

TABLE 17A

INTER-AMERICAN COURT OF HUMAN RIGHTS.  
ADVISORY OPINION OC-21/14  
OF 19 AUGUST 2014

## RIGHTS AND GUARANTEES OF CHILDREN IN THE CONTEXT OF MIGRATION AND/OR IN NEED OF INTERNATIONAL PROTECTION

<http://www.refworld.org/cases,IACRTHR,54129c854.html>

See also TABLE 30A (Due process, Nadege Dorzema et al. v. Dominican Republic), TABLE 9A (IACHR Asylum Inter-American System) and Table 43, DUE PROCESS IN THE DETERMINATION OF REFUGEE STATUS)

<b>Guiding Principles</b>	69. (...) four guiding principles of the Convention on the Rights of the Child should transversely inspire and be implemented throughout every system of comprehensive protection: the principle of non-discrimination, the principle of the best interest of the child, the principle of respect for the right to life, survival and development, and the principle of respect for the opinion of the child in any procedure that affects him or her, in order to ensure the child's participation.
<b>Duty of prevention of the State of origin</b>	64. Although the Court will not delve into the obligations of the State of origin, it is pertinent to remember that these States must observe the general obligations in the matter and in particular their duty of prevention, which requires the State to generate and secure conditions for their nationals so that they are not forced to migrate, and to address the root causes of migration flows.
<b>Non-refusal of entry at border</b>  <b>Interception in international waters</b>	83. (...) border authorities should not prevent the entry of foreign children into national territory, even when they are alone, should not require them to produce documentation that they may not have, and should proceed to direct them immediately to personnel who are able to assess their needs for protection based on an approach in which their condition as children prevails. In this regard, it is essential that States allow for the children's entry into the territory as a precondition for carrying out the initial assessment procedure. 220. However, in the context of the principle of non-refoulement, the Court considers it necessary to make some additional clarifications. In this regard, the Committee on the Rights of the Child has stated that "[t]he State's obligations cannot be arbitrarily and unilaterally diminished, either by excluding zones or areas from the State's territory, or by establishing specific zones or areas as totally or partially outside the jurisdiction of the State". As regards the interception of asylum seekers in international waters in order to not allow their petitions to be evaluated in potential host States, the Court considers that this practice is contrary to the principle of non-refoulement, since it does not allow for the

	assessment of the specific risk factors of each person.
<b>Guarantees in any immigration process involving minors</b>	116 (...) guarantees that, under international human rights law, must govern any immigration proceedings that involve children, referring especially, when appropriate, to those guarantees that are critically important in this type of proceedings. Consequently, the Court will refer to the following aspects: (i) the right to be notified of the existence of proceedings and of the decision adopted during the immigration proceedings; (ii) the right that immigration proceedings are conducted by a specialized official or judge; (iii) the right of the child to be heard and to participate in the different stages of the proceedings; (iv) the right to be assisted without charge by a translator and/or interpreter; (v) effective access to communication and to consular assistance; (vi) the right to be assisted by a legal representative and to communicate freely with the representative; (vii) the obligation to appoint a guardian in the case of unaccompanied or separated children; (viii) the right that the decision adopted has assessed the child's best interest and is duly reasoned; (ix) the right to appeal the decision before a higher court with suspensive effect, and (x) reasonable time for the duration of the proceedings.
<b>The right to seek and receive asylum</b>	<p>74. (...) it should be recalled that although the concept of asylum was initially rooted in the notion of the <i>Latin American tradition of asylum</i>, which consisted of diplomatic and territorial asylum and non-extradition for political motives or offenses, the truth is that, following the adoption of the 1951 Convention relating to the Status of Refugees (hereinafter the "1951 Convention") and its 1967 Protocol, the mechanism of asylum assumed a specific form and modality at the universal level: that of the status of refugee.</p> <p>261. In brief, in order to ensure effectively the right recognized in Articles 22.7 of the American Convention and XXVII of the American Declaration, States must adapt the proceedings on asylum or on the determination of refugee status, in order to provide children with a real access to these procedures, allowing their specific situation to be considered. The Court finds that this obligation entails: not impeding entry to the country; if risk and needs are identified, the person should be given access to the State entity responsible for granting asylum or recognition of refugee status or other procedures that are suitable for the protection and specific attention to the circumstances of each case; priority processing of requests for asylum made by children as the main applicant; the availability of reception personnel in the entity, who can examine the child to determine her or his state of health; conducting an examination and interview endeavoring not to cause further trauma or revictimization; having available a place to accommodate the applicant, if they do not have one; issuing an identity document to avoid return; studying the case, with sufficient flexibility as regards the evidence; assigning an independent and trained guardian in the case of unaccompanied or separated children; if refugee status is granted, proceed to carry out family reunification procedures, if necessary in view of the best interest of the child; and lastly, seeking a durable solution, such as voluntary repatriation, resettlement or social integration, in accordance with the determination of the best interest of the child.</p>
<b>Identification of minors who require international protection</b>	82. (...) in order to comply with international undertakings, States are obliged to identify foreign children who require international protection within their jurisdictions, either as refugees or of another type, through an initial evaluation with guarantees of safety and confidentiality, in order to provide them with the adequate and individualized treatment required by means of special measures of protection. The Court considers that the establishment of procedures to identify

	<p>the needs for protection is a positive obligation of the States and failing to institute them represents a lack of due diligence.</p>
<b>Due process</b>	<p>115. In short, as this Court has maintained previously, although due process and its correlative guarantees are applicable to everyone, in the case of child migrants their exercise supposes, owing to the special conditions in which the children find themselves, the adoption of certain specific measures in order to ensure access to justice in conditions of equality, to guarantee effective due process, and to ensure that the best interest of the child is a paramount consideration in all the administrative or judicial decisions adopted. The administrative or judicial proceedings during which decisions are taken on the rights of child migrants and, if applicable, of the persons whose protection or authority they are under (<i>infra</i> Chapter XV), should be based on the foregoing considerations and be adapted to their situation, needs and rights.</p> <p>245. (...) this Court has considered that, in application of the principles of non-discrimination and due process of law, predictable proceedings are required that guarantee the applicant's right, including children, to be heard with the due guarantees in accordance with Articles 8 and 25 of the American Convention, as well as coherence and objectivity in decision-making at each stage of the proceedings to avoid arbitrary decisions.</p>
<b>Complementary protection</b>	<p>217. (...) the prohibition of refouler established in Article 22(8) of the Convention offers complementary protection to aliens who are not asylum seekers or refugees, in cases in which their right to life or freedom is threatened for the abovementioned reasons.</p> <p>238. The Court has noted that some countries of the region have established a mechanism that contemplates a type of protection similar to that granted to asylum seekers and refugees that would prevent a person from being placed in a situation in which her or his life, liberty, safety or integrity would be endangered. This mechanism, known as complementary protection, may be defined as the protection that the authorized entity in the receiving country accords to the alien who is an irregular migrant and who does not meet the conditions under the traditional or broadened definition of a refugee, consisting, mainly, in not returning her or him to the territory of another country where her or his life, liberty, safety or integrity would be threatened. The Court considers that complementary protection is a way in which the State acknowledges the person's situation, identifies his risks, and ascertains his needs.</p>
<b>Training</b>	<p>121. However, in the case of proceedings involving child migrants, the decisions on migratory matters cannot be delegated to non-specialized officials. Consequently, in proceedings involving children, States must guarantee that those who intervene in them are appropriately qualified, so that they can identify the special needs for protection of the child, in keeping with her or his best interest.</p>
<b>Free legal aid</b>	<p>130. The Court considers that States have the obligation to ensure to any child involved in immigration proceedings the right of legal counsel by the offer of free State legal representation services.</p>

<p><b>Appointment of a guardian</b></p>	<p>133. (...) States have the duty to appoint a guardian for children who are identified as being unaccompanied or separated from their family, even in border areas, as promptly as possible. States also have a duty to maintain such guardianship arrangements until they reach the age of majority, which is usually at 18 years of age; until they permanently leave the territory or jurisdiction of the State; or, when appropriate, until the reason for which the guardian was appointed ceases to exist. The guardian must be sufficiently aware of the interests and situation of the child, and should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.</p>
<p><b>Juvenile criminal justice: the exceptionality of detention on remand and deprivation of liberty as a measure of last resort</b></p>	<p>149. In effect, it is a principle of international human rights law established in the Convention on the Rights of the Child and developed by this Court in its case law in relation to the right to personal liberty in cases concerning juveniles in conflict with the law, that the deprivation of liberty, either on remand or as a punishment, constitutes a measure of last resort that should be used, when appropriate, for the shortest appropriate period of time, since the purpose of criminal proceedings in the case of children is fundamentally pedagogical. Thus, deprivation of liberty in the context of juvenile criminal justice must respect the principles of legality, exceptionality, and the shortest appropriate period of time. Moreover, the exceptional nature of detention on remand operates more strictly because the rule should be liberty and, if the need for a precautionary measure is verified, the application of alternative measures should be given priority.</p>
<p><b>The deprivation of liberty of a migrant minor in an irregular situation, decreed by this single circumstance, is arbitrary</b></p> <p><b>Accommodation measure should not be custodial</b></p>	<p>154. (...) the Court finds that the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order (<i>supra</i> para. 151). Adding to this, the Court finds that the deprivation of liberty of a child in this context can never be understood as a measure that responds to the child's best interest. Thus, the Court considers that measures exist that are less severe (<i>infra</i> para. 162) and that could be appropriate to achieve such objective and, at the same time, satisfy the child's best interest. In sum, the Court finds that the deprivation of liberty of a child migrant in an irregular situation, ordered on this basis alone, is arbitrary and, consequently, contrary to both the Convention and the American Declaration.</p> <p>173. In accordance with the criteria developed above (<i>supra</i> Chapters IX and X), States must, in compliance with its international commitments, prioritize actions that tend to the care of the child with a view to provide comprehensive protection when the child is involved in immigration proceedings. In certain circumstances – when children are with their families and there is evidence of an exceptional, inevitable, and imperative need for precautionary measures during immigration proceedings, and there is no other option that would cause less harm than placing the child in a center where the child can coexist with her or his family; or when children are unaccompanied or separated and there is no possibility of accommodating the child in a family or community environment such that the child would be placed in an accommodation center – then it is possible for States to resort to such measures as placing children in a shelter or accommodation, either for a short period or for as long as necessary to resolve the immigration status. In this regard, the Court recalls that it has already ruled on the need to separate migrants in custody from persons who have been accused or convicted of</p>

	<p>criminal offenses and has established that centers to accommodate migrants must be specifically intended for this purpose.</p> <p>180. In the Court's opinion, according to international law in this area and based on the preceding considerations on the scope of Articles 7 of the Convention and XXV of the American Declaration, any measure concerning accommodation should allow entry into and exit from the place where the child is lodged, i.e., accommodation should be provided in an environment of non-deprivation of liberty.</p>
<p><b>When the best interests of the child require maintaining the family unit, the imperative of not depriving freedom extends to their parents.</b></p>	<p>158 (...) when the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children. Evidently, this entails a correlative State obligation to design, adopt and implement alternative measures to closed detention centres in order to preserve and maintain the family unit and to promote the protection of the family without imposing an excessive sacrifice on the rights of the child by the deprivation of liberty of all or part of the family.</p>
<p><b>Right to family life. Family separation by expulsion</b></p>	<p>280. In those situations in which the child has a right to nationality – original, by naturalization, or for any other reason established in domestic law – of the country from which one or both of the parents may be expelled owing to their irregular migratory situation, or in which the child complies with the legal conditions to reside there on a permanent basis, it is axiomatic that the child must conserve the right to continue enjoying her or his family life in said country and, as a component of this, mutual enjoyment of the cohabitation of parents and children. The Court finds, in application of the criteria described above, that the rupture of the family unit by the expulsion of one or both parents due to a breach of immigration laws related to entry or permanence is disproportionate in these situations, because the sacrifice inherent in the restriction of the right to family life, which may have repercussions on the life and development of the child, appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offense.</p> <p>281. In short, in the Court's opinion any administrative or judicial organ that must decide on family separation owing to expulsion based on the migratory status of one or both parents must, when weighing all the factors, consider the particular circumstances of the specific case, and guarantee an individual decision – in keeping with the parameters described in the paragraphs above – evaluating and determining the child's best interest.</p>

**Compiled by the Regional Legal Unit of the Bureau for the Americas, UNHCR**