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OF HUMAN RIGHTS AND HUMANITARIAN LAW

## RESEARCH BRIEF

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**EXPANDING THE PROTECTION OF MIGRANT  
CHILDREN'S RIGHTS IN THE AMERICAS.**

**JUDICIAL INTEGRATION OF REGIONAL  
HUMAN RIGHTS STANDARDS.**

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## ABSTRACT

The focus of this research brief is to propose a critical analysis of the judicial interrelation (and potential cross-fertilization) between international and regional human rights systems, with particular focus on the effective recognition of asylum-seeking children's rights within the Inter-American system. In this sense, this study intends to make a contribution towards the better understanding of the emerging role that regional systems have (or could have) in reinforcing and guaranteeing the effective enjoyment of human rights of children in the context of migration processes. It focuses on the pioneering jurisprudence developed by the Inter-American Court of Human Rights in the past years, which has developed an evolutive, dynamic and effective interpretation of the American Convention on Human Rights, under the light of the systemic integration of international human rights law. As a result of this innovative method of interpretation, the regional tribunal has reinforced the interpretational guiding value of various provisions of the UN Convention on the Rights of the Child, paving the way for the enhancement of the level of protection of millions of children in the Americas and expanding States' positive obligations in relation to them.

## KEYWORDS

**Human Rights - Inter-American Court of Human Rights - Judicial Interpretation - Child Rights - Best Interest Principle – Asylum - Systemic Integration - International Law**

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## INTRODUCTION

The critical situation of migrant children in the Americas has deteriorated dramatically in recent years, where children are nowadays affected by continuous violations in many of their fundamental rights; including – among others – the right to life, education, family life, health, access to justice and the right to be heard.<sup>1</sup> In this context, the migration of children assumes a regional dimension that goes beyond the different national realities, equally affecting children in their countries of origin, transit and destination.<sup>2</sup>

This phenomenon has not only generated an increasing amount of children seeking asylum in the Americas, but it has also situated minor migrants in a particular situation of vulnerability, which it has not yet been effectively assessed among several States in the region. However, the lack of national responses has triggered the development of a regional jurisprudence by the Inter-American Court of Human Rights (IACrHR or the Court). As a result, the Court has played a fundamental role in the recognition of the rights of children seeking asylum by means of developing their rights under the light of the systemic integration of international human rights law (IHRL).<sup>3</sup>

In other words, the Inter-American Court has interpreted the American Convention on Human Rights (ACHR, the Convention or the American Convention) in light of all other universal or regional instruments that would be applicable in a specific case in order to provide the most effective protection to migrant children in situation of vulnerability in the Americas. As a result of this integrative approach, the IACrHR has referred to various provisions of the UN Convention of the Rights of the Child (CRC) while examining the content and scope of Article 19 (Rights of the Child) ACHR,<sup>4</sup> aiming at enhancing –and render more effective- the level of protection of millions of migrant minors in the Americas by means of expanding States' positive obligations in relation to them.

This study is based on the critical analysis of the jurisprudence developed by the IACrHR in connection with migrant children, focusing in particular on the methods of interpretation used by this regional tribunal that paved the way for an evolutive, effective and systemic integration of children's rights in the Americas. This critical analysis aims to contribute to a better understanding of the steps taken by this regional tribunal towards the enhancement of the level of protection afforded to migrant children in the Americas.

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1 For an overview of the situation of migrant children in the Americas see- among others- IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/ Ser. LV/II, Doc. 46/15 (2015) and IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, OAS/Ser. LV/II 155, Doc 16 (2015).

2 See CGRS et al., *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015). Accordingly, Honduras, Guatemala and El Salvador (as sending countries), Mexico (as both transit and destination country) and the United States (principal country of destination in the region) are the most affected States by the intensity and quantity of child migration in the Americas (See p. 8).

3 For a more comprehensive analysis of the principle of systemic integration of international law, see Fuentes A., "Expanding the boundaries of international human rights law. The systemic approach of the Inter-American Court of Human Rights", *European Society of International Law (ESIL)*, ESIL SSRN Series (2018), Paper No. 13/2017. Available at SSRN: <https://ssrn.com/abstract=3163088>

4 Article 19 ACHR (Rights of the Child) states 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."

## THE COURT'S INTERPRETATIVE METHODS

The Inter-American Court applies in its interpretation of the American Convention both general and particular rules of interpretation in international law. The first ones are enshrined in Articles 31<sup>5</sup> and 32<sup>6</sup> of the Vienna Convention on the Law of Treaties (VCLT), and the second ones have emerged throughout the development of the case law of the Court.

According to VCLT, the first step in the interpretation of ACHR should be to focus on its own *object* and *purpose*, which is shared with all other human rights treaties, namely, the “effective protection of human rights”.<sup>7</sup> As clarified by the Court, this method of interpretation “respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation”.<sup>8</sup> Moreover, the interpretation of the norms contained within ACHR has to be done “in such a way that the system for the protection of human rights has all its appropriate effects (*effet utile*)”.<sup>9</sup> Accordingly, the rights enshrined in the Convention must not be interpreted in a sense that would reduce, restrict or limit their recognition and effective protection.

As a complement of the principle of effectiveness, Article 29 ACHR<sup>10</sup> incorporates the principle of *non-restrictive* interpretation, which precludes any restrictive interpretation of the rights and freedoms recognized in the Convention through domestic legislation or other conventional obligations.<sup>11</sup> Therefore, the effective protection of fundamental rights and freedoms requires the incorporation of *contextual*, *historical* and *evolutive* interpretative approaches of the rights recognized in the Convention. This means that the interpreter needs to take into consideration all circumstances and contextual factors relevant to the specific case under analysis (e.g. special situation of vulnerabilities, socio-cultural conditions, age and maturity of the individuals involved, etc.), including the societal changes over time and the current “present-day conditions” existing in the society.<sup>12</sup>

In addition to pay attention to the evolution in the society, the evolutive interpretation of the American Convention needs to consider the developments in the legal system in which operates. In fact, in the wording of the Vienna Convention, the interpreter must take into account not only the instruments and agreements directly related to it (Article 31(2)(a)(b) VCLT), but also “any relevant rules of international law applicable

5 Article 31 VCLT states – in its first paragraph – that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

6 Article 32 VCLT recognises the possibility to recourse to supplementary means of interpretation, such as “the preparatory work of the treaty and the circumstances of its conclusion”.

7 *Case of Yatama v. Nicaragua*, 23 June 2005, IACrHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 127, para. 167.

8 See “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), 24 September 1982, IACrHR, Advisory Opinion oc-1/82, Series A No.1, para. 33.

9 *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999, IACrHR, Advisory Opinion OC- 16/99, Series A No. 16, para. 58.

10 Article 29 ACHR (Restrictions Regarding Interpretation) reads as follows: “No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; d) [...]”

11 *Case of Ivcher- Bronstein v. Peru*, 24 September 1999, IACrHR, Competence, Series C No. 54, para. 41

12 *Cf. The Right to Information on Consular Assistance*, *supra* note 9, para. 114.

in the relations between the parties” (cf. Article 31(3)(c) VCLT). This is nothing but the introduction of one of the most relevant principles of interpretation in international law: the principle of *systemic* integration.

Under the principle of systemic integration of IHRL, the interpretation should take into consideration the legal system of which ACHR is part, that is, the international human rights law. Accordingly, through the implementation of the systemic interpretation, the IACrHR would not limit itself to the ‘solely’ interpretation of the American Convention in the adjudication of a given case; rather, it would scrutinise and draw inspiration from all other relevant human rights instruments substantially related to the case.<sup>13</sup>

Moreover, the principle of systemic integration has been further reaffirmed by being considered as intrinsically interrelated with the evolutive interpretation of IHRL. In this sense, the regional tribunal has maintained in its constant jurisprudence that human rights treaties are living instruments which should be interpreted by taking into consideration the *corpus juris* of international human rights law.<sup>14</sup> This means that the Court would apply instruments that are part of the international human rights law system (*corpus juris*) in order to develop better understandings and expand the scope of protection of the rights enshrined in the Convention, seeking – as mentioned above – their more effective and adequate protection.

The incorporation of the notion of the *corpus juris* of international human rights law within the jurisprudence of the Court has been one of the key developments that has paved the way for a more *humanistic* or *pro-persona* integration of international human rights law.<sup>15</sup> In fact, by highlighting the centrality of the human person in the hermeneutical process of interpreting and applying human rights instruments, that is, searching a legal approach that would be “most favourable to the human being” or *pro-persona*, the regional tribunal has reinforced the systemic integration of the Convention and enhanced the protection of the rights and freedom enshrined in it.<sup>16</sup>

## **SYSTEMIC INTEGRATION OF IHRL IN THE CASE OF THE RIGHTS OF THE CHILD**

The rights of the child are recognized in Article 19 of the American Convention. This provision specifically states that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

13 *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012, IACrHR, Merits and Reparations, Series C No. 145, para. 161.

14 The Court has repeatedly referred to the *corpus juris* of international law in its case law, explaining -pedagogically- that: “The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law”. Cf. *The Right to Information on Consular assistance*, *supra* note 9, para. 115.

15 See Trindade, Cançado A.A., ‘The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice’, *Chinese Journal of International Law*, Vol. 6, No. 1, 2007, pp. 1-16.

16 See e.g. *Case of Baena-Ricardo et al. v. Panama*, 2 February 2001, IACrHR, Merits, Reparations and Costs, Series C No. 72, para. 189.

Since the decision in the case of the “*Street Children*” (*Villagran-Morales et al.*) *v. Guatemala*,<sup>17</sup> the first judgement in which this provision was applied, the Inter-American Court has developed an interpretative framework able to deliver an effective protection of children’s rights. The Court has built its hermeneutical approach by introducing an *evolutive, dynamic* and *systemic* interpretation of the provisions contained in Article 19 ACHR, which has provided the bases for the recognition of the existence of an international corpus juris for the protection of children’s rights.<sup>18</sup> In other words, the Inter- American Court has recognized that both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that helps to determine and further clarify “the content and scope of the general provision established in Article 19 of the American Convention”.<sup>19</sup>

After the ground-breaking decision in the case of “*Street Children*”, the Court has consistently developed a landmark jurisprudence on the rights of the child based on the expansive and non-restrictive interpretation of Article 19 ACHR. For instance, in relation to children in the context of migration, the IACrTHR expressly acknowledged that “Article 19 of the Convention, in addition to granting special protection to the rights recognized therein, establishes a State obligation to respect and ensure the rights recognized to children in other applicable international instruments.”<sup>20</sup> Consequently, through the evolutive, dynamic and effective interpretation of the ACHR, the regional tribunal has found that in cases related to children’s rights, the Convention on the Rights of the Child was the most suitable instrument for the interpretation of Article 19 ACHR.

In this sense, the Inter-American Court highlighted the relevance of several provisions contained in CRC for the determination of the content and extension of protected rights of children in the Americas. Among these provisions, the regional tribunal stressed the importance of the principle of non-discrimination, among the key legal principles that need to be considered when interpreting children’s rights. In this sense, the Court has declared in several occasions that the fundamental principles contained in the Convention on the Rights of the Child should be implemented in every system of protection of children’s rights.<sup>21</sup> Based on this interpretative approach, the IACrTHR has reinforced -for instance- the importance to pay attention to the specific conditions that could affect a child in a particular situation of vulnerability, such as the case of children deprived of their family environment; children who are abandoned or exploited; or children who’s adequate standard of living is not guaranteed or are in need of social rehabilitation.<sup>22</sup>

In short, under the light of the principles and norms contained in the CRC, the Court has integrated and expanded the scope of protection of children’s rights, as recognised

17 “*Street Children*” (*Villagran-Morales et al.*) *v. Guatemala*, 19 November 1999, IACrTHR, Merits, Series C No. 32.

18 *Ibid*, para. 194. See also- among others- *Juridical Condition and Human Rights of the Child*, 28 August 2002, IACrTHR, Advisory Opinion OC 17-02, Series A No. 17, para. 24.

19 See *Case of the “Street Children”*, *supra* note 17, para.188 and *Juridical Condition and Human Rights of the Child*, *supra* note 18, para. 24.

20 *Cf. Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, 25 November 2013, IACrTHR, Preliminary Objections, Merits, Reparations and Costs, Series C No.272, para. 219

21 See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, IACrTHR, Advisory Opinion OC-21/14, Series A No. 21.

22 See *Case of the “Street Children”*, *supra* note 17, para. 196

under Article 19 ACHR. Moreover, and even more importantly, the *systemic* interpretation of Article 19 ACHR has paved the way for the identification and further clarification of the specific obligations that States have in relation to children involved in migration processes. As further explained below, these obligations include -among others- the state's responsibility to guarantee procedural rights to children during judicial and administrative procedures -in particular- in relation to children separated from their families.<sup>23</sup>

## **RECOGNITION OF SPECIFIC PROCEDURAL GUARANTEES FOR THE PROTECTION OF CHILDREN IN THE CONTEXT OF MIGRATION PROCEDURES**

As introduced above, one of the key elements of the Inter-American Court's jurisprudence regarding human rights' of children and -in particular- child migrants, is the strengthening of procedural guarantees, as enshrined in Articles 8 (Right to a fair trial) and 25 (Right to judicial protection) ACHR. As stated by the Court, these procedural rights "must be correlated with the specific rights established in Article 19 ACHR, in such a way that they are reflected in any administrative or judicial proceedings where the rights of a child are discussed".<sup>24</sup>

Regarding the specific development of the rights of the child, the regional tribunal made clear efforts in its *Advisory Opinion on the Juridical Condition and Human Rights of the Child (2002)* to integrate and reinforce the application of procedural guarantees provided by the American Convention to all proceedings involving children. In this sense, the IACrHR made specific interpretative references to CRC, the Beijing Rules,<sup>25</sup> the Tokyo Rules<sup>26</sup> and the Riyadh Guidelines.<sup>27</sup> Among different procedural guarantees that need to be taken into account, the Court stressed the importance of the intervention of a competent, impartial and independent judicial body;<sup>28</sup> the effective recognition and availability of the right to appeal and effective remedy;<sup>29</sup> and the respect for the children's right to participation in accordance with the specific conditions of the child and his or her best interest.<sup>30</sup>

The importance to introduce specific procedural safeguards in the context of migration processes that take into account the needs of children within judicial procedures, were further developed by the Court in the case of *Pacheco Tineo Family v. Plurinational State of Bolivia*. In the latter case, the regional tribunal did nothing but reinforced the importance of taking into account the fundamental principles enshrined in CRC as substantial and procedural guidelines applicable to asylum procedures.<sup>31</sup> Based on these considerations the Inter-American Court recognized that migrant children have

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23 *Ibid*, paras. 67,98.

24 *Cf. Juridical Condition and Human Rights of the Child*, *supra* note 18, para. 95.

25 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, UN Doc. A/RES/40/33, adopted on 29 November 1985.

26 *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)*, UN Doc. A/RES/45/110, adopted on 14 December 1990.

27 *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, UN Doc. A/RES/45/112, adopted on 14 December 1990.

28 *Juridical Condition and Human Rights of the Child*, *supra* note 18, para.120.

29 *Ibid*, para.121.

30 *Ibid*, paras. 92-102.

31 *Pacheco Tineo Family v. Plurinational State of Bolivia*, *supra* note 20, para. 224.

the right to participate and express their opinion in asylum proceedings, but not only.<sup>32</sup> Parallel to the substantive obligation to respect and fulfil this right, state authorities have the procedural obligation to enable and facilitate its enjoyment by means of introducing and implementing adequate procedures for children,<sup>33</sup> all in accordance with the “assessment, determination consideration and protection of the best interest of the child”.<sup>34</sup>

These jurisprudential developments were consolidated by the adoption of one of the most influential IACrTHR’s advisory opinions, that is, the *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection (2014)*. Indeed, through a dynamic, systemic and evolutive interpretation of the provisions of the American Convention under the light of instruments contained within the *corpus juris* of international human rights law, the IACrTHR has identified -among others safeguards- the obligation to provide the child with a translator or interpreter free of charge;<sup>35</sup> a legal representative;<sup>36</sup> a guardian when the applicant is an unaccompanied or separated minor;<sup>37</sup> and the opportunity to communicate with consular authorities.<sup>38</sup>

Moreover, as part of the safeguards that need to be implemented for the protection of the rights of the child, the Court has specifically mentioned the children’s rights to be notified of the existence of the proceedings and of the decisions adopted concerning entry, permanence or expulsion;<sup>39</sup> the right of the child to immigration procedures conducted by a specialized official or judge;<sup>40</sup> and the right to appeal before a judicial authority with suspensive effect.<sup>41</sup> In addition to these procedural guarantees, the protection of the children’s right to personal liberty during immigration proceedings has also been stressed. In this sense, the IACrTHR resorted to a wide array of international norms in order to support the development of the principle of non-deprivation of liberty of children based on their *irregular* migratory status. In the wording of the Court, “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”.<sup>42</sup>

Furthermore, it is noteworthy to highlight that in the latest advisory opinion on migration, that is, *the Advisory Opinion on The institution of asylum, its recognition as a human rights under the Inter-American system of protection (2018)*, the IACrTHR has recognized that children are entitled to a ‘differential treatment’ in asylum procedures.<sup>43</sup> In other words, under the ACHR, States have the obligation to adapt asylum procedures in order to take into consideration the specific needs of children and adolescents.<sup>44</sup> As a result

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32 *Rights and Guarantees of Children*, *supra* note 21, para. 219.

33 *Ibid*, paras. 223/227.

34 *Ibid*, para. 70.

35 *Ibid*, paras. 124-125.

36 *Ibid*, paras. 129-131.

37 *Ibid*, paras. 132-136.

38 *Ibid*, paras. 126-128.

39 *Ibid*, paras.117-119.

40 *Ibid*, paras. 120-121.

41 *Ibid*, paras. 140-142.

42 *Ibid*, para. 154.

43 *The institution of asylum, its recognition as a human rights under the Inter-American system of protection (interpretation and scope of Articles 5, 22 (7) and 22 (8) in relation to Article 1(1) of the American Convention on Human Rights*, 20 May 2018, IACrTHR, Advisory Opinion OC-25/18, Series A No. 25. (Only available in Spanish).

44 *Ibid*, para. 99.



of this interpretative path, the situation of vulnerability of the child who is separated or unaccompanied has been specifically considered by the Court.<sup>45</sup>

In the case of unaccompanied minors, the application of the *pro-homine* principle requires from state authorities to take all necessary measures to consider their specific situation of vulnerability, under the interpretative guideline of the principle of the best interest of the child. Based on the provisions contained in the CRC and the guidelines set by the Committee on the Rights of the Child,<sup>46</sup> the Inter-American Court concluded that owing to the high vulnerability that affect children who are unaccompanied, the determination of their current status as unaccompanied children should be done immediately upon arrival as these minors are exposed to severe risks.<sup>47</sup>

Among the positive obligations that States have to adopt towards unaccompanied minors –as a vulnerable group– the Court has identified the duty to appoint them with a guardian as soon as possible, that is, as soon as their condition as unaccompanied minors is determined.<sup>48</sup> The same right has been recognized in cases where unaccompanied children are deprived of their liberty due to migration reasons.<sup>49</sup> Additionally, state authorities are equally responsible for monitoring the quality and exercise of these guardianships.<sup>50</sup>

In short, in the case of unaccompanied children involved in migration processes, State authorities have to provide both a legal representative and a guardian, and guarantee the right to communication and information between them.<sup>51</sup>

## CONCLUSIVE REMARKS

The Inter-American Court has enlarged the conventional protection of the rights of migrant children by means of implementing a *systemic, evolutive, dynamic* and *effective* interpretation of the American Convention under the light of human rights instruments that are part of the *corpus juris* of international human rights law. In this sense, it would be possible to say that the expansive interpretation of States' obligations in relation to the measures of protection contained in Article 19 ACHR shows a clear awareness of the specific needs of protection of migrant children in the Americas, by the Inter-American Court.

In particular, the regional tribunal has highlighted the interpretative importance of the provisions contained within the Convention on the Rights of the Child for the determination of the extension and scope of protection of Article 19 ACHR. The integration of the latter

45 In the views of the Court, it is essential to "consider personal factors, such as disability, being a member of an ethnic minority group, or living with HIV/AIDS, as well as the particular characteristics of the situation of vulnerability of the child, such as victim of trafficking, or separated or unaccompanied, for the purpose of determining the need for specific additional positive measures." *Cf. Rights and Guarantees of Children*, *supra* note 21, para. 71.

46 See e.g. Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005).

47 *Rights and Guarantees of Children*, *supra* note 21, paras. 89- 93.

48 *Ibid.*, para. 116.

49 *Ibid.*, para. 204.

50 *Ibid.*, para. 135.

51 *Ibid.*, paras. 201, 204.

provision- under the light of the *corpus juris* for the protection of children's rights- has led to the development of concrete procedural and substantive safeguards afforded to children based on the implementation of the principles of effective protection (*effet utile*) and the best interest of the child.

Examples of these safeguards could be found on the recognition of the right of the child to be heard, with regards to all aspects of legal proceedings that could directly affect them, and that her or his views be adequately taken into account; and the effective realization of the right to legal assistance, including consular support and the appointment of a guardian. The Court has complemented these positive obligations that States should adopt in connection to unaccompanied children with additional guarantees, due to their specific situation of vulnerability, such as the case –for instance- of the need to identify the whereabouts of their family members.

**To conclude, the systemic integration of Article 19 ACHR, under the light of the norms contained within the corpus juris of international human rights law for the protection of the rights of the child and -in particular- the Convention of the Right of the Child, has reinforced the level protection of children's rights in the Americas. By doing so, the IACrHR has not only expanded the scope of protection of its conventional norms but –fundamentally– has paid due consideration to the principle of the best interest of the child and their inherent vulnerable condition.**