INTER-AMERICAN COURT OF HUMAN RIGHTS[*]

CASE OF RAMÍREZ ESCOBAR *ET AL. V.* GUATEMALA

JUDGMENT OF MARCH 9, 2018

(*Merits, reparations and costs*)

In the case of *Ramírez Escobar et al.,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Eduardo Ferrer Mac-Gregor Poisot, President,
Humberto Antonio Sierra Porto,
Elizabeth Odio Benito,
Eugenio Raúl Zaffaroni, and
L. Patricio Pazmiño Freire,

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 62, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment structured as follows:

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[*] Judges Eduardo Vio Grossi and Roberto F. Caldas did not take part in the deliberation and signature of this judgment for reasons beyond their control, accepted by the full Court.

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I
INTRODUCTION OF THE CASE AND SUBJECT MATTER OF THE DISPUTE

1. *The case submitted to the Court.* On February 12, 2016, based on Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of the *Ramírez Brothers and family against the Republic of Guatemala* (hereinafter "the State" or "Guatemala"). According to the Commission the case related to the intercountry adoption, in June 1998, by means of a notarial procedure, of the children, Osmín Ricardo Tobar Ramírez and J.R.,[1] aged seven years and two years, respectively, following the institutionalization of the two brothers on January 9, 1997, and the subsequent declaration of an alleged situation of child abandonment. The Commission determined that, both the initial decision of institutionalization and the judicial declaration of child abandonment failed to comply with the minimum substantive and procedural obligations to be considered in conformity with the American Convention. The presumed victims in this case are Osmín Ricardo Tobar Ramírez and his biological parents, Flor de María Ramírez Escobar and Gustavo Tobar Fajardo. The status of alleged victim of J.R., and his participation in this case, will be examined and decided in Chapter V of this judgment.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) *Petition.* On August 1, 2006, *Casa Alianza, the Movimiento Social por los Derechos de la Niñez,* and the Center for Justice and International Law (CEJIL) (hereinafter "the petitioners") lodged the initial petition on behalf of the alleged victims.

b) *Admissibility Report.* On March 19, 2013, the Commission adopted Admissibility Report No. 8/13.[2]

c) *Merits Report.* On October 28, 2015, the Commission adopted Merits Report No. 72/15, in which it reached a series of conclusions and made several recommendations to the State.

- *Conclusions.* The Commission concluded that the State of Guatemala was responsible for the violation of Articles 5, 7, 8, 11, 17, 18, 19 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Osmín Ricardo Tobar Ramírez, J.R., Flor de María Ramírez Escobar and Gustavo Tobar Fajardo.

- *Recommendations.* Consequently, the Commission made a series of recommendations to the State as follows:

1. Provide comprehensive pecuniary and non-pecuniary reparation for the human rights violations established in the report.

2. Conduct, as promptly as possible, an effective search, making every effort to determine the whereabouts of J.R.

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[1] In response to the representatives' request, the Court agreed to maintain the identity of Flor de María Ramírez Escobar's second son and of his adoptive family confidential in this case. Accordingly, the initials "J.R." will be used to refer to Mrs. Ramírez Escobar's second son; "T.B." to refer to his adoptive father, "J.B." to refer to his adoptive mother, and "the B. couple" or "the B. family" to refer to the couple or to the adoptive family of J.R., as a whole.

[2] *Cf.* IACHR, Report No. 8/13, Petition 793-06, Admissibility, *Ramírez brothers and family*, Guatemala, March 19, 2013.

3. Immediately establish a procedure to forge effective ties between Flor de María Ramírez Escobar and Gustavo Tobar Fajardo and the Ramírez children, in accordance with the wishes of the latter and taking their views into account.

4. The State must immediately provide the victims with such medical and psychological or psychiatric treatment as they request.

5. Order the administrative, disciplinary, or criminal measures that correspond to the acts or omissions of the State officials who participated in the facts of this case.

6. Adopt the necessary measures of non-repetition, including legislative and other measures, to ensure that, both in their regulation and in practice, adoptions in Guatemala comply with the international standards described in the report.

d) *Notification of the Merits Report.* The Merits Report was notified to the State on November 12, 2015, granting it two months to report on compliance with the recommendations. Following an extension, the State of Guatemala submitted a brief on February 8, 2016, in which it rejected the conclusions of the Merits Report and indicated, among other matters, that it was not appropriate to grant any type of reparation to the victims because the State had, "at all times, guarantee[d] the human rights of the Ramírez brothers, as it had sought their best interests, considering their need to be integrated into a family."

3. *Submission to the Court.* On February 12, 2016, the Commission submitted this case to the Court "owing to the need to obtain justice for the victims in the case." The Commission appointed Commissioner Enrique Gil Botero and Executive Secretary Emilio Álvarez Icaza as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán and Erick Acuña Pereda, as legal advisers.

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked this Court to conclude and declare the international responsibility of the State of Guatemala for the violations contained in its Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in that report (*supra* para. 2)

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.* The submission of the case was notified to the representatives of the alleged victims and to the State on March 29 and April 21, 2016, respectively.

6. *Brief with pleadings, motions and evidence.* On May 30, 2016, the Guatemalan organization El Refugio de la Niñez and the Center for Justice and International Law (CEJIL) (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The representatives were in substantial agreement with the allegations made by the Commission and asked the Court to declare the international responsibility of the State for the violation of the same articles of the American Convention that had been alleged by the Commission. Additionally, they alleged the violation of the prohibition of slavery and servitude (Article 6 of the Convention) to the detriment of the Ramírez brothers, as well as of the right to equality before the law and the prohibition of discrimination (Articles 1(1) and 24 of the Convention) to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and the Ramírez brothers. Lastly, they asked the Court to order the State to adopt various measures of reparation and to reimburse certain costs and expenses.

7. *Legal Assistance Fund*. In an order of October 14, 2016, the President of the Court declared that the request presented by the alleged victims, through their representatives, for access to the Court's Legal Assistance Fund was admissible.[3]

8. *Answering brief.* On November 23, 2016, the State submitted to the Court its brief answering the Commission's submission of the case and with observations on the pleadings and motions brief (hereinafter "the answering brief").[4] In this brief, the State acknowledged some of the alleged violations, contested others, and responded to the requests for reparation.

9. *Observations on the partial acknowledgement of responsibility.* On January 9, 2017, the Commission and the representatives presented their observations on the State's partial acknowledgement of responsibility.

10. *Public hearing.* On April 11, 2017, the President issued an order in which he called the State, the representatives and the Inter-American Commission to a public hearing on the merits, reparations and costs in order to hear the final oral arguments of the parties and the final oral observations of the Commission on those issues.[5] In addition, in this order, he required that the statements of one alleged victim, one witness and nine expert witnesses be submitted by affidavit. Subsequently, following a request by the State, he also ordered that the statement of another witness be received by affidavit.[6] The affidavits were presented by the representatives on May 12 and 16, 2017, and by the Commission and the State on May 17, 2017. In the said order, the President also called two alleged victims and one expert witness to provide their statements during the public hearing. The public hearing took place on May 22, 2017, during the Court's 118th regular session held at its seat.[7] During the hearing, the Court's judges requested specific information and explanations from the parties and the Commission.

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[3] *Cf. Case of Ramírez Escobar et al. v. Guatemala. Victims' Legal Assistance Fund.* Order of the President of the Court of October 14, 2016. Available at: http://www.corteidh.or.cr/docs/asuntos/Ramírezescobar_fv_16.pdf

[4] On April 21, 2016, the State appointed Carlos Rafael Asturias Ruiz, Steffany Rebeca Vásquez Barillas and Cesar Javier Moreira Cabrera as Agents. Subsequently, in its answering brief of November 23, 2016, it indicated that Guatemala would be represented in this case by the President of the Presidential Commission for the Coordination of the Executive's Human Rights Policy (COPREDEH), Victor Hugo Godoy, and by the Executive Director of COPREDEH, María José Ortiz Samayoa. On September 26, 2017, Guatemala advised of the appointment of the new President of COPREDEH, Jorge Luis Borrayo Reyes. On November 6, 2017, it advised of the appointment of the new Executive Director of COPREDEH, Felipe Sánchez González. Therefore, the Court understands that, at the time this judgment is issued, the State's Agents for this case are Jorge Luis Borrayo Reyes, President of COPREDEH, and Felipe Sánchez González, Executive Director of COPREDEH.

[5] *Cf. Case of Ramírez Escobar et al. v. Guatemala. Call to a hearing.* Order of the President of the Court of April 11, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/Ramírez_11_04_17.pdf.

[6] In the President's order of April 11, 2017, the witness proposed by the State, Erick Benjamín Patzán Jiménez, was called to testify during the public hearing. However, on May 9, 2017, the State advised that it "did not have the necessary and sufficient resources to cover the travel expenses" of Erick Benjamín Patzán and, therefore, asked that he be allowed to present his statement by affidavit. On May 12, 2017, in notes of the Secretariat, the parties and the Commission were advised that, given the impossibility of Erick Benjamín Patzán being present at the public hearing, the President had ordered that witness Patzán's statement be received by affidavit.

[7] At this hearing, there appeared: (a) for the Inter-American Commission: the Executive Secretariat lawyers, Silvia Serrano Guzmán and Selene Soto Rodríguez; (b) for the alleged victims' representatives: for CEJIL, Marcia Aguiluz, Gisela De León Esther Beceiro and Carlos Luis Escoffié, and for *El Refugio de la Niñez*, Monica Mayorga and Leonel Dubón, and (c) for the State of Guatemala: Ambassador Juan Carlos Orellana Juárez, the President of COPREDEH, Víctor Hugo Godoy, and the COPREDEH Director for the Monitoring of International Cases, Wendy Cuellar Arrecis.

11. *Alleged supervening facts.* On May 16, 2017, the representatives presented information on alleged supervening facts. The State presented its observations on those facts in its final written arguments (*infra* para. 13). The Commission did not present observations in this regard.

12. *Amicus curiae.* The Court received an *amicus curiae* brief from the Clinic on Policy Advocacy in Latin America at New York University[8] concerning "the illegal intercountry adoptions carried out in Guatemala following the conflict, exploiting children and their families" and "the stereotypes involving poverty, gender and sexual orientation used to justify the State's intervention in the family."

13. *Final written arguments and observations.* On June 22, 2017, the representatives and the State forwarded their final written arguments together with several annexes, and the Commission presented its final written observations.

14. *Disbursements in application of the Assistance Fund.* On October 12, 2017, the report on the disbursements made from the Court's Legal Assistance Fund in this case and its annexes was sent to the State. The State did not present observations in this regard.

15. *Helpful information and evidence.* The parties presented the helpful information and evidence that the judges had requested during the public hearing together with their final written briefs. In addition, on November 24, 2017, the President of the Court asked the State and the representatives to present further helpful information and evidence. The representatives presented this information on December 1, 2017. The State presented part of this information on December 1 and 20, 2017.

16. *Observations on the helpful information and evidence and the supervening evidence on expenses.* On July 27, 2017, the representatives presented their observations on the documentation presented by the State with its final written arguments. On the same date, the Commission advised that it had no observations to make. The State did not present observations on the annexes presented by the representatives with their final written arguments. Subsequently, on December 11 and 12, 2017, the parties and the Commission presented their observations on the documentation presented on December 1, 2017, and, on January 8, 2018, the representatives presented their observations on the documentation presented by the State on December 20, 2017.

17. *Deliberation of the case.* The Court began deliberating this judgment on March 9, 2018.

III
JURISDICTION

18. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

IV
STATE ACKNOWLEDGEMENT OF RESPONSIBILITY

A. Acknowledgement by the State and observations of the Commission and of the representatives

19. The ***State*** made a partial acknowledgement of responsibility indicating that "the adoption laws in force at the time of the facts of this case were not in conformity with the international *corpus*

[8] The brief was signed by Professor Eduardo A. Bertoni and Professor Florencia Saulino.

juris, thus violating the human rights contained in the [American Convention]." However, according to Guatemala, "the current laws on this matter do conform to the international standards for the protection of children, and adoption as a measure of last resort to restore the rights of children and adolescents." Guatemala acknowledged the alleged violations as follows:

a. *Regarding the alleged violations of Articles 5, 7 and 11 of the Convention, in relation to Article 1(1) of this instrument*:
   i. "In this case, the State's institutions removed the children from their mother because she was not complying with the obligation to care for and protect her children satisfactorily. As the result of a complaint, the Attorney General's Office took the children from their mother because they were in a situation that entailed risk (without adult care and unprotected) and they were referred to an institution in order to protect them. Such procedures were established by the laws in force at the time.
   ii. The "actions of certain public institutions described in the Merits Report reveal that [the] right[s] guaranteed to the Ramírez brothers in [Articles] 7 and 11 of the [Convention] could have been violated, among other reasons because they were placed in a private institution for seventeen months and deprived of contact with the members of their family." It also considered that "notwithstanding the actions of the institutions involved, it regrets that the laws in force might have allowed a declaration of abandonment to be sufficient to make the children available for adoption, thus violating their right to a family."
   iii. "Taking into account the [Commission's] conclusion, the case law of the […] Court, the actions of certain State institutions, and the laws in force at the time, the State acknowledges that, although the latter aspects have now been harmonized with current international principles, the situation described could represent a presumed violation of the right to personal integrity (Art. 5) of the Ramírez brothers and their family members, as well as of the rights to personal liberty (Art. 7) and protection of honor and dignity (Art. 11) of the Ramírez brothers."

b. *Regarding the alleged violations of Articles 17, 18 and 19 of the Convention*:
   i. "This family was separated owing to the mother's neglect of the children in their home. However, the State's intention was to restore their right to a family by means of the adoption. The State of Guatemala acknowledges that this interpretation violated the rights of the family and that it failed to apply the principle which indicates that priority must be given to the family unit or environment to ensure the adequate development of the child and respect for the right to a family."
   ii. "By violating their rights to integrity and to a family, their right to a name was also violated." "The State acknowledges that the family, name, nationality and family ties are elements that constitute the right to an identity."
   iii. "The State considers that, in the instant case, the rights of the Ramírez brothers were, indeed, violated because neither the family nor the State, in its capacity of guarantor, were able to ensure their protection and development."
   iv. "Based on the actions of the competent bodies that removed the children from their biological mother, the fact that they were placed in a private institution and that, subsequently, their intercountry adoption was permitted so that they would live in another country, all the rights cited in Articles 17, 18 and 19 were violated to the detriment of the Ramírez brothers."

c. *Regarding the alleged violations of Articles 8 and 25 of the Convention*:
   i. "The State acknowledges and regrets that, although the laws contained previously established judicial procedures and the corresponding means of appeal existed, when the latter were filed, they were processed incorrectly by the courts and were not

decided pursuant to the law."

ii. "Based on the international undertaking made to protect and ensure the rights established in the [Convention], the State regrets that, in the specific case of the Ramírez brothers, the right to due process was violated and, consequently, the rights recognized in Articles 8 and 25 [of the Convention]."

20. With regard to reparations, the State included considerations on each of the measures requested. It asked the Court to take into account its case law in this regard and indicated that the State had "amended adoption procedures by laws currently in force that are harmonized with the international principles and treaties on the protection of children and concerning adoption"; also, that "the State of Guatemala's financial capacity is very limited." Furthermore, although it acknowledged violations to the detriment of J.R., it argued that, "in the instant case, Osmín Ricardo Amilcar Tobar Ramírez, Flor de María Ramírez Escobar and Gustavo Amilcar Tobar Fajardo should be considered holders of the right to reparation," because J.R. "did not wish to know anything about these proceedings" and, therefore, he should not be considered in the proposed reparations.

21. During the public hearing, the State repeated its considerations on the alleged violations and, with regard to the facts, clarified that:

> The State of Guatemala acknowledges international responsibility for the facts described in the Merits Report […] regarding the failure to adapt its laws on the protection of children and adolescents to the international standards established in the international *corpus juris* concerning the protection of children and adoption. As indicated in paragraphs 14 to 23 of its brief answering the application, the State acknowledges that Osmín Ricardo and J.R. may have been subject to a violation of their human rights in relation to Article 5(1) on personal integrity, Article 7 on personal liberty, and Article 11 on honor and dignity, derived from the separation from their parents, even though the facts of the case do not show that they were subject to abuse or ill-treatment in the institution in which they were placed.

22. In its final written arguments, the State indicated that it "reiterated the arguments submitted during the international proceedings and, therefore, it was for the […] Court to determine the presumed violations that had been alleged against the State based on the evidence provided." It also indicated that "the evidence provided to the international proceedings must determine the existence of the harm caused, because the reparations (if these are ordered) will depend on the gravity of the acts that are alleged to have violated human rights." In addition, it clarified that it could not be attributed with international responsibility for the alleged violation of the prohibition of slavery and servitude recognized in Article 6 of the Convention "because the elements based on which it could be considered that human trafficking or any contemporary form of slavery or servitude had been committed have not been established."

23. The ***Commission*** "appreciated" the State's acknowledgement and considered that "it constitutes a constructive step in these international proceedings." However, it considered that "the acknowledgement is extremely limited" and that this case is much more wide-ranging than merely whether a law on adoption was in force that was incompatible with the Convention, to which the State appeared to be circumscribing its acknowledgement. The Commission pointed out that the State had acknowledged the violation of Articles 5, 7 and 11 of the Convention "in conditional terms." It also stressed that "most of the violations" had been acknowledged to the detriment of the Ramírez brothers, but not to the detriment of the other members of the family. According to the Commission, the only violation that the State was acknowledging to the detriment of Flor de María Ramírez Escobar and Gustavo Tobar Fajardo was the violation of their personal integrity; therefore, the dispute subsisted in relation to the violation, to their detriment, of the rights established in Articles 8, 11, 17 and 25. Additionally, it noted that, although the State had not expressly acknowledged the violation of Article 2 of the Convention, it had indicated that the adoption laws in

force at the time of the facts of the case did not conform to the international *corpus juris*. According to the Commission, "[t]he wording used seems to be addressed at acknowledging the violation of Article 2 of the Convention." Lastly, the Commission underscored that "the State's description of the facts relating to the violations acknowledged does not include all the facts in the terms in which they were analyzed in the Merits Report in light of the same articles." It emphasized that, although the State had cited all the rights, when indicating the reasons for the said acknowledgement, it had excluded numerous factual elements that had been considered by the Commission and added some "assertions that were not included" in the determinations made in the Merits Report. Consequently, the Commission alleged that it was necessary for the Court to make a detailed examination of the facts and the violations of the American Convention.

24. The ***representatives*** argued that, "although the acknowledgement made by the State contributes to resolving the litigation and reflects a positive attitude […], it does not make a real contribution to establishing the truth and exhausting the issues raised before the Court." They indicated that Guatemala's acknowledgement of responsibility was "ambiguous, unclear and, at times, contradictory," and that its attitude throughout the proceedings "was not consistent with the existence of an acknowledgement of responsibility and, therefore, does not contribute to redressing the harm caused." They noted that the State had acknowledged "directly" its international responsibility in relation to the violation of Articles 8, 17, 18, 19 and 25 of the American Convention, while it had denied the other violations, adopting an ambiguous position or failing to make any reference to them. Regarding the violations that Guatemala had acknowledged, they indicated that they understood that this meant that the State "accepts its international responsibility for all the facts that resulted from the arbitrary separation of the Ramírez children from their biological parents (everything related to the institutionalization process, the declaration of abandonment proceedings, and the intercountry adoption procedure), facts that also violated the special protection to which the children should have been subject, as well as their right to a name." Consequently, according to the representatives, "the State's acknowledgement of responsibility encompasses the serious negligence and irregularities that occurred during the declaration of abandonment proceedings, the processing of the appeals filed against this declaration, and the notarial procedure for the children's adoption, as well as the failure to investigate the foregoing."

25. They also indicated that, since the State had failed to refer to the alleged violations of Articles 6 and 24 of the Convention, the dispute subsisted in relation to the violation of those articles. Furthermore, they argued that Guatemala had been ambiguous when acknowledging the violation of Articles 5, 7 and 11 of the American Convention because "the State indicates that the violation of these articles could have occurred, but does not clearly accept its responsibility in this regard." The representatives understood that "owing to the State's ambiguity, it is not possible to understand that it has accepted its responsibility for the violations that occurred; consequently, the dispute subsists in this regard." They argued that, even though the State had acknowledged that Mrs. Ramírez Escobar and Mr. Tobar Fajardo were the victims of some violations, "it has not acknowledged their right to redress and has assumed a revictimizing position." They argued that it was contradictory for the State to accept responsibility for the violation of Articles 8 and 25 of the Convention, while continuing to assert that the mother had failed to protect her children, thus justifying a decision that was clearly arbitrary and ignoring the impact that this had on her right to a family. Based on the foregoing, they considered that the dispute subsisted with regard to the harm suffered by Flor de María Ramírez Escobar and Gustavo Tobar Fajardo and the consequent reparations.

26. Regarding the measures of reparation, they indicated that the State had not accepted most of the proposed measures and that the ambiguity of its acknowledgement also extended to the reparations. They argued that "[a]lthough the authorities have indicated their good intentions, this has not been accompanied by the necessary clarity and decisiveness to consider that the

acknowledgement will have tangible effects on the life of the victims in this case, or address the context that gave rise to the violations described." Lastly, they argued that the dispute subsisted in relation to the reparations because, on the points on which the State had indicated that it accepted what was proposed, "it does so incompletely and/or ambiguously; and this does not provide certainty as regards its intention to provide comprehensive redress to the victims."

B. Considerations of the Court

27. Based on Articles 62 and 64 of the Rules of Procedure,[9] and in exercise of its authority for the international protection of human rights, a matter of international public order, this Court must ensure that acknowledgements of responsibility are acceptable for the purposes of the inter-American system. This task is not limited to verifying, recording or taking note of the acknowledgement made, or of its formal conditions; rather the Court must weigh it against the nature and seriousness of the alleged violations, the requirements and interests of justice, the specific circumstances of the particular case, and the attitude and position of the parties,[10] in order to clarify, insofar as possible and in the exercise of its competence, the judicial truth of what happened.[11] Thus, the acknowledgement cannot result in limiting, either directly or indirectly, the exercise of the Court's authority to hear the case submitted to it,[12] and to decide whether a right or freedom protected by the Convention has been violated.[13] To this end, this Court examines the situation set out in each specific case.[14]

B.1 The facts

28. In the instant case, the State expressed its partial acknowledgement of responsibility with regard to the alleged violations of the American Convention, without indicating, clearly and specifically, to which of the facts described in the Commission's Merits Report or the representatives' pleadings and motions brief this acknowledgement referred. In other cases,[15] the Court has

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[9] Articles 62 and 64 of the Court's Rules of Procedure establish: "Article 62. Acquiescence: If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects." "Article 64. Continuation of a Case: Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding articles."

[10] *Cf. Case of Kimel v. Argentina*. *Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 341, para. 21.

[11] *Cf. Case of Manuel Cepeda Vargas v. Colombia*. *Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of Vereda La Esperanza v. Colombia, supra,* para. 21.

[12] Article 62(3) of the Convention establishes: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[13] Article 63(1) of the Convention establishes: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[14] *Cf. Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 105, and *Case of Ortiz Hernández et al. v. Venezuela. Merits, reparations and costs*. Judgment of August 22, 2017. Series C No. 338, para. 22.

[15] *Cf. Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 16, para. 17, and *Case of Campesino Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299, para. 24.

considered that, in situations such as those of the instant case, it should be understood that the State has accepted the facts that, according to the Merits Report – the factual framework for these proceedings – constitute the violations acknowledged in the terms in which the case was submitted. However, the Court considers that, in this case, although the State was neither clear nor detailed, it did include some assertions concerning the facts that underpin its acknowledgement. Some of these assertions do not constitute an acknowledgement of the facts, but rather a version that differs from the one alleged by the Commission and the representatives (particularly, everything concerning Flor de María Ramírez Escobar's supposed "neglect" of her children) (*supra* para. 19.b). During the public hearing, the State tried to clarify that the acknowledgement was based on the facts contained in the Merits Report; however, once again, it limited the acknowledgement to part of those facts referring to the "possible" violations committed (*supra* para. 21).

29. The Court recalls that, for an act of the State to be considered an acquiescence or acknowledgement of responsibility, its intention must be clear in this regard.[16] Therefore, the Court understands that the State's acquiescence covers those facts alleged by the Commission and the representatives that formed the grounds for the violations of the treaty-based rights that the State acknowledged clearly and without reservations (*infra* para. 31), as well as those facts expressly described by the State in its answering brief and that concur with the allegations of the Commission and the representatives (such as the reference to having no alternative to intercountry adoption following the declaration of abandonment, and the improper processing of the appeals) (*supra* para. 19 and *infra* para. 30).

30. Consequently, the Court understands that Guatemala acknowledged the facts relating to: (i) the adoption laws in force at the time of the facts and their failure to meet the international standards in force for Guatemala at the time of the facts; (ii) the way in which Osmín Tobar Ramírez and J.R. were separated from their mother, Flor de María Ramírez Escobar, although not the reasons for this separation; (iii) the institutionalization of Osmín Tobar Ramírez and J.R. immediately after their removal from their mother for seventeen months, without allowing them to have contact with any of their family members, but not the other conditions of this institutionalization; (iv) the granting of the intercountry adoptions following the declaration that the children had been abandoned; (v) the failure to consider other family members as care alternatives for them before the intercountry adoptions, and (vi) the irregularities committed by the judicial authorities when deciding the appeals filed against the declaration of abandonment and the adoption procedures.

B.2 The legal claims

31. The State acknowledged certain violations clearly and without reservations, but also indicated as "acknowledgements" assertions made in a conditional, ambiguous and imprecise manner. The Court reiterates its considerations with regard to the clarity required when expressing an acquiescence (*supra* para. 29). Consequently, taking into account the State's express assertions, as well as the observations of the representatives and of the Commission, the Court considers that the dispute has ceased in relation to the violation of the right to protection of the family (Article 17), the right to a name (Article 18), and the rights of the child (Article 19), to the detriment of Osmín Ricardo Tobar Ramírez and his brother, J.R., as well as the rights to judicial guarantees (Article 8) and judicial protection (Article 25), to the detriment of Osmín Ricardo Tobar Ramírez, J.R., Flor de María Ramírez Escobar and Gustavo Amílcar Tobar Fajardo.

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[16] *Cf. Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No.221, para. 28, and *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 332, para. 47.

32. The Court notes that the State did not acknowledge the violation of Article 17 of the Convention to the detriment of Flor de María Ramírez Escobar and Gustavo Amílcar Tobar Fajardo, and, therefore, understands that the dispute subsists owing to this violation of their rights. In addition, with regard to the assertions that the State presented as an acknowledgement of a conditional nature (*supra* para. 19.a), this Court finds that they cannot be considered an acquiescence. Rather, those assertions constitute the State's attempt to require this Court to determine the violations of the Convention in which it has incurred based on the evidence provided and the facts accepted (*supra* para. 22). Therefore, the dispute also subsists with regard to the alleged violations regarding which the State made conditional assertions; in other words, the violations of the rights to personal integrity (Article 5), private and family life (Article 11) and personal liberty (Article 7), to the detriment of the Ramírez brothers, Flor de María Ramírez Escobar and Gustavo Tobar Fajardo, as well as the alleged violations of the prohibition of discrimination and the principle of equality before the law (Articles 1(1) and 24), and the prohibition of slavery and servitude (Article 6), all the latter denied by the State (*supra* para. 22).

B.3 The reparations

33. The State undertook to execute or grant some of the measures of reparation, offered to make "arrangements" for or "expedite" others, and rejected the remaining measures. Additionally, it asked the Court to determine the necessary measures of reparation based on the violations found and the harm verified in this case, taking into account its case law on reparations, as well as Guatemala's financial constraints (*supra* paras. 20 and 22). Furthermore, although the State acknowledged certain violations of the American Convention to the detriment of J.R., it argued that he should not be a beneficiary of the measures of reparation because he was not participating in this case. Consequently, the Court verifies that the dispute subsists in relation to the determination of the eventual reparations, costs and expenses and it will, therefore, determine the measures of reparation that are in order in the corresponding chapter (*infra* Chapter IX), taking into account the requests of the Commission and of the representatives, the relevant case law of this Court, and the respective observations of the State.

B.4 Assessment of the acknowledgement

34. This Court appreciates the partial acknowledgement of international responsibility made by the State. It also underlines the commitment made by the State with regard to some of the measures of reparation requested by the Commission and the representatives, subject to the criteria established by the Court. All these actions represent a positive contribution to the development of these proceedings, respect for the principles that inspire the Convention[17] and, in part, satisfaction of the needs for reparation of the victims of human rights violations.[18]

35. As in other cases,[19] the Court considers that the acknowledgement made by the State produces full legal effects pursuant to the aforementioned Articles 62 and 64 of the Court's Rules of

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[17] *Cf. Case of Benavides Cevallos v. Ecuador. Merits, reparations and costs*. Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Gómez Murillo et al. v. Costa Rica.* Judgment of November 29, 2016. Series C No. 326, para. 46.

[18] *Cf. Case of Manuel Cepeda Vargas v. Colombia, supra*, para. 18, and *Case of Ruano Torres et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 303, para. 32.

[19] *Cf. inter alia, Case of Torres Millacura et al. v. Argentina. Merits, reparations and costs.* Judgment of August 26, 2011. Series C No. 229, para. 37, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, para. 20, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 14, 2014. Series C No. 287, para. 32.

Procedure and has a significant symbolic value to ensure that similar acts are not repeated. In addition, the Court notes that the acknowledgement of specific facts and violations may have effects and consequences in its analysis of the other alleged facts and violations insofar as they all form part of the same set of circumstances.[20]

36. Based on the above, and on its powers as an international organ for the protection of human rights, the Court finds it necessary – considering the particularities of the facts of the instant case and the absence of a domestic investigation into them – to deliver a judgment in which it determines the facts that occurred based on the evidence provided in these proceedings because this will contribute to providing redress to the victims, to avoiding the repetition of similar facts and, in brief, to the objectives of the inter-American human rights jurisdiction.

37. Also, to ensure a better understanding of the State's international responsibility in this case and the causal nexus between the violations established and the reparations to be ordered, the Court deems it pertinent to describe the human rights violations that occurred in this case.

V
PRELIMINARY CONSIDERATION ON THE PARTICIPATION OF J.R.

38. Pursuant to Article 35(1) of the Court's Rules of Procedure, when submitting this case to the Court, the Inter-American Commission identified Flor de María Ramírez Escobar, Gustavo Tobar Fajardo, Osmín Ricardo Tobar Ramírez and his brother, J.R., as alleged victims. Both the Commission and the representatives alleged that a series of violations of the American Convention had been committed to the detriment of both Ramírez brothers. The State acknowledged some of these violations. However, as recorded in the case file, J.R. has not participated at any stage of the proceedings before the inter-American system or expressed his consent to be part of it.

A. Arguments of the parties and of the Commission

39. The ***Commission*** argued that J.R. should not be excluded from the reparations. According to the Commission, "the nature of the facts, the duration of the effects of such serious violations as those in this case, and the complexity of the processes that victims of these types of violations have to endure," make it reasonable for the Court to establish measures of reparation in favor of J.R., maintaining his identity confidential and retaining them for a reasonable time in case he should decide to receive them at some future date.

40. The ***representatives*** noted that "the fact that J.R. has indicated that, at this time, he is not interested in the proceedings, in no way deprives him of his status as a victim." They argued that any person whose rights have been violated should be considered a victim and that, throughout these proceedings, the State had failed to present any evidence that contested the alleged facts. They also argued that "it is evident" that, just like his brother, Osmín Tobar Ramírez, the facts of this case "gravely affected the rights of J.R. and, therefore, he should be considered a victim in the case." They indicated that "it is precisely as a result of these effects that J[.R.] has decided not to be involved in these proceedings" because it was only a few years ago that he had become aware that he was adopted and about the circumstances of his adoption; therefore, he should be accorded a prudent time to process what happened. On this basis, they asked that J.R. be considered a "victim in this case and beneficiary of the corresponding reparations, maintaining his identity confidential,"

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[20] *Cf. Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 27, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 49.

and that the reparations that would benefit him directly be put on hold "to give him a prudent time to indicate whether he wishes to benefit from them."

41. The ***State*** indicated that it understood that J.R. had waived participation in this case. Consequently, it argued that the Court should clarify that he was not a victim in the case and, therefore, did not have a right to reparation.

B. Considerations of the Court

42. As previously mentioned, J.R. has not participated at any stage of the proceedings before the inter-American system or expressed his consent to be part of them. Therefore, on August 19, 2016, the President of the Court sent a letter to J.R., advising him of the submission of the case on his behalf, providing him with some information on the proceedings before the Court, asking him to communicate with the Court to express his consent to be part of the proceedings, and informing him that, to the contrary, it would be understood that he did not wish to participate.[21] J.R. did not answer this note; therefore, at the end of September 2016, the full Court decided that it would not consider him part of this case, without prejudice to the possibility of his coming forward at a subsequent stage of the proceedings, pursuant to Article 29(2) of the Court's Rules of Procedure. To date, J.R. has not come forward or expressed his consent to take part in the case. However, both the Commission and the representatives have insisted that he should be considered a victim of the violations found in this case and a beneficiary of the corresponding reparations. On the contrary, the State has indicated that he should not be a beneficiary of the reparations ordered even though it has acknowledged that he was the victim of certain violations (*supra* paras. 19.b, 19.c and 31).

43. The Court understands the complexity of a process of re-establishing family ties so that it is possible that J.R. – even though, to date, he has not expressed his consent to be part of this case – could do so at a future date. However, it recalls that the Court must ensure an appropriate balance between the protection of human rights, the ultimate purpose of the inter-American system, and the legal certainty and procedural equality that ensure the stability and reliability of the international protection.[22] Although it is true that proceedings under international human rights law cannot be inflexibly formal – because their main and determinant concern is the due and complete protection of such rights[23] – it is also true that certain procedural elements permit preserving the conditions required to ensure that the procedural rights of the parties are neither reduced nor unequal.[24] Legal certainty requires that the alleged victim or victims in a case be defined at the latest in the act that ends the dispute: in other words, the judgment.

44. The inter-American human right system permits any person to present a petition and, in order to ensure the protection of public interests the Commission may also, *motu proprio*, initiate the processing of a petition without the alleged victims necessarily having to participate.[25] However, as

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21 This communication was sent to an email address provided by the representatives.

22 *Cf. Case of Cayara v. Peru. Preliminary objections.* Judgment of February 3, 1993. Series C No. 14, para. 63, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 29, 2016. Series C No. 327, para. 28.

23 *Cf. Case of Castillo Petruzzi et al*. *Preliminary objections*. Judgment of September 4, 1998. Series C No. 41, para. 77, and *Case of González et al. ("Cotton Field") v. Mexico.* Order of the Court of January 19, 2009, considering paragraph 45.

24 *Cf. Case of Velásquez Rodríguez v. Honduras, Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 33 and 34, and *Case of González et al. ("Cotton Field") v. Mexico.* Order of the Court of January 19, 2009, considering paragraph 45.

25 Article 44 of the Convention establishes that: "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing

the processing of an individual petition advances, the participation of those affected is increasingly required – for example, to consent to friendly settlements or to provide their views on whether the case should be submitted to the Court.[26] Once the case has been submitted to the Court, the consent of the alleged victims to be part of the proceedings is required,[27] provided this is possible, because their participation in the proceedings before this Court, in person or through their representatives, is essential.

45. The organisations representing the victims in this case have advised that they "do not have an express power of attorney from J.R.," with whom they have been unable to establish contact to date. Consequently, this Court sent him a communication in order to contact him directly to advise him of the existence of international proceedings involving his interests and to determine whether he wished to take part in those proceedings (*supra* para. 42). However, J.R. did not respond to this communication[28] and, to date, there is no information indicating his interest in taking part in the case. To the contrary, the scant information that this Court has, which was forwarded by his brother, is that he does not want to take part in the case.[29]

46. The Court notes that the fact that J.R. is not considered an alleged victim or a victim in this judgment does not mean that he is not a victim of human rights violations based on the facts examined herein. However, as mentioned previously, in proceedings before this Court, people must give their consent to be considered parties to a case – provided and whenever this is possible – and this is a fundamental element for the Court to adjudicate international responsibility to a State for

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denunciations or complaints of violation of this Convention by a State Party." See, similarly, Articles 23 and 24 of the Rules of Procedure of the Inter-American Commission, adopted by the Commission at its 137th regular session held from October 28 to November 13, 2009, and amended on September 2, 2011, and at its 147th regular session held from March 8 to 22, 2013, entering into force on August 1, 2013.

[26] Article 48(1)(f) of the Convention establishes that "1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: […] (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention." In this regard, the relevant part of Article 40(5) of the Commission's Rules of Procedure establishes that: "Prior to adopting th[e] report [on a friendly settlement], the Commission shall verify whether the victim of the alleged violation or, as the case may be, his or her successors, have consented to the friendly settlement agreement." Furthermore, Article 50(1) of the American Convention establishes that, "[i]f a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. […]." Also, Article 44(3) of the Commission's Rules of Procedure establishes that "[a]fter the deliberation and vote on the merits of the case, the Commission shall proceed as follows: […] It shall notify the petitioner of the adoption of the report and its transmittal to the State. In the case of States Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission shall give him or her one month to present his or her position as to whether the case should be submitted to the Court. When the petitioner is interested in the submission of the case, he or she should present the following: a. the position of the victim or the victim's family members, if different from that of the petitioner […]."

[27] In this regard, see*, Case of Vereda La Esperanza v. Colombia, supra*, paras. 37 to 39, as well as Articles 35, 39 and 40 of the Court's Rules of Procedure which require the Commission to provide information on "the duly accredited representatives of the alleged victims" when submitting the case; that the submission of the case be notified to "the alleged victim, his or her representatives or the inter-American defender, if applicable," and that "the alleged victim or his or her representatives" should submit a brief with pleadings, motions and evidence.

[28] In the communication sent to J.R., he was advised that if he did not respond to the Court's communication (either to request further information, clarify doubts, request an extension, or indicate his consent), it would be understood that he did not wish to be a party to the case.

[29] The representatives explained that Osmín Tobar Ramírez had contacted J.R. through Facebook, but the latter had indicated that he "did not want to know anything about these proceedings." They indicated that, following this, they had sent a communication to J.R. asking him to confirm what he had indicated to Osmín Tobar Ramírez, but had not received any response to date.

harm caused to them.[30] If someone does not want to be considered an alleged victim or a victim in a case, the Court must respect and take into account this expression of their wishes.

47. Therefore, for the effects of this case, the Court will not consider J.R. a party to it. Consequently, it will not examine or declare violations against him, or establish reparations in his favor. However, this does not prevent the Court from examining all the facts of the case and establishing the violations that harmed his family, particularly his biological mother, Flor de María Ramírez Escobar, and his biological brother, Osmín Tobar Ramírez. In addition, this decision should not be interpreted as voiding or annulling the State's acknowledgement of responsibility to the detriment of J.R. (*supra* paras. 19 and 31), or the resulting reparations that could correspond to him at the domestic level.

48. Finally, in order to protect the privacy of J.R. and the family B., this Court reminds the parties that they must respect the confidentiality ordered in this case in all their briefs and interventions before the Court, and also finds it pertinent to order the parties and the Commission to take all necessary steps to ensure that the pertinent parts of the documents and procedural acts that refer to his identify are not made public, unless he or his legal representative expressly authorizes this.[31]

VI
EVIDENCE

A. Documentary, testimonial and expert evidence

49. This Court received diverse documents presented as evidence by the Commission and the parties attached to their principal briefs (*supra* paras. 1, 3, 6 and 8). It also received from the parties documents requested by the Court's judges as helpful evidence pursuant to Article 58 of the Rules of Procedure (*supra* paras. 10 and 15). In addition, the Court received the affidavits made by the alleged victim, Flor de María Ramírez Escobar, and the witnesses Erick Benjamín Patzán and Zully Santos de Uclés, as well as the expert opinions of Nigel Cantwel, Maud de Boer-Buquicchio, Maggi Palau, María Renne González, Karla Lemus, Norma Angélica Cruz Córdova, Zoila Esperanza Ajuchan Chis, Christina Baglietto and Carolina Pimentel.[32] In the case of the evidence provided during the public hearing, the Court received the statements of the alleged victims, Osmín Ricardo Tobar Ramírez and Gustavo Amilcar Tobar Fajardo, together with the expert opinion of Jaime Tecú.

B. Admission of the evidence

B.1 Admission of the documentary evidence

50. In this case, as in others, the Court admits those documents presented at the appropriate moment by the parties and the Commission or requested as helpful evidence by the Court or its President, the admissibility of which was not contested or challenged.[33]

51. Regarding the appropriate procedural moment for the presentation of documentary evidence, according to Article 57(2) of the Rules of Procedure, in general, it must be presented together with

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30 *Cf. Case of Vereda La Esperanza v. Colombia, supra*, paras. 37 to 39.

31 *Cf. Case of Vereda La Esperanza v. Colombia, supra*, para. 40.

32 The purpose of these statements was established in the order of the President of April 11, 2017 (*supra* nota 5).

33 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgment of December 1, 2016. Series C No. 330, para. 16.

the briefs submitting the case or with pleadings and motions, or with the answering brief, as applicable. Evidence forwarded outside the appropriate procedural occasions is not admissible, subject to the exceptions established in the said Article 57(2) of the Rules of Procedure; namely, *force majeure*, grave impediment or if it refers to an event that occurred after the procedural moments indicated.

52. The State contested the admission of the information on alleged supervening events together with the supporting documentation provided by the representatives on May 16, 2017, concerning "grave human rights violations committed in […] the Virgen de la Asunción Safe House" between the end of 2016 and March 8, 2017, relating this to the institutionalization conditions of the Ramírez brothers (*supra* para. 11). Guatemala argued that the facts relating to the institutionalization of children in the Virgen de la Asunción Safe House were neither directly nor indirectly related to the facts of the instant case, "since, from the description included by the [Commission] in the Merits Report, it cannot be concluded that the children, Osmín Ricardo and J.R., [had been] institutionalized there." The Court notes that the supervening events reported by the representatives occurred in the Virgen de la Asunción Safe House between 2016 and 2017. The conditions and the treatment received by the children placed there, and the State's response to those events do not form part of the factual framework of the case currently before the Court. Therefore, the Court finds that the information and documentation on events that took place in the Virgen de la Asunción Safe House provided by the representatives on May 16, 2017, are inadmissible.

53. On June 9, 2017, expert witness Jaime Tecú forwarded a written version of the opinion he provided during the public hearing in this case, and also submitted a copy of several judgments of the Guatemalan Constitutional Court in response to a request by the Court's judges during his appearance before the Court. On the same date, and on the instructions of the President of the Court, the parties were advised that, pursuant to Article 58(a) of the Court's Rules of Procedure, the said text and its attachments were admitted, and they could submit any comments they deemed pertinent in this regard with their final written arguments and observations. In accordance with Article 58(a) of the Rules of Procedure, the Court ratified the President's decision and admitted the information and documentation provided by expert witness Jaime Tecú.

54. Both the State and the representatives presented specific documentation annexed to their final written arguments. In this regard, the representatives asked the Court to reject ten of the annexes presented by the State.[34] The representatives argued that the State had not submitted this documentary evidence with its answering brief and had not alleged any circumstance that would justify the late presentation of the documents identified as annexes A, B, C, D, F, G, H, I, J and M to its brief with final arguments. The Court notes that the State had already provided annexes A and B with its answering brief; therefore, it does not find it necessary to make a separate ruling on the

[34] Specifically, the representatives asked that the following annexes of the State's final written arguments be excluded: A (Government Decision No. 266 of September 22, 2016, of the Ministry of Foreign Affairs of the Republic of Guatemala, appointing the President of COPREDEH and its Executive Director to appear before the inter-American human rights system); B (Summary of the progress made by the State of Guatemala on legislation in favor of children and on adoption, 2016); C (National Adoptions Council: Quality standards for the attention of children and adolescents in temporary shelters, 2010); D (Public policy against human trafficking and comprehensive protection of victims, 2014-2024); F (Referral protocol in cases of violence against women or intra-family, femicide, human trafficking and illegal adoptions); G (Measures for cases of pregnancies in girls under 14 years of age of the Secretariat to combat sexual violence, exploitation and human trafficking); H. (Interinstitutional coordination protocol for the protection and care of victims of human trafficking of the Secretariat to combat sexual violence, exploitation and human trafficking); I (Interinstitutional coordination protocol for the repatriation of victims of human trafficking of the Secretariat to combat sexual violence, exploitation and human trafficking); J (Decree 18-2010 of the Congress of the Republic of Guatemala. Law on the Alba-Keneth alert system for the immediate localization and safeguard of kidnapped or missing children), and M (Actuarial report of May 11, 2017, on the possible financial reparation for loss of earnings of Flor de María Ramírez Escobar and Gustavo Amílcar Tobar Fajardo).

admissibility of the copies provided with the final written arguments. Regarding annex C, the Court notes that it relates to the supervening events alleged by the representatives (*supra* para. 52). Since the said events were considered to fall outside the factual framework of this case, the Court considers it irrelevant to admit the documentation provided by the State in response to those events. In the case of annexes D, F, G, H, I and J, the Court finds that the State provided them in response to questions raised by the judges at the end of the public hearing; in particular, those related to the measures adopted to investigate the facts of this case and other similar cases, in general. Therefore, pursuant to Article 58(a) of the Rules of Procedure, this evidence is admitted. Lastly, regarding annex M, which consists in an actuarial report on the possible loss of earnings that would correspond as reparation, the Court finds that the State has not justified its presentation after the appropriate procedural moment – that is, with the answering brief. Consequently, this evidence is time-barred and, under Article 57(2) of the Rules of Procedure, its incorporation into the body of evidence in this case is inadmissible.

55. Finally, regarding the evidence on expenses forwarded by the representatives together with their final written arguments, the Court will only consider those documents that refer to new costs and expenses incurred by the representatives owing to the proceedings before this Court; in other words, those incurred after the presentation of the pleadings and motions brief.[35]

B.2 Admission of the testimonial and expert evidence

56. The Court also finds it pertinent to admit the statements of the alleged victims and the witnesses, and the expert opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

57. On May 17, 2017, when submitting the affidavits, the State indicated its opposition to four of the questions proposed by the representatives for the witness, Erick Benjamín Patzán Jiménez, considering that they exceeded the purpose of his testimony. The Court notes that those questions referred to the alleged supervening facts presented by the representatives concerning the Virgen de la Asunción Safe House (*supra* para. 52). Considering that those facts were considered to exceed the factual framework of this case, the Court finds that the State's objection is in order and will not consider the answers given by the witness to those questions.

C. Assessment of the evidence

58. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, and on its consistent case law regarding evidence and its assessment, the Court will examine and assess the documentary probative elements forwarded by the parties and the Commission, the statements, testimony and expert opinions, and also the helpful evidence requested and incorporated by this Court when establishing the facts of the case and ruling on the merits. To this end, it will abide by the principles of sound judicial criteria, within the corresponding legal framework, taking into account the whole body of evidence and the arguments submitted in this case.

59. That said, according to the case law of the Inter-American Court, the statements provided by the alleged victims cannot be assessed in isolation; rather, they must be examined together with all the evidence in the proceedings, insofar as they may provide further information on the alleged violations and their consequences.

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[35] *Cf. Case of Tenorio Roca et al. v. Peru*. *Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2016. Series C No. 314, para. 41, and *Case of Vereda La Esperanza v. Colombia, supra*, para. 47.

VII
FACTS

60. This case relates to the alleged international responsibility of Guatemala for the declaration of abandonment of the brothers Osmín Ricardo Tobar Ramírez and J.R., their institutionalization, and their subsequent intercountry adoption by two different families under an extrajudicial procedure before a notary public. In this chapter, the Court will describe the relevant facts concerning: (A) the context of irregular adoptions in Guatemala at the time of the events; (B) the applicable domestic legal framework at the time of the events; (C) the brothers, Osmín Ricardo Tobar Ramírez and J.R., and their family; (D) the alleged harassment, threats and aggression against Gustavo Tobar Fajardo, and (E) the current situation of the Ramírez family.[36]

A. Context of irregular adoptions in Guatemala at the time of the events

61. Starting in the early 1990s and up until around 2010, intercountry adoptions were a very lucrative business in Guatemala.[37] "The situation within Guatemala, including the extreme poverty, a high birth rate, and lack of effective control and supervision of adoption procedures, sustained this trade."[38] This was emphasized by the Special Rapporteur on the sale of children, child prostitution and child pornography following her visit in 1999, when she expressed her concern owing to the increasing number of children adopted internationally between 1997 and 1999, which made Guatemala "the fourth largest 'exporter' of children in the world."[39]

62. According to the International Commission against Impunity in Guatemala (hereinafter "the CICIG"), the entry into force in 1977 of the Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction (Decree No. 54-77) signified a privatization of adoptions which, thereafter, could be arranged by notaries,[40] with the sole control and endorsement of the Attorney General's Office; thereby permitting "the elimination of the institutional safety devices established by the State"[41] (*infra* para. 76). This privatization resulted in the fees paid for each process gradually increasing, which turned adoptions into a profitable business for all those who intervened in the process, especially notaries, intercountry adoption agencies, and orphanage representatives.[42] The

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[36] Throughout this judgment, the Court will refer to Osmín Tobar Ramírez and to J.R. as "the Ramírez brothers" or "the Ramírez children" to refer to them together, since it is the last name they share. For the same reason, it will refer to the family unit they formed with their biological mother, Flor de María Ramírez Escobar, and the biological father of Osmín Tobar Ramírez, Gustavo Tobar Fajardo, as "the Ramírez family."

[37] *Cf.* CICIG, *Informe sobre actores involucrados en el proceso de adopciones irregulares en Guatemala a partir de la entrada en vigor de la Ley de Adopciones (Decreto 77-2007),* December 1, 2010 (hereinafter "CICIG, Report on irregular adoptions in Guatemala"), pp. 26 and 27 (evidence file, folios 3023 and 3024).

[38] *Cf.* Commission on Human Rights, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas Santos, Addendum, Mission to Guatemala (July 19 to 30, 1999), January 27, 2000, UN Doc. E/CN.4/2000/73/Add.2 (hereinafter "Report of the Special Rapporteur on the sale of children, child prostitution and child pornography following the July 1999 visit"), para. 11 (evidence file, folio 2729).

[39] Report of the Special Rapporteur on the sale of children, child prostitution and child pornography following the July 1999 visit, UN Doc. E/CN.4/2000/73/Add.2, para. 12 (evidence file, folio 2730), and expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7280).

[40] *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 23 (evidence file, folio 3020). See, similarly, written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court (merits report, folio 1098).

[41] CICIG, Report on irregular adoptions in Guatemala, p. 18 (evidence file, folio 3015).

[42] *Cf.* Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7278). In addition, expert witness Nigel Cantwell indicated that "[i]n some countries [such as Guatemala], lawyers and notaries, social workers (even, in some case, those appointed by the courts), hospitals, doctors, and childcare institutes

adoption of a Guatemalan baby could cost between twelve thousand and eighty thousand United States dollars.[43]

63. Following the entry into force of this law and up until 2007, when it was rescinded, the number of adoptions gradually increased.[44] From 1990 to 1995 more than 2,000 adoptions were processed,[45] while from 1996 to 2001 this increased to 9,000 adoptions, and from 2002 to 2007 to around 25.000 adoptions.[46] According to the records of the Attorney General's Office, 731 adoptions were approved in 1996; between 1,265 and 1,278 in 1997; 1,370 in 1998, and in 1999, between 1,600 and 1,650.[47] By 1999, Guatemala was the fourth country with the greatest number of adoptions in the world[48] and, in 2008, it was considered the largest exporter of children to the United States.[49] It is calculated that, between 1977 and 2008, more than 30,000 Guatemalan children were given up in intercountry adoption.[50]

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at times became "baby factories" and, at other times, worked together to obtain children and generate profits based on the desperation of the parents – in particular women in very difficult situations – at times by deception." Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6940).

[43] According to a 2003 report of the Social Welfare Secretariat, in Guatemala, it was possible "to pay from US$12,000 to US$15,000" (United States dollars) to adopt a child under the notarial procedure. According to expert witness Carolina Pimentel González, the adoption of a Guatemalan baby came to cost "from US$30,000 to US$80,000." According to expert witness Jaime Tecú, an adoption costed approximately US$25,000. *Cf.* Social Welfare Secretariat of the Presidency of the Republic and *Movimiento Social por los Derechos de la Niñez y la Juventud*, "Public policy and national plan of action in favor of children and adolescents, 2004-2015, December 2003 (evidence file, folio 416); expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7278); expert opinion provided by Jaime Tecú during the public hearing held before this Court and written version of this opinion (merits report, folio 1100).

[44] *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court. Between 1996 and 2006, adoptions increased 6.7 times. Between 1997 and 2006, 27,140 Guatemalan children were placed in adoption and, of these, only 2.4% were in country adoptions; the remaining 97.6% were intercountry adoptions. *Cf.* Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, *"Adopciones en Guatemala ¿protección o mercado?",* November 2007, p. 24 (evidence file, folios 3140 and 3142).

[45] *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court. According to expert witness Jaime Tecú, from 1977 to 1989, there are "few or no records of what happened." A Peace Secretariat report on adoptions between 1977 and 1989 cites figures and records of the Social Welfare Secretariat. *Cf.* Peace Archives Directorate of the Peace Secretariat of the Presidency of the Republic, *"Las adopciones y los derechos humanos de la niñez Guatemalteca, 1977-1989,"* 2009, p. 77 (evidence file, folio 3621). However, the November 2007 report of the Social Welfare Secretariat indicates that it has no precise records of adoptions prior to 1996. *Cf.* Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, "*Adopciones en Guatemala ¿protección o mercado*?", November 2007, p. 24 (evidence file, folio 3140).

[46] *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court, and Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, *"Adopciones en Guatemala ¿protección o mercado?",* November 2007 (evidence file, folio 3140).

[47] *Cf.* Latin American Institute for Education and Communication (ILPEC), Report prepared for UNICEF, "Adoption and the Rights of the Child in Guatemala," 2000 (evidence file, folio 2960), and Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, *"Adopciones en Guatemala ¿protección o mercado?",* November 2007 (evidence file, folio 3140). See also, IACHR, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, Doc.21rev., April 6, 2001, Chapter XII, para. 38, and expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[48] *Cf.* Report of the Special Rapporteur on the sale of children, child prostitution and child pornography following the July 1999 visit, UN Doc. E/CN.4/2000/73/Add.2, para. 12 (evidence file, folio 2730), and Latin American Institute for Education and Communication (ILPEC), Report prepared for UNICEF, "Adoption and the Rights of the Child in Guatemala," 2000 (evidence file, folio 2984).

[49] *Cf.* Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7280), and CICIG, Report on irregular adoptions in Guatemala, p. 25 (evidence file, folio 3022).

[50] *Cf.* Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7280), and written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court, indicating that the adoptions of more than 37,000 children were processed between 1990 and 2007 (merits report, folio 1101).

64. Of the adoptions carried out between 1977 and 2007, 99% were processed through notaries and, by 2006, 95% of these were intercountry adoptions.[51] According to information from the Attorney General's Office, in 1997, two-thirds of the Guatemalan children adopted abroad went to the United States of America and, by 2002, because other receiving countries had begun to reduce their adoption programs with Guatemala due to evidence pointing to serious and widespread irregularities, that proportion had increased to 87%.[52]

65. Various international bodies expressed concern with regard to the permissive legislation that was in force at the time of the facts and its effect on child adoption procedures.[53] In its 1996 concluding observations on Guatemala, the Committee on the Rights of the Child recommended that the State "introduce the measures necessary to monitor and supervise effectively the system of adoption of children in the light of article 21 of the Convention [on the Rights of the Child]" because, due to information provided by the State itself, "an illegal adoption network has been uncovered and […] the mechanisms to prevent and combat such violations of children's rights are insufficient and ineffective."[54] Subsequently, in 2001 the Committee on the Rights of the Child "note[d] with deep concern that there was no follow-up to its recommendations to introduce measures to monitor and supervise the system of adoption effectively" and expressed concern "at the extremely high rates of intercountry adoptions, at adoption procedures not requiring authorization by competent authorities, at the absence of follow-up and, in particular, at reported information on sale and trafficking in children for intercountry adoptions."[55] Consequently, it took the exceptional measure of "strongly recommend[ing] that [Guatemala] suspend adoptions in order to take the adequate legislative and institutional measures to prevent the sale and trafficking of children and to establish an adoption procedure which is in full compliance with the principles and provisions of the Convention [on the Rights of the Child]."[56]

66. The privatization of adoption procedures through Guatemalan notaries permitted that, over time, transnational organized criminal networks were established dedicated to processing irregular adoptions, with the intervention of numerous individuals who took advantage of the lack of real official control.[57] In its report on adoption procedures in Guatemala, the CICIG included an analysis

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[51] *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 23 (evidence file, folio 3020).

[52] *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6942).

[53] *Cf.* Concluding observations of the Committee on the Rights of the Child: Guatemala, July 9, 2001. CRC/C/15/Add.154, para. 34; Report of the Special Rapporteur on the sale of children, child prostitution and child pornography following the July 1999 visit, UN Doc. E/CN.4/2000/73/Add.2, para. 11 (evidence file, folio 2729), and IACHR, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, OEA/Ser.L/V/II.111, Doc. 21 rev., p. 183, para. 39.

[54] Concluding observations of the Committee on the Rights of the Child: Guatemala, June 7, 1996. CRC/C/15/Add.58, paras. 21 and 34.

[55] Concluding observations of the Committee on the Rights of the Child: Guatemala, July 9, 2001. CRC/C/15/Add.154, para. 34.

[56] Concluding observations of the Committee on the Rights of the Child: Guatemala, July 9, 2001. CRC/C/15/Add.154, para. 35. According to expert witness Cantwell, contrary to the 2001 recommendation of the Committee on the Rights of the Child to suspend adoptions, an increased number of adoptions were permitted between 2001 and 2002. Based on figures he indicated were from the Guatemalan Attorney General's Office, the expert witness explained that adoptions rose from 2,246 in 2001 to 2,931 the following year. *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6948).

[57] The CICIG indicated that child-trafficking networks were established that, among other activities, were dedicated to forging documents, stealing children, falsifying DNA tests, and threatening mothers so that they would hand over their children for adoption. *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 20 and 23 (evidence file, folios 3017 and 3020).

of the adoption procedures carried out between 1963 and 2010.[58] When examining the period between 1977 and 2007, during which the possibility of processing adoptions by public notary was introduced and in force, the CICIG indicated that, in some cases, adoptions were carried out disregarding the best interests of the child by failing to seek appropriate alternatives or resources within their family circle[59] and concluded that:

> The lack of control by the institutions responsible for providing protection to Guatemalan children resulted in a lucrative business and the consequent establishment of structures that, to respond to the demand, engaged in recruitment using threats and coercion taking advantage of the vulnerable situation of the mother, and the theft or purchase of children to send them abroad. […] This explains the establishment of transnational organized criminal networks which led to expressions of concern at the international level by international bodies, especially those of the United Nations, and to the suspension of procedures for the intercountry adoption of Guatemalan children by some European countries following a resolution of the European Parliament.[60]

67. Even though most of the children given up for adoption were offered "voluntarily" by their parents, the judicial procedure of declaration of abandonment was used in the case of those who needed to be removed from their families, when it was not possible to obtain the parents' consent, as a way "to purge children [of family ties]."[61] Once they had been declared abandoned, consent for their adoption was provided by the director of the institution in which the children had been placed.[62] Subsequently, during the adoption procedures, the social workers involved issued their reports without corroborating the financial situation of the families, "without any type of visit or inquiry," without examining the possibility of care by the extended family circle and even without ascertaining its origin or existence, thus facilitating the adoption of children who had been stolen.[63]

68. The Guatemalan Social Welfare Secretariat has indicated that the excessive increase in intercountry adoptions was partly the result of the high percentage of the population living in poverty and extreme poverty, and this affected women in particular.[64] Referring, especially, to the lack of protection for single mothers, the Social Welfare Secretariat emphasized that "one of the arguments used most to achieve the handing over of children for adoption is […] the needs of single mothers: needs for food and […] medicines and medical care."[65] It also indicated that adoption procedures were based illegally on the lack of resources of the family or of the mother in order to

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58 *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 20 (evidence file, folios 3014 a 3018).

59 *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 20 (evidence file, folio 3017).

60 CICIG, Report on irregular adoptions in Guatemala, p. 27 (evidence file, folio 3024), and *Cf.* expert opinion of Norma Angélica Cruz Córdova provided by affidavit on May 9, 2017 (evidence file, folio 7065).

61 Written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court (merits report, folio 1100).

62 Peace Secretariat, "*Las adopciones y los derechos humanos de la niñez Guatemalteca, 1977-1989*," 2009, p. 89 (evidence file, folio 3633).

63 *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 41 (evidence file, folio 3038). Similarly, expert witness Norma Angélica Cruz Córdova indicated that "children who were vulnerable or who experienced some kind of ill-treatment were sought in order to declare them abandoned and they were then given up for adoption without undertaking any pertinent investigations." Expert opinion of Norma Angélica Cruz Córdova provided by affidavit on May 9, 2017 (evidence file, folio 7065).

64 *Cf.* Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, "*Adopciones en Guatemala ¿protección o mercado?",* November 2007 (evidence file, folios 3136 to 3138).

65 Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, "A*dopciones en Guatemala ¿protección o mercado?",* November 2007 (evidence file, folio 3136).

remove children from their families and facilitate their intercountry adoption.[66] Similarly, the CICIG found that most of the socioeconomic studies examined based their opinion in favor of adoption on the fact that the mother "had insufficient financial resources."[67]

69. In 2002, Guatemala acceded to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter "the Hague Convention on Intercountry Adoption"), which would enter into force in 2003. However, its validity was contested and the Constitutional Court declared that the process of acceding to this instrument had been unconstitutional.[68] This decision enabled the continuation of notarial adoption procedures and these, in turn, "permitted the establishment of child-trafficking networks around such procedures resulting in a significant increase in the number of adoptions processed between 2003 and 2007."[69]

70. In May 2007, the Constitutional Court recognized Guatemala's accession to the Hague Convention on Intercountry Adoption executed by the President of the Republic in 2002. In December 2007, the Adoption Act was promulgated and this assigned the control of adoption procedures to a central authority, the National Adoptions Council, and to the Judiciary through the family courts and the juvenile courts.[70]

71. According to the CICIG, despite the questions raised, the malpractice, and the irregularities in the adoption processes, "no serious investigations were conducted into those networks and, to the contrary, superficial changes in the procedures were preferred in order to provide a favorable solution to the irregular adoptions."[71] It was only starting in 2006, that the Public Prosecution Service opened investigations into the offense of human trafficking for the purpose of irregular adoption and, in November 2007, the Unit against Human Trafficking and Irregular Adoptions was created in the Office for the Prosecution of Organized Crime of the Public Prosecution Service.[72] By

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66 *Cf.* Social Welfare Secretariat, Human Rights Office of the Archbishopric of Guatemala and others, "*Adopciones en Guatemala ¿protección o mercado?",* November 2007 (evidence file, folio 3139).

67 CICIG, Report on irregular adoptions in Guatemala, p. 41 (evidence file, folio 3038), and expert opinion provided by Jaime Tecú during the public hearing held before this Court.

68 The Constitutional Court argued that it was the President of the Republic who had acceded to that convention and that the reservations made by Guatemala to articles 11 and 12 of the Vienna Convention on the Law of Treaties excluded all forms of the expression of the will of the State to be bound by a treaty other than signature or ratification. *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 18 and 19 (evidence file, folios 3015 and 3016), and Constitutional Court, Decision on general and total unconstitutionality of Decree 50-2002 adopting the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. Accumulated files Nos. 1555-2002 and 1808–2002, August 13, 2003 (merits report, folio 1112).

69 CICIG, Report on irregular adoptions in Guatemala, p. 19 (evidence file, folio 3016).

70 *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 20 and 21 (evidence file, folios 3017 and 3018), and Adoption Act, Decree No. 77-2007 of December 2007, arts. 17, 23, 35, 43 and 49 to 52 (evidence file, folios 3195 3215).

71 CICIG, Report on irregular adoptions in Guatemala, p. 43 (evidence file, folio 3040). The CICIG indicated that, in many cases, the irregularities committed constituted offenses defined in the Guatemalan Criminal Code. However, the failure to investigate cases of human trafficking for the purpose of illegal adoption, as well as the failure to respect the best interests of the child, led to the situation remaining in impunity for many years. Currently, the Guatemalan Criminal Code includes the definition of the offense of human trafficking for the purpose of irregular adoptions, as well as other related conducts, such as irregular adoptions and the irregular processing of adoptions. The CICIG also stressed that "it is important to recall that, in addition, the actions of the adoption networks frequently include a series of offenses, such as asset-laundering, active and passive bribery, and document tampering, to mention just a few." CICIG, Report on irregular adoptions in Guatemala, pp. 20 and 22 (evidence file, folios 3017 and 3019).

72 *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 43 (evidence file, folio 3040), and Report of the Human Trafficking Prosecutor of June 2, 2017 (evidence file, folio 7698).

June 2017, this unit had obtained 24 convictions for the offense of human trafficking for irregular adoptions and 81 convictions for related offenses.[73]

B. Applicable domestic legal framework at the time of the events

72. In the instant case, two procedures were carried out: first, the process for the declaration of abandonment and, second, the adoption procedure. The Court will now describe the regulations applicable to each of these procedures.

B.1 Process for the declaration of abandonment

73. The Children's Code regulated the protection provided by the State to children and adolescents,[74] particularly those in an "irregular situation." Article 5 defined juveniles in an irregular situation as "those suffering or liable to suffer abuse or disorders in their physiological, moral or mental condition and those who have been abandoned or are in danger."[75] The code also defined the situation of abandonment or danger mentioned in the said article 5 as follows:

> **Article 47 (abandoned minors).** Abandoned minors are considered to be: (1) Those who, lacking parents, have no one to take care of them, and (2) Those who, due to neglect, resort to vagrancy or begging.
>
> **Article 48 (minors in danger).** Minors in danger are considered to be: (1) Those who are victims of exploitation by adults, who engage them in begging or working in bars, gambling dens, brothels and similar places; (2) Those who have been induced into or placed in an irregular situation by adults or who benefit from the product of acts categorized as offenses committed by adults; (3) Children of immoral or dissolute parents or of prostitutes, who keep them in the places mentioned in subparagraph 1, and (4) Those who, for any reason, are at risk of engaging in an irregular or dissolute conduct.[76]

74. Any person or authority may "report the case of minors in a situation of abandonment or danger."[77] On being informed of this situation, the juvenile judge must order the corresponding investigation by a social worker, hear the complainant, the child, his or her parents or those who are responsible for the child. In addition, the Code established that the juvenile judge should order measures of protection for children in an irregular situation, and also "take a final decision in proceedings involving minors, ordering the measures established in this code."[78]

B.2 Adoption procedure

75. The Guatemalan Constitution establishes that "[t]he State recognizes and protects adoption. The adopted child acquires the condition of the child of the adopter. The protection of orphans and abandoned children is declared to be of national interest."[79] At the time of the facts, the laws of

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[73] *Cf.* Report of the Human Trafficking Prosecutor of June 2, 2017 (evidence file, folio 7700).

[74] *Cf.* Children's Code. Decree No. 78-79 of November 28, 1979, art. 1 (evidence file, folios 3442 and 3443).

[75] Children's Code. Decree No. 78-79 of November 28, 1979, art. 5 (evidence file, folio 3443).

[76] Children's Code. Decree No. 78-79 of November 28, 1979, arts. 47 and 48 (evidence file, folio 3447).

[77] Children's Code. Decree No. 78-79 of November 28, 1979, art. 49 (evidence file, folio 3447).

[78] Children's Code. Decree No. 78-79 of November 28, 1979, arts. 19, 42, 43 and 49 (evidence file, folios 3444 and 3447).

[79] 1985 Constitution of the Republic of Guatemala, art. 54 (evidence file, folio 3368).

Guatemala established two adoption procedures, one judicial[80] and the other extrajudicial before notary public. The method used for an adoption procedure was optional.[81] In the instant case, the adoptions of Osmín Tobar Ramírez and J.R. were carried out under the extrajudicial procedure (*infra* paras. 112 to 116).

76. As mentioned in the section on the context, the extrajudicial adoption procedure was established in the 1977 Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction (*supra* para. 62). This law established that an adoption could be formalized "before notary public, without requiring prior judicial approval of the procedure."[82] The processing of an adoption using the notarial procedure could be initiated in two situations: when a mother went to a notary to give up her child for adoption, or when a juvenile judge declared that a child had been abandoned[83] (*supra* paras. 73 and 74). In this case, the latter situation occurred.

77. The notarial adoption procedure started with a request by the person who wished to adopt a child, who had to submit to the notary: (i) a certification of the birth certificate; (ii) two "honorable" witnesses who had to "accredit the propriety of the adopter and their moral and financial possibility to meet the obligations imposed by adoption," and (iii) a "favorable report or opinion, issued under oath, by a social worker attached to the family court of their jurisdiction."[84]

78. Once these requirements had been complied with, it was necessary to hold a hearing to receive the opinion of the Attorney General's Office[85] and, if the latter raised no objections, the respective public instrument could be issued.[86] The Attorney General's Office had to examine the file and functioned "as the entity controlling the notary's activity in the sphere of adoption."[87] If the Attorney General's Office "raised an objection, [it was necessary] to forward the file to the competent court so that the appropriate ruling could be issued."[88] The favorable opinion of the Attorney General's Office or, if applicable, of the corresponding family court provided the final authorization for the adoption.[89] The procedure was finalized by the issue of the adoption papers. To obtain these, "the adopter and the parents or the person or institution exercising the guardianship of

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[80] The judicial adoption proceeding was regulated by the 1963 Civil Code. *Cf.* Guatemalan Civil Code, Decree Law No. 106-63 of September 14, 1963, arts. 239 to 251 (evidence file, folio 3468).

[81] *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[82] Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 28 (evidence file, folio 396).

[83] *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 28 (evidence file, folio 3025).

[84] Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 29 (evidence file, folio 396).

[85] The law expressly granted this function to the Public Prosecution Service. However, under Legislative Decree 18-93, which amended the Constitution in 1993, the functions were divided between the Public Prosecution Service and the Attorney General's Office. Based on the new article 252 of the Constitution of the Republic of Guatemala, the latter was responsible for advising and counselling the state organs and for representing the State before the population. The Court understands that, following this date, it was the role of the Attorney General's Office to produce the report that the Children's Code attributed to the Public Prosecution Service. *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court, and CICIG, Report on irregular adoptions in Guatemala, p. 29 (evidence file, folio 3026).

[86] *Cf.* Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 32 (evidence file, folio 396).

[87] Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[88] Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 32 (evidence file, folio 396).

[89] *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

the child must come forward."[90] Then, "the notary [must extend] the respective testimony in order to forward this to the appropriate registries so that the annotations concerning the adoption can be made."[91] In other words, the notary issued the notarial adoption papers and went to the Civil Registry to register them, and this was the act by which the child's name was changed.[92] In cases of intercountry adoption, the file was also sent to the Director General of Migration for processing the passport.[93]

C. The brothers, Osmín Ricardo Tobar Ramírez and J.R., and their family

79. Osmín Ricardo Amílcar Tobar Ramírez was born on June 24, 1989, and was registered in the Guatemalan Civil Registry by his parents, Gustavo Amílcar Tobar Fajardo and Flor de María Ramírez Escobar.[94] Meanwhile, J.R. was born on August 27, 1995, and was registered in the Guatemalan Civil Registry by his mother, Flor de María Ramírez Escobar.[95] A friend of the family subsequently recognized J.R. as his son.[96]

80. Flor de María Ramírez Escobar was born in 1972.[97] She had her first son, Osmín, when she was 17 years old. Gustavo Tobar Fajardo, was born in 1970[98] and was 18 years old when Osmín was born.[99] The parents of Osmín Tobar Ramírez separated when he was a few months old.[100]

81. Following the separation of his parents, Osmín Tobar Ramírez and his mother initially lived in the home of his maternal grandmother, Flor Escobar Carrera.[101] Osmín's father, Gustavo Tobar Fajardo, kept in contact with his son and contributed financially to his maintenance.[102]

82. By 1997, Mrs. Ramírez Escobar had moved from her mother's house and lived with her two sons in a house in the "Las Vacas" neighborhood where she rented a room.[103] She worked running

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[90] Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 33 (evidence file, folio 396).

[91] Law Regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 33 (evidence file, folio 396).

[92] CICIG, Report on irregular adoptions in Guatemala, p. 29 (evidence file, folio 3026).

[93] CICIG, Report on irregular adoptions in Guatemala, p. 29 (evidence file, folio 3026).

[94] *Cf.* Birth registration of Osmín Tobar Ramírez on July 3, 1989 (evidence file, folio 6).

[95] *Cf.* Birth registration of J.R. on January 12, 1996 (evidence file, folio 9).

[96] *Cf.* Annotation in the margin of the birth registration of J.R. on January 12, 1996 (evidence file, folio 9), and social study of Flor de María Ramírez Escobar prepared by a court social worker on March 13, 2001 (evidence files, folio 4538).

[97] *Cf.* Identity card of Flor de María Ramírez Escobar (evidence file, folio 2177).

[98] *Cf.* Copy of the passport of Gustavo Amílcar Tobar Fajardo (merits report, folio 1034).

[99] *Cf.* Birth registration of Osmín Tobar Ramírez on July 3, 1989 (evidence file, folio 6).

[100] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6820), and social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4326).

[101] *Cf.* Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folio 4301); social study of Flor de María Ramírez Escobar prepared by a court social worker on March 13, 2001 (evidence files, folios 4537 to 4540), and social study of Gustavo Tobar Fajardo prepared by a court social worker on March 13, 2001 (evidence files, folios 4541 to 4543).

[102] *Cf.* Social study of Flor de María Ramírez Escobar prepared by a court social worker on March 13, 2001 (evidence files, folios 4537 to 4540), and social study of Gustavo Tobar Fajardo prepared by a court social worker on March 13, 2001 (evidence files, folios 4541 to 4543).

errands in different government institutions, such as helping people with "customs and excise procedures"; usually between 8 a.m. and 5 p.m.[104] Gustavo Tobar Fajardo worked as an "urban bus driver" in Mexico, where he had emigrated for economic reasons in around 1994.[105] At that time, Osmín Tobar Ramírez was seven years of age and attended school in Las Vacas, in Zone 16 of Guatemala City,[106] while J.R. was two years of age.[107] Mrs. Ramírez Escobar hired a neighbor to take care of her sons while she was absent for work.[108] Gustavo Tobar Fajardo explained that, although he lived apart from his son, "he worked for twenty or twenty-two days and then returned for five or six days to rest and was able to see Osmín at that time."[109]

C.1 Declaration of abandonment of the Ramírez brothers

83. On December 18, 1996, the Judicial Coordinator of the Juvenile Jurisdiction received an anonymous complaint, by telephone, alleging that the Ramírez children had been "abandoned by their mother who spent her days inhaling glue and drinking alcohol, and they were therefore in a situation of risk and danger."[110]

84. On January 8, 1997, the First Juvenile Trial Court of Guatemala City asked the head of the Juvenile Department of the Attorney General's Office to visit the home of the Ramírez children.[111] It indicated that, if the reported situation was verified, the Attorney General's Office should "proceed to rescue them, placing them in the *Niños de Guatemala* children's home for their care and protection."[112]

85. The following day, officials from the Attorney General's Office went to the home of the Ramírez children.[113] The officials reported that:

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[103] *Cf.* Child support agreement between Flor de María Ramírez Escobar and Gustavo Amílcar Tobar Fajardo dated July 31, 1997 (evidence file, folios 12 and 13), and record of court appearance by Flor Escobar Carrera on March 12, 1997 (evidence file, folio 4372)

[104] *Cf.* Record of court appearance by Flor de María Ramírez Escobar before the First Juvenile Trial Court on January 9, 1997 (evidence file, folio 4390), and social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4326).

[105] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

[106] *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4282); record of appearance before the First Juvenile Trial Court on January 9, 1997 (evidence file, folio 4390); 1995 school report by the Rosa Pardo de Lanuza Rural Mixed Public School on the academic performance of Osmín Ricardo Almícar Tobar Ramírez (evidence file, folios 4334 to 4337) and diploma awarded to Osmín Ricardo Almícar Tobar Ramírez on October 31, 1996, by the Rosa Pardo de Lanuza Rural Mixed Public School for completing his pre-school education (evidence file, folio 4342).

[107] *Cf.* Birth registration of J.R. on January 12, 1996 (evidence file, folio 9).

[108] *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4281), and record of appearance before the First Juvenile Trial Court on January 9, 1997 (evidence file, folio 4390).

[109] Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court. Flor de María Ramírez Escobar explained that the relationship between Osmín and his father was not constant, partly because he worked driving buses; however, she "took him to visit Gustavo's mother, [who] had a food kiosk in the central market, and Gustavo came there from time to time and watched him." Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6812).

[110] Anonymous complaint of December 18, 1996 (evidence file, folio 30).

[111] *Cf.* Communication of the First Juvenile Trial Court of January 8, 1997, addressed to the Head of the Juvenile Department of the Attorney General's Office (evidence file, folio 32).

[112] Communication of the First Juvenile Trial Court of January 8, 1997, addressed to the Head of the Juvenile Department of the Attorney General's Office (evidence file, folio 32).

[113] *Cf.* Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4323).

> They found [Osmín and J.R.] abandoned. They showed no signs of physical aggression; however, when they arrived, at exactly 10 a.m., neither the mother nor anyone who indicated that they were responsible for the children were present and the children stated that they had not had breakfast. When they asked about the children's mother, some neighbors indicated that she worked as a "*tramitadora*" [Note: someone who helps other people with official paperwork] outside the Finance Ministry. The children were taken and placed in the *Niños de Guatemala* children's home.[114]

86. That same January 9, 1997, at midday, Mrs. Ramírez Escobar appeared before the First Trial Court to request the return of her sons and presented their birth certificates.[115] She explained that she had been working and that her children were being cared for by a neighbor.[116] However, according to Mrs. Ramírez Escobar's statement, she was not allowed to see them and was not informed of their whereabouts.[117]

87. According to Mrs. Ramírez Escobar, on January 9, 1997, she had left her sons with the neighbor who looked after them and was working running an errand when her boyfriend advised her that they had been taken away.[118] He told her that he had tried to explain to the state officials that the children's mother was working, but they refused to listen; instead "they stuck a sheet of paper on the door indicating that supposedly they had been taken to the Attorney General's Office."[119] She had then gone "to the court [to a psychologist who sent her to the court], to the Attorney General's Office," to the Archbishopric and "to everywhere [she] was told to go" to seek help.[120] The Archbishopric recommended that she contact *Casa Alianza,* where she was told that the children had been taken to a children's home although it did not know which one.[121] Mrs. Ramírez Escobar also indicated that:

> I never found out [what had happened]; they never told me what occurred; they always told me that it was because of things I don't understand; I always worked and fought for my children; I love them and I'm sure that I won't die without being able to see J.R., because they mean everything to me; I don't understand what happened, they never explained what occurred.[122]

88. Gustavo Tobar Fajardo found out that his son had been taken from his mother through a friend of Mrs. Ramírez Escobar's mother almost a year later.[123] As revealed by the facts, Mr. Tobar

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[114] Case monitoring report of the Rescue Team of the Juvenile Department of the Attorney General's Office of January 9, 1997 (evidence file, folio 4388).

[115] *Cf.* Record of appearance before the First Juvenile Trial Court on January 9, 1997 (evidence file, folios 4390 and 4391).

[116] *Cf.* Record of appearance before the First Juvenile Trial Court on January 9, 1997 (evidence file, folio 4390).

[117] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6814).

[118] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folios 6812 to 6814).

[119] Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6813).

[120] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folios 6813 and 6814).

[121] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folios 6813 and 6814). *Casa Alianza* was one of the organisations that later supported her petition before the Inter-American Commission (*supra* para. 2).

[122] Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6814).

[123] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court. According to Mrs. Ramírez Escobar, her relations with Osmín's father were not close and when he found out that Osmín had been taken away "he came to my house and asked me about this; he asked me for photos and Osmín's kindergarten diploma, which

Fajardo was not served notice at any stage of the proceedings, until he came forward in person in December 1998 (*infra* para. 117). The Court will now describe the actions and measures taken in the context of those proceedings following the physical separation of the Ramírez children from their mother.

89. On January 13, 1997, the judge asked the Judiciary's Medical Forensic Service to determine whether the Ramírez children showed any signs of abuse.[124] There is no record in the case file that this examination was performed.

90. On January 27, 1997, the court confirmed the placement of Osmín Tobar Ramírez and J.R. in the *Niños de Guatemala* children's home.[125] It also asked the home to conduct a social study on the children's situation.[126]

91. The social study was prepared by a social worker from *Niños de Guatemala*, and submitted on February 3, 1997.[127] According to the report, the study was carried out "based on interviews and home visits."[128] The report gives an account of interviews with six neighbors who indicated that Mrs. Ramírez Escobar left her children alone, without any food; that, in the evening, she returned drunk and hit the children, especially Osmín.[129] The neighbor who, according to Mrs. Ramírez Escobar, was left in charge of the children, denied that this was true and indicated that their mother "left them alone."[130] The report also included an interview with the President of *Niños de Guatemala*, who indicated that, it had:

> received the children […] in a pitiable condition. Dirty, hungry, showing signs of having been beaten, and with little clothing. […] Osmín had an infection inside his mouth that required treatment with antibiotics and analgesics for the pain. [J.R.] had bruises resulting from a blow, and Osmín had scars on his abdomen that, he indicated, had been caused by blows inflicted by his father.[131]

92. The President also indicated that, due to his age, Osmín, had been transferred to the adjacent children's home.[132]

93. The report concluded that:

> The children came from a broken home, where the mother had completely abandoned them, without providing them with clothing, food and education. Furthermore, she treated them badly, both physically and mentally, because they saw her arrive home drunk and drugged, accompanied by different men, which did not provide them with an edifying example.

I gave him, and that is how he found out." *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6820).

124 *Cf.* Communication of the First Juvenile Trial Court of January 13, 1997 (evidence file, folio 4386).

125 *Cf.* Communication of the First Juvenile Trial Court of January 27, 1997 (evidence file, folio 4384).

126 *Cf.* Communication of the First Juvenile Trial Court of January 27, 1997 (evidence file, folio 4384).

127 *Cf.* Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folio 4379).

128 Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folio 4379).

129 *Cf.* Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folios 4380 and 4381).

130 Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folios 4380 and 4381).

131 Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folios 4381 and 4382).

132 *Cf.* Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folio 4382).

> Based on the interviews conducted, it has been fully established that Flor de María Ramírez Escobar is not capable of taking care of her children; therefore, it is essential to find them a substitute home in which they are taught moral values and their physical and mental needs are met.
>
> [Consequently, she recommended that] they be declared in a state of abandonment so that they can be included in the adoption program sponsored by *Niños de Guatemala*.[133]

94. On February 5, 1997, the court asked *Niños de Guatemala* to conduct a further social study on Mrs. Ramírez Escobar.[134] The case file does not show that this study was carried out. On February 21, the court asked the Attorney General's Office to conduct a social study on Flor de María Ramírez Escobar.[135] On March 14, 1997, the Attorney General's Office presented their report which reflected interviews with three neighbors and two unnamed women who presumably knew Mrs. Ramírez Escobar. Those interviewed indicated that, in the evenings, Mrs. Ramírez Escobar arrived home drunk, she mistreated her children, and she left them alone and without any food.[136] One of those interviewed, the neighbor who allegedly was left in charge of the Ramírez brothers, indicated that, when she went out, "she entrusted her children to [her] but she usually left them nothing to eat."[137] The Attorney General's Office interviewed Mrs. Ramírez Escobar, who indicated that she did not drink, that she loved her children very much, and that her relationship with her family was not good. She indicated that her mother was a lesbian, and therefore the children should not be handed over to her mother, but rather returned to her, and also that she "th[ought] that no one in her family could take charge of her children because they were poor also."[138] The Attorney General's Office concluded that it "left it to the court to reach its own conclusions and decide what it believes is best for the future well-being of these children."[139]

95. On March 12, 1997, Flor Escobar Carrera, the Ramírez children's maternal grandmother, appeared before the court to request the return of her grandchildren for their care and protection, indicating that she "love[d] [her] grandchildren very much and they were very close to [her]."[140] The grandmother indicated that the children used to live with her, but her daughter had decided to live independently and took the children with her, "but then she neglected them, because she lied to [me, because] she said that she had organized special carers for them."[141] Following this statement, the court asked the Attorney General's Office to conduct a social study on Mrs. Escobar Carrera.[142] The Attorney General's Office interviewed Mrs. Ramírez Escobar and other people who knew Mrs. Escobar Carrera and concluded that:

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133 Study prepared by the *Niños de Guatemala* social worker of February 3, 1997 (evidence file, folios 4382 and 4383).

134 *Cf.* Communication of the First Juvenile Trial Court of February 5, 1997 (evidence file, folio 4376).

135 *Cf.* Communication of the First Juvenile Trial Court of February 21, 1997 (evidence file, folio 4375).

136 *Cf.* Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folios 4323 and 4324).

137 Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4325).

138 Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4326).

139 Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4326).

140 *Cf.* Record of court appearance by Flor Escobar Carrera on March 12, 1997 (evidence file, folios 4372 and 4373).

141 *Cf.* Record of court appearance by Flor Escobar Carrera on March 12, 1997 (evidence file, folios 4372).

142 *Cf.* Communication of the First Juvenile Trial Court of March 12, 1997 (evidence file, folio 4371).

> Taking into account the very precarious financial situation of the mother and the maternal grandmother, as well as the very disorderly conduct of both, it is considered that, at this time, neither of them represent a resource for the protection of the children, and nor do their families; it is therefore recommended that the children continue to be institutionalized and, within a period that the court considers prudent, the social study and the corresponding investigation be updated to establish whether the living conditions and conduct have changed for the better.[143]

96. On March 17, Yesenia Escobar Carrera, J.R.'s godmother, and Maritza Echeverría Carrera, Osmín Tobar Ramírez's godmother, appeared before the court and each asked to be put in charge of the children because their mother "has some problems."[144] On April 22, 1997, the judge ordered *Niños de Guatemala* to conduct a social study.[145] The study concluded that "the interest of the children's godmothers in claiming the children is a ploy to have the children assigned to them and then return them to their mother, who mistreats them and is a bad influence for them." It also indicated that "the child, Osmín Ricardo Amílcar Tobar Ramírez, was present during the interview and […] stated that he would not like to live with his godmother because her husband hit him a lot."[146] The study indicated that "the overcrowded conditions in which the godmothers and their families live, their limited financial resources, and the fact that they were aware of the desperate situation of the children when their mother was in charge of them and yet did nothing to end the abuse, lead us to recommend that the children are not handed over to Mrs. Escobar Carrera and Mrs. Echeverría de Reyes."[147] Additionally, the social worker "reiterate[d] what [she had] stated in the first socioeconomic study in the sense that both children should be incorporated into families that provide them with the love and care they need […], and therefore recommend[ed] that they be declared in a state of abandonment so that they can be included in the adoption program sponsored by *Niños de Guatemala*."[148]

97. In addition, according to the representatives, in March 1997, Mrs. Ramírez Escobar was able to see Osmín and J.R. for the last and only time when officials from the Attorney General's Office brought them to her place of residence. However, she was not allowed to talk to them or hug them. Mrs. Ramírez Escobar also stated that she was never allowed to visit them or to know exactly where they were.[149]

98. On May 13, 1997, the General Directorate of the National Police advised that Mrs. Ramírez Escobar did not have a criminal record.[150] Regarding the maternal grandmother, the Police indicated that she did have a record for document tampering, fraud, carrying an offensive weapon, and possession of marihuana.[151] In addition, the Judiciary's Psychology Unit presented a psychological

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[143] Social study of Flor Escobar Carrera prepared by the Attorney General's Office on May 7, 1997 (evidence file, folio 50).

[144] Record of court appearance by Yesenia Escobar Carrera and Maritza Echeverría Carrera on March 17, 1997 (evidence file, folios 4355 and 4356). See also, Baptism certificate of Osmín Robar Ramírez dated July 30, 1995, issued on March 18, 1997 (evidence file, folio 4368), and Baptism certificate of J.R. dated February 18, 1996, issued on March 18, 1997 (evidence file, folio 4367).

[145] *Cf.* Communication of the First Juvenile Trial Court of Guatemala addressed to the director of *Niños de Guatemala*, dated April 22, 1997 (evidence file, folio 4344).

[146] Social study prepared by the *Niños de Guatemala* social worker on May 4, 1997 (evidence file, folio 4316).

[147] Social study prepared by the *Niños de Guatemala* social worker on May 4, 1997 (evidence file, folio 4317).

[148] Social study prepared by the *Niños de Guatemala* social worker on May 4, 1997 (evidence file, folio 4317).

[149] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6814).

[150] *Cf.* Police record report of May 13, 1997 (evidence file, folio 106).

[151] *Cf.* Police record report of May 13, 1997 (evidence file, folio 106).

assessment of Flor de María Ramírez Escobar and Flor Escobar Carrera.[152] Regarding Mrs. Ramírez Escobar, this report indicated that "the patient's personality characteristics,[153] inferred that her ability to assume the role of mother was seriously compromised; she [would need] medium-term psychological treatment at least, seeking to redirect her affections to enable her to fulfill her maternal responsibilities satisfactorily."[154] Regarding the maternal grandmother, the report indicated that, "when considering her as a family resource, it was necessary to take into account that an adult with homosexual preferences will be transmitting a series of values to any children that she may be in charge of."[155] The report also reveals that, on that occasion, Mrs. Ramírez Escobar indicated that, although she was concerned by the homosexualism and the problems that her mother had had with the law, she "agreed that her children could be placed with their grandmother."[156]

99. In June 1997, Mrs. Ramírez Escobar went to the Attorney General's Office to request the return of her children. However, she was not received.[157]

100. On July 29, 1997, the Attorney General's Office appeared before the court to give its opinion on the legal status of the Ramírez children.[158] It asked that the children be declared abandoned and that they be incorporated into the adoption program, taking into account that:

> [T]he children were completely abandoned and, at all times, all they received from their family, and principally their mother, was physical and psychological abuse and abuse due to neglect, as well as bad examples owing to their disorderly lives.[159]

101. On August 6, 1997, the First Juvenile Trial Court of Guatemala issued a ruling in which it summarized the evidence gathered – which has been mentioned in the preceding paragraphs – and declared "the children [J.R.] and Osmín Ricardo Amílcar Tobar Ramírez in a situation of abandonment."[160] The court granted the legal guardianship of the Ramírez brothers to *Niños de Guatemala*, and ordered this institution to include them in the adoption programs it sponsored.[161]

C.2 Application for judicial review of the declaration of abandonment

102. On August 22, 1997, Mrs. Ramírez Escobar filed an application for judicial review of the declaration of abandonment of the children.[162] She denied that she had mistreated or abandoned

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152 *Cf.* Psychological report of the Psychology Unit of the Judiciary of July 21, 1997 (evidence file, folios 7960).

153 The personality characteristics referred to in the report are as follows: "Mrs. Ramírez reveals a personality profile characterized by emotional immaturity, with difficulty to relate to her environment especially at the emotional level; she is characterized by her hyperactivity, although without a specific goal. She has a high level of depression." Psychological report of the Psychology Unit of the Judiciary of July 21, 1997 (evidence file, folios 7961).

154 Psychological report of the Psychology Unit of the Judiciary of July 21, 1997 (evidence file, folios 7962).

155 Psychological report of the Psychology Unit of the Judiciary of July 21, 1997 (evidence file, folios 7961).

156 Psychological report of the Psychology Unit of the Judiciary of July 21, 1997 (evidence file, folios 7960).

157 *Cf.* Extract from the statement made by Mrs. Ramírez Escobar, included in the report of the National Civil Police, Criminal Investigation Service, Minors and Missing Persons Section, of June 4, 2001 (evidence file, folio 4533).

158 *Cf.* Brief of the Attorney General's Office of July 28, 1997, submitted on July 29, 1997 (evidence file, folios 4306 and 4307).

159 Brief of the Attorney General's Office submitted on July 29, 1997 (evidence file, folio 4306).

160 Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folio 4304).

161 *Cf.* Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folio 4304).

162 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folios 4279 a 4291).

her children.[163] She indicated that "there was no medical forensic report" revealing that the children were malnourished.[164] She also indicated that the person who took care of her children had left them alone with malicious intent.[165] In this regard, Mrs. Ramírez Escobar alleged that "it was she who had planned all of this as a new method of kidnapping because, on more than one occasion, she had indicated that the children could be given up in adoption to a family that would give [Mrs. Ramírez Escobar] good money; that she could find out through the lawyers she knew and that [Mrs. Ramírez Escobar] should give part of the money to her."[166] She pointed out that the reports did not include the names of the neighbors.[167] Also, she questioned why the court had not used its own social workers and alleged that it was "totally inhuman […] that the social worker of the Attorney General's Office should say that, because I am poor, I have no right to bring up my children, because this and nothing more should be understood from what she said."[168] Mrs. Ramírez Escobar asked, as an urgent measure, the preventive removal of her children from *Niños de Guatemala*, and that she be allowed to visit them.[169]

103. On August 25, 1997, the court issued a ruling admitting the application for processing and ordering that the Attorney General's Office be heard.[170] On September 12, 1997, the Attorney General's Office asked that the court ratify the appealed decision.[171] On September 23, 1997, the First Juvenile Trial Court of Guatemala declared the application inadmissible,[172] indicating that the Attorney General's Office, which had conducted the pertinent investigations, had issued a favorable opinion, and that "none of the family members of [the Ramírez brothers] qualify to be considered their guardians."[173]

104. Following Mrs. Ramírez Escobar's appeal,[174] on September 30, 1997, the court acknowledged that, "in the present case, an error had been committed by failing to notify the person who filed the application for judicial review of the ruling of August [25]," "which infringe[d] the right of defense of the person who filed the application."[175] The Court decided to annul any actions taken as of August 25.[176]

105. On October 2, 1997, Mrs. Ramírez Escobar presented four briefs to the First Court: (1) In the first, she recused the judge who had ruled in favor of the inadmissibility of the application.[177] This

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163 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4284).

164 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4280).

165 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4281).

166 Application for judicial review filed on August 22, 1997 (evidence file, folio 4281).

167 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4285).

168 Application for judicial review filed on August 22, 1997 (evidence file, folios 4282 and 4287).

169 *Cf.* Application for judicial review filed on August 22, 1997 (evidence file, folio 4290).

170 *Cf.* Order of the First Juvenile Trial Court of August 25, 1997 (evidence file, folio 4278).

171 *Cf.* Brief of the Attorney General's Office of September 12, 1997 (evidence file, folio 4275).

172 *Cf.* Ruling of the First Juvenile Trial Court of September 23, 1997 (evidence file, folio 4272).

173 Ruling of the First Juvenile Trial Court of September 23, 1997 (evidence file, folio 4271).

174 On September 26, 1997, Mrs. Ramírez Escobar presented a brief indicating that she had not been notified of the court's decisions of August 25 and September 23, 1997. She also alleged that the application for judicial review should not be processed as an interlocutory proceeding, but should be decided by the judge immediately. *Cf.* Appeal for reconsideration of judgment of September 26, 1997 (evidence file, folios 83 to 87).

175 Ruling of the First Juvenile Trial Court of September 30, 1997 (evidence file, folios 4261 and 4262).

176 *Cf.* Ruling of the First Juvenile Trial Court of September 30, 1997 (evidence file, folios 4261 and 4262).

177 *Cf.* Brief of Mrs. Ramírez Escobar of October 2, 1997 (evidence file, folios 4254 and 4255).

recusal was admitted on October 6[178] and, on October 17, the third juvenile trial judge was appointed to continue hearing the application.[179] (2) In the second, she argued that the application for judicial review should not be processed as an interlocutory proceeding, pursuant to article 46 of the Children's Code,[180] and questioned why the Juvenile Department of the Attorney General's Office and *Niños de Guatemala* had been ordered to prepare social studies, without explaining "why [the court's social service] had been sidelined."[181] The court decided not to admit this brief "because it did not contain a request."[182] (3) In the third, Mrs. Ramírez Escobar requested the annulment of the declaration of abandonment of August 6, 1997, "because the actions taken [were] insufficient to issue this, and the case should be reopened and an impartial investigation conducted by the court's social service."[183] (4) In the fourth, she indicated that she had not been notified of "the interlocutory proceeding" in the case file, or of the decision made, even though she was advised of a ruling that claimed to be the final ruling on the review. She asked that the proceedings be conducted as established by law.[184]

106. On October 3, 1997, the Attorney General's Office requested confirmation of the declaration of abandonment, considering that the Ramírez brothers did not have "an adequate natural resource so that they could be discharged from the institution in which they are located,"[185] based on the social studies conducted previously by *Niños de Guatemala* and by the Attorney General's Office itself, which were the grounds for the declaration of abandonment (*supra* paras. 91 to 96). The Attorney General's Office indicated that, according to the neighbors' statements, "the children's mother only worked to finance her vices, which were alcohol and drugs; she left the children alone and without food all day" and she had "both men and women as sexual companions."[186] In addition, it underlined that the statements received with regard to the grandmother indicated that she "has never had a male partner; and that she has had female partners; also, that she has been arrested; therefore, it is considered that she does not represent a good resource, because she does not have a well-defined personality, and this would prejudice her grandsons."[187]

107. On January 6, 1998, the Court declared the application for judicial review inadmissible, indicating that the separation of the children from their parents was in keeping with the best interests of the child and that "the situation of the [Ramírez brothers] has not changed to date."[188] Nevertheless, the other requests made by Mrs. Ramírez Escobar remained pending.

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178 *Cf.* Ruling of the First Juvenile Trial Court of October 6, 1997 (evidence file, folio 4243).

179 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of the Municipality and Department of Guatemala of October 17, 1997 (evidence file, folio 4237 and 4238). On October 29, the third juvenile trial judge excused himself from hearing the case because he was a friend of Mrs. Ramírez Escobar's lawyer. However, the court did not accept this. *Cf.* Order of the Third Juvenile Trial Court of October 29, 1997 (evidence file, folio 4234 and 4235), and order of the Judicial Coordinator of the Juvenile Jurisdiction of the municipality and department of Guatemala of November 20, 1997 (evidence file, folio 4223 and 4224).

180 *Cf.* Brief of Mrs. Ramírez Escobar of October 2, 1997 (evidence file, folio 4245).

181 *Cf.* Brief of Mrs. Ramírez Escobar of October 2, 1997 (evidence file, folios 4245 and 4246).

182 Order of the First Juvenile Trial Court of Guatemala City of October 6, 1997, notified on October 7, 1997 (evidence file, folios 4239 to 4244).

183 Brief of Mrs. Ramírez Escobar of October 2, 1997 (evidence file, folio 4700).

184 *Cf.* Brief of Mrs. Ramírez Escobar of October 2, 1997 (evidence file, folios 150 and 151).

185 Brief of the Attorney General's Office of October 3, 1997 (evidence file, folio 4253).

186 Brief of the Attorney General's Office of October 3, 1997 (evidence file, folio 4251).

187 Brief of the Attorney General's Office of October 3, 1997 (evidence file, folios 4251 and 4252).

188 Ruling of the Third Juvenile Trial Court of January 6, 1998 (evidence file, folios 4218 and 4219).

108. Subsequently, the judge who had been in the First Court became the judge of the Third Court; therefore, in March, she excused herself from hearing the case,[189] and it was transferred to the First Court.[190] On March 23, the first judge excused herself from continuing to hear the case because she had already decided the application for judicial review on January 6, 1998.[191] The case file was forwarded to the Second Juvenile Trial Court.[192]

109. On March 19, 1998, Mrs. Ramírez Escobar repeated her request for a review of the proceedings, reiterating that the procedure established by law had not been followed, because the proceedings had not been opened to evidence. On that occasion, Flor de María Ramírez Escobar indicated that, although she "had been informed of a decision that claimed to be the final ruling on the application she had filed, it could not have any legal effect as due process had been violated and, thus, the right to a legitimate defense, because, whether or not it had been intentional, the court had modified the form of the proceedings."[193] This request was incorporated into the case file but was not decided.[194]

110. On May 4, 1998, the Second Trial Court ordered that the case file be returned to the original court for archiving "because the declaration of abandonment [of August 6, 1997,] was final" and had been ratified on January 6, 1998.[195]

111. On June 11, 1998, Mrs. Ramírez Escobar alleged that several requests "to review the case" remained pending, and therefore asked that it be returned to the Second Juvenile Court and that her pending requests be decided.[196] On June 17, the judge presented her excuses because the President and the legal counsel of *Niños de Guatemala*, "had harmed the honor of the head of th[at] court."[197] On July 7, 1998, the case was assigned to the judge responsible for the Fourth Juvenile Trial Court.[198] However, on July 8, this judge also presented her excuses because, in May that year, she had denounced the legal counsel of *Niños de Guatemala* before the Supreme Court of Justice because the latter had threatened her and the clerk of the court.[199] On August 3, 1998, the case

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189 *Cf.* Decision of the Third Juvenile Trial Court of March 3, 1998 (evidence file, folio 4214).

190 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of March 9, 1997 (evidence file, folio 4212).

191 *Cf.* Ruling of the First Juvenile Trial Court of March 23, 1998 (evidence file, folio 4205).

192 *Cf.* Ruling of the First Juvenile Trial Court of April 4, 1998 (evidence file, folio 4204).

193 Brief of Mrs. Ramírez Escobar of March 19, 1998 (evidence file, folios 4208 and 4210).

194 *Cf.* Juvenile Trial Court of the department of Jutiapa, ruling of June 20, 2000 (evidence file, folios 4750).

195 *Cf.* Ruling of the Second Juvenile Trial Court of May 4, 1998 (evidence file, folio 4203).

196 *Cf.* Brief of Mrs. Ramírez Escobar of June 11, 1998 (evidence file, folio 4202).

197 According to the judge, the President of *Niños de Guatemala* and the legal counsel harmed her honor "because the former had filed a totally groundless complaint before the General Supervisor of Courts, containing offensive and disrespectful words [… and the latter by publishing two press releases] the content of which was offensive and in which the judge's impartiality was called into question," in relation to another case concerning the proceedings for a girl child declared to haves been abandoned. *Cf.* Ruling of the Second Juvenile Trial Court of June 17, 1998 (evidence file, folios 4197 and 4198), and letters addressed to the General Supervisor of Courts on May 26 and 27, 1998, and related press releases (evidence file, folios 4189 to 4196).

198 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of June 7, 1998 (evidence file, folios 4184 and 4185).

199 *Cf.* Ruling of the Fourth Juvenile Trial Court of July 8, 1998 (evidence file, folios 4180 and 4181). The complaint and the accompanying brief indicated that, on May 15, 1998, the legal counsel of *Niños de Guatemala*, "had worked herself up, extremely violently, to the extent that she had threatened the clerk of the court and [the judge]." Insisting that "they should agree to her requests immediately." In addition, it was placed on record that the legal counsel of *Niños de Guatemala* had complained about the court's pace of work and "argued that the organization she represents no longer has the funds required to maintain the children placed with it; in response to which it is suggested that they be

was assigned to the Juvenile Trial Court of Mixco.[200] On September 10, 1998, the judge of that court also excused himself owing to a dispute with the legal counsel of *Niños de Guatemala*.[201] On October 1, 1998, the case file was forwarded to the Juvenile Trial Court of Escuintla.[202] This court ordered the archive of the case file on December 11, 1998, "owing to the status of the case and because the declaration of abandonment was final."[203]

C.3 Procedures for the adoption of the Ramírez brothers

112. The process for the adoption of the Ramírez children began in April 1998, using the extrajudicial or notarial adoption procedure described previously[204] (*supra* paras. 75 to 78).

113. J.R. and Osmín Tobar Ramírez were adopted by two different North American families. J.R. was adopted by family B. of Illinois, who adopted a girl child at the same time.[205] Osmín was adopted by the family Borz-Richards of Pennsylvania, who adopted another boy child at the same time.[206] Both families granted power of attorney to the same lawyer to carry out the adoption procedures and both adoptions took place before the same notary.[207]

114. In keeping with the law in force (*supra* paras. 76 and 78), the notary forwarded the requests to the Attorney General's Office to obtain its opinion.[208] On May 8 and 11, 1998, the Attorney General's Office advised that, "at the present time, it was not appropriate to grant" the adoptions of J.R. and Osmín Tobar Ramírez, respectively, because an appeal against the declaration of abandonment was pending.[209] In view of the negative of the Attorney General's Office, both files were forwarded to the Family Trial Court of the department of Sacatepéquez.[210]

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transferred to another children's home, but this suggestion is rejected. She also demanded to know whether or not this court will issue "abandonments" (evidence file, folios 4171 to 4179).

200 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of August 3, 1998 (evidence file, folios 4160 and 4161).

201 *Cf.* Ruling of the Juvenile Trial Court of Mixco of September 10, 1998 (evidence file, folios 4146 and 4147). The judge's excuses and the brief accompanying them record that the legal counsel of *Niños de Guatemala* became annoyed, "fumed, raised her voice and accused the undersigned of negligence and intransigence"; she asked the judge "whether there was an order not to issue abandonments and what that court's policy was, because she did not understand how it had not issued abandonments for such a long time, and that the judges should understand that the only way to maintain the children's homes was by adoptions" (evidence file, folios 4147, 4150 and 4151).

202 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of October 1, 1998 (evidence file, folio 4139).

203 Ruling of the Juvenile Trial Court of Escuintla of December 11, 1998 (evidence file, folio 4129).

204 *Cf.* Report of the President of *Niños de Guatemala* of December 31, 1998 (evidence file, folio 4639).

205 *Cf.* Report of the Attorney General's Office of May 8, 1998 (evidence file, folios 4502 and 4503) and adoption papers of June 2, 1998, with regard to J.R. (evidence file, folio 115).

206 *Cf.* Decision of the Attorney General's Office of May 11, 1998 (evidence file, folios 4505 to 4507); Order of the Family Trial Court of the department of Sacatepéquez of May 26, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 6576 to 6579); statement by Osmín Tobar Ramírez during the public hearing held before this Court, and adoption papers of June 2, 1998, with regard to Osmín Tobar Ramírez (evidence file, folio 123).

207 *Cf.* Adoption papers of June 2, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 123 to 128), and adoption papers of June 2, 1998, with regard to J.R. (evidence file, folios 115 and 119).

208 *Cf.* Decision of the Attorney General's Office of May 11, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 4505 to 4507); Decision of the Attorney General's Office General of May 8, 1998, with regard to J.R. (evidence file, folios 4502 and 4503), and report provided by an assistant agent of the Juvenile Department of the Attorney General's Office on May 5, 1998 (evidence file, folios 4508 and 4509).

209 *Cf.* Decision of the Attorney General's Office of May 8, 1998 (evidence file, folios 4502 and 4503), and Report of the auxiliary agent of the Juvenile Department of the Attorney General's Office of May 5, 1998 (evidence file, folios 4508 and 4509), and Report of the Attorney General's Office of May 11, 1998 (evidence file, folios 4505 to 4507). Both reports were based on a report of the auxiliary agent of the Juvenile Department of the Attorney General's Office on May 5,

115. However, on May 26, 1998, that court rejected the arguments of the Attorney General's Office and ordered the issue of the adoption papers of J.R. and Osmín Tobar Ramírez, in two rulings of the same date.[211] In the ruling on Osmín, the court indicated that, on August 6, 1997, the state of abandonment had been declared; on January 6, 1998, an application for judicial review filed against the abandonment declaration had been declared inadmissible and, on January 30, 1998, "a certification of the said ruling was issued, indicating […] that no appeal or notification was pending."[212] Therefore, the court considered that the reason given by the Attorney General's Office was not "a valid reason," because it had been certified that no appeal was pending.[213] The Court declared that the adoption procedures for Osmín were admissible and placed on record that the adopters "had complied fully with all legal requirements" and "proved their moral and financial solvency."[214] On June 2, 1998, the notary granted the adoptions of J.R. and of Osmín Tobar Ramírez, by separate decrees, indicating that the suitability of the adopters had been verified, and also their moral and financial possibilities, by "the statements made by the witnesses offered and the report of the social worked attached to the Family Section of the Trial Court of Sacatepéquez."[215]

116. On June 11, 1998, the respective annotations were made on the birth certificates of Osmín Tobar Ramírez[216] and J.R.[217] as adoptive sons. In July 1998, Osmín left for the United States of America with his adoptive parents.[218]

1998, which indicated that: "[a]t this time, an interlocutory proceeding initiated by the judge who issued the abandonment declaration is pending a decision; moreover, since the General Supervisor of Courts is also involved in this case […], his ruling is also pending"; therefore, "it was advisable that [the adoption] not be processed until the judicial remedies have been exhausted." Report of the auxiliary agent of the Juvenile Department of the Attorney General's Office on May 5, 1998 (evidence file, folios 4508 and 4509).

[210] *Cf.* Adoption papers of June 2, 1998, with regard to Osmín Tobar Ramírez (evidence file, folio 125); and adoption papers of June 2, 1998, with regard to J.R. (evidence file, folio 117).

[211] *Cf.* Order of the Family Trial Court of the department of Sacatepéquez of May 26, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 6576 to 6579). The State was asked to provide the judicial decision on the adoption of J.R. as helpful evidence, but Guatemala failed to submit this and, therefore, the Court does not have the judicial decision authorizing the adoption of J.R..

[212] Order of the Family Trial Court of the department of Sacatepéquez of May 26, 1998 (evidence file, folios 6576 and 6577).

[213] In this regard, the court indicated that "the case file contains a certification indicating that no appeal or notification is pending, so that this should be considered certain, as it is one of the characteristics of legal certainty that any judicial process should have, and the officials and employees who extended this certification are responsible for its content and, in any case, this opinion or report does not refer to which interlocutory proceeding it refers." In addition, regarding the opinion pending from the General Supervisor of Courts, it indicated that this was "an administrative procedure and, above all, it would prejudice the official and not the processing of the file itself, which could be modified only and exclusively by judicial acts rather and not by administrative acts." Ruling of the Family Trial Court of the department of Sacatepéquez of May 26, 1998 (evidence file, folios 6577 and 6578).

[214] Order of the Family Trial Court of the department of Sacatepéquez of May 26, 1998 (evidence file, folios 6577 and 6578). As previously mentioned, the State was requested to provide the judicial decision on the adoption of J.R. as helpful evidence, but failed to provide this (*supra* nota 211).

[215] Adoption papers of June 2, 1998, for Osmín Tobar Ramírez (evidence file, folios 123 to 128), and adoption papers of June 2, 1998, for J.R. (evidence file, folios 115 to 120). Even though the State was asked to provide as helpful evidence the studies prepared by the social workers attached to the Trial Court of Sacatepéquez, which are mentioned in the adoption papers, these were not provided to the case file.

[216] *Cf.* Annotations in the margin of the birth registration, Record No. 4519 of the Civil Registry Book of the municipality of Guatemala (evidence file, folio 142).

[217] *Cf.* Annotations in the margin. of the birth registration, Record No. 284 of the Civil Registry Book of the municipality of Guatemala (evidence file, folio 145).

[218] *Cf.* Report of the President of *Niños de Guatemala* of December 31, 1998 (evidence file, folio 4639).

C.4 Appeals filed following the adoption of the Ramírez children

117. On December 17, 1998, Gustavo Tobar Fajardo filed an application for judicial review before the Juvenile Trial Court of Escuintla in the proceedings on the declaration of abandonment (*supra* para. 111) stating that:

> As the father [of Osmín], he has never been invited to intervene in the case and the judges have had to excuse themselves because the owner of the business of the sale of children is the wife of one of the justices of the Supreme Court of Justice, […] whose business has flourished in recent times owing to the children that some courts have referred to it.[219]

118. He also indicated that, at that time, several briefs filed in the proceedings by Mrs. Ramírez Escobar were pending a decision.[220] The same day, the Court declared the application inadmissible, indicating that it was time-barred and that Mr. Tobar Fajardo "had not been a party to this case."[221]

119. On February 2, 1999, Mr. Tobar Fajardo filed an application for amparo before the 12th Chamber of the Appellate Court for Drug-trafficking and Environmental Crime.[222] He underscored that neither he nor the father of J.R. had been "contacted by any authority to intervene in the case"; moreover, "there [was] no record that an attempt ha[d] been made to locate [them]."[223] He indicated that several irregularities had occurred in the application for judicial review filed by Mrs. Ramírez Escobar, including that the report of the social worker of the Attorney General's Office had even indicated that, "at a later date, another study should be conducted to determine whether the circumstances have changed that made this ruling of a temporary separation from her children necessary."[224] Furthermore, he argued that the Children's Code did not establish a deadline for filing an application for judicial review; therefore, it was not possible for the court to declare that the application for judicial review filed was time-barred[225] (*supra* para. 118). Mr. Tobar Fajardo also requested a provisional amparo to suspend the effects of the decision of December 17.[226]

120. On February 16, 1999, the Appellate Court Chamber decided not to grant the provisional amparo requested by Mr. Tobar Fajardo.[227] However, on May 5, 1999, the Chamber decided to grant Mr. Tobar Fajardo the requested amparo.[228] It indicated that, "the case file does not record that Mr. Tobar Fajardo had filed an application for judicial review […]; therefore, the judge's decision that the application was time-barred is irrelevant."[229] Nevertheless, the Chamber indicated that "the judicial decision indicating that Gustavo [Tobar] has not been a party to this case violates the applicant's right of defense because it prevents him from asserting his standing as father of the child Osmín […] for the child to be handed over to him."[230] Consequently, the Chamber ordered that

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219 Brief of Gustavo Tobar Fajardo of December 17, 1998 (evidence file, folios 4126 and 4127).

220 *Cf.* Brief of Gustavo Tobar Fajardo of December 17, 1998 (evidence file, folios 4126 and 4127).

221 Ruling of the Juvenile Trial Court of the department of Escuintla of December 17, 1998 (evidence file, folio 4121).

222 *Cf.* Application for amparo filed by Gustavo Tobar Fajardo on February 2, 1999 (evidence file, folios 182 to 197).

223 Application for amparo filed by Gustavo Tobar Fajardo on February 2, 1999 (evidence file, folio 184).

224 Application for amparo filed by Gustavo Tobar Fajardo on February 2, 1999 (evidence file, folio 185).

225 *Cf.* Application for amparo filed by Gustavo Tobar Fajardo on February 2, 1999 (evidence file, folio 186).

226 *Cf.* Application for amparo filed by Gustavo Tobar Fajardo on February 2, 1999 (evidence file, folios 192 and 193).

227 *Cf.* Ruling of the 12th Chamber of the Appellate Court of February 16, 1999 (evidence file, folio 4734).

228 *Cf.* Ruling of the 12th Chamber of the Appellate Court of May 5, 1999 (evidence file, folios 211 and 212).

229 Ruling of the 12th Chamber of the Appellate Court of May 5, 1999 (evidence file, folios 210 and 211).

230 Ruling of the 12th Chamber of the Appellate Court of May 5, 1999 (evidence file, folio 211).

Gustavo Tobar Fajardo be permitted to intervene in the proceedings and that the decision of December 17, 1998, be suspended.[231]

121. On June 24, 1999, the Juvenile Trial Judge of Escuintla excused himself from hearing the case because Mr. Tobar Fajardo had used "phrases that harmed [his] honor" in his amparo application.[232] His excuse was accepted and, on July 26, 1999, the Judicial Coordinator of the Juvenile Jurisdiction ordered that the case file be forwarded to the Juvenile Trial Court of Jutiapa.[233]

122. On August 3, 1999, the Jutiapa Court asked the parties to comment on the applications for judicial review filed by Mrs. Ramírez Escobar and Mr. Tobar Fajardo.[234] Both Mrs. Ramírez Escobar and Mr. Tobar Fajardo requested the annulment of the order declaring the abandonment of the Ramírez brothers.[235] On September 24, 1999, a hearing was held during which they repeated this request and asked that an order be issued to return the children to their biological parents, indicating that this "will allow us to continue procedures to obtain the return of the children from abroad."[236] That same day, the judge ordered that psychological assessments be made of Mrs. Ramírez Escobar and Mr. Tobar Fajardo.[237] The case file does not reveal that these assessment were performed.

123. On February 3, 2000, the judge ordered that an official communication be sent to the Attorney General's Office requiring it to establish the situation of the children, J.R. and Osmín Tobar Ramírez.[238] On March 20, 2000, the Attorney General's Office forwarded a report on the situation of Osmín Tobar Ramírez prepared by *Niños de Guatemala* indicating that he had been given up for adoption on June 2, 1998.[239] On March 21, 2000, the court asked the Attorney General's Office to submit information on J.R., but this was not presented; it also sent an official request to the Civil Registry to "advise if any changes had been made to the birth certificates" of the Ramírez children.[240] On May 18, 2000, the birth certificates recording the children's adoptions were received.[241]

124. On June 20, 2000, the Juvenile Trial Court of Jutiapa issued a ruling in which it partially amended the proceedings and annulled the actions taken between the rulings of August 25, 1997, and October 15, 1999, ratifying the actions taken as of February 3, 2000.[242] The court established that, "during the processing of this case, numerous substantive errors were committed that

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231 *Cf.* Ruling of the 12th Chamber of the Appellate Court of May 5, 1999 (evidence file, folios 211 and 212).

232 *Cf.* Ruling of the Juvenile Trial Court of Escuintla of June 24, 1999 (evidence file, folios 4089 and 4090).

233 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of July 26, 1999 (evidence file, folio 4698).

234 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of August 3, 1999 (evidence file, folio 4695).

235 *Cf.* Brief of Mr. Tobar Fajardo of August 19, 1999 (evidence file, folios 4691 to 4693), and brief of Mrs. Ramírez Escobar of August 19, 1999 (evidence file, folios 4688 and 4689).

236 Record of the hearing of September 24, 1999 (evidence file, folios 4664 and 4665).

237 *Cf.* Order of September 24, 1999 (evidence file, folio 4662).

238 *Cf.* Order of February 3, 2000 (evidence file, folio 4656).

239 *Cf.* Report No. 51-2000 of the Attorney General's Office of March 20, 2000 (evidence file, folio 4640), and report of the President of *Niños de Guatemala* of December 31, 1998 (evidence file, folios 4638 and 4639).

240 *Cf.* Ruling of the Juvenile Trial Court of March 21, 2000 (evidence file, folio 229).

241 *Cf.* Annotation on the birth registration of J.R. (evidence file, folio 4630); Annotation on the birth registration of Osmín Tobar Ramírez (evidence file, folio 4627), and Ruling of the Juvenile Trial Court of the department of Jutiapa of May 18, 2000 (evidence file, folio 4625).

242 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of June 20, 2000 (evidence file, folio 4751).

prejudiced the constitutional rights and guarantees of Flor de María Ramírez Escobar, as a procedural party to this case; in addition, the legal formalities of due process were also violated."[243] In particular, the court mentioned that the case should not have been processed as an interlocutory proceeding;[244] also, the failure to notify the different decisions between 1997 and 1999,[245] and the existence of several briefs presented by Mrs. Ramírez Escobar that had not been decided.[246]

125. On July 10, 2000, the Juvenile Trial Judge of Jutiapa excused himself from continuing to hear the proceedings, indicating that "on several occasions, intimidating telephone calls had been received […] attempting to obtain a favorable decision in this case and indicating that the [callers] were being supported by an international agency."[247]

126. On August 29, 2000, Mrs. Ramírez Escobar and Mr. Tobar Fajardo requested the joinder of their legal representation before the Jutiapa Court.[248] They also asked that the proceedings be amended, "annulling and removing all legal effects from the actions taken following the ruling that ordered the processing of the application for review as an interlocutory proceeding" and that "an order be given to hand over [their] sons under the supervision of that court's social service."[249] The same day, the court accepted to joinder the parents' legal representation.[250] Subsequently, Mr. Tobar Fajardo assumed the representation of both parents "for the purposes of immediacy and procedural certainty."[251]

127. On October 13, 2000, the case was assigned to the Juvenile Trial Court of Chimaltenango.[252] On November 6, 2000, the parents asked the new court to amend the proceedings, to conduct a socioeconomic study of both parents, to determine the whereabouts of the person who appeared as the father of J.R. on the birth certificate, and include him in the proceedings, and to order *Niños de Guatemala*, "to make the two children available to that court […] while their situation was decided."[253]

128. On November 7, 2000, the court declared that "the review filed was admissible," and required that a series of measures be taken "in order to have obtain further information that would allow it to reach a decision pursuant to the law."[254] In its ruling, it indicated that Mrs. Ramírez Escobar and Mr. Tobar Fajardo "were not given sufficient opportunity to prove that they constituted an appropriate

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243 Ruling of the Juvenile Trial Court of the department of Jutiapa of June 20, 2000 (evidence file, folio 4745).

244 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of June 20, 2000 (evidence file, folio 4745).

245 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of June 20, 2000 (evidence file, folios 4746 to 4749).

246 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of June 20, 2000 (evidence file, folio 4750).

247 Ruling of the Juvenile Trial Court of the department of Jutiapa of July 10, 2000 (evidence file, folios 4623 and 4624).

248 *Cf.* Brief of Mrs. Ramírez Escobar and Mr. Tobar Fajardo of August 29, 2000 (evidence file, folio 4616).

249 Brief of Mrs. Ramírez Escobar and Mr. Tobar Fajardo of August 29, 2000 (evidence file, folios 4616 and 4617).

250 *Cf.* Ruling of the Juvenile Trial Court of the department of Jutiapa of August 29, 2000 (evidence file, folio 4611).

251 Brief of Mrs. Ramírez Escobar and Mr. Tobar Fajardo of November 6, 2000 (evidence file, folios 4591 to 4595).

252 *Cf.* Order of the Judicial Coordinator of the Juvenile Jurisdiction of the municipality and department of Guatemala of October 13, 2000 (evidence file, folios 4603 and 4604).

253 Brief of Mrs. Ramírez Escobar and Mr. Tobar Fajardo of November 6, 2000 (evidence file, folios 4591 to 4596).

254 Ruling of the Juvenile Trial Court of the department of Chimaltenango of November 7, 2000 (evidence file, folio 4589).

emotional, psychological and family resource for their minor children."[255] The court asked that a statement be taken from the parents; that a social and psychological assessment of both of them be prepared, and that the National Civil Police investigate the situation of the children, and the background and lifestyle of the parents. In addition, the judge ordered the localization of the person who appeared as the biological father of J.R. on the birth certificate in order to include him in the case.[256]

129. In compliance with that ruling, the statements of Mrs. Ramírez Escobar[257] and Mr. Tobar Fajardo were received,[258] and the psychological assessments[259] and socioeconomic studies were prepared.[260] Both the psychological assessments[261] and the socioeconomic studies were favorable to the parents and indicated their suitability to assume the care of the children, indicating that "no social problems were found that could put the children at risk if they were handed over to them."[262] The National Police presented their report on June 4, 2001.[263]

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[255] Ruling of the Juvenile Trial Court of the department of Chimaltenango of November 7, 2000 (evidence file, folio 4588).

[256] *Cf.* Ruling of the Juvenile Trial Court of the department of Chimaltenango of November 7, 2000 (evidence file, folios 4589 and 4590).

[257] *Cf.* Statement by Mrs. Ramírez Escobar on November 28, 2000 (evidence file, folios 4569 to 4571).

[258] *Cf.* Statement by Mr. Tobar Fajardo on December 6, 2000 (evidence file, folios 4560 to 4563).

[259] *Cf.* Psychological assessment of Gustavo Tobar Fajardo of January 9, 2001 (evidence file, folio 4552), and Psychological assessment of Flor de María Ramírez Escobar of January 9, 2001 (evidence file, folio 4551).

[260] *Cf.* Social study of Flor de María Ramírez Escobar prepared by a court social worker on March 13, 2001 (evidence files, folios 4537 to 4540), and social study of Gustavo Tobar Fajardo prepared by the court social worker on March 7, 2001 (evidence files, folios 4541 to 4543).

[261] The psychological assessment of Mrs. Ramírez Escobar concluded that: "Mrs. Ramírez has emotional problems derived from traumatic experiences and from inadequate paternal care during her infancy […] which, however, and taking advantage of the love she has for her children, can be treated and overcome with psychotherapy, because she shows no signs of resistance to this." Psychological assessment of Flor de María Ramírez Escobar of January 9, 2001 (evidence file, folio 4551). The psychological assessment of Mr. Tobar Fajardo concluded that: "Mr. Tobar suffers from some emotional problems […] in reaction to the loss of his son, which only require brief therapeutic support, because the emotional support provided by his partner keeps him fairly stable, emotionally speaking. Also, it is to be hoped that when he again has his son, and his son's brother, if this were the case, those emotional problems would be totally overcome." Psychological assessment of Gustavo Tobar Fajardo of January 9, 2001 (evidence file, folio 4552).

[262] Regarding Flor de María Ramírez Escobar, the social study concluded that: "Flor de María [Ramírez] Escobar […], has always demonstrated great interest in recovering her children, she is aware that the father of the older boy also wants to recover him, a situation with which she is in complete agreement. Her financial situation and living conditions cannot be considered a limiting factor for access to one or both children because the most important point is her constancy and interest in recovering her children. In addition, no social problems were found that could put the children at risk if they were to be handed over; therefore, it is considered appropriate to take into account the request filed by the mother of the children; however, the pertinent decision is left to the judge's discretion." Social study of Flor de María Ramírez Escobar prepared by a court social worker on March 13, 2001 (evidence files, folios 4539 and 4540). Regarding Gustavo Tobar Fajardo, the social study concluded that: "Gustavo Amílcar Tobar Fajardo shows great interest in recovering his minor child, Osmín Ricardo Amílcar Tobar Ramírez, and the latter's younger brother, owing to the evident excellent relationship between them when they lived with their mother. To this end, he says that he is supported by his current partner who agrees to take responsibility for the two children and care for them as her own children. Taking into account that there are no social problems that would not allow or that would limit the right of the children to remain with their parents, it is considered appropriate to take into account the request filed by the subject of the report; however, the pertinent decision is left to the judge's discretion." Social study on Gustavo Tobar Fajardo prepared by the court social worker on March 7, 2001 (evidence files, folio 4543).

[263] *Cf.* Report of the Criminal Investigation Service of the National Civil Police of June 4, 2001 (evidence file, folio 4532 a 4534).

130. On August 30, 2001, a hearing called by the court was held.[264] Mr. Tobar Fajardo asked that the Ramírez children be "returned to be reincorporated into their home."[265] He stated that, if the children did not want to return, they "would take their views into account, and would even reach an agreement with the adoptive family […] for reciprocal visits so that, in future, when they look for us, they will know who their parents are and that we are always fighting to get them back."[266]

131. On August 31, the court ordered that a letter rogatory be sent to the Embassy of the United States of America in order to summon the two adoptive families to appear in court on November 15, 2001, and "to make [Osmín and J.R.] available to the [court]," because "their biological parents request a resumption of contact with them."[267] The court indicated that it was "necessary to obtain the views of the said children in order to establish their interests and allow them to define with which of their parents they wish to live."[268] The court indicated that:

> It is essential that the [children] know that their biological parents have expressed their wish to recover them if possible, because they have contested the fact that their children were given up for adoption without their consent and an application for judicial review filed by these persons is currently pending a decision in this case, alleging anomalies in the processing of the corresponding case which resulted in the adoption of these children.[269]

132. The letter rogatory was sent to the Supreme Court of Justice on October 16, 2001.[270] On November 15, 2001, only Mr. Tobar Fajardo appeared before the court, so that the hearing that had been called was not held.[271]

133. On December 6, 2001, the Ministry of Foreign Affairs informed the Supreme Court of Justice that the letter rogatory issued by the Juvenile Trial Court of Chimaltenango had not been received by the Embassy of the United States of America in Guatemala, because it had not been presented "as provided for in the Inter-American Convention on Letters Rogatory and its Additional Protocol."[272] On December 19, 2001, the Supreme Court forwarded the communication to the Chimaltenango court and, that same day, the court advised the parties that it was necessary to comply with the provisions of the said treaty.[273]

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[264] *Cf.* Record of the hearing held on August 30, 2001, by the Juvenile Trial Court of the department of Chimaltenango (evidence file, folios 4483 to 4485).

[265] Record of the hearing held on August 30, 2001, by the Juvenile Trial Court of the department of Chimaltenango (evidence file, folio 4483).

[266] Record of the hearing held on August 30, 2001, by the Juvenile Trial Court of the department of Chimaltenango (evidence file, folios 4483 and 4484).

[267] Ruling of the Juvenile Trial Court of the department of Chimaltenango of August 31, 2001 (evidence file, folio 4472).

[268] Ruling of the Juvenile Trial Court of the department of Chimaltenango of August 31, 2001 (evidence file, folios 4472 and 4473).

[269] Ruling of the Juvenile Trial Court of the department of Chimaltenango of August 31, 2001 (evidence file, folio 4473).

[270] *Cf.* Notification received by the Supreme Court of Justice on October 16, 2001 (evidence file, folio 4459 and 4460).

[271] The court indicated that it was unaware why Osmín Tobar Ramírez, J.R. and their adoptive parents had not attended the hearing. *Cf.* Ruling of the Juvenile Trial Court of the department of Chimaltenango of November 15, 2001 (evidence file, folio 4458).

[272] Communication from the Ministry of Foreign Affairs to the Supreme Court of Justice received on December 6, 2001 (evidence file, folio 4454).

[273] *Cf.* Ruling of the Juvenile Trial Court of the department of Chimaltenango of December 19, 2001 (evidence file, folio 4447).

134. On June 20, 2002, the court asked Mr. Tobar Fajardo to advise "whether he agreed to deposit in the Ministry of Foreign Affairs the expenses incurred to summon the adoptive parents of the children, as established in the Additional Protocol to the Inter-American Convention on Letters Rogatory; to the contrary it would order the archive of this case because it was unable to continue processing it."[274]

135. On August 2, 2002, Mr. Tobar Fajardo presented a brief indicating that, after seeking financial support, he could cover "any expense that might arise in this case over and above expenses directly related to the court, [such as] everything related to the payment of official translators and similar disbursements."[275] On August 20, 2002, the court summoned Mr. Tobar Fajardo to appear on September 10 that year "regarding the procedure before the Ministry of Foreign Affairs."[276] According to the representatives, "the case file does not record that he appeared in court as requested."

136. On September 19, 2002, the court archived the case "because it was unable to proceed" given that, "to date, Gustavo Amílcar Tobar Fajardo has not paid the expenses described in the decision of June 20, 2002, and also, the legal status of the child [J.R.] and of the adolescent, Osmín Ricardo Amílcar Tobar Ramírez, had been duly decided."[277]

D. Alleged harassment, aggression and threats against Gustavo Tobar Fajardo

137. In 1999, the legal counsel of *Niños de Guatemala* sued Mr. Tobar Fajardo for slander, lies and defamation.[278] According to the representatives, this lawyer subsequently withdrew the action.

138. In 2001, Mr. Tobar Fajardo was allegedly a victim of various instances of aggression and harassment. He recounted that, two days prior to a hearing before the Juvenile Trial Court of Chimaltenango, while he was driving a bus, he was stabbed by an individual who "warned [him] of the risks he would incur if he continued the case."[279] According to the representatives, Mr. Tobar Fajardo reported this incident to the Public Prosecution Service, but does not have a copy of the corresponding record. Nevertheless, this incident was included in the complaint filed before the Ombudsman in 2009 (*infra* para. 140).

139. On March 16, 2009, at around 7 p.m., "two armed men, who arrived in a vehicle with tinted windows, knocked on the door" of Gustavo Tobar Fajardo's home and asked for Mr. Tobar Fajardo. However, he was not there.[280] Following this, he began to receive threatening phone calls in which he was told that, "as you have no one to defend you now, you're going to die, son of a bitch." According to Mr. Tobar Fajardo, this referred to the closure of *Casa Alianza*.[281]

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274 Ruling of the Juvenile Trial Court of the department of Chimaltenango of June 20, 2002 (evidence file, folio 4439).

275 Brief of Gustavo Tobar Fajardo received on August 2, 2002 (evidence file, folio 4429).

276 Ruling of the Juvenile Trial Court of the department of Chimaltenango of August 20, 2002 (evidence file, folio 4428).

277 Ruling of the Criminal Trial Court for Children and Adolescents, and Adolescents in Conflict with the Law of the department of Chimaltenango of September 19, 2002 (evidence file, folio 4419).

278 *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

279 Complaint filed by Mr. Tobar Fajardo on April 1, 2009 (evidence file, folio 4755), and Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

280 *Cf.* Complaint filed by Gustavo Tobar Fajardo on April 1, 2009, before the Ombudsman (evidence file, folio 4755).

281 *Cf.* Complaint filed by Gustavo Tobar Fajardo on April 1, 2009, before the Ombudsman (evidence file, folio 4756).

140. The incidents of 2001 and also those of 2009 were reported to the Ombudsman on April 1, 2009.[282] Mr. Tobar Fajardo asked the State to urgently adopt safety measures to protect him against such attacks and indicated that he did not have "sufficient confidence to report these threats to the Public Prosecution Service because there was ample evidence in the case file that the individuals involved were powerful and were embedded in parts of the government."[283] Based on this report, on April 23, 2009, the Ombudsman asked the General Directorate of the National Civil Police to provide Gustavo Tobar Fajardo with personal and perimeter safety measures.[284] According to Mr. Tobar Fajardo, the agents came to his home on just one day and advised him that if anything happened he should call them.[285]

E. Current situation of the Ramírez family

141. In addition to the requests and the briefs presented in the context of the applications for judicial review, Mr. Tobar Fajardo and Mrs. Ramírez Escobar took different steps to locate the children. Among other actions, they provided information on their case, through *Casa Alianza*, to a journalist who was researching irregular adoptions in Guatemala.[286] In 2002, this journalist was able to locate and interview Osmín Tobar Fajardo, living in the United State under the name of Ricardo William Borz.[287] The journalist informed Mr. Tobar Fajardo that Osmín "had cried while telling [him] that he misse[d] his parents and want[ed] to return to them."[288]

142. Mr. Tobar Fajardo and Mrs. Ramírez Escobar decided to wait until their son was older before tracing him themselves. In 2009, Mr. Tobar Fajardo was able to contact Osmín by the internet, through the Facebook social network.[289] Thereafter, they were in contact on a daily basis. However, they had communication difficulties because Osmín was no longer proficient in the Spanish language.[290]

143. In May 2011, Osmín travelled to Guatemala for a month and met up with his biological family.[291] In November 2015, Osmín decided to move to Guatemala,[292] where he is currently living

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[282] *Cf.* Complaint filed by Gustavo Tobar Fajardo on April 1, 2009, before the Ombudsman (evidence file, folios 4754 to 4757).

[283] Complaint filed by Gustavo Tobar Fajardo on April 1, 2009, before the Ombudsman (evidence file, folio 4756).

[284] *Cf.* Communication sent by the Ombudsman to the National Civil Police on April 23, 2009 (evidence file, folio 4758).

[285] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

[286] *Cf.* Psychological assessment of Gustavo Tobar Fajardo made by Zoila Esperanza Ajuchan Chis and provided by affidavit on May 9, 2017 (evidence file, folio 7082).

[287] On his American passport, Osmín appears as Ricardo William Borz and, on his birth certificate issued by the National Civil Registry (RENAP) of Guatemala, as Osmín Ricardo Borz Richards. *Cf.* Passport and birth certificate (evidence file, folios 4767 to 4769). Osmín Tobar Ramírez stated during the hearing that, "when [he] was 12 years old, [a journalist] interviewed [him] because [his] parents had received several telephone calls telling them that they had stolen Rico, and this got out and [the journalist came] and that made [him …] want to make an effort to look for [his] family again." Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[288] Brief of Gustavo Tobar of August 2, 2002 (evidence file, folio 4430), and *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

[289] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court and Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[290] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court, and Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6817).

[291] *Cf.* Testimonial video entitled "*Guatemala: Osmin Ricardo Tobar Ramirez (Rico Borz) returns to his family*" published on May 15, 2012 (evidence file, file of audiovisual material). Also available at:

with his father, his father's partner and their son.[293] Mrs. Ramírez Escobar and Mr. Tobar Fajardo have had no contact with J.R. since he was removed from the family (*supra* paras. 85 to 88). Osmín Tobar Ramírez advised that, in 2016, he was able to contact his brother, J.R., through Facebook; however, the latter indicated that he did not wish to know anything about the instant case.[294]

VIII
MERITS

144. In this chapter, the Court will examine the merits of the case, taking into account the State's partial acknowledgement of responsibility which was admitted in Chapter IV of this judgment. In order to clarify the scope of Guatemala's international responsibility for the facts of this case, the Court will examine the alleged violations as follows: (1) the rights not to be subject to arbitrary interference in family life, and to the protection of the family, the rights of the child, and to judicial guarantees and protection, and the prohibition of discrimination established in Articles 8(1), 11(2), 17(1),19 and 25(1) of the Convention; (2) the prohibition of human trafficking derived from Article 6(1) of the Convention; (3) the right to personal liberty of Osmín Tobar Ramírez established in Article 7(1) of the Convention, due to his placement in the *Niños de Guatemala* children's home; (4) the right to identity and a name of Osmín Tobar Ramírez recognized in Article 18 of the Convention, and (5) the right to personal integrity of the members of the Ramírez family established in Article 5 of the American Convention.

VIII-1
RIGHTS TO FAMILY LIFE[295] AND TO THE PROTECTION OF THE FAMILY,[296] RIGHTS OF THE CHILD,[297] JUDICIAL GUARANTEES[298] AND JUDICIAL PROTECTION,[299] IN RELATION TO

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https://www.youtube.com/watch?v=IEkmpGNGyz0 and Psychological assessment of Gustavo Tobar Fajardo made by Zoila Esperanza Ajuchan Chis and provided by affidavit on May 9, 2017 (evidence file, folio 7082).

292 *Cf.* Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

293 *Cf.* Psychological assessment of Gustavo Tobar Fajardo made by Zoila Esperanza Ajuchan Chis and provided by affidavit on May 9, 2017 (evidence file, folio 7085).

294 Also, according to Osmín Tobar Ramírez, in 2010, he contacted the adoptive mother of J.R., who told him that they did not want J.R. to have any contact with his biological family.

295 Article 11(2) of the Convention establishes that: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

296 Article 17(1) of the Convention establishes that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

297 Article 19 of the Convention establishes that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

298 Article 8(1) of the Convention establishes that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

299 Article 25(1) of the Convention establishes that: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS WITHOUT DISCRIMINATION[300] AND THE DUTY TO ADOPT DOMESTIC LEGAL PROVISIONS[301]

145. The Court notes that the facts of this case occurred in a context of serious irregularities in the Guatemalan child adoption procedures, encouraged by the institutional weakness of the organs of control, and a flexible and inadequate legislation that facilitated the establishment of organized criminal networks and structures dedicated to the "lucrative" business of intercountry adoptions (*supra* paras. 61 to 71). In Guatemala, following the internal armed conflict, intercountry adoptions increased exponentially, "mainly due to the lack of State control, corruption and a permissive legislation."[302] As the Special Rapporteur on the sale of children emphasized, "[w]hat started out as genuine efforts to place quickly children in dire need of homes turned into lucrative business deals when it became apparent that there was a great demand in other countries for adoptable babies"[303] (*supra* para. 61).

146. The Court underlines that, according to the CICIG, the quantitative and qualitative dimensions of the irregularities committed in the intercountry adoption procedures, which were tolerated by the public bodies responsible for controlling them, "leads to the conclusion that these were not exceptional in nature, but have been a systematic practice"[304] and that "they could not have been accomplished without the participation or at least the acquiescence of state agents."[305] Furthermore, it concluded that the perpetration of such offenses required the establishment of structures with the characteristics of transnational organized crime, where "[t]he participation of state institutions played a central role in the activities," through the actions of certain judges, officials of the Attorney General's Office, civil registrars, and immigration officials, among others.[306]

147. The Court also emphasizes that, since 1996, the Committee on the Rights of the Child had warned the State of the existence of illegal adoption networks in Guatemala and that the mechanisms to prevent and combat them were "insufficient and ineffective" (*supra* para. 65). However, it was not until 2007 that the State took measures to deal with this situation (*supra* para. 70).

148. Bearing in mind this context, in this chapter, the Court will examine and determine whether the removal of the Ramírez brothers from their family, by means of a declaration of abandonment, the subsequent intercountry adoptions and the remedies filed against these actions, violated the right not to be subject to arbitrary interference in family life, the protection of the family, the rights of the child, the guarantees of due process, judicial protection, and the prohibition of discrimination,

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[300] Article 1(1) of the Convention establishes that: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

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

[302] CICIG, Report on irregular adoptions in Guatemala, p. 22 (evidence file, folio 3019).

[303] Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos following her mission to Guatemala in July 1999, UN Doc. E/CN.4/2000/73/Add.2, para. 11 (evidence file, folio 2729), and expert opinion provided by affidavit by Carolina Pimentel González on May 16, 2017 (evidence file, folio 7280).

[304] CICIG, Report on irregular adoptions in Guatemala, p. 81 (evidence file, folio 3078).

[305] CICIG, Report on irregular adoptions in Guatemala, p. 81 (evidence file, folio 3078).

[306] *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 23 and 45 (evidence file, folios 3020 and 3042).

established in Articles 8(1), 11(2), 17(1), 19 and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of the Convention. To this end, the Court will: (A) make some general considerations on the obligations of States in cases involving children, to then examine (B) the irregularities and violations of due process committed in the proceedings on the declaration of abandonment; (C) the compatibility with the American Convention of the intercountry adoption procedures of the Ramírez brothers; (D) the effectiveness, diligence and reasonable time of the judicial remedies filed against the family separation, and (E) the prohibition of discrimination.

A. General considerations on the rights of the child

149. In the instant case, the alleged violations of the rights to judicial guarantees, judicial protection, the protection of the family and family life, and the rights of the child must be interpreted in light of the international *corpus juris* for the protection of the child. As this Court has indicated on other occasions, when examining the rights of the child, this *corpus juris* should serve to define the content and the scope of the obligations that a State has assumed.[307] Therefore, when analyzing the facts of this case, the Court will refer specifically to the Convention on the Rights of the Child.[308]

150. Children are holders of the rights established in the American Convention, in addition to being accorded special measures of protection under its Article 19.[309] That article has implications for the interpretation of all the other rights when the case refers to a minor, owing to his or her condition as such.[310] The Court understand that the due protection of the rights of the child, as a subject of rights, must take into consideration the intrinsic characteristics of children and the need to foster their development in order to take full advantage of their potential.[311] Children are able to exercise their rights for themselves progressively, as they develop a greater degree of personal autonomy.[312] Consequently, the Convention provides that the pertinent measures of protection for children are special or more specific that those established for adults.[313] The measures of protection that should be adopted under Article 19 of the Convention must be defined on the basis of the particular circumstances of each case.[314]

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[307] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 194, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 106.

[308] Guatemala ratified the Convention on the Rights of the Child on June 6, 1990, and it entered into force on September 2, 1990.

[309] *Cf. Case of Gelman v. Uruguay, supra*, para. 121; *Case of García Ibarra et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 17, 2015. Series C No. 306, para. 117, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 66.

[310] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 66.

[311] *Cf. Juridical Status and Human Rights of the Child,* Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, para. 56; *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 106, and Advisory Opinion OC-21/14, *supra*, para. 66.

[312] *Cf. Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 230; *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 143, and Advisory Opinion OC-21/14, *supra*, para. 66. See also, Committee on the Rights of the Child, General comment No. 7: Implementing child rights in early childhood, UN Doc. CRC/GC/7/Rev. 1, September 20, 2006, para. 17.

[313] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 66.

[314] *Cf. Case of Gelman v. Uruguay, supra*, para. 121, and *Case of García Ibarra et al. v. Ecuador, supra*, para. 117.

151. In addition, specifically with regard to family life, children have the right to live with their family, which is called on to meet their material, affective and psychological needs.[315] This Court has indicated that the mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life. In this sense, children should remain within their family unit, unless decisive reasons exist, based on their best interests, to choose to separate them from their family. In any case, the separation should be exceptional and preferably temporary.[316]

152. In any situation involving children, four crosscutting guiding principles must be applied and respected, namely: (i) non-discrimination; (ii) the best interests of the child; iii) the right to be heard and to participate, and (iv) the right to life, survival and development.[317] Any decision of the family, society or the State that involves a limitation to the exercise of any rights of a child must take into account the best interests of the child and abide strictly by the provisions governing this matter.[318] The Court reiterates that the best interests of the child are based on the dignity of the human being, on the intrinsic characteristics of children, and on the need to foster their development, taking full advantage of their potential.[319]

153. The Court has indicated that the determination of the child's best interests in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven harm or risks to the child's well-being, and not on those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes or generalized considerations regarding the parents' personal characteristics, or cultural preferences regarding certain traditional concepts of the family, are not admissible.[320]

154. Taking into account these general considerations, as well as the context in which the facts of this case occurred, the Court will now rule on the declaration of abandonment; the adoption procedures; the remedies against the family separation filed by the family, and the prohibition of discrimination in the context of those proceedings.

B. Declaration of abandonment

B.1 Arguments of the Commission and of the parties

155. The ***Commission*** argued that, in the declaration of abandonment proceedings "many irregularities were apparent, as well as the failure to provide evidence and to ensure due diligence on the part of the different state authorities." In general, it indicated that other less harmful

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315 *Cf.* Advisory Opinion OC-17/02, *supra*, paras. 67 and 71.

316 *Cf.* Advisory Opinion OC-17/02, *supra*, paras. 72, 75 and 77; *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 47, and *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 226.

317 *Cf.* Convention on the Rights of the Child, Articles 2, 3, 6 and 12; Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4 and 42 and Article 44(6)), November 27, 2003, UN Doc. CRC/GC/2003/5, para. 12, and Advisory Opinion OC-21/14, *supra*, para. 69. See also, expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7244).

318 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 65, and *Case of the Pacheco Tineo Family v. Bolivia, supra*, para. 218.

319 *Cf.* Advisory Opinion OC-17/02, *supra*, paras. 56, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 106.

320 *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 109, and *Case of Fornerón and daughter v. Argentina, supra*, para. 50.

measures than institutionalization and subsequent adoption were not considered, including the possibility of investigating Mrs. Ramírez Escobar's situation more thoroughly to assess the pertinence or need for providing her with the necessary support; locating the father of at least one of the children; looking into the extended family, or evaluating the conditions for re-establishing ties during the children's institutionalization. It also indicated that "there was no permanent and effective participation by any specialized agency to protect the rights of the Ramírez brothers." Specifically, it indicated, first, that the time that elapsed from December 18, when the anonymous complaint was received, and January 8, when the Attorney General's Office was asked to go to the home of Mrs. Ramírez Escobar, "constituted the first failure to comply with the obligation to determine […] the protective measures that might be needed to safeguard the best interests of the Ramírez children." Second, during this visit, "there is no indication that Osmín Tobar Ramírez or his brother were ever consulted about the accuracy of the complaint that was filed anonymously." Third, the Commission underscored that the court did not take into consideration the account given by Mrs. Ramírez Escobar on January 9, or "order any measure to verify the allegations that had been made." Fourth, it indicated that *Niños de Guatemala* did not have either the technical capacity or the independence and impartiality to conduct the social study of Mrs. Ramírez Escobar and of the children's situation.

156. Regarding the social study of February 1997, the Commission emphasized that it was based on interviews, but did not mention the names of those who had provided their testimony. Also, according to the Commission, this social study contradicts the report of January 9 indicating that the children had bruises and scars, without offering any documentary or expert evidence that would have corroborated the situation. In this regard, it underscored that this failure was not rectified by "any judicial authority throughout the proceedings on the declaration of abandonment." It also stressed that the right of the children – and, in particular, of Osmín Tobar Ramírez – to be heard was not ensured in the report, and statements were not taken from Mrs. Ramírez Escobar or Mr. Tobar Fajardo, or any other member of the family.

157. Fifth, the Commission emphasized that the reports of the Attorney General's Office, which used the mother's financial situation as a reason for removing the children, failed to "identify those who testified or the specific content of their statements," and did not take into account the possibility of other evidence. Sixth, it indicated that the social study on the godmothers did not include an interview with them, and they were not subject to a psychological assessment. Also, according to the Commission, the reference to the statement by Osmín Tobar Ramírez in that report is not substantiated by any documentary evidence. Seventh, it indicated that the report of the Judiciary's Psychology Unit on Mrs. Escobar Carrera, the children's maternal grandmother, took into account her sexual preferences to determine her alleged lack of suitability to take care of her grandchildren.

158. The ***representatives*** agreed with the Commission as regard the irregularities in the abandonment proceedings and the alleged violation of the right of defense. They argued that the authorities responsible for the proceedings had not obtained appropriate or sufficient reports or appraisals to prove or to reject the truth of the alleged situation of abuse, or the mother's allegations in relation to the truth of the neighbors' testimony. They added that the judge who declared the abandonment of the Ramírez brothers based her decision on a series of stereotypes and speculations without any basis and without making an objective assessment of the best interests of the children, Osmín Tobar Ramírez and J.R. Similarly, they indicated that the socioeconomic studies carried out on the family to determine their capacity to take charge of the children were not prepared by experts with guarantees of independence and impartiality, but by employees of *Niños de Guatemala*.

159. Regarding the children's fathers, the representatives indicated that the authorities had not taken any steps to locate them and they were never contacted. Also, according to the

representatives, the decision of August 6, 1997, provides no explanation of the reasons that led to rejecting the godmothers and the maternal grandmother as an appropriate family resource. Similarly, they argued that the judge based her decision on norms that were not applicable to the specific case, such as articles 6, 28 to 41, 43 and 45 of the Children's Code, which refer to the protection procedure to be followed in cases in which a child is attributed with a fact categorized as a misdemeanor or offense.

160. The ***State*** indicated that the decision to remove the Ramírez brothers from their family was based on the vulnerable situation in which the biological mother maintained the children, so that "the State's intention was to restore their right to a family through adoption." Nevertheless, the State of Guatemala acknowledged that "this interpretation violated the rights of the family" and was contrary to prioritizing the family unit. Regarding the rights of the child, it acknowledged that, in this case, the rights of the Ramírez brothers had been violated because "neither the family, nor the State, in its capacity of guarantor, could ensure their protection and development." Guatemala made no specific reference to the alleged violation of the right to be heard, but acknowledged that the remedies and appeals available in the law "were improperly processed" and "were not decided pursuant to the law."

B.2 Considerations of the Court

161. The American Convention has two articles that protect family life directly, and in a supplementary manner. This Court has considered that potential violations of this right must be analyzed, not only as a possible arbitrary interference in private and family life, under Article 11(2) of the American Convention, but also, based on the impact that they may have on a family unit in light of Article 17(1) of this instrument.[321]

162. In this case, the declaration of abandonment proceedings entailed the separation of the Ramírez family from the outset. The Court has already indicated that the right to protection of the family, recognized in Article 17 of the American Convention, involves, among other obligations, fostering the development and strength of the family unit as comprehensively as possible.[322] Also, pursuant to Article 11(2) of the Convention, everyone has the right to receive protection against arbitrary or abusive interference in their family[323] and, especially, children, because the family plays an essential role in their development.[324] Thus, the mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life.[325]

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[321] *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 175, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 174.

[322] *Cf.* Advisory Opinion OC-17/02, *supra*, para. 66, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 104.

[323] *Cf.* Advisory Opinion OC-17/02, *supra*, para. 71; *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 424, and Advisory Opinion OC-24/17, *supra*, para. 173.

[324] *Cf.* Advisory Opinion OC-17/02, *supra*, para. 71, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. supra*, para. 424.

[325] *Cf.* Advisory Opinion OC-17/02, *supra*, para. 72, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 104.

163. The family to which every child has a right is, above all, his or her biological family,[326] which includes the extended family. This family must protect the child and must also be the priority subject of measures of protection provided by the State.[327] This Court recalls that there is no single model for a family; thus, it should not be restricted to the traditional notion of a couple and their children because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties.[328]

164. In cases involving child custody, the Court has indicated that, in the absence of one of the parents, the judicial authorities have the obligation to try and locate the other father or mother, or other biological family members.[329] In addition, it has established that the expression "family members" should be understood in the broadest sense, encompassing all those linked by a close relationship.[330] Thus, expert witness Magdalena Palau Fernández indicated that "if no one in the extended family is able to care for a child, it is also necessary to seek someone in [the child's] emotional environment; in other words, next of kin who are not blood relatives and with whom the child has emotional ties."[331] Only if "all the preceding alternatives have been considered, investigated sufficiently, and then rejected, should consideration be given to a care alternative by people who the child does not know very well or even at all."[332]

165. One of the most serious State interferences in the family is that which results in its separation or break-up. The legal separation of a child from its biological family is only in order if it is duly justified in the best interests of the child, exceptional and, insofar as possible, temporary.[333] In particular, article 9 of the Convention on the Rights of the Child establishes that:

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

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326 *Cf.* Opinion provided by expert witness García Méndez during the public hearing in the *Case of Fornerón and daughter v. Argentina,* transferred to the file of this case by an order of the President of the Court of April 11, 2017 (*supra* footnote 5).

327 *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 119, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 104.

328 *Cf.* Advisory Opinion OC-21/14, *supra*, para. 272, and Advisory Opinion OC-24/17, *supra*, para. 178.

329 *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 119.

330 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 70, and *Case of Fornerón and daughter v. Argentina, supra*, para. 98. Similarly, *See, Cf.* Advisory Opinion OC-21/14, *supra*, para. 272, and Advisory Opinion OC-24/17, *supra*, para. 178.

331 Expert opinion of Magdalena Palau Fernández provided by affidavit on May 9, 2017 (evidence file, folio 7023).

332 Expert opinion of Magdalena Palau Fernández provided by affidavit on May 9, 2017 (evidence file, folio 7023).

333 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 77; *Case of Gelman v. Uruguay, supra*, para. 125, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. supra*, para. 416.

166. Taking these considerations into account, the Court will examine the declaration of abandonment proceedings conducted in this case, which separated the Ramírez children from their biological family, in order to rule on the arguments of the Commission and of the representatives concerning: (a) the irregularities committed during this procedure, and (b) the failure to provide a justification for the decision declaring the children in a situation of abandonment.

B.2.a Irregularities in the declaration of abandonment proceedings

167. In the case of *Fornerón and daughter v. Argentina*, the Court established that diligence and compliance with the legal provisions in judicial proceedings involving the custody of children were essential elements to protect the best interests of the child.[334]

168. The Children's Code established that, when a child was in a situation of abandonment or danger, the juvenile judge could order measures of protection (*supra* para. 74). The code did not explicitly establish the measures of protection that the juvenile judge could order, but did provide for the possibility of placing the child in a "children's" institution or establishment.[335]

169. Regarding the declaration of abandonment proceedings, the Children's Code established that, on becoming aware of an alleged situation that a child had been abandoned or was in danger, the juvenile judge should "order that the corresponding inquiry be conducted by a social worker; hear the complainant, the child, the parents or those having charge of the child, and order the measures that this Code establishes."[336] In particular, in relation to the proceedings that concluded with the declaration of abandonment of the Ramírez brothers, the Commission and the representatives argued that: (i) neither the parents nor the children were given a hearing, and (ii) no real verification of the complaint concerning their alleged situation of abandonment was conducted, among other reasons, because the social workers of *Niños de Guatemala* lacked the required independence and impartiality to carry out the socioeconomic studies of the Ramírez family in the context of the abandonment proceedings.

(i) Right to be heard

170. The Court notes that the obligation to hear the children and their parents included in the law corresponds to the right to be heard recognized in the American Convention. In this regard, this Court has indicated that Article 8(1) of the Convention establishes the right of everyone, including children, to be heard in proceedings in which their rights are determined.[337]

171. Specifically, with regard to children, the Court has indicated that this right should be interpreted in light of Article 12 of the Convention on the Rights of the Child, which establishes the right to be heard ensuring that the child's intervention is adapted to his or her age and maturity and does not result in prejudice to the child's true interests.[338] In fact, there is a direct relationship between the right to be heard and the best interests of the child. The proper implementation of the best interests of the child is not possible without respecting his or her right to be heard, and this includes "the right of every child to freely express her or his views freely in all matters affecting her

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334 *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 105.

335 Children's Code. Decree No. 78-79 of November 28, 1979, arts. 42.2 and 43 (evidence file, folio 3447), and *Cf.* Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folio 4304).

336 Children's Code. Decree No. 78-79 of November 28, 1979, art. 49 (evidence file, folio 3447).

337 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 196, and *Case of Furlan and family v. Argentina, supra*, para. 228.

338 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 99; *Case of Atala Riffo and daughters v. Chile, supra*, para. 196, and *Case of Furlan and family v. Argentina, supra,* para. 228.

or him" "and the subsequent right for those views to be given due weight according to the child's age and maturity."[339] The Committee on the Rights of the Child has underscored the importance of hearing the views of the child "whenever decisions are made to remove a child from his or her family because the child is a victim of abuse or neglect within his or her home,"[340] which is what it is argued allegedly occurred in this case and, as a result of which, proceedings were conducted to obtain a declaration of abandonment.

172. The Court reiterates that children exercise their rights progressively as they develop a greater degree of personal autonomy (*supra* para. 150). Consequently, those implementing this right, whether in the administrative or the judicial sphere, must take into consideration the specific conditions of the child and their best interests when arranging their participation, as appropriate, in the determination of their rights.[341] This consideration will try to ensure that the child has as much access as possible to the examination of his or her case.[342] The right to be heard also supposes that the child is adequately informed of his or her rights, and the reasons for and consequences of the proceedings that are being held; moreover, this information must be communicated to the child taking into account his or her age and maturity.[343] Thus, the Court considers that children must be informed that they have a right to be heard directly or through a representative if they so wish.[344]

173. In the instant case, Osmín Tobar Ramírez was between seven and eight years of age during the declaration of abandonment proceedings. According to his statement during the public hearing, he was never informed that a declaration of abandonment procedure was being conducted, or the implications that it could have for him.[345] Furthermore, according to the case file, Osmín Tobar Ramírez was never heard directly by the judge in charge of the proceedings for the declaration of abandonment. It appears that it was only a *Niños de Guatemala* social worker who asked Osmín Tobar Ramírez for his views on the possibility of his godmother taking charge of him.[346] The Court notes that there is no evidence of this interview in the case file beyond the words of the social worker of *Niños de Guatemala* in the report she sent to the corresponding juvenile court. However, even if she effectively consulted his views on living with his godmother, this Court underlines that he was not interviewed about the living conditions with his mother, his grandmother or his father at any stage of the judicial proceedings. Since it did not hear Osmín Tobar Ramírez, the judicial authority was unable to evaluate his views in the matter. To the contrary, absolutely no account was taken of his views and he was not even informed of, or provided with, an explanation on the proceedings that were taking place. This reflects the fact that the Guatemalan authorities did not consider him a subject of law, whose views were of paramount importance before a decision was taken that directly affected his best interests and that had significant consequences for his

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339 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 200 and *Case of Furlan and family v. Argentina, supra*, para. 230, citing the Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard. UN Doc. CRC/C/GC/12, July 20, 2009, paras. 15 and 53. See also, Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 43.

340 *Cf.* Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard. UN Doc. CRC/C/GC/12, July 20, paras. 53 and 54.

341 *Cf.* Advisory Opinion OC-21/14, *supra*, para. 122, citing the Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard. UN Doc. CRC/C/GC/12, July 20, para. 21.

342 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 102; *Case of Atala Riffo and daughters v. Chile, supra*, para. 199, and *Case of Mendoza et al. v. Argentina, supra,* para. 143.

343 *Mutatis mutandis,* Advisory Opinion OC-21/14, *supra*, para. 197.

344 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 199.

345 *Cf.* Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

346 *Cf.* Social study by the social worker of *Niños de Guatemala* on May 4, 1997 (evidence file, folio 4316).

development. This constituted a violation of the right to be heard and to be duly taken into account established in Article 8(1) in relation to Articles 19 and 1(1), all of the American Convention, to the detriment of Osmín Tobar Ramírez.

174. Furthermore, in the case of Gustavo Tobar Fajardo, the father of Osmín Tobar Ramírez, he was not heard and did not participate in the declaration of abandonment proceedings. In this regard, the Guatemalan Civil Code indicated that both the father and the mother were responsible for the care and maintenance of their children.[347] Similarly, the Convention on the Rights of the Child establishes that:

> States Parties shall use their best efforts to ensure recognition of the principle that **both parents** have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern (bold added).[348]

175. In particular, regarding proceedings for the removal of children from their parents, the Convention establishes that "all interested parties shall be given an opportunity to participate in the proceedings and make their views known."[349]

176. Even though Mr. Tobar Fajardo was living in Mexico at the time of the declaration of abandonment, he continued to be Osmín Tobar Ramírez's father. The temporary removal of children from their family does not mean that this ceases to be their family. The Court notes that, also, the authorities failed to contact the person who appeared as the father of J.R. on his birth certificate. Since both fathers bear the principal responsibility for the care of their sons (*supra* paras. 163 and 174), if it is found necessary to remove a child from one of the parents, the possibility of the other parent taking charge of the child should be the first consideration.[350]

177. The court that heard the case did not take any steps to contact Mr. Tobar Fajardo. To the contrary, it presumed that he had no interest or possibility of taking charge of Osmín Tobar Ramírez. Therefore, Mr. Tobar Fajardo's lack of participation entailed failure to comply with the provisions of the Children's Code that required hearing the children's parents. Furthermore, it also constituted a violation of the right to be heard established in Article 8(1) of the American Convention.

178. Regarding Mrs. Ramírez Escobar, the Court notes that she was a party to the proceedings, contrary to Gustavo Tobar Fajardo and Osmín Tobar Ramírez. Mrs. Ramírez Escobar submitted a statement on January 9, 1997, when, on her own accord, she went before the court to request the return of her children (*supra* para. 86). She was also interviewed by the Attorney General's Office during the social studies on her and her mother conducted by that office (*supra* paras. 94 and 95), and by the Judiciary's Psychology Unit during the psychological assessment of her and her mother (*supra* para. 98). However, it cannot be verified whether these interventions by Mrs. Ramírez Escobar were taken into account, because they are not reflected in the reasoning of the decision, which will be examined in greater detail in paragraphs 187 to 192.

(ii) Failure to verify diligently the complaint that the children had been abandoned

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347 *Cf.* Civil Code of Guatemala, October 9, 1963, art. 253 (evidence file, folio 3469).

348 Convention on the Rights of the Child, art. 18(1).

349 Convention on the Rights of the Child, art. 9(2).

350 *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 119.

179. With regard to the allegations concerning the failure to verify the complaint that the children had been abandoned, the Court notes that, in the instant case, an investigation was conducted that consisted, above all, in: (i) the visit of the Juvenile Department of the Attorney General's Office to the home of the Ramírez brothers to verify the complaint received (*supra* paras. 84 and 85); (ii) the social study on the situation of the Ramírez children carried out by the *Niños de Guatemala* social worker, during which neighbors and the President of *Niños de Guatemala* were interviewed (*supra* paras. 90 to 93); (iii) the social study on Mrs. Ramírez Escobar carried out by the Attorney General's Office for which neighbors, two unnamed women who allegedly knew her and worked helping people with their paperwork in the Finance Ministry, and Mrs. Ramírez Escobar were interviewed (*supra* para. 94); (iv) the social study of the maternal grandmother, Mrs. Escobar Carrera carried out by the Attorney General's Office, for which Mrs. Ramírez Escobar and other people who knew Mrs. Escobar Carrera were interviewed (*supra* para. 95); (v) the social study on the children's godmothers carried out by the *Niños de Guatemala* social worker, for which she visited the home of both godmothers and interviewed them, and also Osmín Tobar Ramírez (*supra* para. 96); (vi) the verification of whether Mrs. Ramírez Escobar or Mrs. Escobar Carrera had a police record (*supra* para. 98), and (vii) the psychological assessments of Mrs. Ramírez Escobar and Mrs. Escobar Carrera (*supra* para. 98).

180. The Committee on the Rights of the Child has indicated that the procedural guarantees to ensure that the best interests of the child are safeguarded signify that:

> Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment. This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, witnesses to certain incidents, among others. Information and data gathered must be verified and analysed prior to being used in the child's or children's best-interests assessment.[351]

181. The Court notes that several problems can be identified in the supposed investigation conducted to verify the alleged situation of abandonment of the Ramírez brothers. First, two of the social studies were prepared by the *Niños de Guatemala* social worker. This institution was where the Ramírez brothers had been placed and the one which, in turn, promoted the intercountry adoption program under which the Ramírez brothers were adopted (*supra* paras. 84 and 90 to 93). This reveals a possible interest in the results of the declaration of abandonment proceedings and, consequently, the staff of this organization were not competent to carry out the said social studies. In this regard, the Court underscores that the two reports prepared by *Niños de Guatemala* recommended "that they be declared abandoned so that they may be included in the adoption program sponsored by *Niños de Guatemala*" (*supra* paras. 93 and 96). Mrs. Ramírez Escobar alleged this possible lack of objectivity in her application for judicial review, which never received a response (*supra* paras. 102 and 105).

182. Second, as mentioned above, during the investigation, only Osmín Tobar Ramírez was interviewed about the possibility of living with his godmother and he was never asked about his relationship with his mother or his father (*supra* paras. 173). In addition, J.R., was never heard at any stage of the proceedings. Even though J.R. was only between one and two years of age, the Court recalls that children exercise their rights progressively according to their age and maturity, so that the States must take the appropriate steps to consider "non-verbal forms of communication, including play, body language, facial expression, and drawing and painting, through which very

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[351] Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 92.

young children demonstrated understanding, choices and preferences."[352] (*supra* paras. 150 and 172). In addition, regarding the obligation to hear the views of babies and very small children, the Committee on the Rights of the Child has indicated that:

> Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.[353]

183. Since Osmín Tobar Ramírez was not heard and no effort was made to hear J.R., the possibility of the children taking part in the determination of their best interests was not respected (*supra* para. 171).

184. Third, the Court notes that the judicial authorities failed to conduct any investigation into the contradictions that arose from the evidence. On the one hand, the report of the officials of the Attorney General's Office who visited the home of the Ramírez children indicated that they showed no signs of physical abuse (*supra* para. 85). On the other hand, the report prepared by *Niños de Guatemala* established that the President of that organization had indicated that the children were "[d]irty, hungry, showing signs of having been beaten and with little clothing" when they were received[354] (*supra* para. 91). Furthermore, regarding this organization's possible interest in obtaining the declaration of abandonment of the children and their subsequent adoption (*supra* para. 181), the Court underscores that the children were never examined in order to verify or reject this information. Even though, on January 13, 1997, the judge asked the Judiciary's Medical Forensic Service "[t]o establish whether the children had been abused"[355] (*supra* para. 89), there is no record in the case file that this examination was carried out or any observation in this regard in the ruling declaring that the children had been abandoned (*supra* para. 101).

185. Fourth, the investigation did not include interviews that could have been relevant to determine the children's situation. In this regard, no one other than the neighbors who had contact with the children was interviewed, such as other family members, close friends of the family, and the staff of Osmín Tobar Ramírez's school. Also, for the social study on the children's godmothers, only they and Osmín Tobar Ramírez were interviewed and no interviews were conducted with the husbands of the two godmothers or with other people who could have testified to their suitability to care for the children.

186. The Court considers that these shortcomings in the investigation prevented verification of the real situation of the Ramírez brothers and whether or not it was appropriate to order any measure of protection. Consequently, the Court concludes that the separation of the Ramírez family was carried out by means of proceedings that failed to comply with the procedure established in the Guatemalan Children's Code, and also was not aimed at ensuring the best interests of the children; rather, to the

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[352] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 122, citing the Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard. UN Doc. CRC/C/GC/12, July 20, para. 21.

[353] Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 44.

[354] During this interview, the President of the organization indicated that she had "received the children […] in a regrettable condition. Dirty, hungry, showing signs of having been beaten and with little clothing. […] Osmín had an infection in the lower part of the mouth which required antibiotics and analgesics for the pain. J.R. had bruises resulting from a blow, and Osmín had scars on his abdomen that, he indicated, had been caused by blows inflicted by his father." Social study of the children, J.R. and Osmín Tobar Ramírez prepared by *Niños de Guatemala* on February 3, 1997 (evidence file, folios 4381 and 4382).

[355] Communication of the First Juvenile Trial Court of January 13, 1997 (evidence file, folio 4386).

contrary, it revealed a readiness to agree to the intercountry adoption of the children from the outset (*supra* paras. 93, 96, 100 and 101).

B.2.b Failure to substantiate decisions

187. This Court has stressed that decisions made by domestic organs that may affect human rights must be duly substantiated because, if not, they would be arbitrary.[356] Thus, the reasoning of a ruling must show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed. Furthermore, the reasoning reveals to the parties that they have been heard and, in those case in which decisions can be appealed, it allows them to contest such decisions and achieve a fresh examination of the matter in question before the higher courts. Therefore, the duty to provide a statement of reasons is one of the "due guarantees" included in Article 8(1) of the Convention to safeguard the right to due process.[357]

188. Additionally, in specific cases concerning children, the decisions must "demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision."[358] In this regard, the Committee on the Rights of the Child has indicated that:

> In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated.[359]

189. The ruling of August 1997 which decided the declaration of abandonment merely listed the measures taken, the evidence gathered, and the laws applicable without including any reasoning on the best interests of the child or why the exceptional measure of removing the children from their mother was necessary (*supra* para. 101). The Court notes that the mere description of activities carried out and measures taken, together with a list of the laws that could be applicable to the acts or conducts penalized, does not meet the requirements of an adequate motivation. Moreover, the decision also failed to reflect whether alternatives to the declaration of abandonment had been given serious consideration. In this regard, the Court notes that the exceptional nature of family separation means that it is necessary to analyze whether the national authorities took all the necessary and appropriate measures that could reasonably be expected to ensure that the children could lead a normal family life within their own family before separating the family.[360] This means that, insofar as possible, family separations should only be temporary, and the State should

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[356] *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 152, and *Case of Zegarra Marín v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 331, para. 146.

[357] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 78, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312 para. 248.

[358] Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 14.b.

[359] Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 97.

[360] *Cf.* ECHR, *R.M.S. v. Spain.* Application No. 28775/12. Judgment of June 18, 2013, para. 82.

therefore take measures to encourage family reunion, including providing support to the children's family to avoid the separation or its perpetuation,[361] as well as the possibility of visits or other forms of maintaining the contact or personal relations between parents and children.[362] In the instant case, the judicial decision declaring that the children had been abandoned (*supra* para. 101), does not reflect that a future possibility of family reunion had even been contemplated following the initial separation to ensure that this was temporary, or the possibility of taking other positive measures to provide support to the family so that it could be reunited.

190. In addition, the judicial authorities failed to contact the father of Osmín Tobar Ramírez, or the person who appeared as the father of J.R. on his birth registration (*supra* paras. 174 to 177). Therefore, the first option when one parent is absent – the other parent – was not even considered (*supra* para. 176). Furthermore, the authorities did not consider other relatives of the Ramírez brothers who could haves taken charge of the children, which would have preserved the children's relations with their extended family. In this case, the children's maternal grandmother and their godmothers came forward of their own accord and requested their custody, but their requests were rejected without further consideration.[363] Additionally, the authorities failed to evaluate, *ex officio*, whether other close relatives with whom the children were in contact, such as the paternal grandfather of Osmín Tobar Ramírez, for example, could take charge of the Ramírez brothers and, thus, not have to remove them completely from their family environment.

191. Similarly, the rulings that initially decided the application for judicial review, before the adoptions were granted, ratified the declaration of abandonment but did not make a ruling on the absence of motivation. The judicial ruling of January 1998 declaring the application for judicial review inadmissible did not include any reasons; it merely indicated that the situation of the Ramírez brothers had not changed and that the removal of children from their parents was permitted when the best interests of the child required this (*supra* para. 107). Subsequently, in May 1998, in response to Mrs. Ramírez Escobar's insistence, another court "verified" that the abandonment

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[361] In this regard, Article 18 of the Convention on the Rights of the Child establishes that: "[…] 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible." Consequently, the Committee on the Rights of the Child has indicated that "the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child." Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 61.

[362] Article 9(3) of the Convention on the Rights of the Child establishes that "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."

[363] The custody requests by the children's maternal grandmother and godmothers were rejected based on superficial social studies that were full of stereotypes. The reports concluded that the godmothers and the maternal grandmother did not constitute a resource for the protection of the children, in part, due to the alleged lack of financial resources and, in the case of the maternal grandmother, also owing to her sexual orientation. Those elements are examined in greater detail in the section of this chapter on the prohibition of discrimination *infra*. However, the Court notes that the deficiencies in the investigation into the children's situation mentioned previously were also present in the investigation of the godmothers and grandmother. In particular, the failure to interview people who could have been relevant to determine the situation of the children; that the views of Osmín Tobar Ramírez were not heard regarding the possibility of living with his grandmother, or of J.R in any of the cases, and that the social study on the godmothers was drawn up by an organization that may have had an interest in the result of the declaration of abandonment proceedings. On this last point, it is worth emphasizing that the social study on the godmothers prepared by *Niños de Guatemala* even repeated the recommendation that "they should be declared to have been abandoned in order to be able to include them in the adoption program sponsored by *Niños de Guatemala*." Social study by the social worker of *Niños de Guatemala* of May 4, 1997 (evidence file, folio 4317).

decision was final and ordered the archive of the case, once again without providing any motivation (*supra* para. 110).

192. This Court considers that the absence of a statement of reasons prevents it from knowing the reasoning concerning the best interests of the children and whether these interests were really taken into account; also, whether measures were considered that were less harmful to the right to a family and the right of children to grow up within their biological family. Therefore, the judicial decision declaring that the Ramírez brothers had been abandoned not only lacked sufficient motivation, but did not meet the requirement that the removal of children from their family should be an exceptional measure.

B.2.c Conclusion

193. Based on the above, the Court concludes that the separation of the Ramírez family was carried out following insufficient investigation, and by proceedings that failed to comply with domestic law and violated the right to be heard. Moreover, the judicial rulings did not include an adequate and sufficient statement of reasons proving that the separation was a necessary measure for the best interests of the Ramírez brothers. Therefore, the proceedings on the declaration of abandonment constituted arbitrary interference in family life, and a violation of the rights to judicial guarantees and to the protection of the family established in Articles 8(1), 11(2) and 17(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, and also in relation to Article 19 of this instrument to the detriment of the latter.

194. The representatives also alleged the violation of Article 2 because the laws "did not guarantee that the children's views would be taken into account throughout the proceedings on the declaration of abandonment, or establish the latter as a measure of last resort."

195. In this regard, the Court notes that the articles of the Children's Code applied in this case corresponded to the traditional or "tutelary" model in which children were considered objects of protection. However, this model is not based on the primacy of the best interests of the child or on the recognition of the autonomy and dignity of children as subjects of rights. In this regard, it should be underlined that the Convention on the Rights of the Child, which entered into force in 1990 and which this Court considers is an essential component of the international *corpus juris* that underlies Article 19 of the American Convention (*supra* para. 149), expressly establishes the best interests of the child as an obligation required of administrative, legislative or judicial authorities and of private individuals when implementing any measure involving a child (*supra* para. 152). The best interests of the child, together with the other guiding principles that must be respected in any system of comprehensive protection[364] (*supra* para. 152), substantially modified the traditional approach to the treatment of minors. Thereafter, the conception of children as powerless subjects was abandoned to instead recognize their potential to be involved in any decision-making that affected them. Thus, they came to be considered free and autonomous persons with full rights who, according to their age and maturity, are able to decide on their own life and assume responsibilities (*supra* paras. 150, 171 and 172). The Convention on the Rights of the Child also includes a list of fundamental rights of different kinds – relating to acts that States must refrain from or undertake, and also to social benefits – that are necessary to ensure the adoption of measures of comprehensive protection which are adequate and pertinent in every situation.

196. From this new perspective, children are unquestionably acknowledged as subjects of law who, in exercise of their dignity, are active participants in their own destiny and who, due to their special

[364] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 69.

situation of vulnerability, must be comprehensively protected by the family, society and the State in order to achieve the full, autonomous and free development of their potential. In this situation, the best interests of the child are established as a crosscutting element with a multiplier effect that constitutes "a substantive right, a fundamental interpretative legal principle and a rule of procedure"[365] (*infra* para. 215). The articles of the Children's Code applied to this case were not adapted to this three-fold aspect of the best interests of the child or to the other guiding principles and rights derived from a conception of children as full subjects of law and not merely objects of protection. This is evident in the instant case, where the judicial authority that decided the children's situation never sought their views on the family separation (*supra* para. 173) and failed to provide an adequate and sufficient reason to justify the decision to separate the family by an analysis of the specific situation of the children (*supra* para. 192). Furthermore, the express wording of the norms established the declaration of "abandonment" or "danger" for situations where no adult "was in charge of the [children]" or they might "engage in an irregular or dissolute conduct," reflecting a perception of children as being powerless persons and objects of state protection, rather than as persons with regard to whom the State must respect and ensure all the rights established in the Convention, as well as some special measures for their satisfactory development and survival. Therefore, the Court concludes that the provisions of the Children's Code that regulated the proceedings for the declaration of abandonment did not conform to the American Convention and, consequently, resulted in a violation of Article 2 of the Convention in this case.

C. Adoption procedures

C.1 Arguments of the Commission and of the parties

197. The ***Commission*** argued that the extrajudicial adoption procedure did not require numerous investigations, or procedures and paperwork, and was not subject to mandatory review. It underlined that the context of irregular adoptions in Guatemala was facilitated by a permissive legal framework that established adoption through public notary, without any minimum procedural or substantive safeguards, such as the exploration of all possible alternatives before proceeding to authorize the adoption, or that the presence or declaration of consent of the parents should meet the relevant standards. In addition, this procedure did not require children to be heard or establish an individualized appraisal of the suitability of potential adoptive parents in relation to the specific needs of the child. It noted that, faced with the rejection of the adoption by the Attorney General's Office, because an appeal filed by Mrs. Ramírez Escobar was pending a decision, the adopters resorted to the Judiciary, but the judicial ruling that declared the adoptions admissible did not meet the minimum standards to guarantee the rights of the Ramírez children pursuant to their best interests. According to the Commission, the judicial authorities did not examine whether there were any remedies still pending, or the situation of Mrs. Ramírez Escobar, and did not take Gustavo Tobar Fajardo into account. In addition, they failed to assess the possibility that the children could be placed in the care of their extended family, or the possibility of in-country adoption. Consequently, they repeated the omissions that occurred in the declaration of abandonment. The Commission alleged that Guatemala had fast-tracked adoption requests for children to go to families living in the United States without considering that intercountry adoption should be exceptional and take place only when in-country adoption is not possible. It also pointed out that the court did not assess the suitability of the adoptive families in relation to the specific needs of the Ramírez brothers, who were separated, and it did not give a hearing to either the parents or the children during the adoption procedure. It stressed that, sometime later, both the Judiciary and the National Civil Police "acknowledged […] that [the procedure] suffered from diverse irregularities." The Commission considered that those irregularities violated the rights to be heard, to a family life free from arbitrary

[365] Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, paras. 6 and 14.

interference, and to the protection of the family established in Articles 8(1), 11(2), 17 and 19 of the American Convention.

198. The ***representatives*** alleged that the State had failed to comply with its obligations with regard to the said treaty-based rights because the decisions made concerning the separation and adoption of the children: (i) did not respect the criteria of being legal, necessary, exceptional and provisional, and (ii) did not contain a statement of reasons; (iii) the views of the children were not heard during the different procedural stages; nor were the parents heard and their consent obtained; (iv) no explanation was provided as to how the measures implemented protected the best interests of the two children, and (v) it appeared that no measures had been sought other than the separation of the children from their biological family. According to the representatives, the State failed to provide the mandatory protection and executed an unjustified intervention; first, by institutionalizing the children as the initial and only preventive measure; second, by decreeing their situation of abandonment using arbitrary and discriminatory criteria and, finally, by facilitating an intercountry adoption that signified their definitive separation from their biological family and country of origin. Therefore, the representatives asked the Court to declare the violation of Articles 11(2) and 17(1), in relation to Article 1(1) of the American Convention, to the detriment of all the victims, and Article 19 of the Convention in the case of the Ramírez brothers.

199. The representatives also indicated that the State had violated the rights contained in Articles 8(1) and 25 of the American Convention, in relation to its Article 1(1), to the detriment of the Ramírez family and Article 19 with regard to Osmín Tobar Ramírez, because the judicial ruling that authorized the adoption of the Ramírez brothers lacked a statement of reasons. Thus, the judge decided to authorize the children's adoptions without explaining or describing the reasons why intercountry adoption – as an exceptional and permanent measure of protection – constituted the most appropriate measure for the best interests of the children and the reasons why other less harmful measures aimed at reinsertion in their biological family were rejected.

200. The ***State*** did not add any specific arguments concerning the adoption procedure to those described previously in relation to the declaration of abandonment (*supra* para. 160)

C.2 Considerations of the Court

201. Intercountry adoption is a permanent form of substitute care that may be considered one of the possible measures of protection, as an alternative to the family circle, under Article 19 of the American Convention. Contrary to other permanent care measures, intercountry adoption separates children not only from their family environment, but also from their own country. Consequently, international law mandates that a series of substantive and procedural requirements are met at all stages of the adoption procedure to protect the human rights and the best interests of any child that is being considered for adoption abroad.[366]

202. In the instant case, the Court must determine whether the procedure for the intercountry adoptions of J.R. and Osmín Tobar Ramírez complied with the substantive and procedural requirements that international law mandates, taking into account the aforementioned guiding principles and in light of the obligations established in the American Convention (*supra* paras. 149 to 153).

203. As previously mentioned, the series of norms that seek to ensure the human rights of children constitute the international *corpus juris* that inspires and defines the content of Article 19 of the American Convention (*supra* para. 149). In the context of intercountry adoptions, these rules are

[366] *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6958).

reflected, above all, in article 21 of the Convention on the Rights of the Child, which establishes that:

> 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;
>
> (b) Recognize that intercountry adoption may be considered as an alternative means of childcare, 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;
>
> (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) Take all appropriate measures to ensure that, in intercountry 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.

204. This article, together with others of the Convention on the Rights of the Child, establishes the following specific State obligations that are relevant for adoption procedures: (i) to respect the right of the child to preserve his or her identity and family relations (article 8);[367] (ii) to render appropriate assistance to parents in the performance of their child-rearing responsibilities (article 18);[368] (iii) to ensure the adoptability of the child and the legality of the determination of the legal status of the child to be given up for adoption (article 21.a); (iv) to ensure that the parents have given their free and informed consent to the adoption (article 21.a), (v) to recognize that intercountry adoption may be considered an option only if there is no other appropriate alternative for the care of the child in his or her country of origin (Article 21.b); (vi) to ensure that intercountry adoption does not result in improper financial gain for those involved in it (Article 21.d), and (vii) to prevent the abduction of, the sale of or traffic in children (Article 35[369]).[370]

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[367] Article 8 of the Convention on the Rights of the Child establishes that: "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."

[368] Article 18 of the Convention on the Rights of the Child establishes that: "1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

[369] The said Article 35 of the Convention on the Rights of the Child establishes that: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

205. In addition, under the inter-American human rights system, most of the States Parties to the Convention and some OAS members[371] are also obliged by the 1993 Hague Convention on Intercountry Adoption. This treaty introduces certain obligations into the practice of intercountry adoptions[372] and has been considered an instrument for implementation of the Convention on the Rights of the Child in this regard.[373] Guatemala acceded to the Hague Convention on Intercountry Adoption in 2002, so that its specific obligations entered into force for that State in March 2003.[374] However, owing to internal proceedings on the unconstitutionality of the accession to this treaty, the Constitutional Court only recognized Guatemala's accession to the convention in May 2007 (*supra* paras. 69 and 70). The proceedings for the adoption of the Ramírez brothers began in 1998 and the final appeal was archived in September 2002 (*supra* paras. 112 to 136). Therefore, the substantive and procedural obligations derived specifically from the Hague Convention on Intercountry Adoption are not applicable to the facts of this case.

206. The Inter-American Court will analyze the intercountry adoptions that took place in this case based on the obligations in force for Guatemala at the time of the events; particularly, the Convention on the Rights of the Child, which inspires the content of Article 19 of the American Convention (*supra* paras. 149, 203 and 204). Also, given the effects that adoption has on the family, the violations committed during adoption procedures have a supplementary impact on the right to the protection of family life established in Articles 11(2) and 17(1) of the American Convention (*supra* paras. 161 and 162). Lastly, as in the case of any procedure in which rights are determined, adoption procedures must respect the minimum judicial guarantees established in Article 8(1) of the Convention. Therefore, in this case, the Court will examine the intercountry adoptions pursuant to the obligations derived from Articles 8(1), 11(2), 17(1) and 19 of the

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370 *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6941).

371 The Hague Convention on Intercountry Adoption is applicable in the following OAS States: (1) Bolivia (July 1, 2002); (2) Belize (April 1, 2006); (3) Brazil (July 1, 1999); (4) Canada (April 1, 1997); (5) Chile (November 1, 1999); (6) Colombia (November 1, 1998); (7) Costa Rica (February 1, 1996); (8) Cuba (June 1, 2007); (9) Dominican Republic (March 1, 2007); (10) Ecuador (January 1, 1996); (11) El Salvador (March 1, 1999); (12) Guatemala (March 1, 2003); (13) Haiti (April 1, 2014); (14) Mexico (May 1, 1995); (15) Panama (January 1, 2000); (16) Paraguay (September 1, 1998); (17) Peru (January 1, 1996); (18) United States of America (April 1, 2008); (19) Uruguay (April 1, 2004), and (20) Venezuela (May 1, 1997). The dates correspond to the entry into force of the treaty for each State.

372 *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6940). The preamble to the Hague Convention establishes that it desires "to establish common provisions […], taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986)." Preamble to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

373 *Cf.* UNICEF, International Child Development Center. Innocenti digest No. 4*: Intercountry adoption,* 1999, p. 5. Also, the Committee on the Rights of the Child has recommended to several States Parties to the Convention on the Rights of the Child that they adopt the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption for this reason. In this regard, see*,* UN, Committee on the Rights of the Child, Report to the UN General Assembly, May 8, 2000, UN Doc. A/55/41(SUPP).

374 According to article 44 of the Hague Convention on Intercountry Adoption, States that are not Members of the Hague Conference on Private International Law "may accede to the Convention after it has entered into force," and "[s]uch accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph b) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary." In the case of Guatemala, five States (Canada, Germany, the Netherlands, Spain and the Kingdom of Great Britain and Northern Ireland) raised objections to its accession owing to the failure to adapt its domestic laws to the obligations arising from the treaty; therefore, the convention has not entered into force between those States and Guatemala. *Cf.* Status table: Declaration/reservation/notification. Available at: https://www.hcch.net/en/instruments/conventions/statustable/notifications/?csid=767&disp=type.

Convention, in light of the specific obligations established in the Convention on the Rights of the Child.

207. In this regard, the Committee on the Rights of the Child has indicated that, in order to ensure full respect for the preconditions provided under article 21 of the Convention on the Rights of the Child during adoption procedures, State should observe the following: (i) adoption of children should only be considered once it has been established that the child is in a position to be adopted; (ii) any adoption must be determined as being in the child's best interests and carried out in keeping with applicable national and international law; (iii) 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, and (iv) priority must be given to adoption by relatives in their country of residence and, 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/her own culture.[375]

208. The Court finds that, in order to determine the compatibility of the intercountry adoption procedures carried out in this case with the American Convention, it must verify whether the following requirements were met: (i) that it was verified that the children could be legally adopted (adoptability); (ii) that the best interests of the children were assessed as a determinant factor and primordial consideration in the adoption decision (best interests of the child); (iii) that the right of the children to be heard was guaranteed (right to be heard); (iv) that intercountry adoption was only authorized after verification that the children could not be provided with adequate care in their own country or the country of habitual residence (subsidiarity principle), and (v) that it was verified that no individual or entity had obtained improper financial gain at any stage of the adoption procedure (prohibition of improper financial gain).

C.2.a Adoptability of the Ramírez brothers

209. Establishing adoptability involves determining that this measure is legally authorized "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,"[376] in accordance with article 21.a of the Convention on the Rights of the Child. In practice, determining adoptability means that attempts to locate and reunite the family have been unsuccessful, or that the parents have given their consent to the adoption.[377]

210. In this case, the legal grounds for the rupture of the family ties between the Ramírez brothers and their biological parents were provided by the declaration of abandonment (*supra* paras. 101 and 115), which this Court has determined constituted arbitrary interference in the family life of the Ramírez family because the declaration did not comply with domestic law and it had not been proved that removal from their family was in the best interests of the Ramírez brothers (*supra* para. 193). Despite the violations that have been identified in the declaration of abandonment proceedings and in the remedies filed against it, the extrajudicial adoption procedures were initiated following that judicial ruling which served as the legal grounds.

211. In extrajudicial adoption procedures, such as those carried out in this case, the Attorney General's Office had to authorize the process initiated through a notary's office (*supra* para. 78).

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375 *Cf.* Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, September 1, 2005, para. 91.

376 Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6945).

377 *Cf.* Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, September 1, 2005, para. 91.

This intervention by the Attorney General's Office was the only measure of state control required in a notarial adoption procedure[378] by which the requisite of adoptability could be verified. However, as the CICIG has noted, in practice, this state control was limited to a verification of formal requirements, because no investigation was conducted or action taken to verify the information, nor was the presence of the biological mother required, and neither was there any communication with other authorities with competence for the protection of children.[379] If the Attorney General's Office detected any formal anomaly, "it sent a note to the notaries requiring them to rectify the error."[380] The purpose of the observations of the Attorney General's Office was not to suspend the adoption procedure; rather, to the contrary, its intention was to rectify errors and facilitate completion of the missing information in order to conclude the procedure. Thus, by converting irregularities into simple omissions and facilitating rectifications, such observations formally facilitated the adoption.[381]

212. In the instant case, it should be underscored that, in the context of this verification, at the beginning of May 1998, the Attorney General's Office raised objections to the adoption of the Ramírez brothers, "because judicial proceedings have not been exhausted," without naming the remedy that was pending or making any investigation into, or verification of, the children's legal status (*supra* para. 114). At the end of May 1998, this lack of precision regarding the judicial remedy that was pending was used by the Family Trial Court of Sacatepéquez to reject the arguments of the Attorney General's Office and to declare "the adoption procedures admissible," even with the unfavorable opinion of the only state entity responsible for supervising such procedures (*supra* para. 115).

213. The Court notes that, in the judicial decision concerning Osmín Tobar Ramírez, the court rejected the objection raised by the Attorney General's Office merely on the basis that a certification of the file existed, dated January 30, 1998, which indicated that "no remedy or notification [was] pending" (*supra* para. 115). In addition, it only made a formal verification of compliance with the legal requirements and, on this basis, authorized the adoption of Osmín Tobar Ramírez, without making a thorough assessment of his legal status or even a serious analysis of the argument of the Attorney General's Office that an interlocutory proceeding was pending a decision. At that date, although a decision was being reviewed (*supra* para. 110), a thorough examination of the case file would have revealed that some issues were pending, particularly, when the Attorney General's Office, the only state organ with specific oversight functions in the notarial adoption procedure, had indicated that a ruling on judicial remedies was pending.[382] The rights and interests at stake called

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[378] In addition to the notary, for both the civil registrars when registering the adoption, and the Immigration officials when issuing passports in cases of intercountry adoption, the favorable decision of the Attorney General's Office was a specific requirement. *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 30 and 82 (evidence file, folios 3027 and 3081).

[379] *Cf.* CICIG, Report on irregular adoptions in Guatemala, pp. 31 and 42 (evidence file, folios 3028 and 3039). Similarly, expert witness Jaime Tecú indicated that, in many cases, "the Attorney General's Office [PGN] implemented a system of reviewing the documents submitted to it; merely a review of the documents in the case file; it never reviewed the children's guarantees: whether the child had a family, if this family was still claiming their child. Rather, if any document was missing in the case file, it issued a 'caution' indicating 'before taking a decision' bring this document or incorporate this document. Therefore, if there was a problem in the notarial adoption, they went to the judge and the judge took a decision without the opinion of the PGN; thus, in such cases, the judicial mechanism was used to circumvent the PGN's request, by indicating that 'this document is required.'" Expert opinion provided by Jaime Tecú during the public hearing held before this Court and written version of this opinion (merits report, folio 1098).

[380] CICIG, Report on irregular adoptions in Guatemala, p. 42 (evidence file, folio 3039).

[381] *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 42 (evidence file, folio 3039).

[382] It should be underlined that, according to the helpful documentation forwarded by the State in December 2017, a lawyer, in representation of Mrs. Ramírez Escobar, had advised the Attorney General's Office, in February 1998, that "the mother of the [two] children had been deprived of them by the processing of a case fraught with anomalies," and an application for judicial review had been filed. The note requested that "strict control should be kept over the

for a more formal and more extensive review. This Court stresses that the alleged certification on which the court based itself had been issued before the application for judicial review filed by Mrs. Ramírez Escobar had obtained a final ruling; this was ultimately decided in favor of the children's parents, almost two and a half years after the court's decision declaring the adoption admissible (*supra* para. 128). Although this Court does not have a copy of the judicial decision with regard to J.R., it notes that, by ordering the notary to grant the adoption papers, that court rejected the same arguments of the Attorney General's Office and did not take them into account.

214. Due either to lack of coordination between the Judiciary, the family courts and the juvenile courts, or to the lack of diligence of specific judicial officials, at the time the adoptions of the Ramírez brothers were judicially authorized, the children were not adoptable, because their legal status had not been resolved. Therefore, by authorizing and granting the adoptions of Osmín Tobar Ramírez and of J.R., the State failed to comply with this first requirement.

C.2.b Assessment of the best interests of the child

215. As previously mentioned, the best interests of the child is a threefold concept constituted by a substantive right, a fundamental interpretative legal principle, and a rule of procedure (*supra* para. 196). As a substantive right, it creates the obligation of the State to assess and consider the child's best interests in any matter that concerns him or her.[383] As an interpretative principle, it guarantees that in any situation in which a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.[384] As a rule of procedure, this principle ensures that whenever a decision is to be made that will affect a child, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned.[385] The Committee on the Rights of the Child has stressed that this requires procedural guarantees, and the decision must explain how that right has been taken into account; "that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."[386]

216. In the context of adoptions, the Committee on the Rights of the Child expressly establishes that the best interests of the child are a "primary consideration" (*supra* para. 203). This means that they have the highest priority, over and above other considerations.[387] If adoption is being considered, it is necessary to assess and determine, in each specific case, that this is pursuant to the best interests of the child and his or her human rights, and why adoption is the best option for that child. It entails assessing the adoptability of the child from a psychosocial perspective "establishing, on the one hand, that the child will truly benefit from the adoption and, on the other,

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measures pursued by the children's home […] in relation to the adoption of these two children" (evidence file, folios 7987 and 7989).

383 *Cf.* Committee on the Rights of the Child, Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 6, and Committee on the Rights of the Child, General Comment No. 17: Implementing child rights in early childhood, September 20, 2006, UN Doc. CRC/C/GC/7/Rev.1, para. 13.

384 *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 6.

385 *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 6.

386 Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, paras. 6 and 14.

387 *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, paras. 36 to 40.

that the adoption may potentially be seen as the most appropriate measure to satisfy the general needs of the child and his or her rights."[388]

217. In the extrajudicial adoption procedure in force in Guatemala and applied in this case, neither law nor practice was clear or explicit as regards which organ, entity or authority was responsible for verifying the best interests of the child as a "paramount consideration" in each specific case of adoption, or even if this was one of the legal requirements that were verified in order to authorize the adoption. As previously mentioned, the Attorney General's Office was the state organ to which Guatemala had assigned a certain degree of oversight over notarial adoptions, but this entity did not conduct an individualized examination of the psychosocial circumstances of the child whose adoption was requested in order to determine whether this measure was appropriate to guarantee his or her best interests. In the instant case, beyond noting that a decision on an "interlocutory proceeding" was pending, the Attorney General's Office did not make any autonomous assessment of whether the adoptions satisfied the best interests of the Ramírez children in either of the two decisions it issued (*supra* para. 114).

218. As previously mentioned, even though the adoptions of J.R. and Osmín Tobar Ramírez were carried out by the extrajudicial procedure, a judicial authority intervened, owing to the adverse opinion of the Attorney General's Office (*supra* paras. 114 and 115). However, that court did not review or analyze whether intercountry adoption was the most suitable alternative for the best interests of the children, merely making a formal verification of the contents of the case file (*supra* para. 213). The motivation for that court's rulings merely indicated that it authorized the adoptions of the Ramírez brothers because it had verified that: (i) in January 1998, the declaration of abandonment had been declared final, even though this was an error; (ii) the adoptive parents "had complied fully with all the legal requirements," and "demonstrated their moral and financial solvency" based on the socioeconomic study "conducted in their place of origin" and the statements of the witnesses who were present, and (iii) that the "argument used by the Attorney General's Office to reject this procedure [was] not legally valid."[389]

219. This Court emphasizes that, according to the said judicial authority, the criteria regarding the qualities and capacities of the adoptive parents was based partly on a socioeconomic study prepared by an entity in their country of origin, without any autonomous supervision, control or verification by the State or any private entity delegated by the State. Those reports were not provided to the case file. However, it is underscored that, according to the CICIG, "[s]uch reports and opinions merely assessed the possibility of maintaining the child financially, and not his or her suitability for, or compatibility with, the adoptive family."[390]

220. In conclusion, the Court notes that the judicial authority that authorized the intercountry adoptions of Osmín Tobar Ramírez and J.R., did not assess whether those adoptions were the most appropriate measure to ensure the best interests of the two boys based on their individual circumstances, such as the fact that the adoptions would lead to the definitive separation of the brothers and the rupture with their national identity and culture, among other aspects that should have been taken into account (*infra* para. 226).

221. In addition, "a social worker" attached to the family court of the respective jurisdiction intervened in the notarial procedure, and had "to give a favorable opinion [on the adoption] on

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[388] Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6945).

[389] Order of the Family Trial Court of the department of Sacatepéquez of May 26, 1998 (evidence file, folios 6576 a 6578).

[390] CICIG, Report on irregular adoptions in Guatemala, p. 41 (evidence file, folio 3038).

oath."[391] According to expert witness Jaime Tecú, this opinion was provided by means of a socioeconomic study in which it was verified whether the child "was really in need of being adopted, after examining his or her situation, and generally, these reports indicated that the children was in need of adoption."[392] Despite having asked the State to provide them,[393] the Court does not have the socioeconomic studies presumably prepared by a social worker attached to the family court in the context of the adoptions of Osmín Tobar Ramírez and J.R. However, the considerations in the adoption papers reveal that those reports "attest to the honorability, propriety, moral values and financial possibilities of the adoptive parents to meet the obligations imposed by the adoption."[394] This does not constitute an assessment and determination that the intercountry adoptions of Osmín Tobar Ramírez and J.R. were in their best interests; it merely attests to the qualities of the adoptive parents.

222. Following the intervention of the social worker and the Attorney General's Office or, if applicable, the family court, the adoption was handed over to the notary, to whom the State delegated "the adoption regulated in the Civil Code." Although the specific norm establishes that the adoption was "formalized" before the notary public, the Court notes that the notary was responsible for verifying compliance with the formal requirements, hearing the Attorney General's Office (obtaining its favorable opinion or that of the respective family court) and, if applicable, "granting the respective [adoption] papers"[395] (*supra* paras. 77 and 78). The CICIG and expert witnesses before this Court have categorized this delegation as a privatization of adoptions[396] (*supra* para. 62).

223. The Committee on the Rights of the Child has emphasized that States parties to the Convention on the Rights of the Child "have an obligation to ensure that non-State service providers operate in accordance with its provisions, thus creating indirect obligations for such actors."[397] The delegation to the private sector does not in any way lessen the State's obligation to ensure, for all children within its jurisdiction, the full recognition and realization of all rights.[398] In particular, "the obligation of the States to duly consider the child's best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children."[399] Therefore, the Court stresses that, when delegating the granting of adoptions to notaries, it was the State's responsibility to

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[391] Law regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, art. 29 (evidence file, folio 396).

[392] Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[393] The State was asked to provide these reports as helpful evidence. The State indicated that it had asked the judiciary to provide them and would forward them to the Court once they had been received. At the date of the delivery of this judgment, the said reports had not been presented to the Court.

[394] Adoption papers of June 2, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 125 and 126), and adoption papers of June 2, 1998, with regard to J.R. (evidence file, folios 117 and 118).

[395] Law regulating the Notarial Processing of Matters of Voluntary Jurisdiction, Decree Law No. 54-77 of November 5, 1977, arts. 28 to 32 (evidence file, folio 396).

[396] *Cf.* CICIG, Report on irregular adoptions in Guatemala, p. 23 (evidence file, folio 3020). See, similarly, written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court (merits report, folio 1098), and Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6823).

[397] *Cf.* Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4 and 42 and Article 44(6)), November 27, 2003, UN Doc. CRC/GC/2003/5, para. 43.

[398] *Cf.* Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4 and 42 and Article 44(6)), November 27, 2003, UN Doc. CRC/GC/2003/5, para. 44.

[399] *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 25.

ensure that those private individuals respected and guaranteed, among other matters, the right concerning the best interests of the child as a paramount consideration when granting an adoption.

224. However, the Court observes that the adoption papers do not reveal that an assessment was made of whether the intercountry adoption of the children by two different families was the most appropriate care alternative, based on their individual and family circumstances. Like the decision of the court authorizing the adoptions, the notary merely verified compliance with formal requirements, described the steps taken in the procedure, and granted the corresponding adoption papers.[400]

225. Expert witness Jaime Tecú explained that, in Guatemala, "the abandonment declarations that were issued by judicial proceedings before the juvenile courts were frequently methods or the avenue used to enable adoptions" because the courts handed children over to children's homes connected to adoption agencies that linked children with adoptive families, even before their legal status in relation to their family of origin had been decided.[401] The best interests of the child "were reduced to intercountry adoption because, according to the protection system, poor families, or those living in marginalized areas, or those who had to work, were unsuitable for children."[402] This was the situation in the instant case, in which: (i) the children were declared abandoned based, in part, on social studies prepared by the same organization that had the adoption program under which they were adopted (*supra* para. 181); (ii) the intercountry adoption procedures were started in April 1998, almost immediately after the initial decision was issued during the application for judicial review of the declaration of abandonment, a decision that was subsequently amended when the children had already been given up for adoption and left the country (*supra* paras. 107, 112, 124 and 128), and (iii) the only care alternative considered, following the separation of the family by a judicial decision, was that of intercountry adoption (*infra* paras. 231 to 233).

226. The determination of the best interests of the child, when intercountry adoption is a possibility, is a complex exercise, because it is necessary to assess to what extent intercountry adoption would be compatible with other rights of the child (such as, the right to grow up and be cared for by his or her parents[403] or the right not to be illegally or arbitrarily deprived of any of the elements of his or her identity[404]), as well as the child's family situation (including sibling relationships) and the need "to try and predict the child's possibility of adapting to the new care arrangements in a new environment."[405] The Committee on the Rights of the Child has established that, to assess and

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400 *Cf.* Adoption papers of June 2, 1998, with regard to Osmín Tobar Ramírez (evidence file, folios 125 and 126), and adoption papers of June 2, 1998, with regard to J.R. (evidence file, folios 117 and 118).

401 *Cf.* Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

402 Written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court (merits report, folio 1106).

403 In this regard, article 7(1) of the Convention on the Rights of the Child establishes that: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

404 In this regard, article 8 of the Convention on the Rights of the Child establishes that: "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.

405 Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6959). Expert witness Nigel Cantwell suggested that, for a child's best interests to be considered in an intercountry adoption procedure, the State of origin must ensure, through its competent authorities, that the following steps are taken: (i) determine adoptability; (ii) allow the child to freely indicate or deny consent; (iii) prepare a report on the child, including determination of best interests; (iv) prepare the child for the adoption; (v) organize a preliminary meeting between the possible adoptive parents (proposed by the receiving State and provisionally accepted by the State of origin) and the

determine the child's best interests in order to take a decision on any specific measures, the following steps must be taken: (a) determine the relevant elements required for a best-interests assessment in light of the specific circumstances of each child; give them concrete content and assign weight to each in relation to one another,[406] with the particularity that, in respect of adoption, the right of best interests must be "the paramount consideration,"[407] and (b) "follow a procedure that ensures legal guarantees and proper application of the right."[408]

227. In the instant case, as previously verified, neither the Attorney General's Office, nor the family court or the notary who intervened in the procedures for the adoption of Osmín Tobar Ramírez and J.R. assessed or determined that the intercountry adoption of the two children was the most appropriate measure based on their best interests. Furthermore, the notarial adoption procedure did not ensure that the guarantees of due process of the children or their parents were respected, such as the right to be heard (*infra* paras. 228 and 230) and the proper application of the right. Therefore, the Court concludes that the State failed to comply with its obligation to ensure that the best interests of the Ramírez children were the paramount consideration in the adoption of J.R. and of Osmín Tobar Ramírez.

C.2.c Right to be heard

228. As previously mentioned, children have the right to be heard on all matters that affect them in accordance with their age and maturity (*supra* paras. 170 to 172). Adoption, whether in country or intercountry is undoubtedly one of such matters. Owing to this right, during the procedures for the adoption of the Ramírez brothers, the children should have been heard so that they could give their views, and those views should have been considered taking into account their age and maturity in 1998 (*supra* para. 172). Implicit in this right is that the child should be counselled and duly informed of the consequences of the adoption and of his or her consent to it, if applicable.

229. The right to be heard is one of the procedural guarantees required to comply with the child's best interests (*supra* para. 171). In an adoption procedure, the best interests of the child cannot be ensured if the child in question is not heard, because his or her views are an essential element in order to take this decision.

230. In the instant case, there is no evidence whatsoever that either Osmín Tobar Ramírez or J.R. were heard or that their views were considered in order to authorize and grant their adoptions. Indeed, Osmín Tobar Ramírez stated during the hearing that no one asked for his views during the adoption procedure or even explained to him that he was going to be adopted; rather, he realized what was happening when he saw foreigners "entering and leaving [the children's home] and collecting children," and that "those children who were in the same children's home left and never

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child; (vi) provide the possible matched adoptive parents and the child with an opportunity to develop ties of affinity, under adequate supervision and with access to counselling and, if these ties of affinity are successfully established, (vii) entrust the child to the adoptive parents and legalize the adoption. *Cf.* Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folios 6959 and 6960).

406 According to the Committee, the elements to be taken into account when assessing the child's best interests are: (i) the child's view; (ii) the child's identity; (iii) preservation of the family environment and maintaining relations; (iv) care, protection and safety of the child; (v) situation of vulnerability; (vi) the child's right to health; (vii) the child's right to education. *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, paras. 48 to 84.

407 *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 38.

408 *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 46.

returned."[409] The notarial adoption procedure completely dispensed with the children's views and, thus, was geared more towards ensuring the interests of the adoptive parents rather than those of the children.[410] Consequently, this Court considers that the State also failed to comply with the requirement of ensuring the right of the children to be heard in relation to their intercountry adoption.

C.2.d Subsidiarity of intercountry adoption

231. The principle of subsidiarity signifies intercountry adoption should only be considered if it has not been possible to find adequate alternative care in the child's country of origin. The "principle of subsidiarity" serves as the grounds for deciding whether intercountry adoption is necessary and in the child's best interests, rather than any appropriate solution within the country of origin that might be available. According to this principle, intercountry adoption should only be approved "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" (*supra* para. 203).

232. Consistent with the arguments of the Commission and the representatives, the Committee on the Rights of the Child has indicated that intercountry adoption should be considered as a measure of last resort.[411] Expert witness Nigel Cantwell explained that, although perhaps it was not appropriate to speak of "last resort,"[412] it was clear that the Convention on the Rights of the Child established the requirement that all potentially appropriate domestic options must be examined before considering the possibility and desirability of an intercountry adoption,[413] based on both article 21.b of the Convention on the Rights of the Child and also on article 20.3 of this instrument which establishes that, "[w]hen considering solutions, due regard shall be paid to the desirability of

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409 Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

410 According to the CICIG report, "in Guatemala, frequently, intercountry adoption is not a means of obtaining a family for the vulnerable child, but rather has been a mechanism to obtain children for those requesting them." CICIG, Report on irregular adoptions in Guatemala, p. 81 (evidence file, folio 3078).

411 *Cf.*, *inter alia*, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations of the Committee on the Rights of the Child: Mexico*, February 7, 1994, CRC/C/15/Add.13, para. 18, and Committee on the Rights of the Child*, Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Bolivia*, February 11, 2005, CRC/C/15/Add.256, para. 42.

412 The expert witness explained that a "child protection measure should never be decided on the grounds that it is the 'last resort.' The purpose of child protection systems is to determine which of the various available options responds best to the needs and respects the human rights of each child individually from a positive and constructive point of view. There is an important difference between, on the one hand, establishing the need to examine the possible national solutions for adequate care before considering cross-border solutions and, on the other, examining cross-border solutions from the perspective that they constitute a 'last resort.' If a child's legal and psychosocial adoptability has been duly established, the responsibility of those in charge of decision-making should be to demonstrate that intercountry adoption is necessary to ensure 'appropriate care' for a child because no domestic alternative is considered 'suitable' (CRC, article 21.b). Consequently, the approach should be based on the requirement of, first, examining viable national solutions, and on the need to establish that the intercountry adoption not only constitutes the only identifiable measure to ensure the 'appropriate care' of the child, but also – and importantly – a positive move for the child in question." Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6958).

413 Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6958).

continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.[414]

233. The Court notes that, in this case, once the children had been declared abandoned, the only permanent care option considered was intercountry adoption. Notwithstanding that the possibility of the children remaining in the care of their extended family was inappropriately discarded during the abandonment proceedings (*supra* para. 190), this Court stresses that the possibility of an in country adoption or other form of care in their country of origin – which would have respected their right to develop in keeping with their ethnic, religious, cultural and linguistic background – was not even assessed or considered before the children were given up for adoption to families abroad. Consequently, the Court concludes that the State also failed to comply with the principle of subsidiarity by granting the intercountry adoptions of J.R. and Osmín Tobar Ramírez.

C.2.e Prohibition of improper financial gain

234. The Convention on the Rights of the Child expressly establishes the obligation of States to ensure that intercountry adoption does not constitute or result in improper financial gain (*supra* para. 203).

235. Already in 1996, the Committee on the Rights of the Child had warned of the existence of illegal adoption networks in Guatemala and that the mechanisms to prevent and combat them were "insufficient and ineffective"; it therefore recommended the introduction of "the measures necessary to monitor and supervise effectively the system of adoption of children in the light of article 21 of the Convention"[415] (*supra* para. 65). In addition, according to the CICIG report, various officials from the Attorney General's Office were aware of the irregularities and the context in which numerous adoptions were handled in Guatemala, which had resulted in a lucrative business for all those involved.[416] According to several expert witnesses who testified before this Court, "from the moment the notaries suggested that adoption was a way to make money," children were sought for adoption because an adoption represented thousands of United States dollars, leading to "trading in the protection mechanism that adoption should provide."[417] Expert witness Carolina Pimentel explained that the large sums of money involved "were shared out among the international agencies, children's homes, social workers in the countries of origin and reception, public officials and notaries."[418]

236. The judicial case file for this case records that at least three judges excused themselves from hearing the application for judicial review filed against the declaration of abandonment owing to insults and threats by the legal counsel of *Niños de Guatemala* under whose protection the Ramírez

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[414] The complete text of article 20 of the Convention on the Rights of the Child establishes that: "1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

[415] Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Guatemala*, June 7, 1996, CRC/C/15/Add.58, paras. 21 and 34.

[416] *Cf.* CICIG, Report on irregular adoptions in Guatemala, December 1, 2010, pp. 43 and 81 (evidence file, folios 3040 and 3078).

[417] Expert opinion provided by Jaime Tecú during the public hearing held before this Court and written version of this opinion (merits report, folio 1098).

[418] Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7278).

brothers had been placed. The excuses given by these judges reveal that those threats and insults related to the impact that the alleged delays in the abandonment proceedings could have on the financial gains that the children's home expected to receive as a result of the adoptions (*supra* para. 111). In addition, in the briefs filed by Flor de María Ramírez Escobar in the application for review, she reported the possible improper financial gain resulting from the removal of her children from her care and the possible interest of the children's home in her children's adoption (*supra* para. 102).

237. The Court finds it particularly serious that the state authorities who intervened in the adoptions of the Ramírez brothers did not verify that the adoptions did not result in improper financial gain owing to the context at the time of the facts – of which Guatemala was aware – added to the specific mentions and reports of possible failure to comply with this prohibition in this specific case. Consequently, the Court finds that the State also failed to comply with verification of the said requirement in relation to the adoptions of J.R. and of Osmín Tobar Ramírez.

C.2.f Conclusion regarding the adoption of the Ramírez brothers

238. Based on the foregoing, the Inter-American Court concludes that, when granting the intercountry adoptions of J.R. and of Osmín Tobar Ramírez, Guatemala failed: (a) to verify the legal status of the children adequately in order to determine their adoptability; (b) to assess or determine whether the intercountry adoption of the children was the most appropriate measure for their best interests – moreover, the notarial adoption procedure did not provide sufficient guarantees that the best interests of the children were taken into account as a paramount consideration; (c) to respect the right of the Ramírez brothers to be heard in the adoption procedure; (d) to take into account the subsidiary nature of intercountry adoption, in relation to other possible alternatives of care in the children's country of origin, and (e) to assess whether, or take any measure to discard the possibility that, the adoptions of the Ramírez brothers resulted in improper financial gain.

239. The adoptions of the Ramírez brothers were carried out in violation of minimum guarantees of due process, such as the right to be heard, and failed to comply with the minimum substantive and procedural requirements that States must respect and ensure in the context of an intercountry adoption procedure. The way in which the procedures for the adoption of J.R. and Osmín Tobar Ramírez were carried out had an almost irreparable impact on the private and family life of the Ramírez family, the rights of the children, and their right to be heard. Therefore, the Court concludes that the State violated the right to be heard, the right to a family life free from arbitrary interference and the right to the protection of the family established in Articles 8(1), 11(2) and 17(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of the American Convention to the detriment of the latter.

240. Furthermore, the Court reiterates that the adoptions occurred in a context in which institutional weaknesses and normative flexibility facilitated the creation of organized crime networks and structures dedicated to the business of illegal adoptions (*supra* paras. 61 to 71 and 145). As emphasized by several expert witnesses before this Court, and by the CICIG, in Guatemala, adoptions did not respond to the child's best interests; rather, children's homes, notaries and judicial authorities responded, to a great extent, to financial interests.[419] In addition, this Court underscores how these illegal adoption networks entrenched in the State's structures took advantage not only of the legal and institutional weaknesses of the Guatemalan State, but also of

[419] *Cf.* Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7246); written version of the expert opinion provided by Jaime Tecú during the public hearing held before this Court (merits report, folios 1105 and 1106), and CICIG, Report on irregular adoptions in Guatemala, pp. 22 to 27 (evidence file, folios 3019 to 3024).

the vulnerable situation of mothers and families living in poverty in Guatemala (*supra* paras. 61, 68 and *infra* para. 282).

241. In this regard, the Court emphasizes the negative impact of corruption and the obstacles it represents for the effective enjoyment of human rights, as well as the fact that the corruption of state authorities or private providers of public services has a particular impact on vulnerable groups.[420] In addition, corruption affects not only the rights of the individuals concerned, but has negative repercussions on society at large, insofar as "the people's confidence in the government, and eventually in the democratic order and the rule of law, is undermined."[421] In this regard, the preamble to the Inter-American Convention against Corruption establishes that "representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance."[422]

242. The Court recalls that States must adopt measures "to prevent and combat corruption more effectively and efficiently."[423] However, as mentioned previously, the child protection system and the adoption mechanism in force in Guatemala at the time of the facts, far from complying with these obligations, provided space for it to occur and permitted the establishment and continuance of illegal adoption networks in Guatemala. The instant case may reflect a manifestation of this context. The Court underscores that intercountry adoptions occurred in a context of corruption in which a series of individuals and public and private institutions operated under the cover of the protection of the best interests of the child, but with the real purpose of their own enrichment. Thus, the mechanisms established and tolerated for illegal adoptions, which particularly affected the poorest sectors, had an extremely negative impact on the enjoyment of human rights of the children and their biological parents.

243. Lastly, the Court reiterates that, under Article 2 of the Convention, States Parties are obliged to adapt their domestic laws to the parameters established in the Convention in order to guarantee and give effect to the exercise of the rights and freedoms recognized therein. This means: (a) the elimination of norms and practices of any nature that result in the violation of the guarantees established in the Convention, that disregard the rights recognized therein, or that hinder their exercise, and (b) the enactment of laws and the implementation of practices conducive to effective respect for those guarantees.[424] The Court considers that the extrajudicial adoption procedure in force at the time of the facts and applied in this case, failed to guarantee and, in certain aspects indicated above, directly violated the rights to private and family life and to the protection of the family, the right to be heard, and the rights of the child. Therefore, the Court concludes that the domestic laws that regulated this procedure violated Article 2 of the American Convention.

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[420] *Cf.* Human Rights Council, Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, January 5, 2015, UN Doc. A/HRC/28/73, para. 22. See also, Human Rights Council, Resolution 23/9: The negative impact of corruption on the enjoyment of human rights, June 20, 2013, UN Doc. A/HRC/RES/23/9.

[421] Human Rights Council, Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, January 5, 2015, UN Doc. A/HRC/28/73, para. 20c.

[422] Preamble to the Inter-American Convention against Corruption, entry into force on June 3, 1997, and ratified by Guatemala on March 7, 2001.

[423] In this regard, see, article 1 of the United Nations Convention against Corruption, entry into force on December 14, 2005, and ratified by Guatemala on November 3, 2006, and Article II of the Inter-American Convention against Corruption.

[424] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 254.

244. It is worth noting that, even though it is possible to execute important voluntary acts either administratively or by notarial procedures, in the case of child adoption care must be taken that the simplification of the procedure does not reach the extreme of permitting the reification of the child and facilitate human trafficking.

D. Remedies filed against the family separation

D.1 Arguments of the Commission and of the parties

245. The ***Commission*** indicated that the application for judicial review filed by Mrs. Ramírez Escobar was not processed correctly. It noted that the court did not request that the children be examined or that their testimony be taken. It also indicated that the court failed to assess the documentation presented by Mrs. Ramírez Escobar, or to take any steps to investigate her allegations, or to rule on her request to visit her children. Regarding the application for judicial review filed by Mr. Tobar Fajardo, the Commission indicated that "the court's decision to rule Mr. Tobar's application inadmissible was inadequately substantiated." It also considered that, "after its own judicial authorities had acknowledged the irregularities during the proceedings to review the declaration of abandonment and subsequent adoption of the children, the State had the obligation to rectify those shortcomings to the best of its ability, with exceptional diligence, in accordance with the children's best interests and without imposing financial or other burdens on the victims of the irregularities that had been acknowledged." In addition, it alleged that the duration of the review proceedings of five years and almost one month greatly exceeded a duration that could be considered reasonable.

246. The ***representatives*** indicated that the application for judicial review filed by Mrs. Ramírez Escobar was not processed in keeping with the law and she was not permitted to present evidence during this remedy. They also indicated that neither the application for judicial review filed by Mrs. Ramírez Escobar nor the one filed by Mr. Tobar Fajardo were decided until November 7, 2000, suffering unjustified delays. They indicated that the decision to require Mr. Tobar Fajardo to pay the expenses related to the letter rogatory to the United States of America was a disproportionate burden that did not correspond to him, particularly when it is considered that it was diverse Guatemalan authorities who were responsible for the irregular adoption of the Ramírez brothers. That decision rendered the remedy ineffective because the limited financial capacity of Mr. Tobar Fajardo was not taken into account.

247. The ***State*** acknowledged a violation of Articles 8 and 25 of the American Convention. In this regard, it indicated that it "acknowledges and regrets that, although previously established judicial proceedings were to be found in the law, and the corresponding remedies of appeal existed, when these [applications] were submitted, they were improperly processed by the courts and were not decided pursuant to law."

D.2 Considerations of the Court

248. In the instant case, two applications for judicial review were filed against the declaration of abandonment of the Ramírez brothers: one by Flor de María Ramírez Escobar on August 22, 1997, and the other by Gustavo Tobar Fajardo on December 17, 1998 (*supra* paras. 102 and 117). The two applications were subsequently joindered in a single file on August 29, 2000, which was declared admissible in November 2000, but archived in September 2002 (*supra* paras. 126, 128 and 136).

249. Based on the State's acknowledgement of responsibility, the Court, as in other cases,[425] does not find it necessary to make a detailed examination of all the irregularities that occurred in the processing of the remedies filed against the declaration of abandonment, and alleged by the Commission and the representatives. Nevertheless, in this section, it will examine the effectiveness of the said remedies and whether they were decided within a reasonable time and with due diligence, in order to ensure a better understanding of the State's international responsibility in this case and the causal nexus between the violations that are established and the reparations that will be ordered.

D.2.a Effectiveness of the remedies

250. This Court has indicated that judicial protection is one of the basic pillars of the American Convention and of the rule of law itself in a democratic society.[426] The Court has pointed out that Articles 8 and 25 of the Convention also establish the right of access to justice, a peremptory norm of international law.[427] In addition, the principle of effective judicial protection requires that judicial proceedings are accessible to the parties, without obstacles or undue delays, in order to achieve their objective in a prompt, simple and comprehensive manner.[428]

251. Consequently, the Court's case law has established a close link between the scope of the rights established in Articles 8 and 25 of the American Convention. In this way, it has determined that, to ensure the full protection of human rights, States have the obligation to devise effective remedies and establish them by law, but also the obligation to ensure the due implementation of those remedies by its judicial authorities in proceedings with adequate guarantees,[429] which must be substantiated pursuant to the rules of due process of law.[430] Thus, an effective judicial remedy means that the analysis made by the competent authority cannot be reduced to a mere formality; rather that authority must examine the arguments submitted by the applicant and make an express ruling on them.[431]

252. Therefore, as this Court has indicated previously, when assessing the effectiveness of the remedies, it must verify whether the decisions taken in the judicial proceedings have made a real contribution to end the situation that violated rights, to ensure the non-repetition of the harmful acts, and to guarantee the free and full exercise of the rights protected by the Convention.[432]

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425 *Cf. Case of Ruano Torres et al. v. El Salvador, supra*, para. 35.

426 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 174.

427 *Cf. Case of Goiburú et al. v. Paraguay*. *Merits, reparations and costs.* Judgment of September 22, 2006. Series C No. 153, para. 131, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

428 *Mutatis mutandis, Case of Mejía Idrovo v. Ecuador*. *Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011. Series C No. 228, para. 106, and *Case of Lagos del Campo v. Peru, supra*, para. 174.

429 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 237, and *Case of Lagos del Campo v. Peru, supra*, para. 176.

430 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Lagos del Campo v. Peru, supra*, para. 176.

431 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Lagos del Campo v. Peru, supra*, para. 176.

432 *Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005, Series C No. 134, para. 210, and *Case of Fornerón and daughter v. Argentina, supra,* para. 108.

253. Regarding the remedies filed in this case, the Court notes that, in the remedy she filed initially, Mrs. Ramírez Escobar alleged diverse irregularities in the way in which the proceedings for the declaration of abandonment had been conducted (*supra* paras. 102 and 105). However, this was declared inadmissible on January 6, 1998, in a decision that was insufficiently motivated (*supra* paras. 107 and 191). Since it did not include any considerations on the arguments presented by Mrs. Ramírez Escobar, this remedy failed to provide a real response to the situation described; therefore, it was reduced to a mere formality and constituted an ineffective remedy.

254. Nevertheless, the Court notes that, following the remedy subsequently filed by Mr. Tobar Fajardo, the court acceded to the parents' request to review the declaration of abandonment and ordered a series of measures to investigate the situation of the parents and of the children (*supra* para. 128). However, in September 2002, the case was archived in view of the alleged impossibility of sending a letter rogatory to the United States of America requesting its collaboration to summons the two adoptive families (*supra* paras. 131 to 136). This Court notes that the decision declaring the application for judicial review admissible had established that "the [children] must be made aware that their biological parents indicate their desire to recover them if this is admissible because they have contested the fact that their children were given up for adoption without their consent."[433] However, the notification of the children became impossible in the practice since the adoptive parents were not summoned and no attempt was made to contact the children by any other means. The Court underlines that the impossibility of summoning the adoptive families occurred because, even though Mr. Tobar Fajardo indicated his agreement to cover the expenses of this procedure and had even requested a loan for this purpose, he failed to appear before the court in relation to the procedure before the Ministry of Foreign Affairs (*supra* paras. 134 to 136). Even though he offered to cover the expenses, the Court considers that, in this case, this was an excessive burden for Mr. Tobar Fajardo. The alleged discriminatory nature of this circumstance will be examined in paragraphs 266 to 304 *infra*.

255. Furthermore, since the best interests of Osmín Tobar Ramírez and of J.R. were involved, the Attorney General's Office,[434] responsible for "ensuring respect for the rights of the child,"[435] or the judicial authority in charge of the proceedings, should have ruled in this regard, so that it was the Guatemalan State that covered those expenses. This is particularly relevant because the failure to cover the expenses resulted in the archiving of the case despite the previously acknowledged irregularities in the process.

256. Additionally, although Mr. Tobar Fajardo did not appear for a hearing relating to the payment of the procedure before the Ministry of Foreign Affairs, this was not sufficient reason to archive the case. In view of the interests and rights that were at stake, a genuine effort should have been made, *ex officio*, to ensure that the remedy filed by Mr. Tobar Fajardo made a real contribution to end a situation that violated rights and to guarantee the free and full exercise of the rights protected by the Convention. Therefore, the archive of the case constituted a violation of the right to judicial protection established in Article 25(1) of the American Convention, in relation to Articles 1(1), 11(2) and 17(1) thereof, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and their son Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter.

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[433] Ruling of the Juvenile Trial Court of the department of Chimaltenango of August 31, 2001 (evidence file, folio 4473).

[434] The Court notes that the Attorney General's Office was a party to the proceedings and was notified of the decision by which Mr. Tobar Fajardo was asked to cover the costs of summoning the adoptive parents (evidence file, folio 4441).

[435] Children's Code. Decree No. 78-79 of November 28, 1979, art. 14 (evidence file, folio 3444).

D.2.b Reasonable time and due diligence

257. The Court recalls that the right of access to justice requires that the facts investigated during judicial proceedings be decided within a reasonable time, because a prolonged delay may, in certain cases, of itself, constitute a violation of judicial guarantees.[436] This Court has considered four elements when analyzing the reasonableness of the duration: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the authorities, and (d) the impact on the legal status of the person involved in the proceedings.[437]

258. Regarding administrative and judicial proceedings that involve protection of the human rights of children, particularly those judicial proceedings related to the adoption, guardianship and custody of very young children, the Court has established that the authorities must conduct these with exceptional diligence.[438] The Court has also indicated that, owing to the particular impact that such proceedings could have on a child, it is particularly important to insist that their duration – up until a final decision is taken – must respect a reasonable time; thus, contributing to maintaining the situation of uncertainty for the least possible time, and causing the least possible impact on the physical, mental and emotional integrity of the child. However, the duration should be sufficient to ensure that the child is heard sufficiently and that his or her best interests are guaranteed. Thus, a violation of a child's rights cannot be justified merely by indicating that the proceedings must be completed promptly.[439]

259. Taking into account the criteria described above, the Court will now determine whether the duration of more than three years to grant the review of the legal status of the children, and of more than five years until the archive of the case (*supra* para. 248) exceeded a reasonable time, in violation of Article 8(1) of the Convention.

260. Regarding the first two elements, the Court considers that the proceedings involved in this case, although of great importance and requiring special care, were not especially complex or unusual for the authorities involved. Even though the constant transfer of the case file to different courts could have made the processing of the remedy more complex, this circumstance can be attributed to the State (*infra* para. 261), so that it cannot, in itself, justify the delay in the processing of the remedy. In addition, the Court notes that nothing in the case file indicates that the procedural activity of the interested parties obstructed or delayed the decision on the remedies; rather, to the contrary, the remedies were initiated and continued on the initiative and impetus of the victims who played an active role doing everything possible to ensure that progress was made towards their conclusion. Nevertheless, the Court underscores that, in cases such as this one, the responsibility for expediting the proceedings falls on the state authorities based on their duty to provide special protection to children owing to their condition as minors, rather than on the procedural activity of their parents.[440]

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[436] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Andrade Salmón v. Bolivia, supra*, para. 157.

[437] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192 para. 155, and *Case the Dismissed Workers of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 182.

[438] *Cf. Case of Fornerón and daughter v. Argentina*, *supra*, para. 51, and *Case of Furlan and family v. Argentina, supra*, para. 127.

[439] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 143.

[440] *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 69.

261. Regarding the conduct of the authorities, the Court notes that more than three years passed from the time Mrs. Ramírez Escobar first requested the review of the declaration of abandonment until both parents were give a real opportunity to contest the legal status of their children. However, this was when the violations had already been committed almost irreversibly since the children had already been given up for adoption abroad (*supra* paras. 102 to 128). During this period of almost three years, and on four different occasion, the courts in charge of the case declared the remedy inadmissible or ordered the archive of proceedings, without examining or deciding Mrs. Ramírez Escobar's requests and arguments (*supra* paras. 103, 107, 110 and 111). It was not until June 20, 2000, when all the actions taken from August 1997 to October 1998 were annulled, that the domestic judicial authorities acknowledged that the requests made by Mrs. Ramírez Escobar since October 1997 had not been decided; that is, two years and eight months after they had been filed (*supra* paras. 102 to 124). Subsequently, when the proceedings had finally made some progress, a series of measures were taken: an evidentiary stage was opened, the parents were accorded the opportunity of proving their suitability to care for the children, and the judicial authority sought to hear the Ramírez brothers. However, owing to unfamiliarity with the correct way to issue a letter rogatory to the United States of America, the proceedings made no further progress and remained inactive from October 2001 until June 2002 (*supra* paras. 132 to 134). This series of actions do not reflect the special diligence that the judicial authorities should observe when processing matters relating to the protection of the human rights of children (*supra* para. 258). Moreover, the Court underscores that this remedy was heard by at least nine different courts owing to one recusal and numerous excuses presented by the judges.[441] Consequently, the case file was frequently transferred to different courts, and this prejudiced the guarantee of proper diligence when deciding the remedy.

262. In judicial proceedings concerning children, compliance with the law and due diligence are essential elements to protect the best interests of the child.[442] In this case, the conduct of the authorities lacked even the slightest diligence. To the contrary, it was characterized by a formalistic approach to the processing of briefs and documents on which rulings were made without considering the arguments presented – leading, more than once, to the annulment of judicial actions – and without considering the rights being litigated or the impact that the delay might have on those involved. This Court has established that, if the passage of time has a relevant impact on the legal status of the individual, the proceedings must advance with greater diligence to ensure that the case is decided promptly.[443] In cases involving the guardianship and custody of children, any delay in judicial decisions has significant, and often irreversible and irremediable, effects.[444]

263. Based on the above, the Court concludes that the duration of more than three years to grant the review of the legal status of the children, and more than five years until the case was archived

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[441] Between August and October 1997, the First Juvenile Trial Court was in charge of the case (*supra* paras. 102 to 105). Following a request for a recusal by Mrs. Ramírez Escobar, the case file was transferred to the Third Juvenile Trial Court (*supra* para. 105). Owing to excuses by the corresponding judges, in March 1998, the case file was transferred to the First Court and, in April 1998, to the Second Court (*supra* para. 108). Between June and September 1998, the case file was transferred to three different courts (from the Second Court to the Fourth Court, from there to First Court of Mixco, and from there to the Juvenile Trial Court of Escuintla), because the judges excused themselves from hearing the remedy owing to alleged insults and threats by the legal counsel of the children's home where the children had been placed (*supra* para. 111). Following an excuse by the judge, in July 1999, the file was transferred from the Escuintla court to the Juvenile Trial Court of Jutiapa (*supra* para. 121). Finally, in October 2000, the file was assigned to the Trial Court of Chimaltenango owing to threatening telephone calls received by the judge of the Jutiapa court (*supra* paras. 125 and 127).

[442] *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 105.

[443] *Cf. Case of Valle Jaramillo et al. v. Colombia, supra*, para. 155, and *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs.* Judgment of November 15, 2017. Series C No. 342, para. 120.

[444] *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 76.

exceeded a duration that could be considered reasonable for deciding this type of remedy. Therefore, this constituted a violation of Article 8(1) of the Convention, in relation to Articles 1(1), 11(2) and 17(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and their son Osmín Tobar Ramírez, and also in relation to Article 19 thereof to the detriment of the latter.

E. Prohibition of discrimination in relation to the obligation to respect and ensure rights

E.1 Arguments of the parties and of the Commission

264. The ***representatives*** pointed out that "the decision declaring that the Ramírez brothers had been abandoned used different stereotypes that constitute categories for which discrimination is prohibited by Article 1(1) of the [American Convention]." Among these, they mentioned "the financial situation and responsibilities of Flor Ramírez, in her capacity of mother (gender role), and sexual orientation." They also indicated that the State did not have a system of "providing assistance to parents in the performance of their child-rearing responsibilities," and used measures such as separation and institutionalization. Regarding the context of discrimination in the adoption procedures, they indicated that the practice of the trafficking of children for the purpose of adoption, executed and tolerated by state agents, "had a disproportionate impact on the most financially vulnerable sectors of the Guatemalan population, especially on women in their capacity as mothers, and directly on the children as the objects of trafficking." They also considered that "gender stereotyping was applied in the procedure for the declaration of abandonment in which Mrs. Ramírez Escobar's activities were judged assigning a specific role to her in keeping with social and cultural norms, and then punishing her for not complying with it." They added that such stereotyping also had an impact on Mr. Tobar Fajardo, arbitrarily depriving him of the exercise of his parental rights, because the responsibility for childcare was focused on the mother. Lastly, they indicated that the declaration of abandonment had referred to the sexual orientation of the brothers' grandmother indicating that "an adult with homosexual preferences would be transmitting this series of values to the children."

265. The ***State*** did not comment on the alleged violation of the prohibition of discrimination and the principle of equality before the law, arguing that this had not been claimed at the proper procedural moment before the Commission. For its part, the ***Commission*** did not declare this type of violation in its Merits Report.

E.2 Considerations of the Court

266. The representatives argued that, throughout the process of separating the Ramírez family, by means of the declaration of abandonment and the subsequent adoptions, the members of the family were discriminated against for different reasons, particularly, their financial position, gender, and sexual orientation.

267. First, regarding the State's objection, the Court recalls its consistent case law according to which the possibility of changing or amending the legal classification of the facts that are the subject of a specific case is permitted in proceedings under the inter-American system. Thus, the alleged victims and their representative may cite the violation of rights other than those included in the Merits Report, provided that they abide by the facts contained in that document, because the

alleged victims are the holders of all the rights established in the Convention.[445] The alleged violations of Articles 24 and 1(1) of the Convention refer to facts that are included in the Merits Report.

268. Therefore, the Court will now examine the representatives' allegations in the following order: (a) general considerations on the right to equality before the law, the prohibition of discrimination, and the special protection for children; (b) the right not to be discriminated against based on financial situation; (c) the right not to be discriminated against based on gender stereotypes, and (d) the right not to be discriminated against based on sexual orientation, and will then outline (e) its conclusion on these allegations.

E.2.a General considerations on the right to equality before the law, the prohibition of discrimination, and the special protection for children

269. The Court has defined discrimination as any distinction, exclusion, restriction or preference based on specific reasons, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, and birth or any other social condition, the purpose or result of which is to annul or impair the acknowledgement, enjoyment and exercise, in equal conditions, of the fundamental human rights and freedoms of everyone.[446]

270. Regarding the principle of equality before the law and that of non-discrimination, the Court has indicated that the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.[447] In addition, the fundamental principle of equality and non-discrimination is part of *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.[448] The Court has also established that States must refrain from carrying out any action that, in any way, is aimed, directly or indirectly, at creating situations of *de jure* or *de facto* discrimination[449] and that they are obliged to adopt positive measures to reverse or change any discriminatory situations that exist in their societies to the detriment of a specific group of individuals.

271. Article 1(1) of the Convention is a general rule the content of which extends to all the provisions of the treaty and establishes the obligation of States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever its origin or the form it takes, any treatment that may be considered

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[445] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Acosta et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 25, 2017. Series C No. 334, para. 30.

[446] *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 81, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 90.

[447] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 55, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 238.

[448] *Cf. Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 101, and *Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of August 24, 2017. Series C No. 339, para. 150.

[449] *Cf.* Advisory Opinion OC-18/03, *supra*, para. 103, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 150.

discriminatory in relation to the exercise of any of the rights guaranteed by the Convention is, *per se*, incompatible with this instrument.[450] The State's failure to comply with the general obligation to respect and ensure human rights, due to any discriminatory treatment, will result in its international responsibility. Thus, there is an indissoluble link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.[451]

272. While the general obligation of Article 1(1) refers to the State's obligation to respect and to ensure "without discrimination" the rights contained in the American Convention, Article 24 protects the right to "equal protection of the law."[452] This means that Article 24 of the American Convention prohibits *de jure* discrimination, not only in relation to the rights contained in this treaty, but also in relation to all the laws enacted by the State and their implementation.[453] In other words, if a State discriminates in the respect and guarantee of a treaty-based right, it would be failing to comply with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to the unequal protection of domestic law or its implementation, the fact should be examined in light of Article 24 of the American Convention in relation to the categories protected by Article 1(1) of the Convention.[454]

273. In the instant case, no facts are alleged that relate to unequal protection derived from a domestic law or its implementation; rather, it is alleged that discrimination based on the use of stereotypes concerning gender, sexual orientation and financial situation was used to justify the declaration of abandonment, and also that the practices and patterns associated with the context of illegal adoptions in Guatemala had a disproportionate impact on families living in poverty, such as the family in this case. Therefore, the Court considers that the situation alleged by the representatives should be examined under the general prohibition of discrimination established in Article 1(1) of the Convention and not under the principle of equality before the law established in Article 24 of the Convention.

274. In the special case of children, the prohibition of discrimination should be interpreted in light of Article 2 of the Convention on the Rights of the Child.[455] The said Article 2 establishes that children have the right to protection against all forms of discrimination on the basis of the status, activities, expressed opinions, or beliefs of family members.[456] This Court has underscored that the prohibition of discrimination that prejudices children also extends to their parents or family members.[457] In

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[450] *Cf.* Advisory Opinion OC-4/84, *supra*, para. 53, and *Case of I.V. v. Bolivia, supra*, para. 239.

[451] *Cf.* Advisory Opinion OC-18/03, *supra*, para. 85, and *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 335.

[452] *Cf.* Advisory Opinion OC-4/84, *supra*, paras. 53 and 54, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 150.

[453] *Cf. Case of Yatama v. Nicaragua, supra*, para. 186, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 150.

[454] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 209, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 150.

[455] *Cf.* Advisory Opinion OC-17/02, *supra,* para. 49, and *Case of Atala Riffo and daughters v. Chile, supra*, para. 150.

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

[457] *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 151, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 273.

keeping with this, the Committee on the Rights of the Child has clarified that young children may suffer the consequences of discrimination against their parents.[458] The alleged discrimination in this case had a direct impact on the two children, who were deprived of their family unit and then separated by being given up for intercountry adoption to different families. Therefore, if the allegations of discrimination in this case are proved, this had an impact not only on the rights of the parents but also on the rights of Osmín Tobar Ramírez, alleged victim in this case.

275. In the instant case, it is alleged that discrimination occurred for three reasons: (1) the family's financial situation; (2) the gender role assigned to the children's mother and to the father of Osmín Tobar Ramírez, and (3) the sexual orientation of the maternal grandmother of the Ramírez brothers (*supra* para. 264), all of which the Court will analyze in the above order.

276. Despite this, the Court notes that, if the different reasons for discrimination alleged in this case are verified, in the case of Flor de María Ramírez Escobar, in particular, different factors of vulnerability or sources of discrimination associated with her situation of single mother, living in poverty, with a lesbian mother, coalesced intersectionally, because the discrimination experienced by Mrs. Ramírez Escobar was the result of the intersecting action of all the reasons for which she was discriminated against. In this regard, the Committee for the Elimination of Discrimination against Women has emphasized that:

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women […]. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them[, and also] adopt and pursue policies and programmes designed to eliminate such occurrences.[459]

277. For the purposes of the legal analysis that the Court must make, and taking into account that, in this case, it is alleged that several individuals were victims of discrimination for similar reasons, the Court will analyze each of the alleged reasons for discriminations separately. This is notwithstanding the fact that the Court understands that the confluence of discriminatory factors intersectionally results in a discriminatory experience that differs from the simple accumulation of different causes of discrimination against one individual.

E.2.b Right to non-discrimination based on financial situation

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[458] *Cf.* Committee on the Rights of the Child, General Comment No. 7: Implementing child rights in early childhood, UN Doc. CRC/C/GC/7, September 30, 2005, para. 12.

[459] Committee for the Elimination of Discrimination against Women. General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, December 16, 2010, UN Doc. CEDAW/C/GC/28, para. 18. In this regard, the Committee has emphasized that those factors may include a woman's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, and being in prostitution, among others. *Cf.* Committee for the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, July 26, 2017, UN Doc. CEDAW/C/GC/35, para. 12. In addition, the Committee on the Rights of Persons with Disabilities has indicated that: "The Convention on the Rights of Persons with Disabilities recognizes that women with disabilities may be subject to multiple and intersectional forms of discrimination based on gender and disability." Committee on the Rights of Persons with Disabilities. General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 35.

278. The Court has emphasized that, contrary to other human rights treaties, the "economic status" of the individual is one of the reasons for discrimination prohibited by Article 1(1) of the American Convention.[460] The Court has also determined that the direct legal effect of the fact that a condition or characteristic of an individual falls within the categories of Article 1(1) of the Convention is that the judicial scrutiny must be stricter when weighing differences in treatment based on the said categories.[461] Consequently, the eventual restriction of a right, based on any of the categories of Article 1(1) of the Convention, requires strict and robust justification with reasons supported by comprehensive arguments.[462] Moreover, any different treatment based on the said categories reverses the burden of proof, so that it will correspond to the authority to prove that its decision had neither a discriminatory purpose nor effect.[463]

279. The Court has been clear in indicating that the lack of material resources cannot be the only grounds for an administrative or judicial decision that results in the removal of a child from his or her family, and the consequent deprivation of other rights established in the Convention.[464] Likewise, the European Court of Human Rights has stressed that poverty can never be the sole reason for removing children from their families,[465] and underlined the positive obligation of States to create conditions that permit the development of the ties between parents and children.[466] Regarding the removal of children from poor families, the European Court has emphasized that the mere fact that the child could be placed in a more beneficial environment for his or her upbringing[467] or the mere reference to the parents' precarious situation does not on its own justify a compulsory measure of removal, because the situation can be addressed by less radical means that the splitting of the family, such as targeted financial assistance or social counselling.[468]

280. Meanwhile, the Implementation Handbook for the Convention on the Rights of the Child indicates that the homelessness or poverty of the parents should not be grounds in themselves for removal of the child, nor should a parent's failure to send the child to school.[469] Rather, if these

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460 *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 335.

461 *Cf. Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 256.

462 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 124, and *Case of I.V. v. Bolivia, supra*, para. 244.

463 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 124, and *Case of I.V. v. Bolivia, supra*, para. 244.

464 *Cf.* Advisory Opinion OC-17/02, *supra*, para. 76. See also, Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, para. 62, and Committee on the Rights of the Child, General Comment No. 21 on children in street situations, June 21, 2017, UN Doc. CRC/C/GC/21, para. 46.

465 *Cf.* ECHR, *Case of Saviny v. Ukraine*, No. 39948/06. Judgment of December 18, 2008, paras. 51, 57 and 58, and *Case of Soares de Melo v. Portugal*, No. 72850/14. Judgment of February 16, 2016, paras. 89, 106 and 107. In this regard, the European Court has indicated that "there must exist other circumstances pointing to the "necessity" for such an interference with the parents' right, under Article 8 of the [European] Convention [on Humana Rights], to enjoy a family life with their child." *Cf.* ECHR*, Case of K. and T. v. Finland,* No. 25702/94. Judgment of July 12, 2001, para. 173, and *Case of Kutzner v. Germany,* No. 46544/99. Judgment of February 26, 2002, para. 69.

466 *Cf.* ECHR, *Case of Soares de Melo v. Portugal*, No. 72850/14. Judgment of February 16, 2016, para. 89.

467 *Cf.* ECHR, *Case of Saviny v. Ukraine*, No. 39948/06. Judgment of December 18, 2008, paras. 50 and 107.

468 *Cf.* ECHR, *Case of Saviny v. Ukraine*, No. 39948/06. Judgment of December 18, 2008, para. 50. See also, ECHR, *Case of Moser v. Austria*, No. 12643/02. Judgment of September 21, 2006, paras. 68 and 69; *Case of Wallová and Walla v. The Czech Republic*, No. 23848/04. Judgment of October 26, 2006, para. 73; *Case of N.P. v. The Republic of Moldova*, No. 58455/13. Judgment of October 6, 2015, para. 79, and *Case of Soares de Melo v. Portugal*, No. 72850/14. Judgment of February 16, 2016, paras. 106 and 107.

469 *Cf.* UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, 2007, p. 123. See also, Committee on the Rights of the Child, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Nepal*, September 21, 2005, UN Doc. CRC/C/15/Add.261, para. 54.

deficiencies are causing the child's development to be impaired, then the State should put its resources into making good the deficiency while maintaining the child in the family.[470] Moreover, article 18.2 of the Convention on the Rights of the Child establishes that: "States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children." In this regard, the Committee on the Rights of the Child has repeatedly expressed its concern owing to the separation of children from their parents due to poverty[471] and has recommended that States "provide adequate support to disadvantaged families, including counselling and educational service, and ensure that separation of children from their parents only takes place if necessary, in their best interest and on precise legal grounds."[472]

281. In order to determine if there was discrimination owing to the financial situation of the family members of the Ramírez brothers, the Court will examine: (i) the context of poverty in abandonment and adoption procedures in Guatemala at the time of the facts, and (ii) whether the financial situation of the Ramírez family was used as a justification to remove the children from their biological family.

(i) Context of poverty in the abandonment and adoption procedures at the time of the facts

282. As previously mentioned, the situation of poverty of a high percentage of the Guatemalan population had an impact on illegal adoptions at the time of the facts (*supra* paras. 61 and 68). In this regard, the Court notes that, at that time, a context of illegal adoptions existed in which: (i) the situation of poverty or extreme poverty of Guatemalan families could have had an impact on several stages of the removal of children from their families (*supra* para. 68); (ii) the high international demand and the poverty of the Guatemalan families resulted in adoption being handled according to the "laws of supply and demand";[473] (iii) during the declaration of abandonment and adoption procedures, there was a tendency to consider the mother's lack of financial resources as a major

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[470] *Cf.* UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, 2007, p. 123.

[471] See, *inter alia*, Committee on the Rights of the Child, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Azerbaijan*, March 17, 2006, UN Doc. CRC/C/AZE/CO/2, para. 37, and *Concluding observations: Hungary*, March 17, 2006, UN Doc. CRC/C/HUN/CO/2, para. 30; Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of Romania,* July 13, 2017, UN Doc. CRC/C/ROU/CO/5, para. 45; Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic report of Lebanon,* June 22, 2017, UN Doc. CRC/C/LBN/CO/4-5, para. 26; Committee on the Rights of the Child, *Concluding observations on the third and fifth periodic reports of Malawi*, March 6, 2017, UN Doc. CRC/C/MWI/CO/3-5, para. 29; Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth period reports of Panama*, February 28, 2018, UN Doc. CRC/C/PAN/CO/5-6, para. 26.

[472] Committee on the Rights of the Child, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Concluding observations: Azerbaijan*, March 17, 2006, UN Doc. CRC/C/AZE/CO/2, para. 38, and *Concluding observations: Hungary*, March 17, 2006, UN Doc. CRC/C/HUN/CO/2, paras. 32 and 33. Similarly, see, *inter alia*, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Bulgaria*, January 24, 1997, UN Doc. CRC/C/15/Add.66, paras. 27 and 28, and Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Paraguay*, February 10, 2010, UN Doc. CRC/C/PRY/CO/3, para. 41.

[473] In a report prepared for UNICEF, the Latin American Institute for Education and Communication (ILPEC) concluded that: "[t]he high international demand for children and the poverty experienced by most Guatemalan families has created a situation where the processing of adoptions occurs according to the "laws of supply and demand," effectively resulting in the trafficking of children." Latin American Institute for Education and Communication (ILPEC), "Adoption and the Rights of the Child in Guatemala," prepared for the United Nations Children's Fund (UNICEF) in 2000 (evidence file, folio 2983).

factor for removing children from their families and including them in adoption programs,[474] and (iv) thereafter, the absence of financial resources made it difficult for the families to access a judicial remedy to recover the custody of their children[475] (*supra* paras. 61 to 71).

(ii) The use of the financial situation of the Ramírez family as justification to remove the children from their biological family

283. This Court has already concluded that the declaration of abandonment that separated the Ramírez brothers from their biological family lacked sufficient justification (*supra* paras. 189 to 193). Therefore, the Court will take into account the considerations set out in the social studies and opinions cited in the said declaration in order to determine whether the decision to separate the Ramírez family constituted a difference in treatment based, among other reasons, on the financial situation of the members of the Ramírez family.

284. In this regard, the Court notes that, during the abandonment proceedings, social studies were prepared on Flor de María Ramírez Escobar, the mother of the Ramírez brothers, and on the children's maternal grandmother and godmothers (*supra* paras. 91 to 96). Several of these studies referred to the family's socioeconomic situation as the main argument to recommend the continuation of the placement of the Ramírez brothers in a children's home or their removal from their biological family. In particular, the Court notes that: (i) a study prepared by the Attorney General's Office in May 1997 (*supra* para. 95), indicated that "[a]t the present time, the conduct of both the children's mother and grandmother […] is prejudicial for the care and upbringing of the children," mentioning, as essential factors, the fragile financial situation of both of them and their "very disorderly conduct." In particular, it was concluded that the mother's socioeconomic situation was "precarious" and that her "living conditions are humble," and also that the maternal grandmother "worked in the informal sector, [and therefore] she earns very little";[476] (ii) a social study on the children's godmothers prepared by *Niños de Guatemala* in May 1997 (*supra* para. 96), indicated that "[t]he income of each family group is evidently insufficient to cover the needs of each family and it is clear that their financial situation does not allow them to assume the responsibility of raising and educating another child." In this study, the social worker recommended that the children be declared to have been abandoned, based on the "overcrowded conditions in which the godmothers and their family members live" and "the limited nature of their financial resources." She also indicated that "[b]oth children […] deserve to have their own family where they are not a burden due to the circumstances";[477] (iii) in an opinion of July 29, 1997 (*supra* para. 100), the

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[474] The CICIG underscored that, even though international protection standards concerning the rights of the child indicate that "the lack of financial resources should not be the principal reason for giving up a child in adoption," "most of the socioeconomic studies examined based their favorable opinion on the fact that the mother 'did not have sufficient financial resources.'" CICIG, Report on irregular adoptions in Guatemala, p. 41 (evidence file, folio 3038). Similarly, expert witness Jaime Tecú pointed out that, "in several cases, the studies prepared by the Attorney General's Office did not promote the defense of the children; rather they examined the families' lack of resources and, on that basis, issued a favorable opinion for many of the adoptions because the studies conducted were socioeconomic studies that underlined the families' poverty, and their inability to cope with maternity or paternity, and this authorized the judicial rulings on abandonment." Expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[475] *Cf.* IACHR, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, OEA/Ser.L/V/II.111, Doc. 21 rev., chap. XII, para. 40. Similarly, the Special Rapporteur on the sale of children noted that "[i]gnorant of the law, these fearful mothers often painfully give up the fight and assume that nothing can be done to help them because they are poor." Report of the Special Rapporteur on the sale of children, child prostitution and child pornography on her July 1999 visit to Guatemala, UN Doc. E/CN.4/2000/73/Add.2, para. 35 (evidence file, folio 2734).

[476] Social study of Flor Escobar Carrera prepared by the Attorney General's Office on May 7, 1997 (evidence file, folio 50).

[477] Social study prepared by the *Niños de Guatemala* social worker on May 4, 1997 (evidence file, folios 4316 and 4317).

Attorney General's Office concluded that "the case file […] contains abundant elements [and] its analysis reveals the need to provide the said children with better standard of living, in a family."[478]

285. Additionally, following the declaration of abandonment, the Court notes that: (i) the review of this decision was archived in view of Mr. Tobar Fajardo's impossibility of covering certain expenses, thus conditioning the continuation of the proceedings to the financial situation of Mr. Tobar Fajardo (*supra* para. 136), and (ii) in apparent contrast to the lack of financial resources of the biological family, the verification of the financial solvency of the Ramírez brothers' adoptive parents was emphasized during the adoption procedures (*supra* para. 115).

286. The Court notes that the financial situation of the members of the family was not the only reason included in those studies and opinions or in the decision ordering the removal of the Ramírez children from their biological family. However, it recalls that the allegations concerning the mother's treatment of the children were never sufficiently investigated (*supra* paras. 179 to 186), and the other reasons cited reveal the use of discriminatory stereotyping based on sexual orientation and gender roles, which will be analyzed below (*infra* paras. 294 to 302). Therefore, the Court considers that the decision to remove the Ramírez brothers from their family was justified to a great extent on the financial situation of the different members of the family, including the extended family, represented by the maternal grandmother and the children's godmothers.

287. The Court reiterates that the possible limitation of a right, based on any of the categories prohibited by Article 1(1) of the Convention, calls for a rigorous justification supported by a comprehensive statement of reasons (*supra* para. 278). In addition, it repeats that the ruling declaring the abandonment of the Ramírez brothers lacked motivation. Therefore, the State has not provided satisfactory justification for the use of the financial situation of the different members of the family as grounds for declaring the Ramírez children had been abandoned and, subsequently, authorizing their intercountry adoption.

288. The Court recognizes that the lack of resources may have an impact on the upbringing of children, especially when this compromises the possibility of meeting their most basic needs such as food and health. However, the lack of material resources cannot be the only basis for a decision that involves the removal of a child from his or her family (*supra* para. 279). The best interests of the child, as well as the rights of children to preserve their family ties and not to be subject to arbitrary interference in these, requires that a family's financial situation may only be used to remove children from that family when more weighty reasons are cited that, in themselves, would justify this measure.

289. In the instant case, the reasons cited regarding the need for a better standard of living or a family where they were not a "burden" (*supra* para. 284), do not constitute sufficient justification. Thus, expert witness Cantwell stressed that "it is vital to differentiate between what is in a child's best interests and what could be considered an action taken for a child to be 'better off,' essentially in material terms,"[479] because "[t]he 'best interests of the child' cannot simply be equated to the fact that the child is 'in a better situation' – above all materially – in another country."[480]

290. Therefore, the Court considers that the State has not provided a satisfactory, or even moderately substantiated, justification for the use of the family's financial situation in its decision to remove the Ramírez brothers from their biological family, taking into account the context of irregular

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478 Brief of the Attorney General's Office presented on July 29, 1997 (evidence file, folios 4306 and 4307).

479 Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6946).

480 Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6959).

adoptions at the time of the facts in which the poverty of many Guatemalan families had an impact on several stages of the removal of children from their families (*supra* para. 282), and that, in this specific case, the financial situation of different members of the family was a predominant reason to justify the removal of the children, and the refusal to hand them over or return them. Consequently, the Court concludes that those decisions discriminated against the Ramírez family owing to their financial situation.

291. Added to the above, the Court underscores that the application for judicial review in this case was archived, also due to the lack of financial resources of the Ramírez family (*supra* paras. 134 to 136). In this regard, the Court emphasizes that, in this case, a family was arbitrarily separated, in part due to the lack of financial resources and, subsequently, the State made their access to an effective remedy to repair or rectify this arbitrary separation depend, once again, on the financial capacity of the victims. In this way, Guatemala twice made the protection of the rights of the family and to family life depend on the financial capacity of the holders of those rights.

292. This Court recalls that, to achieve their objectives, proceedings must recognize and resolve the factors of real inequality of those who appear before justice in order to respect the principle of equality before the law and the courts, and the prohibition of discrimination.[481] In particular, the Court recalls that if someone who is seeking the protection of the law in order to assert the rights guaranteed to them by the Convention finds that their financial situation prevents them from doing this because they are unable to pay for the necessary legal assistance or cover the procedural costs, they are discriminated against due to their financial situation and placed in conditions of inequality before the law.[482]

293. Based on the above, the Court finds that Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez were subject to discrimination owing to their financial situation.

E.2.c Right to non-discrimination based on gender stereotyping

294. The Court has emphasized that gender stereotyping refer to a preconception of the respective attributes, behaviors or characteristics of, or roles that are or should be played by, men and women,[483] and its creation and use is particularly serious when it is implicitly or explicitly reflected in policies and practices, particularly in the reasoning and language of state authorities.[484]

295. The Court has identified, recognized, shed light on, and rejected gender stereotyping. It is incompatible with international human rights law and States should take measures to eliminate it in circumstances in which it has been used to justify violence against women or its impunity,[485] the

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[481] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 119, and Advisory Opinion OC-18/03, *supra*, para. 121.

[482] *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights,* Advisory Opinion OC-11/90, August 10, 1990. Series A No. 11, para. 22.

[483] *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra,* para. 401, and *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2015. Series C No. 307, para. 180.

[484] *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra*, para. 401, and *Case of Velásquez Paiz et al. v. Guatemala, supra*, para. 180.

[485] See, among others, *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, paras. 212 and 213, and *Case of Velásquez Paiz et al. v. Guatemala, supra*, para. 183.

violation of a woman's judicial guarantees,[486] or the differentiated impact of State actions and decisions.[487]

296. In this case, the Court notes that several reports, as well as the decisions taken by the judicial authorities, reveal gender stereotyping regarding the roles assigned to the children's mother and father. Thus, on the one hand, various reports looked at whether or not Mrs. Ramírez Escobar was able to assume her "maternal role" or "role of mother," without clarifying the characteristics attributed to that role. They analyzed whether "she accepted her female role" and "the sexual model" attributed to that role,[488] and they based their conclusions on testimony that Mrs. Ramírez Escobar was an irresponsible mother because, *inter alia*, "she abandon[ed her children] when she [went] to work]," and that, for this reason, among others, "her conduct was unsatisfactory"[489] (*supra* paras. 91 to 94 and 98).

297. In addition, no attempts were made during the declaration of abandonment proceedings to locate Gustavo Tobar Fajardo, Osmín's father, or the person who appeared as J.R.'s father on his birth certificate. All the inquiries made by the juvenile courts, as well as the reports and the opinions of the Attorney General's Office, refer to the mother's alleged abandonment of her children, reflecting a preconceived ideal of the distribution of roles between the parents, according to which only the mother was responsible for the care of the children. This stereotyping regarding the role of mother implied the use of a "traditional" conception of the social role of women as mothers, according to which it is socially expected that they bear the main responsibility for their children's upbringing.[490]

298. That said, this assignment of roles prejudiced not only Mrs. Ramírez Escobar, but also Mr. Tobar Fajardo. No attempt was made, or consideration given, to locating Gustavo Tobar Fajardo, father of Osmín Tobar Ramírez, in order to investigate the possibility of granting him the custody of his son. As Mr. Tobar Fajardo mentioned, even though he lived in another country, he maintained family ties with his son and had not shirked his responsibilities towards Osmín Tobar Ramírez (*supra* paras. 81 and 82). As soon as he became aware of what had happened, Mr. Tobar Fajardo came forward and filed an application for judicial review of the declaration of abandonment; subsequently, his appeal was joindered to that of Mrs. Ramírez Escobar and, finally, he assumed the representation of both parents in the proceedings. Gustavo Tobar Fajardo attempted to recover his son and his son's brother by all available legal means, even though the different state authorities who intervened in the case never considered him when they removed his son from his family, gave his son up for intercountry adoption, and removed him from the country. Therefore, in this case, the stereotyping regarding the distribution of parental roles was based not only on a preconceived idea of the role of the mother, but also on a macho stereotype of the role of the father that accorded no

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[486] *Cf. Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014, paras. 268 and 272.

[487] *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, paras. 294 to 297.

[488] The report on the psychological assessment of Mrs. Ramírez Escobar in July 1997 included among the personality traits – based on which it was later concluded that "her capacity to assume the role of mother is seriously compromised" – that "[r]egarding her sexual orientation, she accepts her female role, but has difficulty in determining the sexual model in her relationship with a partner." Psychological report of the Judiciary's Psychology Unit, July 21, 1997 (evidence file, folio 7960).

[489] Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folios 4300 and 4301), and *Cf.* Study prepared by the *Niños de Guatemala* social worker, of February 3, 1997 (evidence file, folios 4379 to 4383), and Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4323 and 4326).

[490] *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 140.

value to the affection and care that Mr. Tobar Fajardo could have provided to Osmín Tobar Ramírez as his father. In this way, Mr. Tobar Fajardo was deprived of his parental rights, to a certain extent presuming or insinuating that a father does not have the same obligations and rights as a mother, nor the same interest, love and capacity to care for and protect his children.

299. Consequently, in this case, it has been demonstrated that the actions and decisions of the authorities who intervened in the abandonment proceedings of the Ramírez brothers were based on gender stereotyping regarding the distribution of parental responsibilities, and preconceived ideas on the role of a mother or a father in relation to the care of their children. The Court considers that this constituted a form of gender-based discrimination, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez.

E.2.d Right to non-discrimination based on sexual orientation

300. The Court has established that sexual orientation and gender identity are categories protected by the Convention; therefore, any norm, action or practice that discriminates based on a person's sexual orientation is prohibited. Consequently, no norm, decision or practice of domestic law may diminish or restrict, in any way whatsoever, a person's rights based on their sexual orientation.[491] The Court has emphasized that, in order to prove that a differentiation in treatment has occurred in a particular decision, it is not necessary that the whole of that decision be based "fundamentally and solely" on a person's sexual orientation; rather, it is sufficient to verify that, to a certain extent, sexual orientation was taken into account, either explicitly or implicitly, when adopting a specific decision.[492]

301. The Court notes that, in this case, the possibility that the care of the Ramírez brothers be transferred to their maternal grandmother was discarded because she had "homosexual preferences [and could] transmit this set of values to the children in her care" (*supra* para. 98). Even though the judicial decision that declared the children abandoned does not include an explicit statement of reasons, it has been established that the respective judicial authority considered that none of the members of the Ramírez brothers' family constituted an appropriate resource for their protection and that one of the arguments used as grounds for this consideration was the sexual orientation of the maternal grandmother. The Court reiterates that sexual orientation cannot serve as a decisive factor in matters concerning the custody or guardianship of children.[493] Considerations based on sexual orientation stereotypes, such as those used in this case – in other words, preconceptions regarding the attributes, behaviors or characteristics of homosexuals or the alleged impact these may have on children – are not appropriate to ensure the best interests of the child, and are therefore inadmissible.[494] Bearing in mind that the sexual orientation of the maternal grandmother was explicitly taken into account to take the decision to declare that the Ramírez children had been abandoned and to remove them from their biological family, this Court considers that this constituted an additional discriminatory factor in this case.

302. The Court notes that the maternal grandmother of the Ramírez brothers is not an alleged victim in this case. However, it recalls that the prohibition of discrimination to the detriment of the children extends to the conditions of their parents and legal representatives and, in this case, to other individuals who could have exercised their care, such as their grandmother, because the discrimination against Mrs. Escobar Carrera deprived Osmín Tobar Ramírez of the possibility of

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491 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 91, and Advisory Opinion OC-24/17, *supra*, para. 78.

492 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 94.

493 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 110.

494 *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 111.

growing up and developing within his family circle and his culture (*supra* para. 274). Consequently, the discrimination based on the sexual orientation of the maternal grandmother also constituted a form of discrimination that harmed Osmín Tobar Ramírez.

E.2.e Conclusion

303. Based on the above, the Court concludes that the decision to separate the Ramírez brothers from their biological family was founded on arguments relating to the financial situation of the members of their family, gender stereotyping in relation to the attribution of different parental roles to the mother and to the father, and the sexual orientation of their maternal grandmother. The Court considers that these represented discriminatory justifications that served as the grounds for the family separation. Consequently, it concludes that the State is responsible for violating the prohibition of discrimination in relation to the obligation to respect and ensure the rights to family life and to the protection of the family established in Articles 11(2) and 17(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of the Convention to the detriment of the latter.

304. Furthermore, the Court recalls that those factor coalesced intersectionally for Flor de María Ramírez Escobar who, since she was a single mother living in poverty, formed part of the groups that were most vulnerable to becoming victims of the unlawful and arbitrary removal of their children, in the context of irregular adoptions in which the facts of this case occurred (*supra* paras. 68 and 282). The discrimination against Mrs. Ramírez Escobar was intersectional because it was the result of several factors that interacted and were conditional on each other (*supra* para. 276).

VIII-2
PROHIBITION OF HUMAN TRAFFICKING,[495] JUDICIAL GUARANTEES AND JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS

A. Arguments of the parties and of the Commission

305. The ***representatives*** argued that the facts of the case "occurred in [a] context of the systematic use of trafficking networks for the purpose of adoption," in which diverse officials intervened with total impunity and the legal framework facilitated adoption procedures, all of which made the sale of children a lucrative business. They indicated that adoption was one of the purposes of the traffic in children, and represented one of the main reasons why such crimes were perpetrated worldwide. According to the representatives, the State was responsible, first, for failing to take the necessary measures to prevent the violations committed in this case and for creating the conditions for a generalized practice of the trafficking and sale of children. Second, they argued that the State had violated the obligation to respect the prohibition of the trafficking and sale of children established in Article 6 of the Convention. In this regard, they indicated that the adoption of the Ramírez brothers met the requirements of the offenses of the trafficking and sale of children, both of which are contemporary forms of slavery prohibited by the Convention. In addition, they underlined that two individuals involved in the adoptions of the Ramírez brothers had been convicted, one for child trafficking for adoption purposes and unlawful association with criminal intent, and the other for malfeasance in office. Third, they argued that the State had not adopted sufficient measures to end the phenomenon of the trafficking and sale of children for the purpose of adoption. In this regard, they alleged that the criminal laws in force at the time of the facts were not adapted to the relevant international standards, insofar as they did not contemplate trafficking for the purpose of

[495] Article 6(1) of the Convention establishes that: "No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women."

adoption, or the trafficking and sale of children. They also stressed that "the inadequate legal definition and the practical application of the law did not allow illegal adoptions to be addressed as a phenomenon of organized crime; therefore, it was not possible to prosecute all the criminal acts corresponding to the different elements of the trafficking networks," facilitating impunity. Fourth, they argued that, to date, no administrative or criminal investigation had been opened against those responsible for the facts of this case. Lastly, according to the representatives, the sale and trafficking of children are complex phenomena that violate numerous rights protected by the American Convention. Consequently, and for all the above reasons, they asked the Court to declare the State responsible for the joint violation of Articles 6(1), 5(1), 11(1) and 7(1), in relation to Articles 1(1), 2 and 19 of the Convention.[496]

306. The ***State*** did not comment on this alleged violation in its answering brief, considering that it had not been claimed at the proper procedural moment before the Commission. However, in its final written arguments, it indicated that it could not be attributed with international responsibility for the alleged violation of Article 6 of the Convention because the elements of human trafficking or any contemporary form of slavery or servitude had not been constituted. It also indicated that it had an adequate legal framework for the protection of children including, in particular, the 2003 Law for Comprehensive Protection of Children and Adolescents, the 2007 Law on Adoptions and its respective 2010 Regulations, and also the Criminal Code which included illegal adoption as a form of human trafficking. Also, regarding the investigation of the facts of this case, it indicated that the person in charge of the children's home where Osmín Tobar Fajardo was placed, "has been arrested and is being tried," so that it "hoped to be able to incorporate this case into that trial," and it considered that this formed part of the reparations.

307. The ***Commission*** did not comment on the phenomenon of irregular adoptions as a form of human trafficking, or declare a violation in this regard in its Merits Report.

B. Considerations of the Court

308. In order to determine whether the State has violated the prohibition of human trafficking, established in Article 6(1) of the American Convention, the Court will make its analysis as follows: (1) general considerations on the traffic and sale of children for the purpose of adoption under Article 6 of the Convention, and (2) assessment of the specific circumstances of this case.

B.1 General considerations on the traffic and sale of children for the purpose of adoption under Article 6 of the Convention

309. Article 6(1) of the American Convention establishes that "[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women." The Court has emphasized that the right not to be subject to slavery, servitude, forced labor or the slave trade and traffic in women is an essential provision of the American Convention and forms part of the non-derogable core of rights that cannot be suspended in case of war, public danger, or other emergency pursuant to Article 27(2) of this instrument.[497] Furthermore, the prohibition of slavery is considered a peremptory norm of international law (*jus cogens*)[498] and its

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[496] In their final written arguments, the representatives added that those facts also resulted in violations of Articles 3 (Right to Juridical Personality) and 22 (Freedom of Movement and Residence) of the Convention. These claims are time-barred and, consequently, inadmissible insofar as they were not made in the pleadings and motions brief pursuant to Article 40 of the Court's Rules of Procedure.

[497] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 243.

[498] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 249. See also: Human Rights Committee, General Comment No. 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the

violation may constitute a crime against humanity.[499] The Court has also considered that, since slavery violates numerous laws, when an individual is subjected to this condition, several rights are violated individually, some to a greater or lesser extent, depending on the specific factual circumstances of each case.[500] However, when verifying a situation prohibited by Article 6 of the Convention, the numerous rights violated are subsumed under Article 6, which protects both the specific and also the complex definition of the concept of slavery.[501]

310. In the case of the *Hacienda Brasil Verde Workers v. Brazil,* the Court underscored that the concepts of the slave trade and the traffic in women have transcended their literal meaning in order to protect, at the current stage of development of international human rights law, those "individuals" trafficked in order to subject them to different forms of exploitation without their consent.[502] In light of the evolution of international law over recent years, this Court has interpreted that the expression "the slave trade and traffic in women" of Article 6(1) of the American Convention should be understood extensively to refer to "human trafficking."[503] Therefore, the prohibition contained in Article 6(1) of the Convention refers to:

a. The recruitment, transportation, transfer, harboring or receipt of persons;

b. By means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. In the case of children under 18 years of age these requirements are not a necessary condition to characterize trafficking;

c. For the purpose of exploitation.[504]

311. Bearing this definition in mind, it should be recalled that human trafficking is a crime that "converts the individual into an object that can be traded, which entails their reification."[505] Based on the arguments of the parties, the Court must determine whether human trafficking, the prohibition of which, in the Court understanding, is prohibited by Article 6(1) of the Convention, also encompasses human trafficking for the purpose of adoption.

Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, November 11, 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

499 *Cf.* Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by the UN Security Council, May 25, 1993, UN Doc. S/RES/827, art. 5.c; Statute of the International Criminal Tribunal for Rwanda, adopted by the UN Security Council, November 8, 1994, UN Doc. S/RES/955, art. 3.c; Statute of the Special Court for Sierra Leone, adopted by the UN Security Council, March 8, 2002, UN Doc. S/2002/246, art. 2.c, and the Rome Statute of the International Criminal Court, entered into force on July 1, 2002, UN Doc. A/CONF.183/9, art. 7.1.c.

500 *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 306.

501 *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 306.

502 *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 288.

503 In particular, the Court has underlined that, in order to give practical effect to the prohibition established in the American Convention and from the perspective of the most favorable interpretation for the individual and the *pro persona* principle, the protection provided by this article cannot be limited to women or "slaves" in keeping with the evolution of the phenomenon of human trafficking in our societies. *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 289.

504 *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 290.

505 United Nations Office on Drugs and Crime (UNODC) in collaboration with ILANUD, *Manual sobre la investigación del delito de trata de personas – Guía de Autoaprendizaje*, 2009, p. 28 (evidence file, folio 2423), and *Cf.* Expert opinion of Norma Angélica Cruz Córdova provided on May 9, 2017 (evidence file, folio 7070).

312. As revealed by the definition established above, the crime of human trafficking may be committed "for the purpose of exploitation" of any kind. The element of purpose is not limited to any specific purpose of exploitation, such as forced labor or sexual exploitation, but may also include other forms of exploitation. This interpretation is in keeping with the *pro persona* principle and the practical effects of the prohibition of human trafficking that – in view of the seriousness of the crime – seeks the broadest possible protection against the numerous ways in which an individual may be exploited.[506] This is also clear from the definition of trafficking in persons contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Protocol of Palermo), which explicitly indicates that the purposes of exploitation included in that definition are a "minimum."[507] Therefore, it is clear that there is no exhaustive list of the possible purposes of exploitation related to the perpetration of the crime of human trafficking.

313. In the specific case of children, Article 35 of the Convention on the Rights of the Child establishes that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[508] This Court notes that the concepts of the sale of or traffic in children are closely interrelated, but are not identical or interchangeable. Trafficking has been defined above, while the sale of children has been defined as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."[509] Although the two crimes may overlap, because the sale of children may take place at any stage of the traffic in children, there are situations of the traffic in children that do not involve the sale of children and vice versa.[510]

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[506] In this regard, the International Criminal Tribunal for the former Yugoslavia has emphasized that "it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea." International Criminal Tribunal for the former Yugoslavia (ICTY), *Case of Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, No. IT-96-23 and IT-96-23/1-A. Judgment of June 12, 2002, para. 119. See also, Human Rights Council, Report of the Special Rapporteur on contemporary forms of slavery including its causes and consequences, July 1, 2013, UN Doc. A/HRC/24/43, paras. 28, 33, 46 and 85 (evidence file, folio 5135, 5137, 5140 and 5147).

[507] Article 3 of the Protocol of Palermo defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs […]" (underlining added). The Protocol also includes a specific definition of child trafficking when indicating that: "[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article." Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, entered into force on December 25, 2003, UN Doc. A/RES/55/25, art. 3.

[508] Convention on the Rights of the Child, art. 35. In addition, Article 2 of the Inter-American Convention on International Traffic in Minors, to which Guatemala is not a party, defines the international traffic in minors as "the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means." Among the "unlawful means" it includes kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located." Inter-American Convention on International Traffic in Minors, entered into force on August 15, 1997, art. 2.

[509] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, entered into force on January 18, 2002, UN Doc. A/RES/54/263, art. 2.a.

[510] *Cf.* UNICEF, Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*)*, Innocenti Research Centre, 2009, pp. 4, 9 and 10.

314. In addition, illegal adoption has been considered a form of exploitation, so the perpetration of human trafficking for the purpose of adoption would not require the subsequent exploitation of the child, only the adoption itself.[511] In this regard, expert witness Nigel Cantwell stressed that the Convention on the Rights of the Child prohibits the traffic of children "for any purpose or in any form" and that "the extended notion of 'exploitation' is an integral component of most unlawful acts that result in illegal adoption."[512] The Special Rapporteurship on the sale of children, child prostitution and child pornography has indicated that intercountry adoption is a cause of trafficking[513] and has referred to illegal adoption as one of the "different forms of exploitation," for which the sale of, and traffic in, children is intended.[514] Furthermore, the Special Rapporteur on trafficking in persons has emphasized that "significant numbers of human beings are trafficked for labour exploitation and children are also trafficked for the purposes of international adoption."[515] Meanwhile, the United Nations Office on Drugs and Crime has underscored that fraudulent adoptions are a form of trafficking in persons.[516] Also, the International Organization for Migration has

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[511] The *travaux préparatoires* of the Protocol of Palermo reveal that, according to those drafting the text, illegal adoption could be included within the scope of application of this protocol and constituted a form of trafficking in people "[w]here illegal adoption amounts to a practice similar to slavery" defined as "[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour." *Cf.* United Nations Office on Drugs and Crime, *Travaux préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2008. p. 366; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force on April 30, 1957, art. 1(d). Expert witness Maud de Boer-Buquicchio, Special Rapporteur on the sale of children, child prostitution and child pornography, explained that, in addition, illegal adoption meets the requirement of "for the purpose of exploitation" of the crime of trafficking, even when it does not equate a practice such as slavery, because obtaining children unlawfully for the purpose of adoption constitutes exploitation "of a child's inherent nature, vulnerability and developmental needs," since the child's capacity and need for love and connection are exploited as part of an unlawful process that obliges the child to develop emotional ties with strangers instead of with the child's original parents and family. *Cf.* Expert opinion of Maud de Boer-Buquicchio provided by affidavit on April 28, 2017 (evidence file, folio 6998), and also Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6954). Furthermore, on the subject of the sale of children, various international reports and instruments have made specific reference to its relationship to illegal adoptions. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography establishes the obligation of States to establish criminal sanctions for "Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption." Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, entered into force on January 18, 2002, UN Doc. A/RES/54/263, art. 3.1.a(ii). Also, the Special Rapporteur on the sale of children, child prostitution and child pornography has indicated that "[t]he sale of children for adoption also continues to be a serious problem, as it is reported that foreign adoptive parents are willing to pay from US$20,000 to $40,000 in adoption fees and costs to adopt a healthy baby." Report on the sale of children, child prostitution and child pornography prepared by of the Special Rapporteur of the Commission on Human Rights in accordance with General Assembly Resolution 51/77, October 16, 1997, UN Doc. A/52/482, para. 30.

[512] Expert opinion of Nigel Cantwell provided by affidavit on May 5, 2017 (evidence file, folio 6953).

[513] *Cf.* Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas Santos, January 29, 1999, UN Doc. E/CN.4/1999/71, para. 54. It has also been noted that "[t]he Internet has led to the expansion of the sale and trafficking of children for the purposes of illegal adoption, partly because it allows the creation of websites which offer children as commodities across borders." Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer-Buquicchio, December 22, 2014, UN Doc. A/HRC/28/56, para. 35.

[514] *Cf.* Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, August 2, 2011, UN Doc. A/66/228, para. 24.b (evidence file, folio 5395). Similarly, the Handbook for Parliamentarians No. 9, published by UNICEF and the Inter-Parliamentary Union, underlines that "[c]hildren are trafficked into a range of exploitative practices that include: illicit adoption." UNICEF and Inter-Parliamentary Union, Handbook for Parliamentarians No. 9: Combating Child Trafficking, 2005, pp. 13 and 14.

[515] Report of the Special Rapporteur on trafficking in persons, especially women and children, December 22, 2004, UN Doc. E/CN.4/2005/71, p. 1 (evidence file, folio 2709).

[516] *Cf.* United Nations Office on Drugs and Crime (UNODC), *Manual sobre la investigación del delito de trata de personas – Guía de Autoaprendizaje,* 2009, p. 36 (evidence file, folio 2431).

indicated that an indicator of human trafficking is that the victims "are adopted using fraudulent procedures (illegal adoption)."[517] The Court also observes that several countries of the region have included the crime of human trafficking in their domestic law.[518]

315. As previously mentioned, the intended purpose of exploitation has not been defined in international law (*supra* para. 312). However, the forms of exploitation that are generally expressly included reveal that the intended purpose of exploitation is that the trafficker executes an act in order to use a person abusively for his own benefit. In this way, a value is attributed to the individual – for example, by his labor – to then convert this to the benefit of the trafficker, under abusive, unfair or fraudulent conditions; and this benefit is the result of the reification or commercialization of that individual. Taking into account all the foregoing considerations, this Court considers that illegal adoption may constitute one of the purposes of exploitation related to human trafficking. In itself, an illegal adoption does not constitute the crime of human trafficking, but when the acts of recruitment, transportation, transfer, harboring or receipt of persons (*supra* para. 310) are committed in order to facilitate or carry out an illegal adoption, this involves a situation of human trafficking for the purpose of adoption. In this situation, the trafficker executes these conducts in order to exploit the child concerned by his or her reification for an illegal adoption. The Court considers that, for the crime of human trafficking to be constituted in this context, the illegal adoption does not need to serve as a means for the subsequent exploitation of the adopted child, such as forced labor or sexual exploitation, because the exploitation occurs owing to the commercialization of the child in abusive conditions or by fraudulent and unfair means, either before, during or after the adoption procedure.

316. This Court has underscored that the sale of a child in exchange for remuneration or any other consideration clearly violates fundamental rights such as the child's liberty, personal integrity and dignity, resulting in one of the most serious forms of violence against a child, regarding whom adults have taken advantage of his or her vulnerable condition.[519] In addition, in relation to human trafficking, it has indicated that States must adopt comprehensive measures of protection, and also ensure that they have an adequate legal protection framework, which is implemented effectively, and prevention policies and practices that allow it to act effectively to respond to complaints.[520] This obligation is reinforced by the specific obligation, established in Article 35 of the Convention on the Rights of the Child read in conjunction with Article 19 of the American Convention, under which States are obliged to take all appropriate measures to prevent the sale of or traffic in children, without any exceptions or limitations, and this includes, among other administrative, legislative and any other measures, the obligation to establish criminal sanctions for the sale of or traffic in

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[517] International Organization for Migration (IOM), Office in Costa Rica, *Manual para la detección del delito de trata de personas orientado a las autoridades migratorias*, 2011, pp. 72, 73, 87 and 88 (evidence file, folios 5491, 5492, 5506 and 5507).

[518] *See, inter alia:* (1) Bolivia: Comprehensive law against human trafficking and smuggling, Law No. 263, July 31, 2012, art. 34; (2) Costa Rica: Law against human trafficking and creation of the National Coalition against Illegal Smuggling of Migrants and Human Trafficking, Law No. 9095, February 8, 2013, art. 5; (3) El Salvador: Special Law against human trafficking, Decree No. 824, November 14, 2014, art. 5; (4) Guatemala: Criminal Code, Decree 17-73, amended by article 47 of the Law against sexual violence, and human trafficking and exploitation, Decree No. 9-2009, March 20, 2009, art. 202 Ter. (evidence file, folio 3881); (5) Honduras: Law against human trafficking, Decree No. 59-2012, July 6, 2012, art. 6; (6) Mexico: General Law to prevent, punish and eliminate crimes of human trafficking for the protection of, and assistance to, the victims of such crimes, June 14, 2012, arts. 10.VIII and 27; (7) Nicaragua: Criminal Code, Law No. 641, November 13, 2007, art. 182; (8) Panama: Law on human trafficking and related activities, Law No. 79, November 9, 2011, art. 4; (9) Dominican Republic: Law on Migrant Smuggling and Human Trafficking, Law No. 137-03, October 8, 2003, art. 1, and (10) Venezuela: Organic Law on organized crime and terrorism financing, January 30, 2012, art. 41.

[519] *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 140.

[520] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 320.

children, whatsoever its form and purpose, and also the obligation to investigate possible offenses.[521]

317. Having established that human trafficking includes the traffic of children for the purpose of adoption, the Court will now determine whether, as the representatives argue, it is possible to conclude that: (i) this offense was constituted in the case of the Ramírez brothers, in violation of Article 6(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, and (ii) whether the State has failed to comply with the other obligations derived from this determination, such as the obligation to investigate those facts.

B.2 Assessment of the specific circumstances of this case

318. The Court has previously concluded that the adoptions of the Ramírez brothers were carried out following their arbitrary removal from their family and in non-compliance with the international norms concerning adoption; therefore, they constituted irregular or illegal adoptions. It has also verified that, at the time of the facts, transnational organized crime networks had been set up dedicated to illegal adoptions, facilitating the commercialization of Guatemalan children (*supra* paras. 61 to 71, 145 to 147, 193, 238 and 239).

319. Regarding this specific case, the Court notes that there are some contextual indications and elements, as well as points that connect it to other cases where the perpetration of human trafficking has been verified: (i) the legal counsel of *Niños de Guatemala*, where the Ramírez brothers were placed and whose social worker prepared two social studies on the Ramírez family (*supra* paras. 85, 90 to 93 and 96), has been tried and convicted of human trafficking in several cases, and also of other offenses such as coercion, threats and influence trading in relation to the adoption of other children;[522] (ii) three judges excused themselves from hearing the application for judicial review of the declaration of abandonment in this case owing to the insults and threats proffered by this lawyer (*supra* paras. 111 and 236) because they were not issuing "abandonments" with sufficient celerity; she even indicated to one of those judges that he needed "to understand […] that the only way to maintain the children's homes was through adoptions";[523] (iii) one judge excused himself after receiving threatening telephone calls demanding that he decide in favor of the caller who indicated that "an international agency [was] supporting them" (*supra* para. 125); (iv) the judge in charge of the Juvenile Trial Court of Escuintla, which was hearing the application for judicial review in this case from October 1998 until July 1999 (*supra* paras. 111 and 117 to 121), was convicted of taking part in the irregular adoption of a child stolen in November 2006 and handed over to a foreign family with false papers,[524] and the Supreme Court withdrew his immunity

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[521] *Cf. Case of Fornerón and daughter v. Argentina, supra*, paras. 139 and 144.

[522] *Cf.* Report prepared by the Human trafficking Prosecutor on June 2, 2017 (evidence file, folios 7702, 7708 and 7710). See also, CICIG, Press release 016: "*Susana Luarca regresa a prisión,*" March 19, 2012, Available at http://cicig.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=146&cntnt01showtemplate=false (cited in evidence file, folio 7298); Press release, "*María Luarca de Umaña, esposa de exPresidente de la Corte Suprema de Justicia involucrada en el tráfico de personas"* [María Luarca de Umaña, wife of the former President of the Supreme Court of Justice involved in human trafficking], Fundación Sobrevivientes, December 18, 2009, Available at: http://fsobrevivientes.blogspot.com/2009/12/esposa-de-ex-President-de-la-corte.html (cited in the Merits Report, folios 500 and 746).

[523] Record No. 16 of the Juvenile Trial Court of Mixco of September 8, 1998 (evidence file, folio 4151), and *Cf.* Ruling of the Juvenile Trial Court of Mixco of September 10, 1998 (evidence file, folios 4146 and 4147).

[524] *Cf.* UN News, "*Guatemala: Tribunal condena a acusados en casos de adopción irregular*", June 19, 2015, Available at: http://www.un.org/spanish/News/story.asp?NewsID=32642#.VmIBjb9tt2C (cited in the Merits Report, folios 481 and 625)

following a complaint of his participation in an irregular adoptions network;[525] (v) Mr. Tobar Fajardo was allegedly threatened in 2001 and 2009, to intimidate him and prevent him from continuing with the case (*supra* para. 138 and 139), and (vi) both Flor de María Ramírez Escobar and Gustavo Tobar Fajardo noted the possible financial profit and commercialization of the children in the briefs they submitted during the application for judicial review of the declaration of abandonment.[526]

320. That said, the Court considers that the aforementioned contextual indications and those related to other cases are not sufficient to conclude that, in the instant case, the irregular adoptions of the Ramírez brothers constituted human trafficking. It has not been demonstrated that, in the specific case of the Ramírez brothers, they had been recruited, transported, transferred, harbored or received for the exclusive purpose of achieving their illegal adoption. Additionally, it has not been demonstrated in this particular case that any of those who intervened in the abandonment and adoption procedures, whether judicial authorities, officials of the Attorney General's Office or the members of *Niños de Guatemala*, or any other person who may have participated at any stage of the procedures, obtained financial benefit or any other form of improper compensation. Contrary to the allegations of the representatives, it is not possible to presume that, in this specific case, improper financial gain occurred. Even though the authorities should have verified this before approving the adoptions (*supra* para. 234 to 237), the absence of diligence in verifying this does not automatically lead to the understanding that this is what happened in the instant case. Consequently, this Court considers that it does not have sufficient probative elements indicating that, in this particular case, an act or transaction was performed by means of which the Ramírez brothers were transferred by a person or group of persons to another in exchange for remuneration or any other type of consideration. The Court also notes that the fact that two of the people who intervened in the case of the Ramírez brothers have been convicted for such offenses in relation to other cases does not mean that all adoptions or abandonment proceedings in which they took part had similar characteristics or that the specific procedures involving the Ramírez brothers also constituted human trafficking. The foregoing elements constitute important indications that need to be investigated, but this is not sufficient to conclude that the intercountry adoptions in this case constituted human trafficking for the purpose of adoption. Therefore, the Court considers that it does not have sufficient evidence to determine that the State violated the prohibition of human trafficking established in Article 6(1) of the American Convention.

321. Nevertheless, the Court notes that, in the instant case, no administrative or criminal investigation of any kind has been opened into the irregularities committed in the proceedings for the declaration of abandonment and the subsequent adoption of the Ramírez brothers, even though

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[525] *Cf.* Report prepared by the Human trafficking Prosecutor on June 2, 2017 (evidence file, folios 7701, 7708 and 7710). See also, Press release, "*CSJ retira inmunidad a juez por adopciones ilegales,*" Prensa Libre, May 8, 2014, Available at: http://www.prensalibre.com/noticias/justicia/CSJ-retira-inmunidad-juez-Escuintla-Mario-Peralta_01134486733.html (cited in the Merits Report, folio 746), and Press release, "*Piden juicio por caso de adopción ilegal en Asociación Primavera*", Diario La Hora, August 1, 2014, Available at: http://lahora.gt/piden-juicio-por-caso-de-adopcion-ilegal-en-asociacion-primavera/ (cited in the Merits Report, folio 746).

[526] Mrs. Ramírez Escobar indicated that the person who took care of her sons had allegedly left her sons alone with malicious intent and asserted that "it was she who had planned all of this as a new method of kidnapping because, on more than one occasion, she had indicated that the children could be given up in adoption to a family that would give [Mrs. Ramírez Escobar] good money; that she could find out through the lawyers she knew and that [Mrs. Ramírez Escobar] should give part of the money to her." Application for judicial review filed on August 22, 1997 (evidence file, folio 4281). Meanwhile, Mr. Tobar Fajardo, in the briefs he submitted during the judicial proceedings claimed that "the judges have had to excuse themselves because the owner of the business of the sale of children is the wife of one of the justices of the Supreme Court of Justice […] whose business has flourished in recent times owing to the children that some courts have referred to it." Brief of Gustavo Tobar Fajardo of December 17, 1998 (evidence file, folios 4126 and 4127). Subsequently, in 2000, Mr. Tobar Fajardo and Mrs. Ramírez Escobar jointly stated that the "children were taken out of the country by means of illegal procedures, as a high-priced commodity, under the disguise of the noble institution of adoption." Brief of Mrs. Ramírez Escobar and Mr. Tobar Fajardo of November 6, 2000 (evidence file, folios 4591 and 4592).

some of these irregularities have been acknowledged by the judicial authorities who decided the remedies filed by their parents (*supra* paras. 120, 124, 128 and 247). This Court has indicated repeatedly that the right of access to justice must ensure, within a reasonable time, the right of the alleged victims or their family members that everything necessary is done to know the truth about what happened, to establish the respective responsibilities, and to punish those responsible.[527] The Court considers that the failure to investigate the irregularities verified by the domestic authorities themselves, added to the indications described above regarding the possibility that the traffic of children for the purpose of adoption had occurred, constitutes a violation of the right of access to justice, derived from a joint interpretation of Articles 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez.

322. Finally, the Court notes that the representatives alleged that the absence of a legal definition of the crime of human trafficking for the purpose of adoption at the time of the facts constituted a violation of Article 2 of the American Convention. The Court has verified that Guatemala included this crime in its criminal law in 2005.[528] A report of the Public Prosecution Service provided to this Court indicates that "[i]t would have been possible to investigate the irregularities committed in adoption procedures prior to March 2005 under other offenses that were defined by law and in force when the facts occurred, but the crime of human trafficking for irregular adoptions could not be used based on [the] principle of legality."[529] Expert witness Carolina Pimentel indicated that "[e]ven though the 1997 criminal legal framework did not establish human trafficking for irregular adoptions, it did establish other crimes that could have been prosecuted in order to investigate, prosecute and punish those responsible for the theft of children."[530] The Court considers that it has not been proved that the failure to define human trafficking for the purpose of adoption as a crime at the time of the facts would have had an impact on the investigation and prosecution of the corresponding conducts in this specific case.[531] Therefore, it concludes that the State has not incurred in a violation of Article 2 of the American Convention on this basis.

VIII-3
RIGHT TO PERSONAL LIBERTY,[532] IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS AND THE DUTY TO ADOPT DOMESTIC LEGAL PROVISIONS

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[527] *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of Acosta et al. v. Nicaragua, supra*, para. 131.

[528] Human trafficking for the purpose of adoption is contemplated in article 202 Ter of the Criminal Code, which establishes: "The recruitment, transportation, transfer, harboring or receipt of one or more persons for the purpose of exploitation constitutes the crime of human trafficking. Anyone committing this crime shall be punished with eight to eighteen years' imprisonment and a fine of three hundred thousand to five hundred thousand quetzals. The consent given by the victim of human trafficking or by their legal representative shall never be taken into account. For the purposes of the crime of human trafficking, the following shall be understood as exploitation: the prostitution of others, any other form of sexual exploitation, forced labor or services, any type of labor exploitation, begging, any form of slavery, servitude, the sale of persons, the extraction and trafficking of human tissue and organs, the recruitment of minors by organized criminal groups, irregular adoptions, the irregular processing of adoptions, pornography, forced pregnancy, and forced or servile marriage." The category of irregular adoptions was added to the Criminal Code by article 47 of the Law against sexual violence, exploitation and human trafficking, Decree No. 9-2009, March 20, 2009 (evidence file, folio 3881).

[529] Report prepared by the human trafficking prosecutor on June 2, 2017 (evidence file, folio 7698).

[530] Expert opinion of Carolina Pimentel González provided by affidavit on May 16, 2017 (evidence file, folio 7296). Similarly, expert opinion provided by Jaime Tecú during the public hearing held before this Court.

[531] *Mutatis mutandis*, *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 104.

[532] Article 7(1) of the Convention establishes that: "Every person has the right to personal liberty and security."

A. Arguments of the parties and of the Commission

323. The ***Commission*** indicated that the institutionalization of children may be a form of deprivation of liberty. It added that "[t]he institutionalization of the brothers was an automatic measure without the State taking steps to prevent the need for alternative placement; it did not explore the need to provide support to their mother so that she could care for her children or the possibility that the father [of Osmín] could take charge of their care." In addition, the decision that confirmed their institutionalization was not motivated. The Commission indicated that "measures were not taken to allow [the Ramírez brothers] to remain in contact with their family," despite their mother's constant requests to have contact with them. It stressed that "'[t]hroughout that whole time, it failed to make a periodic review of the institutionalization as a measure of protection. To the contrary, the proceedings for the declaration of abandonment and for the intercountry adoption were conducted in parallel." It also indicated that, in this context, the right to liberty also entailed the liberty of every person to decide on those aspects that have an impact on their life and the exercise of their rights. The Commission underlined that States have the obligation to ensure that children's homes meet the necessary conditions for children to be able to live their lives as they see fit.

324. The ***representatives*** indicated that a valid restriction of the right to personal liberty is an exceptional situation and, in the case of children, the State has the obligation to verify and document, strictly and rigorously, situations that authorize this, as well as the actions of the state agents who execute this. They pointed out that the measure of institutionalization was arbitrary because "the proceedings were tainted by irregularities in violation of the relevant international standards, and the actions of the authorities were always directed at facilitating the intercountry adoption of the children and not of protecting their interests and family life." They emphasized that "Guatemalan law did not expressly establish the institutionalization of children as a measure of last resort, violating the relevant international standards." Additionally, they argued that "during their institutionalization, the physical liberty of the Ramírez brothers was clearly restricted." In this regard, they argued that it had been demonstrated that, prior to their adoption, the children were separated without being able to have any contact and without the possibility of a visiting regime or contact with their parents and other family members, despite the latter's requests." They also indicated that "the State did not have adequate and sufficient regulations to carry out effective oversight of the institutions that assumed the care of the children before they were given up for adoption."

325. The ***State*** indicated that "the actions of certain public institutions" denote that the right guaranteed in Article 7 of the American Convention "could have been violated," "among other reasons, because [the children] were placed in a private institution for seventeen months and deprived of contact with the members of their family."

B. Considerations of the Court

326. Article 7 of the Convention contains two very different types of rule: one general and the other specific. The general rule is to be found in the first paragraph: "[e]very person has the right to personal liberty and security"; while the specific rule consists of a series of guarantees that protect the right not to be deprived of liberty illegally (Art. 7(2)) or arbitrarily (Art. 7(3)), to be informed of the reasons for the detention and the charges (Art. 7(4)), to judicial control of the deprivation of liberty and the reasonable duration of pre-trial detention (Art. 7(5)), to contest the lawfulness of the detention (Art. 7(6)) and not to be detained for debt (Art. 7(7)).

327. In general, liberty is the ability to do or not do everything that is legally allowed.[533] In other words, it is the right of everyone to organize their individual and social life in keeping with their own choices and beliefs and pursuant to the law.[534] Meanwhile, security is the absence of interferences that restrict or limit physical liberty beyond what is reasonable.[535] Defined in this way, liberty is a basic human right inherent in the attributes of the person that permeates the whole of the American Convention.[536]

328. In this case, the representatives and the Commission have alleged the violation of the general protection of the liberty of Osmín Tobar Ramírez, indicating that his placement in the *Niños de Guatemala* children's home constituted a deprivation of his personal liberty. The State has not acknowledged this violation, but neither has it denied it; rather, it has indicated that this right "could have been violated" due to the children's placement in an institution (*supra* paras. 19, 30, 32 and 325).

329. This Court has indicated, pursuant to the evolution of international human rights law,[537] that deprivation of liberty is constituted when a person, in this case a child, is not permitted to leave at will, the premises or establishment in which he or she has been placed.[538] According to this definition, placement in institutional care may constitute a form of deprivation of liberty if children are subject to measures that restrict their freedom of movement in a way that exceeds the rules

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[533] *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, supra*, para. 142; *Case of I.V. v. Bolivia, supra*, para. 151, and Advisory Opinion OC-24/17, *supra*, para. 89.

[534] *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, supra*, para. 142; *Case of I.V. v. Bolivia, supra*, para. 151, and Advisory Opinion OC-24/17, *supra*, para. 89.

[535] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 52, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 80.

[536] *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, supra*, para. 142; *Case of I.V. v. Bolivia, supra*, para. 151, and Advisory Opinion OC-24/17, *supra*, para. 89.

[537] Article 4.2 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes that, for the purposes of the Protocol, "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority." Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199, adopted on December 18, 2002, entered into force on June 22, 2006. According to Rule 11.b of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority." United Nations Rules for the Protection of Juveniles Deprived of their Liberty, attached to UN General Assembly Resolution 45/113 adopted on December 14, 1990, UN Doc. A/RES/45/113. For the purposes of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Inter-American Commission on Human Rights, deprivation of liberty is understood to be "[a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty." IACHR, Resolution 1/08*:* Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*,* adopted during the 131st regular session held from March 3 to 14, 2008, OEA/Ser/L/V/II.131 doc. 26, general provision.

[538] *Cf.* Advisory Opinion OC-21/14, *supra*, para. 145.

that would be imposed by a family to safeguard a child's well-being, such as forbidding him or her from going out at night.[539]

330. In the instant case, Osmín Tobar Ramírez was confined in a *Niños de Guatemala* children's home from January 9, 1997, until July 1998[540] (*supra* paras. 85 and 116). The case file contains insufficient information on the regime and the conditions of this home and whether or not his freedom of movement was restricted. Therefore, it is not possible to determine whether this placement in institutional care constituted a deprivation of his personal liberty pursuant to Article 7(2) and 7(3) of the American Convention.

331. Nevertheless, the Court notes that any placement of children in institutional care entails an interference by the State in their life by determining a place of residence other than the habitual one. This signifies changes in their daily life, the persons they interact with, their belongings, and their eating habits, among others. Therefore, the Court considers that this type of measure constitutes, at the very least, an interference in the general liberty protected by Article 7(1), by having a radical impact on the way in which each child leads his or her life.

332. In this sense, any measure of placement in institutional or residential care must be established by law, pursue a legitimate purpose, and meet the requirements that it be suitable, necessary and proportionate[541] in order to be in conformity with the American Convention. The Court will now analyze whether the placement in residential care of Osmín Tobar Ramírez complied with the said requirements.

B.1 Legality of residential care

333. At the time of the facts, the law did not establish the measures of protection that a judge could order in cases in which the abandonment of a child was alleged. The Children's Code established that the juvenile judge could order measures of protection for children in an irregular situation, and also "[t]ake a final decision in cases involving children, ordering the measures that this code establishes."[542] However, it did not establish what these measures were. The placement of

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[539] In this regard, see, for example: UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, 2007, p. 285. Similarly, the Human Rights Committee also considers that "[p]lacement of a child in institutional care amounts to a deprivation of liberty." Human Rights Committee of the International Covenant on Civil and Political Rights, General Comment No. 35: Article 9 (Liberty and security of persons), December 16, 2014, UN Doc. CCPR/C/GC/35, para. 62. Similarly, the UN General Assembly has indicated that: "[m]easures aimed at protecting children in care should be in conformity with the law and should not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community." Guidelines for the alternative care of children, attached to UN General Assembly Resolution 64/142, February 24, 2010, UN Doc. A/RES/64/142, para. 92.

[540] *Cf.* Social study of Flor de María Ramírez Escobar prepared by the Attorney General's Office on March 14, 1997 (evidence file, folio 4323), and Report of the President of *Niños de Guatemala* of December 31, 1998 (evidence file, folio 4639).

[541] *Mutatis mutandis,* regarding any restriction of a right protected by the American Convention, See, *The Word "Laws " in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86, May 9, 1986. Series A No. 6, paras. 35 and 37, and *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 168.

[542] Children's Code. Decree No. 78-79 of November 28, 1979, arts. 19 and 49 (evidence file, folios 3444 and 3447). In response to a request for helpful information, the representatives indicated that this norm referred back to the Code itself, but the Code "did not establish specific measures for the protection of children in a situation of risk; but rather, merely measures for dealing with children in conflict with the law." These were described in article 42 of the code and are as follows: "1. Reprimand of the child. 2. Placement of the child in an appropriate institution or establishment for his or her treatment and education. 3. Supervised liberty. 4. Fine or reprimand for the parents, guardians or those responsible for the child if they have been summoned and heard during the proceedings. 5. Referral of the case to an ordinary court, if inquiries reveal the commission of a misdemeanor or offense by an adult" (underlining added). Children's Code. Decree No. 78-79 of November 28, 1979, arts. 42 and 43 (evidence file, folios 3446 and 3447). For its

children in "a children's institution or establishment" was only expressly established in the Children's Code as one of the measures that could be ordered to resolve the situation of children in conflict with the law.[543] Moreover, the law did not expressly establish the need to consider the best interests of the child when ordering this type of measure or that the placement in a residential institution should be the option of last resort.

334. In this regard, first, the Court notes that States must distinguish between the procedure and treatment to be given to children who need care and protection from that established for children who are in conflict with the law.[544] Second, State laws must give effect to the rights recognized in the Convention on the Rights of the Child,[545] as well as in the American Convention itself. Thus, the domestic laws of States Parties must include the need to consider the best interests of the child[546] in any decision on institutionalization, and also that this should only be ordered when absolutely necessary.[547] Nevertheless, the Court considers that it has insufficient evidence to rule on the strict legality of the measure of placement in institutional care applied to Osmín Tobar Ramírez. This is without prejudice to ruling on the need for this measure in this specific case which will be examined below.

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part, the State indicated that the protection measures that the juvenile judge could order were regulated by the Family Courts Act, "which was the law applied when the facts of the case occurred." Article 12 of this law established that: "[t]he family courts have discretionary powers. They shall ensure that the weakest party in the family relationship is duly protected and, to this end, they shall order the measures they deem pertinent. In addition, they are obliged to investigate the truth in any disputes that arise, and to order the evidentiary procedures they deem necessary, even questioning the parties directly concerning the disputed facts; and they shall assess the value of the evidence in keeping with the rules of sound judicial discretion. Pursuant to the spirit of this law, when a judge finds it necessary to protect the rights of a party, before or during the processing of the proceedings, they may – on receiving a petition or a communication from one of the parties – determine any type of precautionary measures, and these shall be ordered without further processing and without the need to provide a surety." Family Courts Act. Decree-Law No. 206, May 7, 1964 (evidence file, folio 7955). According to the State, this law "authorized the judge to order any type of measure he deemed pertinent in order to safeguard, protect and ensure the best interests of the child," and it was not correct to limit the applicable measures of protection to just one law out of the whole structure of the domestic legal order. In this regard, the representatives underlined that the law cited by the State referred to "the measures that the family courts with jurisdiction to hear "all matters relating to the family" could order, and not to those "measures that the juvenile judge who had jurisdiction to hear 'cases of children in an irregular situation" could order. The Court notes that the decisions based on which Osmín Tobar Ramírez was placed in institutional care were issued by a juvenile court rather than a family court (*supra* paras. 90 and 101), and there is no record in the placement decision, or in the decision on abandonment that ordered the institutionalization, that this measure was ordered based on the said law, rather it was based on the provisions of the Children's Code. *Cf.* Communication of the First Juvenile Trial Court of January 27, 1997 (evidence file, folio 4384), and Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folios 4303 and 4304).

[543] *Cf.* Children's Code. Decree No. 78-79 of November 28, 1979, art. 42 (evidence file, folio 3447).

[544] *Cf.* Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Argentina, October 9, 2002, UN Doc. CRC/C/15/Add.187, para. 40. The Court also notes that places where children in need of protection are institutionalized cannot be the same as those for children in conflict with the law. *Cf.* Committee on the Rights of the Childs, Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Antigua and Barbuda, November 3, 2004, UN Doc. CRC/C/15/Add.247, para. 41.

[545] In this regard, article 4 of the Convention on the Rights of the Child establishes that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

[546] *Cf.* Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, May 29, 2013, paras. 25 and 31. See also, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Guatemala*, July 9, 2001, CRC/C/15/Add.154, paras. 24 and 25.

[547] *Cf.* Convention on the Rights of the Child, art. 20. *See also,* UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Fully revised third edition, 2007, p. 282.

B.2 Purpose and suitability of residential care

335. Children who are provisionally or permanently removed from their family have the right to the special protection and assistance of the State. Placement in suitable institutions for the care of children may be one of the care options.[548] Consequently, placement in residential care is a measure that has a legitimate purpose in keeping with the Convention and could be appropriate to achieve this objective.

336. Nevertheless, the Court notes that there has been a tendency to eliminate large residential care facilities.[549] In this regard, the Committee on the Rights of the Child has indicated that smaller childcare institutions often have a better record of caring for children.[550] However, the larger the setting, the fewer the chances are to guarantee the individualized needs of each child.[551] In this regard, expert witness Magdalena Palau indicated that "it has been proved that large care institutions have not been able to provide an effective response to children from an integral perspective; that is, contemplating the complex aspects that must be taken into account in order to protect children."[552] As previously mentioned, there is no record in the case file of the characteristics or conditions of the children's home in which Osmín Tobar Ramírez was placed (*supra* para. 330). Therefore, in the following section, the Court will analyze his institutionalization as a form of institutional or residential care, without this signifying a favorable opinion or determination with regard to the form of residential care it provided.[553]

B.3 Need for residential care

337. To determine the need for the residential care of Osmín Tobar Ramírez, it is necessary to analyze whether this was the least harmful measure for his rights and the most suitable for his best interests. This Court has already determined that the removal of the Ramírez brothers from their family by the declaration of abandonment was not in keeping with domestic law; nor was it shown to be a necessary measure for their best interests (*supra* para. 193). Therefore, the Court does not find it necessary to repeat its consideration on the different care alternatives that the extended family of the Ramírez brothers could have provided (*supra* paras. 189 and 190). However, bearing in mind the facts of this case, in this section, it will examine residential care as a provisional measure, without analyzing other permanent care alternatives such as adoption as part of the need for the measure.

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548 *Cf.* Convention on the Rights of the Child, art. 20.

549 *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 23.

550 See, *inter alia,* Committee on the Rights of the Child, Report on the twenty-fifth session, Geneva November 14, 2000, UN Doc. CRC/C/100, paras. 688.22 and 688.24, and Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Costa Rica,* August 3, 2011, UN Doc. CRC/C/CRI/CO/4, para. 49c). Similarly, see also, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, Mission to Guatemala, January 21, 2013, UN Doc. A/HRC/22/54/Add.1, para. 117.d), and Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 122.

551 See, *inter alia,* European Commission, General-Directorate for Employment, Social Affairs and Inclusion, *Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, September 2009, p. 9.

552 Expert opinion of Magdalena Palau Fernández provided by affidavit on May 9, 2017 (evidence file, folio 7022).

553 The Court understands institutional or residential care to be placement in an institution rather than with a family, irrespective of the size of the institution and the number of children it can hold. Thus, the terms "institutionalization," "institutional care" or "residential care" will be used without this constituting an assessment of the way in which this type of care was provided.

338. Nevertheless, the Court notes that, when children are removed from their families, "the State is responsible for protecting [their] rights and ensuring appropriate alternative care with or through competent local authorities and duly authorized civil society organizations."[554] The best interests of the child must be the primary consideration when determining the type of care that the State will provide.[555] Thus, States should ensure the availability of a range of alternative care options to enable them to decide which is the most appropriate for each specific case.[556]

339. The Convention on the Rights of the Child establishes that States must ensure alternative care for children removed from their families,[557] including "foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (*supra* para. 232). When interpreting this right, the Committee on the Rights of the Child has pointed out that "any form of institutionalized care for children should only serve as a measure of last resort," with the exclusive purpose of protecting the best interests of the child.[558] In this regard it has indicated that:

> The Committee is concerned that the institutionalization of children is used systematically. The Committee acknowledges that there has been a general agreement that the family environment provides the best possibilities for the harmonious development of the child, but between the family of origin and the placement in institution, options have to be found. These options could include the traditional placement in the family or in the extended family, open centres, the placement for day or night, emergency placement, temporary stay solutions, etc. Many of these options already exist.[559]

340. This Court considers that recourse to institutional care should only be used when measures of care within the family environment are considered unsuitable for the child, and the institutional care is provided in an environment that is "specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests."[560] Therefore, the decision must be based on an individualized assessment of each child.

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[554] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 5.

[555] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, paras. 6 and 7.

[556] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 54.

[557] *Cf.* Convention on the Rights of the Child, art. 20.2.

[558] *Cf.* Committee on the Rights of the Child, General Comment No. 21 on children in street situations, June 21, 2017, UN Doc. CRC/C/GC/21, para. 45, and Committee on the Rights of the Child, General Comment No. 3: HIV/AIDS and the rights of the child, March 17, 2003, UN Doc. CRC/GC/2003/3, para. 35.

[559] Committee on the Rights of the Child, Report on the fortieth session, March 17, 2006, UN Doc. CRC/C/153, para. 665. See also, Committee on the Rights of the Child, Report on the twenty-fifth session, Geneva, November 14, 2000, UN Doc. CRC/C/100, paras. 688.17 and 688.26.

[560] Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 21. See also, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Latvia*, June 28, 2006, CRC/C/15/Add.58, para. 33, and Committee on the Rights of the Child, Report on the fortieth session, March 17, 2006, UN Doc. CRC/C/153, paras. 660 and 667.

341. According to the Guidelines for the Alternative Care of Children adopted by the United Nations General Assembly, decision-making on the method of alternative care should take place "through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings."[561] Furthermore, the decision must be based on rigorous assessment of each situation, carried out by suitably qualified professionals, with full consultation with the child, and with his/her parents or legal guardian.[562] In addition, "the child and his/her parents should be fully informed about the alternative care options available, the implications of each option and their rights and obligations in the matter."[563]

342. In the instant case, the decisions that ordered the placement of Osmín Tobar Ramírez in the *Niños de Guatemala* children's home, did not contain any statement of reasons, or reveal that other care options had been examined, or that any consideration had been given to assessing whether the temporary institutionalization was the measures most in keeping with the best interests of Osmín Tobar Ramírez. Additionally, the case file shows that no steps were taken to determine the ideal care option in the case of Osmín Tobar Ramírez and neither were he or his parents consulted regarding alternative care options.

343. To the contrary, the authorities automatically considered placement in the children's home of the said organization as the only option, without even examining the possibility of conferring Osmín Tobar Ramírez to the care of residential institutions other than *Niños de Guatemala*, or considering alternative care options other than residential care. In fact, when asking the Attorney General's Office to visit the home of the Ramírez brothers to verify the alleged situation of abandonment, the court in charge of the case indicated that, if the reported situation was verified, it was necessary to "proceed to rescue them, placing them in the *Niños de Guatemala* children's home for their care and protection"[564] (*supra* para. 84). On January 27, 1997, the decision to place the children in this home was confirmed, without any additional consideration[565] (*supra* para. 90). Finally, on August 6, 1997, in the judicial decision declaring the abandonment, the guardianship of the Ramírez brothers was awarded to *Niños de Guatemala*, without any observations being made in this regard[566] (*supra* para. 101). Therefore, the State has not demonstrated that the temporary institutionalization of Osmín Tobar Ramírez was necessary for his best interests.

344. Similarly, the Court notes that, while placed in the *Niños de Guatemala* children's home, the Ramírez brothers were separated owing to their difference in age.[567] Following this separation, they were never reunited again. This Court notes that:

> Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child.

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[561] Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 57.

[562] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 57.

[563] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 64.

[564] Communication of the First Juvenile Trial Court of January 8, 1997, addressed to the Head of the Juvenile Department of the Attorney General's Office (evidence file, folio 32).

[565] *Cf.* Communication of the First Juvenile Trial Court of January 27, 1997 (evidence file, folio 4384).

[566] *Cf.* Ruling of the First Juvenile Trial Court of August 6, 1997 (evidence file, folio 4304).

[567] *Cf.* Study prepared by the *Niños de Guatemala* social worker on February 3, 1997 (evidence file, folio 4382).

> In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests.[568]

345. The State should have considered the type of alternative care that could be used to ensure, insofar as possible, that the Ramírez brothers were not separated. If institutional care were found to be necessary, options other than *Niños de Guatemala* should have been considered in which the Ramírez brothers would not have been separated due to their age difference. There is no record that this matter was taken into account by the domestic authorities or by the children's home itself. However, the Court recalls that the State must ensure that institutions responsible for the care and protection of children respect their best interests[569] (*supra* para. 223).

346. The Court also recalls that, while Osmín Tobar Ramírez was in the *Niños de Guatemala* children's home, Mrs. Ramírez Escobar was not allowed to visit him (*supra* paras. 86, 87 and 97). In addition, the Court notes that, according to Mrs. Ramírez Escobar, she was not informed of the children's home in which her children had been placed[570] (*supra* para. 87). There is no record that the decision to prevent Mrs. Ramírez Escobar visiting her children had been taken following any specific examination or analysis in which it had been determined that it was in the best interests of Osmín Tobar Ramírez not to receive visits from his mother and other family members. In this regard, the Court reiterates that the removal of children from their families should not prevent their regular contact with their parents, unless this is contrary to the best interests of the child (*supra* para. 189). "The natural family relationship is not terminated by reason of the fact that the child has been taken into public care."[571]

347. Lastly, the Court notes that the appropriateness of the institutionalization should be reviewed periodically. The Convention on the Rights of the Child establishes that:

> States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.[572]

348. Those periodic reviews should take into account the child's personal development and any changing needs in order to determine whether this type of care continues to be necessary and adequate.[573] In this case, it appears that, at no time during the seventeen months that Osmín Tobar Ramírez remained institutionalized, was it questioned or analyzed whether this institutional care continued to be the appropriate measure of alternative care.

349. Based on the above, the Court notes that the State has not demonstrated that the placement of Osmín Tobar Ramírez in a residential care home was decided after having discarded other types of alternative care that could have been appropriate for his specific case or necessary to guarantee

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[568] Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 17.

[569] *Cf.* Convention on the Rights of the Child, art. 3.

[570] *Cf.* Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6814).

[571] *Cf.* ECHR, *Case of Scozzari and Giunta v. Italy* [GS], Nos. 39221/98 and 41963/98, Judgment of July 13, 2000, para. 169.

[572] Convention on the Rights of the Child, art. 25. *See also,* Committee on the Rights of the Childs, *Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Latvia*, June 28, 2006, CRC/C/15/Add.58, para. 33.

[573] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 67.

his best interests. Moreover, neither has it demonstrated that the separation from his younger brother or the impossibility of receiving visits from Mrs. Ramírez Escobar was in the best interests of Osmín Tobar Ramírez. Therefore, the placement in the *Niños de Guatemala* children's home constituted an arbitrary restriction of the right to liberty of Osmín Tobar Ramírez, in its general sense, protected by Article 7(1) of the Convention (*supra* para. 0).

350. The Court also notes that, to ensure that placement in such residential institutions does not become deprivation of personal liberty, pursuant to Article 7(2) and (3) described above (paras. 329 and 330), and that their conditions are commensurate with the general well-being of children, the State must regulate, monitor and supervise residential childcare institutions and centers.

B.4 Duty to regulate, monitor and supervise

351. Children removed from their families are subject to the protection of the State (*supra* para. 339). The State must ensure that the institutions responsible for the care of children operate in accordance with their rights (*supra* paras. 223 and 345). In this regard, the Convention on the Rights of the Child establishes that:

> States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[574]

352. Similarly, the Committee on the Rights of the Child has indicated that "States should ensure that State and civil society-run shelters and facilities are safe and of good quality."[575] States should also ensure that such institutions do not isolate children – "for example, by ensuring that education, recreation or health services are provided outside the institution."[576]

353. Additionally, the Guidelines for the Alternative Care of Children establish that care institutions in general, including residential institutions, "must be registered and authorized to operate by social welfare services or another competent authority."[577] This authorization must be reviewed periodically.[578]

354. The Court considers that, when children are removed from their families and under the State's protection, the State is obliged to prevent third parties from unduly interfering in the enjoyment of their rights. Therefore, States have the duty to regulate and monitor all residential childcare

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[574] Convention on the Rights of the Child, art. 3(3). In addition, article 19(1) of this Convention establishes that: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

[575] *Cf.* Committee on the Rights of the Child, General Comment No. 21 on children in street situations, June 21, 20172017, UN Doc. CRC/C/GC/21, para. 45.

[576] *Cf.* Committee on the Rights of the Child, Report on the twenty-fifth session, Geneva, November 14, 2000, UN Doc. CRC/C/100, para. 688.22. See also, Committee on the Rights of the Child, General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), April 17, 2013, UN Doc. CRC/C/GC/17, para. 51.

[577] Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 105.

[578] *Cf.* Guidelines for the Alternative Care of Children, attached to UN General Assembly Resolution 64/142 , February 24, 2010, UN Doc. A/RES/64/142, para. 105.

institutions and centers within their jurisdiction, as a special duty for the protection of the rights of the child, regardless of whether the entity that provides such services is public or private.

355. Failure to comply with the duty to regulate and monitor gives rise to international responsibility because States are responsible for the actions of both public and private entities in charge of the care of children removed from their families and because, pursuant to the American Convention, the grounds for international responsibility include the acts of private entities that are acting on behalf of the State, as well as the acts of third parties, when the State has failed to comply with its duty to regulate and monitor them.[579]

356. In the instant case, the parties and the Commission only referred to the regulations included in article 12 of the Children's Code, which indicated that the General Directorate for the Welfare of Children and the Family of the Social Welfare Secretariat was the entity responsible for everything related to institutions and establishments for children in an "irregular situation," as well as the custody, management and treatment of such children.[580] They did not allege before this Court that there was any other specific regulation with regard to the actions of the residential institutions, or regarding the State's monitoring and supervision mechanisms at the time the facts of this case occurred and, particularly, while Osmín Tobar Ramírez was confined in the *Niños de Guatemala* children's home. According to a report of the Social Welfare Secretariat, in 2002, "there [were] numerous children's homes […] operating in the country […]. However, these private institutions operate[d] largely without State control and/or supervision."[581] Furthermore, there is no record in the case file that the State, acting through any competent authority, verified the situation of Osmín Tobar Ramírez or, in any way, continued to be informed of his situation. Such measures would have allowed the State to require *Niños de Guatemala* to respect the rights and best interests of Osmín Tobar Ramírez: for example, not to have been separated from his brother. Therefore, the State failed to comply with its duty to adequately regulate, supervise and monitor the *Niños de Guatemala* children's home where Osmín Tobar Ramírez had been placed.

B.5 Conclusion

357. The Court concludes that the placement of Osmín Tobar Ramírez in a residential childcare institution constituted a restriction of his liberty contrary to the American Convention, because it has not been proved that this measure was necessary. In addition, the separation of the Ramírez brothers, the impossibility of visits by Mrs. Ramírez Escobar, and the absence of a periodic review of the appropriateness of that measure of care for Osmín Tobar Ramírez contributed to the arbitrary nature of the measure. Lastly, the failure to regulate, supervise and monitor *Niños de Guatemala* prove that the State also failed to take measures to ensure that the residential care was provided in accordance with his rights as a child. Therefore, the State violated the right to personal liberty of Osmín Tobar Ramírez established in Article 7(1) of the Convention, in relation to Articles 11(2), 17(1), 19, 1(1) and 2 of the Convention.

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[579] *Cf. Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 86, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 175.

[580] Specifically, article 12 establishes that: "the General Directorate for the Welfare of Children and the Family of the Social Welfare Secretariat shall have the mandate of executing the programs for the social welfare and protection of children, in collaboration with the jurisdictional organs, and everything relating to institutions and establishments for children in an irregular situation, as well as the custody, management and treatment of such children." Children's Code. Decree No. 78-79 of November 28, 1979, art. 12 (evidence file, folio 3444).

[581] *Cf.* Social Welfare Secretariat of the Presidency of the Republic and *Movimiento Social por los Derechos de la Niñez y la Juventud*, "Public policy and national plan of action in favor of children and adolescents 2004-2015, December 2003 (evidence file, folio 417).

VIII-4
RIGHT TO A NAME[582] OF OSMÍN TOBAR RAMÍREZ IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS

A. Arguments of the parties and of the Commission

358. The ***Commission*** considered that the State was responsible for the violation of the right to identity and to a name established in Article 18 of the American Convention, to the detriment of the Ramírez brothers because, following their adoption, the first and last names of both children were changed. This constituted an arbitrary substitution of their name which was a fundamental component of their identity. In addition, it stressed that Guatemala "imposed a financial burden on the parents in order to achieve [the] restoration" of the family ties and the name. Meanwhile, the ***representatives*** alleged that, as a result of the facts that violated the Convention in this case, the State also violated different aspects of the identity of the Ramírez brothers; in particular, the name, the family relations, and the biological identity, as well as their culture and language of origin, in violation of Articles 11(2), 17(1) and 18 of the Convention. Regarding the right to a name, they indicated that, since the proceedings for the declaration of abandonment and adoption were irregular, the change of name represented the violation of the victims' right to a name, as a fundamental component of their identity. They added that, to date, Guatemala had not taken a single measure to reinstate their first and last names, so that the change in the identity of the children persisted up until the present time. The ***State*** acknowledged the violation of the right to a name established in Article 18 of the Convention to the detriment of Osmín Tobar Ramírez. It indicated that it "recognizes that the family, the name, the nationality and the family relations are elements that constitute the right to an identity."

B. Considerations of the Court

359. The Court has established that, in general, the right to identity may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several other rights depending on the subject of rights in question and the respective circumstances.[583] The identity is a right that includes various elements, including – and without being exhaustive – nationality, name and family relations.[584] Although the American Convention does not specifically refer to the right to identity under this name, it does include other rights that are its components.[585] In this regard, the Court recalls that the American Convention protects those elements as rights in themselves even though not all such rights will necessarily be involved in all cases that concern the right to identity.[586] The right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them.[587] For example, the name clearly forms part of

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[582] Article 18 of the Convention establishes that: "Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary."

[583] *Cf. Case of Gelman v. Uruguay, supra*, para. 122, and Advisory Opinion OC-24/17, *supra*, para. 90.

[584] *Cf. Case of Gelman v. Uruguay, supra*, para. 122, and *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 112. Similarly, article 8 of the Convention on the Rights of the Child includes "nationality, name and family relations" within the right of the child to preserve his or her identity.

[585] *Cf. Case of Gelman v. Uruguay, supra*, para. 122, and Advisory Opinion OC-24/17, *supra*, para. 90.

[586] *Cf. Case of Rochac Hernández et al. v. El Salvador, supra*, para. 116, and Advisory Opinion OC-24/17, *supra*, para. 91.

[587] *Cf.* Advisory Opinion OC-24/17, *supra*, para. 90.

the right to identity, but it is not its only component.[588] This right is closely linked to the individual in his or her specific individuality and private life, both of which are supported by historical and biological experiences, as well as by the way in which this person relates to others through the development of relationships within the family and society.[589]

360. The right to a name, recognized autonomously in Article 18 of the Convention, constitutes a basic and essential element of the identity of each person.[590] The name, as an attribute of personality, represents an expression of individuality and its purpose is to affirm the identity of a person before society and in procedures before the State.[591] It seeks to ensure that every individual has a unique and singular symbol that distinguishes him or her from everyone else, by which he or she can be identified and recognized. It is a basic right inherent to all persons based merely on their existence.[592] In addition, the first and last names are essential to establish, officially, the connection that exists between the different members of a family.[593]

361. In view of the State's acknowledgement of responsibility, this Court does not find it necessary to examine this violation (*supra* para. 248). However, it emphasizes that, in the case of Osmín Tobar Ramírez, his name and identity were changed and he was cut off from his culture[594] as the result of arbitrary proceedings in which he was removed from his family and subject to an adoption procedure that failed to comply with the minimum substantive and procedural guarantees required in this regard, and also without the guarantee of an effective remedy to protect him against such violations (*supra* paras. 193, 238, 239, 256 and 263), all of which the Court has considered to be an arbitrary interference in his private and family life, his right to protection of the family, his rights of the child, and to judicial guarantees and protection. In addition, the Court notes that, currently, the legal name of Osmín Tobar Ramírez is Ricardo William Borz. In this regard, the State has indicated that he can request a change of name before a notary; however, Guatemala has not taken any measure to make the pertinent changes in his records and identity document, despite its responsibility in the events which gave rise to this change of name and identity and having acknowledged the irregularities committed in the proceedings on the declaration of abandonment at the domestic level, and also this specific violation at the international level.

362. Therefore, this Court concludes that Guatemala violated the right to identity and the right to a name of Osmín Tobar Ramírez recognized in Article 18 of the Convention, in relation to Article 1(1) and 19 of this instrument.

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588 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 90, citing OAS, Inter-American Juridical Committee, Opinion "on the scope of the right to identity," resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 11.

589 *Cf. Case of Contreras et al. v. El Salvador, supra*, para. 113, Advisory Opinion OC-24/17, *supra*, para. 91.

590 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of September 8, 2005. Series C No. 130, para. 182, and Advisory Opinion OC-24/17, *supra*, para. 106.

591 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 106.

592 *Cf.* Advisory Opinion OC-24/17, *supra*, para. 106.

593 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic, supra*, 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.

594 During the public hearing, Osmín Tobar Ramírez stated that when he moved to the United States with his adoptive family, he suffered "a cultural shock; I was removed from my culture, whether this was rich or poor; I never felt that I fit into that society, […] due to the color of my skin. In the United States, children, […] if one does not look like them, then one is not accepted; there was a great deal of bullying owing to how I was and how I had been born." Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

363. Based on the preceding conclusion and taking into account the conclusions in Chapter VIII-1 regarding the violations of Articles 11(2) and 17(1) in the context of this case, the Court finds that it is not necessary to make an additional ruling on the violation of these rights, in relation to the violation of the right to identity of Osmín Tobar Ramírez.

VIII-5
RIGHT TO PERSONAL INTEGRITY[595] IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS

A. Arguments of the parties and of the Commission

364. The ***Commission*** considered that the removal of the Ramírez children from the home where they lived with their mother, their placement in an institution for a year and a half where, according to Mrs. Ramírez Escobar, they were unable to receive visits from their family, and their subsequent adoption, were actions of such gravity that they allow it to be presumed that the right to personal integrity of both the Ramírez brothers and of Mrs. Ramírez Escobar and Mr. Tobar Fajardo was violated. For their part, the ***representatives*** alleged that the facts of the case prove that the children experienced intense psychological and emotional suffering, as a direct result of the acts and omissions of the authorities who were involved in the case and of the violence suffered during their placement in the children's home. They indicated that "[t]he personal integrity of the victims was violated owing to the arbitrary family separation and the subsequent adoption process of the children […], as well as by the ineffectiveness of the domestic remedies and the lack of access to justice. The ***State*** indicated that the facts "could constitute the presumed violation of the right to personal integrity (Art. 5) of the Ramírez brothers and their family members."

B. Considerations of the Court

365. The Court has concluded that the declaration of abandonment, the placement in a residential care center, and the adoption of the Ramírez brothers constituted violations of the rights to family life, to protection of the family, to personal liberty, and of the child (*supra* paras. 193 to 196, 238 to 243 and 357). The Court considers that the suffering that results from the unjustified and permanent separation of a family is such that it should be analyzed as a possible violation of the right to personal integrity of each member of the said family. The Court has indicated that the removal of children from their families may give rise to specific and particularly serious violations of personal integrity, which may have lasting effects.[596]

366. Mrs. Ramírez Escobar stated that, when she found out that they had taken her children, she had "an attack of nerves, [she] fell apart," she "felt an inner emptiness."[597] Regarding how her life was without her children, she indicated that it was "empty; always wanting to see them, know what has happened to them, touch them, tell them that [she was] their mother – no one else – that [she] had to work and that is why [she had] left them that day."[598] Expert witness María Renee González Rodríguez described how Mrs. Ramírez Escobar "was profoundly affected, living with guilt, shame, fear and misgivings after her rights as a woman, a mother, a person, were violated; she did not receive what was necessary to meet her basic needs and, to this day, this prevents her from living a

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[595] The relevant part of Article 5 of the Convention establishes that: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

[596] *Cf. Case of Contreras et al. v. El Salvador, supra*, para. 100.

[597] Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6815).

[598] Affidavit made by Flor de María Ramírez Escobar on May 8, 2017 (evidence file, folio 6817).

life that she finds satisfying and fulfilling."[599] The expert witness also indicated that "[t]he mistreatment by the State's institutions […] has had a psycho-effective impact on her, represented by her anger, frustration and irritation towards the authorities who did nothing to assist her. This reveals the secondary victimization to which she was subjected."[600]

367. Meanwhile, Mr. Tobar Fajardo stated that his life "was enormously affected; he spent many years alone when, at night, [he] asked God to look after [his son]; he watched other children running around and it made [him] very sad that [he] did not have [his] son at the most important times; [his] son was not there. There was always a place for him in [his] home and it was always empty."[601] He also underlines that even now that he is living with Osmín Tobar Ramírez they are unable to communicate because they do not speak the same language.[602] Expert witness Zoila Esperanza Ajuchan Chis described how the family separation caused Mr. Tobar Fajardo to suffer moments of anguish, "hopelessness, sadness and anger."[603] Furthermore, the State's lack of response has caused him frustration.[604] Additionally, Mr. Tobar Fajardo stated that he had been the victim of different forms of aggression and harassment (*supra* paras. 137 to 140). The Court does not have sufficient evidence to determine whether this aggression could be attributed to the State in any way.

368. Lastly, Osmín Tobar Ramírez stated that, when he was separated from his brother, he "lost part of [his] soul because he was [his] family; it was [his] brother; it was as if they had taken part of [his] heart."[605] He indicated that when he arrived in the United States, he suffered from "a cultural shock; [he] was removed from [his] culture, whether this was rich or poor; [he] never felt that [he] fit into that society, […] due to the color of [his] skin."[606] He also recounted that, since he was twelve years old, "every evening" he had tried to find his biological family.[607] Now that he is living with his biological family he "again feels like a human being. [He] feel[s] that [he is] someone; [that he is worth something], that [he] can live and achieve [his] potential, which every human being has the right to achieve."[608] Expert witness Karla Renee Lemus Barrios described how the failure to consult him and provide him with information during the adoption procedure, had "had an impact on his affective relationships," because he tends to believe that they are all utilitarian; also, "it has caused him to have a higher level of anger manifested as violence; constantly suspecting that others want to take advantage of him," and this has led him to isolate himself.[609] The expert witness also underscored that the separation from his family and the lack of information about what

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[599] Psychosocial appraisal of Flor de María Ramírez Escobar, provided by affidavit by María Renee González Rodríguez on May 4, 2017 (evidence file, folio 7049).

[600] Psychosocial appraisal of Flor de María Ramírez Escobar, provided by affidavit by María Renee González Rodríguez on May 4, 2017 (evidence file, folio 7049).

[601] Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

[602] *Cf.* Statement made by Gustavo Tobar Fajardo during the public hearing held before this Court.

[603] Psychological assessment of Gustavo Tobar Fajardo provided by affidavit by Zoila Esperanza Ajuchan Chis on May 9, 2017 (evidence file, folio 7086).

[604] *Cf.* Psychological assessment of Gustavo Tobar Fajardo provided by affidavit by Zoila Esperanza Ajuchan Chis on May 9, 2017 (evidence file, folio 7086).

[605] Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[606] Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[607] Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[608] Statement made by Osmín Tobar Ramírez during the public hearing held before this Court.

[609] *Cf.* Psychological assessment of Osmín Tobar Ramírez provided by affidavit Karla Renee Lemus Barrios on May 8, 2017 (evidence file, folio 7058).

happened "have resulted in his losing his sense of belonging; where he does not fit into any family because he blames everyone for the kidnapping and subsequent adoption."[610]

369. Based on the above, the Court finds that it has been proved that the facts of this case also involved a violation of the right to personal integrity recognized in Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter.

IX
REPARATIONS
(Application of Article 63(1) of the American Convention)

370. Based on the provisions of Article 63(1) of the American Convention,[611] the Court has indicated that any violation of an international obligation that has caused harm entails the duty to redress this adequately, and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.

371. Reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation.[612] If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of such violations.[613] Therefore, the Court has considered the need to grant diverse measures of reparation in order to redress the harm comprehensively, so that in addition to financial compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition have special relevance for the harm caused.[614]

372. This Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe this concurrence in order to rule appropriately and pursuant to law.[615]

373. Based on the violations declared in the preceding chapter, the Court will now examine the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law in relation to the nature and scope of the obligation

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[610] Psychological assessment of Osmín Tobar Ramírez provided by affidavit Karla Renee Lemus Barrios on May 8, 2017 (evidence file, folio 7059).

[611] Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[612] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 5, 2018. Series C No. 346. para. 183.

[613] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 183.

[614] *Cf. Case of the Las Dos Erres Massacre v. Guatemala, supra*, para. 226, and *Case the Dismissed Workers of PetroPeru et al. v. Peru, supra*, para. 195.

[615] *Cf. Case of Ticona Estrada et al. v. Bolivia, supra*, para. 110, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 184.

to make reparation, in order to establish measures addressed at redressing the harm caused to the victims.[616]

374. International case law and, in particular, that of this Court, has established repeatedly that the judgment constitutes, *per se,* a form of reparation.[617] However, considering the circumstances of this case and the suffering that the violations caused to the victims, the Court finds it pertinent to establish other measures.

A. Injured party

375. The Court reiterates that, pursuant to Article 63(1) of the Convention, the injured party is considered to be anyone who has been declared a victim of the violation of any right recognized therein. Therefore, the Court considers that Osmín Tobar Ramírez, Flor de María Ramírez Escobar and Gustavo Tobar Fajardo are the "injured party," and in their capacity as victims of the violations declared in Chapter VIII, they will be the beneficiaries of the measures that the Court now orders.

B. Measures of restitution

B.1 Re-establishment of the family ties of the Ramírez family

376. The ***Commission*** recommended the immediate institution of a procedure addressed at the effective establishment of ties between Flor de María Ramírez Escobar and Gustavo Tobar Fajardo and the Ramírez children, according to the wishes of the latter and taking their opinion into account. It also recommended the immediate provision of medical and psychological or psychiatric treatment to the victims who request this.

377. The ***representatives*** asked the Court to order the State to take the necessary measures to provide therapeutic assistance and any other action necessary to restore the family ties between Osmín Tobar Ramírez and his mother and father, with therapeutic assistance and the support of experts who, in consultation with the victims, should draw up a work plan to achieve this. They indicated that these restitution actions should not undermine the existing ties with his adoptive family. They also indicated that the removal of the children from their parents meant that they had grown up with a different identity and with a language and cultural values that were completely different from those of their biological family in Guatemala. Consequently, the representatives considered that it was necessary, in order to restore the family ties, that the State ensure free and permanent access to Spanish and English language lessons for Osmín and his parents, respectively. Lastly, they asked that measures be taken to restore the ties between J.R. and his mother and brother.

378. The ***State*** argued that it was impossible to restitute the affective and family ties, but it was possible to help re-establish them with therapeutic assistance and it therefore considered that the medical expenses of the family members and of Osmín Tobar Ramírez were fair and equitable. It also indicated that, in order to contribute to this re-establishment, it offered therapeutic assistance under the public programs provided by the State's institutions. Furthermore, it indicated that it "undertook to take the necessary steps to implement" the program of Spanish and English language lessons in a public institution.

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[616] *Cf. Case of Andrade Salmón v. Bolivia, supra*, para. 189, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 185.

[617] *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 197.

379. The Court recalls that the reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution. Moreover, as it has also indicated on previous occasions,[618] it understands that this is not fully possible in cases such as this one, which involved the separation of the family for a prolonged period. However, the Court considers that Guatemala must take all necessary and appropriate measures to facilitate and contribute to re-establishment of the family ties between Osmín Tobar Ramírez and his parents, and make a serious, multidisciplinary effort, *ex officio*, to initiate, encourage and, if appropriate, continue a connection between Flor de María Ramírez Escobar and Osmín Tobar Ramírez with J.R. To comply with these reparations, the State may use its own public institutions or contract private entities and individuals who have experience in these matters, always guaranteeing the participation of the victims and their representatives in any relevant decisions. To this end, the State must meet the following minimum parameters.

B.1.a Re-establishment of the family ties between Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and their son, Osmín Tobar Ramírez

380. To create the most propitious and appropriate conditions for the re-establishment of the family ties, and taking into account the psychological problems that the facts of this case have caused to the victims (*supra* paras. 365 to 369), the State must provide, immediately and free of charge, the psychological or psychiatric treatment that each of the victims requires. When providing this psychological or psychiatric treatment, the particular circumstances and needs of each victim must be considered, so that they are provided with collective, family and individual treatment, according to the needs of each of them, and following an individual appraisal by a health professional.[619] Without prejudice to the foregoing, and in a complementary manner, Guatemalan must provide therapeutic support to the members of the family by experts in this area, to support and assist them, if they so wish, in the process of re-establishing family ties. The Ramírez family must advise whether they desire this assistance within six months of notification of this judgment. On being advised of their consent, the State must immediately appoint an expert or establish a team of professionals who, without delay, must prepare and implement a work plan. The State must also guarantee the impartiality and suitability of the experts who take part in this process, who must be made aware of this judgment as well as the other relevant circumstances regarding what happened to the Ramírez family.

381. The Court also finds it appropriate that the State provide study grants to the members of the Ramírez family so that Flor de María Ramírez Escobar and Gustavo Tobar Fajardo may learn English, and their son Osmín Tobar Ramírez may learn Spanish, in order to facilitate communication between them. The centers or institutions for which these study grants are awarded must be determined by mutual agreement between the State and the victims. The grants must include the cost of enrolment and the materials required for the said courses.

B.1.b Reconnection of Flor de María Ramírez Escobar and Osmín Tobar Ramírez with J.R.

382. The State must also design and implement, with the assistance of experts in this area, a procedure for a gradual rapprochement addressed at creating effective links between Flor de María Ramírez Escobar and Osmín Tobar Ramírez with J.R. Even though J.R. is not a victim in this case, his removal from the Ramírez family also violated the rights of his mother and brother and, it is for

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618 *Cf. Case of Fornerón and daughter v. Argentina, supra*, para. 157.

619 *Cf. Case of the 19 Traders v. Colombia. Merits, reparations and costs.* Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of Vereda La Esperanza v. Colombia, supra*, para. 279.

the benefit of them that this measure of reparation is established. To this end, the State must immediately appoint a multidisciplinary team of professionals who, without delay, prepare a work plan to achieve the gradual reconnection of the members of the family, which must then be executed by the State. Guatemala must ensure the impartiality and suitability of the expert or experts who take part in this process, and they must be made aware of this judgment as well as the other relevant circumstances of what happened to the Ramírez family. The State must guarantee the participation of the victims and their representatives in the designation of the team of experts.

383. Among other matters, the work plan must establish an initial approach to J.R. during which he is informed, appropriately and accompanied by the best psychosocial resources, about the facts of the case that are relevant and necessary for him to be able to take an informed decision on whether he wishes to take part in this measure of gradual reconnection. Even though J.R. is not a victim in this case, the Court notes that, at all times, his wishes must be respected, and his rights guaranteed and protected. Therefore, the work plan that is designed must establish the most appropriate mechanisms for obtaining his consent at each stage of the process and keeping him fully informed, without causing harm. In this first contact, the State must make a serious effort to inform him of the facts of this case and the violations found, using all necessary psychological, social or family assistance. Guatemala must guarantee that this first consent or, if applicable, refusal to take part in the reconnection process to which this measure refers, is fully informed. To comply with this measure, the State must activate, use and cover the costs of the diplomatic mechanisms available to coordinate cooperation with the United States of America, where J.R. currently lives.

384. The Court understands that the result of this measure of reparation does not depend strictly on Guatemala, and that compliance with this aspect of the judgment will be based on the efforts made by the State. Consequently, the State must report on the steps taken in this regard within one year of notification of this judgment. If J.R. indicates, in a clear and informed manner, that he does not wish to take part in a process of gradual reconnection with his biological family, it will be understood that this measure of reparation has been complied with by the State's presentation of a detailed report, with supporting documentation, demonstrating fulfilment of the elements indicated in the preceding paragraphs concerning the initial approach.

385. If J.R. agrees to take part in a process of gradual reconnection with his biological family that, eventually leads to a re-encounter with the Ramírez family, the State must take the necessary steps to provide therapeutic support to the members of the family by experts in this area, to support and assist them in this process of re-establishing family ties. The State must also guarantee and provide all the material resources and conditions determined by the experts for the process of reconnection to come about and for all necessary visits and meetings to take place, including, among other aspects, travel and accommodation expenses for Flor de María Ramírez Escobar, Osmín Tobar Ramírez and, eventually, J.R., to and from the United States of America, as well as any other necessary resource.

B.2 Measures to amend the birth certificate of Osmín Tobar Ramírez and restore the legal family relationship

386. The ***representatives*** alleged that, to achieve the full restitution of the rights of the victims, the Court should order the State to take the necessary measures to annul the decisions on abandonment and adoption issued in relation to Osmín Tobar Ramírez. They also asked that the Court order the State to take appropriate steps to restore the identity of Osmín Tobar Ramírez, including the first and last names given to him by his biological parents, as well as other personal data; this should include the amendment of all records in Guatemala. They indicated that, if this process entails any expenses or requires legal representation, the State should pay for these.

387. The ***State*** indicated that no mechanisms existed that would allow it to annul the said domestic procedures because they had been carried out legally, pursuant to the domestic laws in force at the time. It also argued that, although the declaration of abandonment, *per se,* represented a violation of rights, it was not possible to reverse it because, today, Osmín Tobar Ramírez was an adult and it would not have any legal effects. It also indicated that it had played no part in the change of name procedure and that this action was regulated by civil law and the dispositive principle relating to the parties; thus, at any time, Mr. Tobar Ramírez could initiate this procedure before the National Civil Registry.

388. The Court considers that the State must adopt, *ex officio*, all appropriate and necessary measures to amend the birth certificate of Osmín Tobar Ramírez in order to restore the legal family ties and other rights that arose at the time of this birth, together with the first and last names given to him by his biological parents and other personal data. This entails the amendment of all official records in Guatemala in which Osmín Tobar Ramírez appears with the first and last names given him by his adoptive parents. To comply with this measure, the State must guarantee the full access and participation of Osmín Tobar Ramírez at all times; it must provide him with adequate legal assistance so that he is duly and fully informed of the measures to be taken, their legal consequences and their scope; moreover, the State must have the express and informed consent of Osmín Tobar Ramírez at each and every stage of its implementation. The Court also notes that, since this is a measure of reparation, the State may not place the burden of the legal expenses or the expenses of legal representation required to carry out the necessary procedures before the corresponding Guatemalan authorities on the victim. The State is obliged to comply with this measure of reparation, *ex officio*, within one year of notification of this judgment.

389. Furthermore, as it has in other cases,[620] this Court orders the State to activate and use the available diplomatic channels to coordinate cooperation with the United States of America to facilitate the amendment of the name and personal data of Osmín Tobar Ramírez in the records of the state of his former residence. The Court understands that the result of this aspect of the measure of reparation does not depend solely on Guatemala. Consequently, its fulfillment will be based on the efforts made by the State and it must therefore report on the steps taken in this regard within one year of notification of this judgment.

390. Without prejudice to the foregoing, the Court recalls that J.R. has not consented to participate in these proceedings. Consequently, the State must, at all times protect his rights and, any measure or decision taken in relation to Osmín Tobar Ramírez must not have an impact on the legal status of J.R. unless he has given his express consent to this.

C. Obligation to investigate the facts of this case

391. The ***Commission*** recommended that the State order such administrative, disciplinary or criminal measures as might be applicable to the acts or omissions of the State officials who participated in the facts of this case.

392. The ***representatives*** asked the Court to ensure that all those responsible for the human rights violations committed to the detriment of the victims were investigated, prosecuted and punished. They indicated that a diverse series of public officials responsible for administering justice took part in the facts of this case, as well as other individuals involved in the trafficking networks. However, the Guatemalan authorities had not prosecuted anyone for those violations, either administratively or criminally, despite the different complaints filed and the irregularities detected in the proceedings. They underscored that the investigation should consider that the facts of this case

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620 *Cf. Case of Contreras et al. v. El Salvador, supra*, para. 196.

constituted a contemporary practice of slavery and, therefore, a crime against humanity, so that no exemptions of responsibility were permissible, and they asked that the investigation be addressed not only at identifying the immediate participants, but also at dismantling the structures that permitted and gave rise to these grave human rights violations.

393. The ***State*** undertook "to take the necessary steps" before the institutions of the Guatemalan judicial sector to see that those responsible for the human rights violations in this case were investigated, prosecuted and punished. It also indicated that it undertook to facilitate a mechanism for the review and updating of the institutions responsible for the investigation of human trafficking for the purpose of adoption and that it would ensure that the Performance Assessment Unit of the Public Prosecution Service verified the implementation of this measure.

394. As it has in other cases,[621] the Court establishes that the State must open, *ex officio*, and conduct effectively the appropriate disciplinary, administrative and criminal investigations into the arbitrary separation of the family, the procedure for the declaration of abandonment, the intercountry adoptions of the Ramírez brothers and, in particular, the indications pointed out in this case regarding the possibility that the removal and subsequent adoption of the Ramírez brothers constituted human trafficking for the purpose of adoption and, if applicable, determine and punish those responsible (*supra* paras. 318 to 321). This obligation must be complied with within a reasonable time, taking into consideration the criteria and standards indicated in this judgment.

395. Additionally, the Court finds it necessary that, in order to comply with this obligation, the State must guarantee that the competent authorities have available and use all necessary resources, including logistic and scientific resources, to gather and process the evidence and, in particular, that they have the authority for full access to the pertinent documentation and information to investigate the facts reported and to conduct promptly those actions and inquiries that are essential to clarify what happened. The Court also considers that the State must ensure the full access and capacity to act of the victims or their family members at all stages of the investigation and prosecution of those responsible, pursuant to domestic law and the provisions of the American Convention.

D. Measures of satisfaction and guarantees of non-repetition

D.1 Organization of a public act to acknowledge international responsibility

396. The ***representatives*** asked the Court to order Guatemala to hold a public act to acknowledge international responsibility and to apologize for the facts and guarantee their non-repetition. They indicated that, for such an act to be meaningful for the victims and for Guatemalan society as a whole, it should meet a series of minimum requirements: that it be attended by the most senior State authorities, including the heads of all the institutions that were involved in these grave facts, including the Judiciary, the Legislature, and the Attorney General's Office, in order to demonstrate a real commitment; that it be organized in consultation with the victims, and that it be disseminated as extensively as possible.

397. The ***State*** undertook to hold a public act in which it would acknowledge its responsibility for the facts and the violations committed.

398. The Court appreciates the State's acknowledgement of responsibility which could represent partial satisfaction for the victims in relation to the violations declared in this judgment.

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[621] *Cf., inter alia, Case of the Las Dos Erres Massacre v. Guatemala, supra*, para. 233(d); *Case of Fornerón and daughter v. Argentina, supra*, para. 172, and *Case of Pacheco León et al. v. Honduras, supra*, para. 196.

Nevertheless, and as it has in other cases,[622] the Court finds it necessary, in order to redress the harm caused to the victims and to avoid facts such as those of this case being repeated, to establish that the State must hold a public act to acknowledge its international responsibility for the facts of this case. During the act, reference must be made to the human rights violations declared in this judgment. In addition, it must be carried out by means of a public ceremony in the presence of senior State officials and the victims. The State must reach agreement with the victims or their representatives on the way in which this public act of acknowledgement is executed, as well as on essential details, such as the place and date. To this end, the State has one year as of notification of this judgment.

D.2 Preparation of an audiovisual documentary

399. The ***representatives*** asked the Court to order the elaboration of an audiovisual documentary on the trafficking of children for the purpose of adoption in Guatemala. They also considered it pertinent that a committee be created so that the victims in this case, their representatives, and representatives of the corresponding public entities would participate in the making of the documentary. They added that the State should cover all the costs of the production, exhibition and distribution of the documentary.

400. The ***State*** agreed to make the audiovisual documentary in keeping with the possibilities of its social communication institutions and financial possibilities. It also indicated that it would support its distribution via the available state media at peak viewing hours. It stressed that this reparation should not include the payment of transmission time on commercial and/or private channels owing to the high cost involved, which would entail a disproportionate burden for the State of Guatemala.

401. Considering the willingness indicated by the State, the Court finds it pertinent that the State make a documentary on the facts of this case, the context in which they occurred, and the violations declared in the judgment. To this end, the State must set up a committee composed of the victims and their representatives, together with representatives of public institutions in order to prepare this audiovisual material. For the purposes of its domestic distribution, the documentary must be made in Spanish and, at least, translated into Maya K'iche'. In addition, Guatemala must cover all the costs relating to the production, exhibition and distribution of the documentary. The documentary must be shown on a national television channel, once, and the family members and representatives must be informed of the details at least two weeks in advance. Additionally, the State must provide the representatives with five copies of the video for distribution among the victims, their representatives, other civil society organizations, and the country's principal universities for promotion purposes. The State has two years from notification of this judgment to make this documentary, and to exhibit and distribute it.

D.3 Publication of the judgment

402. Neither the Commission nor the representatives asked the Court to order the State to publish this judgment. However, as in other cases,[623] the Court finds it pertinent to order the State, within six months of notification of this judgment, to make the following publications: (a) the official

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[622] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 81, and *Case of Vereda La Esperanza v. Colombia, supra*, para. 284.

[623] *Cf., inter alia, Case of Cantoral Benavides v. Peru. Reparations and costs, supra*, para. 79; *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 207; *Case of Andrade Salmón v. Bolivia, supra*, para. 197; *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 333, para. 300, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 199.

summary of the judgment prepared by the Court, once, in the official gazette and in a national newspaper with widespread circulation, in an appropriate and legible font, and (b) this judgment, in its entirety, available for at least one year on an official website of the State, in a way that is accessible to the public from the website's home page.

403. Additionally, bearing in mind that Osmín Tobar Ramírez is not fluent in Spanish, the Court considers that the State must translate this judgment into English within six months of its notification. Also, Guatemala must forward a copy of this translation to the Court.

404. The State must inform this Court immediately it has made each of the publications ordered, regardless of the one-year time frame for presenting its first report established in the operative paragraphs of this judgment.

D.4 Reinforcement of the supervision and control of the institutionalization of children

405. The ***Commission*** reiterated the importance of measures of non-repetition in this case. In particular, it stressed the information provided by expert witness Jaime Tecú during the hearing on the persistence of the almost automatic institutionalization of children as the predominant measure employed for their protection.

406. The ***representatives*** indicated that, even though the law had subsequently been amended, the problem of supervision and control continued. They asserted that there was no system in place for monitoring the institutionalization of children and they indicated that, even though, currently, the National Adoptions Commission (CNA) had the authority to control and monitor private children's homes – while public children's homes were under the control of the Social Welfare Secretariat – in practice, the CNA did not have the capacity to comply with the monitoring functions assigned to it. They also indicated that Guatemala should adopt measures other than institutionalization in order to reduce the population of children institutionalized under legal protection measures. In this regard, they asked that the State adopt a norm that regulated the child protection system and that met the relevant international standards. To this end, they indicated that the State must implement a permanent training program for agents of justice on the international standards concerning the institutionalization of children, child protection systems, and the best interests of the child.

407. The ***State*** undertook to facilitate the strengthening of the State's institutional framework responsible for all the issues related to child protection. Thus, it indicated that, regarding oversight, and capacity-building for the control and supervision of the institutionalization of children, it would support the CNA by institutional and regulatory reinforcement measures to provide it with the necessary resources for the adequate monitoring of children's homes. Lastly, it undertook to continue providing, through the COPREDEH, a permanent training program for agents of justice that included international standards for institutionalization, child protection systems, and the best interests of the child.

408. This Court appreciates the willingness shown by the State with regard to the measures requested by the representatives. The Court recalls that it has concluded that the State had failed to comply with its obligation to supervise and monitor organizations such as *Niños de Guatemala*, where the Ramírez brothers were placed and this had contributed to the arbitrary nature of the institutionalization of Osmín Tobar Ramírez (*supra* paras. 351 to 357). Therefore, the Court considers it opportune to order, as a guarantee of non-repetition, that the State of Guatemala create and implement an effective national program to guarantee adequate supervision, monitoring and control of the institutionalization of children. Among those measures, the State must, at least: (i) provide constant, regular and updated training for state officials and agents of justice who intervene

in the processes of institutionalization or the residential care of children, as well as for employees of private organizations to which the care and protection of children are delegated; to this end, it must also establish an inventory and keep an updated register of all institutions, centers or organizations that exercise such functions; (ii) guarantee that the National Adoptions Council has the necessary logistic and financial resources to deal effectively with the new methods used by the networks that traffic institutionalized children; (iii) ensure, by regular reviews, that the institutionalization of children does not entail an abusive restriction of their freedom of movement, which may result in a deprivation of their liberty, based on the standards established in Chapter VIII-3 of this judgment, and (iv) guarantee the gradual de-institutionalization of children and adolescents who are in its care, establishing and implementing measures other than institutionalization. To comply with these measures, the State must demonstrate the effective creation of this program, and its implementation.

E. Other measures requested

409. The ***Commission*** recommended the adoption of the necessary measures of non-repetition, including legislative and other measures, to ensure that in both their regulation and practice, adoptions in Guatemala complied with the international standards described in its report.

410. The ***representatives*** asked the Court to order the State: (i) to provide housing for each of the victims so that they had improved and more decent conditions in which to reconstruct their life projects in Guatemala; (ii) to set up a committee to search for child victims of trafficking; (iii) to grant a university grant to Osmín Tobar Ramírez; (iv) to cover the cost of two flights each year so that Osmín Tobar Ramírez could visit his adoptive family; (v) to guarantee medical care to the victims to treat their physical ailments; (vi) to reinforce the CNA's capacity to supervise, monitor and control adoption procedures by decentralizing its services and providing sufficient resources; (vii) to implement a permanent training program for agents of justice on international standards for adoptions, and the trafficking of children for the purpose of adoption; (viii) to amend article 202 Ter of the Criminal Code in order to establish the human trafficking as a crime against humanity, which continues until the whereabouts of the victim has been established and, therefore, is not subject to statutory limitation; (ix) to reinforce the institutions that prosecute the crime of trafficking for the purpose of adoption, so that they can operate in a decentralized manner and are provided with increased financial resources, and also to appoint more prosecutors and court officials, and (x) to ratify the Inter-American Convention on the International Traffic in Minors.

411. The ***State*** indicated that: (i) the request for housing was inappropriate due to the absence of a causal nexus with the violations that occurred; (ii) it undertook "to facilitate actions to coordinate," through the COPREDEH, the "establishment of a committee to search for missing children," which included not only cases of adoption but also other cases; (iii) it agreed to award a grant for Osmín Tobar Ramírez to study in Guatemala; (iv) it was not feasible to cover the costs of his air transportation in order to maintain the ties with his adoptive family; (v) it was not possible to find a causal nexus between the harm committed and the ailments suffered by Flor de María Ramírez Escobar and Gustavo Tobar Fajardo; however, "as an expression of the State's good will," it undertook to provide medical care to both parents through the hospital services of the Ministry of Public Health and Social Welfare (MSPAS); (vi) it undertook to facilitate the strengthening of the State's institutional framework for the execution of all actions related to child protection, and would also support the CNA by institutional and regulatory strengthening processes that would allow it to have the necessary resources for the satisfactory monitoring of adoption procedures; (vii) the CNA and the COPREDEH had initiated training processes, through a diploma program, that included international standards for adoptions, and human trafficking for the purpose of adoption, and it undertook to continue offering a permanent training program for agents of justice on these issues; (viii) criminal doctrine established that the non-applicability of statutory limitations was regulated by

the ratification of international instruments for the protection of human rights that established this and, otherwise, the general rules of criminal law were applicable which established the "non-retroactivity" of criminal law and "the statute of limitations," principles that also regulated due process and that were established in the Constitution; (ix) it would transfer to the Prosecutor General and Head of the Public Prosecution Service the request to strengthen the office of the human trafficking prosecutor and the corresponding investigation unit, but it was not possible for this unit to operate in a decentralized manner because the Public Prosecution Service was a unique and indivisible autonomous entity, and (x) it undertook "to initiate measures for the possibility of ratifying the Inter-American Convention on the International Traffic in Minors to be included on Guatemala's foreign policy agenda."

412. This Court recalls that measures of reparation should have a causal nexus with the facts of the case (*supra* para. 372); therefore, it considers that it is not appropriate to order the State to grant the housing requested by the representatives, or the creation of a committee to search for child victims of human trafficking, or the award of a university grant and air transportation expenses to Osmín Tobar Ramírez. Regarding the other measures requested, the Court takes note of the willingness indicated by the State to implement or facilitate some of the measures, but considers that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims. Therefore, it does not find it necessary to order those additional measures, without prejudice to the State deciding to adopt them and grant them at the domestic level.

F. Compensation

F.1 Pecuniary damage

413. The ***representatives*** asked that the Court consider, as consequential damage, the debt of almost US$30,000.00 that Osmín Tobar Ramírez had to incur in order to study in the United States of America, which he has been unable to repay and which is still outstanding. They also indicated that Osmín had to cover the cost of his air travel to Guatemala to reunite with his biological parents in May 2011 and in November 2015, which amounted to US$900 and US$300, respectively. They also asked that the Court consider that, from the start of the proceedings on the declaration of abandonment, his parents had made an untiring effort to try and reverse the decisions that violated their fundamental rights and freedoms and those of their children, and to seek justice for the violations committed, which had entailed numerous hours of dedication, many of which were taken from their working hours in the case of Mrs. Ramírez Escobar as a *tramitadora* and in the case of Mr. Tobar Fajardo as a bus driver. They also indicated that Mr. Tobar Fajardo was unable to work for four months in 2001 as a result of the attack he suffered. Therefore, in this regard, they asked the Court to order the State to pay loss of earnings, in equity, to Flor de María Ramírez Escobar and Gustavo Tobar Fajardo.

414. The ***State*** argued that no causal nexus could be observed in the case of payment of the debt incurred by Osmín Tobar Ramírez in the United States of America for his university studies, but that it could recognize the expense of the airfares that were authenticated with the pertinent vouchers. It stressed that no vouchers had been presented to support the damages claimed. It also pointed out that the biological parents had not suffered any type of incapacity or obstacle that prevented them from carrying out their work due to the facts of this case, and the representatives had not indicated how the facts had affected their ability to earn a fixed income.

415. In its case law, this Court has developed the concept that pecuniary damage supposes "the loss of, or detriment to, the income of the victims, the expenses incurred due to the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case."[624]

416. Regarding the sums requested in favor of Osmín Tobar Ramírez, first, the Court considers that there is no causal nexus between the debt incurred to pay for his university studies and the violations declared in this judgment. For the same reason, the Court does not consider that it is in order to pay a sum for the concept of loss of earnings of his parents. However, it finds that, under the concept of consequential damage, it is appropriate to compensate the victims for the expenses incurred as a result of this case, the measures they had to take to obtain justice and try to obtain the return of the Ramírez brothers, and also for the family reunion with Osmín Tobar Ramírez. Thus, the Court establishes, in equity, the following sums for the concept of consequential damage which the State must pay to each of the victims: US$5,000.00 (five thousand United States dollars) to Osmín Tobar Ramírez, US$5,000.00 (five thousand United States dollars) to Flor de María Ramírez Escobar, and US$5,000.00 (five thousand United States dollars) to Gustavo Tobar Fajardo.

F.2 Non-pecuniary damage

417. The ***representatives*** asked that the State redress the non-pecuniary damage by the payment of US$100,000.00 to each of the victims based on the circumstances of the case, the violations committed, the suffering caused, the time that has passed, the denial of justice, the impact on the life projects, and the other consequences of a non-pecuniary nature suffered.

418. The ***State*** argued that the other measures of non-repetition offered entailed a significant financial contribution, and therefore the reparations of a social nature that facilitated non-repetition of the facts should be given priority, as opposed to the claims based on the "materialist concept of *homo economicus.*" Consequently, the State argued that, in this case, specific measures had been taken that, in addition to responding to the hopes and claims of the family, sought an institutional reform aimed at the non-repetition of the facts that occurred for vulnerable children in Guatemala.

419. International case law has established that the judgment constitutes, *per se,* a form of reparation.[625] However, this Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and afflictions caused to the direct victim and his close family, the impairment of values of great significance for the individual, and also the changes of a non-pecuniary nature in the living conditions of the victim or his family."[626]

420. The Court recalls that, in this case, it has determined that the State violated the personal integrity of the victims owing to the suffering caused as a result of the arbitrary separation of the family and the subsequent intercountry adoptions of the Ramírez brothers (*supra* paras. 161 to 196, 201 to 243 and 365 to 369). Based on the suffering and afflictions caused by the violations declared in this case, the denial of justice, the change in the living conditions and the other circumstances of this case, the Court deems it pertinent to establish, in equity, for the concept of non-pecuniary damage, the sum of US$100,000.00 (one hundred thousand United States dollars) for each of the victims: Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez.

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[624] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 208.

[625] *Cf. Case of El Amparo v. Venezuela. Reparations and costs.* Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 197.

[626] *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs***.** Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 334.

G. Costs and expenses

421. The ***representatives*** asked that the victims be reimbursed for the expenses incurred throughout the proceedings of the declaration of abandonment, in equity, because they had not kept the vouchers for those expenses. They also requested reimbursement to CEJIL of the sum of US$43,479.75 for salaries and travel expenses relating to the processing of this case and the expenses incurred in processing the case before the Court.[627] They also indicated that the organization, *El Refugio*, had "indicate[d] its intention to waive reimbursement of costs and expenses."

422. The ***State*** took note of the express waiver of the payment of costs and expenses by *El Refugio* and indicated that "it acknowledge[d]" CEJIL's travel expenses. However, it argued that the salaries included and the number of professionals who had supported the case throughout the last ten years was unjustified when compared to what Guatemalan lawyers earn for the same work. It also asked that the future expenses requested by the representatives should not be considered as these were not certain. Lastly, it asked that the victims should not be awarded the expenses of their representatives during the domestic proceedings, as they had not incurred this expense.

423. The Court reiterates that, pursuant to its case law,[628] costs and expenses form part of the concept of reparation, because the actions taken by the victims in order to obtain justice at both the national and the international level, entail disbursement that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it corresponds to the Court to assess their scope prudently, and this includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[629]

424. The Court has indicated that the claims of the victims or their representatives for costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural moment granted them; that is, in the pleadings and motions brief, without prejudice to those claims being updated subsequently in keeping with the new costs and expenses incurred due to the proceedings before this Court.[630] In addition, the Court reiterates that it is not sufficient to merely forward evidentiary documents; rather, the parties must include arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[631]

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[627] In their pleadings and motions brief, they asked for payment to CEJIL of the sum of US$3,395.09 for travel expenses, and US$31,661.85 for salaries, for total expenses of US$35,056.94, to be reimbursed directly to CEJIL. In their final arguments, they updated this sum to US$47,117.05 due to the expenses of the proceedings before the Court following the presentation of the pleadings and motions brief. Following this, when forwarding the annexes to their final written arguments, they indicated that they "renounce[d] the reimbursement of [certain] sums corresponding to the forwarding of [two] expert opinions, and the fees of [one lawyer]." Consequently, they indicated that the total amount of costs and expenses incurred during the whole proceedings was US$43,479.75.

[628] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 42, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 214.

[629] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 214.

[630] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs, supra*, para. 82, and *Case the Dismissed Workers of PetroPeru et al. v. Peru, supra*, para. 243.

[631] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 277, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 215.

425. With regard to the expenses incurred by the victims during the domestic proceedings, the Court considers that this item has already been covered by the sum granted as consequential damage *supra*; therefore, it does not find it appropriate to grant an additional sum for this item.

426. Regarding the expenses incurred by CEJIL, the Court notes that the representatives demonstrated that they had incurred expenses related to this case of approximately US$28,000.00 (twenty-eight thousand United States dollars), based on the expenses incurred for the hearing of the case before the Court, travel to Guatemala and to the United States in order to document this case, as well as expenses associated with the production, translation and certification of expert opinions. Also, although the representatives provided evidence of the salaries of the organization's personnel, in some cases it failed to indicate the names of the individuals or lawyers who had worked on the case and, in others, it failed to provide the payrolls for the corresponding month and year in which it alleged that it had worked on some aspect of the case. Even though the Court is, consequently, unable to verify the precise amount that was incurred for professional salaries for the monitoring and litigation of this case, the Court considers that this constitutes a necessary and reasonable expense and will take it into account in the sum established. Therefore, the Court orders the State to reimburse CEJIL the sum of US$45,000.00 (forty-five thousand United States dollars) for the concept of costs and expenses. At the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for any reasonable subsequent expenditure that has been duly authenticated.[632]

H. Reimbursement of expenses to the Victims' Legal Assistance Fund

427. In this case, in an order of April 11, 2017, the President of the Court granted the necessary financial support from the Victims' Legal Assistance Fund of the Court to cover the travel and accommodation expenses necessary to enable Gustavo Tobar Fajardo, Osmín Tobar Ramírez and expert witness Jaime Tecú to take part in the public hearing, as well as reasonable expenses for preparing and forwarding the affidavit of Flor de María Ramírez Escobar.

428. On October 12, 2017, a disbursements report was sent to the State as established in Article 5 of the Rules for the Operation of the Fund. Thus, the State was given the opportunity to present its observations on the disbursements made in this case, which amounted to US$2,082.79 (two thousand and eighty-two United States dollars and seventy-nine cents). However, Guatemala did not present observations in this regard.

429. Based on the violations declared in this judgment and compliance with the requirements for access to the Court's Legal Assistance Fund, the Court orders the State to reimburse the Fund the sum of US$2,082.79 (two thousand and eighty-two United States dollars and seventy-nine cents) for the expenses incurred. This sum must be reimbursed within six months of notification of this judgment.

I. Method of compliance with the payments ordered

430. The State must make the payments of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgment.

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[632] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 291, and *Case of Pacheco León et al. v. Honduras, supra*, para. 224.

431. If any of the beneficiaries is deceased or dies before they receive the respective amount, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

432. The State must comply with its monetary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America) the day before payment to make the respective calculation.

433. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the time indicated, the State shall deposit the amounts in their favor in a deposit account or certificate in a solvent Guatemalan financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed, after ten years the sums shall be returned to the State with the interest accrued.

434. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, must be delivered to the persons indicated in full, as established in this judgment without any deductions derived from possible taxes or charges.

435. If the State should fall in arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it must pay interest on the amount owed corresponding to bank interest on arrears in the Republic of Guatemala.

X
OPERATIVE PARAGRAPHS

436. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To admit the partial acknowledgement of international responsibility made by the State, pursuant to paragraphs 27 to 37 of this judgment.

DECLARES,

Unanimously that:

2. The State is responsible for the violation of the prohibition of arbitrary interference in family life, judicial guarantees, and the right to protection of the family recognized in Articles 8(1), 11(2) and 17(1) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter, pursuant to paragraphs 161 to 196 and 201 to 243 of this judgment.

3. The State is responsible for the violation of the right to judicial protection recognized in Article 25(1) of the American Convention, in relation to Articles 1(1), 11(2) and 17(1) thereof, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter, pursuant to paragraphs 248 to 256 of this judgment.

4. The State is responsible for the violation of the judicial guarantee of a reasonable time recognized in Article 8(1) of the Convention, in relation to Articles 1(1), 11(2) and 17(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter, pursuant to paragraphs 257 to 263 of this judgment.

5. The State is responsible for the violation of the prohibition of discrimination in relation to the obligation to respect and ensure the rights to family life and to the protection of the family recognized in Articles 11(2) and 17(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of this instrument to the detriment of the latter, pursuant to paragraphs 266 to 304 of this judgment.

6. The State is responsible for the failure to investigate the irregularities committed in the proceedings that separated the Ramírez family and the subsequent intercountry adoptions in violation of the right of access to justice derived from a joint interpretation of Articles 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, pursuant to paragraphs 318 to 322 of this judgment.

7. The State is responsible for the violation of the right to personal liberty recognized in Article 7(1) of the Convention, in relation to Articles 11(2), 17(1), 19, 1(1) and 2 of this instrument, to the detriment of Osmín Tobar Ramírez, pursuant to paragraphs 326 to 357 of this judgment.

8. The State is responsible for the violation of the right to identity and the right to a name recognized in Article 18 of the Convention, in relation to Article 1(1) and 19 of this instrument, to the detriment of Osmín Tobar Ramírez, pursuant to paragraphs 359 to 362 of this judgment.

9. The State is responsible for the violation of the right to personal integrity recognized in Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Flor de María Ramírez Escobar, Gustavo Tobar Fajardo and Osmín Tobar Ramírez, as well as in relation to Article 19 of the Convention to the detriment of the latter, pursuant to paragraphs 365 to 369 of this judgment.

AND ESTABLISHES,

Unanimously that:

10. This judgment constitutes, *per se*, a form of reparation.

11. The State shall adopt all the necessary and appropriate measures to facilitate and contribute to the re-establishment of family ties between Osmín Tobar Ramírez and his parents, including providing the psychological and psychiatric treatment and therapeutic support that the victims require, as well as grants for English and Spanish lessons, and must make a serious and multidisciplinary effort, *ex officio*, to initiate, encourage and, if applicable, continue the reconnection between Flor de María Ramírez Escobar and Osmín Tobar Ramírez with J.R., pursuant to paragraphs 379 to 385 of this judgment.

12. The State shall adopt, *ex officio*, all appropriate and necessary measures to amend the

birth certificate of Osmín Tobar Ramírez to restore his legal family ties and other rights that arose at the time of his birth, as well as his first and last name and other personal data, pursuant to paragraphs 388 to 390 of this judgment.

13. The State shall open and conduct effectively the corresponding disciplinary administrative and criminal investigations into the facts of this case and determine and punish those responsible, as appropriate, as established in paragraphs 394 and 395 of this judgment.

14. The State shall hold a public act to acknowledge international responsibility as established in paragraph 398 of this judgment.

15. The State shall make a documentary on the facts of this case, the context in which they occurred, and the violations found in the judgment, pursuant to paragraph 401 of this judgment.

16. The State shall make the publications indicated in paragraph 402 of the judgment, as established in that paragraph and paragraphs 403 and 404 of this judgment.

17. The State shall take the necessary measures to create and implement an effective national program to guarantee the satisfactory supervision, monitoring and control of the institutionalization of children, taking into account the criteria established in paragraph 408 of this judgment.

18. The State shall pay the amounts established in paragraphs 416, 420 and 426 of this judgment, as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to the said paragraphs and paragraphs 430 to 435 of this judgment.

19. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraphs 427 to 429 and 435 of this judgment.

20. The State shall provide the Court with a report, within one year of notification of this judgment, on the measures adopted to comply with it.

21. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfilment of its duties under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

IACtHR. Case of Ramírez Escobar *et al. v.* Guatemala. Merits, reparations and costs. Judgment of March 9, 2018.

Eduardo Ferrer Mac-Gregor Poisot
President

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary