán Morales et al. Case, supra note 10, para. 144.

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81. Full exercise of economic, social, and cultural rights of children has been associated with the possibilities of the State that is under the obligation (Article 4 of the Convention on the Rights of the Child), which must make its best effort, in a constant and deliberate manner, to ensure access of children to those rights, and their enjoyment of such rights, avoiding regressions and unjustifiable delays, and allocating as many available resources as possible to this compliance. The International Conference on Population and Development (Cairo, 1994) [FN86] highlighted that

[a]ll States and families should give highest possible priority to children. The child has the right to standards of living adequate for its well-being and the right to the highest attainable standards of health, and the right to education. [...] (principle 11)

[FN86] Principle 11 of the International Conference on Population and Development adopted from September 5 to 13, 1994 in Cairo, Egypt (1994).

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82. Likewise, the II World Conference on Human Rights (Vienna, 1993) [FN87] stated specifically that

[n]ational and international mechanisms and programmes should be strengthened for the defence and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child

prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies. [FN88]

[FN87] II World Conference on Human Rights adopted from June 14 to 25, 1993 in Vienna, Austria.

[FN88] Principle 10 of the International Conference on Population and Development adopted from September 5 to 13, 1994 in Cairo, Egypt (1994). Likewise, the World Conference on Human Rights, the Vienna Declaration and Program of Action (1993), page 69.

[...] The World Conference on Human Rights considers human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.

[...] States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The World Conference on Human Rights calls on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.

[...] Human rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights.

[...] Taking into account the World Plan of Action on Education for Human Rights and Democracy, adopted in March 1993 by the International Congress on Education for Human Rights and Democracy of the United Nations Educational, Scientific and Cultural Organization, and other human rights instruments, the World Conference on Human Rights recommends that States develop specific programmes and strategies for ensuring the widest human rights education and the dissemination of public information, taking particular account of the human rights needs of women.

[...] Governments, with the assistance of intergovernmental organizations, national institutions and non-governmental organizations, should promote an increased awareness of human rights and mutual tolerance. The World Conference on Human Rights underlines the importance of strengthening the World Public Information Campaign for Human Rights carried out by the United Nations. They should initiate and support education in human rights and undertake effective dissemination of public information in this field. The advisory services and technical assistance programmes of the United Nations system should be able to respond immediately to requests from States for educational and training activities in the field of human rights as well as for special education concerning standards as contained in international human rights instruments and in humanitarian law and their application to special groups such as military forces, law enforcement personnel, police and the health profession. The proclamation of a United Nations decade for human rights education in order to promote, encourage and focus these educational activities should be considered.

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83. In this regard, the International Conference on Population and Development also highlighted that

[e]veryone has the right to education, which shall be directed to the full development of human resources, and human dignity and potential, with particular attention to women and the girl-child. Education should be designed to strengthen respect for human rights and fundamental freedoms, including those relating to population and development. [FN89]

[FN89] Principle 10 of the International Conference on Population and Development adopted from March 5 to 13, 1994 in Cairo, Egypt (1994).

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84. It should be highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention.

85. Principle 7 of the Declaration on the Rights of the Child (1959) established:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.
[...]
The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

86. In brief, education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights.

Positive obligations to provide protection

87. This Court has repeatedly established, through analysis of the general provision set forth in Article 1(1) of the American Convention, that the State is under the obligation to respect the rights and liberties recognized therein and to organize public authorities to ensure persons under its jurisdiction free and full exercise of human rights. According to legal standards regarding international responsibility of the State that are applicable to International Human Rights Law, actions or omissions by any public authority, of any branch of government, are imputable to the State which incurs responsibility under the terms set forth in the American Convention. [FN90] This general obligation requires the States Parties to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties. [FN91] By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention are under the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this

Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.

[FN90] Cfr. Mayagna (Sumo) Awas Tingni Community Case. August 31, 2001 Judgment. Series C No. 79, para. 134; Ivcher Bronstein Case. February 6, 2001 Judgment. Series C No. 74, para. 168; and Constitutional Court Case. January 31, 2001 Judgment. Series C No. 71, para. 109; Bámaca Velásquez Case, supra note 10, para. 210; and Caballero Delgado and Santana Case. December 8, 1995 Judment. Series C No. 22, para. 125.
[FN91] Cfr. Provisional Measures, Peace Community of San José de Apartadó, June 18, 2002 Order of the Court, Whereas 11.

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88. Likewise, according to the provisions set forth in the Convention on the Rights of the Child, children's rights require that the State not only abstain from unduly interfering in the child's private or family relations, but also that, according to the circumstances, it take positive steps to ensure exercise and full enjoyment of those rights. This requires, among others, economic, social and cultural measures. [FN92]In its first general comment, the Committee on the Rights of the Child specifically emphasized the major importance of the right to education. [FN93] Accordingly, it is mainly through education that the vulnerability of children is gradually overcome. The State, given its responsibility for the common weal, must likewise safeguard the prevailing role of the family in protection of the child; and it must also provide assistance to the family by public authorities, [FN94] by adopting measures that promote family unity. [FN95]

[FN92] Human Rights Committee, General Comment 17, Rights of Child (Art. 24), 07/04/1989, CCPR/C/35, para. 3.
[FN93] Committee on the Rights of the Child, The Aims of Education, General Comment 1, CRC/C/2001/1, 17.04.2001.
[FN94] Human Rights Committee, General Comment 17, Rights of the Child (Article 24), 07.04.1989, para. 6.
[FN95] Eur. Court H.R., Olsson v. Sweden (no. 1), Judgment of 24 March 1988, Series A no. 130, para. 81; Eur. Court H.R., Johansen v. Norway, Judgment of 7 August 1996, Reports 1996-IV, para. 78; and P. C. and S v. the United Kingdom, Judgment of 16 July 2002, para. 117.

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89. It should be highlighted that the Committee on the Rights of the Child paid special attention to violence against children both within the family and at school. It pointed out that "the Convention on the Rights of the Child sets high standards for protection of children against violence, particularly in Articles 19 and 28, as well as in Articles 29, 34, 37, and 40, and others, [...] taking into account the general principles contained in Articles 2, 3 and 12." [FN96]

[FN96] Committee on the Rights of the Child, Report of its Twenty-Eighth Session, 28.11.2001, CRC/C/111, para. 678.

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90. The European Court, referring to Articles 19 and 37 of the Convention on the Rights of the Child, has recognized the right of the child to be protected against interference by actors other than the State, such as mistreatment by one of the parents; [FN97] it has also recognized that if children are not cared for by their parents and their basic social needs are not satisfied, the State has the duty to intervene to protect them. [FN98]

[FN97] Eur. Court H.R., A v. The United Kingdom, Judgment of 23 September 1998, Reports 1998-VI, para. 22; also see Human Rights Committee, General Comment 17, Rights of the Child (Article 24), 07.04.1989, para. 6.
[FN98] Eur. Court H.R., Z and others v. the United Kingdom, Judgment of 10 May 2001, para. 73-75; also see the Report of the Commission of 10 September 1999, paras. 93-98.
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91. In conclusion, the State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child.

IX. JUDICIAL OR AMINISTRATIVE PROCEEDINGS INVOLVING CHILDREN

Due process and guarantees

92. As stated above (supra 87), States have the obligation to recognize and respect rights and liberties of the human person, as well as to protect and ensure their exercise through the respective guarantees (Article 1(1)), which are suitable means for them to be effective under all circumstances; [FN99] both the corpus iuris of rights and liberties and their guarantees are inseparable concepts of the systems of values and principles distinctive of a democratic society. In such a society, “the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.” [FN100]

[FN99] Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 25.
[FN100] Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights), supra note 99, para. 26.
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93. These fundamental values include safeguarding children, both because they are human beings with their inherent dignity, and due to their special situation. Given their immaturity and vulnerability, they require protection to ensure exercise of their rights within the family, in society and with respect to the State.

94. These considerations must be reflected in regulation of judicial or administrative proceedings where decisions are reached regarding children's rights and, when appropriate, those of the persons under whose custody or guardianship they find themselves.

95. The guarantees set forth in Articles 8 and 25 of the Convention are equally recognized for all persons, and must be correlated with the specific rights established in Article 19, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed.

96. It is evident that a child participates in proceedings under different conditions from those of an adult. To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings.

97. In this regard, it should be recalled that the Court pointed out, in the Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, when it addressed this matter from a general perspective, that

[t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts [FN101] and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. [FN102] (supra 47).

[FN101] Cf. the American Declaration on the Rights and Duties of Man, Arts. II and XVIII; the Universal Declaration on Human Rights, Arts. 7 and 10; the International Covenant on Civil and Political Rights, Arts. 2(1), 3 and 26; the Convention on the Elimination of All Forms of Discrimination against Women, Arts. 2 and 15; the International Convention on the Elimination of All Forms of Racial Discrimination, Arts 2(5) and 7; the African Charter on Human and Peoples' Rights, Arts. 2 and 3; the American Convention on Human Rights, Arts. 1, 8(2) and 24; and the European Convention on Human Rights and Fundamental Freedoms, Art. 14.
[FN102] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 119.

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98. Finally, while procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special conditions of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.

Participation of the child

99. The hypothetical situations proposed by the Inter-American Commission refer directly to participation of the child in proceedings where his or her own rights are discussed and where the decision has a significant bearing on his or her future life. Article 12 of the Convention on the Rights of the Child contains adequate provisions regarding this point, with the aim of ensuring that intervention of the child is adjusted to his or her conditions and is not detrimental to his or her genuine interests:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. [FN103]

[FN103] With respect to enhancing the possibility of children giving their opinions, the Committee on the Rights of the Child issued the following reports: Report of the Committee on the Rights of the Child in Paraguay, 2001; Report of the Committee on the Rights of the Child in Guatemala, 2001; Report of the Committee on the Rights of the Child in the Dominican Republic, 2001; Report of the Committee on the Rights of the Child in Surinam, 2000; Report of the Committee on the Rights of the Child in Grenada, 2000; Report of the Committee on the Rights of the Child in Venezuela, 1999; Report of the Committee on the Rights of the Child in Honduras, 1999; Report of the Committee on the Rights of the Child in Nicaragua, 1999; Report of the Committee on the Rights of the Child in Belize, 1999; Report of the Committee on the Rights of the Child in Ecuador, 1999; and Report of the Committee on the Rights of the Child in Bolivia, 1998.

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100. From this same perspective, and specifically with respect to certain judicial proceedings, General Observation 13 on Article 14 of the United Nations Covenant on Civil and Political Rights, pertaining to equality among all persons in terms of the right to be heard publicly by a competent court, pointed out that this provision applies both to regular and to special courts, [FN104] and established that “minors must enjoy at least the same guarantees and protection granted to adults in Article 14.” [FN105]

[FN104] Human Rights Committee, General Comment 13, Equity before the Courts and the right to a fair and public hearing by an independent court established by law (Art. 14). 13/04/84, CCPR/C/21, p. 2.
[FN105] Human Rights Committee, General Comment 13, Equity before the Courts and the right to a fair and public hearing by an independent court established by law (Art. 14). 13/04/84, CCPR/C/21, p. 4. Article 14 of the aforementioned Covenant reads:
[...] 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.

[...] Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

[...] 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 adequate time and facilities for the preparation of his defence 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.

[...] 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.

[...] 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.

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101. This Court deems it appropriate to provide some specification regarding this issue. As stated above, the group defined as children includes al persons under 18 (supra 42). Evidently, there is great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3-year-old child is not the same as that of a 16-year-old adolescent. For this reason, the degree of

participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests, which are the ultimate objective of International Human Rights Law in this regard.

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

ADMINISTRATIVE PROCESS

103. Protection measures adopted by administrative authorities must be strictly in accordance with the law and must seek continuation of the child's ties with his or her family group, if this is possible and reasonable (supra 71); in case a separation is necessary, it should be for the least possible time possible (supra 77); those who participate in decision-making processes must have the necessary personal and professional competence to identify advisable measures from the standpoint of the child's interests (supra 78 and 79); the objective of measures adopted must be to re-educate and re-socialize the minor, when this is appropriate; and measures that involve deprivation of liberty must be exceptional. All this enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality.

JUDICIAL PROCEEDINGS (Chargeability, criminal conduct and state of risk)

104. To examine this issue, it is useful to identify certain concepts that are often used in this regard –with better or worse judgment-, such as those of chargeability, criminal conduct, and state of risk.

105. From a criminal perspective –associated with conduct that is defined and punishable as a crime, and with the consequent sanctions-, chargeability refers to a person's capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable. Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding. It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice.

106. Provision 4 of the Beijing Rules, which is not binding, stated that criminal chargeability "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity" of the child.

107. The Convention on the Rights of the Child does not refer explicitly to repressive measures for this type of situations, except in Article 40(3) subparagraph a), [FN106] which

establishes the obligation of the States Party to set a minimum age up to which it is presumed that the child cannot infringe penal or criminal laws.

[FN106] States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law [...].

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108. This leads to consider the hypothesis that minors –children, in the sense defined by the respective Convention- incur in unlawful conduct. State action (prosecuting, punitive measures, or those geared toward re-adaptation) is justified, both in the case of adults and in that of minors of a certain age, when the former or the latter carry out acts that criminal laws consider punishable. Therefore, it is necessary for the conduct that leads to State intervention to be defined as a crime. Thus, the rule of law is ensured in this delicate area of relations between the person and the State. This Court has stated that the principle of penal legality "means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment." [FN107] This guarantee, set forth in Article 9 of the American Convention, must be granted to children.

[FN107] Castillo Petruzzi et al. Case. May 30, 1999 Judgment. Series C No. 52, para. 121.

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109. One obvious consequence of the relevance of dealing in a differentiated manner with matters that pertain to children, and specifically those pertaining to an unlawful behavior, is the establishment of specialized jurisdictional bodies to hear cases involving conduct defined as crimes and attributable to them. What was stated above regarding the age required for a person to be considered a child, according to the predominant international criteria, applies to this important matter. Therefore, children under 18 who are accused of conduct defined as crimes by penal law must be subject, for the case to be heard and appropriate measures to be taken, only to specific jurisdictional bodies different from those for adults. Thus, the Convention on the Rights of the Child addresses the "establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law" (Article 40(3)).

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

fall under the first aforementioned situation, that is, those who incur in conduct legally defined as a crime, not to those who are in the other situations.

111. In this regard, Riyadh Guideline 56 states that "legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person."

112. Finally, it is appropriate to point out that there are children exposed to grave risk or harm who cannot fend for themselves, solve the problems that they suffer or adequately channel their own lives, whether because they absolutely lack a favorable family environment, supportive of their development, or because they have insufficient education, suffer health problems or have deviant behavior that requires careful and timely intervention (supra 88 and 91) by well-prepared institutions and qualified staff to solve those problems or allay their consequences.

113. Obviously, these children are not immediately deprived of rights and withdrawn from relations with their parents or guardians and from their authority. They do not pass into the "dominion" of the authorities, in such a manner that the latter, disregarding legal procedures and guarantees that preserve the rights and interests of the minor, take over responsibility for the case and full authority over the former. Under all circumstances, the substantive and procedural rights of the child remain safeguarded. Any action that affects them must be perfectly justified according to the law, it must be reasonable and relevant in substantive and formal terms, it must address the best interests of the child and abide by procedures and guarantees that at all times enable verification of its suitability and legitimacy.

114. Neither do grave circumstances, such as those described above, immediately exclude the authority of the parents nor relieve them of the primary responsibilities that naturally fall to them, and which can only be modified or suspended, if that were the case, as the outcome of a proceeding in which rules applicable to infringement of rights are respected.

Due process

115. Observance of the right to fair trial is mandatory in all proceedings where the personal liberty of an individual is at stake. The principles and acts of due legal process are an irreducible and strict set that may be expanded in light of new progress in human rights Law. As this Court established in its Advisory Opinion on The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law:

the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has

evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of International Law, can and should be added. [FN108]

[FN108] The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law, supra note 8, para. 117.

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116. As regards the subject matter we are now addressing, the rules of due process have been set forth, mainly but not exclusively, in the Convention on the Rights of the Child, the Beijing Rules, the Tokyo Rules, and the Riyadh Guidelines, which safeguard the rights of children subject to various actions by the State, society, or the family.

117. The rules of due process and the right to fair trial must be applied not only to judicial proceedings, but also to any other proceedings conducted by the State, [FN109] or under its supervision (supra 103).

[FN109] Ivcher Bronstein Case, supra note 90, paras. 102-104; Baena Ricardo et al. Case. February 2, 2001 Judgment. Series C No. 72, paras. 124-126; Constitutional Court Case, supra note 90, paras. 69-71; and Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). August 10, 1990 Advisory Opinion OC-11/90. Series A No. 11, para. 28.

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118. At an international level, it is important to note that the States Party to the Convention on the Rights of the Child have undertaken the obligation to adopt a number of measures to safeguard due legal process and judicial protection, following similar parameters to those set forth in the American Convention on Human Rights. These provisions are Articles 37 [FN110] and 40. [FN111]

[FN110] States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. 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;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation

of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[FN111] States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

To be presumed innocent until proven guilty according to law;

4. (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

5. (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

6. (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

7. (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

8. (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

9. (vii) To have his or her privacy fully respected at all stages of the proceedings.

10. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

11. A variety of dispositions, such as care, guidance and supervision orders; counseling; 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.

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119. For the purposes of this Advisory Opinion, it is pertinent to state certain considerations regarding the various material and procedural principles, the application of which is actualized in proceedings pertaining to minors, and which must be associated with the points examined above to set the complete framework regarding this matter. In this regard, it is also appropriate to consider the possibility and convenience of all procedural forms followed in those courts to have features of their own, in accordance with the characteristics and needs of the proceedings that take place there, bearing in mind the principle set forth in Convention on the Rights of the Child, that at this level can be reflected both in court intervention, as regards the form of procedural acts, and in the use of alternative means of solving controversies, mentioned below (infra 135 and 136): "Whenever appropriate and desirable, [measures will be adopted to deal with children who are accused of or recognized as having infringed the penal law], without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected." (Article 40(3)b of the Convention on the Rights of the Child).

a) Competent, Independent and Impartial Court previously established by Law

120. Guaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality. [FN112] In this regard, Beijing Rule No. 6 regulates the authority of judges to determine the rights of children:

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.
6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates. [FN113].

[FN112] Las Palmeras Case. December 6, 2001 Judgment. Series C No. 90, para. 53; Castillo Petruzzi et al. Case, supra note 107, paras. 129 and 130; and Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights), supra note 99, para. 30.
[FN113] Rules 6.1, 6.2 and 6.3 address several important aspects of an effective, just and humanitarian administration of juvenile justice: the need to allow exercise of discretionary powers at all important levels in the proceedings, so that those who adopt decisions can take the steps they deem most appropriate in each individual case, and the need to foresee checks and balances so as to restrict any abuse of discretionary powers and safeguard the rights of juvenile offenders. Competence and professionalism are the most adequate instruments to restrict excessive exercise of those powers. Therefore, suitable professional expertise and expert training are emphasized as a valuable means to ensure prudent use of discretionary powers regarding juvenile offenders. (Also see rules 1.6 and 2.2.).

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b) Right to appeal and effective remedy

121. The aforementioned procedural guarantee is complemented by the possibility of actions of the lower court being reviewed by a higher one. This right has been reflected in Article 8(2)(h) of the American Convention and in Article 40(b) subparagraph v) of the Convention on the Rights of the Child, which states:

v) If [the child is] considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law[...].

122. Article 25 of the American Convention provides that each person must have access to prompt and simple recourse. Amparo and habeas corpus are set within this framework, and they cannot be suspended, even in emergency situations. [FN114].

[FN114] That "[…] general provision [...] gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention." Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights). January 30, 1987 Advisory Opinion OC-8/87. Series A No. 8, para. 34.

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123. The Beijing Rules also established the following parameters:

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

c) Presumption of innocence

124. Article 8(2)(g) of the American Convention applies to this matter, when it states that

[…]
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[…]
g. the right not to be compelled to be a witness against himself or to plead guilty; and
[…]

125. The aforementioned provision must be read in combination with Article 40(2)(b) of the Convention on the Rights of the Child, which states that

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

[...]

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

i) To be presumed innocent until proven guilty according to law;

126. Likewise, Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that

Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

127. This Court has establish that said principle “demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted.” [FN115]

[FN115] Cantoral Benavides Case, supra note 10, para. 120.

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128. Within the proceedings there are acts that are –or have been considered- especially far-reaching for the definition of certain juridical consequences that affect the sphere of rights and responsibilities of the parties. This category includes admission of guilt, understood as the recognition by the accused of the facts attributed to him or her, which does not necessarily mean that this recognition encompasses all issues that might be associated with those facts or their effects. It has also been understood that confession might involve an act of disposing of the goods or rights regarding which there is a controversy.

129. In this regard, and with respect to minors, it is relevant to point out that any statement by a minor, if it were indispensable, must be subject to the procedural protection measures that apply to minors, including the possibility of remaining silent, the assistance of legal counsel, and the statement being made before the authority legally empowered to receive it.

130. Furthermore, it is necessary to take into account that due to his or her age or other circumstances, the child may not be able to critically judge or to reproduce the facts on which he or she is rendering testimony and the consequences of his or her statement, and in this case the judge can and must be especially careful when assessing the statement. Evidently, the latter cannot be granted efficacy for purposes of the decision when it is made by persons who, precisely because they not have the civil capacity to act, and cannot make their will of their patrimony nor exercise their rights on their own (supra 41).

131. All the above would apply to a procedure in which the minor is involved and is to render testimony. As regards specifically penal proceedings –the request for this Advisory Opinion referred to "criminal matters"- it should be taken into account that minors are excluded from participating as accused parties in this type of trials. Therefore, there should be no possibility of their rendering testimony that might correspond to the evidentiary category of an admission of guilt.

d) Presence of both parties

132. All proceedings require certain elements for there to be the greatest possible balance among the parties for due defense of their interests and rights. This involves, among other things, application of the principle of the presence of both parties in the actions. This principle is addressed in the provisions of various instruments that require intervention of the child, whether personally or through representatives in the procedural acts, providing evidence and examining it, stating arguments, among others. [FN116]

[FN116] In this regard see, inter alia, Beijing Rules 7.1, Article 8 of the American Convention on Human Rights, Article 6(1) and 6(3) of the European Convention on Human Rights. Likewise, Eur. Court H.R., Case Meftah and others v. France, Judgment of 26 July, 2002, para. 51; Eur. Court H.R., S.N. v. Sweden, Judgment of 2 July, 2002, para. 44; and Eur. Court. H. R., Siparicius v. Lithuania, Judgment of 21 February, 2002, paras. 27-28. There are previous judgments of this Court pertaining to this same issue.

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133. In this regard, the European Court has stated that:

The right to contradict in a proceeding for the purposes of Article 6(1), as has been interpreted by case law, "in principle means the opportunity of the parties in a civil or criminal trial to hear and analyze alleged evidence or observations included in the file [...], with the aim of influencing the decision of the Court."

e) Principle of the public nature of the proceedings

134. When the proceedings address issues pertaining to minors, which affect their lives, it is appropriate to set certain limits to the broad principle of the public nature of the proceedings that applies to other cases, not regarding access by the parties to evidence and decisions, but rather regarding public observation of the procedural acts. These limits take into account the best interests of the child, insofar as they protect him or her from opinions, judgments or stigmatization that may have a substantial bearing on his or her future life. In this regard, referring to Article 40(2)(b) of the Convention on the Rights of the Child, the European Court has pointed out that "the privacy of children accused of crimes must be fully respected in all stages of the proceedings." [FN117] Likewise, the Council of Europe ordered the States Parties to review and change legislation with the aim of ensuring respect for the privacy of the child. [FN118] In a similar manner, Beijing Rule 8.1 establishes that the privacy of minors must be respected at all stages of the proceedings. [FN119]

[FN117] Eur. Court H.R., Case T v. The United Kingdom, Judgment of 16 December, 1999, para. 74.
[FN118] European Committee of Ministers of the Council of Europe Recommendation No. R (87) 20, para. 47.
[FN119] To avoid undue publicity or the process of slander harming minors, their right to privacy will be respected at all stages of the proceedings.

Alternative justice

135. International standards seek to exclude or reduce "judicialization" [FN120] of social problems that affect children, which can and must be resolved, in many cases, through various types of measures, pursuant to Article 19 of the American Convention, but without altering or diminishing the rights of individual persons. In this regard, alternative means to solve controversies are fully admissible, insofar as they allow equitable decisions to be reached without detriment to individuals' rights. Therefore, it is necessary to regulate use of alternative means in an especially careful manner in those cases where the interests of minors are at stake.

[FN120] Article 40 of the Convention on the Rights of the Child, Beijing Rule 11, and Riyadh Guideline 57.

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136. In this regard, Article 40 of the Convention on the Rights of the Child reads:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

[...]

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

X. OPINION

137. For the foregoing reasons,

THE COURT,

by six votes to one

DECIDES

That it is competent to render the instant Advisory Opinion and that the request by the Inter-American Commission on Human Rights is admissible.

DECLARES

That for the purposes of this Advisory Opinion, a "child" or "minor" is any person who has not yet turned 18, unless he or she has attained majority, by legal mandate, before that age, under the terms set forth in paragraph 42.

AND IS OF THE OPINION

1. That pursuant to contemporary provisions set forth in International Human Rights Law, including Article 19 of the American Convention on Human Rights, children are subjects entitled to rights, not only objects of protection.
2. That the phrase "best interests of the child", set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives.
3. That the principle of equality reflected in Article 24 of the American Convention on Human Rights does not impede adopting specific regulations and measures regarding children, who require different treatment due to their special conditions. This treatment should be geared toward protection of children's rights and interests.
4. That the family is the primary context for children's development and exercise of their rights. Therefore, the State must support and strengthen the family through the various measures it requires to best fulfill its natural function in this field.
5. That children's remaining within their household should be maintained and fostered, unless there are decisive reasons to separate them from their families, based on their best interests. Separation should be exceptional and, preferably, temporary.
6. That to care for children, the State must resort to institutions with adequate staff, appropriate facilities, suitable means, and proven experience in such tasks.
7. That respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children's existence to develop under decent conditions.
8. That true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.
9. That the States Party to the American Convention have the duty, pursuant to Articles 19 and 17, in combination with Article 1(1) of that Convention, to take positive steps to ensure protection of children against mistreatment, whether in their relations with public officials, or in relations among individuals or with non-State entities.
10. That in judicial or administrative procedures where decisions are adopted on the rights of children, the principles and rules of due legal process must be respected. This includes rules regarding competent, independent, and impartial courts previously established by law, courts of review, presumption of innocence, the presence of both parties to an action, the right to a hearing

and to defense, taking into account the particularities derived from the specific situation of children and those that are reasonably projected, among other matters, on personal intervention in said proceedings and protective measures indispensable during such proceedings.

11. That children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults. Characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.

12. That behavior giving rise to State intervention in the cases to which the previous paragraph refers must be described in criminal law. Other cases, such as abandonment, destitution, risk or disease, must be dealt with in a different manner from procedures applicable to those who commit criminal offenses. Nevertheless, principles and provisions pertaining to due legal process must also be respected in such cases, both regarding minors and with respect to those who have rights in connection with them, derived from family statute, also taking into account the specific conditions of the children.

13. That it is possible to resort to alternative paths to solve controversies regarding children, but it is necessary to regulate application of such alternative measures in an especially careful manner to ensure that they do not alter or diminish their rights.

Judge Jackman dissents, and informs the Court of his Dissenting Opinion. Judges Cançado Trindade and García Ramírez inform the Court of their Concurring opinions, which are attached to the instant Advisory Opinion.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, on August 28, 2002.

Antônio A. Cançado Trindade
President

Alirio Abreu-Burelli
Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
Oliver Jackman
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF JUDGE JACKMAN

I have, regretfully, found myself unable to join the majority of the Court in its decision to respond favourably to the "Request for an Advisory Opinion" dated March 30th 2001, by the Inter-American Commission on Human Rights ("the Commission") because, in my view, the Request does not fulfill the criteria for admissibility set out in Article 64 of the Convention, as consistently interpreted by this Court from the moment of its very first advisory opinion.

In its communication requesting the issuing of an advisory opinion, the Commission states the "objective" of the request in the following terms.

"The Commission deems it necessary to interpret whether Articles 8 and 25 of the American Convention on Human Rights include limits to the good judgment and discretion of the States to issue special measures of protection in accordance with Article 19 thereof and requires (sic) the Court to express general and valid guidelines in conformance to the framework of the Convention."

The Commission then indicates the five "special measures of protection" on which it desires the Court to pronounce (cf. para 4 of this Opinion):

a. without guarantees for t separation of young persons (minors) from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
b. deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives ("causales") which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
c. the acceptance of confessions by minors in criminal matters without due guarantees;
d. judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and
e. determination of rights and liberties in judicial and administrative proceedings he right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.*

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* My translation

With the greatest respect to the Inter-American Commission on Human Rights, the so-called "objective" of the requested advisory opinion is, in my view, vague almost to the point of meaninglessness, a vagueness that is fatally compounded by the "requirement" that the Court should express "general and valid guidelines".

Repeatedly in its examination of the scope of the "broad ambit" (el amplio alcance) of its consultative function, (cf para. 34 of the present Opinion) the Court has insisted that the fundamental purpose of that function is to render a service to member-states and organs of the

Inter-American system in order to assist them “in fulfilling and applying treaties that deal with human rights, without submitting them to the formalities and the system of sanctions of the contentious process”.

It should not be forgotten that in the exercise of its vocation to “throw light on the meaning, object and purpose of the international norms on human rights [and], above all, to provide advice and assistance to the Member States and organs of the OAS in order to enable them to fully and effectively comply with their international obligations in that regard” “the Court is a judicial institution of the inter-American system” (OC-1/82: para 19) (my emphasis). As such, the Court should resist invitations to indulge in “purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion” (cf. OC-9/87, para 16).

I would suggest that a request to provide “general and valid guidelines” to cover a series of hypotheses that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in “purely academic speculation” of a kind which assuredly “would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.” (cf. OC-1/82, para 25).

For these reasons I have declined to participate in the deliberations on this Opinion, and herewith record my vote against it in its entirety.

Oliver Jackman
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption, by the Inter-American Court of Human Rights, of the present Advisory Opinion n. 17 on the Juridical Condition and Human Rights of the Child, which constitutes, in my view, a new contribution of its recent case-law to the evolution of the International Law of Human Rights. The consultation formulated by the Inter-American Commission of Human Rights fits perfectly, in my view, into the wide jurisdictional basis of the advisory function of the Inter-American Court (Article 64 of the American Convention on Human Rights), already clearly explained and established by this latter in its Advisory Opinion n. 15 on the Reports of the Inter-American Commission of Human Rights (of 14.11.1997) [FN121]. The Court, thus, has the competence to interpret the relevant provisions (object of the present consultation) of the American Convention on Human Rights and of other treaties which bind the States of the region, besides the responsability and the duty - as determined by the American Convention - to exert its advisory function, the operation of which is a matter of international ordre public.

[FN121] Inter-American Court of Human Rights, Advisory Opinion OC-15/99, Series A, n. 15, pp. 3-25, pars. 1-59, esp. pp. 13-19 and 24, pars. 23-41 and resolutory points 1-2.

I. Prolegomena: Brief Conceptual Precisions.

2. The preamble of the United Nations Convention on the Rights of the Child of 1989 warns that "in all countries in the world there are children living in exceptionallly difficult conditions", standing therefore in need of "special consideration". Children abandoned in the streets, children overtaken by delinquency, child labour, enforced prostitution of children, traffic of children for sale of organs, children engaged in armed conflicts, children who are refugees, displaced and stateless persons, are aspects of the day-to-day contemporary tragedy of a world apparently without future.

3. I do not see how to avoid this sombre prognostic that, a world which does not take care of its children, which destroys the enchantment of their infancy within them, which puts a premature end to their childhood, and which subjects them to all sorts of deprivations and humiliations, effectively has no future. A tribunal of human rights cannot avoid taking account of this tragedy, with all the more reason when expressly requested to pronounce on aspects of the human rights of the child and of his juridical condition, in the exercise of its advisory function, endowed with a wide jurisdictional basis.

4. We all live in time. The passing of time affects our juridical condition. The passing of time should strengthen the bonds of solidarity which link the living to their dead, bringing them closer together [FN122]. The passing of time should strengthen the ties of solidarity which unite all human beings, young and old, who experience a greater or lesser degree of vulnerability in different moments along their existence. Nevertheless, not always prevails this perception of the implacable effects of the passing of time, which consumes us all.

[FN122] Cf., on this point, my Separate Opinions in the case Bámaca Velásquez versus Guatemala, Judgment as to the merits, of 25.11.2000, Series C, n. 70, pars. 1-40 of the Opinion; and Judgment as to reparations, of 22.02.2002, Series C, pars. 1-26 of the Opinion.
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5. In a general way, it is at the beginning and the end of the existential time that one experiences greater vulnerability, in face of the proximity of the unknown (birth and early infancy, old age and death). Every social milieu ought, thus, to be attentive to the human condition. The social milieu which does not take care of its children has no future. The social milieu which does not take care of its elderly people has no past. And to count only on the escaping present is no more than a mere illusion.

6. In its resolutory point n. 1, the present Advisory Opinion n. 17 of the Inter-American Court provides that, "in conformity with the contemporary norms of the International Law of Human Rights, in which is found Article 19 of the American Convention on Human Rights, the children are subjects of rights and not only object of protection" [FN123]. In fact, the subjects of

law are the children [FN124], and not infancy or childhood. The subjects of law are the elderly persons, and not old age. The subjects of law are the persons with disabilities [FN125], and not disability itself. The subjects of law are the stateless persons, and not statelessness. And so forth. The limitations of legal capacity nothing subtract from legal personality. The titulaire of rights is the human being, of flesh and bone and soul, and not the existential condition in which he finds himself temporarily.

[FN123] (Emphasis added). - Article 19 of the American Convention provides that "every 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".

[FN124] A term which, - as the Court points out (note 43 of the present Advisory Opinion), - comprises, evidently, boys and girls and adolescents.

[FN125] The preamble of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (of 1999), e.g., begins by reaffirming that the persons with disabilities "have the same human rights" as other persons (including the right not to be subjected to discrimination on the basis of disabilities), which "flow from the inherent dignity and equality of each person".

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7. From the standpoint of the conceptual universe of the International Law of Human Rights, - in the framework of which are found, in my view, the human rights of the child, - the titulaires of rights are the children, and not the infancy or childhood. An individual can have specific rights in virtue of the condition of vulnerability in which he finds himself (e.g., the children, the elderly persons, the persons with disabilities, the stateless persons, among others), but he remains always the titulaire of rights, as human person, and not the collectivity or the social group to which he belongs by his existencial condition (e.g., the infancy or childhood, the old age, the disability, the statelessness, among others).

8. It is certain that the juridical personality and capacity keep a close relationship, but at the conceptual level they are distinguished from each other. It may occur that an individual may have juridical personality without enjoying, as a result of his existential condition, full capacity to act. Thus, in the present context, one understands by personality the aptitude to be titulaire of rights and duties, and by capacity the aptitude to exercise them by himself (capacity of exercise). Capacity is, thus, closely linked to personality; nevertheless, if by any situation or circumstance an individual does not enjoy full juridical capacity, this does not mean that thereby he is no longer subject of right. It is the case of the children.

9. Given the transcendental importance of the matter dealt with in the present Advisory Opinion n. 17 of the Inter-American Court of Human Rights on the Juridical Condition and Human Rights of the Child, I feel obliged to leave on the records my thoughts on the matter, centred in six central aspects, which I consider of the greatest relevant in our days, and which conform a theme which has consumed me years of study and meditation, namely: first, the crystallization of the international juridical personality of the human being; second, the juridical personality of the human being as a response to a need of the international community; third, the advent of the child as a true subject of rights at international level; fourth, the subjective right,

human rights and the new dimension of the international juridical personality of the human being; fifth, the implications and projections of the juridical personality of the child at international level; and sixth, the human rights of the child and the obligations of their protection erga omnes. Let us pass on to a succinct exam of each one of these aspects.

II. The Crystallization of the International Juridical Personality of the Human Being.

10. The crystallization of the international juridical personality of the human being constitutes, in my understanding [FN126], the most precious legacy of the legal science of the XXth century, which requires greater attention on the part of contemporary juridical doctrine. In this respect, International Law experiences today, at the beginning of the XXIst century, in a way a return to the origins, in the sense in which it was originally conceived as a true jus gentium, the droit des gens. Already in the XVIth and XVIIth centuries, the writings of the so-called founding fathers of International Law (especially those of F. Vitoria, F. Suárez and H. Grotius, besides those of A. Gentili and S. Pufendorf) sustained the ideal of the civitas maxima gentium, constituted by human beings organized socially in States and coextensive with humanity itself [FN127].

[FN126] A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", Karel Vasak Amicorum Liber - Les droits de l'homme à l'aube du XXIe siècle, Bruxelles, Bruylant, 1999, pp. 521-544; A.A. Cançado Trindade, El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao, Universidad de Deusto, 2001, pp. 17-96; A.A. Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XXI, Santiago, Editorial Jurídica de Chile, 2001, pp. 317-374.

[FN127] It is certain that the world has entirely changed, since Vitoria, Suárez, Gentili, Grotius, Pufendorf and Wolff wrote their works, but the human aspiration remains the same. A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in Jornadas de Derecho Internacional (UNAM, Mexico City, 11-14 December 2001), Washington D.C., General Secretariat of the OAS, 2002, pp. 311-347.

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11. Regrettably, the thoughts and vision of the so-called founding fathers of International Law (set forth notably in the writings of the Spanish theologians and in the Grotian writings), which conceived it as a truly universal system [FN128], came to be surpassed by the emergency of legal positivism, which personified the State, endowing it with a "will of its own", reducing the rights of the human beings to those that the State "conceded" to them. The consent of the will of the

States (according to the voluntarist positivism) became the predominant criterion in International Law, denying jus standi to the individuals, to the human beings [FN129].

[FN128] C.W. Jenks, The Common Law of Mankind, London, Stevens, 1958, pp. 66-69; and cf. also R.-J. Dupuy, La communauté internationale entre le mythe et l'histoire, Paris, Economica/UNESCO, 1986, pp. 164-165.
[FN129] P.P. Remec, The Position of the Individual in International Law According to Grotius and Vattel, The Hague, Nijhoff, 1960, pp. 36-37.
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12. This rendered difficult the understanding of the international community, and undermined International Law itself, reducing it to a strictly inter-State law, no more above but rather among sovereign States [FN130]. In fact, when the international legal order moved away from the universal vision of the so-called "founding fathers" of the law of nations (droit des gens / derecho de gentes) (cf. supra), successive atrocities were committed against the human kind. The disastrous consequences of this distortion are widely known.

[FN130] Ibid., p. 37.
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13. Already by the end of the twenties, there emerged the first doctrinal reactions against this reactionary position [FN131]. And by the mid-XXth century the more lucid jusinternacionalist doctrine moved away definitively from the Hegelian and neo-Hegelian formulation of the State as the final depositary of the freedom and responsibility of the individuals who composed it, and that in it [in the State] integrated themselves entirely [FN132]. Against the doctrinal current of traditional positivism [FN133], which came to sustain that only the States were subjects of International Law [FN134], there emerged an opposing trend [FN135], sustaining, a contrario sensu, that, ultimately, only the individuals, addressees of all juridical norms, were subjects of International Law. It must never be forgotten that, ultimately, the State exists for the human beings who compose it, and not vice-versa.

[FN131] Like, e.g, the illuminating monograph by Jean Spiropoulos, L'individu en Droit international, Paris, LGDJ, 1928, pp. 66 and 33, and cf. p. 19. The author pondered that, contrary to what was inferred from Hegelian doctrine, the State is not a supreme ideal subjected only to its own will, is not an end in itself, but rather "a means of realization of the aspirations and vital needs of the individuals", it thus being necessary to protect the human being against the violation of his rights by his own State. Ibid., p. 55; an evolution in this sense, he added, would have to bring us closer to the ideal of the civitas maxima.
[FN132] W. Friedmann, The Changing Structure of International Law, London, Stevens, 1964, p. 247.
[FN133] Formed, besides Triepel and Anzilotti, also by K. Strupp, E. Kaufmann, R. Redslob, among others.
[FN134] A position which came also to be adopted by the so-called Soviet doctrine of International Law, with emphasis on the inter-State "peaceful coexistence"; cf., e.g., Y.A. Korovin, S.B. Krylov, et alii, International Law, Moscow, Academy of Sciences of the USSR/Institute of State and Law, [without date], pp. 93-98 and 15-18; G.I. Tunkin, Droit international public - problèmes théoriques, Paris, Pédone, 1965, pp. 19-34.

[FN135] Formed by L. Duguit, G. Jèze, H. Krabbe, N. Politis and G. Scelle, among others.

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14. Meanwhile, there persisted the old polemics, sterile and pointless, between monists and dualists, erected upon false premises, which, not surprisingly, failed to contribute to the doctrinal endeavours in favour of the emancipation of the human being vis-à-vis his own State. In fact, what both the dualists and the monists did, in this particular, was to "personify" the State as subject of International Law [FN136]. The monists discarded all anthropomorfism, affirming the international subjectivity of the State by an analysis of the juridical person [FN137]; and the dualists [FN138] did not contain themselves in their excesses of characterization of the States as sole subjects of International Law [FN139].

[FN136] Cf. C.Th. Eustathiades, "Les sujets du Droit international et la responsabilité internationale - Nouvelles tendances", 84 Recueil des Cours de l'Académie de Droit International de La Haye (1953) p. 405.

[FN137] Ibid., p. 406.

[FN138] As exemplified above all by H. Triepel and D. Anzilotti.

[FN139] For a criticism of the incapacity of the dualist thesis to explain the access of the individuals to the international jurisdiction, cf. Paul Reuter, "Quelques remarques sur la situation juridique des particuliers en Droit international public", La technique et les principes du Droit public - Études en l'honneur de Georges Scelle, vol. II, Paris, LGDJ, 1950, pp. 542-543 and 551.

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15. With the recognition of the legal personality of the human being at international level, International Law came to appear as a corpus juris of emancipation. There is no "neutrality" in Law; every Law is finalist, and the ultimate addressees of legal norms, both national and international, are the human beings. In the mid-XXth century, the juridical experience itself contradicted categorically the unfounded theory that the individuals were simple objects of the international juridical order, and destructed other prejudices of State positivism [FN140]. The legal doctrine of the time it made clear the recognition of the expansion of the protection of the individuals in the international legal order [FN141], as true subjects of law (of the law of nations) [FN142].

[FN140] Cf. G. Sperduti, L'Individuo nel Diritto Internazionale, Milano, Giuffrè Ed., 1950, pp. 104-107.

[FN141] C. Parry, "Some Considerations upon the Protection of Individuals in International Law", 90 Recueil des Cours de l'Académie de Droit International de La Haye (1956) p. 722.

[FN142] H. Lauterpacht, International Law and Human Rights, London, Stevens, 1950, pp. 69, 61 and 51; and, earlier on, H. Lauterpacht, "The International Protection of Human Rights", 70 Recueil des Cours de l'Académie de Droit International de La Haye (1947) pp. 11, 6-9 and 104.

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16. In the ponderation of René Cassin, writing in 1950, for example, "all human creatures" are subjects of law, as members of the "universal society", it being "inconceivable" that the State

comes to deny them this condition [FN143]. Human rights were conceived as inherent to every human being, independently from any circumstances in which he finds himself. By then, already, the individual came to be seen as subject jure suo of international law, such as the more lucid doctrine sustained, since that of the so-called founding fathers of the law of nations (droit des gens) [FN144].

[FN143] R. Cassin, "L'homme, sujet de droit international et la protection des droits de l'homme dans la société universelle", in La technique et les principes du Droit public - Études en l'honneur de Georges Scelle, vol. I, Paris, LGDJ, 1950, pp. 81-82.
[FN144] P.N. Drost, Human Rights as Legal Rights, Leyden, Sijthoff, 1965, pp. 223 and 215.

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17. Also in the American continent, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro Álvarez [FN145] and Hildebrando Accioly [FN146]. In fact, successive studies of the international instruments of international protection came to emphasize precisely the historical importance of the recognition of the international juridical personality of the individuals [FN147].

[FN145] A. Álvarez, La Reconstrucción del Derecho de Gentes - El Nuevo Orden y la Renovación Social, Santiago de Chile, Ed. Nascimento, 1944, pp. 46-47 and 457-463, and cf. pp. 81, 91 and 499-500.
[FN146] H. Accioly, Tratado de Direito Internacional Público, vol. I, 1st. ed., Rio de Janeiro, Imprensa Nacional, 1933, pp. 71-75.
[FN147] Cf., e.g., R. Cassin, "Vingt ans après la Déclaration Universelle", 8 Revue de la Commission internationale de juristes (1967) n. 2, pp. 9-17; W.P. Gormley, The Procedural Status of the Individual before International and Supranational Tribunals, The Hague, Nijhoff, 1966, pp. 1-194; C.A. Norgaard, The Position of the Individual in International Law, Copenhagen, Munksgaard, 1962, pp. 26-33 and 82-172; A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, University Press, 1983, pp. 1-445; A.A. Cançado Trindade, O Esgotamento de Recursos Internos no Direito Internacional, 2nd. ed., Brasília, Editora Universidade de Brasília, 1997, pp. 1-327; F. Matscher, "La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo", in Studi in Onore di Giuseppe Sperduti, Milano, Giuffrè, 1984, pp. 601-620; A.Z. Drzemczewski, European Human Rights Convention in Domestic Law, Oxford, Clarendon Press, 1983, pp. 20-34 and 341; P. Thornberry, International Law and the Rights of Minorities, Oxford, Clarendon Press, 1992 [reprint], pp. 38-54; J.A. Carrillo Salcedo, Dignidad frente a Barbarie - La Declaración Universal de Derechos Humanos, Cincuenta Años Después, Madrid, Ed. Trotta, 1999, pp. 27-145; E.-I.A. Daes (special rapporteur), La condition de l'individu et le Droit international contemporain, U.N. doc. E/CN.4/Sub.2/1988/33, of 18.07.1988, pp. 1-92; J. Ruiz de Santiago, "Reflexiones sobre la Regulación Jurídica Internacional del Derecho de los Refugiados", in Nuevas Dimensiones en la Protección del Individuo (ed. J. Irigoin Barrenne), Santiago, Universidad de Chile, 1991, pp.

124-125 and 131-132; R.A. Mullerson, "Human Rights and the Individual as Subject of International Law: A Soviet View", 1 European Journal of International Law (1990) pp. 33-43; A. Debricon, "L'exercice efficace du droit de recours individuel", in The Birth of European Human Rights Law - Liber Amicorum Studies in Honour of C.A. Norgaard (eds. M. de Salvia and M.E. Villiger), Baden-Baden, Nomos Verlagsgesellschaft, 1998, pp. 237-242.

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18. The whole new corpus juris of the International Law of Human Rights has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespectively of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as subject of both domestic and international law [FN148]. Nowadays one recognizes the responsibility of the State for all its acts - both jure gestionis and jure imperii - and all its omissions, what brings to the fore the legal personality of the individuals and their direct access to international jurisdiction to vindicate their rights (including against their own State) [FN149].

[FN148] On the historical evolution of juridical personality in the law of nations, cf. H. Mosler, "Réflexions sur la personnalité juridique en Droit international public", Mélanges offerts à Henri Rolin - Problèmes de droit des gens, Paris, Pédone, 1964, pp. 228-251; G. Arangio-Ruiz, Diritto Internazionale e Personalità Giuridica, Bologna, Coop. Libr. Univ., 1972, pp. 9-268; G. Scelle, "Some Reflections on Juridical Personality in International Law", Law and Politics in the World Community (ed. G.A. Lipsky), Berkeley/L.A., University of California Press, 1953, pp. 49-58 and 336; J.A. Barberis, Los Sujetos del Derecho Internacional Actual, Madrid, Tecnos, 1984, pp. 17-35; J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 Recueil des Cours de l'Académie de Droit International de La Haye (1983) pp. 157-238; A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts", Contemporary International Law Issues: Conflicts and Convergence (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167; C. Dominicé, "La personnalité juridique dans le système du droit des gens" Theory of International Law at the Threshold of the 21st Century - Essays in Honour of Krzysztof Skubiszewski (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 147-171; M. Virally, "Droits de l'homme et théorie générale du Droit international", René Cassin Amicorum Discipulorumque Liber, vol. IV, Paris, Pédone, 1972, pp. 328-329.

[FN149] S. Glaser, "Les droits de l'homme à la lumière du droit international positif", Mélanges offerts à Henri Rolin - Problèmes de droit des gens, Paris, Pédone, 1964, p. 117, and cf. pp. 105-106, 114-118 and 123.

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19. The State, created by the human beings themselves, and composed by them, exists for them, for the realization of their common good. For this recognition the considerable evolution in the last five decades of the International Law of Human Rights [FN150] has contributed decisively, at international level, to which one may likewise add that of the International Humanitarian Law; also this latter considers the persons protected not as simple object of the

established regulation, but rather as true subject of International Law [FN151]. Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality [FN152].

[FN150] Cf. M. Ganji, International Protection of Human Rights, Genève/Paris, Droz/Minard, 1962, pp. 178-192; A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 Recueil des Cours de l'Académie de Droit International de La Haye (1987) pp. 1-435; P. Sieghart, The International Law of Human Rights, Oxford, Clarendon Press, 1983, pp. 20-23.

[FN151] This can be inferred, e.g., from the position of the four Geneva Conventions on International Humanitarian Law of 1949, erected as from the rights of the protected persons (e.g., III Convention, Articles 14 and 78; IV Convention, Article 27); such is the case that the four Geneva Conventions clearly prohibit to the States Parties to derogate - by special agreements - the rules enunciated therein and in particular to restrict the rights of the protected persons set forth therein (I, II y III Conventions, Article 6; and IV Convention, Article 7); cf. A. Randelzhofer, "The Legal Position of the Individual under Present International Law", State Responsibility and the Individual - Reparation in Instances of Grave Violations of Human Rights (eds. A. Randelzhofer and Ch. Tomuschat), The Hague, Nijhoff, 1999, p. 239. - In reality, the first Conventions on International Humanitarian Law (already at the end of the XIXth century and beginning of the XXth) were pioneering in expressing the international concern for the destiny of human beings in armed conflicts, recognizing the individual as a direct beneficiary of the conventional obligations of the State. K.J. Partsch, "Individuals in International Law", Encyclopedia of Public International Law (ed. R. Bernhardt), vol. 2, Elsevier, Max Planck Institute/North-Holland Ed., 1995, p. 959; and cf. G.H. Aldrich, "Individuals as Subjects of International Humanitarian Law", Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 857-858.

[FN152] F.A. von der Heydte, "L'individu et les tribunaux internationaux", 107 Recueil des Cours de l'Académie de Droit International de La Haye (1962) p. 301; cf. also, on the matter, e.g., E.M. Borchard, "The Access of Individuals to International Courts", 24 American Journal of International Law (1930) pp. 359-365.

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20. The "eternal return" or "rebirth" of jusnaturalism has been reckoned by the jusinternationalists themselves [FN153], much contributing to the assertion and the consolidation of the primacy, in the order of values [FN154], of the State obligations as to human rights, and of the recognition of their necessary compliance vis-à-vis the international community as a whole [FN155]. This latter, witnessing the moralization of Law itself, assumes the vindication of common superior interests [FN156]. One has gradually turned to conceive a truly universal legal system.

[FN153] J. Maritain, O Homem e o Estado, 4th. ed., Rio de Janeiro, Ed. Agir, 1966, p. 84, and cf. pp. 97-98 y 102; A. Truyol y Serra, "Théorie du Droit international public - Cours général", 183 Recueil des Cours de l'Académie de Droit International de La Haye (1981) pp. 142-143; L.

Le Fur, "La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne, 18 Recueil des Cours de l'Académie de Droit International de La Haye (1927) pp. 297-399; C.J. Friedrich, Perspectiva Histórica da Filosofia do Direito, Rio de Janeiro, Zahar Ed., 1965, pp. 196-197, 200-201 and 207; J. Puente Egido, "Natural Law", in Encyclopedia of Public International Law (ed. R. Bernhardt/Max Planck Institute), vol. 7, Amsterdam, North-Holland, 1984, pp. 344-349. - And, for a general study, cf. A.P. d'Entrèves, Natural Law, London, Hutchinson Univ. Libr., 1970 [reprint], pp. 13-203; Y.R. Simon, The Tradition of Natural Law - A Philosopher's Reflections (ed. V. Kuic), N.Y., Fordham Univ. Press, 2000 [reprint], pp. 3-189.

[FN154] Gustav Radbruch, particularly sensitive - above all in the old age - to the value of justice, summarized the various conceptions of natural law as presenting the following fundamental common features: first, all of them provide certain "judgments of juridical value with a given content"; second, such judgments, universal ones, always have as source either nature, or revelation, or reason; third, such judgments are "accessible to rational knowledge"; and fourth, such judgments have primacy over the positive laws which are contrary to them; in sum, "natural law must always prevail over positive law". G. Radbruch, Filosofia do Direito, vol. I, Coimbra, A. Amado Ed., 1961, p. 70.

[FN155] J.A. Carrillo Salcedo, "Derechos Humanos y Derecho Internacional", 22 Isegoría - Revista de Filosofía Moral y Política - Madrid (2000) p. 75.

[FN156] R.-J. Dupuy, "Communauté internationale et disparités de développement - Cours général de Droit international public", 165 Recueil des Cours de l'Académie de Droit International de La Haye (1979) pp. 190, 193 and 202.

III. The Juridical Personality of the Human Being as a Response to a Need of the International Community.

21. Thus, International Law itself, in recognizing rights inherent to every human being, has disauthorized the archaic positivist dogma which, in an authoritarian way, intended to reduce such rights to those "conceded" by the State. The recognition of the individual as subject of both domestic law and international law, represents a true juridical revolution, - to which we have the duty to contribute in the search for the prevalence of superior values, - which comes at last to give an ethical content to the norms of both public domestic law and international law. This transformation, proper of our time, corresponds, in its turn, to the recognition of the necessity that all States are made answerable for the way they treat all human beings who are under their jurisdiction, so as to avoid new violations of human rights.

22. This rendering of accounts would simply not have been possible without the crystallization of the right of individual petition, amidst the recognition of the objective character of the positive obligations of protection and the acceptance of the collective guarantee of the compliance with them. This is the real meaning of the historical rescue of the individual as subject of the International Law of Human Rights. It is for this reason that, in my Concurring Opinion in the case of Castillo Petruzzi and Others versus Peru (Preliminary Objections, Judgment of 04.09.1998), urged by the circumstances of the cas d'espèce, I saw it fit to examine the evolution and crystallization of the right of international individual petition, which I qualified as a fundamental clause (cláusula pétrea) of the human rights treaties which provide for it [FN157]. And I added:

- "The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights" [FN158].

[FN157] To which is added, in so far as the American Convention on Human Rights is concerned, the other fundamental clause (cláusula pétrea) of the recognition of the competence of the Inter-American Court of Human Rights in contentious matter. For a study, cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario (Nov. 1999), vol. I, San José of Costa Rica, Inter-American Court of Human Rights, 2001, pp. 3-68.

[FN158] Inter-American Court of Human Rights, case Castillo Petruzzi and Others versus Peru (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, p. 62, par. 35. My Opinion was subsequently published in the form of article, titled "El Derecho de Petición Individual ante la Jurisdicción Internacional", 48 Revista de la Facultad de Derecho de México - UNAM (1998) pp. 131-151.

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23. In fact, the recognition of the juridical personality of the individuals fulfils a true necessity of the international community [FN159], which today seeks to guide itself by common superior values. As it can be inferred, e.g., from the historical case of the "Street Children" (case Villagrán Morales and Others versus Guatemala) before this Court (1999-2001), the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

[FN159] As recognized decades ago; cf. A.N. Mandelstam, Les droits internationaux de l'homme, Paris, Éds. Internationales, 1931, pp. 95-96, 103 and 138; Charles de Visscher, "Rapport - `Les droits fondamentaux de l'homme, base d'une restauration du Droit international'", Annuaire de l'Institut de Droit International (1947) pp. 3 and 9; G. Scelle, Précis de Droit des Gens - Principes et systématique, part I, Paris, Libr. Rec. Sirey, 1932 (reimpr. of the CNRS, 1984), p. 48; Lord McNair, Selected Papers and Bibliography, Leiden/N.Y., Sijthoff/Oceana, 1974, pp. 329 and 249.

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24. In its Judgment as to the merits (of 19.11.1999) in the aforementioned case of the "Street Children", the Court significantly warned that

"In the light of Article 19 of the American Convention, the Court wishes to record the particular gravity of the fact that a State Party to this Convention can be charged with having applied or

tolerated in its territory a systematic practice of violence against at-risk children. When States thus violate the rights of at-risk children, such as `street children', this makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the `full and harmonious development of their personality' [FN160], even though every child has the right to harbour a project of life that should be tended and encouraged by the public authorities so that it may be developed for his personal benefit and that of the society to which he belongs. Second, they violate their physical, mental and moral integrity, and even their lives" [FN161].

[FN160] To which the preamble (par. 6) of the United Nations Convention on the Rights of the Child refers to.
[FN161] IACtHR, Series C, n. 63, pp. 78-79, par. 191.

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25. The human being emerges, at last, even in the most adverse conditions, as ultimate subject of Law, domestic as well as international. The case of the "Street Children", decided by the Inter-American Court, in which those marginalized and forgotten by the world succeeded to resort to an international tribunal to vindicate their rights as human beings, is truly paradigmatic, and gives a clear and unequivocal testimony that the International Law of Human Rights has achieved its maturity.

26. The doctrinal trend which still insists in denying to the individuals the condition of subjects of International Law is based on a rigid definition of these latter, requiring from them not only to possess rights and obligations emanated from International Law, but also to participate in the process of creation of its norms and of the compliance with them. It so occurs that this rigid definition does not sustain itself, not even at the level of domestic law, in which it is not required - it has never been - from all individuals to participate in the creation and application of the legal norms in order to be subjects (titulaires) of rights, and to be bound by the duties, enmanated from such norms.

27. Besides unsustainable, that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising - if not astonishing, - besides regrettable, to see that conception repeated mechanically and ad nauseam by a part of doctrine, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious. In the brief historical period in which that Statist conception prevailed, in the light - or, more precisely, in the darkness - of legal positivism, successive atrocities were committed against the human being, in a scale without precedents.

28. It results quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emananate directly from International Law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize - even with greater

precision - as subject of International Law any person or entity, titulaire of rights and obligations, which emanate directly from norms of International Law. It is the case of the individuals, who thus have strengthened this direct contact - without intermediaries - with the international legal order [FN162].

[FN162] A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo...", op. cit. supra n. (7), pp. 311-347.

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29. The truth is that the international subjectivity of the human being (whether a child, an elderly person, a person with disability, a stateless person, or any other) erupted with all vigour in the legal science of the XXth century, as a reaction of the universal juridical conscience against the successive atrocities committed against the human kind. An eloquent testimony of the erosion of the purely inter-State dimension of the international legal order is found in the historical and pioneering Advisory Opinion n. 16 of the Inter-American Court, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 01.10.1999) [FN163], which has served as orientation to other international tribunals and has inspired the evolution in statu nascendi of the international case-law on the matter.

[FN163] Inter-American Court of Human Rights, Advisory Opinion OC-16/99, Series A, n. 16, pp. 3-123, pars. 1-141, and resolutory points 1-8.

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30. In that Advisory Opinion, the Inter-American Court lucidly pointed out that the rights set forth in Article 36.1 of the Vienna Convention on Consular Relations of 1963

"have the characteristic that their titulaire is the individual. In effect, this provision is unequivocal in stating that the rights to consular information and notification are `accorded' to the interested person. In this respect, Article 36 is a notable exception to the essentially Statist nature of the rights and obligations set forth elsewhere in the Vienna Convention on Consular Relations; as interpreted by this Court in the present Advisory Opinion, it represents a notable advance in respect of the traditional conceptions of International Law on the matter" [FN164].

[FN164] Paragraph 82 (emphasis added).

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31. In this way, the Inter-American Court reconized, in the light of the impact of the corpus juris of the International Law of Human Rights in the international legal order itself, the crystallization of a true individual subjective right to information on consular assistance, of which is titulaire every human being deprived of his freedom in another country; furthermore, it broke away from the traditional purely inter-State outlook of the matter, giving support to numerous migrant workers and individuals victimized by poverty, deprived of freedom abroad. The present Advisory Opinion n. 17 of the Inter-American Court, on the Juridical Condition and

Human Rights of the Child, fits into the same line of assertion of the juridical emancipation of the human being, in stressing the consolidation of the juridical personality of the children, as true subject of law and not simple object of protection.

32. The juridical category of the international legal personality has not shown itself insensible to the necessities of the international community, among which appears with prominence that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability, as do the children. In fact, doctrine and international case-law on the matter sustain that the subjects of law themselves in a legal system are endowed with attributes that fulfil the needs of the international community [FN165].

[FN165] International Court of Justice, Advisory Opinion on Reparations for Injuries, ICJ Reports (1949) p. 178: - "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States".

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33. Hence, - as Paul de Visscher points out perspicaciously, - mientras que "the concept of juridical person is unitary as concept", given the fundamental unity of the human person who "finds in herself the ultimate justification of her own rights", the juridical capacity, on it turn, reveals a variety and multiplicity of scopes [FN166]. But such varieties of the extent of the juridical capacity, - including its limitations in relation to, e.g., the children, the elderly persons, the persons with mental disability, the stateless persons, among others, - in nothing affect the juridical personality of all human beings, juridical expression of the dignity inherent to them.

[FN166] Paul de Visscher, "Cours Général de Droit international public", 136 Recueil des Cours de l'Académie de Droit International de La Haye (1972) p. 56, and cf. pp. 45 and 55.

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34. Thus, in sum, every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition.

IV. The Advent of the Child as a True Subject of Rights at International Level.

35. On the basis of all this notable development is found the principle of the respect for the dignity of the human person, independently of her existential condition. In virtue of this principle, every human being, irrespectively of the situation and the circumstances in which he

finds himself, has the right to dignity [FN167]. This fundamental principle is invoked in the preambles of the United Nations Convention on the Rights of the Child of 1989 as well as of the Declaration of the Rights of the Child of 1959. It appears likewise in the preamble of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, of 1988), among other treaties and international instruments of human rights.

[FN167] On this principle, cf., recently, e.g., B. Maurer, Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme, Aix-Marseille/Paris, CERIC, 1999, pp. 7-491; [Various Authors,] Le principe du respect de la dignité de la personne humaine (Actes du Séminaire de Montpellier de 1998), Strasbourg, Conseil de l'Europe, 1999, pp. 15-113; E. Wiesel, "Contre l'indifférence", in Agir pour les droits de l'homme au XXIe. siècle (ed. F. Mayor), Paris, UNESCO, 1998, pp. 87-90.

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36. It is also found, - and it could not be otherwise, - in the present Advisory Opinion of the Inter-American Court, when this latter places, in the scale of the fundamental values, "the safeguard of the children, both by their condition of human beings and the dignity inherent to them, as by the special situation in which they find themselves. As a result of their immaturity and vulnerability, they require a protection that guarantees the exercise of their rights within the society and with regard to the State" (par. 93).

37. It is certain, as the Court points out in the present Advisory Opinion on the Juridical Condition and Human Rights of the Child, that only along the XXth century the corpus juris of the rights of the child was articulated, in the framework of the International Law of Human Rights (pars. 26-27), conceived the child as a true subject of law. This occurred with the impact notably of the aforementioned Declaration (1959) [FN168] and Convention (1989) on the Rights of the Child, as well as the Minimum Rules of the United Nations for the Administration of the Justice of Minors (Beijing, 1985), and on the Measures Not in Deprivation of Freedom (Tokyo, 1990), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (Ryad, 1990), - besides the general treaties of human rights.

[FN168] Preceded by the Declaration of 1924 of the League of Nations on the matter.

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38. That is, the rights of the child at last detached themselves from the patria potestas [FN169] (from Roman law) and from the conception of the indissoluble character of marriage (from canon law). In the law of family itself, - enriched by the recognition, in the XXth century, of the rights of the child, at international level, - the foundation of parental authority becomes the "superior interest of the child", whose statute or juridical condition acquires at last an autonomy of its own [FN170].

[FN169] It may be observed that, already in the XVIIth century, John Locke gave attention to the treatment to be dispensed to the children, even though from the perspective of parental rights, and in particular of the duties of protection of the children (and not of the development of their juridical statute); such is the case that he dedicated, e.g., the whole of a chapter (VI) of his Essay on Civil Government (besides his writings on education) to patria potestas; despite this advance, the children had not yet emerged as true subjects of law.
[FN170] D. Youf, Penser les droits de l'enfant, Paris, PUF, 2002, pp. 2-5, 9, 14, 18-27 and 77.
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39. It is surprising that, in face of this notable development of the contemporary legal science, there still existes a doctrinal trend which insists in the view that the Convention on the Rights of the Child limits itself to create State obligations. This posture seems to me unconvincing and juridically unfounded, as such obligations exist precisely in virtue of the human rights of the child set forth in that Convention of the United Nations and other international instruments of protection of human rights.

40. Moreover, that trend of thought fails to appreciate precisely the great achievement of contemporary legal science in the present domain of protection, namely, the recognition of the child as subject of law. This is, in my view, the Leitmotiv which permeates the present Advisory Opinion on the Juridical Condition and Human Rights of the Child as a whole. In fact, the Inter-American Court of Human Rights does not hesitate to affirm that all human beings, irrespectively of their existential condition, are subjects of inalienable rights, which are inherent to them (par. 41), and to stress the imperative to fulfil the needs of the child "as a true subject of law and not only as object of protection" (par. 28).

41. The child comes does to be treated as a true subject of right, being in this way recognized his own personality, distinct even from those of his parents [FN171]. Thus, the Inter-American Court sustains, in the present Advisory Opinion, the preservation of the substantive and procedural rights of the child in all and any circumstances (par. 113). The Kantian conception of the human person as an end in herself comprises naturally the children, all the human beings independently of the limitations of their juridical capacity (of exercise).

[FN171] F. Dekeuwer-Défossez, Les droits de l'enfant, 5th. ed., Paris, PUF, 2001, pp. 4-6 and 61; D. Youf, op. cit. supra n. (46), p. 134; J.-P. Rosenczveig, "The Self-Executing Character of the Children's Rights Convention in France", Monitoring Children's Rights (ed. E. Verhellen), Ghent/The Hague, Univ. Ghent/Nijhoff, 1996, p. 195, and cf. pp. 187-197.
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42. All this extraordinary development of the jusinternationalist doctrine in this respect, along the XXth century, finds its roots, - as it so happens, - in some reflections of the past, in the juridical as well as philosophical thinking [FN172]. This is inevitable, as it reflects the process of maturing and refinement of the human spirit itself, which renders possible the advances in the human condition itself.

[FN172] For an examination of the individual subjetivity in philosophical thinking, cf., e.g., A. Renaut, L'ère de l'individu - Contribution à une histoire de la subjectivité, [Paris,] Gallimard, 1991, pp. 7-299.

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43. Thus, as to the juridical domain, I limit myself to rescue a passage of a magisterial course delivered by Paul Guggenheim at the Hague Academy of International Law in 1958. On the occasion, that jurist pertinently recalled that, already in the XVIIth century, Hugo Grotius, who so much had contributed to the autonomy of the jus gentium (detaching it from scholastic thinking), sustained that the rules pertaining to the capacity of trhe children in civil matters [FN173] belonged to the droit des gens itself [FN174].

[FN173] E.g., successions, goods and property, acquisitive prescription.
[FN174] P. Guggenheim, "Contribution à l'histoire des sources du droit des gens", 94 Recueil des Cours de l'Académie de Droit International de La Haye (1958) pp. 30 and 32-34.

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44. As to philosophical thinking, in his Treatise on Education (better known as the Émile, 1762), Jean-Jacques Rousseau appears as a precursor of the modern conceptualization of the rights of the child, in warning, with great sensitiveness, that one ought to respect infancy, to let "nature work", that wishes the children to be children (with their own way of seeing, thinking and feeling) before being adults [FN175]. Human intelligence, - Rousseau kept on warning, - has its limits, cannot learn everything, and the existential time is brief. At the beginning "we do not know to live, soon we will be able to"; reason and judgment "come slowly", while "prejudices overwhelm" [FN176]. One, thus, ought not to lose sight of the passing of time, ought to have it always in mind, and one ought to know to respect the ages of the human existence.

[FN175] J.-J. Rousseau, Emilio, o De la Educación, Madrid, Alianza Ed., 2001 (reed.), pp. 145-146 and 120.
[FN176] Ibid., pp. 241, 311 and 250.

VI. The Subjective Right, Human Rights and the New Dimension of the International Juridical Personality of the Human Being.

45. There is no way to dissociate the recognition of the international juridical personality of the individual from the dignity itself of the human person. In a wider dimension, the human person appears as the being who brings within himself his supreme end, and who achieves it throughout his life, under his own responsibility. In fact, it is the human person, essentially endowed with dignity, who articulates, expresses and introduces the "ought to be" ("deber ser") of the values in the world of the reality in which he lives, and only is he capable of this, as bearer of such ethical values. The juridical personality, in its turn, manifests itself as a juridical category in the world of Law, as a unitary expression of the aptitude of the human person to be titulaire of rights and duties at the level of the regulated behaviour and human relations [FN177].

[FN177] Cf., in this sense, e.g., L. Recaséns Siches, Introducción al Estudio del Derecho, 12th. ed., México, Ed. Porrúa, 1997, pp. 150-151, 153, 156 and 159.

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46. It may be recalled, in the present context, that the conception of individual subjective right already has a wide historical projection, originated in particular in the jusnaturalist thinking in the XVIIth and XVIIIth centuries, and systematized in the juridical doctrine along the XIXth century. Nevertheless, in the XIXth century and the beginning of the XXth century, that conception remained in the framework of domestic public law, emanated from public power, and under the influence of legal positivism [FN178]. The subjective right was conceived as the prerrogative of the individual such as defined by the legal order at issue (the objective law) [FN179].

[FN178] L. Ferrajoli, Derecho y Razón - Teoría del Garantismo Penal, 5th. ed., Madrid, Ed. Trotta, 2001, pp. 912-913.

[FN179] Ch. Eisenmann, "Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin", 60 Revue du droit public et de la science politique en France et à l'étranger (1954) pp. 753-774, esp. pp. 754-755 and 771.

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47. Notwithstanding, there is no way to deny that the crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a titulaire of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-XXth century, the impossibility became clear of the evolution of Law itself without the individual subjective right, expression of a de true "human right" [FN180].

[FN180] J. Dabin, El Derecho Subjetivo, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

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48. As I saw it fit to sustain in my Concurring Opinion in the historical Advisory Opinion n. 16 of this Court on the Right to Information on Consular Assistance in the Famework of the Guarantees of the Due Process of Law (of 01.10.1999), we nowadays witness

"the process of humanization of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law" (par. 35).

49. The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosig the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as oposable to the public power itself.

50. The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, - on the other hand the corpus juris of the universal human rights conferrred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State.

VII. Implications and Projections of the Juridical Personality of the Child at International Level.

51. The convergence of points of view, expressed in the course of the present advisory procedure, both in written form and in the oral pleadings before the Inter-American Court during the public hearing of 21 June 2002, in support of the position of the children as true subjects of law and not and not as simple object of protection, cannot pass unnoticed. In this same sense manifested themselves, e.g., the two intervening States, Mexico and Costa Rica, as well as the Inter-American Commission on Human Rights, besides specialized organisms such as the Inter-American Institute of the Child, the Latin-American United Nations Institute for the Prevention of Delict and the Treatment of the Delinquent (ILANUD), besides non-governmental organizations, such as the Centre for Justice and International Law (CEJIL) and the Foundation Rafael Preciado Hernández (of Mexico). This convergence of points of view as to the juridical condition of the children as titulaires of rights established in the International Law of Human Rights highly significant, as such recognition, besides reflecting a true change of paradigm, represents, ultimately, the opinio juris comunis in our days on the matter.

52. But it is not sufficient to affirm that the child is subject of right, it is important that he knows about it, including for the development of his responsibility. Hence the transcendental relevance of education in general [FN181], and of human rights education in particular, duly recognized in the present Advisory Opinion (pars. 84-85 and 88). It is not difficult to reckon the precocious manifestations of some great vocations, at times very early in life. Every child has effectively the right to create and develop his own project of life [FN182]. In my view, the acquisition of knowledge is a form - perhaps the most effective one - of human emancipation, and indispensable for the safeguard of the rights inherent to every human being [FN183].

[FN181] Set forth in Articles 13 and 16 (in fine) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, of 1988).

[FN182] In the present Advisory Opinion n. 17, the fundamental right to life itself (Article 4 of the American Convention on Human Rights) is understood lato sensu, comprising likewise the conditions of life with dignity (resolutory point n. 7). In this same line of reasoning, the Court pondered, in its Judgment as to the merits in the case of the "Street Children" (Villagrán Morales and Others versus Guatemala, of 19.11.1999) that "the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. (...) Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it" (Series C, n. 63, pp. 64-65, par. 144).
[FN183] And as our ca[acity of knowledge is ineluctably limited, the conscience of this finitude is the best remedy to fight against dogmatisms, ignorance and fanaticisms, so common in our days.

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53. The corpus juris of the human rights of the child has conformed itself as a response of the human conscience to its needs of protection.The fact that the children do not enjoy full legal capacity to act [FN184], and that they therefore have to exercise their rights by means of other persons, does not deprive them of their juridical condition of subjets or right. No one would dare to deny the imperative of the observance, as from the dawn of life, of the rights of the child, e.g., the freedoms of conscience, thought and expression. Special relevance has been attributed to the respect for the points of view of the child, set forth in Article 12 of the United Nations Convention on the Rights of the Child, which, in its turn, has fostered a holistic and integral vision of human rights [FN185].

[FN184] On the décalage, if not the paradox, about the incapacity of the child in civil matters (e.g., law of contracts), in order to avoid his assuming obligations without discernment, and the retention of his (civil and penal) responsibility when he commits a delict, cf. F. Dekeuwer-Défossez, op. cit. supra n. (47), pp. 22-23; and cf. D. Youf, op. cit. supra n. (46), pp. 109-110 and 118-119.
[FN185] On this last point, cf. N. Cantwell, "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child", in The United Nations Convention on the Rights of the Child - A Guide to the `Travaux Préparatoires' (ed. Sh. Detrick), Dordrecht, Nijhoff, 1992, p. 27.

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54. Besides the wide scope of this duty, as formulated in Article 12 of the Convention of 1989, - comprising the right of the child to be heard (directly or by means of a legal representative) in judicial or administrative proceedings in which he participates, and to have his points of view taken into account, - in practice the Committee on the Rights of the Child (of the United Nations) has attributed capital importance to it, reflected in its general guidelines for the elaboration of the initial and periodic (State) reports [FN186]. In circumstances of commission of a delict, the approach of that corpus juris of the rights of the child in relation to the minor who

commits the infraction ends up by being that of a guarantee, oriented towards the development of the responsibility of this latter [FN187]; in no circumstance, - as it can be inferred from the present Advisory Opinion, - is the child deprived of his legal personality, with all the juridical consequences ensuing therefrom.

[FN186] Sh. Detrick, A Commentary on the United Nations Convention on the Rights of the Child, The Hague, M. Nijhoff, 1999, pp. 213-214 and 222.
[FN187] Limited in direct reason of his immaturity and vulnerability.

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55. In the light of the previous considerations, it is undeniable that the international juridical subjectivity of the human being has been affirmed and expanded in the last decades (cf. supra), and that the child (as titulaire of rights) is no exception to that. In the face of the limitations of the juridical capacity of the child (to exercise his rights for himself), a legal representative is recognized to him. But independently of such limitations, the juridical personality of the child, - as of every human being, - projects itself at international level. As it is not possible to conceive rights - emanated directly from International Law - without the prerrogative of vindicating them, the whole evolution of the matter ha oriented itself towards the crystallization of the right of the individual - including the child - to resort directly to the international jurisdictions [FN188].

[FN188] M. Pilotti, "Le recours des particuliers devant les juridictions internacionales", in Grundprobleme des internationalen Rechts - Festschrift für Jean Spiropoulos, Bonn, Schimmelbusch & Co., [1957], p. 351, and cf. pp. 351-362; and cf. S. Séfériadès, "Le problème de l'accès des particuliers à des juridictions internationales", 51 Recueil des Cours de l'Académie de Droit International de La Haye (1935) pp. 23-25 and 54-60.

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56. The experience of the application of the European Convention on Human Rights provides examples of concrete cases in which children have effectively made use of the right of international individual petition under the Convention. Thus, for example, the petitioners in the case X and Y versus The Netherlands (1985) [FN189] before the European Court of Human Rights were a girl child (of 16 years of age) and her father (cf. infra). More recently, in the cases Tanrikulu versus Turkey (1999) [FN190], Akdeniz and Others versus Turkey (2001) [FN191], and Oneryildiz versus Turkey (2002) [FN192], adults and children appeared as petitioners jointly, in denunciations of violations of the right to life [FN193]. In the case A versus United Kingdom (1998) [FN194], a 9-year old child acted as petitioner (cf. infra).

[FN189] Case n. 16/1983/72/110, originated from the petition n. 8978/80.
[FN190] Originated from the petition n. 23763/94.
[FN191] Originated from the petition n. 23954/94.
[FN192] Originated from the petition n. 48939/99.
[FN193] Encompassing murders and forced disappearances of persons.
[FN194] Case n. 100/1997/884/1096, originated from the petition n. 25559/94.

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57. In this way, a child, event though not endowed with juridical capacity in the national legal system at issue, can, nevertheless, make use of the right of individual petition to the international instances of protection of his rights. But once interposed the petition, he must, of course, count on a legal representative [FN195], if he is legally incapable. There is no reason why such representation be conditioned by provisions of any domestic law. As I saw it fit to point out in my aforementioned Concurring Opinion in the case Castillo Petruzzi and Others versus Peru (Preliminary Objections, 1998) before the Inter-American Court, the conditions for the exercise of the right of internacional individual petition do not necessarily coincide with the criteria of domestic law pertaining to locus standi, and there is a whole jurisprudence constante in clear support of the autonomy of the right of individual petition at international level vis-à-vis concepts and provisions of domestic law (pars. 21-22).

[FN195] The European Court of Human Rights has adopted a wide and flexible approach of such legal representation, - which is foreseen in Article 36 of its Regulations in force.

VIII. The Human Rights of the Child and the Obligations of Their Protection Erga Omnes.

58. The preceding considerations lead me to my last line of thoughts, pertaining to the resolutory point n. 9 of the present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child, which provides that

"The States Parties to the American Convention have the duty, in accordance with Articles 19 and 17, in relation to Article 1.1 of it, to take all positive measures which secure the protection to the children against ill-treatment, either with regard to public authorities, or in inter-individual relations or with non-State entities".

59. In this respect, in its Judgment in the aforementioned case of the "Street Children" (Villagrán Morales and Others versus Guatemala, of 19.11.1999), in which "a context of much violence against the children and youth who lived in the streets" was established (pars. 167 and 79), the Inter-American Court pointed out

"the particular gravity of the instant case since the victims were youths, three of them children, and because the conduct of the State not only violated the express provision of Article 4 of the American Convention, but also numerous international instruments, widely accepted by the international community, which devolve to the State the duty to adopt special measures of protection and assistance for the children under its jurisdiction" [FN196].

[FN196] IACtHR, Series C, n. 63, p. 65, par. 146.
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60. The advances, in the present context, at the juridical level (cf. supra), cannot make us forget the current deterioration of basic social policies everywhere, aggravating the economic-social problems which so much affect children, and which transform the necessity to secure the right to create and develop their project of life an undeniable question of justice [FN197]. The recurring, and aggravated, problems, which nowadays affect the children (added to the tragedy of refugee, displaced and stateless children, and of the children involved in armed conflicts), warn that we remain far from their "integral protection". Nevertheless, one ought to persevere in the endeavours in favour of the prevalence of the general principle of the "superior interest of the child", - enshrined into Article 3 of the United Nations Convention on the Rights of the Child, and evoked in the present Advisory Opinion (pars. 56-61), - from which emanates their dignity as human beings.

[FN197] Cf., in this sense, E. García Méndez, "Infancia, Ley y Democracia: Una Cuestión de Justicia", in Infancia, Ley y Democracia en América Latina (eds. E. García Méndez and M. Beloff), Bogotá/Buenos Aires, Temis/Depalma, 1998, pp. 9-28, esp. p. 28.

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61. In the aforementioned case X and Y versus The Netherlands (1985) before the European Court of Human Rights, concerning sexual abuse to the detriment of a 16-year old girl child with mental disability, - with traumatic consequences for the direct victim, aggravating her mental disturbances, - the European Court pointed out that the concept of "private life" (under Article 8 of the European Convention) encompassed the physical and moral integrity of the person (including her sexual life). In the case, - added the Court, - "fundamental values and essential aspects of private life" were at issue, and required the adoption of positive measures on the part of the State so as to secure the respect for private life also in the sphere of inter-individual relations. The Court concluded that the respondent State had violated Article 8 of the Convention, as the pertinent provisions of the Dutch Penal Code [FN198] did not secure to the victim a "practical and effective protection" [FN199].

[FN198] Articles 248 ter and 239(2) of that Code.
[FN199] European Court of Human Rights, case of X and Y versus The Netherlands, Judgment of 26.03.1985, Series A, n. 91, pp. 11-14, esp. pars. 7-8, 22-23, 26-27 and 30.

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62. That is, the Court concluded that the Netherlands had violated Article 8 of the Convention for not providing the legal protection against abuses (to the detriment of a girl child) in the private or inter-individual relations. We are here before the State duty to take positive measures of protection of the of the children, among the other individuals, not only vis-à-vis the public authorities, but also in relation with other individuals and non-State actors. This is a clear example of obligations of protection of the children (and all those in need of protection) truly erga omnes.

63. In two other recent cases, A versus United Kingdom (1998) and Z and Others versus United Kingdom (2001), the European Court affirmed the obligation of the respondent State to

take positive measures to protect the children against ill-treatment, including that inflicted by other other individuals (pars. 22 and 73, respectively) [FN200]. It is precisely in this private ambit that abuses are often committed against children, in face of the omission of public power, - what thus requires a protection of the human rights of the child erga omnes, that is, including in the inter-individual relations (Drittwirkung).

[FN200] The same position was assumed by the old European Commission of Human Rights, in the case Z, A, B and C versus United Kingdom (petition n. 29392/95), interposed by two boys and two girls (Report of 10.09.1999, par. 93).

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64. This is a context in which, definitively, the obligations of protection erga omnes assume special relevance. The foundation for the exercise of such protection is found in the American Convention on Human Rights itself. The general obligation which is set forth in its Article 1.1 to respect and to ensure respect for the protected rights - including the rights of the child, as stipulated in Article 19 [FN201] - requires from the State the adoption of positive measures of protection (including for preserving the preponderant role of the family, foreseen in Article 17 of the Convention, in the protection of the child - par. 88), applicable erga omnes. In this way, Article 19 of the Convention comes to be endowed with a wider dimension, protecting the children also in the inter-individual relations.

[FN201] During the work of the Inter-American Specialized Conference on Human Rights (San José of Costa Rica, November 1969), this provision (of Article 19) was inserted into the American Convention on Human Rights without major difficulties; cf. OAS, Conferencia Especializada Interamericana sobre Derechos Humanos - Actas y Documentos (San José of Costa Rica, 07-22.11.1969), doc. OEA/Ser.K/XVI/1.2, 1978 (reprint), pp. 20-21, 232, 300 and 445.

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65. The present Advisory Opinion of the Inter-American Court on the Juridical Condition and Human Rights of the Child gives a notable contribution to the jurisprudential construction of the erga omnes obligations of protection of the rights of the human person in every and any circumstances. The Advisory Opinion affirms categorically the general duty of the States Parties to the American Convention, as guarantors of the common good, to organize public power so as to guarantee to all persons under their respective jurisdictions the free and full exercise of the conventionally protected rights, - an obligation which is susceptible to being required not only in relation to the State power but also in relation to "actions of private third parties" (par. 87).

66. At a moment in which the sources of violations of the rights of the human person are regrettably diversified, the understanding of the Court could not be otherwise. This is the interpretation which imposes itself, in conformity with the letter and the spirit of the American Convention, and capable of contributing to the fulfilment of its object and purpose. Just as the Court sustained in its recent Resolution of Provisional Measures of Protection (of 18.06.2002) to the benefit of the members of the Community of Peace of San José of Apartadó (Colombia), and

of the persons who render services to this latter, in the present Advisory Opinion n. 17 the Court again stresses, correctly, that the protection of the rights of the human person applies erga omnes.

67. This is an imperative of international ordre public, which implies the recognition that human rights constitute the basic foundation, themselves, of the legal order. And the values, which are always underlying it, - besides being perfectly identifiable [FN202], - see to it to give them concrete expression. It is not to pass unnoticed, for example, that already the preamble of the Universal Declaration of Human Rights of 1948 invoked the "consciencie of mankind". And, one decade later, the preamble of the Declaration on the Rights of the Child of 1959 warned with all propriety that "mankind owes to the child the best it has to give".

[FN202] Along the operative part of treaties and international instruments of human rights, but explicitly referred to above all in their preambles, which tend to invoke the ideals which inspired such treaties and instruments, or to enunciate their foundations or general principles. N. Bobbio, "Il Preambolo della Convenzione Europea dei Diritti dell'Uomo", 57 Rivista di Diritto Internazionale (1974) pp. 437-440.

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68. In sum, in the domain of the International Law of Human Rights, moved by considerations of international ordre public, we are before common and superior values, truly fundamental and irreducible, seized by human conscience. This latter is always present, it has accompanied and fostered the whole evolution of the jus gentium, of which - I firmly believe - is the material source par excellence.

69. In concluding this Concurring Opinion, I allow myself to return to my starting-point. We all live in time. Each one lives in his time, which ought to be respected by the others. It is important that each one lives in his time, in harmony with the time of the others. The child lives in the minute, the adolescent lives in the day, and the adult, already "impregnated of history" [FN203], lives in the epoch; those who already departed, live in the memory of those who remain and in eternity. Each one lives in his time, but all human beings are equal in rights.

[FN203] In the fortunate characterization of Bertrand Russell, A Última Oportunidade do Homem, Lisbon, Guimarães Ed., 2001, p. 205.

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70. From the perspective of an international tribunal of human rights like the Inter-American Court, one ought to affirm the human rights of the children (and not the so-called "rights of the childhood or infancy"), as from their juridical condition of true subjects of law, endowed with international legal personality; one has, moreover, to develop all the potentialities of their legal capacity. I have always sustained that the International Law of Human Rights will achieve its plenitude the day when is definitively consolidated the recognition not only of the personality, but also of the international legal capacity of the human person, as subject of inalienable rights, in all and any circumstances. In the jus gentium of our days, the importance of the consolidation

of the international legal personality and capacity of the individual, irrespectively of his existential time, is much greater than what one may prima facie assume.

71. In fact, as the Law ineluctably recognizes juridical personality to every human being (whether he is a child, an elderly person, a person with disability, a stateless person, or any other), irrespectively of his existential condition or of his juridical capacity to exercise his rights for himself (capacity of exercise), - we may, thus, visualize a true right to the Law (derecho al Derecho), that is, the right to a legal order (at domestic as well as international levels) which effectively protects the rights inherent to the human person [FN204]. The recognition and consolidation of the position of the human being as full subject of the International Law of Human Rights constitutes, in our days, an unequivocal and eloquent manifestation of the advances of the current process of humanization of International Law itself (jus gentium), to which we have the duty to contribute, as the Inter-American Court of Human Rights has done in the present Advisory Opinion n. 17 on the Juridical Condition and Human Rights of the Child.

[FN204] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2002, chapter XX, pp. 521-524.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ ON ADVISORY OPINION OC-17, REGARDING THE "LEGAL STATUS AND HUMAN RIGHTS OF CHILDREN," OF AUGUST 28, 2002.

1. The request for an Advisory Opinion received and considered by the Court --OC-17/2002, on the "Legal status and human rights of children"—to which this Concurring Opinion is attached, reflects among other matters a concern with identifying and adequately defining the limits of the power of the State to act with respect to children under certain extremely important assumptions.These must be carefully delimited: a) conduct, by action or omission, that has been legally defined as criminal, in other words, that is a criminal offense; and b) a situation which involves no legally defined crime and where there is a need for such an action for the real or alleged benefit of the minor. This viewpoint, which I do not necessarily share but which nevertheless expresses those assumptions, would lead us to refer to "juvenile offenders" or to "criminal children or youths", in the former case, and to "minors in irregular situations" or "at risk", in the latter. Needless to say, these terms today have a strong "unfavorable connotation", or at least one that is controversial. The great debate begins –or ends- with the very use of those expressions.

2. It is worth pointing out that the borderline between those two hypotheses must be subordinated to the nature of the facts or the respective situations of each one, from the

standpoint of the rights recognized and protected by the juridical order –in mi opinion, from the level of the national Constitution itself- and the gravity of the detriment caused to them or the danger they face. In a democratic society, the legislative authority must carefully observe the limits of each hypothesis, in accordance with its nature, and consequently establish the appropriate regulation. It is not acceptable for a conduct to be placed within one of the aforementioned categories solely by the free discretion of the legislative body, without taking into account Constitutional decisions and principles that govern legislators' tasks when they "select" the conducts that must be considered criminal, as well as the respective juridical consequences.

3. In this Vote, as in Advisory Opinion OC-17 itself, the terms "child" and "minor" are used in their most rigorous sense (para. 39), and at the same time in that which is farthest from any disqualifying, biased or pejorative intention. Language is a system of codes. I must define the scope of those I now use, adhering to the way the Court has used them in this Advisory Opinion, to place them above or beyond –according to each one's preference- a debate that casts more shadows than light. The word "minor", widely used at a national level, refers to a person who has not yet reached the age at which full –or broad- exercise of his or her rights has been established there, together with the respective duties and responsibilities. As a rule, this borderline coincides with the ability to enjoy civil rights, or many of them (a possibility that arises in the past: since birth, or even before that), and the ability to exercise them (a possibility that unfolds toward the future, where the borderline is crossed toward an autonomous exercise of rights by the person entitled to them). The meaning of the word "child", in turn, has in principle been more biological or biopsychological than juridical, and this meaning, that is in line with popular usage of the term, contrasts with adolescent, youth, adult, or elderly persons.

4. The concept of a "child" coincides with that of a "minor" when the former and the latter are juridicized, so to speak, and they concur under the same consequences of Law. The United Nations Convention on the Rights of the Child, often invoked in the instant Advisory Opinion, considers children to be persons under 18, "unless under the law applicable to the child, majority is attained earlier" (Article 1) (para. 42). This grants a precise legal meaning to the term child, and as such it places this concept –and this subject- as a reference point to assign multiple juridical consequences. Needless to say, the word child here encompasses adolescents, because it thus arises from this widely ratified Convention, and it also includes girls, according to the rules of our language. The Inter-American Court itself declares the scope of the terms "child" and "minor" for purposes of the Advisory Opinion. Allow me, then, to avoid constant use of the exuberant expression: boy-child, girl-child, and adolescent (which could be expanded if we also establish a distinction between male and female adolescents).

5. Neither the statement by the Court in this regard nor the Whereas paragraphs nor the specific opinions in the last part of OC-17 differentiate in any way that would allow a distinction to be established on the basis of or in connection with good judgment or the so called presumption regarding capability (or incapability) of actual malice. Such distinctions would, in turn, create new sub-sets within the larger group of children. It is, then, understood that the age of 18 is a precise borderline between two ages that involve two distinctive situations in the ambit of this Opinion: one, regarding those who find themselves outside the subjective validity of normal criminal rules, and the other pertaining to those who are subject to them.

6. When the Advisory Opinion refers to a specific treatment of children or minors, and distinguishes it from that given to adults or persons who have attained majority, in my opinion this entails the assumption that the system applicable to adults cannot be transferred or applied to minors (para. 109). This, of course, does not hinder: a) the existence of principles and rules applicable, by their very nature, to both groups (human rights, guarantees), whatever modalities are reasonable or, even, necessary in each case, and b) the existence, in the ambit of minors, of differences derived from the diverse development among individuals under 18: there is, in effect, a major difference between those who are 8 or 10 years old and those who are 16 or 17.There are also differences –which I do not intend to examine now- in the other group, that of adults, for various reasons; the most obvious example is that of those who have lost their faculty of reasoning.

7. Clearly, the points I mentioned in paragraph 1, supra, would also be of interest if we were dealing with an adult or a "person who has attained majority", and in fact they have determined some of the more protracted, intense, and significant developments associated with democracy, the Rule of Law, liberties, human rights, and guarantees. These themes –with their respective values- come to the forefront when the public authorities face "criminal" individuals, on the one hand, or "marginal or destitute" individuals on the other. In this confrontation, as longstanding as it is dramatic, the most relevant individual rights –to life, liberty, humane treatment, patrimony- are at stake, and the most impressive, though not necessarily justified or persuasive, arguments are put forward to legitimize the actions of the State, as well as their characteristics and objectives, whether acknowledged or unspeakable.

8. Nevertheless, the point becomes more complex when in addition to its sensitivity due to the subject matter –irregularity, extravagance, marginality, dangerousness, crime-, members of an especially vulnerable human group are involved, often lacking the personal abilities to adequately face certain problems, due to lack of experience, immaturity, weakness, lack of information or of training; or when they do not meet the requirements of the law to freely manage their own interests and exercise their rights in an autonomous manner (para. 10). Such is the situation of children or minors, who on the one hand generally and in a relative manner –as different factors generate diverse situations- lack those personal requirements, and on the other hand exercise of their rights is restricted or halted, ope legis. It is natural that in this "mine-strewn terrain" abuse may appear and thrive, often shrouded by paternal discourse or one of redemption, which can hide the severest authoritarianism.

9. In the criminal system of the remote past, adults and minors were subject to similar if not identical rules, eased in the case of the latter by benevolence issuing from a humane attitude or based on the lack of or diminished judgment (subject to demonstration, because malitia supplet aetatem). The various ages of the individual could also establish different degrees of subjection to criminal justice and its distinctive consequences. Extreme minority –up to seven or nine years of age, for example- could lead to complete exclusion from access to criminal justice, though not to all State justice. For older but still not juvenile children, the consequences of criminal conduct or intervention of criminal justice were moderated in accordance with the level of good judgment that the individual could exercise to appreciate and govern his or her own conduct. Finally, attaining another, juvenile age –between 16 and 21- made the individual fully responsible for his

or her conduct, and therefore subject to criminal prosecution and conviction. In actual “penal life”, things did not always happen as was sought by legislation or good sense: there are abundant stories –both forensic or criminological and literary- about the indistinct incarceration of children, adolescents, youths and adults in the same detention centers.

10. In a period somewhat longer than the last century, the idea of setting a clear-cut boundary between minors and adults took root; the former would be subject to semi-paternal action or jurisdiction by the State, while the latter –legally qualified according to criminal Law- would be subject to regular criminal justice. It was then said that criminal chargeability would begin at the threshold age, and that under that age there would be absolute immunity from prosecution, established by law. This certainty was reflected in a centenarian expression: “L’enfant est sorti du Droit pénal” [FN205].

[FN205] Garçon, at the First National Criminal Law Congress (Rev. Pénitentiaire, 1905), cit. by Nillus, Renée, “La minorité pénale dans la législation et la doctrine du XIX siècle”, in Several authors, Le problème de l’enfance délinquante, Institut de Droit Comparé de l’Université de Paris, Lib. du Recueil Sirey, Paris, 1947, p. 104.

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11. I will not expand at this time on the relevance or irrelevance of referring in this regard, as is often done, to “immunity from prosecution,”, or of using other concepts that can better explain the distinction between adults and minors for purposes of criminal Law. If it is considered, as accredited doctrine and many criminal laws do, that chargeability is the capacity to understand the lawfulness of one’s own conduct and to behave in accordance with that understanding, it follows that chargeability is not a group theme, but rather an individual one; in effect, one is or is not chargeable depending on that capacity, which one does or does not personally have. Assignment of chargeability or immunity from prosecution ope legis to a broad human group, by virtue of the age they all have, and not each one’s capacity, is a useful fiction which answers to the needs and expectations of a certain policy apropos of youth’s protection and development, but not of the specific reality –the only one that exists- of each one’s case.

12. In any case, the delimitation, which was supposed to be uniform, has never been so: different boundaries prevailed in various countries, and there also were or are different boundaries within a single country under a federal system. The situation is quite diverse even among countries that have common juridical values, as in the case of Europe: the age for criminal responsibility is seven years in Cyprus, Ireland, Switzerland, and Liechtenstein; eight in Scotland; thirteen in France; fourteen in Germany, Austria, Italy, and several East European States; fifteen in the Scandinavian countries; sixteen in Portugal, Poland, and Andorra, and eighteen in Spain, Belgium, and Luxembourg. [FN206]

[FN206] Cfr. Eur. Court of H. R., Case of T. v. The United Kingdom, Judgment of 16 December 1999, para. 48.

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13. Distribution of the population between these two major sectors, for purposes of responsibility for unlawful conduct, involved the establishment or development of different jurisdictions --lato sensu--, differentiated juridical orders as well as procedures and institutions for each one. In the case of adults, this development coincided with the apogee of the principle of criminal and procedural legality, which gave rise to a more or less demanding system of guarantees. In the case of minors, instead, removal from criminal justice led to the establishment of "paternalistic or protective" jurisdictions based on the idea that the State relieves parents or guardians of custody or guardianship, and undertakes their functions with their usual scope and characteristics. In the Anglo-Saxon tradition, the roots of this idea are found in the parens patria [FN207] system, which connects with the principle of the king as father of the realm.

[FN207] Cfr. Senna, Joseph J., and Siegel, Larry J., Introduction to criminal justice, West Publishing Company, 4th. ed., St. Paul, 1987, p. 535.

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14. Evolution and adaptation of this way of addressing the issue of juvenile offenders is related to the idea of the "social State," broadly empowered to undertake economic, social, educational, or cultural tasks. That same tendency to intervene and take over functions, which previously were the sole responsibility of other instances –with arguments worthy of consideration and in relation to pressing realities-, to a certain extent encouraged the State to move into the ambit of parenthood and guardianship. If parents or guardians can decide on the development of their children with considerable liberty, even adopting measures of authority that would not be applicable to adults outside judicial proceedings, the "parent or guardian State" might do the same, setting aside, to this end, the formalities and guarantees of regular Law: from legality in definition of conducts that give rise to intervention and the nature and duration of the respective measures, to the procedures to reach decisions and implement them.

15. National legislation and case law, supported by a doctrine that seemed innovative at the time, strengthened the paternalistic position of public authorities in various countries. In the United States, these ideas took root after an 1838 Pennsylvania Supreme Court order: Ex parte crouse. In Mexico, almost a hundred years later, a well-known judgment by the Supreme Court of Justice, rendered in the amparo case brought by Ezequiel Castañeda against acts of the Minors' Court and the respective law, stated the traditional criterion: in that case, the State did not act "as an authority, but rather performing a social mission and substituting the private citizens entrusted by the law and by the juridical tradition of Western civilization to carry out an educational and corrective action with respect to minors." [FN208] This defined the path that would be followed regarding this matter, in a more or less peaceful manner, for many years. Taking into account the parental and protective role undertaken, which juridically explained and justified the actions of the State, as well as the purpose given to its intervention in these affairs, which roughly coincided with the intention to correct or recover that prevailed in the case of adults, this way of acting and the line of thought that backed it, were given a name which has survived until our times: "protective."

[FN208] “Ejecutoria dictada por la Primera Sala de la Suprema Corte de Justicia de la Nación, con motivo del amparo promovido a favor del menor Castañeda por su detención en el Tribunal de Menores”, in Ceniceros, José Angel, and Garrido, Luis, La ley penal mexicana, Ed. Botas, Mexico, 1934, p. 323.
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16. The protective approach, understood as stated in the paragraphs above, was at the time an interesting step forward from the previously prevailing system. It sought to, and effectively did, remove minors from the spaces where justice was applied to adult offenders. Since it was understood that children do not commit crimes and therefore cannot be classified nor treated as criminals, but rather as “sui generis” offenders, it sought to exclude them from the world of regular criminals. It also noted the enormous weight that the judicial apparatus can apply on minors, and assumed that it was preferable to establish procedures and organize bodies that did not have the “profile and clamor” of regular justice, the results of which had not, precisely, been satisfactory in the case of minors.

17. Handing children over to this method to solve their “behavior problems,” understood as “problems with the law,” brought with it various difficult questions that led to its being questioned increasingly and gave rise to proposals to substitute it with a different system. First of all, the extraordinary flexibility of the protective concept regarding conduct that could determine State intervention brought into the same framework for attention, action and decision-making, acts that were legally defined as crimes and others that were not. This included certain domestic conflicts which should be solved by the parents and were transferred, due to their incompetence or for their convenience, to correctional bodies of the State. This confusion brought to the same courts and institutions those who had committed legally-defined grave crimes and those who had incurred in more or less slight “errors of conduct”, that should have been addressed from a different perspective. This gave rise to questioning of the protective approach: “the protective pretext can hide very grave injuries of all sorts (to the right to legal representation, to freedom of movement, to custody, to the family). Juvenile law, understood as “protective law,” has been rightly questioned several years ago and no one can forget that, historically, the worst aberrations have been committed with protective pretexts: against heretics, against infidels, etc.” [FN209]

[FN209] "Documento de discusión para el Seminario de San José (11 al 15 de julio de 1983), redactado por el coordinador, profesor Eugenio R. Zaffaroni,” in Sistemas penales y derechos humanos en América Latina (Primer Informe), Ed. Depalma, Buenos Aires, 1984, p. 94.
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18. Likewise, when the State took over the authority of parents and guardians, it not only took control of and captured minors, but it also violently deprived adults of certain rights under family statute. Furthermore, the intention to exclude the legal definition and form of the regular trial, together with the idea that the State is not in conflict with the child, but rather the best guarantor of his or her well-being –proceedings that were not contentious and therefore had no procedural parties-, led to minimizing participation of the minor and of those legally responsible for him or her in the procedural acts, setting aside certain acts that in regular Law are part of “due legal process,” and suppression of the system of guarantees that contributes to control of

actions by the State to moderate its strength and its discretion for the sake of legality, which must ultimately benefit justice.

19. These and other problems gave rise, as I mentioned before, to a strong reaction that demanded a return –or evolution, if one prefers to state it thus- toward different legal methods, that involve a significant sum of guarantees: first of all, substantive and procedural legality that can be verified and controlled. Erosion of the former system began from various angles. A very significant one was jurisprudence: just as it had strongly exalted the parens patria doctrine, it would demolish the solutions linked to that doctrine and establish a new guarantee-based system. In the United States, a famous Supreme Court order of May 15, 1967, In re Gault, [FN210] effected a turn in the direction that would subsequently prevail, reinstating certain essential rights of minors: to be informed of the charges, to have legal counsel, to examine witnesses, to not incriminate themselves, to have access to the file, and to appeal. [FN211] The reaction gave rise to a different system, one that is usually referred to by the expressive name of a "guarantee-based" system. This name denotes the reinstatement of guarantees –essentially, the minors' rights, as well as those of their parents- in the system applied to juvenile offenders.

[FN210] In re Gault, 387 U.S. 9, 1967), issued in the case of the fifteen-year-old adolescent, Gerald Gault, who was accused –together with another youth: Ronald Lewis- of obscene phone calls.

[FN211] Cfr. Cole, George F., The American System of Criminal Justice, Brooks/Cole Publishing Company, 3rd. ed., Monterey, California, 1983, p. 474.

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20. Actually, increasing criminal waves –and among them crime by children or youths in "youthful societies," such as the Latin American ones-, which lead to equally growing and understandable demands by public opinion, have triggered legal and institutional changes that seem to define one of the most important and significant current positions of society and the State. These disturbing changes include a reduction in the age of access to criminal justice, with the resulting growth of the universe of those potentially subject to criminal justice: with each reduction of that age, millions of persons enter that universe, having been children or adults the day before and having become adults by legislative agreement. Transformation of procedures with respect to minors has obviously brought with it the application of legal definitions that are typical of criminal proceedings, together with the penal customs or culture that are inherent to them.

21. Currently there is in many countries, as was clearly seen in the course of the proceedings (briefs and statements at the June 21, 2002 public hearing) (para. 15) leading to the Advisory Opinion to which this Opinion is attached, a strong debate between schools of thought, trends or concepts: on the one hand, the protective system, associated with the doctrine of the "irregular situation" –which "means nothing else, it has been stated, than legitimizing indiscriminate judicial action regarding those children and adolescents who are in difficult situations"- [FN212] and on the other hand, the guarantee-based system, linked to what has been called the doctrine of "comprehensive protection" –which "refers to a series of international juridical instruments that express a fundamental qualitative leap in social consideration of childhood;" there is thus a

movement from the “minor as an object of compassion-repression, to children and adolescents as full subjects of rights.” [FN213] There has been an acute polarization between these two schools of thought, and their encounter –or confrontation- poses a fundamental dilemma of sorts, which can sometimes generate “fundamentalisms” with their characteristic styles. This dilemma is posed in very simple terms: either the protective system or the guarantee-based system.

[FN212] García Méndez, Emilio, Derecho de la infancia-adolescencia en América Latina: de la situación irregular a la protección integral, Forum Pacis, Santa Fé de Bogotá, Colombia, 1994, p. 22.
[FN213] Id., pp. 82-83.

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22. If one takes into account that the protective approach has as its emblem that of treating the minor in accordance with his or her specific conditions and providing the protection that he or she requires (hence the term “protection”), and that the guarantee-based approach is substantially concerned with recognition of minors’ rights and legal responsibilities, identification of minors as subjects, rather than objects of the proceedings, and control of acts of the authorities by means of the relevant system of guarantees, it is possible to note that there is no essential or radical opposition between one and the other intent. Neither do the basic goals of the protective project contradict those of the guarantee-based project, nor do those of the latter contradict those of the former, if both of them are considered in their essential aspects, as I do in this Opinion and as has been done, in my view, in the Advisory Opinion, which does not adhere to any specific doctrine.

23. How can we, in effect, deny that a child is in a different situation from that of an adult, and that diverse situations may rationally require diverse approaches? Or that the child requires, because of these characteristic conditions, special, different and more intense and meticulous protection than an adult, if there is any for the latter? And how can we deny, on the other hand, that the child –above all, a human being- is entitled to irreducible rights, some of which are generic while others are specific? And that he or she is not and cannot be seen as an object of the proceedings, subject to the discretion or whim of the authorities, but rather as a subject of the proceedings, since he or she has true and respectable rights, both substantive and procedural? And that in his or her case, as in any other, procedures must abide by clear and legitimate rules and be subject to control through a system of guarantees?

24. If that is true, then probably the time has come to leave behind the false dilemma and recognize the true dilemmas that are present in this field. Those of us who at one time addressed these issues –rightly or mistakenly, and now seeking to overcome mistakes or, better, to move forward by revising concepts that are no longer justified-. have had to correct our earliest assertions and reach new conclusions. Real contradictions –and therefore dilemmas, antinomies, true conflicts- must be expressed in other terms. The protective and guarantee-based approaches are not opposed to each other. The real opposition is between protective and punitive approaches, at one level of consideration, and between the approach based on guarantees and arbitrarity, at the other level. [FN214] Ultimately, where there seems to be contradiction a synthesis, a meeting-ground or consensus may arise dialectically. This would take up the substantive aspects

of each doctrine; their intimate raison d'être, and would restore the original meaning of the word "protection" –as one speaks of protection of the Law or protection of human rights-, which has led some writers of treatises to identify it with juvenile offenders' Law, [FN215] which under the sign of protection, in its original and pure meaning, would constitute a protective Law, not a Law that takes away fundamental rights.

[FN214] Cf. the development of this opinion in my paper "Algunas cuestiones a propósito de la jurisdicción y el enjuiciamiento de los menores infractores", in Memoria (of the symposium: Coloquio Multidisciplinario sobre Menores. Diagnóstico y propuestas), Cuadernos del Instituto de Investigaciones Jurídicas, UNAM, 1996, pp.205-206.

[FN215] Thus, when Jescheck states that juvenile criminal Law is part of minors' protective Law. Cf. Tratado de Derecho penal. Parte general. Transl. S. Mir Puig and F. Muñoz Conde, Bosch, Barcelona, vol. I, pp. 15-16.

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25. On the one hand, this synthesis would retain the intention of protecting the child, as a person with specific needs for protection, who should be looked after with measures of this type, rather than with the characteristic solutions of the criminal system for adults. This initial articulation of the synthesis has been reflected, extensively, in the American Convention itself, in the San Salvador Protocol, and in the Convention on the Rights of the Child, which insists on the specific conditions of minors and the respective protection measures, as well as in other instruments cited by the Advisory Opinion: Beijing Rules, Riyadh Guidelines, and Tokyo Rules (paras. 106-111). And on the other hand, the synthesis would include the basic demands of the guarantee-based approach: the rights and guarantees of minors. This second articulation is reflected, no less extensively, in those same international instruments, which express the current situation in this regard. In brief, the child will be treated in a specific manner, according to his or her own conditions, and will not be deprived –since he or she is a subject of rights, not just an object of protection- of the rights and guarantees inherent to human beings and to their specific conditions. Rather than suggesting that minors be included in the system for adults, or that their guarantees be diminished, on the one hand specificity is reinforced, and on the other hand lawfulness.

26. For this reason, in my view, the Advisory Opinion of the Inter-American Court avoids "subscribing" to one or another of the lines of thought involved, and prefers to analyze the issues raised before it –conveniently grouped, as the decision itself states, under broad concepts that can be applied to the specific hypotheses- and to state the respective opinions. In this manner, the Court, taking into account the inherent objectives of an opinion with these characteristics, fosters the development of domestic Law in accordance with the principles reflected in and applied by international law.

27. In the procedural system for minors, both when the procedure involves offenders who have broken the criminal law and when the procedure has been triggered by situations that are different in nature, it is necessary to respect the principles of fair trial in a democratic society, governed by legality and legitimacy of the acts of the authorities. This involves equality between the parties, the right to be heard and to legal counsel, the possibility of submitting evidence and

arguments, the presence of both parties, control over lawfulness, the right to appeal, etc. However, it is not possible to disregard the fact that minors have a special situation in the proceedings, as they do in life and in all social relations. Neither inferior nor superior: different, thus also requiring different attention. It must be underlined, as I did above –and the Advisory Opinion is emphatic in this regard- that all international instruments pertaining to the rights of the child or minor recognize without a doubt the "difference" between them and adults and the relevance, therefore, of adopting "special" measures with respect to children. The very idea of "speciality" recognizes and reaffirms the existing difference –a de facto inequality, which the Law does not disregard- and the diverse juridical solutions that it is appropriate to contribute given this panorama of diversity.

28. It is well known that in the social process –not public, not private- equality among the parties is sought by ways other than the simple, solemn and ineffective proclamation that all men are equal before the law. It is necessary to introduce compensation factors to attain, insofar as possible, that leveling. This has been explicitly stated by the Inter-American Court itself in its case law, cited in this Advisory Opinion. [FN216] (paras. 47 and 97). Proceedings involving minors in a major, rather than an incidental, manner to solve controversies and define their obligations and rights, coincide to a large extent with proceedings that are social in nature, origin, or orientation, and are distinct from those typically public, private, or criminal. The former require the "material" defense provided by the law and by judicial proceedings: specialized assistance, measures to correct material and procedural inequality, correction of deficiencies of the complaint, official aid to gather evidence offered by the parties, establishment of historical truth, etc.

[FN216] Cfr. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99, of October 1, 1999. Series A No. 16, para. 119. Likewise, see Proposed ammendments to the naturalization provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 57.

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29. An extreme form of the proceedings regarding juvenile offenders excluded parents and guardians from them. Said exclusion in this ambit –dominated by what a distinguished procedural specialist called a proceeding of a "protective-inquisitorial nature" [FN217]- reflected the idea that there was no true controversy in trials of minors, because the interests of the minor and those of society coincided. Both sought the welfare of the child. In current terms one would say: the best interests of the minor. If such was the theory, things did not function that way in concrete regulations and in practice, and in any case the rights of the parents regarding their children were at stake, as well as their own rights, those of the family and other rights. It is therefore necessary to accept that the minor cannot be foreign to his or her own trial, a witness and not a protagonist of his or her case, and that the parents –or guardians- also have their own rights to assert and for this reason they must participate in the trial, each with an advisor, promoter or defense counsel undertaking their defense fully and effectively.

[FN217] Alcalá-Zamora and Castillo, Niceto, Panorama del Derecho mexicano. Síntesis del Derecho procesal, Universidad Nacional Autónoma de México, Instituto de Derecho Comparado, Mexico, 1966, p. 245.

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30. This procedural claim should, on the other hand, note certain facts. In one case, the child is not qualified –let us consider, especially, the youngest children- to conduct a personal action such as that an experienced or at least a mature adult could conduct (para. 101). This characteristic of the child should be reflected in his or her participation in the trial and in the significance of the acts he or she carries out –the statements, among other acts, whose requirements in terms of admissibility and efficacy are usually set forth in procedural law itself-; can be ignored neither by the law nor by the courts, using as a pretext equality among all participants in the proceedings, as this would ultimately cause the greatest harm to the legal interests of the child. And in another case it is possible –especially given the characteristics of the conflicts decided here- that there is a contradiction of interests and even of positions between the parents and the minor. This is not always the appropriate terrain for legal representation, which in principle corresponds to those who exercise custody or guardianship, to be exercised to its fullest natural extent.

31. The above reflections regarding these and other similar hypotheses should not be construed as impediments for the State to act effectively and diligently –and invariably with due respect for lawfulness- in urgent situations that require immediate attention. Grave danger faced by a person –and, obviously, not only a minor- requires that the risk be addressed in a prompt and expedite manner. It would be absurd for a fire only to be turned out when there is a court order authorizing intervention in the private property on fire, or to protect an abandoned child, at risk of injury or death, only after a judicial process culminating with a written order by the competent authority.

32. The State has duties of immediate protection –set forth in legislation, in addition to reason and justice- which it cannot disregard. In these hypotheses, the nature and function of the State as a "natural and necessary guarantor" of the goods of its citizens comes forth with all its strength, when all other entities called upon to ensure their safety –the family, for example- are not able to ensure it or may, even, be a clear risk factor. This emergency action, which allows for no delay, is based on the same considerations that authorize adoption of preventive or precautionary measures inspired by a reasonable appearance of urgent need, which suggests the existence of rights and duties, and by periculum in mora. Of course, the precautionary measure does not prejudge the merits, nor does it defer or suppress the respective trial or proceeding.

33. I believe it necessary to highlight –and I am pleased that OC-17/2002 has done so- a major issue for reflection on this matter, which is part of the background to understand where solutions to many of the problems –not all, obviously- that affect us in this regard are to be found. If one looks at the reality of minors taken before administrative or judicial authorities and then subject to protection measures in view of criminal offenses or other situations, one will note, in the vast majority of cases, that they lack integrated households, means of subsistence, true access to education and to healthcare, adequate recreation; in brief, they neither have nor ever had reasonable expectations and conditions for a decent life (para. 86). Generally it is they –

and not those better off- who end up at police headquarters, with various charges, or who suffer violation of some of their most essential rights: life itself, as has been seen in the judicial experience of the Inter-American Court.

34. In these cases, which apply to an enormous number of children, not only are civil rights violated, including those pertaining to offenses or conduct that give rise to intervention by the abovementioned authorities, but also economic, social, and cultural rights. The "progressiveness" of the latter has not yet enabled coverage of millions and millions of human beings who, in their childhood, are far from having the necessities of life satisfied as those declarations and provisions –pending fulfillment- formally promise. The Court has referred to this in the Villagrán Morales Case, cited in the instant Advisory Opinion (para. 80), when it puts forth concepts that will provide new paths for jurisprudence and it establishes that the right of children to life involves not only respect for prohibitions regarding deprivation of life, set forth in Article 4 of the American Convention, but also providing suitable living conditions to promote the development of minors. [FN218]

[FN218] Cf. "Street children" Case (Villagrán Morales et al.), Judgment of November 19, 1999. Series C No. 63, para. 144.

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35. In this regard, the unified idea of human rights becomes relevant: all of them significant, enforceable, mutually complementary and conditioned. It is good for proceedings to be organized in such a way that the children have all the means required by due legal process for assistance and defense, and it is also good for children not to be removed from the family milieu –if they have one- without justification, but none of this amounts to a release from the obligation to construct circumstances that allow minors to adequately develop their existence, throughout the horizon of each human life, and not only in situations –that should be exceptional- in which certain minors face "problems with the law." They are all, simultaneously, the protective shield of the human being: they are mutually enforced, conditioned, and perfected, and it is therefore necessary to pay equal attention to all of them. [FN219] We could not say that human dignity is safe where there is, perhaps, care for civil and political rights –or only some of them, among the most visible ones- and attention is not paid to other rights.

[FN219] As was stated in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (June, 1986), "as human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights" (principle 3).

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36. In my view, OC-17 rightly addresses this matter from a dual perspective. On the one hand it underlines the obligation of the States, which –as regards the Americas- was set forth in the Bogotá Charter pursuant to the Buenos Aires Protocol, to adopt measures that will enable people's various necessities of life to be satisfied; and on the other hand it recognizes that true

rights are involved, the enforceability of which, as such, begins to gain ground. In effect, it would not suffice to attribute duties to the States if the rights of individuals are not in turn recognized: the characteristic bilateralism of the juridical system thus takes shape. In this regard, there has been a conceptual evolution similar to that prevailing in the domestic system: if Constitutions have a normative nature, as is now proclaimed –they are, in this sense, genuine "supreme law," "law of laws"-, this is also the nature of treaties, and as such they ascribe true obligations and authentic rights. The latter include, as regards the theme I address here, the economic, social, and cultural rights of children.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary