

**REPORT No. 72/15**  
**CASE 12.896**  
**MERITS**  
**HERMANOS RAMÍREZ AND FAMILY**  
**GUATEMALA**  
**OCTOBER 28, 2015**

**I. SUMMARY**

1. On August 1, 2006, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the IACHR,” or “the Inter-American Commission”) received a petition from Covenant House Association, the Social Movement for the Rights of Children and Young People, and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”), alleging the international responsibility of the Republic of Guatemala (hereinafter “the State,” “the Guatemalan State,” or “Guatemala”) for acts and omissions that cause the minor children Osmín Ricardo Tobar Ramírez and J.R.<sup>1</sup> to be removed from their home and put up for international adoption.

2. According to the petitioners, on January 9, 1997, seven-year-old Osmín Ricardo Tobar Ramírez and two-year-old J.R. were removed from their home by agents from the Office of the Attorney General of Guatemala based on the allegation of child abandonment. They maintained that the boys were placed in a private institution, and turned over to two different U.S. families for adoption in June 1998, by means of a notarial procedure. They stated that all of the steps—both administrative and judicial—taken by the children’s mother and the father of one of them to try to get them back were unsuccessful.

3. For its part, the State alleged that the judicial declaration of abandonment and the subsequent adoption were carried out properly and in compliance with all of the respective procedures under Guatemalan law. The State also maintained that the courts adjudicated the appeals filed by the mother of both boys and the father of one of them. It asserted that ultimately the decision was made to shelve the case because it was impossible to proceed with a letter rogatory to the United States for the children to appear in Guatemala. The State maintained in general terms that it had taken various actions to fully enforce the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the rights of children and adolescents enshrined in international law.

4. Upon examining the positions of the parties, the Inter-American Commission concluded that the State of Guatemala is responsible for the violation of the rights to humane treatment, personal liberty, the right to a name, a fair trial, privacy, the rights of the family, equal protection, and judicial protection, established in Articles 5, 7, 8, 11, 17, 18, 19, and 25 of the American Convention, in conjunction with the obligations established in Articles 1.1 and 2 thereof, to the detriment of the individuals specified in each section of this report.

**II. PROCEEDINGS BEFPRE THE COMMISSION**

5. The Commission received the initial petition on August 1, 2006. The proceedings conducted from the filing of the petition to the decision on admissibility are detailed in Admissibility Report No. 8/13.<sup>2</sup> In that report, the IACHR found that the facts alleged amounted to potential violations of the rights established in Articles 5, 7, 8, 11, 17, 18, 19, 24, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 thereof.

6. The parties were given notice of the admissibility report on May 16, 2013. In that communication, the Commission made itself available to the parties for a friendly settlement procedure. On

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<sup>1</sup> Throughout this report, the Commission will refer to the “Ramírez brothers,” as that is the surname they both share.

<sup>2</sup> IACHR, Report No. 8/13, Petition 793-06, Admissibility, Ramírez Brothers and Family, Guatemala, March 19, 2013. Available at: <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/GTAD793-06EN.pdf>

June 18, 2013 the petitioners stated that, given the State's unwillingness, "the conditions for a (...) friendly settlement procedure do not exist," and they requested that the Commission continue with the merits phase of the proceedings.

7. The petitioners submitted their observations on the merits on June 12 and 18, and on July 18 and 22, 2013. For its part, the State submitted its additional observations on the merits on December 16, 2013. Later, the IACHR received new communications from the petitioners and the State. All of the communications were duly forwarded to the parties.

### III. POSITIONS OF THE PARTIES

#### A. Position of the petitioners

8. The petitioners alleged that the State is responsible for the different acts and omissions that resulted in the minor children Osmín Ricardo Tobar Ramírez and J.R. being separated from their families in Guatemala City and put up for intercountry adoption, which broke the brother's family core. They asserted that the various administrative and judicial appeals filed by their mother Flor María Ramírez Escobar and the father of one of them, Gustavo Amílcar Tobar Fajardo, were all unsuccessful. They stated that this situation arose in the larger context of a significant number of irregular intercountry adoptions in Guatemala. They underscored that this background has been corroborated by different local organizations and international bodies.

9. The petitioners reported that on January 9, 1997, personnel from the Office of the Attorney General of Guatemala appeared at the home of Mrs. Ramírez and took the two boys to the "*Hogar Asociación Los Niños de Guatemala*" (Child Care Residence of the Guatemala Children's Association) (hereinafter "the Association Residence"), a State-sponsored institution. They indicated that on August 6, 1997, the Ramírez boys were judicially declared to have been abandoned without duly justified cause or exhaustion of remedies to maintain the family unit. They maintained that on May 26, 1998, the boys were given up for adoption to two families in the United States. They added that the parents personally appeared before the State authorities to file appeals with respect to the judicial declaration of abandonment in the adoption case, but failed to obtain an effective response. The domestic proceedings are detailed in the section containing the established facts.

10. With respect to the merits of the case, the petitioners asserted that the State violated the **rights to a fair trial and judicial protection** of the children and their parents during the proceedings for the declaration of abandonment and during the adoption process. They stated that the boys were not properly heard. They maintained that the parents were also denied the opportunity to present their arguments and defense evidence. They further stated that many of the court orders did not properly state the grounds on which they were based, and that the parents were not given notice of some of those decisions.

11. They stated that the parents' motion for review took an unreasonable length of time to adjudicate; a motion for review was filed in August 1997 in the proceedings for the declaration of abandonment, and was still pending when the adoption of the Ramírez boys was ordered. They added that the motion for review remained pending for an additional, unwarranted period of time after the Ramírez boys were adopted, and was only granted in November 2000. They stated that, in spite of this fact, the court's request to have statements taken from the two U.S. adoptive families was never carried out.

12. They explained that this was not a complicated matter, that the rights affected required a rapid solution, and that the parents' activity was very intense. They maintained that, even though the judicial declaration of abandonment was set aside, the State took no measures to reestablish contact between the parents and the children. They explained that the State placed a disproportionate burden on Mr. Tobar by requiring him to assume the costs of the proceedings to summons the adoptive parents.

13. The petitioners also alleged that the State failed to investigate the authorities responsible for the unwarranted delay in the proceedings for the review of the declaration of abandonment, as well as other authorities and individuals involved in the declaration of abandonment and adoption of the Ramírez boys.

14. In addition, the petitioners argued that the State violated the **right to privacy and family life** of the Ramírez brothers, their mother, and the father of one of them. They alleged that the State arbitrarily interfered in their nuclear family by removing the boys from their home in an irregular manner, as well as through the declaration of abandonment and subsequent adoption. The petitioners asserted that the State allowed the lawyers and notaries involved in both proceedings—which were plagued by a number of errors—to continue with the respective procedures to finalize the adoption, which did not comply with international standards on the matter.

15. In relation to the **right to equal protection**, the petitioners alleged that the Ramírez brothers and their parents were the victims of discrimination by the various government actors who took part in the proceedings for the declaration of abandonment. They claimed that the boys and their parents were treated differently based on social prejudices and the family's financial status. They stated that, in their opinion, this was the basis for the declaration of abandonment of the Ramírez brothers.

16. The petitioners additionally asserted that, due to the irregular proceedings that resulted in the judicial declaration of abandonment and adoption, Osmín Ricardo and J.R.' **rights to a name and identity** were violated. They argued that, in addition to having their names and their history's data changed, they boys lost the opportunity to grow up with the identity of their family and their culture, which affected their personal, family, and social development.

17. The petitioners argued that the State violated the **right to personal liberty** of the Ramírez boys by sending them to live in a private institution for 17 months without having conducted the appropriate prior assessments of the suitability of the boys' nuclear and extended family for purposes of their reintegration into their immediate family. They explained that this was because at that time there was a widespread practice of issuing evaluations directly recommending transfer to different State-sponsored adoption residences.

18. They alleged that the Ramírez brothers' right to **humane treatment** was violated, especially in its mental aspect, given that they had been: (i) arbitrarily forced by the State to be removed from their biological mother and the biological father of Osmín Ricardo Tobar Ramírez; (ii) arbitrarily sent to live in a private institution for 17 months; and (iii) taken to live with families residing in the United States of America where the language and cultural values were different from those of their biological parents, and without contact between them. They stated that all of this caused the children to experience distress, pain, and suffering.

19. The petitioners added that this suffering has continued, given that the boys have not had contact with their biological parents. They argued that Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Amílcar Tobar Fajardo's right to humane treatment was also violated, as they were arbitrarily separated from their sons and unable to have contact with them. The petitioners stated that all of this, as well as the unsuccessful motions and appeals filed before the Guatemalan authorities, have caused them intense distress, pain, and suffering.

## **B. Position of the State**

20. The State argued that it bears no responsibility in this case. It alleged that the judicial declaration of abandonment and the subsequent adoption were properly conducted in accordance with domestic law.

21. It maintained that the authority that issued the declaration of abandonment considered different evidence in order to render its decision on the appropriateness of the protection measures on behalf of the Ramírez brothers. In addition, the court found that no family member was suitable to care for the boys,

and therefore custody was awarded to the *Asociación Los Niños de Guatemala* (Guatemala Children's Association) so they could be included in its adoption program. The State maintained that, among the different proceedings conducted, (i) statements were taken from Flor de María Ramírez Escobar and Gustavo Amílcar Tobar Fajardo; (ii) statements were obtained from relatives and witnesses; and (iii) the social worker and psychologist who handled the case was ordered to conduct a study to determine whether the parents provided a suitable family, emotional, and psychological environment for the boys.

22. As for the adoption proceedings, the State alleged that they were conducted according to the domestic laws in effect at the time. It stated that, in view of the unfavorable opinion of the Office of the Attorney General of Guatemala with respect to the adoptions of the Ramírez brothers, the Trial and Family Court of Sacatepequez acted in accordance with the law when it found that the boys' adoption was proper based on the final and unappealable declaration of abandonment.

23. The State indicated that on August 31, 2001, the presiding court ordered that a letter rogatory be sent to the Embassy of the United States of America to request that the two families who adopted the Ramírez boys be summonsed to appear so that the children can resume contact with their parents. It maintained that Mr. Gustavo Tobar Fajardo was given notice of the order and asked to state whether he was amenable to paying the expenses that would be incurred to summons both families. The State indicated that Mr. Tobar's response "was not specific in terms of the expenses that would be incurred by the rogatory to summons the boys' adoptive parents." It maintained that Mr. Tobar subsequently failed to appear at a hearing related to that request. It stated that, in view of the situation, the case was ordered to be shelved on September 19, 2002.

24. The State alleged that there was no unwarranted delay of justice. It maintained that each one of the appeals filed was adjudicated promptly and in accordance with domestic law. It added that the petitioners did not continue to pursue the case or to exhaust the proceedings available in the case.

25. The State asserts that it did not fail to comply with its obligation to enact domestic law provisions consistent with the American Convention, and described several measures adopted to implement the relevant international rules on adoption and the prevention of child trafficking. Furthermore, it enumerated the draft bills and legislative and administrative measures adopted by Guatemala on the subject.

26. The State reported on the advances made with regard to the adoption laws in Guatemala. It cited the enactment of the 2003 Law for the Comprehensive Protection of Children and Adolescents and the 2007 Adoption Law, which are consistent with the guiding principles on adoption and the rights of the child. It maintained that adoption proceedings are now conducted in accordance with the provisions of those laws and the Convention on the Rights of the Child, with priority given to the best interests of the child. The State referred specifically to the prohibition against for-profit adoptions and stated that the entire process must be transparent.

27. The State reiterated that the petitioners failed to exhaust the appropriate domestic remedies. It stated that the case was therefore currently in a "shelved" status in the Guatemalan courts, for reasons attributable to the petitioners, who, in the State's opinion, did not take the proper actions during the proceedings.

#### **IV. ANALYSIS OF THE MERITS**

##### **A. Established facts**

##### **1. Adoption laws at the time of the events**

28. At the time of the events at issue in this case, adoptions in Guatemala were regulated by either a judicial or extrajudicial proceeding. The judicial adoption procedure was governed by the 1963 Civil

Code.<sup>3</sup> Under the Code, adoption had to be done through a notarial instrument, with prior approval of the respective proceedings from the competent trial court judge.<sup>4</sup> It was established that the parents of the child had to express their consent to the adoption.<sup>5</sup> Then, the Public Ministry was required to examine the proceedings and, if it had no objections, the judge would rule the adoption admissible and order the execution of the respective notarial instrument.<sup>6</sup>

29. The out-of-court adoption procedure was regulated by the Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings.<sup>7</sup> That law allowed for adoptions to be legalized before a notary public without the need for prior judicial approval of the proceedings, and the process was initiated by a request from the person who wished to adopt.<sup>8</sup> The only requirements stated in that law are: (i) the submission of the birth certificate; (ii) two witnesses who must “vouch for the good morals of the adoptive parent and his or her character and financial ability to meet the obligations”; and (iii) a favorable report from a court social worker.<sup>9</sup>

30. Once those requirements were met, the notary public had to go before the Public Ministry and, if no objections were raised, could then proceed to execute the respective notarial instrument.<sup>10</sup> In the event that the Public Ministry opposed the adoption request, the file was sent to the court of competent jurisdiction for adjudication.<sup>11</sup> Finally, the execution of the notarial instrument of adoption required the appearance of the adoptive parents and the mother and father of the child, for purposes of providing their testimony and making the respective notation.<sup>12</sup>

## **2. The context of irregular adoptions at the time of the events**

31. The publicly available information states that at the time of the events at issue in this case different local organizations and international bodies considered Guatemala to be one of the countries with the most irregular adoption practices in the world.

32. According to a report commissioned by UNICEF, the Latin American Institute for Education and Communication concluded that for 1999 Guatemala was the fourth largest supplier country in the world for delivering children into international adoption.<sup>13</sup> The report indicated that these adoption processes were plagued by many irregularities, and that “the profit motive has been prevalent among those involved in [adoption] proceedings.”<sup>14</sup>

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<sup>3</sup> Civil Code of Guatemala, Decree Law No. 106-63. See Articles 228-551.

<sup>4</sup> Civil Code of Guatemala, Decree Law No. 106-63. See Article 239.

<sup>5</sup> Civil Code of Guatemala, Decree Law No. 106-63. See Article 243.

<sup>6</sup> Civil Code of Guatemala, Decree Law No. 106-63. See Article 243.

<sup>7</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Articles 28-33.

<sup>8</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Articles 28-29.

<sup>9</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Article 29.

<sup>10</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Article 32.

<sup>11</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Article 32.

<sup>12</sup> Law Governing Notarial Procedures for Legal Matters in Non-Adversarial Proceedings, Decree Law No. 54-77. See Article 33.

<sup>13</sup> ILPEC Guatemala for UNICEF, “Adoption and the Rights of the Child in Guatemala,” 2000. Available in: [http://www.iss-ssi.org/2007/Resource\\_Centre/Tronc\\_DI/documents/Guatemala-UNICEFILPECESP.PDF](http://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/Guatemala-UNICEFILPECESP.PDF)

<sup>14</sup> ILPEC Guatemala for UNICEF, “Adoption and the Rights of the Child in Guatemala,” 2000. Available in: [http://www.iss-ssi.org/2007/Resource\\_Centre/Tronc\\_DI/documents/Guatemala-UNICEFILPECESP.PDF](http://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/Guatemala-UNICEFILPECESP.PDF)

33. With regard to the mechanisms implemented to proceed with adoptions, the International Commission against Impunity in Guatemala (hereinafter “the CICIG”) indicated that most adoptions took place through the extrajudicial rather than the judicial procedure.<sup>15</sup> It maintained that the laws in effect at that time “led to the privatization of adoption by notaries.”<sup>16</sup>

34. The CICIG maintained that in a context where the processing of an adoption before a notary public could cost between US \$12,000.00 and \$15,000.00, the children given up for adoption are turned over in many cases by women living in extreme poverty in exchange for a small amount of money.<sup>17</sup> It therefore concluded that adoptions done through the out-of-court procedure had turned into “the actual purchase and sale of children.”<sup>18</sup>

35. The International Labor Organization (ILO) found that transnational organized crime networks were formed during that time, which were engaged in irregular adoptions and facilitated the sale of Guatemalan children.<sup>19</sup> The ILO maintained that this situation was due to the following factors: (i) the existence of laws that allowed for adoptions to be processed through notary public offices; (ii) the absence of detailed regulations on the pre-adoption procedures to guarantee the rights of the child and his or her family; and (iii) the lack of effective controls and oversight of the process by competent authorities.<sup>20</sup> The ILO also noted that in many cases the mechanisms used to establish the nationality and biological family of the children in the process of being adopted were vitiated by unlawful activities including the forgery of documents and DNA tests, transactions for the sale of children, and threats against mothers.<sup>21</sup>

36. In June 1996, the United Nations Committee on the Rights of the Child presented its observations on the situation in Guatemala.<sup>22</sup> The Committee acknowledged the situation of “illegal child adoption” and even the existence of an illegal adoption network.<sup>23</sup>

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<sup>15</sup> International Commission against Impunity in Guatemala (CICIG), United Nations, “Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007),” December 1, 2010. Available in: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf)

<sup>16</sup> International Commission against Impunity in Guatemala (CICIG), United Nations, “Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007),” December 1, 2010. Available in: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf)

<sup>17</sup> International Commission against Impunity in Guatemala (CICIG), United Nations, “Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007),” December 1, 2010. Available in: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf)

<sup>18</sup> International Commission against Impunity in Guatemala (CICIG), United Nations, “Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007),” December 1, 2010. Available in: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf)

<sup>19</sup> National Statistics Institute (INE) and the International Program on the Elimination of Child Labor (IPEC) of the International Labor Organization (ILO), Qualitative Study on Child Labor in Guatemala, 2003. Available in: Instituto Nacional de Estadística (INE) y Programa Internacional para la Erradicación del Trabajo Infantil (IPEC), de la Organización Internacional del Trabajo (OIT), Estudio Cualitativo sobre el Trabajo Infantil en Guatemala, 2003. Disponible en: [http://white.oit.org.pe/ipecc/documentos/cr\\_cualitativo\\_final.pdf](http://white.oit.org.pe/ipecc/documentos/cr_cualitativo_final.pdf)

<sup>20</sup> National Statistics Institute (INE) and the International Program on the Elimination of Child Labor (IPEC) of the International Labor Organization (ILO), Qualitative Study on Child Labor in Guatemala, 2003. Available in: Instituto Nacional de Estadística (INE) y Programa Internacional para la Erradicación del Trabajo Infantil (IPEC), de la Organización Internacional del Trabajo (OIT), Estudio Cualitativo sobre el Trabajo Infantil en Guatemala, 2003. Disponible en: [http://white.oit.org.pe/ipecc/documentos/cr\\_cualitativo\\_final.pdf](http://white.oit.org.pe/ipecc/documentos/cr_cualitativo_final.pdf)

<sup>21</sup> National Statistics Institute (INE) and the International Program on the Elimination of Child Labor (IPEC) of the International Labor Organization (ILO), Qualitative Study on Child Labor in Guatemala, 2003. Available in: Instituto Nacional de Estadística (INE) y Programa Internacional para la Erradicación del Trabajo Infantil (IPEC), de la Organización Internacional del Trabajo (OIT), Estudio Cualitativo sobre el Trabajo Infantil en Guatemala, 2003. Disponible en: [http://white.oit.org.pe/ipecc/documentos/cr\\_cualitativo\\_final.pdf](http://white.oit.org.pe/ipecc/documentos/cr_cualitativo_final.pdf)

<sup>22</sup> Concluding Observations of the Committee on the Rights of the Child: Guatemala. 07/06/96. CRC/C/15/Add.58. June 7, 1996.

<sup>23</sup> Concluding Observations of the Committee on the Rights of the Child: Guatemala. 07/06/96. CRC/C/15/Add.58. June 7, 1996.

37. In relation to her visit to Guatemala in 1999, the UN Special Rapporteur on the sale of children, child prostitution, and child pornography stated that intercountry adoption in Guatemala had “developed into a profitable business as a result of the large number of children who were orphaned or abandoned during the years of conflict.”<sup>24</sup> She stated that the situation within Guatemala, including the extreme poverty, a high birth rate, and lack of effective control and supervision of adoption proceedings, sustained this trade.<sup>25</sup>

38. In the Inter-American sphere, the Inter-American Commission addressed the situation of adoption procedures in Guatemala. In its 2001 report, the IACHR stated that the adoption of children in Guatemala “was converted into a profitable business venture when it became evident that there was a substantial ‘market’ for adoptable babies.”<sup>26</sup> The Commission indicated that a central aspect of the problem is the absence of adequate legislation.<sup>27</sup> In consequence, it recommended that the State “take the measures necessary to achieve the entry into force of an adequate legislative framework so as to ensure that the best interests of the child are a primary consideration in all decisions taken, to assure the free and informed consent of the parent or parents, and to guarantee legality, clarity and transparency in the applicable procedures.”<sup>28</sup>

39. At the domestic level, in a report covering the period from 1996 to 2006, the Office of the Attorney General of Guatemala identified several anomalies in out-of-court adoption procedures, most notably including: (i) the double registration of birth certificates; (ii) documents showing that a mother has given up her children for adoption, when in fact she has died; (iii) fake birth certificates issued by unregistered physicians or nonexistent midwives; (iv) altered DNA tests certified by the United States embassy in Guatemala; (v) fingerprints that do not match the ones in the adoption file; and (i) the unwillingness of the biological mothers to give their children up for adoption, when the notary public has certified the opposite.<sup>29</sup>

40. Statistics from the Office of the Attorney General indicate that the adoption of Guatemalan children increased 6.7 times from 1996 to 2006, with a total of 731 adoptions in 1996 and 4918 in 2006. From 1997 to 2006, 97.6% of all Guatemalan adoptions were international, with the United States receiving 87% of the Guatemalan children given up for adoption during that period.<sup>30</sup>

41. The Commission notes that Guatemala acceded to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in November 2002. Subsequently, the Constitutional Court called into question the procedure for the domestic incorporation of that instrument, which, according to international law, does not affect the fact that Guatemala is a party thereto. In the processing of this case, the State made reference to the enactment of various provisions and reforms designed to standardize adoptions in Guatemala. The Law for the Comprehensive Protection of Children and Adolescents entered into force in 2003.<sup>31</sup> The following year, the Guatemalan State approved the “National

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<sup>24</sup> Report of the Special Rapporteur on the Sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas Santos, Addendum (Visit of July 19-30, 1999), Report on the mission to Guatemala, E/CN.4/2000/73/Add.2 January 27, 2000, para. 11.

<sup>25</sup> Report of the Special Rapporteur on the Sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas Santos, Addendum (Visit of July 19-30, 1999), Report on the mission to Guatemala, E/CN.4/2000/73/Add.2 January 27, 2000, para. 11.

<sup>26</sup> IACHR, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, para. 37.

<sup>27</sup> IACHR, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, para. 41.

<sup>28</sup> IACHR, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, para. 46.

<sup>29</sup> Office of the Attorney General of Guatemala: Presentation on the Current Situation of Adoption, 2007.

<sup>30</sup> Study “Adoptions in Guatemala: protection or market?” Covenant House, *Fundación Sobrevivientes*, Social Movement for Human Rights [*Movimiento Social por los Derechos Humanos*], Human Rights Office of the Archdiocese of Guatemala (ODHAG), Office of the Secretary of Social Welfare (SBS), produced in Guatemala, November 2007, p. 24-25.

<sup>31</sup> Law for the Comprehensive Protection of Children and Adolescents, Decree 27-2003.

Plan of Action for Children and Adolescents for 2004-2015,” to raise awareness of the childhood issues and vulnerabilities that create the conditions for irregular, for-profit adoptions.<sup>32</sup>

42. The Adoption Law was enacted in 2007.<sup>33</sup> That law created the National Adoption Board as a central authority in compliance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The law also gives preference to national adoption over intercountry adoption, and prohibits persons, institutions, and authorities involved in the adoption process from obtaining improper benefits.

43. With regard to adoption proceedings, the Adoption Law states that:

The family court judge will receive the adoption request from the interested parties and, once it is verified that the administrative adoption proceeding complies with the requirements of this law and the Hague Convention, the judge shall approve and uphold the national or intercountry adoption without further proceedings. (...) <sup>34</sup>

44. In view of these measures, the United Nations Committee on the Rights of the Child presented its concluding remarks on the situation in Guatemala in June 2007.<sup>35</sup> The Committee stated that Guatemala “continues to cause several serious concerns with respect to intercountry adoption.”<sup>36</sup> It identified the following shortcomings: (i) the continued inadequacy of national laws regulating adoption practices; (ii) irregular practices based on financial interest that persist in the management of Guatemalan child adoptions, especially since notaries are involved in an increasing number of cases of intercountry adoptions; and (iii) crimes committed in Guatemala involving child-selling for purposes of adoption, which generally go unpunished because the authorities are to a large extent complicit.<sup>37</sup>

45. In addition, in 2010 the CICIG indicated that there is still evidence to show that at least 60% of those cases of adoption processed prior to the enactment of the Adoption Law contain potential irregularities in their files.<sup>38</sup> For its part, in 2012 the Guatemalan Coalition for the Rights of Children and Adolescents in Guatemala asserted that the shortcomings in the effective controls and oversight of adoptions still persist in Guatemala.<sup>39</sup> The Coalition maintained that the State has not taken measures to investigate and punish individuals, including State agents, who have been involved in irregular adoption procedures.<sup>40</sup>

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<sup>32</sup> Government Order No. 333-2004, October 19, 2004.

<sup>33</sup> Adoption Law, by Decree Law No. 77-2007.

<sup>34</sup> Adoption Law, by Decree Law No. 77-2007. Article 49.

<sup>35</sup> Committee on the Rights of the Child, Examination of the Reports Presented by the States Party in accordance with Paragraph 1 of Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Concluding remarks. Guatemala. July 6, 2007.

<sup>36</sup> Committee on the Rights of the Child, Examination of the Reports Presented by the States Party in accordance with Paragraph 1 of Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Concluding remarks. Guatemala. July 6, 2007.

<sup>37</sup> Committee on the Rights of the Child, Examination of the Reports Presented by the States Party in accordance with Paragraph 1 of Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Concluding remarks. Guatemala. July 6, 2007.

<sup>38</sup> International Commission against Impunity in Guatemala (CICIG), United Nations, “Report on Players Involved in the Illegal Adoption Process in Guatemala since the Entry into Force of the Adoption Law (Decree 77-2007),” December 1, 2010. Available in: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf)

<sup>39</sup> Guatemalan Coalition for the Rights of Children and Adolescents in Guatemala. Report of October 2012. Available in: <http://www.gobernacionsuchitepequez.gob.gt/cms/svet/CajadeHerramientasVET/Derechos%20de%20Ninez%20y%20Adolescencia/UPR%20GUATEMALA%20report%20-%20espa%23U00f1ol.doc>

<sup>40</sup> Guatemalan Coalition for the Rights of Children and Adolescents in Guatemala. Report of October 2012. Available in: <http://www.gobernacionsuchitepequez.gob.gt/cms/svet/CajadeHerramientasVET/Derechos%20de%20Ninez%20y%20Adolescencia/UPR%20GUATEMALA%20report%20-%20espa%23U00f1ol.doc>



46. The Commission also has public information on investigations opened against individuals who—as described below—were involved in alleged irregular adoptions, including the adoption of the Ramírez brothers.

47. On this point, the Commission notes that Susana Luarca Saracho was the attorney and director of the Guatemala Children’s Association Residence at the time the Ramírez boys were admitted to that center. Mrs. Luarca was the subject of multiple complaints alleging threats and intimidation, as well as other forms of pressure, aimed at judicial actors and parties to the adoption cases she handled.<sup>41</sup>

48. According to information that is public knowledge, in 2009 Mrs. Luarca was arrested for her alleged participation in an illegal adoption ring.<sup>42</sup> In that case, the International Commission against Impunity in Guatemala (CICIG), as private prosecutor, recommended that Mrs. Luarca be prosecuted for similar offenses of human trafficking and the use of forged documents.<sup>43</sup>

49. On August 1, 2014 the Office of the Prosecutor General of Guatemala brought charges against Mrs. Luarca for having processed at least 101 adoption cases in an irregular manner, charging her with the offenses of conspiracy, human trafficking, and the use of forged documents.<sup>44</sup>

50. Judge Mario Peralta Castañeda, who was involved in the appeals filed by Mrs. Ramírez, was stripped of his immunity by the Supreme Court.<sup>45</sup> According to information published in the media, Judge Peralta was accused of having participated in illegal adoptions in Guatemala by issuing judicial certificates stating that children with a certain adoption profile did not have parents when in fact they did.<sup>46</sup>

### **3. The brothers Osmín Ricardo Amílcar Tobar Ramírez and J.R. and their family**

#### **3.1. General information**

51. Osmín Ricardo Amílcar Tobar Ramírez was born on June 24, 1989.<sup>47</sup> He was acknowledged at the Vital Records Office of Guatemala by his parents Gustavo Tobar Fajardo and Flor de María Ramírez Escobar.<sup>48</sup> J.R. was born on August 27, 1995.<sup>49</sup> He was acknowledged at the Vital Records Office of Guatemala

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<sup>41</sup> “María Loarca de Umaña, esposa de ex-presidente de la Corte de Suprema de Justicia involucrada en el tráfico de personas,” Fundación Sobrevivientes. Available at: <http://fsobrevivientes.blogspot.com/2009/12/esposa-de-ex-presidente-de-la-corte.html>

<sup>42</sup> “María Loarca de Umaña, esposa de ex-presidente de la Corte de Suprema de Justicia involucrada en el tráfico de personas,” Fundación Sobrevivientes. Available at: <http://fsobrevivientes.blogspot.com/2009/12/esposa-de-ex-presidente-de-la-corte.html>

<sup>43</sup> “Asociación Primavera lawyer, director found guilty of human trafficking in ‘Karen Abigail’ case,” Finding Fernanda. Available at: <http://findingfernanda.com/2011/10/sentencing-today-in-karen-abigail-case-timothy-and-jennifer-monahan-appear-on-tv/>

<sup>44</sup> “Asociación Primavera lawyer, director found guilty of human trafficking in ‘Karen Abigail’ case,” Finding Fernanda. Available at: <http://findingfernanda.com/2011/10/sentencing-today-in-karen-abigail-case-timothy-and-jennifer-monahan-appear-on-tv/>

<sup>45</sup> “Piden juicio por caso de adopción ilegal en Asociación Primavera,” August 1, 2014. Diario La Hora. Available at: <http://lahora.gt/piden-juicio-por-caso-de-adopcion-ilegal-en-asociacion-primavera/>. See also: “CSJ retira inmunidad a juez por adopciones ilegales,” May 8, 2014. Diario Prensa Libre. Available at: [http://www.prensalibre.com/noticias/justicia/CSJ-retira-inmunidad-juez-Escuintla-Mario-Peralta\\_0\\_1134486733.html](http://www.prensalibre.com/noticias/justicia/CSJ-retira-inmunidad-juez-Escuintla-Mario-Peralta_0_1134486733.html)

<sup>46</sup> “Piden juicio por caso de adopción ilegal en Asociación Primavera,” August 1, 2014. Diario La Hora. Available at: <http://lahora.gt/piden-juicio-por-caso-de-adopcion-ilegal-en-asociacion-primavera/>. See also: “CSJ retira inmunidad a juez por adopciones ilegales,” May 8, 2014. Diario Prensa Libre. Available at: [http://www.prensalibre.com/noticias/justicia/CSJ-retira-inmunidad-juez-Escuintla-Mario-Peralta\\_0\\_1134486733.html](http://www.prensalibre.com/noticias/justicia/CSJ-retira-inmunidad-juez-Escuintla-Mario-Peralta_0_1134486733.html)

<sup>47</sup> Annex 1. Birth Certificate No. 4,519, Page 19, Book No. 82-G, July 3, 1989.

<sup>48</sup> Annex 1. Birth Certificate No. 4,519, Page 19, Book No. 82-G, July 3, 1989.

<sup>49</sup> Annex 2. Birth Certificate No. 284, Page 172, Book No. 193-G, January 12, 1996.

by his mother Flor de Maria Ramírez Escobar.<sup>50</sup> Mrs. Ramírez stated that her son J.R. was born as the result of a rape.<sup>51</sup>

52. Osmín Tobar Ramírez's parents later separated and agreed in court to a visitation schedule whereby Mr. Tobar would see his son once a week.<sup>52</sup>

53. According to Mrs. Ramírez, at the time of the events, Osmín Tobar Ramírez, who was seven years old, was attending the Las Vacas School in Zone 16, Guatemala City.<sup>53</sup> J.R. was two years old.<sup>54</sup> Mrs. Ramírez was working as a processing agent at the Ministry of Finance, and hired her neighbor Ana Delmy Arias to take care of her children while she was at work.<sup>55</sup>

### **3.2. Declaration of abandonment of the Ramírez boys**

54. On December 18, 1996, the Judicial Coordination Office for the Juvenile Courts received an anonymous telephone complaint.<sup>56</sup> It was reported that the Ramírez boys "have been abandoned by their mother, who sniffs glue and drinks alcoholic beverages, and therefore are at risk or in danger."<sup>57</sup>

55. On January 8, 1997, Judge Aida Rabasso of the First Juvenile Trial Court for Guatemala City asked the Chief of the Juvenile Legal Assistance Section of the Office of the Attorney General to schedule a home visit to check on the welfare of the Ramírez boys.<sup>58</sup> She specified that, in the event the alleged situation was confirmed, they should "proceed to rescue the children, admitting them to the Guatemala Children's Association Residence for their care and protection."<sup>59</sup>

56. The following day, personnel from the Office of the Attorney General reported to the home of the Ramírez boys.<sup>60</sup> They informed the court that upon their arrival the boys were without adult supervision and stated that they had not eaten breakfast.<sup>61</sup> They also reported that neither child "showed signs of physical abuse."<sup>62</sup> The boys were taken to the Guatemala Children's Association Residence.<sup>63</sup>

57. That same January 9, 1997, Mrs. Ramírez appeared before Judge Rabasso to request that her sons be released to her.<sup>64</sup> She presented their birth certificates and indicated that she "[leaves] the house

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<sup>50</sup> Annex 2. Birth Certificate No. 284, Page 172, Book No. 193-G, January 12, 1996.

<sup>51</sup> Annex 56. Guatemalan National Civil Police, Criminal Investigation Service, Minors and Disappeared Persons Division, Investigator Gilberto Arturo Salas Tornez, Report of June 4, 2001.

<sup>52</sup> Annex 3. Support Agreement (07/31/97) between the parents Flor de Maria Ramírez Escobar and Gustavo Amílcar Tobar Fajardo, Agreement No. 308-97, approved by the court on August 18, 1997.

<sup>53</sup> Annex 4. Brief of Flor de Maria Ramírez filing a motion for review, August 25, 1997, case file 2663-96.

<sup>54</sup> Annex 2. Birth Certificate No. 284, Page 172, Book No. 193-G, January 12, 1996.

<sup>55</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997, case file 2663-96.

<sup>56</sup> Annex 4. Public complaint 1573-96, case file 2663-96, December 18, 1996. Annex 20.

<sup>57</sup> Annex 4. Public complaint 1573-96, case file 2663-96, December 18, 1996. Annex 20.

<sup>58</sup> Annex 4. Official Letter of January 8, 1997, communication addressed to the Chief of the Juvenile Legal Assistance Section of the Office of the Attorney General of Guatemala, case file 2663-96.

<sup>59</sup> Annex 4. Official Letter of January 8, 1997, communication addressed to the Chief of the Juvenile Legal Assistance Section of the Office of the Attorney General of Guatemala, case file 2663-96.

<sup>60</sup> Annex 4. Report of the Office of the Attorney General, Juvenile Legal Assistance Section, rescue group, case file 2663-96.

<sup>61</sup> Annex 4. Report of the Office of the Attorney General, Juvenile Legal Assistance Section, rescue group, case file 2663-96.

<sup>62</sup> Annex 4. Report of the Office of the Attorney General, Juvenile Legal Assistance Section, rescue group, case file 2663-96.

<sup>63</sup> Annex 4. Report of the Office of the Attorney General, Juvenile Legal Assistance Section, rescue group, case file 2663-96.

<sup>64</sup> Annex 4. Record of Appearance dated January 9, 1997, First Juvenile Trial Court, Guatemala, case file 2663-96.

early and (...) [instructs her] older son to give the younger one his bottle.”<sup>65</sup> She added that she pays her neighbor Mrs. Ana Delmy Arias to take care of her sons.<sup>66</sup> Mrs. Ramírez stated that she was not informed of her sons’ whereabouts.<sup>67</sup> The Commission does not have any information on proceedings conducted between January 9 and 27, 1997.

58. On January 27, 1997 the court upheld the placement of the Ramírez boys at the Guatemala Children's Association Residence.<sup>68</sup> In addition, it asked the institution to conduct a social study on the boys’ situation.<sup>69</sup>

59. The social study was forwarded to the court on February 3, 1997.<sup>70</sup> According to the report, interviews were conducted with neighbors of Mrs. Ramírez who stated that she mistreated and neglected her children.<sup>71</sup> Despite the fact that the personnel from the Office of the Attorney General who visited the boys on January 9, 1997 had indicated that there were no signs of physical abuse, this report stated that upon their arrival at the Residence the boys had cuts and bruises that were the result of beatings.<sup>72</sup> The report concluded that “With the interviews conducted, it has been fully established that Flor de María Ramírez Escobar is unable to care for her sons, and therefore it is imperative to find them a foster home where good moral values can be instilled and their physical and mental needs can be met (...). Given the behavior and neglect on the part of their mother, I recommend that the court issue a declaration of abandonment so they can be included in the adoption program sponsored by the Guatemala Children's Association.”<sup>73</sup>

60. Between March 12 and 17, 1997, the maternal grandmother and two aunts of the Ramírez boys appeared before the court.<sup>74</sup> They sought custody of the boys.<sup>75</sup> On April 22, 1997, the judge ordered the Association to conduct a social study on the situation of those relatives.<sup>76</sup>

61. On May 14, 1997, the Office of the Attorney General filed a social study on the mother and maternal grandmother of the Ramírez boys with the court.<sup>77</sup> The study concluded that:

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<sup>65</sup> Annex 4. Record of Appearance dated January 9, 1997, First Juvenile Trial Court, Guatemala, case file 2663-96.

<sup>66</sup> Annex 4. Record of Appearance dated January 9, 1997, First Juvenile Trial Court, Guatemala, case file 2663-96.

<sup>67</sup> Annex 4. Record of Appearance dated January 9, 1997, First Juvenile Trial Court, Guatemala, case file 2663-96.

<sup>68</sup> Annex 4. Official Letter of January 27, 1997 addressed to the director of the Guatemala Children's Association Residence, from the First Juvenile Trial Court, Guatemala, case file 2663-96. Annex 1.1 to the petitioners’ communication dated August 1, 2006.

<sup>69</sup> Annex 4. Official Letter of January 27, 1997 addressed to the director of the Guatemala Children's Association Residence, from the First Juvenile Trial Court, Guatemala, case file 2663-96. Annex 1.1 to the petitioners’ communication dated August 1, 2006.

<sup>70</sup> Annex 5. Social study by Mrs. Blanca Anabella Burbano E., Social Worker, February 3, 1997 Guatemala Children's Association.

<sup>71</sup> Annex 5. Social study by Mrs. Blanca Anabella Burbano E., Social Worker, February 3, 1997, Guatemala Children's Association.

<sup>72</sup> Annex 5. Social study by Mrs. Blanca Anabella Burbano E., Social Worker, February 3, 1997, Guatemala Children's Association.

<sup>73</sup> Annex 5. Social study by Mrs. Blanca Anabella Burbano E., Social Worker, February 3, 1997, Guatemala Children's Association.

<sup>74</sup> Annex 6. Record of Appearance of Flor De Maria Escobar Carrera, March 12, 1997. Annex 11. Record of Appearance of Yesenia Edelmira Escobar Carrera de Bonilla and Maritza Lizbeth Echeverría Carrera de Reyes, March 17, 1997.

<sup>75</sup> Annex 6. Record of Appearance of Flor De Maria Escobar Carrera, March 12, 1997. Annex 11. Record of Appearance of Yesenia Edelmira Escobar Carrera de Bonilla and Maritza Lizbeth Echeverría Carrera de Reyes, March 17, 1997.

<sup>76</sup> Annex 4. Official Letter of April 22, 1997, addressed to the director of the Guatemala Children's Association Residence. First Juvenile Trial Court, Guatemala, case file 2663-96.

<sup>77</sup> Annex 4. Social Worker's Report, Office of the Attorney General, Juvenile Legal Assistance Section, May 7, 1997, by Ana Bella Calderón Rubello, case file 2663-96.

According to secondary investigations, the mother's conduct, and that of the boys' grandmother, is prejudicial to their care and upbringing at this time. Given the serious financial instability of the mother and the maternal grandmother, as well as their very chaotic behavior, we find that neither one of them, nor their family, is an option at this time for the protection of the boys. Therefore, it is recommended that they remain institutionalized, and that the respective social study and investigation to be updated at a time the court deems prudent in order to establish whether the living and behavioral conditions have improved.<sup>78</sup>

62. In addition, the Office of the Attorney General informed the court of the investigation into Mrs. Ramírez's socioeconomic situation.<sup>79</sup> According to interviews with neighbors, Mrs. Ramírez mistreated her children, drank alcohol constantly, and was a drug addict.<sup>80</sup>

63. On May 15, 1997, National Police Headquarters informed the court that Mrs. Ramírez had no criminal record.<sup>81</sup> The police did indicate that the maternal grandmother had a criminal record of making false statements in a document, fraud, possession of an offensive weapon, and possession of marijuana.<sup>82</sup>

64. On May 19, 1997, the social study conducted by the Association with respect to the aunts of the Ramírez boys was submitted to the court.<sup>83</sup> That study concluded that:

(...) the interest of the boys' godmothers in claiming them is a maneuver to obtain custody of the boys in order to return them to their mother, who abuses them and is terrible for them (...) the minor child Osmín Ricardo Amílcar Tobar Ramírez attended the interview and stated that he would not like to live with his godmother because her husband frequently beats him (...) the overcrowded living conditions of the godmothers and their families, their limited financial resources, and the fact that they were aware of the desperate situation of the boys when they were in their mother's care but did nothing to put an end to the abuse, lead us to recommend that the boys not be turned over to Mrs. Escobar Carrera or Mrs. Echeverría de Reyes. (...) I reiterate what I stated in the initial socioeconomic report, that both boys should be integrated into families who will provide them with the love and care they need (...). Therefore, I recommend that the court issue a declaration of abandonment so they can be included in the adoption program sponsored by the Guatemala Children's Association."<sup>84</sup>

65. On June 21, 1997, the Psychological Services Unit of the Judiciary filed a psychological report on Mrs. Ramírez and the boys' maternal grandmother.<sup>85</sup> With respect to Mrs. Ramírez, it stated that "Due to the characteristics exhibited by the patient, it is inferred that her ability to assume the role of mother is seriously compromised."<sup>86</sup> As for the maternal grandmother, it stated, "With regard to the maternal

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<sup>78</sup> Annex 4. Social Worker's Report, Office of the Attorney General, Juvenile Legal Assistance Section, May 7, 1997, by Ana Bella Calderón Rubello, case file 2663-96.

<sup>79</sup> Annex 4. Report of Investigating Officer No. 012, Office of the Attorney General, Juvenile Legal Assistance Section, March 20, 1997, 3<sup>rd</sup> Officer, prepared by Rivera Castro, case file 2663-96.

<sup>80</sup> Annex 4. Report of Investigating Officer No. 012, Office of the Attorney General, Juvenile Legal Assistance Section, March 20, 1997, 3<sup>rd</sup> Officer, prepared by Rivera Castro, case file 2663-96.

<sup>81</sup> Annex 7. Criminal record reports, National Police Headquarters, May 15, 1997.

<sup>82</sup> Annex 7. Criminal record reports, National Police Headquarters, May 15, 1997.

<sup>83</sup> Annex 8. Social study by Blanca Anabella Burbano E., Social Worker, May 19, 1997, Guatemala Children's Association.

<sup>84</sup> Annex 8. Social study by Blanca Anabella Burbano E., Social Worker, May 19, 1997, Guatemala Children's Association.

<sup>85</sup> Annex 4. Psychological Report of the Psychological Services Unit of the Judiciary, July 21, 1997, case file 2663-96.

<sup>86</sup> Annex 4. Psychological Report of the Psychological Services Unit of the Judiciary, July 21, 1997, case file 2663-96.

grandmother as a family caregiver, it should be borne in mind that an adult with homosexual preferences would be transmitting these values to the children who would be under her charge."<sup>87</sup>

66. On July 29, 1997, the Office of the Attorney General appeared before the court to provide its opinion on the legal status of the Ramírez boys.<sup>88</sup> It concluded that:

(...) its content is extensive [and] its analysis clearly demonstrates the boys' need to be provided with a better standard of living, at the center of a family; it is clear from the social studies (3) and from the investigation (1) that the boys were completely neglected by their family, principally their mother (...) and therefore it is appropriate for the previously identified children to be declared abandoned, and they should be included in the adoption program at the children's residence where they are currently living.<sup>89</sup>

67. On August 6, 1997, the First Juvenile Trial Court of Guatemala issued an order declaring "the abandonment of the minor children J.R. and Osmín Ricardo Amílcar Tobar Ramírez."<sup>90</sup> The court awarded legal custody of the Ramírez boys to Guatemala Children's Association Residence and ordered the institution to include them in the adoption programs it sponsored.<sup>91</sup>

### **3.3. Adoption process**

68. The adoption of the Ramírez boys was initiated through the extrajudicial or notarial process that was previously described.

69. On October 24, 1997, the B. family granted power of attorney to a lawyer in Illinois, United States, to begin the proceedings to adopt J.R..<sup>92</sup> In the case of Osmín Ricardo Tobar Ramírez, the Borz Richards family granted power of attorney to a lawyer in Pittsburg, United States, on February 5, 1998, in order to begin the proceedings for his adoption.<sup>93</sup>

70. On May 8 and 11, 1998, the Office of the Attorney General issued two official letters stating that the adoption of the Ramírez boys was improper according to the report of Attorney Martínez, which stated that the adjudication of an appeal was still pending.<sup>94</sup>

71. The private attorneys for the U.S. families went to court following the unfavorable opinion of Office of the Attorney General regarding the adoption of the Ramírez boys.<sup>95</sup> On May 26, 1998, the Trial and Family Court for the Department of Sacatepéquez allowed the adoption proceedings to go forward.<sup>96</sup> It found that the adoptive parents had proven their good moral character and financial solvency.<sup>97</sup>

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<sup>87</sup> Annex 4. Psychological Report of the Psychological Services Unit of the Judiciary, July 21, 1997, case file 2663-96.

<sup>88</sup> Annex 4. Brief, Juvenile Legal Assistance Section, Office of the Attorney General of Guatemala, July 29, 1997, case file 2663-96.

<sup>89</sup> Annex 4. Brief, Juvenile Legal Assistance Section, Office of the Attorney General of Guatemala, July 29, 1997, case file 2663-96.

<sup>90</sup> Annex 4. Order, First Juvenile Trial Court, Guatemala, August 6, 1997, case file 2663-96.

<sup>91</sup> Annex 4. Order, First Juvenile Trial Court, Guatemala, August 6, 1997, case file 2663-96.

<sup>92</sup> Annex 9. Notarial instruments 72 and 74 of June 2, 1998, authorized by Notary Public Rafael Morales Solares.

<sup>93</sup> Annex 9. Notarial instruments 72 and 74 of June 2, 1998, authorized by Notary Public Rafael Morales Solares.

<sup>94</sup> Annex 10. Official Letter from the Office of the Attorney General of Guatemala, Ramiro Ordonez Honama, Section Chief of the Attorney General's Office, May 11, 1998.

<sup>95</sup> Annex 11. Order of the Trial and Family Court of Sacatepéquez, May 26, 1998.

<sup>96</sup> Annex 11. Order of the Trial and Family Court of Sacatepéquez, May 26, 1998.

<sup>97</sup> Annex 11. Order of the Trial and Family Court of Sacatepéquez, May 26, 1998.

72. The court rejected the arguments put forward by the Office of the Attorney General, stating that “there is no appeal or notification pending.”<sup>98</sup> The court relied on a certification dated January 30, 1998, which reportedly stated that the motion for review was adjudicated with the January 6, 1998 decision (see *infra* para. 85).<sup>99</sup>

73. On June 2, 1998, notary public Rafael Morales Solares executed the notarial instrument for the adoption of the minor child Osmín Ricardo Tobar Ramírez by Richard Anthony Borz and Kathleen Mary Richards.<sup>100</sup> In addition, he executed the notarial instrument for the adoption of J.R. by T.B. and J.L.<sup>101</sup> The IACHR observes that the notarial instrument was reportedly executed without the presence of the biological parents of the Ramírez boys and it was not justified the children’s separation.

74. On June 11, 1998, the respective notations were made on the birth certificates of both boys, as adopted children, at the Vital Records Office of Guatemala.<sup>102</sup> The IACHR has no information regarding the exact date on which the Ramírez boys left Guatemala.

75. According to publicly available information, in 2009 Gustavo Tobar and Flor de Maria Ramírez were able to locate their son Osmín, whose name is reportedly “Ricardo William Burz.”<sup>103</sup> On May 15, 2012, Osmín Tobar Ramírez (Ricardo William Burz) traveled from the United States to Guatemala, where he met his biological parents.<sup>104</sup> He stated that he lost contact with his brother shortly after they were placed at the Association Residence.<sup>105</sup>

### **3.4. Appeals**

#### **i) Motion for review after the declaration of abandonment of the Ramírez boys**

76. On August 25, 1997, Mrs. Flor de Maria Ramírez filed a motion for the review of the judicial declaration of the boys’ abandonment.<sup>106</sup> Mrs. Ramírez questioned the manner in which the studies on their situation had been conducted, as they were based on the testimony of neighbors who were not even identified by name.<sup>107</sup> She indicated that there was no study to indicate that she did not feed her children.<sup>108</sup> She also stated that the person who took care of her children, Ana Delmy Arias, had reportedly left them alone intentionally and maliciously.<sup>109</sup> She maintained that “She was the one who planned all of this as a new form of kidnapping, since on more than one occasion she had told me that the boys could be given up for adoption

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<sup>98</sup> Annex 11. Order of the Trial and Family Court of Sacatepéquez, May 26, 1998.

<sup>99</sup> Annex 11. Order of the Trial and Family Court of Sacatepéquez, May 26, 1998.

<sup>100</sup> Annex 9. Notarial instruments 72 and 74 of June 2, 1998, authorized by Notary Public Rafael Morales Solares.

<sup>101</sup> Annex 9. Notarial instruments 72 and 74 of June 2, 1998, authorized by Notary Public Rafael Morales Solares.

<sup>102</sup> Annex 12. Marginal notes to Certificate No. 4519, Book No. 82-G, page 19, of the Office of Vital Records of the Capital of Guatemala. Marginal notes to Certificate No. 284, Book No. 193-G, page 172, of the Office of Vital Records of the Municipality of Guatemala, Book No. 193-G, Certificate No. 284, page 172.

<sup>103</sup> Annex 13. Video “Guatemala: Osmín Ricardo Tobar Ramírez (Rico Borz) returns to his family.” Available at: <https://www.youtube.com/watch?v=IEkmpGNGyz0>

<sup>104</sup> Annex 13. Video “Guatemala: Osmín Ricardo Tobar Ramírez (Rico Borz) returns to his family.” Available at: <https://www.youtube.com/watch?v=IEkmpGNGyz0>

<sup>105</sup> Annex 13. Video “Guatemala: Osmín Ricardo Tobar Ramírez (Rico Borz) returns to his family.” Available at: <https://www.youtube.com/watch?v=IEkmpGNGyz0>

<sup>106</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96.

<sup>107</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96.

<sup>108</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96.

<sup>109</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

to a family that would give me good money, that she could check with the lawyers she knows and that they would give her part of the money.”<sup>110</sup>

77. In addition, Mrs. Ramírez argued that there was no reliable evidence of abandonment, neglect, or abuse, and that there were no efforts to achieve the family reintegration.<sup>111</sup> She maintained that “there is no forensic medical information on the record to prove that point, that is, that the boys were malnourished at the time they were taken by the authorities without consultation.”<sup>112</sup> She also stated that “[she] could demonstrate with documentation (...) that [she has] always taken care of [her] boys, [and that] [she] sent the older boy to school from nursery school to first grade.”<sup>113</sup>

78. That same day, the court issued an order to proceed with the motion and ordered that the Office of the Attorney General be granted a hearing.<sup>114</sup> On September 12, 1997, the Juvenile Legal Assistance Section of the Office of the Attorney General stated that Mrs. Ramírez “said that the neighbors and individuals who reported her were telling lies, but throughout the investigation there was evidence to the contrary.”<sup>115</sup> It asked the court to uphold the order on appeal.<sup>116</sup>

79. On September 23, 1997, the court ruled that the motion for review lacked merit.<sup>117</sup> It indicated that “The case record reflects that none of the relatives of those minor children qualifies to be entrusted with their care, and therefore the motion for review is unfounded.”<sup>118</sup>

80. On September 26, 1997, Mrs. Ramírez filed a motion for reconsideration challenging the court’s decisions of August 25 and September 23, 1997.<sup>119</sup> She alleged the violation of due process insofar as she had received late notice of both decisions.<sup>120</sup> She maintained that the motion for review was not adjudicated through the proper proceedings, according to the Juvenile Code<sup>121</sup> and the Judiciary Law,<sup>122</sup> because evidence was not taken.<sup>123</sup>

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<sup>110</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>111</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>112</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>113</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for review, August 25, 1997. Case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>114</sup> Annex 4. Order to proceed, First Juvenile Trial Court, Guatemala, August 25, 1997, case file 2663-96. Annex 1.3 to the petitioners’ communication dated August 1, 2006.

<sup>115</sup> Annex 4. Brief, Juvenile Legal Assistance Section, Office of the Attorney General of Guatemala, September 12, 1997, case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>116</sup> Annex 4. Brief, Juvenile Legal Assistance Section, Office of the Attorney General of Guatemala, September 12, 1997, case file 2663-96. Annex 1 to the petitioners’ communication dated August 1, 2006.

<sup>117</sup> Annex 4. Order, First Juvenile Trial Court, Guatemala, September 23, 1997, case file 2663-96. Annex 1.3 to the petitioners’ communication dated August 1, 2006.

<sup>118</sup> Annex 4. Order, First Juvenile Trial Court, Guatemala, September 23, 1997, case file 2663-96. Annex 1.3 to the petitioners’ communication dated August 1, 2006.

<sup>119</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for reconsideration, September 26, 1997, case file 2663-96.

<sup>120</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for reconsideration, September 26, 1997, case file 2663-96.

<sup>121</sup> Juvenile Code: Article 46 (Review). Every order for the placement of a minor in an establishment or institution for purposes of foster care or probation is subject to review at the request of the establishment’s director or the person to whom the minor has been entrusted, the parents or guardians, or the Head of the Juvenile Legal Assistance Section of the Office of the Attorney General. The Juvenile court judge shall adjudicate the matter immediately.

<sup>122</sup> Judiciary Law: Article 138. Procedure. (Amended by Article 8 of Decree Law 112-97). Upon the filing of a motion, the other interested parties, if any, shall be granted a hearing, for a period of two days. (...). Article 139. Evidence. (Amended by Article 9 of Decree Law 112-97). In the event that the motion raises questions of fact, the Judge, at the end of the hearing deadline, will order the admission [continúa...]

81. On September 30, 1997, the court acknowledged that “the error was committed in this case of failing to give notice to the moving party of the order dated August 25, 1997 (...) which affected the right of defense to which she is entitled.”<sup>124</sup> The court ruled to set aside the proceedings held subsequent to August 25.<sup>125</sup>

82. On October 2, 1997, Mrs. Ramírez requested that the court allow her to submit evidence in the proceedings.<sup>126</sup> Her request was denied on October 6, 1997 for “failing to state a claim upon which relief can be granted.”<sup>127</sup>

83. On October 9, 1997, the Judicial Coordination Office for the Juvenile Courts ruled on the self-recusal request submitted by the judge handling the case.<sup>128</sup> Judge Judith Flores de Morales of the Third Juvenile Trial Court was appointed as the new judge in the case.<sup>129</sup>

84. On October 28, 1997, Mrs. Ramírez again requested the appropriate adjudication of the motion for review, pursuant to Article 46 of the Juvenile Code.<sup>130</sup> The following day, Judge Flores recused herself from the case, alleging that she had a “friendship and relationship” with the junior attorney representing Mrs. Ramírez, who had previously worked as a judge.<sup>131</sup> On November 3, 1997, Mrs. Ramírez challenged the self-recusal and alleged that there was no relationship that would prevent Judge Flores from hearing and deciding the case merely because her attorney had worked as a judge many years earlier.<sup>132</sup>

85. On January 6, 1998, the court dismissed the motion for review.<sup>133</sup> It found that, according to the principle of the best interest of the child established in the Convention on the Rights of the Child, there had been a “necessary removal of the children from their parents.”<sup>134</sup> It determined that “the situation (...) has not changed to date.”<sup>135</sup>

86. On March 3, 1998, the Third Juvenile Trial Court allowed Judge Flores to recuse herself from continuing to hear the case.<sup>136</sup> On May 4, 1998, the case file was received by Judge Mildred Celina Roca Barillas de Almengor of the Second Juvenile Trial Court.<sup>137</sup> The judge remanded the case to the court of origin

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[... continuación]

of the evidence offered by the parties at the time of filing the motion or holding the hearing, at no more than two hearings, which shall take place within the next two business days.

<sup>123</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez filing a motion for reconsideration, September 26, 1997, case file 2663-96.

<sup>124</sup> Annex 4. Order, September 30, 1997, case file 2663-96.

<sup>125</sup> Annex 4. Order, September 30, 1997, case file 2663-96.

<sup>126</sup> Annex 14. Communication from Mrs. Ramírez dated October 2, 1997. Annex 1.6.

<sup>127</sup> Annex 15. Court order, October 6, 1997. Annex 1.6.

<sup>128</sup> Annex 16. Order, Judicial Coordination Office for the Juvenile Courts, Guatemala, October 9, 1997. Order to conduct proceedings, Third Juvenile Trial Court, October 21, 1997, case file 1-97. Annex 1.7.

<sup>129</sup> Annex 16. Order, Judicial Coordination Office for the Juvenile Courts, Guatemala, October 9, 1997. Order to conduct proceedings, Third Juvenile Trial Court, October 21, 1997, case file 1-97.

<sup>130</sup> Annex 17. Brief of Mrs. Flor de Maria Ramírez to the Third Juvenile Trial Court, October 28, 1997, case file 1-97. Annex 1.8.

<sup>131</sup> Annex 18. Brief of Mrs. Flor de Maria Ramírez to the Third Juvenile Trial Court, October 28, 1997, case file 1-97.

<sup>132</sup> Annex 19. Communication Mrs. Flor de Maria Ramírez, November 3, 1997. Annex 1.9.

<sup>133</sup> Annex 20. Order, January 6, 1998, Third Juvenile Trial Court.

<sup>134</sup> Annex 20. Order, January 6, 1998, Third Juvenile Trial Court.

<sup>135</sup> Annex 20. Order, January 6, 1998, Third Juvenile Trial Court.

<sup>136</sup> Annex 21. Order of the Third Juvenile Trial Court, March 3, 1998. Annex 1.9.

<sup>137</sup> Annex 22. Order, Second Juvenile Trial Court, May 4, 1998.



to be shelved “in view of the fact that the Declaration of Abandonment [of August 6, 1997] is final and unappealable,” and she affirmed the order of January 6, 1998.<sup>138</sup>

87. On June 11, 1998, Mrs. Ramírez asserted that the case could not be shelved because her different requests to “amend the case file” pursuant to Article 67 of the Judiciary Law were still pending.<sup>139</sup> She requested that the case file “be submitted for consideration to the Judicial Coordination Office for the Juvenile Courts in order for that Office to send the case back to the Second Juvenile Court for the adjudication of the pending petitions.”<sup>140</sup> On July 7, 1998, the Fourth Juvenile Trial Court requested that “the pending proceedings be conducted” in accordance with various domestic provisions and the Convention on the Rights of the Child.<sup>141</sup>

**ii) Motion for review following the adoption of the Ramírez boys**

88. On December 17, 1998, Mr. Gustavo Tobar filed a pleading with the Juvenile Trial Court asserting that several filings still pending disposition in the case being pursued by Mrs. Ramírez.<sup>142</sup> He stated that the courts did not allow him to intervene in the case as Osmín Tobar Ramírez’s father.<sup>143</sup> He further indicated that “the judges have had to recuse themselves because the owner of the child-selling business is the wife of a Supreme Court Justice (...) named UMAÑA, who has recently seen her business flourish thanks to the fact that some courts have been sending children to her.”<sup>144</sup> He asked the court to consider his pleading, and to examine “countless number of anomalies in this case file that led to these children being turned over to the aforementioned merchant.”<sup>145</sup>

89. The court dismissed the motion on the same day.<sup>146</sup> It found that the motion was not timely filed and that Mr. Tobar “had not been a party to this case.”<sup>147</sup>

90. On February 2, 1999, Mr. Tobar filed a petition for a constitutional remedy [*recurso de amparo*] with the 12<sup>th</sup> Division of the Court of Appeals for Criminal, Drug, and Environmental Offenses.<sup>148</sup> He maintained that the Juvenile Code has no established deadline for the filing of a motion for review, and therefore it was impossible for the court to rule that it was not timely filed.<sup>149</sup>

91. In addition, he argued that:

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<sup>138</sup> Annex 22. Order, Second Juvenile Trial Court, May 4, 1998.

<sup>139</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez, June 11, 1998, to the First Juvenile Trial Court, case file 2663-96.

<sup>140</sup> Annex 4. Brief of Mrs. Flor de Maria Ramírez, June 11, 1998, to the First Juvenile Trial Court, case file 2663-96. Annex 1.13.

<sup>141</sup> Annex 23. Order to conduct proceedings, July 7, 1998, Fourth Juvenile Trial Court, case file. 2702-98. Annex 1.15.

<sup>142</sup> Annex 24. Brief of Mr. Gustavo Amílcar Tobar Fajardo, December 17, 1998, to the Juvenile Trial Court for the Department of Escuintla, case file. 318-98.

<sup>143</sup> Annex 24. Brief of Mr. Gustavo Amílcar Tobar Fajardo, December 17, 1998, to the Juvenile Trial Court for the Department of Escuintla, case file. 318-98.

<sup>144</sup> Annex 24. Brief of Mr. Gustavo Amílcar Tobar Fajardo, December 17, 1998, to the Juvenile Trial Court for the Department of Escuintla, case file. 318-98.

<sup>145</sup> Annex 24. Brief of Mr. Gustavo Amílcar Tobar Fajardo, December 17, 1998, to the Juvenile Trial Court for the Department of Escuintla, case file. 318-98.

<sup>146</sup> Annex 25. Order, First Juvenile Trial Court for the Department of Escuintla, case file 318-98, December 17, 1998. Annex 47. Service of Notice, Auxiliary Court Services of Escuintla, January 4, 1998.

<sup>147</sup> Annex 25. Order, First Juvenile Trial Court for the Department of Escuintla, case file 318-98, December 17, 1998. Annex 47. Service of Notice, Auxiliary Court Services of Escuintla, January 4, 1998.

<sup>148</sup> Annex 26. Pleading of Gustavo Tobar, February 2, 1999. Annex 1.16.

<sup>149</sup> Annex 26. Pleading of Gustavo Tobar, February 2, 1999. Annex 1.16.

(...) one of the most relevant [anomalies is] that the appearance of the children's parents before the court has been ignored, and that the respective socioeconomic study submitted to the Court by Social Services has been left out (...) upon receiving the report on the socioeconomic study conducted by the social worker from the Juvenile Legal Assistance Section, the Court ignored its content, which indicated that 'although the return of the boys to the mother as their caregiver is not an option at this time, it would be appropriate for a new study to be conducted at a later time in order to determine whether there has been a change in the circumstances that compel this decision to temporarily remove her children.' The decision of the Juvenile Judge of Escuintla flagrantly violates due process and therefore my lawful and inviolable right to a defense.<sup>150</sup>

92. On February 16, 1999, the Court of Appeals declined to grant the provisional *amparo* remedy requested by Mr. Tobar.<sup>151</sup> Later, on June 1, 1999, the court decided to grant him final and unappealable *amparo* relief.<sup>152</sup> It found that "There is no evidence on the record of Mr. Tobar having filed a motion for review (...) and therefore the lower court's ruling on the timeliness of the appeal is immaterial."<sup>153</sup>

93. The Court maintained that "the court decision stating that Gustavo (...) Tobar (...) has not been a party to the case violates his right to a defense, as he has been prevented from asserting his status as the father of the minor child Osmín (...) in order to gain custody of him."<sup>154</sup> Accordingly, the court suspended the ruling of December 17, 1998 and ordered that Mr. Gustavo Tobar be allowed to intervene as a party to the case.<sup>155</sup>

94. On July 24, 1999, Judge Mario Peralta of the Juvenile Trial Court of Escuintla recused himself from the case.<sup>156</sup> He justified his self-recusal by stating that Mr. Tobar's petition for a constitutional remedy [*recurso de amparo*] "used (...) language that tarnishes the honor of (...) [and] casts doubt upon the capacity and honorableness of this judge."<sup>157</sup>

95. Mr. Tobar and Mrs. Ramírez appeared before the Jutiapa court in the hearing held on September 24, 1999. They requested that the declaration of abandonment of the Ramírez brothers be set aside.<sup>158</sup> They also requested that custody of the boys be returned to their biological parents, stating that this "will allow us to continue with the proceedings to have the boys returned from abroad."<sup>159</sup> The same day, the court ordered the parents to undergo psychological studies.<sup>160</sup>

96. On March 20, 2000, the Office of the Attorney General filed a report requested by the Court regarding the status of the Ramírez brothers.<sup>161</sup> The Office of the Attorney General indicated that the Association Residence provided them with a copy of a report they had prepared that referred to the

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<sup>150</sup> Annex 26. Pleading of Gustavo Tobar, February 2, 1999. Annex 1.16.

<sup>151</sup> Annex 27. Order of the Court of Appeals, February 16, 1999. Annex 1.16.

<sup>152</sup> Annex 28. Order of the 12<sup>th</sup> Division of the Court of Appeals, Petition for Constitutional Remedy 23-99, June 1, 1999.

<sup>153</sup> Annex 28. Order of the 12<sup>th</sup> Division of the Court of Appeals, Petition for Constitutional Remedy 23-99, June 1, 1999.

<sup>154</sup> Annex 28. Order of the 12<sup>th</sup> Division of the Court of Appeals, Petition for Constitutional Remedy 23-99, June 1, 1999.

<sup>155</sup> Annex 28. Order of the 12<sup>th</sup> Division of the Court of Appeals, Petition for Constitutional Remedy 23-99, June 1, 1999.

<sup>156</sup> Annex 29. Self-recusal No. 13-99 of Judge Mario Fernando Peralta Castañeda, Judge of the Juvenile Trial Court of Escuintla, July 24, 1999, case file 318-98. Annex 1.19.

<sup>157</sup> Annex 29. Self-recusal No. 13-99 of Judge Mario Fernando Peralta Castañeda, Judge of the Juvenile Trial Court of Escuintla, July 24, 1999, case file 318-98. Annex 1.19.

<sup>158</sup> Annex 30. Record of hearing, Juvenile Trial Court for the Department of Jutiapa, September 24, 1999, case file 421-99.

<sup>159</sup> Annex 30. Record of hearing, Juvenile Trial Court for the Department of Jutiapa, September 24, 1999, case file 421-99.

<sup>160</sup> Annex 31. Order, Juvenile Trial Court for the Department of Jutiapa, September 24, 1999, case file 421-99. Annex 1.20.

<sup>161</sup> Annex 32. Report No. 51-2000 from the Juvenile Legal Assistance Section, Social Work, March 20, 2000. Annex 2.1.

abandonment of Osmin by his father and called into question the reason for which Mr. Tobar only recently appeared to assert his claim.<sup>162</sup>

97. On March 21, 2000, the court asked the Office of the Attorney General to submit information regarding J.R., and sent an official letter to the Office of Vital Records asking that it “report whether the birth certificates [of the Ramírez boys] had been amended.”<sup>163</sup> On May 18, 2000, the Office of Vital Records sent copies of the respective certificates to the court, which documented the adoption of the Ramírez boys in the marginal notes of the certificates.<sup>164</sup>

98. On June 20, 2000 the Juvenile Trial Court issued a ruling partially amending the proceedings and setting aside “the proceedings held subsequent to the decision of August 25, 1997.”<sup>165</sup> The court established that multiple substantive errors had been committed in the processing of this case, to the detriment of the constitutional guarantees and rights to which Mrs. Flor de Maria Ramírez Escobar is entitled as a party to the case; it also found that the legal formalities of due process had been violated.<sup>166</sup>

99. The court cited: (i) the lack of an opportunity for Mrs. Ramírez to submit evidence after filing the motion for review; (ii) the absence of notice of several decisions between 1997 and 1999; and (iii) the existence of several pleadings filed by Mrs. Ramírez that were not adjudicated.<sup>167</sup>

100. On July 10, 2000, Judge Eduardo Maldonado of the Juvenile Trial Court (the judge who issued the order of June 20, 2000) recused himself from the case.<sup>168</sup> He maintained that “phone calls have been received on several occasions (...) with intimidating language.”<sup>169</sup> He added that the callers “have demanded that the case be decided in their favor, and have stated that they have the support of an international body.”<sup>170</sup>

101. On August 29, 2000, Mrs. Ramírez and Mr. Tobar requested to have a single representative appointed to them before the same Court of Jutiapa.<sup>171</sup> They also asked the court to grant the initial motion for review in order to set aside the declaration of abandonment in accordance with the decision of the Constitutional *Amparo* Court.<sup>172</sup> Accordingly, they asked the court “to order the return of [their] children under the supervision of the social services unit of this Court.”<sup>173</sup>

102. The same day, the court granted the request to appoint a single legal representative for both parents.<sup>174</sup> On October 13, 2000, the Judicial Coordination Office for the Juvenile Courts assigned the case to the Chimaltenango Trial Court.<sup>175</sup>

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<sup>162</sup> Annex 33. Guatemala Children’s Association, detailed report of December 31, 1998, filed with the First 24-Hour Criminal Magistrate’s Court, Judge Marco Vinicio González de León.

<sup>163</sup> Annex 34, exhibit 1. Order, Juvenile Trial Court, Department of Jutiapa, March 21, 2000, case file 421-99.

<sup>164</sup> Annex 34, exhibit 1. Order, Juvenile Trial Court, Department of Jutiapa, March 21, 2000, case file 421-99.

<sup>165</sup> Annex 35. Order, Juvenile Trial Court for the Department of Jutiapa, June 20, 2000, case file. 421-99.

<sup>166</sup> Annex 35. Order, Juvenile Trial Court for the Department of Jutiapa, June 20, 2000, case file. 421-99.

<sup>167</sup> Annex 35. Order, Juvenile Trial Court for the Department of Jutiapa, June 20, 2000, case file. 421-99.

<sup>168</sup> Annex 36. Recusal order, Juvenile Trial Court, Department of Jutiapa, July 10, 2000, case file 421-99. Annex 2.3.

<sup>169</sup> Annex 36. Recusal order, Juvenile Trial Court, Department of Jutiapa, July 10, 2000, case file 421-99. Annex 2.3.

<sup>170</sup> Annex 36. Recusal order, Juvenile Trial Court, Department of Jutiapa, July 10, 2000, case file 421-99. Annex 2.3.

<sup>171</sup> Annex 37. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Jutiapa, August 29, 2000, case file 421-99. Annex 2.4.

<sup>172</sup> Annex 37. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Jutiapa, August 29, 2000, case file 421-99. Annex 2.4.

<sup>173</sup> Annex 37. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Jutiapa, August 29, 2000, case file 421-99. Annex 2.4.

<sup>174</sup> Annex 37. Order, Juvenile Trial Court for the Department of Jutiapa, August 29, 2000, case file 421-99.

103. On November 6, 2000, the parents asked the new court handling the case to amend the proceedings.<sup>176</sup> They argued that they were not given a sufficient opportunity to demonstrate that they were able to care for the children.<sup>177</sup> They stated that “it is completely unwarranted for both boys to be declared abandoned (...) there was no delay whatsoever in the case from the time our sons were removed from the home until they were declared abandoned (7 months).”<sup>178</sup> They requested that the court order the return of the boys to their home while the matter was being resolved.<sup>179</sup>

104. The parents later stated that Mrs. Ramírez had left her children in the care of Ana Delmi Arias while she was at work.<sup>180</sup> They stated that the alleged abuse and neglect of the Ramírez boys was not proven.<sup>181</sup> They further alleged that Mr. Tobar was not allowed to participate as a party to the proceedings.<sup>182</sup> Finally, they added that the case was affected by the pressure exerted by Mrs. Umaña, the then-director of the Association Residence.<sup>183</sup>

105. They also underscored that they knew that the children were given up for adoption in the United States with a favorable ruling by the Attorney General's Office.<sup>184</sup> Mrs. Ramírez stated that, in November 1996, she was the target of an attempted rape by a brother-in-law of Ana Delmy Arias, the lady taking care of her children.<sup>185</sup>

106. On November 7, 2000, the court ruled that the appeal to review the case was admissible.<sup>186</sup> In its ruling, it indicated that the parents were not “given enough the opportunity to show that they constituted a suitable family, emotional, and psychological resource for their (...) children.”<sup>187</sup> The court requested a social and psychological report on the parents of the Ramírez brothers.<sup>188</sup>

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<sup>175</sup> Annex 38. Order issued by the Judicial Coordination Office for the Juvenile Courts, October 13, 2000. Annex 2.5.

<sup>176</sup> Annex 39. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Chimaltenango, November 6, 2000, case file 183-00. Annex 2.7.

<sup>177</sup> Annex 39. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Chimaltenango, November 6, 2000, case file 183-00.

<sup>178</sup> Annex 39. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Chimaltenango, November 6, 2000, case file 183-00.

<sup>179</sup> Annex 39. Brief filed by Mrs. Ramírez and Mr. Tobar with the Juvenile Trial Court for the Department of Chimaltenango, November 6, 2000, case file 183-00.

<sup>180</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>181</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>182</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>183</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>184</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>185</sup> Annex 40. Statement of Mrs. Flora de Maria Ramírez, November 28, 2000. Statement of Mr. Gustavo Tobar Fajardo, December 6, 2000, Juvenile Trial Court for the Department of Chimaltenango, case file. 183-00.

<sup>186</sup> Annex 41. Juvenile Trial Court of the Department of Chimaltenango, November 7, 2000. Annex 2.8.

<sup>187</sup> Annex 41. Juvenile Trial Court of the Department of Chimaltenango, November 7, 2000. Annex 2.8.

<sup>188</sup> Annex 41. Juvenile Trial Court of the Department of Chimaltenango, November 7, 2000. Annex 2.8.

107. On December 12, 2000, the psychological report from the Judiciary on the parents of the Ramírez children was added to the case file.<sup>189</sup> The report yielded favorable results on the parents with respect to their suitability to take care of their children.<sup>190</sup> The following was indicated:

(...) Mr. Tobar suffers from emotional problems (...) in response to the loss of the child, which would only require a brief support therapy (...). It is also expected that when the gentleman is reunited with his son again and the latter's brother, if this were to happen, these emotional problems would be completely overcome (...). Mrs. Ramírez has emotional problems stemming from traumatic experiences and inadequate care by her father during childhood (...) which, nevertheless, on the basis of the love she has for her children, can be treated and overcome (...).<sup>191</sup>

108. On March 13, 2001, the social worker of the Judiciary submitted a social report on the situation of the parents of the Ramírez brothers.<sup>192</sup> It indicated the following:

(...) bearing in mind that there are no social obstacles that do not allow or constrain the right of the children to remain with their parents, it is deemed advisable to take into account the request filed by the person who is the subject of the report (...). [Mrs. Ramírez] has always shown great interest in getting her children back and is aware that the father of the older child also wishes to get him back, which situation he completely agrees with. Her financial and housing status cannot be viewed as a constraining factor to have access to one or both children because what is most interesting is the perseverance and interest of the person to get her children back. In addition there were no social obstacles that could jeopardize the children in the event they are handed over, as a result of which it is deemed advisable to take into account the request filed by the children's mother.<sup>193</sup>

109. In the case file there appears a letter dated June 4, 2001 from the Criminal Investigation Service – Missing Childrens Section of the National Civilian Police Force, sent to the court, with respect to the situation of the parents of the Ramírez brothers.<sup>194</sup> It also requested the following:

[that] the social workers of the courts, the Attorney General's Office (...), child care residences where the children might have been placed, the directors of these residences, and, to the extent possible, the judges of the courts be subpoenaed and their statements taken (...) to thus check the anomalous way whereby these children were given up for adoption and taken out of the country.<sup>195</sup>

110. Regarding the change in various courts in charge of the proceedings, the National Civilian Police Force submitted an official letter indicating that "because of the intervention of the attorney Susana de

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<sup>189</sup> Annex 42. Report of Dr. José Ángel Solís Ovalle, Psychologist of the Juvenile Trial Court of Chimaltenango, December 12, 2000.

<sup>190</sup> Annex 42. Report of Dr. José Ángel Solís Ovalle, Psychologist of the Juvenile Trial Court of Chimaltenango, December 12, 2000.

<sup>191</sup> Annex 42. Report of Dr. José Ángel Solís Ovalle, Psychologist of the Juvenile Trial Court of Chimaltenango, December 12, 2000.

<sup>192</sup> Annex 43. Social Case 150-2000, Marco Antonio Gómez Moya, social study of Mrs. Flor de Maria Ramírez and Mr. Gustavo Tobar, Case file 183-2000, March 13, 2001.

<sup>193</sup> Annex 43. Social Case 150-2000, Marco Antonio Gómez Moya, social study of Mrs. Flor de Maria Ramírez and Mr. Gustavo Tobar, Case file 183-2000, March 13, 2001.

<sup>194</sup> Annex 44. National Civilian Police Force of Guatemala, Criminal Investigation Service, Juveniles and Missing Persons Section, Investigator Gilberto Arturo Salas Tornez, Report of June 4, 2001. Annex 2.8.

<sup>195</sup> Annex 44. National Civilian Police Force of Guatemala, Criminal Investigation Service, Juveniles and Missing Persons Section, Investigator Gilberto Arturo Salas Tornez, Report of June 4, 2001. Annex 2.8.

Umaña in various courts, they have refused to hear the case, claiming that they are being victims of threats from so-called anonymous phone calls so that they will not process their case."<sup>196</sup>

111. On August 30, 2001, a hearing convened by the court was held.<sup>197</sup> The parents requested that the Ramírez children "be returned to their home" and expressed their wish that "they be told that they had parents and that their parents did everything possible to find them."<sup>198</sup> They also indicated that, in the event the children did not want to come back "they would respect their opinion, and would even come to an agreement with the adoptive family."<sup>199</sup> They stressed that, to decide upon the future of the Ramírez brothers, it was necessary to meet their children again and "have contact with them and with the persons in whose custody they are now in and, if necessary, to settle this situation at that time."<sup>200</sup>

112. The following day, the court decided to file a letter of request with the United States Embassy to call upon the two adoptive families (Richard Anthony Borz and Kathleen Mary Richards de Borz; and T.B. and J.B.) on November 15, 2001 so that they could make their statements.<sup>201</sup> The court contended that it is "necessary to listen to the point of view of the minors being referred to in order to determine their interest and definition so that they can indicate with which of their parents they wish to stay."<sup>202</sup>

113. It indicated that it "is necessary for them [the children] to be aware that their biological parents are expressing their wish to recover them if that is appropriate, since they still object to the fact that they had been given up for adoption without their consent, and the ruling on the appeal for review filed by the above-mentioned persons is currently pending in the file on the merits of the case, which claims that there were anomalies in the processing of the related case which led to the adoption of the above-mentioned children."<sup>203</sup>

114. On November 15, 2001, the court indicated that the adoptive families and the Ramírez brothers did not appear on the date that had been set.<sup>204</sup> It claimed it did not know the reasons for their failure to appear.<sup>205</sup>

115. On December 6, 2001, the Ministry of Foreign Affairs informed the Supreme Court of Justice that the letter of request issued by the court of Chimaltenango was not received by the United States Embassy in Guatemala.<sup>206</sup> It contended that this request "must be filed in that country, in compliance with the principles of the Inter-American Convention on Letters Rogatory and Additional Protocol."<sup>207</sup>

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<sup>196</sup> Annex 45. National Civilian Police Force of Guatemala, Criminal Investigation Service, Juveniles and Missing Persons Section, Investigator Gilberto Arturo Salas Tornez, Report of June 4, 2001.

<sup>197</sup> Annex 46. Minutes of the hearing held on August 30, 2001, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000.

<sup>198</sup> Annex 46. Minutes of the hearing held on August 30, 2001, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000.

<sup>199</sup> Annex 46. Minutes of the hearing held on August 30, 2001, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000.

<sup>200</sup> Annex 46. Minutes of the hearing held on August 30, 2001, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000.

<sup>201</sup> Annex 47. Ruling, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000, August 31, 2001.

<sup>202</sup> Annex 47. Ruling, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000, August 31, 2001.

<sup>203</sup> Annex 47. Ruling, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000, August 31, 2001.

<sup>204</sup> Annex 48. Ruling, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000, November 15, 2001. Annex 2.12.

<sup>205</sup> Annex 48. Ruling, Juvenile Trial Court of the Department of Chimaltenango, Case File 183-2000, November 15, 2001.

<sup>206</sup> Annex 49, exhibit 1. Letter from the Ministry of Foreign Affairs addressed to the Supreme Court of Justice, dated November 29, 2001, received by the Court on December 6, 2001, referring to Petition No. 79-2001.

<sup>207</sup> Annex 49, exhibit 1. Letter from the Ministry of Foreign Affairs addressed to the Supreme Court of Justice, dated November 29, 2001, received by the Court on December 6, 2001, referring to Petition No. 79-2001.

116. On June 20, 2002, the court requested Mr. Tobar to indicate "whether he was willing to pay in the Ministry of Foreign Affairs the expenses incurred as a result of the summons for the adoptive parents of the minors to appear (...) otherwise the present case file would be shelved because it cannot continue to be processed."<sup>208</sup>

117. On August 2, 2002, Mr. Tobar submitted a writ indicating that, after looking for financial support, he could cover "any expense that might arise in this case and that are outside the purview of that court (...) [such as] everything that is connected with the payment of sworn translators and similar expenses."<sup>209</sup> On August 20, 2002, the court requested Mr. Tobar to appear on September 10 of that same year "with respect to the proceedings which must be filed with the Ministry of Foreign Affairs."<sup>210</sup>

118. On September 19, 2002, the court shelved the case.<sup>211</sup> It deemed that "because Mr. Gustavo Amílcar Tobar Fajardo has not, to date, paid for the expenses described in the ruling of June 20, 2002 and that the legal status of the child J.R. and the adolescent Osmín Ricardo Amílcar Tobar Ramírez was resolved in due time, the judge ordered the shelving of the present proceedings, because they could not be processed."<sup>212</sup>

### **3.1. Threats, aggression, and persecution against Gustavo Tobar Fajardo**

119. On April 1, 2009, Mr. Gustavo Tobar Fajardo filed a complaint with the Office of the Human Rights Ombudsman for assaults and threats made by anonymous armed persons in 2001 and 2009 in order to intimidate him and prevent the continuation of the case<sup>213</sup>. He urgently requested the State to adopt measures of security in order to be protected against the above-mentioned aggression.<sup>214</sup>

120. In his complaint, Mr. Tobar stated that, during the period of time that appeals were being filed to challenge the judicial declaration of abandonment of the Ramírez children, he was the target of "aggression and persecution by persons directly involved in the events of the irregular adoption."<sup>215</sup> He claimed that, in 2001, he was stabbed by a unknown individual who "warned him of the danger he risked if he continued with the case."<sup>216</sup>

121. Mr. Tobar also stated that, on March 16, 2009, two anonymous armed persons went to his home in motor vehicles with tinted windows.<sup>217</sup> He contended that these persons knocked at the door of his home and another person opened the door and informed that Mr. Tobar was not at home.<sup>218</sup> He indicated that

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<sup>208</sup> Annex 50. Order, Juvenile Trial Court of the Department of Chimaltenango, June 20, 2002, Case file 183-2000.

<sup>209</sup> Annex 51. Brief submitted by Mr. Gustavo Tobar to the Court of Chimaltenango on August 2, 2002.

<sup>210</sup> Annex 52. Order for processing, Juvenile Trial Court of the Department of Chimaltenango, Case file 183-2000, August 20, 2002.

<sup>211</sup> Annex 53. Ruling, Juvenile Trial Court of the Department of Chimaltenango, September 19, 2002, Case file 183-2000.

<sup>212</sup> Annex 53. Ruling, Juvenile Trial Court of the Department of Chimaltenango, September 19, 2002, Case file 183-2000.

<sup>213</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>214</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>215</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>216</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>217</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>218</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

afterwards he received death threats over the phone indicating that "since there was no one to defend [him], now he was going [...] to die, the son of a bitch."<sup>219</sup>

122. Because of this complaint, on April 23, 2009, the Office of the Human Rights Ombudsman of Guatemala requested the Directorate General of the National Civilian Police Force to provide personal security and a security perimeter for Mr. Gustavo Tobar.<sup>220</sup> The Commission has no knowledge about whether or not protection measures were adopted for the benefit of Mr. Tobar.

## **B. Legal analysis**

123. The purpose of the present case is to have the Inter-American Commission review the deeds and omissions of the authorities who took said decisions and who gave the Ramírez brothers up for international adoption in order to establish whether or not the State's actions were compatible with its obligations under the American Convention. To this end, the Commission shall recapitulate, first of all, the international standards that establish the obligations which, in the light of Articles 5, 7, 8, 11, 17, 18, 19 and 25 of the American Convention, the State must fulfill in a case such as the present one and, subsequently, to determine if the State is internationally responsible for the failure to fulfill these obligations in the present case, specifically in the framework of the proceedings for the judicial declaration of abandonment, the adoption proceedings, and the respective appeals. Taking into account the placement of the Ramírez children in an institution and by virtue of the *iura novit curia* principle, the Commission deems it is relevant to include Article 7 of the American Convention in the analysis.

### **1. General considerations about the international standards that are relevant for the application of the American Convention in the present case**

#### **1.1. Rights of the child**

124. Both the Commission and the Inter-American Court have pointed out that, for the purposes of defining the content and scope of the obligations that the State has pledged to fulfill when the rights of the child are examined, it is necessary to resort to the international *corpus juris* for the protection of the child.<sup>221</sup>

125. The American Convention provides, in its Article 19, that "[E]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

126. In addition to Article 19 of the American Convention, in order to interpret the significance, contents, and scope of the rights of the child, the bodies of the Inter-American System have used the United Nations Convention on the Rights of the Child,<sup>222</sup> ratified by Guatemala on June 6, 1990. Likewise, the *corpus juris* framework also includes, for purposes of interpretation, the decisions adopted by the United Nations

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<sup>219</sup> Annex 54. Brief submitted to the Office of the Human Rights Ombudsman, received on April 1, 2009. Annex 4 to the communication of the petitioners of July 19, 2013.

<sup>220</sup> Annex 55. Written record issued by the Office of the Human Rights Ombudsman, addressed to the Directorate General of the National Civilian Police Force with respect to the above-mentioned complaint on April 23, 2009. Notifications Nos. 7532, 2945, and 4595 from the National Civilian Police Force.

<sup>221</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 44. See also: IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 34.

<sup>222</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 36.



Committee on the Rights of the Child.<sup>223</sup> The Inter-American Commission has also highlighted the importance of the United Nations Guidelines for the Alternative Care of Children.<sup>224</sup>

127. Children are thus safeguarded by a *corpus juris* which provides for both the principle of the best interests of the child and special measures of protection, which must be defined on the basis of the specific circumstances of each concrete case.<sup>225</sup> The Court has remarked that the adoption of special measures pertains to both the State and the family, community, and society to which the child belongs.<sup>226</sup>

**i) Best interests of the child principle**

128. Article 3.1 of the Convention on the Rights of the Child provides for the following:

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.

129. The United Nations Committee on the Rights of the Child has stressed that the best interests of the child principle is the "general guiding principle for interpreting and implementing all the provisions of the Convention on the Rights of the Child."<sup>227</sup> Likewise, the Court has pointed out that the best interests of the child principle is the cornerstone governing the regulatory framework for the rights of the child<sup>228</sup> and that it is based on the very dignity of the human being, on the characteristics that are inherent to the child, and on the need to promote their development, with the full harnessing of their potential.<sup>229</sup>

130. In that respect, the best interests of the child principle is established as a benchmark to ensure the effective and full achievement of all of the rights of the child, as well as the integral and harmonious development of children.<sup>230</sup> In particular, the Court has provided that the best interests of the child principle acts as a safeguard in connection with decisions that might entail some kind of limitation on the rights of the child, so that for a limitation to be legitimate it must be based on the best interests of the

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<sup>223</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 38.

<sup>224</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 36.

<sup>225</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina.* Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 44; *Case of Gelman v. Uruguay.* Merits and Reparations. Judgment of February 24, 2011. Series C, No. 221, para. 121; and *Case of Atala Riffo and Daughters v. Chile.* Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 196.

<sup>226</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 62; and *Case of Gelman v. Uruguay.* Merits and Reparations. Judgment of February 24, 2011. Series C, No. 221, para. 121.

<sup>227</sup> United Nations Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, September 27, 2003, para. 12; and General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, May 29, 2013, para. 1.

<sup>228</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60; y *Case of Atala Riffo and Daughters v. Chile.* Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 108.

<sup>229</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60; y *Case of Atala Riffo and Daughters v. Chile.* Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 108.

<sup>230</sup> I/A Court H.R. *Case of the Yean and Bosico Children v. Dominican Republic.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 134.

child.<sup>231</sup> In that regard, not only should the requirement for special measures be given weight but also the specific features of the child's situation.<sup>232</sup>

## ii) Right to be heard

131. Both the Court and the Commission agree with the Committee on the Rights of the Child when pointing out that there is an important complementariness between the best interests of the child principle and the right of the child to be heard and to have his/her opinions duly taken into account on the basis of his/her age and maturity in all those decisions that affect him/her, as recognized by Article 12 of the Convention on the Rights of the Child.<sup>233</sup> This provisions sets forth the following:

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.

132. The Inter-American Court has established that Article 8.1 of the American Convention, in the light of Article 12 of the Convention on the Rights of the Child, enshrines the right of the child to be heard in proceedings where his/her rights are decided upon.<sup>234</sup> The right to be heard implies that the child has the effective possibility of being able to present his/her opinions in such a way that they can have an influence on the decision-making context.<sup>235</sup> The Commission has provided that, in connection with proceedings involving the care and protection of the child, it is assumed that the child has the right to be heard in these proceedings for the purposes of deciding upon the most suitable measure of protection, its review, modification or termination, as well as any other decision about this measure.<sup>236</sup>

133. The Committee on the Rights of the Child has observed that the states have the obligation to adopt all those measures that are deemed necessary to ensure that there are mechanisms, in the framework of administrative and judicial proceedings, to gather, in a timely and adequate fashion, the opinions of the child on the matters affecting him/her and that are the target of analysis and decision making in the framework of these proceedings.<sup>237</sup>

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<sup>231</sup>I/A Court H.R. *Case of Fornerón and Daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 48; and *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 65.

<sup>232</sup>I/A Court H.R. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 61; and *Case of Fornerón and Daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 45.

<sup>233</sup>IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 162. See also: United Nations Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, July 20, 2009, para. 74; and General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, May 29, 2013, para. 43.

<sup>234</sup>I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 196; *Case of Furlan and Family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 228; and *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 99.

<sup>235</sup>IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 247.

<sup>236</sup>IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 247.

<sup>237</sup>United Nations Committee on the Rights of the Child, General Comment No. 12, *The right of the child to be heard*, July 20, 2009, para. 19.

134. Likewise, the Committee has stressed that the child's age and personal maturity must influence the decision about what his/her best interests might be.<sup>238</sup> The Commission has considered that the child's level of development and maturity makes it possible for him/her to understand and form his/her own opinion about his/her circumstances and the decisions about the exercise of his/her rights, and therefore these are conditions that are relevant for the degree of influence his/her opinions might have on deciding what must be considered to be his/her best interests in the concrete case.<sup>239</sup> That is why the child's age and maturity must be duly appraised by the authorities who must adopt any kind of decision in connection with his/her care and well-being.<sup>240</sup>

### iii) Right of the child to personal liberty

135. Article 7.2 of the American Convention provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."

136. As for the Convention on the Rights of the Child, it points out that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily" and that, in any case, restrictions on liberty must be carried out "in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."<sup>241</sup>

137. The Commission has understood that, although it is customary for legislation of states to explicitly stipulate that "protection measures" such as the placement of children in institutions are not tantamount to depriving them of their liberty, in many cases they are subjected to systems that are very similar to the deprivation of liberty or that unnecessarily restrict their right to personal liberty.<sup>242</sup> Thus the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas defines what is meant by "deprivation of liberty":

Any form of (...) institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or other authority (...), for reasons of (...) guardianship (or) protection (...). This category of persons includes (...) persons who are under the custody and supervision of certain institutions such as: (...) institutions for children.<sup>243</sup>

138. States must establish an open operating system for residential child care centers that enable children to stay in contact with the outside world, participate in social life, and uphold their ties with their communities and families.<sup>244</sup> The IACHR has indicated that institutions that have a closed operating system allowing children restricted contact with their families and communities may constitute a breach of the right to personal liberty.<sup>245</sup>

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<sup>238</sup> United Nations Committee on the Rights of the Child, General Comment No. 14, The right of the child to have his or her best interests taken as a primary consideration, May 29, 2013, para. 44: and General Comment No. 12, The right of the child to be heard, July 20, 2009, paras. 82-85.

<sup>239</sup> IACHR, The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas. October 17, 2013, para. 166.

<sup>240</sup> IACHR, The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas. October 17, 2013, para. 166.

<sup>241</sup> Article 37.b) of the Convention on the Rights of the Child.

<sup>242</sup> IACHR, The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas. October 17, 2013, para. 582.

<sup>243</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. General provision.

<sup>244</sup> IACHR, The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas. October 17, 2013, para. 584.

<sup>245</sup> IACHR, The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas. October 17, 2013, para. 582.

139. Furthermore, bearing in mind that the right to liberty in this context also entails the liberty of every person to decide upon aspects affecting his/her life and the exercise of his/her rights, the Commission has stressed that states have the obligation to guarantee that residential institutions meet the conditions that are needed for children to fulfill their own plans for life.<sup>246</sup> Thus, when children do not benefit from any level of decision making for themselves, especially in connection with the exercise of their rights or actions that affect them directly, they are not being allowed to develop their own autonomy, personality, and plans for life.<sup>247</sup>

## 1.2. Right to family

140. Article 17.1 of the American Convention provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” As for Article 11.2 of the same instrument, it points out that “[n]o one may be the object of arbitrary or abusive interference with his private life, his family (...).”

141. The Court has indicated that the right to protection of the family, recognized in both provisions, leads to promoting, in the broadest fashion possible, the development and strength of the family unit.<sup>248</sup> In that regard, the Commission stresses that one of the most severest interferences of the state is that which leads to the breakup of the family.

142. That is why children have the right to live with their family, which is called upon to meet their material, emotional, and psychological needs.<sup>249</sup> Thus, the mutual enjoyment of peaceful coexistence between parents and children constitutes a key element in family life.<sup>250</sup> Because of this, the Commission emphasizes the need for states to adopt the necessary protection measures that do not entail the removal of a child from his/her parents.<sup>251</sup>

143. That said, the Commission and the Court have stressed that, because of this, children must stay in their nuclear family, unless there are decisive reasons, on the basis of the children's best interests, to opt for separating them from their family.<sup>252</sup> In this case, the separation must be exceptional and preferably temporary.<sup>253</sup> Otherwise, the separation of a child from his/her family may constitute a breach of his/her

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<sup>246</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 587.

<sup>247</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 587.

<sup>248</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile.* Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 169; *Case of Chitay Nech et al. v. Guatemala.* Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010. Series C No. 212, para. 157; and *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 66.

<sup>249</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina.* Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 46; and *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 67 and 71.

<sup>250</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina.* Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 47.

<sup>251</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 281.

<sup>252</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina.* Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 47.

<sup>253</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 72, 75 and 77.

right to family life because “even legal separations of a child from his family may only proceed if these are duly justified.”<sup>254</sup>

144. With respect to the possible separation of a child from his/her parents, Article 9 on the Rights of the Child provides for the following:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

145. Likewise, the Guidelines for the Alternative Care of Children, adopted by the United Nations General Assembly on November 20, 2009, in guideline 14, points out the following with respect to protection measures that entail removing the child from his/her parents or family:

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

146. The Commission and the Court have reiterated, in their decisions, the principles stemming from the above-mentioned provisions, that is, the principles of need, exceptionality and temporariness of the protection measures that entail removing the child from his/her parents.<sup>255</sup> In that regard, the state has the obligation to verify, at all times, the suitability and legitimacy of the special protection measures that entail the removal of the child from his/her parents and from his biological family.<sup>256</sup> As the Commission has pointed out, both the decision about resorting to a measure of this kind and the review of said measure must meet the requirements of legitimacy and suitability and, therefore, must be grounded in objective criteria previously established by the regulations, must be implemented by specialized technical staff trained to conduct this type of assessment, and must be subject to periodic review by the judicial authority.<sup>257</sup> Furthermore, the Commission stated the following:

As in the case with decisions made concerning children's custody, care, and well-being, decisions made when reviewing the protection measure must also be justified. The review

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<sup>254</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 169; and *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 77.

<sup>255</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 75 and 77. See also: IACHR. Report No. 83/10, Case 12.584, Merits, Milagros Fornerón and Leonardo Aníbal Fornerón, Argentina, November 29, 2010, paras. 103, 108 and 110.

<sup>256</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 73.

<sup>257</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 71.

must be based on technical evaluations presented by the multidisciplinary teams, and the justification must be objective, appropriate, and sufficient, based on the child's best interests. It is also necessary to take into account the opinion of the child, his or her parents, family, and other persons who are important in the life of the child with respect to the conditions of application, maintenance, modification, or termination of the protective measures.<sup>258</sup>

147. Furthermore, in the event a child is removed from his/her nuclear family, the State must do everything possible to keep that tie by temporarily intervening and steering its actions toward reinserting the child into his/her family and community, as long as it is not contrary to his/her best interests.<sup>259</sup> The Inter-American Court has been very clear in establishing that, in these situations, the child must be returned to his/her parents as soon circumstances allow it.<sup>260</sup>

148. In those cases where it has been substantiated that it is impossible to reestablish ties between the child and his/her parents or extended family, permanent special protection measures shall be adopted to facilitate a final solution, such as adoption, to the child's situation, upholding the child's best interests, especially his/her right to live, grow, and develop in the midst of a family.<sup>261</sup> The standards of international human rights law with regard to adoption are indicated below. Bearing in mind that the American Convention does not refer expressly to this concept, nor to the use of the *corpus juris* on the rights of the child to interpret and enforce the American Convention, these standards are relevant for taking a decision in the present case.

### **1.3. Adoption of children**

149. Article 21.a of the Convention on the Rights of the Child provides for the following:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

150. As for the Court and the Commission, they have both referred to the safeguards that must be put in place in adoption processes. The Court has indicated that, in view of the importance of the interests involved, the administrative and judicial procedures concerning the protection of the human rights of children, especially those in connection with adoption, must be dealt with "by the authorities with exceptional diligence and speed."<sup>262</sup>

151. This is because, as a consequence of removal of a child from his/her parents or family of origin, the child's right to personal integrity and integral development, right to a family and identity, can be

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<sup>258</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 244.

<sup>259</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 71.

<sup>260</sup> I/A Court H.R. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 75 and 77.

<sup>261</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas*. October 17, 2013, para. 74.

<sup>262</sup> I/A Court H.R. *Case of Fornerón and Daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 51; and *Matter of L.M.*, Provisional Measures regarding Paraguay. Order of July 1, 2011, considering clause 16.

severely and irreversibly undermined.<sup>263</sup> As a result of this, the nature and intensity of these impacts on the rights of the child require public authorities to discharge especially forcefully the duty of due diligence with respect to decisions involving the removal of a child from his/her parents or family of origin.<sup>264</sup>

152. As for the Commission, it has underscored that this exceptionally strengthened duty to show due diligence refers to all aspects related to decisions made by public authorities involving the removal of the child from his/her family and his/her insertion in an alternative residential care system: ranging from due diligence in reviewing the circumstances that surround and affect the child, the objective appraisal of the impacts that they exert upon his/her rights, the justification for the decisions, the speed in the decision making, and their timely review.<sup>265</sup>

153. The Commission has also understood that fulfillment of the duty of due diligence must be monitored by means of timely control mechanisms to do so, which must be provided for in the regulatory framework, with a determination of the consequent responsibilities and sanctions in case of failure to fulfill this duty.<sup>266</sup> The Commission added that, in procedures relative to adoptions, the child's right to be heard by those in charge of taking the decisions must be safeguarded, whose opinion must be taken into account according to their maturity.<sup>267</sup> Furthermore, the Commission stated the following:

The Commission emphasizes the need for the law to clearly define and regulate the various legal figures, the rights they protect, their objectives, and the principles that must regulate their implementation. (...) The Commission underscores that the law must establish due guarantees that the rights of the biological parents and the child will not be violated in the event that the law, as an exception, allows for that possibility.<sup>268</sup>

#### **1.4. Intercountry adoption of children**

154. Regarding the intercountry adoption of children, the Convention on the Rights of the Children has the following provisions:

Article 21. States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(...)

b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

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<sup>263</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 199. See also: I/A Court H.R. *Matter of L.M.*, Provisional Measures regarding Paraguay. Order of July 1, 2011, considering clause 16; and *Case of Fornerón and Daughter v. Argentina.* Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 51.

<sup>264</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 199.

<sup>265</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 200.

<sup>266</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 200.

<sup>267</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 200.

<sup>268</sup> IACHR, *The Right of Boys and Girls to a Family. Alternative Care. Ending Institutionalization in the Americas.* October 17, 2013, para. 289.

- c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

155. The Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, adhered to by Guatemala on November 26, 2002, aims "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized by international law."<sup>269</sup> Articles 4 and 5 of said treaty provide for the following:

4. An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin:

- a) have established that the child is adoptable;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c) have ensured that
  - i. the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
  - ii. such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
  - iii. the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
  - iv. the consent of the mother, where required, has been given only after the birth of the child; and
- d) have ensured, having regard to the age and degree of maturity of the child, that
  - i. he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
  - ii. consideration has been given to the child's wishes and opinions,
  - iii. the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
  - iv. such consent has not been induced by payment or compensation of any kind.

5. An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State:

- a) have determined that the prospective adoptive parents are eligible and suited to adopt;
- b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c) have determined that the child is or will be authorized to enter and reside permanently in that State.

156. As for the United Nations Committee on the Rights of the Child, it has pointed out that states must observe the following provisions in connection with intercountry adoptions:

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<sup>269</sup> Article 1.



- Adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted. In practice, this means, inter alia, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the Adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for Adoption must be free and informed. This supposes notably that such consent has not been induced by payment or compensation of any kind and has not been withdrawn.
- Unaccompanied or separated children must not be adopted in haste at the height of an emergency.
- Any Adoption must be determined as being in the child's best interests and carried out in keeping with applicable national, international and customary law.
- The views of the child, depending upon his/her age and degree of maturity, should be sought and taken into account in all Adoption procedures. This requirement implies that he/she has been counselled and duly informed of the consequences of Adoption and of his/her consent to Adoption, where such consent is required. Such consent must have been given freely and not induced by payment or compensation of any kind.
- Priority must be given to Adoption by relatives in their country of residence. Where this is not an option, preference will be given to Adoption within the community from which the child came or at least within his or her own culture.
- Adoption should not be considered: i) where there is a reasonable hope of successful tracing and family reunification is in the child's best interests; ii) if it is contrary to the expressed wishes of the child or the parents; iii) unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members have been carried out. This period of time may vary with circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time.
- Adoption in a country of asylum should not be taken up when there is the possibility of voluntary repatriation under conditions of safety and dignity in the near future.<sup>270</sup>

### 1.5. Right to identity

157. The Court has understood that, on the basis of said provision, the right to identity "can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case."<sup>271</sup> Among the latter, nationality, name and kinship ties are of the utmost importance.<sup>272</sup> In that regard, on the basis of a joint review of various provisions of the American Convention, for example, Articles 11, 17, 18 and 20, it is evident that the right to identity is recognized.

158. As for Article 8 of the Convention on the Rights of the Child, it provides for the following:

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

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<sup>270</sup> United Nations Committee on the Rights of the Child, General Comment No. 6. Treatment of unaccompanied and separated children outside their country of origin. September 1, 2005, para. 91.

<sup>271</sup> I/A Court H.R. *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011. Series C No. 221, para. 122.

<sup>272</sup> I/A Court H.R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, para. 112.

159. Thus personal identity is very closely linked to the person in his/her specific individuality and private life, both sustained by a historical and biological experience, as well as how this individual relates to others, on the basis of the development of family and social ties.<sup>273</sup> Likewise, it is important to stress that, although identity is of the utmost importance during childhood, because it is essential for the development of the person, it is no less true that the right to identity is not a right exclusively for children, because it is constantly being built and the interest of persons in keeping their identity and upholding it does not decline because of age.<sup>274</sup>

160. As for the right to a name, the Court has established that it "constitutes a basic and indispensable element of the identity of each person."<sup>275</sup> In that regard, said Court has pointed out that "States must ensure that every person is registered under the name that his or her parents have chosen, whenever the registration takes place, without any type of restriction to the right or interference in the decision to choose the name."<sup>276</sup> Once a person is registered, the possibility of preserving and re-establishing the given name and surname must be ensured.<sup>277</sup> The given name and surname are essential to establish formally the connection between the different members of the family."<sup>278</sup>

161. As for the European Court of Human Rights, it has constantly pointed out that Article 8 of the European Convention "protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world." Thus, private life includes aspects of the "social and physical identity of the individual."<sup>279</sup> The European Court has indicated that one of the components of the right to identity is the right to information about one's biological truth. Regarding this, it has indicated that a wide interpretation of the scope of the notion of private life also involves recognizing the right of all persons to "know their origins." Regarding this aspect, the European Court has pointed out that people "have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development."<sup>280</sup>

## 2. Application of the above-mentioned standards to the case at hand

162. Bearing in mind what has been said up to now, the Commission shall now focus on examining whether or not, in the present case, the State fulfilled its international obligations under the American Convention, which must be interpreted in line with the standards described until now which endow concrete content to its provisions, in particular, the right of the child to special protection and the best interests of the child principle. In that regard, IACHR shall examine whether or not, in the proceedings of the judicial declaration of abandonment of the Ramírez brothers, in the appeal for review in the adoption proceedings, and in the continued appeals for review, state authorities acted with due diligence to ensure that

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<sup>273</sup>I/A Court H.R. *Case of Fornerón and Daughter v. Argentina*. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C No. 242, para. 123.

<sup>274</sup> Inter-American Juridical Committee, Opinion on the scope of the right to identity, August 10, 2007, second resolving clause.

<sup>275</sup>I/A Court H.R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, para. 110; and *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 182.

<sup>276</sup>I/A Court H.R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, para. 110.

<sup>277</sup>I/A Court H.R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, para. 110.

<sup>278</sup>I/A Court H.R. *Case of the Yean and Bosico Children v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 184; and *Case of the "Las Dos Erres" Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 192.

<sup>279</sup> ECHR, *Case of Bensaid v. The United Kingdom*, Judgment of 6 February 2001, para. 47; *Case of Pretty v. The United Kingdom*, Judgment of 29 April 2002, para. 61; and *Case of Peck v. United Kingdom*, Judgment of 28 January 2003, para. 57.

<sup>280</sup> ECHR, *Case of Odièvre v. France*, Judgment of 13 February 2003, paras. 42 and 44; and *Case of Mikulić v. Croatia*, Judgment of 7 February 2002, paras. 57 and 64.

both substantive and procedural safeguards that must govern this kind of proceeding were observed before the intercountry adoption of the children was ordered.

## **2.1. Judicial declaration of abandonment of the Ramírez brothers and appeals filed**

### **i) Procedure of judicial declaration of abandonment**

163. In the present case, the IACHR observes that, since December 18, 1996, date on which the anonymous complaint on the alleged situation of abandonment of the Ramírez brothers was filed, up to January 8, 1997, date on which the judicial request was made to the Attorney General's Office to go to the home of Mrs. Ramírez, the judicial authority did not take any action to investigate the children's situation, which constituted the first failure to fulfill the obligation to determine, as quickly as possible, the protection measures that might have been needed to safeguard the best interests of the Ramírez children.

164. The IACHR also notes that, in the court ruling of January 8, 1997, the court requested the Attorney General's Office to take the children to the Child Care Residence of the Association (*Hogar Asociación de Los Niños de Guatemala*) if it was confirmed that the Ramírez brothers were in a situation of abandonment. The Commission notes that said ruling indicated institutional placement in the Child Care Residence of the Association as an automatic measure without any reference to the possibility of adopting measures of support for Mrs. Ramírez in the event other circumstances were found or needs identified that could be met on the basis of other responses, for example that the absence of resources had been the cause for the alleged abandonment. Nor was the possibility of finding other next of kin considered in order to determine if they would have been able to take the children in their custody before considering placement in an institution. The Commission deems that the reference to placement of the Ramírez brothers in an institution, without due grounds and without a prior review of other less deleterious options, in line with the standards described above, which must be considered before opting for said possibility, constituted a failure by the state to fulfill the obligations already described above.

165. As observed on the basis of proven facts, this situation continued to prevail throughout the rest of the proceedings of the judicial declaration of abandonment, including the respective appeals. Although certain decisions were subsequently taken with respect to the extended family, this was only because two of the children's aunts and their maternal grandmother appeared in the proceedings, not because they were summoned to appear as an ex officio measure taken by the State, as it was required to do in the discharge of its duty to provide special protection. This widespread omission of looking for alternatives that might have been less deleterious than placement in an institution and subsequent adoption is evident in the fact that, at no time whatsoever, were measures ever adopted to find Mr. Gustavo Tobar, the father of one of the children, so that he could indicate whether or not he wished or was able to take over custody of the child and take care of him.

166. In addition to not examining alternatives that might have been less harmful than placement in an institution and subsequent adoption, the Commission observes that, since the visit of the Attorney General's Office to the home of Mrs. Ramírez up to the judicial declaration of abandonment of her two sons, many irregularities were apparent, as well as the failure to provide evidence and ensure due diligence on the part of the various state authorities. The Commission highlights the relevance of the state's decision to declare a status of abandonment and the severe impact of the latter on the legal status of the children, which made it all the more important for this ruling to be conducted more seriously and thoroughly, with the necessary safeguards of independence and impartiality.

167. First of all, the Commission observes that, on January 9, 1997, civil servants of the Attorney General's Office went to the home of Mrs. Ramírez and when they saw that both children were alone, they proceeded to take them to Child Care Residence of the Association. The IACHR observes that, apart from a reference that they had not acted rashly, in said record of the action there is no indication that Osmín Tobar Ramírez or his brother were ever consulted about the accuracy of the complaint that was anonymously filed.

168. Second, the IACHR notes that, on that same day, Mrs. Ramírez went to court to request the return of her children, explaining that she was paying a neighbor to look after her children while she was at work. The Commission observes that said request was not taken into consideration by the court and no order was issued to check the allegations presented by the biological mother. The Commission further notes that, as of that day 18 days elapsed before the court took any step whatsoever to decide upon the situation of the Ramírez brothers, especially in the light of the allegations presented by Mrs. Ramírez and the fact that they had been placed in an institution.

169. Third, the Commission observes that the ruling of January 27, 1997 whereby the court ratified placement of the Ramírez brothers in the Child Care Residence of the Association did not remedy the above-mentioned irregularities. Nor did this ruling examine the information provided by Mrs. Ramírez or explore measures other than placement of the children in an institution, such as the possibility of investigating more in depth the situation of Mrs. Ramírez to assess the relevance or need to provide her with support if necessary, looking for the father of at least one of the children, looking for the extended family, or evaluating the conditions for reestablishing ties during the children's institutional placement.

170. Fourth, the Commission notes that the judicial authority ordered the Child Care Residence of the Association to conduct the social studies of Mrs. Ramírez, although it was not clear how this institution was technically suitable to reach decisions of that kind to ensure the best interests of the children. Nor is there any information available that might indicate that said institution, which had an adoption program, was able to act independently and impartially in conducting studies that were so essential for the situation of the children. On the contrary, the absence of technical suitability, independence, and impartiality was evident in the way the Child Care Residence of the Association conducted the social studies.

171. With respect to the social study conducted on February 3, 1997, the IACHR observes that the conclusions reached by said report were based exclusively on interviews without any reference, in the report, to the names of the persons who provided their testimony. Furthermore, it is noteworthy that the report indicated that the children had bruises and scars, although there was no documentary or expert evidence whatsoever to substantiate said situation or reference to any medical evaluation. It must be mentioned here that this ruling, which is not supported by any evidence, contradicts the report made by the Attorney General's Office on January 9, 1997, indicating that the children "did not show any signs of physical aggression." Neither the evident absence of motivation or proof in this report, nor the contradiction between this report and that of the Attorney General's Office on a subject that was of the utmost importance such as signs of physical aggression were corrected by any judicial authority whatsoever throughout the proceedings of the official declaration of abandonment.

172. The Commission observes in addition that, in drafting this report, the State failed to fulfill its obligations to hear the children, especially Osmín Tobar Ramírez, who was seven years old at the time and whose opinion had to be taken into account and appraised in keeping with his maturity. The IACHR observes that, in said report, there is no indication that Osmín Tobar Ramírez had been listened to with respect to the situation of his family. Nor does it appear that, for the drafting of this report, the statement of Mrs. Ramírez or Mr. Gustavo Tobar, father of Osmín Tobar Ramírez, or that of any other member of the family had been requested so that the evaluation could be conducted on the basis of all the necessary elements.

173. The Commission notes that the report recommended the issuance of a judicial declaration of abandonment of the children "so that they could be included in the adoptions program" of the institution that drafted the report. The Commission reminds the parties involved that, in accordance with what was described in the present report, adoption –which is an exceptional protection measure– entails a permanent removal of a child from his/her biological family, as a result of which said removal must be justified in the best interests of the child as decided upon in line with the above-mentioned standards stemming from the *corpus juris* pertaining to the rights of the child. Regarding this, in addition to the above-mentioned deficiencies in providing evidence and substantiating due cause, the report does not make any mention whatsoever of possibilities other than adoption or of investigating the feasibility of other options. Nor did this report provide any motivation behind the reasons for deciding that adoption was the most appropriate measure.

174. Fifth, the Commission observes that the two reports from the Attorney General's Office in May 1997 also showed various shortcomings. On the one hand, it was indicated that because of "the mother's very unstable economic situation" she was not able, at that time, to take care of her children. Apart from the fact that the economic situation could not be a reason for removing a child from his/her family and that rather such a situation should trigger the state's duty to provide support in line with its special obligations to protect the child, the IACHR observes that, in said report, there is no evidence for the reasons that might have led to said conclusion. On the other hand, it was concluded that Mrs. Ramírez was mistreating her children, once again on the basis of statements made by neighbors. Nevertheless, just as in the previous report, this report does not identify either the persons who provided their testimonies or the concrete content of their statements. Nor did this report indicate that other evidence of corroboration had been obtained such as forensic examinations of the children, an interview with the children, and psychological checkups. Nor does this report indicate that statements were taken from Mrs. Ramírez, Mr. Tobar or the children themselves.

175. Sixth, the Commission deems that the report of May 19, 1977 from the Child Care Residence of the Guatemala Children's Association about the request made by the two aunts of the Ramírez brothers to be in charge of taking care of them also showed severe irregularities. Thus, as for the first reports, it is repeated that there were no safeguards to ensure the report's technical suitability, independence, and impartiality. Furthermore, it is stressed that it is not possible to identify the evidence that led to various of this report's conclusions. The IACHR observes that, although the study involved the possibility of who would be responsible for taking care of the children, the aunts were not even interviewed nor were they subjected to any psychological examination. In addition, although reference was made to an alleged statement made by Osmín Tobar Ramírez, it is nowhere supported by any documentary evidence that he was actually interviewed or that the interview took place with the safeguards set forth in Article 12 of the Convention on the Rights of the Child, relevant for the application of Article 8.1 of the American Convention when dealing with the right of the child to be heard, as provided for by the Inter-American Court. The Commission cannot fail to note that this is the only reference in the entire case file that any of the Ramírez brothers might have been heard throughout the proceedings of the declaration of abandonment.

176. Seventh, the Commission observes that after the maternal grandmother of the Ramírez brothers requested that she take care of the children, the Psychology Unit of the Judiciary drafted a report where, in addition to the flaws in methodology and contents, it is possible to identify certain discriminatory stereotypes. In this report, it was indicated that "as a family resource, it has to be taken into consideration that an adult with homosexual preferences would be transmitting a series of values to the children under her care." The IACHR recalls that, in the *Case of Atala Riffo and Daughters v. Chile*, the Court pointed out that a decision of removing a father or mother from his/her son or daughter based on a social stigma regarding his/her sexual orientation is not in line with the best interests of the child principle<sup>281</sup> nor in line with the principle of non-discrimination. This is applicable when deciding whether or not the maternal grandmother is suitable on the basis of her possible sexual orientation.

177. The Commission notes that, although other aspects were mentioned in this report, such as the alleged drug addiction and alcoholism of the maternal grandmother, exactly as in the other reports examined to date, the reasoning behind these allegations is so tenuous that it does not provide any evidence on the basis of which these conclusions were reached. The alleged evidence does not appear in the case file submitted to the IACHR, despite the importance of this report to evaluate whether or not the Ramírez children could be taken care of by someone from their biological family.

178. Finally, the decision of the court that issued the judicial declaration of abandonment of the Ramírez children, did not take into any consideration all of the flaws described in the present section nor was it interested in listening to what the children had to say. On the contrary, it neglected to judicially review the suitability of the reports submitted and rather took them as the basis for declaring abandonment and

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<sup>281</sup>I/A Court H.R.. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 121.

adopting as its own the recommendation for including the children in the adoptions program made by the very institution that drafted the majority of the reports.

179. By virtue of the considerations described above, the Commission concludes that both the initial decision of placement in an institution and the judicial declaration of abandonment did not fulfill the minimum substantive and procedural obligations that would allow them to be viewed as complying with the American Convention. As a result of this failure to fulfill said obligations, the Commission concludes that, in this proceeding, the state: i) violated the right to personal liberty, the rights to protection of the family and family life, and the right to be heard as set forth in Articles 7, 8.1, 11.2, and 17 of the American Convention in connection with the obligations set forth in Articles 19 and 1.1 of the same instrument, to the detriment of the Ramírez brothers; and ii) violated the rights to protection of the family and family life and the right to be heard, as set forth in Articles 8.1, 11.2, and 17 of the American Convention in connection with the obligations established in Article 1.1 of the same instrument to the detriment of Flor Ramírez and Gustavo Tobar.

#### **ii) Motion for review of the declaration of abandonment**

180. The Commission will now analyze if the motion for review filed by Mrs. Ramírez against the abandonment declaration was in compliance with judicial guarantees or judicial protection with respect to the violations found in the previous section.

181. Mrs. Ramírez filed a motion for review, which was initially ruled inadmissible by the court's decision of September 23, 1997. The Commission notes, first of all, that the processing of that remedy was marked by several irregularities vis-à-vis the terms of domestic law.

182. The IACHR notes that under Articles 138 and 139 of the Judiciary Law, the court must convene a hearing and, if the motion involves matters of fact, order the collection of evidence. However, no hearing was convened and the court requested no evidence. On the contrary, even though Mrs. Ramírez's filing necessarily involved matters of fact regarding the grounds for the declaration of abandonment, the court merely summoned the office of the Attorney General to hear its position and simply referred to information related to the declaration of abandonment which was already in the case file and which has already been ruled incompatible with the American Convention.

183. Neither did the court request that Mrs. Ramírez give a statement or that Mr. Tobar appear. Similarly, the Commission notes that the court did not request that the children be examined or that their testimony be taken—in particular, that of Osmín Tobar Ramírez, who was seven years old at the time.

184. The court also refrained from examining the documents presented by Mrs. Ramírez during her children's abandonment proceedings, which addressed the medical attention given to her children and the state of their health and education. Neither did the court rule on the claims alleging the lack of credibility of the neighbors' statements, including the actions of her neighbor Delmy Arias and her alleged ties with a network of irregular adoptions. The Commission notes that no formalities were pursued to remedy the evidentiary omissions of the earlier reports, such as identifying the names of the neighbors who had purportedly given statements, for example. Neither was Mrs. Delmy Arias summoned in order for Mrs. Ramírez's allegations to be investigated. The IACHR also notes that the court failed to rule on the admissibility or otherwise of Mrs. Ramírez's application to visit her children during their institutionalization. The Commission also notes that the court did not rule on the request of Mrs. Ramirez to visit her children while they were institutionalized, in order to remove any unnecessary restriction of the children's right to maintain the link with their family.

185. In addition to those omissions, the Commission observes that Mrs. Ramírez was not notified of the court's order of August 25, 1997, which opened the processing of her motion for review and summoned the Attorney General's office—and no other deponents—to the hearing. The IACHR highlights the fact that the court itself acknowledged that omission and the violation of her right to be heard when it stated that "an error was committed by failing to notify the person who had filed the remedy." In addition, the court acknowledged that Mrs. Ramírez's "right of defense was affected" and therefore resolved to void all the

proceedings prior to that date.

186. The Commission therefore notes that although the courts found that Mrs. Ramírez's right of defense had been impaired, the authorities continued with the proceedings without providing due judicial protection against the violations incurred in determining the Ramírez brothers' legal situation. This can be seen in the fact that after issuing that acknowledgment, the court did not convene an *ex officio* hearing to hear the position of the Ramírez brothers' parents, nor did it request that the omitted evidence be gathered. On the contrary, the IACHR notes that the court rejected Mrs. Ramírez's request to submit evidence. The Commission also sees that at least two judges attempted to recuse themselves from the proceedings without due grounds, which contributed to the delay in processing the remedy.

187. In response to Mrs. Ramírez's various requests, the new judge assigned to the case ruled the motion for review groundless by means of an order dated January 6, 1998, and later requested that it be sent to the archive. The Commission points to the same irregularities that were detected in the order of September 23, 1997, in that: (i) no hearing was held, nor was the evidence reception process opened; (ii) the decision was based exclusively on information in the case file for the children's declaration of abandonment; (iii) Mrs. Ramírez's various claims regarding the situation of her children, the lack of credibility of the neighbors' testimony, and the irregularities in the social reports prepared by the Attorney General's office and the Child Care Residence were not taken into account; and (iv) no statements were taken from Mrs. Ramírez, Mr. Tobar, or the Ramírez brothers to assess them in accordance with their maturity.

188. In consideration whereof, the Commission concludes that the motion for review, up to the time of the adoption, allowed the violations already established to continue, failed to provide an effective remedy, and failed to ensure minimum guarantees of due process, and that accordingly, the State violated the rights to a fair trial and judicial protection set forth in Articles 8.1 and 25.1 of the American Convention, in conjunction with Articles 19 and 1.1 thereof, with respect to Osmín Tobar Ramírez and J.R. In addition, the Commission concludes that in its processing of this remedy, the State violated the right to a fair trial and to judicial protection set forth in Articles 8.1 and 25.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Flor Ramírez and Gustavo Tobar.

## **2.2. Regarding the adoption process and the remedies filed**

### **i) Adoption process**

189. The Commission draws attention to the concern expressed by various international agencies regarding the legislation in force for the adoption of children at the time of the facts. In particular, the IACHR notes that the extrajudicial adoption process did not require thorough investigations, procedures, or formalities, nor was it subject to obligatory judicial review. On the contrary, the process lacked the minimum procedural safeguards to ensure that all the possible alternatives were explored prior to proceeding with the adoption and to ensure the parents' presence and that their declaration of consent was given in accordance with the described standards. In addition, the process did not require that the children be heard or that their opinions be taken into account in accordance with their level of maturity. Neither did it provide for an individual appraisal of the suitability of the potential adoptive parents vis-à-vis the specific needs of the child.

190. The Commission notes that these problems in the regulations and practices governing adoptions at the time of the facts were clearly at play in the case at hand.

191. The IACHR notes that the extrajudicial adoption process began with an application made by the attorneys of the adoptive families and notaries in Guatemala. The Commission also notes that the report from the Attorney General's office ruled that the adoption could not proceed because a motion filed by Mrs. Ramírez was still pending resolution. Nevertheless, after the adoptive families had filed an appeal against that decision with the judiciary, the court in charge of the case ruled the adoption of the Ramírez brothers to be admissible.

192. The Commission observes that this judicial decision did not meet the minimum standards for ensuring the rights of the Ramírez children in accordance with their best interests.

193. First of all, the court did not examine whether there were any remedies still pending in the proceedings, as indicated by the report from the Attorney General's office. The court simply stated that pursuant to a judicial certification, the motion for review had been settled by the order of January 6, 1998. Nevertheless, the IACHR points out that according to the evidence presented by both parties, Mrs. Ramírez had filed various documents questioning the irregularities that had arisen during the proceedings for the declaration of abandonment and during the processing of the motion for review itself.

194. Second, the court ordered no formalities of any kind to examine Mrs. Ramírez's situation. The IACHR notes that the report of the Attorney General's office states that it would be useful to examine Mrs. Ramírez's situation at a later juncture in order to determine the measures to be adopted with respect to her children. However, the court did not take that consideration into account. Neither did the court take into account the situation of Ricardo Tobar as Osmín's father, in light of the State's duty to adopt the support measures necessary to ensure that children remain with their parents except when not in accordance with their best interests.

195. Third, the court did not assess the possibility of ordering that the Ramírez brothers' maternal grandmother or aunts, who had requested custody, be made responsible for their care. In addition, in this process the judicial authorities repeatedly failed to investigate other possible maternal or paternal relatives who could assume custody of the children, in the event that the parents were effectively deemed unfit to do so. Thus, in the adoption proceedings, the State also failed in its duty of properly exploring the possibility of the children being cared for by their extended family.

196. Fourth, the IACHR again states that pursuant to the international instruments identified above that are a part of the *corpus iuris* on the rights of children, international adoptions must be exceptional and take place solely when adoption at the national level is not possible. However, in the case at hand, the court failed to examine the possibility of exploring an adoption in Guatemala; instead, it processed, in an expedited fashion, the applications to adopt the Ramírez children made by families living in the United States.

197. Fifth, the court failed to assess the suitability of the adoptive families vis-à-vis the specific needs of the Ramírez brothers, who were, in addition, separated. The IACHR notes that the order merely indicates that the two families "established their moral and economic solvency" and makes no reference as to how that conclusion was reached.

198. Finally, there is no indication that Mr. Gustavo Tobar, Mrs. Flor Ramírez, or the Ramírez brothers were heard during the adoption process, which represents a fresh violation of their right to a hearing and to have the opinions of the two children taken into account according to their age and maturity.

199. The Commission cannot fail to point out that some time after the Ramírez brothers' adoption process had concluded, both the judiciary and the National Civilian Police acknowledged that it suffered from several irregularities (see *supra* paras. 98-110).

200. In consideration whereof, the Commission finds that the State of Guatemala violated the right to a hearing, the right to a family life free of arbitrary interference, and the right to the protection of the family set forth in Articles 8.1, 11.2, 17, and 19 of the American Convention, in conjunction with Articles 19, 1.1, and 2 thereof, with respect to Osmín Tobar Ramírez and J.R. In addition, the Commission finds that the State of Guatemala is responsible for violating the right to a hearing, the right to the protection of the family, and the right to a family life free of arbitrary interference set forth in Articles 8.1, 11.2, and 17 of the American Convention, in conjunction with Articles 1.1 and 2 thereof, with respect to Flor Ramírez and Gustavo Tobar..

## ii) Review and *amparo* remedies



201. The Commission notes that after the Ramírez brothers' adoptions were registered, Mr. Tobar filed a motion with the court claiming that several applications were still pending resolution in the motion for review lodged by Mrs. Ramírez. He also questioned the various irregularities that occurred during the abandonment declaration proceedings and the Ramírez brothers' adoption procedure, including the fact that he was unable to participate in the proceedings despite being the biological father, and that he should have been given the possibility of defending himself against the declaration of abandonment and/or of granting his consent for the adoptions to proceed.

202. The IACHR believes that the court's decision to rule Mr. Tobar's application inadmissible was inadequately grounded. The Commission notes that the court ruled that his application was untimely, without stating the deadline applied or the corresponding legal basis. In addition, the court stated that Mr. Tobar had not been a party to the proceedings which, rather than grounds for inadmissibility, should have been examined as a violation of his right of defense with respect to his family life and, consequently, should have been immediately remedied. The Commission again points out that Mr. Tobar, as Osmín's biological father, was entitled to participate and be heard in all proceedings related to his family ties with his son. Furthermore, the Commission recalls that the State must exhaust the process of locating parents and maintenance of the family ties prior to any final decision on the situation of the children.

203. The Commission notes that although the judicial authorities acknowledged the irregularities in the declaration of abandonment and adoption proceedings on several occasions, it took no steps to correct those errors, such as revoking the recently finalized adoptions or ensuring that the proceedings that were in violation of due process did not continue to affect the children's legal situation.

204. The Commission further notes that the court's failure regarding Mr. Gustavo Tobar's participation was subsequently acknowledged by the Court of Appeal which, in response to an *amparo* relief filing he lodged, found that his lack of participation in the proceedings "violates the applicant's right of defense in that it prevents him from asserting his status as the father of the minor Osmín (...) so that the child could be handed over to him."

205. After a hearing was held under the motion for review, at which both Mr. Tobar and Mrs. Ramírez were able to present their claims, the court asked the Attorney General's office to report on the situation of the Ramírez children's parents. The Commission believes that the report the Attorney General's office submitted failed to comply with the international standards referred to above in that it did not examine: (i) the parents' specific and individual situations as regards their possible custody of the children; (ii) the possibility of adopting measures to support the parents in assuming their responsibilities; or (iii) the possibility of the children's extended family being given custody. On the contrary, the IACHR notes that the Attorney General's office merely presented a copy of the report prepared by the Child Care Residence.

206. In a further recognition of irregularities, the Commission notes that in the order of June 20, 2000, adopted under the motion for review, the court concluded that "multiple substantive errors were committed in the processing of this case, which affected the corresponding constitutional rights and guarantees of Mrs. Flor de Maria Ramírez Escobar as a party to the proceedings, and which also violated the legal formalities of due process." Accordingly, the IACHR notes that the court itself acknowledged some of the shortcomings that arose during the review proceedings, in particular: (i) the failure to provide an opportunity for evidence to be presented after Mrs. Ramírez lodged the motion for review; (ii) the failure to serve notice of several orders between 1997 and 1999; and (iii) the existence of several filings presented by Mrs. Ramírez that were not resolved. In this regard, the Commission considers that this situation violates the rights of the Ramírez children, considering the exceptional diligence principle that should govern all proceedings in respect of the care of a child.

207. The Commission notes that on November 7, 2000, the court upheld the motion for review. The court acknowledged a further infringement of the right of defense of the Ramírez children's parents by stating that they were not given "adequate occasion to demonstrate that they represent the ideal source of family, emotional, and psychological support for their (...) children." Such situation generated a serious violation of the right of children to live in their family.

208. In light of this decision, the numerous acknowledgments of irregularities at the domestic level, and the judiciary's new psychological and social reports finding that Mrs. Ramírez and Mr. Tobar were capable of caring for their children, the Commission notes that the State did not take the measures necessary to determine—seriously and with the exceptional diligence required in cases of this kind—the viability and desirability of reuniting the Ramírez brothers with their biological family.

209. First of all, the Commission notes that on August 31, 2001, the court resolved to summon the two adoptive families to make statements, including the Ramírez brothers. Nevertheless, it was not until almost four months later that the Ministry of Foreign Affairs informed the court that the application had to be sent to the United States, and not to that country's embassy in Guatemala.

210. Second, the IACHR notes that on June 20, 2000, the court requested that Mr. Tobar defray the costs required for statements to be taken from the adoptive parents, otherwise the case file would be archived. In this regard, the Commission believes that after its own judicial authorities had acknowledged the irregularities during the review of the declaration of abandonment and subsequent adoption of the children, the State had the obligation of remedying those shortcomings to the best of its ability, with exceptional diligence, in accordance with the children's best interests, and without imposing economic or other burdens on the victims of the irregularities it had detected.

211. Finally, the Commission notes that there was no permanent and effective participation by any specialized agency to protect the Ramírez brothers' rights. In this regard, the Inter-American Court has ruled that:

The Court considers that, in order to facilitate access to justice for vulnerable persons, the participation of other State institutions and bodies is essential so that they can assist in the judicial proceedings in order to ensure that the rights of such persons are protected and defended.<sup>282</sup>

(...)

Moreover, the Court recalls that while procedural rights and their related guarantees apply to all persons, in the case of children the exercise of those rights requires, due to their special status as minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.<sup>283</sup> The types of specific measures are determined by each State Party and may include direct or joint representation,<sup>284</sup> as the case may be, of the minor in order to reinforce the guarantee of the principle of the best interests of the minor.<sup>285</sup>

212. The Commission believes that the foregoing is fully applicable to both the declaration of abandonment and the adoption proceedings, which were making crucial decisions regarding the lives and futures of both children.

213. In consideration whereof, the Commission concludes that the motion for review processed after the adoption of the Ramírez brothers continued to perpetuate the violations already established in this

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<sup>282</sup> I/A Court H. R. *Case of Furlan and Family v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, para. 241.

<sup>283</sup> I/A Court H. R. *Case of Furlan and Family v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, para. 241. Citing: Advisory Opinion OC-17/02, para. 98.

<sup>284</sup> I/A Court H. R. *Case of Furlan and Family v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246, para. 241. Citing, *mutatis mutandis*: *Case of Atala Riffo and Daughters v. Chile*, para. 199.

<sup>285</sup> I/A Court H. R. *Case of Furlan and Family v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246. Para. 242.

report and further failed to offer an effective remedy against them. The Commission consequently finds that the State of Guatemala is responsible for violating the rights to a fair trial and to judicial protection enshrined in Articles 8 and 25 of the American Convention, in conjunction with the obligations established in Articles 19 and 1.1 thereof, with respect to Osmín Tobar Ramírez and J.R.. Furthermore, the Commission finds the State of Guatemala internationally responsible for violating the rights to a fair trial and to judicial protection enshrined in Articles 8 and 25 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Flor Ramírez and Gustavo Tobar.

### iii) Reasonableness of the duration of the review process

214. Article 8.1 of the American Convention provides that one of the elements of due process is that the courts must resolve the cases placed before them within a reasonable time. Thus, an excessive delay may constitute, in and of itself, a violation of the right to a fair trial,<sup>286</sup> and, for that reason, it falls to the State to explain and prove why it required more time than would be reasonable to deliver final judgment in a specific case.<sup>287</sup>

215. Therefore, the reasonableness of the time taken must be assessed in light of the overall duration of the proceedings.<sup>288</sup> According to the terms of the Article 8.1 of the American Convention, the Commission must take into consideration, in light of the specific circumstances of the case, the four elements used by the Court in its recent judgments. Those elements are: (i) the complexity of the matter, (ii) the procedural activity of the interested party, (iii) the actions of the judicial authorities, and (iv) the general effects on the legal situation of the person involved in the proceeding.<sup>289</sup> In the case at hand, the review process lasted from August 25, 1997, until the case was archived on September 19, 2002: that is, almost five years and one month.

216. The Commission notes that the State has not argued the complexity of the matter as a reason for the delay in resolving the motion for review. As regards the participation of the parties, the Commission notes that Mr. Tobar and Mrs. Ramírez contributed actively to the proceedings, by seeking judicial protection against the infringements of their rights and those of their children; but those are not actions that can be read as a factor that contributed to the delay in resolving this remedy. Regarding the actions of the authorities involved and the nature of the interests at play, the Commission notes that those authorities failed to observe the exceptional diligence required in cases in which the legal situation of a child is to be decided, with an impact on his or her family life, particularly when the passage of time can be a factor in determining the child's best interests.

217. In consideration of the foregoing, the Commission concludes that the total duration of the review procedure is greatly in excess of what could be deemed reasonable and therefore constitutes a violation of Article 8.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the Ramírez children, Mr. Tobar, and Mrs. Ramírez, and in conjunction with Article 19 thereof with respect to the children.

## 3. The Ramírez brothers' right to a name and identity

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<sup>286</sup> I/A Court H. R. *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005. Series C No. 137, para. 166; *Case of Gómez Palomino v. Peru*. Merits, Reparations, and Costs. Judgment of November 22, 2005. Series C No. 136, para. 85; and *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C No. 124, para. 160.

<sup>287</sup> I/A Court H. R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 142.

<sup>288</sup> I/A Court H. R. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 129; *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 104; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 168.

<sup>289</sup> I/A Court H. R. *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits, and Reparations. Judgment of November 30, 2012. Series C No. 259, para. 164.

218. In the case at hand, the Commission has established that both the abandonment declaration proceedings and the subsequent adoption of the Ramírez brothers violated the right to the protection of the family and to a family life free of arbitrary interference with respect to the children, their mother, and the father of one of them. As indicated previously in this report, the family, a name, a nationality, and the family ties are constituent elements of the right of identity. Accordingly, in the circumstances of the case at hand, that violation also impaired the Ramírez brothers' right of identity, and to know the history of their origin. The IACHR further notes that as a result of their adoption, the names and surnames of both children have reportedly been changed.

219. Because of this, the Commission believes that changing the Ramírez children's names and surnames in that way further constituted an arbitrary usurpation of their names, which are a fundamental component of their identities. As the Court found in ruling on a violation of the right to a name in the case of *Contreras et al. v. El Salvador*, an impairment of the right of identity and to a name persists when the State fails to adopt the measures necessary to make the pertinent changes in the registration and identity documents.<sup>290</sup> In the case at hand, instead of taking steps to reinstate their family ties and names as central elements in the children's identities, the State of Guatemala imposed a financial burden on the parents for bringing about that reinstatement, thereby failing to meet its strengthened obligations arising from the duty of affording special protection for children.

220. Consequently, the Commission finds that the State of Guatemala is responsible for violating the right of identity through the violations already established in this report. In addition, the Commission finds that the State is responsible for violating the right to a name established in Article 18 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the Ramírez brothers.

#### **4. The right of the Ramírez brothers and their family to humane treatment**

221. Article 5.1 of the American Convention provides that "every person has the right to have his physical, mental, and moral integrity respected." Likewise, the Court has ruled that separating children from their families can have a specific and particularly grave impact on their personal integrity, with lasting effects.<sup>291</sup>

222. In the case at hand, the Commission believes that removing the Ramírez children from their home they shared with their mother without the minimum guarantees required by the applicable international standards, holding them in an institution for a year and a half where, according to Mrs. Ramírez, they were unable to receive visits from their family, and their subsequent international adoption in the circumstances described in this report were matters of such gravity that they tend to indicate a violation of the right to humane treatment both of the Ramírez brothers and of Mrs. Ramírez and Mr. Tobar. As regards Mr. Tobar, the Commission also takes into account the physical aggression and threats he claims to have received as a consequence of his search for his son Osmín to reestablish their link, together with the lack of protection provided in connection with those aggressions. Consequently, the IACHR concludes that the State of Guatemala violated Article 5.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the Ramírez brothers, Mrs. Flor Ramírez, and Mr. Gustavo Tobar.

## **V. CONCLUSIONS**

223. Based on the legal and factual considerations set out above, the Inter-American Commission concludes that the State of Guatemala is responsible for violating the rights established in Articles 5, 7, 8, 11, 17, 18, 19, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 thereof, with respect to the persons identified in each corresponding section of this report.

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<sup>290</sup> I/A Court H. R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations, and Costs. Judgment of August 31, 2011. Series C No. 232, para. 111.

<sup>291</sup> I/A Court H. R. *Case of Contreras et al. v. El Salvador*. Merits, Reparations, and Costs. Judgment of August 31, 2011. Series C No. 232, para. 100.

224. In consideration of the foregoing conclusions,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
RECOMMENDS THAT THE STATE OF GUATEMALA:**

1. Provide comprehensive redress for the human rights violations established in this report, in both their material and moral dimensions.
2. Conduct, as promptly as possible, a serious search, making all efforts to determine the whereabouts of J.R..
3. Immediately establish a procedure to forge effective ties between Mrs. Flor de María Ramírez Escobar and Mr. Gustavo Tobar Fajardo and the Ramírez children, according to the wishes of the latter and taking their opinions into account.
4. The State must immediately provide the victims with such medical and psychological or psychiatric treatment as they request.
5. Order such administrative, disciplinary, or criminal measures as may be applicable to the actions or omissions of the officers of the State who participated in the facts of the case at hand.
6. Adopt the necessary measures of nonrepetition, including legislative measures and others, to ensure that both in the regulations and in practice, adoptions in Guatemala comply with the international standards described in this report.