

ACCESS TO JUSTICE FOR CHILDREN: GUATEMALA

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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 was ratified by Guatemala on 6 June 1990 and largely integrated into domestic law through the Law for the Integral Protection of Childhood and Adolescence (LIPCA).¹

The country also acceded the first two Optional Protocols to the CRC, but has not yet signed the third one.

B. Does the CRC take precedence over national law?

Under the Guatemalan Constitution, international law and human rights treaties take precedence over national law with respect to human rights. Article 46 of the Guatemalan Constitution states that "in matters of human rights, treaties and conventions that have been accepted and ratified by Guatemala take precedence over domestic law."²

C. Has the CRC been incorporated into national law?

The CRC has not been formally adopted in a single legislative act; rather, various pieces of legislation have been introduced by the Guatemalan government to address aspects of children's rights (primarily through the Law for the Integrated Protection of Childhood and Adolescence). Furthermore, Guatemala has introduced a number of positive pieces of domestic legislation, including the National Law on Adoptions (2007),³ the Law Against Sexual Violence, Exploitation and Trafficking in Persons (2009),⁴ the Early Warning System Law (2010), the creation of the Secretariat against Sexual Violence, Exploitation and Trafficking in Persons (2010), and the Public Policy Against Trafficking in Persons and the Comprehensive Protection of Victims and the elaboration of the Strategic Action Plan 2007-2017.

¹ Decree Number 27-2003 by the Congress of Guatemala approving the Law for the Integrated Protection of Childhood and Adolescence. Available at: http://www.oas.org/dil/esp/Ley_de_Proteccion_Integral_de_la_Ninez_y_Adolescencia_Guatemala.pdf.

² Constitution of Guatemala of 1985 as amended in 1993. Available at: [http://www.unhchr.ch/tbs/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/c86a67ea11bb03ccc125728f00549d06/\\$FILE/G0741301.pdf](http://www.unhchr.ch/tbs/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/c86a67ea11bb03ccc125728f00549d06/$FILE/G0741301.pdf).

³ <http://www.cna.gob.gt/portal/doc/folletoleyadopciones%20pdf.pdf>.

⁴ Law Against Sexual Violence, Exploitation and Trafficking in Persons of 2009. Available at: <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDs%20leyes/2009/pdfs/decretos/D009-2009.pdf>.

However, as the Guatemalan Constitution provides that international human rights treaties and conventions take preeminence over domestic law, the CRC can also be considered automatically part of Guatemala's legal structure.

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

Article 46 of the Constitution states that international treaties ratified by Guatemala take preeminence over national laws. The CRC can therefore be directly enforced in the courts of Guatemala.

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

There is consistent jurisprudence in national courts, fostered by the Constitutional Court, applying the CRC directly, specifically in cases related to children's right to be heard in court and the integral protection of the minor in penal cases.⁵ The CRC has repeatedly been summoned to back amparo writs relating to the best interest of the child.⁶

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?

Children can bring cases usually through a next friend. If parents or guardians are not available or there are conflict of interests, the judge can appoint a legal guardian.

The Defensoría de los Derechos de la Niñez y la Adolescencia is entitled to investigate any reports of child abuse,⁷ while the Procuraduría de la Niñez (Childhood Attorney), is staffed with competent lawyers to represent children in Childhood and Adolescence Courts.

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?

Children usually need their parents or guardian representative in order to access the courts.⁸ However, according to Article 17 of the LIPCA, they also retain a power of petition in case of a violation or risk of violation of

⁵ UN Office of the High Commissioner for Human Rights, *Tendencias jurisprudenciales de la corte de constitucionalidad de Guatemala en materia de derechos humanos*, 2010, pages 41, 80. Available at: <http://www.ohchr.org/gt/documentos/publicaciones/Tendencias%20jurisprudenciales.pdf>.

⁶ Corte de Constitucionalidad de la República de Guatemala, expedientes 1601-2011, 2026-2010, et al. Available at: <http://www.sistemas.cc.gob.gt/Sjc/>.

⁷ Article 92, Law for the Integral Protection of Childhood and Adolescence (LIPCA). Available at: http://www.oas.org/dil/esp/Ley_de_Proteccion_Integral_de_la_Ninez_y_Adolescencia_Guatemala.pdf

⁸ Article 254 of the Civil Code. Available at: <http://leydeguatemala.com/codigo-civil-de-guatemala/representacion-del-menor-o-incapacitado/1173/>

any of their rights. These petitions can be addressed to a public authority who should then take the necessary measures to reassure the child's rights.

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

As mentioned above, cases involving infants and young children would typically be brought by their parents or guardians, or by another intermediary. According to Article 29 of the LIPCA, any citizen who has suspicions about a case of child abuse must communicate these to the competent authorities.

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

Free legal assistance is available to all citizens who cannot afford private representation or the overall costs of litigation. The allocation of funds falls under the discretion of the judge.⁹

Specialised public attorneys for child matters work in conjunction with each juvenile justice court to provide free representation to those in need.¹⁰

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)?

It appears that Guatemala does not place further specific formal restrictions on cases brought by children or their legal representatives. However, enforcement of children's (and parents') rights often lacks uniformity.

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?

Where a violation is detected, the Public Defense or Municipal Councils can bring the cases directly to the Childhood and Adolescence Courts; furthermore, anyone can bring a case to the attention of the joint childhood public attorney office which is responsible for the representation of minors in court.¹¹

Apart from civil procedures, constitutional complaints are also available to child claimants wanting to bring a case against the violation of their rights. Constitutional challenges can be brought to challenge violations brought

⁹ Article 89, Civil Procedure Code. Available at: <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDs%20leyes/2004/PDFs/Codigos/CO DIGO%20PROCESAL%20CIVIL%20Y%20MERC.pdf>

¹⁰ Article 108, LIPCA.

¹¹ Ibid.

about by governmental actions, including through laws. The amparo writ is used widely in the name of minors to protect their best interest and the habeas corpus writ is available to claimants fighting illegal detention.

Laws which are thought to be in violation of the constitution or international human rights treaties can be challenged in court and declared void, temporarily or indefinitely, pending subsequent submission to the Constitutional Court.¹²

Guatemala also falls under the jurisdiction of the Inter-American Commission and the Inter-American Court of Human Rights which are open to individual claimants and petitioners as well.

Inter-American Commission on Human Rights

Individuals or groups of individuals, including children, and NGOs may submit petitions to the Inter-American Commission on Human Rights (IACHR),¹³ on their behalf or on behalf of third persons, regarding alleged violations of the American Convention on Human Rights.¹⁴ A petition can only be lodged after domestic remedies have been exhausted, and normally must be filed within six months after the final judgment.¹⁵ The petition must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, the name(s) of the victim(s) if possible, and whether the petitioner wishes to remain anonymous and the respective reasons.¹⁶ The victim may designate a lawyer or other person to represent him/her before the IACHR, but this is not compulsory.¹⁷ When a petition is declared admissible, the IACHR attempts to reach a “Friendly Settlement” between the parties concerned. If this is not possible, the IACHR will reach a decision on the merits, which consists of non-binding recommendations to the violating State, aimed at ending the human rights violations, making reparations, and/or making changes to the law.

Inter-American Court of Human Rights

¹² The National Constitutional Assembly of Guatemala, *Law of Amparo, Habeas Corpus and Constitutionality*. Available at: <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDs%20leyes/2006/pdfs/normativa/D001-86.pdf>.

¹³ The Inter-American Commission on Human Rights is one of two bodies within the Organisation of American States (OAS) for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. The Commission benefits from a “dual role” as its mandate is found in both the Charter of the Organisation of American States, and in the American Convention on Human Rights (ACHR). As an OAS Charter organ, the IACHR performs functions in relation to all OAS Member States. As an organ of the Convention, its functions are applicable only to States that have ratified the ACHR: Charter of the Organisation of American States, Chapter XV, available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm; American Convention on Human Rights, ‘Pact of San Jose, Costa Rica’, Chapter VII, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

¹⁴ American Convention on Human Rights, Article 44.

¹⁵ Rules of Procedure of the Inter-American Commission on Human Rights, Articles 31-32, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

¹⁶ *Ibid.*, Article 28.

¹⁷ *Ibid.*, Article 23.

If the State does not comply with the recommendations of the IACHR, the IACHR may refer the case to the Inter-American Court of Human Rights (IACtHR).¹⁸ Individuals do not have direct recourse to the Court, and must submit their petitions to the IACHR. The IACtHR interprets and applies the ACHR and other Inter-American human rights treaties and issues a judgment, which may include an order to pay reparations to the victim(s) of human rights violations.¹⁹ The Court's judgments are legally binding on the State against which they are made.

Guatemala has been challenged by child claimants in front of the Court several times, notably in cases involving the country's performance when prosecuting perpetrators of child abuse, e.g. in the *Bosques* case²⁰ and in *Villagrán-Morales et-al. v. Guatemala*.²¹

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

The Guatemalan courts have wide-reaching powers to review violations and offer remedies. For example, they can establish temporary measures such as temporary institutionalisation of a child or placement of a child in a foster family, compulsory attendance of social and psychological programmes by the child's whole family or compulsory attendance to classes by the family.²²

Furthermore, courts have the power to order any authority to follow their obligations under international and national laws and conventions, as well as to establish monetary penalties for the party responsible of a violation. The courts can also halt the application of any norm which infringed children's rights.

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?

The country is in advance discussions for passing a new General Procedure Code which will regulate the litigation of diffuse rights, including a possibility for any person or association to challenge a law or action.²³ The only apparent institution at present which is competent for the protection of diffuse rights is the Human Rights Attorney General.

D. Is any form of collective action or group litigation possible, with or without

¹⁸ Ibid., Article 45.

¹⁹ American Convention on Human Rights, Article 63.

²⁰ Ismene Zarifis, *Guatemala: Children's Rights Case Wins Judgment at Inter-American Court of Human Rights*, Human Rights Brief 9, no. 1 (2001), pages 20-23. Available at: <http://www.wcl.american.edu/hrbrief/09/1zarifis.pdf>.

²¹ CRIN, *Villagrán-Morales et-al. v. Guatemala*, CRC in Court case summary, December 2013. Available at: <http://www.crin.org/Law/instrument.asp?InstID=1641>.

²² LIPCA, Article 112.

²³ General Procedure Code Bill. Available at: <http://www.oj.gob.gt/es/LeyesImportantes/C%C3%B3digoProcesalGeneralActualizado.htm>

naming individual victims?

Collective litigation is possible, both against private actors and public authority, but individual victims must be informed of any litigation being brought.²⁴

- 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?

The new General Procedure Code which is currently being discussed in the country will guarantee the prerogative of non-governmental organisations to fight for diffuse and collective rights. Meanwhile, non-governmental organisations can support litigation on the issue of children's rights by way of amicus curiae briefs. NGOs can also intervene in individual cases and provide legal support to groups of victims. In the case of child claimants or victims, NGOs need the consent of the parents or that of a judge to become active in a case.

- 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:

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

There are nine specialised juvenile courts in Guatemala which deal with criminal and civil cases. The competency of the court responsible for amparo, i.e. constitutional, proceedings will depend on the rank of the government authority being challenged.

In criminal proceedings, children and their representatives can present a criminal complaint directly to the court if a prosecutor fails to do so. In administrative or constitutional proceedings, children have ample right to petition all government institutions.

The initial filing process does not entail anything unusual. It requires the naming of a suspect perpetrator, the presentation of means of proof, potential victims, pertinent norms and a request for financial aid, if required.

- 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?

Pursuant to the Act on the Comprehensive Protection of Children and

²⁴ Article 21, Amparo Law.

Adolescents of 2003, criminal legal proceedings involving children and adolescents are without cost, pending possibility for redress. In all civil and administrative proceedings, the plaintiff must prove his financial status in order to be eligible for legal aid.

- 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?

In addition to Guatemala's legal aid system, there is no provision in the country's laws which would limit the possibility of pro bono assistance, including by registered NGOs.

- 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?

The limitation period for criminal proceedings only starts running after the victim turns 18.²⁵

Claims for civil reparation payments are limited after one year, beginning when the child reaches adulthood. But a child can still claim reparations after this period has expired if their guardian was responsible for the limitation period to elapse.²⁶

Generally, limitation periods for criminal claims are prescribed according to the penalty attributed to the criminal act in question, up to a maximum of 25 years.

- 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?

Generally, the Guatemalan courts will rule on cases on the basis of both direct evidence – testimony, expert reports or documents, inter alia – and indirect evidence– such as circumstantial evidence, indicia and presumptions. The courts may base judgments on indirect evidence when they are coherent, confirm with other evidence, and lead to solid conclusions that are consistent with the facts under examination.

Children under 14 years of age or any person incapable of understanding the meaning of abstaining can testify only if their representative or tutor agrees to it.²⁷

- F. Resolution. How long might it take to get a decision from the court as to

²⁵ Article 108(6), Penal Code.

²⁶ Article 1501, Civil Code.

²⁷ Code of Criminal Procedure, Article 213.

whether there has been a violation?

Guatemalan trial courts have fifteen days after the closing of proceedings to reach an initial verdict. On appeal, appellate courts typically have a further fifteen days after arguments to rule on the validity of the decision of the court of first instance.²⁸

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

In Guatemala, the appropriate mechanism to remedy any due process violation in criminal proceedings would be an appeal through the “special appeals” process, or “apelacion especial,” as provided for by Articles 415-422 of the Guatemalan Criminal Procedural Code.

There is also one juvenile appellate court in Guatemala designed to hear appeals solely regarding juvenile cases.

Complaints related to constitutional provisions or international human rights law can be appealed to the country’s constitutional court.

- 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?

High-profile decisions (positive or negative) may prompt political responses from the Guatemalan government, which has sought to take steps to address issues of equity throughout the country. However, systemic institutional challenges continue to be an issue, which could result in backlash if the decision is inadequately enforced, either on the private level or through the persistence of corruption in the Guatemalan National Civil Police.²⁹

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

Enforcement of children’s rights cases in Guatemala is not uniform, and allegations of preferential treatment are common. Particularly for children in vulnerable situations whose rights have been abused by persons of authority or with unequal bargaining positions, enforcement of a decision may be compromised.

- V. **Additional factors**. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

²⁸ *Scientists and Human Rights in Guatemala: Report of a Delegation*, National Academy of Sciences, 1992, at p.68.

²⁹ United Nations Human Rights Committee, *Report on violation of women’s rights in response to the third periodic report of Guatemala*, 104th Session, New York, 13-30 March 2012, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RVWHR_Guatemala_HRC104_en.pdf.

The UN Committee on the Rights of the Child has noted that Guatemala has taken steps to bring its legislation in line with the Convention, but has further noted that the laws currently in place are insufficiently enforced.³⁰

There is a history of children not being permitted to testify or otherwise have their positions heard. In addition, coercion and corruption still appear to be a problem in the legal system of Guatemala.³¹ The population of Guatemala is over 50% indigenous, but the access to justice for this groups is still unsatisfactory, especially with regard to cases of extraction of natural resources on indigenous land. So-called ‘justices of the peace’ have been used to expand the implementation of justice across the country more quickly, but these still lack support and training and are susceptible to external pressure.³²

This report is provided for educational and informational purposes only and should not be construed as legal advice.

³⁰ UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Guatemala*, CRC/C/GTM/CO/3-4, 25 October 2010, para. 11-16. Available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk70ICkWA Kxw8HLJU1yka3nEoJ5nBbz2XdatIwFHIdlec106cbraMmq48KH0e0X7takFnsPO0m3SnrlUGK2vobXPe 2%2fqf%2fQ3embDzyevqkeP>.

³¹ ILPEC Guatemala, *Adoption and the rights of the child in Guatemala*, 2010, p.12. Available at: <http://poundpulegacy.org/files/Guatemala-UNICEFILPECENG.pdf>.

³² Inter-American Commission of Human Rights, *Justice and social inclusion: the challenges of democracy in Guatemala*, Chapter 1, para. 17 onwards, OEA/Ser.L/V/II.118, 29 December 2003. Available at: <http://www.cidh.org/countryrep/Guatemala2003eng/TOC.html>.