

ACCESS TO JUSTICE FOR CHILDREN: MODEL REPORT

I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The CRC and other international instruments should be recognised as binding obligations in national law. Article 4 of the CRC requires that States Parties “undertake all appropriate legislative, administrative, and other measures for the implementation of [Convention] rights.” As further clarified by the Committee on the Rights of the Child, “[e]nsuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental”.¹

In practice, this means that the CRC must have the authority of written national law. In some States, the constitution explicitly grants international human rights instruments this status; in others, legislation on the role of international law or interpretation of treaties may do the same. Where this is not the case, the CRC must be given authority through separate, often subject-specific implementing legislation (e.g., laws related to child protection, child labour, etc.). To complement this sectoral approach, as described in further detail below, the CRC should still be incorporated into domestic law in its entirety to guarantee children full recognition of all of their rights under the Convention.

B. Does the CRC take precedence over national law?

The CRC should take precedence over national law. It is not enough that the Convention be given “constitutional status” or otherwise recognised as a source of interpretive guidance in national law.² In addition, the CRC must always be given priority over any conflicting legislation as required under the Vienna Convention on the Law of Treaties.³

In some States, there may be a division between treaties or individual rights within treaties that are either considered “self-executing” or “not self-executing.” Self-executing treaties and rights are typically seen as directly enforceable, while “not self-executing” treaties and rights are viewed as aspirational and require further legislation to be given effect. Where this distinction exists, the CRC and all rights contained therein should be considered self-executing.

C. Has the CRC been incorporated into national law?

1 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 1, available at http://www2.ohchr.org/english/bodies/crc/docs/GC4_en.doc.

2 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 19.

3 Vienna Convention on the Law of Treaties, Article 27, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; see also, Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 20.

Where it does not automatically become enforceable in national law upon ratification, the CRC should be incorporated into national law. While it is appropriate to recognise children's rights in all relevant policies and legislation, countries should also directly incorporate the CRC in its entirety to ensure that all Convention rights are viewed together as binding law.⁴ As envisioned by the Committee on the Rights of the Child, incorporation means “that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice”.⁵ By the same token, incorporation also requires that all domestic laws be brought into compliance with the Convention to avoid conflicts and promote the consistent application of children's rights.

Notably, in federal states, all levels of government must be similarly bound by the Convention. Subordinate law-making bodies must legislate in line with the CRC and ensure that Convention rights are recognised and given effect in both policy and practice. In delegating powers to smaller divisions, the national Government should also retain the authority to require full compliance with the Convention as it is ultimately responsible for the incorporation and implementation of international children's rights.⁶

D. Can the CRC be directly enforced in the courts?

The CRC should be directly enforceable in the courts. The Committee on the Rights of the Child believes that children's rights must be applicable in the context of judicial proceedings to be “truly realized” for children.⁷ While recognising the CRC as part of the national legal order and incorporating its provisions into domestic law are essential, these steps alone do not assure full respect for children's rights.⁸ Where these rights have been violated, children must also be able to demand that courts hold the institution or individual responsible for these violations to account. Of particular note, some States may seek to draw a distinction between civil and political rights and economic, social and cultural rights. It must be remembered that these rights are related and interdependent in the Convention itself, and must all be considered equally justiciable for the CRC to be given full legal effect.⁹

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

In enforcing children's rights, domestic courts should regularly look to the CRC. All courts should be authorised and encouraged to apply international human rights instruments where relevant to legal proceedings, even when they have not been raised or cited by the parties involved.

II. **What is the legal status of the child?**

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

4 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 22.

5 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 20.

6 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, paras 40, 41.

7 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 6.

8 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 21.

9 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 6.

In the words of the Committee on the Rights of the Child, “for rights to have meaning, effective remedies must be available to redress violations”.¹⁰ Because of their lack of independence and full legal status, children often face many obstacles in seeking these remedies; countries must therefore “ensur[e] that there are effective, child-sensitive procedures available to children and their representatives”.¹¹ This includes providing information, advice and advocacy services, and – most importantly – meaningful access to the judicial system and any other independent complaints procedures. Particularly in the case of serious international human rights violations, all victims must have “access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings”.¹² To guarantee access to justice in practice, the United Nations Human Rights Council has further called on countries “to spare no effort in providing for effective legislative, judicial, social, educative and other relevant mechanisms and procedures”.¹³

As such, children and their representatives should be empowered to bring claims involving children's rights violations in any and all appropriate national courts. Not only should children be able to claim compensation for harm suffered, but they must also be able to challenge laws, policies and public actions that violate or threaten to violate their rights. Children should be able both to initiate new proceedings seeking redress and to raise violations of their rights before the courts where the legal system mandates their involvement in proceedings as a victim, witness, defendant or otherwise. As per the International Covenant on Civil and Political Rights, children must be considered equal before the courts and are “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.¹⁴ With this in mind, judicial proceedings should be designed to ensure that children's right to be heard and other procedural rights are guaranteed.¹⁵

The UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power¹⁶ firmly state that all victims are “entitled to access the mechanisms of justice and to prompt redress...for the harm they have suffered”.¹⁷ National laws must therefore support judicial and administrative mechanisms that offer victims expeditious, fair, inexpensive and

10 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 24.

11 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 24.

12 UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 32, available at <http://www.derechos.org/nizkor/impu/principles.html>.

13 Resolution on Human Rights in the Administration of Justice, in particular Juvenile Justice, para. 3, available at <http://crin.org/resources/infodetail.asp?id=26261>.

14 International Covenant on Civil and Political Rights, Article 14, available at <http://www.crin.org/Law/instrument.asp?InstID=1006>.

15 See Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.doc>.

16 Victims of abuse of power are defined as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, para. 18). The Declaration is primarily concerned with victims of crime, but calls on countries to “consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses” (para. 19).

17 UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, Article 4, available at <http://crin.org/Law/instrument.asp?InstID=1564>.

accessible remedial procedures, whether formal or informal.¹⁸ Child victims in particular should be able to obtain and enforce reparations via readily accessible and child-sensitive procedures, whether in civil, criminal or other courts.¹⁹

The UN Guidelines for Action on Children in the Criminal Justice System clarify that children need not be the victim of a crime to bring legal claims; rather, “[a]ccess should be allowed to fair and adequate compensation for all child victims of violations of human rights”.²⁰ The UNODC-UNICEF Model Law on Justice Involving Child Victims and Witnesses of Crime provides that child victims should have the right to claim compensation in civil and criminal proceedings alike.²¹ Where a crime has been committed and the public prosecutor decides against bringing charges, children and their representatives should have the right to prosecute those responsible for violations of their rights.²² In these kinds of proceedings, courts should have the power to offer children restitution when a conviction is reached, particularly where a public official has committed an offence.²³ Notably, if a child has been deprived of his or her liberty as the result of a legal proceeding, he or she must have the right to challenge the legality of this deprivation before a court or other competent, independent and impartial authority and be given the necessary access to do so.²⁴

States should also establish national mechanisms “to ensure a prompt, thorough and impartial investigation into allegations against officials of deliberate violation of the fundamental rights and freedoms of children”.²⁵ Where children's rights have been violated, they must be able to raise these violations directly to the attention of public bodies.²⁶ The UN Guidelines for Action on Children in the Criminal Justice System call on States to craft mechanisms that “ensure a prompt, thorough and impartial investigation into allegations against officials of deliberate violation of the fundamental rights and freedoms of children”.²⁷ Along these lines, the Committee on the Rights of the Child has urged Governments to establish ombudspersons and other national human rights institutions, granting them the authority to receive and review individual complaints submitted by and on behalf of children.²⁸ These institutions must have the powers and resources to effectively carry out investigations, and should be able to provide remedies or otherwise ensure that children obtain effective redress for breaches of their rights.²⁹ As a general matter, the

18 UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, Article 4.

19 UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Articles 35, 37, available at <http://crin.org/Law/instrument.asp?InstID=1496>.

20 UN Guidelines for Action on Children in the Criminal Justice System, Article 48, available at <http://crin.org/Law/instrument.asp?InstID=1109>.

21 UNODC-UNICEF Model Law on Justice Involving Child Victims and Witnesses of Crime, Articles 29, 34, available at <http://crin.org/Law/instrument.asp?InstID=1495>.

22 UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 19, available at <http://www.derechos.org/nizkor/impu/principles.html>.

23 UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, Articles 9, 11.

24 Committee on the Rights of the Child, General Comment no. 10 on children's rights in juvenile justice, para. 28B, available at http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc.

25 UN Guidelines for Action on Children in the Criminal Justice System, Article 25.

26 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 46, available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.doc>.

27 UN Guidelines for Action on Children in the Criminal Justice System, Section 25, available at <http://crin.org/Law/instrument.asp?InstID=1109>.

28 Committee on the Rights of the Child, General Comment no. 2 on the role of independent national human rights institutions in the promotion and protection of the rights of the child, para. 13: http://www2.ohchr.org/english/bodies/crc/docs/GC2_en.doc.

29 Committee on the Rights of the Child, General Comment no. 2 on the role of independent national human rights

Human Rights Council has also called for national mechanisms to “contribute to monitoring and safeguarding the rights of children...and to address children's concerns”.³⁰

In addition, customary courts and other informal dispute resolution mechanisms should be available to children where appropriate.³¹ These systems may be less intimidating and in some instances better able to address issues of direct relevance to children.³²

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Article 12 of the CRC grants children the right be heard either directly or through a representative, and the Committee on the Rights of the Child recommends that children be given the opportunity to be directly heard in any proceedings that affect them.³³ As such, children should be permitted to bring cases by themselves and in their own names or, where they so desire, with the assistance of an appropriate representative. Children should not be required to bring or participate in legal proceedings through a representative, although one should be offered and provided should the child need or desire the guidance of an adult.

If the child wishes, a parent, guardian, lawyer or other suitable professional should be appointed to represent him or her in court proceedings. It is critical, however, that a child's chosen or appointed representative not pose a conflict of interest that would interfere with his or her duties to the child.³⁴ Courts may be in some cases empowered to appoint *guardians ad litem* or other persons to represent a child's interests, as is often true in family proceedings.³⁵ While this is not problematic in and of itself, children must also have the option to be represented by a person who is solely tasked with determining and acting on their views.³⁶

In juvenile justice proceedings, the right to be heard is fundamental to a fair trial.³⁷ To facilitate this right, court proceedings should “be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely”.³⁸ In some circumstances, this may require modification of judicial and administrative procedures to suit a child's age and maturity.³⁹

As above, children accused of offences should have the right to a representative in their own name, especially where there is or could be a conflict of interest with their parents,

institutions in the promotion and protection of the rights of the child, para. 14.

30 Committee on the Rights of the Child, General Comment no. 2 on the role of independent national human rights institutions in the promotion and protection of the rights of the child, para. 17.

31 UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, Article 7.

32 Guidance Note of the Secretary-General: UN Approach to Justice for Children, para. B.2, available at http://www.crin.org/docs/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf.

33 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 35.

34 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 36.

35 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Articles 35, 37.

36 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 37.

37 Committee on the Rights of the Child, General Comment no. 10 on children's rights in juvenile justice, para. 23c.

38 UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Article 14, available at <http://www.crin.org/Law/instrument.asp?InstID=1071>.

39 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 52(h), available at <http://www.crin.org/Law/instrument.asp?InstID=1589>.

guardians or other legal representatives.⁴⁰ This said, children should also have the right to have their parents or legal guardians present during the proceedings provided this does not run against their best interests.⁴¹ Where a child victim is involved in criminal proceedings, the UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime similarly provides that they be offered the support of a person with training and professional skills to assist them.⁴²

C. In the case of infants and young children, how would cases typically be brought?

While children must have the right to seek remedies where their rights have been violated, it is important to realise that many children are unlikely to bring legal proceedings of their own initiative. Children may not know how or where to challenge violations of their rights or, especially in the case of infants and very young children, may not even be aware that their rights are being violated. For these reasons, it is important that adults be empowered to help children pursue violations through legal action, with parents and legal guardians often playing a “crucial” role in assisting children to achieve and enforce their rights.⁴³

The Committee on the Rights of the Child has in particular recognised that “parents are normally the major conduit through which young children are able to realize their rights.”⁴⁴ Article 18 of the CRC enshrines parents' (or legal guardians') responsibility for their children's upbringing and development, and Article 5 recognises children's evolving capacities, a concept that reflects children's ever-increasing ability to understand and realise their rights. Given this, the Committee has underscored the need for adults “to continually adjust the levels of support and guidance they offer to a child...in ways that enhance young children's capacities to exercise their rights.”⁴⁵ As children have the right under Article 12 of the CRC to participate in all matters that affect them, including legal proceedings, States are accordingly obligated to “promote the active involvement of parents, professionals and responsible authorities in the creation of opportunities for young children to progressively exercise their rights.”⁴⁶

It must be remembered, however, that the ability of parents or legal guardians to act on behalf of children is linked to the requirement that this be carried out in the children's best interests.⁴⁷ While most parents and guardians will seek to protect their children's rights, States have a special duty to safeguard children whose rights are being violated in the home. When children's rights are breached by those who are expected to uphold them, States must take active steps to give children access to the courts and help them to enforce their rights.⁴⁸

40 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 52(a).

41 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 52(c).

42 UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, Article 15.

43 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, para. 15, available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

44 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, para. 16.

45 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, para. 17.

46 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, paras. 14, 16.

47 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, para. 16.

48 Committee on the Rights of the Child, General Comment no. 7 on Implementing child rights in early childhood, para. 36; see also <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Children and their designated representatives should be eligible to receive legal assistance free of charge when bringing cases that allege violations of their rights. Whether claims arise in civil, criminal, administrative, family or other judicial proceedings, children must be given appropriate, child-sensitive legal assistance to challenge rights violations. As a general matter, the Basic Principles on the Role of Lawyers establish that persons should have effective and equal access to lawyers, and call on Governments to “ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons”.⁴⁹ The right to legal assistance is an essential element of access to justice for children in particular, as recognised by the Committee on the Rights of the Child.⁵⁰

In this vein, the UN Guidelines for Action on Children in the Criminal Justice System provide that child victims of human rights violations should have access to “necessary legal representation to bring an action within an appropriate court or tribunal”.⁵¹ Governments must build legal aid systems around this principle, ensuring that all children are able to secure the level of legal assistance required to remedy rights violations. In its Resolution on the Administration of Justice, in particular Juvenile Justice, the UN Human Rights Council specifically encouraged States “to allocate adequate resources for the provision of legal aid services with a view to the promotion and protection of human rights”.⁵² The UN Secretary-General further emphasised the importance of the right to legal aid as a basic procedural safeguard in the Guidance Note on the UN Approach to Justice for Children, calling on States to support community-based legal and paralegal services that provide information and representation to children.⁵³

Where children are required to participate in legal proceedings that relate to violations of their rights, they must also be provided with proper assistance to guide them through the justice process.⁵⁴ Child victims and witnesses in particular should have access to “assistance that meets their needs”, and all victims of crime should be provided legal aid wherever appropriate.⁵⁵ Victims should not only receive legal advice on their involvement in the criminal justice process, but also on opportunities to file a civil lawsuit or otherwise make a claim for compensation.⁵⁶

The UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime grants child victims the right to receive legal assistance at their option; at the request of their parents, guardian, or support person; or on court order if considered to be in their

49 UN Basic Principles on the Role of Lawyers, Articles 2, 3, available at <http://www.crin.org/Law/instrument.asp?InstID=1599>.

50 Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 24.

51 UN Guidelines for Action on Children in the Criminal Justice System, Article 48.

52 Resolution on Human Rights in the Administration of Justice, in particular Juvenile Justice, para. 4.

53 Guidance Note of the Secretary-General: UN Approach to Justice for Children, para. B.4.

54 UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power, Article 6.

55 UN Guidelines for Action on Children in the Criminal Justice System, Articles 46, 49; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 24.

56 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 47.

best interests.⁵⁷ The UN Principles and Guidelines on Access to Legal Aid emphasise that the best interests of the child should be the primary consideration in legal aid decisions affecting children, and that assistance provided should be “accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children”.⁵⁸ States are also urged to establish child-friendly and child-sensitive legal aid systems that respect both children's right to be heard and the best interests of the child.⁵⁹

In criminal proceedings, every defendant has the right to a lawyer of his or her own choosing and to have legal assistance provided without charge where the interests of justice so require.⁶⁰ Any person who does not have a lawyer should be assigned “a lawyer of experience and competence commensurate with the nature of the offence”.⁶¹ The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recognise effective legal aid in criminal courts as “a fundamental human right”, “a foundation for the enjoyment of other rights”, and “an important safeguard that ensures fundamental fairness”.⁶²

As such, States should guarantee the right to legal aid in criminal proceedings at the highest possible level, including in the constitution where one exists.⁶³ To implement this right, States must pass laws to create a well-resourced, comprehensive legal aid system that is “accessible, effective, sustainable and credible”.⁶⁴ States must also ensure that children have meaningful access to legal aid “under the same or more lenient conditions as adults”.⁶⁵ Article 40 of the CRC grants children in conflict with the law the right to a fair hearing in the presence of legal or other appropriate assistance, and the Committee on the Rights of the Child has confirmed that children are entitled to receive legal or other appropriate assistance free of charge.⁶⁶ The Beijing Rules consider the right to counsel as a critical procedural safeguard, and specify that “throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country”.⁶⁷

Importantly, where a person has been arrested or detained, access to a lawyer must be provided as soon as possible and in all cases within 48 hours.⁶⁸ If a child has been deprived of his or her liberty, Article 37 of the CRC enshrines the right to prompt access to legal or other appropriate system. The UN Guidelines for Action on Children in the Criminal Justice System further clarify that children should have access to legal and other assistance from the moment they are detained, and urge Governments to set up legal aid agencies and programmes as a matter of priority.⁶⁹

57 UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, Article 10.

58 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 35.

59 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 57.

60 International Covenant on Civil and Political Rights, Article 14.

61 UN Basic Principles on the Role of Lawyers, Article 6.

62 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 14.

63 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 14.

64 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 15.

65 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Articles 22, 32.

66 Committee on the Rights of the Child, General Comment no. 10 on children's rights in juvenile justice, para. 23f.

67 UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Articles 7, 15.

68 UN Basic Principles on the Role of Lawyers, Article 7.

69 UN Guidelines for Action on Children in the Criminal Justice System, Article 16.

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

In general, there should be no limits on children or their legal representatives bringing cases to challenge violations of their rights. As above, conflicts of interest may make it difficult for a child's parent or guardian to act on behalf of the child where the child wishes, but this in no way implies a requirement that a child's parent or guardian be granted the authority to decide whether the child can pursue legal action.⁷⁰ It may be appropriate to notify a child's parents or guardian that the child has been appointed a legal representative or to consult with a child's parents or guardian about the child's wishes in so doing⁷¹, but this should not be viewed as a request for permission nor should parents or guardians be given an opportunity to challenge an appointment made on request of the child or by the court in the child's best interests.

While it does not provide a limit to children challenging violations of their rights, children do have the right to have their parents or guardian present in juvenile justice and criminal proceedings under Article 40 of the CRC. The Beijing Rules state that parents and guardians are entitled to participate in the proceedings and may be required to attend them, so long as this would not run against the best interests of the child.⁷² The Committee on the Rights of the Child has further clarified that although parents and guardians can provide psychological and emotional assistance to a child involved in legal proceedings, this “does not mean that parents can act in defence of the child or be involved in the decision-making process”.⁷³

III. **How can children's rights violations be challenged before national courts?**

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Children and their representatives should have access to all appropriate courts of law and any other legal or judicial mechanisms or procedures established or authorised to review actions, laws and policies that violate or threaten to violate children's rights. As discussed in further detail below, States should establish rules, systems and mechanisms that facilitate legal challenges to children's rights violations. This includes not only enabling individual children to bring these challenges, but also groups of children and interested organisations acting on children's behalf or in the general public interest. General codes of procedure and individual court rules should specifically authorise these kinds of cases, and should make special provision for all children involved in legal proceedings.

B. What powers would courts have to review these violations, and what remedies could they offer?

⁷⁰ Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 36.

⁷¹ For example, in appointing a support person to help a child victim or witness navigate judicial proceedings, Article 16 of the UNICEF-UNODC Model Law on Justice Involving Child Victims and Witnesses of Crime permits courts “consult with the child and his or her parents or guardian, including with respect to the gender of the support person to be designated”

⁷² UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Article 15.

⁷³ Committee on the Rights of the Child, General Comment no. 10 on children's rights in juvenile justice, para. 23g.

While different branches of a court system will understandably have varying powers to review and provide remedies for violations of children's rights, these powers should give children and those acting on their behalf broad opportunities to challenge rights violations and obtain full redress. Courts should be able not only to offer children restitution and compensation for harm suffered, but also to stop the enforcement of a problematic law or policy and demand that the Government take active steps to prevent and remedy rights violations.⁷⁴ When provided with information that violations of children's rights have occurred, courts should also have the authority to launch investigations and begin proceedings of their own initiative.

In the case of serious violations of international human rights, Governments should further be expected to offer guarantees of non-repetition to ensure that these same violations do not recur.⁷⁵ Among other things, this can and should involve repealing laws that contribute to or authorise human rights violations and enacting new laws to ensure necessary respect for human rights.⁷⁶

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

While all child victims should be permitted to bring cases directly, it should not be required that individual child victims be identified where the challenge relates to a law or action that affects large numbers of children. In these cases, individuals or organisations with a particular interest in a matter should be permitted to bring a legal challenge without the involvement of individual children, who may be difficult to identify or unable or unwilling to participate in legal proceedings. As described in further detail below, judicial systems should offer many avenues for advocates to mount these kinds of challenges on behalf of affected children or in the general public interest.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

States can and should provide for varying forms of group litigation to ensure the full right to a remedy for child victims of human rights violations. Naming or notifying individual child victims may at times be necessary, most notably where compensation is requested and this information is necessary to facilitate the distribution of any money damages awarded. If a lawsuit primarily seeks to challenge a public action or national law, however, this information should not be required. The Committee on the Rights of the Child has made strong statements in support of collective communications, which allow courts “to address a problem affecting an indeterminate number of persons in a single procedure, rather than to engage in consideration of a series of similar communications arising out of the same situation”.⁷⁷

74 See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 19, available at <http://www2.ohchr.org/english/law/remedy.htm>; UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 34, available at <http://www.derechos.org/nizkor/impu/principles.html>.

75 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 23.

76 UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 35.

77 Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the

In line with the above, national codes of procedure and individual court rules should allow for children, their representatives and other individuals or organisations acting on their behalf to initiate group litigation and collective action where children's rights have been violated. In the case of serious violations of international human rights, States should especially “endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation as appropriate”.⁷⁸ In addition, where multiple lawsuits relating to the same violations have already been filed, courts should also generally be able to combine these suits to offer a clear, consistent pronouncement of the law. Alternatively, courts may allow one of these cases to proceed as a test, setting a precedent that will apply equally to each of the others.

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Non-governmental organisations and national human rights institutions should be permitted both to file challenges to children's rights violations and to intervene in cases that have already been filed. Where an organisation has a particular interest in a matter involving children's rights, courts should recognise the “standing” of that organisation to bring a lawsuit challenging the resulting or threatened violations. As under the UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, “States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein”.⁷⁹ In the context of developing a new international complaints mechanism for children, the Committee on the Rights of the Child has similarly encouraged States to allow a broad range of NGOs to file cases alleging violations of children's rights.⁸⁰

Relevant organisations and individuals should also be permitted to intervene in cases that have already been filed. Courts should allow for NGOs and NHRIs to participate as interested parties or “amicus curiae” – friends of the court – where they can provide special expertise on particular children's rights issues. Where appropriate, NGOs should also be permitted to participate as full parties to cases where they would otherwise have standing. Notably, the Committee on the Rights of the Child has urged States to establish national human rights institutions that are empowered to bring and intervene in lawsuits concerning children's rights.⁸¹

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/WG.7/2/3, available at <http://www2.ohchr.org/english/bodies/crc/docs/A-HRC-WG-7-23.doc>.

78 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 13.

79 UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 19.

80 Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure.

81 Committee on the Rights of the Child, General Comment no. 2 on the role of independent national human rights institutions in the promotion and protection of the rights of the child, para. 14.

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

As above, children should be able to file cases in any court with the jurisdiction to hear matters related to the violation of their rights. Because it may not be easy for children to travel long distances to participate in court proceedings, States should ensure that local courts are able to adequately address children's rights violations wherever possible. The initial filing process, much like courtroom procedures, should be adapted to maximize children's access to justice. Formal restrictions should be relaxed as necessary and appropriate, offering children and their representatives the opportunity to work constructively with the judicial system to initiate proceedings.

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As above, child complainants, their representatives and those acting on their behalf should always be eligible to receive legal aid free of charge to challenge violations of children's rights where they do not have the resources to afford it. The UN Principles and Guidelines on Legal Aid in Criminal Justice Systems set out criteria designed to help States ensure that all persons in need of legal aid are able to obtain it. Of particular relevance to children, family income should not be used to determine eligibility where family members do not have equal access to that income.⁸²

Equally, child complainants should not be expected to pay court fees, legal costs or other expenses where they qualify for legal aid. On a basic level, court rules and procedures should provide for waivers of court fees to initiate and conduct proceedings. Where courts have the power to order that one party pay the legal costs of another party upon reaching a decision, children and those acting on their behalf should never be forced to pay the defending party's legal fees in cases alleging violations of children's rights.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Although legal aid should always be available where necessary, lawyers should also be encouraged to offer their services free of charge to children challenging violations of their rights. This may be done in cooperation with legal and bar associations, which are often best positioned to reach large numbers of lawyers who may be willing to offer pro bono representation.⁸³ Children's rights organisations may also prove valuable allies in helping children to bring violations of their rights before the courts, and must be able to do so without interference from the Government.

82 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 40.

83 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Article 55.

States should be encouraged to permit conditional or contingent fee arrangements, under which legal fees are not paid up front. In these kinds of arrangements, lawyers are paid a percentage of the proceeds recovered in a successful case. This can provide added incentive for private lawyers to take cases involving violations of children's rights, although it is important to ensure that child complainants receive a fair share of any damages awarded.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

While children should be permitted to bring complaints at any point after violations of their rights have occurred, the usual required time periods in which to do so should not begin running until children have reached adulthood. Under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, statutes of limitation – the laws that set out how soon after an event a particular kind of lawsuit must be brought – should not apply at all to serious violations of international human rights law.⁸⁴ For other rights violations, time limitations should be “not unduly restrictive”.⁸⁵

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

All manner of evidence should be admissible to prove a violation of children's rights, whether physical, documentary, established facts, expert reports or – perhaps most importantly – testimony from those involved in the case. Indeed, the views and concerns of victims of rights violations must be “presented and considered at appropriate stages of the proceedings where their personal interests are affected”.⁸⁶

States have a special duty to ensure that child victims are able to fully participate in legal procedures; as expressed by the Committee on the Rights of the Child, “States parties are under strict obligation to undertake appropriate measures to fully implement [the right to be heard] for all children” in “all relevant judicial proceedings affecting the child”.⁸⁷ In no circumstances should there be age restrictions for giving evidence, as “even the youngest children are entitled to express their views”.⁸⁸ The UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime provides that children are presumed capable to testify, and clarifies that a child's testimony “shall not be presumed invalid or untrustworthy by reason of his or her age alone”.⁸⁹ Along these lines, children should not be required to swear an oath where they do not understand the consequences of this, and should be permitted to give unsworn evidence so long as they can understand the importance of

84 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 6.

85 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 7.

86 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 6.

87 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, paras. 19, 32.

88 Committee on the Rights of the Child, General Comment no. 7 on implementing rights in early childhood, available at http://www2.ohchr.org/english/bodies/crc/docs/GC7.Rev.1_en.doc.

89 UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, Article 20.

telling the truth.⁹⁰

Because children may be intimidated in their interactions with the legal system and have difficulty expressing themselves in formal, adversarial environments, States should also adopt child-friendly procedures to fully facilitate children's participation in all aspects of a judicial proceeding.⁹¹ The Committee on the Rights of the Child notes the importance of “adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms”.⁹² Among other things, the UN Guidelines for Action on Children in the Criminal Justice System encourage States to amend their codes of procedure to permit the videotape pre-recording of children's testimony, and the UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime provide that all “interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner”.⁹³

Children should be consulted on how they wish to give testimony, and enabled to express themselves freely and in their own way.⁹⁴ As advanced in The UN Principles and Guidelines on Legal Aid in Criminal Justice Systems, children giving evidence should be offered legal assistance as required or, as under the UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, be accompanied by a support person to help reduce anxiety and stress.⁹⁵ Where a child has been accused of committing an offence, courts should especially foster “an atmosphere of understanding” to help children share their views.⁹⁶

States must also ensure the privacy of children who give evidence in legal proceedings. Under the UN Guidelines on Legal Aid in Criminal Justice Systems, the privacy and personal data of any child “who is or has been involved in judicial or non-judicial proceedings or other interventions...should be guaranteed by law”⁹⁷, and the UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime emphasise that child victims and witnesses should “have their privacy protected as a matter of primary importance”.⁹⁸ As such, child victims and witnesses should be permitted to testify outside the presence of the public and media, and “special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and...unnecessary contact with the justice process”.⁹⁹ Article 14 of the International Covenant on Civil and Political Rights authorises courts to exclude the media and general public from courtroom proceedings “when the interests of the private lives so requires,” and makes specific provision for judgments involving children

90 UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, Articles 20, 22.

91 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 34; Guidance Note of the Secretary-General: UN Approach to Justice for Children, para. B.2.

92 Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 34.

93 UN Guidelines for Action on Children in the Criminal Justice System, Guideline 50; UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime, Guideline 13.

94 UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime, Guideline 21.

95 UN Principles and Guidelines on Legal Aid in Criminal Justice Systems, Guidelines 25, 28; UNODC-UNICEF Model Law on Justice involving Child Victims and Witnesses of Crime, Articles 23, 25.

96 UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Article 14.

97 UN Guidelines on Legal Aid in Criminal Justice Systems, Guideline 53.

98 UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime, Guideline 26.

99 UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime, Guidelines 28, 31.

to go unpublished.

Article 40 of the CRC further grants every child accused of an offence the right “[t]o have his or her privacy fully respected at all stages of the proceedings.” The Committee on the Rights of the Child has stated that proceedings involving children in conflict with the law should almost invariably be conducted behind closed doors. The Beijing Rules further specify that children’s “right to privacy shall be respected at all stages” and that “no information that may lead to the identification of a juvenile offender shall be published.”¹⁰⁰

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

As children have a different sense of timing, cases involving violations of their rights should be resolved as quickly and effectively as possible. Trials involving child victims and witnesses should take place “as soon as practical”, and there should be “procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited”.¹⁰¹ The UN Guidelines for Action on Children in the Criminal Justice System call on States to establish and strengthen judicial and administrative mechanisms “to enable child victims to obtain redress through formal or informal procedures that are *prompt*, fair and accessible”.¹⁰² To be responsive to children’s particular needs, the Guidelines further advocate “[t]aking measures to minimize delays in the criminal justice process”, while the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power demands “expeditious” procedures and the avoidance of “unnecessary delay” in both resolving cases and executing final orders or decrees.¹⁰³

In the case of children in conflict with the law, the Committee on the Rights of the Child notes an international consensus that “the time between the commission of the offence and the final response to this act should be as short as possible”.¹⁰⁴ The Beijing Rules provide that cases shall “from the outset be handled expeditiously, without any unnecessary delay” given that “[t]he speedy conduct of formal procedures in juvenile cases is a paramount concern”.¹⁰⁵ Children are entitled to a trial “without undue delay” under Article 14 of the International Covenant on Civil and Political Rights, and, where they have been deprived of their liberty, a “prompt” decision on the legality of their detention under Article 37 of the CRC. To implement these rights, the Committee has recommended that States Parties set time limits for resolving cases involving children that are “much shorter than the ones for adults”.¹⁰⁶

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Children and those acting on their behalf should have the right to appeal resolutions reached and orders delivered in judicial or administrative matters involving violations of children’s

¹⁰⁰UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Article 8; Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, para. 61.

¹⁰¹UN Guidelines on Justice in Matters involving Child Victims and Witnesses Of Crime, Guideline 30.

¹⁰²UN Guidelines for Action on Children in the Criminal Justice System, Article 47 (emphasis added).

¹⁰³UN Guidelines for Action on Children in the Criminal Justice System, Guideline 51; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 5, 6.

¹⁰⁴Committee on the Rights of the Child, General Comment no. 10 on children’s rights in juvenile justice, para. 23g.

¹⁰⁵UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), Article 20.

¹⁰⁶Committee on the Rights of the Child, General Comment no. 10 on children’s rights in juvenile justice, para. 23g.

rights. Judicial systems can be complex and difficult to navigate, especially at the subordinate court level, but the principle remains the same: children must be able to seek recourse in a higher court. This should hold true across all lower courts, and in States where access to the highest courts is restricted to matters of particular legal or public importance, cases involving serious or large-scale violations of children's rights should be considered as such.

The Guidance Note on the UN Approach to Justice for Children recognises appeals as a basic procedural safeguard, and urges States to guarantee children's "right to challenge decisions with a higher judicial authority".¹⁰⁷ The Committee on the Rights of the Child has similarly stated that children "must have access to appeals and complaints procedures which provide remedies for rights violations", and that it should be possible for higher courts to overturn, substitute, or refer back for judicial consideration decisions that violate rules of procedure.¹⁰⁸ Children in conflict with the law have an even more specific right to appeal under Article 14 of the International Covenant on Civil and Political Rights and Article 40 of the CRC, the latter of which further explains that children must be able "to have decision[s] and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law."

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

It is fundamental to the rule of law that States establish and respect the decisions of independent judicial bodies. Where a court has found violations of children's rights, the Government should take steps both to remedy these violations and to ensure that they do not recur. Where violations of children's rights are raised but ultimately not substantiated, Governments should similarly look for opportunities to better guarantee respect for children's rights.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Judicial decisions are worth little if they are not implemented and cannot be enforced. In all matters involving children's rights, the Committee on the Rights of the Child notes that "[s]elf-monitoring and evaluation is an obligation for Governments". The Committee also "regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions".¹⁰⁹ These groups must be authorised and permitted to operate freely, and should be empowered to challenge instances where Governments have failed to follow court decisions finding violations of children's rights.

¹⁰⁷Guidance Note of the Secretary-General: UN Approach to Justice for Children, para. B.6.

¹⁰⁸Committee on the Rights of the Child, General Comment no. 12 on the right of the child to be heard, paras. 39, 47.

¹⁰⁹Committee on the Rights of the Child, General Comment no. 5 on General measures of implementation, para. 46.