

INTERNATIONAL CONFERENCE

CONVENTION ON THE RIGHTS OF THE CHILD: FROM MORAL IMPERATIVES TO LEGAL OBLIGATIONS.

**In search of effective remedies for
child rights violations**

Geneva, 12-13 November 2009

CONFERENCE REPORT



Save the Children



ngo group for the crc



CRIN

Child Rights International Network



unite for children



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TABLE OF CONTENT

Introduction.....	7
1. Background, methodology and programme.....	9
2. Reports from the working groups.....	13
2.1 Working Group 1: Using national systems to address violation of child rights	13
2.1.1 Speeches	13
2.1.2 Working Groups	14
A) The importance of choosing the right case: What makes a case strategic?.....	15
B) Obstacles to litigation	16
C) Overcoming obstacles.....	18
2.2 Working Group 2: Using international and regional systems to address violations of child rights.....	19
2.2.1 Speeches	19
2.2.2 Working Groups	20
A) The African System.....	21
B) The Inter-American System	22
C) The dearth of a continental human rights system in Asia	24
D) The European System.....	25
2.3 Working Group 3: Designing a strategic litigation strategy	27
2.3.1 Speeches	27
2.3.2 Working Groups	29
A) Designing a strategic litigation strategy: Advice for NGOs	29
B) Africa: some case studies.....	32
C) The Americas: Devising a common regional agenda on child rights litigation.....	34
D) Asia: Preparation for NGOs planning strategic litigation	35
E) Europe: some case studies	38
3. Conference observations and conclusions	39
3.1 Main conclusions	39
3.2 Follow-up actions.....	40
Annex: Glossary of legal terms.....	41

INTRODUCTION

The aim of this report is to highlight key observations, conclusions and conversations resulting from the international conference *Convention on the Rights of the Child: From Moral Imperatives to Legal Obligations – In search of effective remedies for child rights violations* which took place in Geneva, 12-13 November 2009.

The conference attracted more than 120 participants from more than 60 countries, with diverse professional backgrounds, experience and expertise. The format of the conference saw participants divided, according to their regional affiliations, into African, American, European and Asian working groups where they discussed specific topics related to child rights litigation. Between these sessions, all participants came together to hear presentations from a range of speakers.

It was a delight to bear witness to meaningful discussions between committed activists and advocates from all corners of the world, and there was much to share during the conference. Our hope now is that the momentum launched by the event will carry far beyond the mere publication of a conference report. As a first step, we hope that you will sign up for, and contribute to, the new CRINMAIL dedicated to child rights litigation. Please also visit CRIN's new "CRC in court" section of the website, where you will be able to find CRC jurisprudence in international and national courts from around the world.

Conference reports can make a rather dry read, so we have tried to feature key discussions, rather than provide a comprehensive account of the proceedings. Our aim has been to produce a useful document that will help inspire readers into pursuing creative legal strategies in their activities relating to the realisation of children's rights.

The report is organised in three main sections. The first explains the background of the conference, and gives an overview of the conference's methodology and programme. The second and main section is organised around the three themes of the working groups, namely: (1) Using national systems to address violations of child rights; (2) Using international and regional systems to address violations of child rights; and (3) Designing a strategic litigation strategy. Each sub-section also includes abstracts from

relevant presentations delivered during the plenary sessions. Notably, the summary of working group three includes different strategic litigation strategies designed by the different working groups, and the third section contains conclusions from the conference and suggests actions for follow-up. In the annex, you can find a glossary of legal terms.

This report, presentations made during the conference, and the conference pack are available in a CD-Rom, which you can find in the pocket on the third cover, as well as online at <http://www.crin.org/resources/infodetail.asp?id=21160>

We hope you enjoy the reading!

Roberta Cecchetti

International Save the Children Alliance

On behalf of the conference organisers



1. BACKGROUND, METHODOLOGY AND PROGRAMME

1.1 Background

On the 12th and 13th of November, Save the Children, in partnership with the Office of the High Commissioner for Human Rights (OHCHR), UNICEF, the NGO Group for the Convention on the Rights of the Child and Child Rights Information Network (CRIN) held an international conference in Geneva with the objective of inspiring child rights NGOs to use the Convention on the Rights of the Child as a legal instrument. Most participants were from national child rights coalitions, but other NGOs, UN agencies, key donor States and private foundations were also present.

The conference was very well received, with many attendees expressing appreciation for both its topic and its tone, which were seen as groundbreaking and inspiring.

Donors included the organizers and partner organizations, the Swiss Confederation, the Canton of Geneva, the City of Geneva, Loterie Romande and the OAK Foundation.

1.2 Methodology

The conference was structured around plenary sessions with expert speakers presenting on the key issues concerning the effective use of the CRC as a legal instrument. These sessions were supplemented with regional working group segments, where participants were asked to undertake practical exercises on the topics raised.

Four working groups were established based on the region of origin of the participants: “Americas”, “Asia”, “Council of Europe” and “Africa”.

The working groups remained the same for the duration of the conference and consisted of the participants from the region, a selection of expert speakers from the plenary session panels, a moderator and a rapporteur. The organizers provided the groups with a series of general guiding questions to help steer and focus the discussion.

Dialogue focused on the practical use of the Convention of the Rights of the Child to provide effective remedies in cases of violations, determining how best to overcome difficulties and maximize the use of resources. The working group session on day two merits particular mention. In this session, each working group was tasked with applying the knowledge gained throughout the conference in designing a litigation strategy around a fictive case set in the region.

The collective experience of the working group truly shined, and participants worked together in solving not only the legal issues that underpinned the case, but also issues of networking with other partners, the use of media and advocacy, the importance of selecting the right case and the right forum, sustainability over-time, links between the national and regional/international systems, child protection issues, the consent and empowerment of the victims and the complementarity of all the available methods.

1.3 Conference Programme

12 November 2009 (day 1)

Conference opening and introduction to the themes and objectives of the conference

Chair: *Roberta Cecchetti,*
International Save the Children Alliance, UN Representative

Presentations:

Manuel Tornare, Councilor of the Administrative Council of the City of Geneva

Charlotte Petri Gornitzka, CEO of the International Save the Children Alliance

Pascal Villeneuve, Deputy Director, Programme Division, UNICEF

Bacre Waly Ndiaye, Director, Human Rights Council and Treaty Division, OHCHR

Panel 1: Introduction - The legal status of the Convention on the Rights of the Child

Chair: *Allegra Franchetti, OHCHR*

Presentations:

“The CRC as an enforceable treaty”- *Prof. Ariel Dulitzky, Professor of Law and Director of the Human Rights Clinic, University of Texas*

“An introduction to use of the CRC as a legal instrument”- *Elizabeth Dahlin, CEO of Save the Children Sweden*

“General measures of implementation of the CRC and the need for system reform”- *Jean Zermatten, Vice-Chair of the Committee on the Rights of the Child*

Panel 2: Using national legal systems to address violations of Child Rights

Chair: *Ellen Stie Kongsted, Save the Children Norway*

Presentations:

“Children seeking to obtain an effective remedy for violations of Child Rights in national courts”- *Edo Korlijan, Council of Europe*

“Seeking remedies for violations of Child Rights in different legal traditions (common law, civil law, religion based, community based and transitional) and systems (administrative, penal and civil courts)”- *Savitri Goonesekere, University of Colombo, Sri Lanka*

“Enforcing Child Rights in weak national legal systems”- Nevena Vučković Šahović, Human rights lawyer/scholar and former member of the CRC

4 Working Groups: *The Working Groups discussed the national legal systems in their respective regions, how (and if) they work and how they can be used to enforce Child Rights.*

Panel 3: Using Regional and International Human Rights Mechanisms to address violations of Child Rights

Chair: Nicolette Moodie, UNICEF

Presentations:

“An overview of Regional and International systems suitable for addressing violations of Child Rights and the Remedies available in these” – Susanna Villarán, Committee on the Rights of the Child

“Bringing a case to a Regional Court - Case study of the Roma Children in Special Education Classes case (DH and Others v. Czech Republic) in front of the European Court of Human Rights” – Lilla Farkas, CFCF, Hungary

“Bringing a case to a Regional Court - Case study of the Serrano Cruz sisters (Las Hermanas Serrano Cruz v. El Salvador) in front of the Interamerican Court of Human Rights” – Gisela de Leon, litigating lawyer, CEJIL Mesoamerica

“The need for a Complaints Procedure under the CRC”- Peter Newell, Coordinator of the Global Initiative to end all Corporal Punishment of Children

4 Working Groups: *The Working Groups discussed the regional Human Rights Mechanisms in their respective regions, how (and if) they work and how they can be used to enforce Child Rights.*

13 November 2009 (day 2)

Panel 4: An introduction to Strategic Litigation

Chair: Erik Nyman, International Save the Children Alliance

“When and how should you consider Strategic Litigation and alternative practices (litigation, threat of litigation, friend of the court – amicus curiae)” – Ann Skelton, Director for the Centre for Child law, South Africa

“A case study of Successful Strategic Litigation achieving substantial impact on the realization of Children’s Rights– The India Right to Food Case (People’s Union for Civil Liberties v. Union of India and Others)” – Sheela Ramanathan, litigating lawyer, Human Rights Law Network India

“A case study of Successful Strategic Litigation – The Ogoni Case (the Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria)” – Felix Morka, Director of SERAC Nigeria

Panel 5: The added value of using the CRC as a legal instrument as a complement to existing strategies

Chair: Lena Karlsson, UNICEF Innocenti Research Centre

Presentations:

“Why child focused NGOs should consider adding litigation to their range of tools” – Edmund Foley, Institute for Human Rights and Development, Gambia

“Involving Children in litigation – the do’s and don’ts”- Vipin Bhatt, Programme Coordinator, Child Protection Unit, Haq: Centre for Child Rights India

“Case study: The creation of child friendly courts in Ethiopia” – Solomon Areda Waktolla, Vice-President of the Federal First Instance Court of Ethiopia

“Case study: Integrating litigation practices in the work of a child focused civil society organization”- Renato Roseno, ANCED, Brazil

4 Working Groups: *The Working Groups designed a strategic litigation strategy for sample cases to challenge a violation of children’s rights common to the respective region.*

Concluding speeches and plans for follow-up

Chair: Roberta Cecchetti, International Save the Children Alliance

Presentation:

“Concluding speeches and plans for follow-up”- Veronica Yates, CRIN and Alan Kikuchi-White, NGO Group for the CRC

2. REPORTS FROM THE WORKING GROUPS

2.1 Working Group 1: Using national systems to address violations of child rights

2.1.1 Speeches:

Charlotte Petri-Gornitzka, CEO of the International Save the Children Alliance - opening speech

This speech considers the necessary requirements for the fulfilment of children's rights and access to justice and effective remedies, including a firm conviction that all child rights are realisable.

Professor Ariel Dulitzky, Director of the Human Rights Clinic, University of Texas - the CRC as an international human rights treaty

This presentation outline sketches the significance of human rights treaties and the obligations of States and other parties in respect of such treaties. It considers the interface between politics and the law in enforcing human rights obligations through litigation.

Jean Zermatten, Vice-Chair of the UN Committee on the Rights of the Child – General measures of implementation of the CRC and the need for system reform

The presentation focuses on the role of the CRC Committee and its implications on State Parties. It touches upon the future Third Optional Protocol to the CRC establishing a communications procedure. It explains the general measures of

implementation from a legal obligation point of view.

Elizabeth Dahlin, CEO of Save the Children Sweden - An introduction to use of the CRC as a legal instrument

This speech focuses on the practical use of the CRC as a legal instrument. It asks: how can NGOs make legal use of the CRC? It looks at advocating for legal reform, becoming 'friends of the court' (producing amicus curiae briefs), becoming a 'friend of the litigant', referring cases and denouncing violations, legal aid for children and, finally, strategic litigation.

Nevena Vučković Šahović, Human rights lawyer/scholar and former member of the CRC - Enforcing Child Rights in Inefficient National Systems

This speech outlines the international child rights legal framework, and considers the barriers to implementation. It addresses the importance of governance in realising children's rights, as well as the Committee on the Rights of the Child's General Measures of Implementation. Professor Vučković Šahović also discussed solutions to the barriers to implementation.

Savitri Goonesekere, University of Colombo, Sri Lanka - Seeking Remedies For Violations of Children's Rights in

Diverse Legal Traditions and Systems

This speech shares experiences from a UNICEF study that examined different approaches to the enforcement of children's rights in three of the major legal traditions of the world – the Common Law, the Civil Law and the Islamic Law systems. It considers the implications of the absence of a complaints procedure under the CRC for the implementation of children's rights, and looks at the benefits of public interest litigation.

*“A litigation strategy must also address problems related to the powerlessness of communities to obtain access to justice, the lack of cultural legitimacy for adversarial dispute settlement, and the need sometimes to incorporate alternative dispute resolution approaches into traditional litigation strategies.”-
Savitri Goonesekere*

2.1.2 Working group

This working group explored how NGOs can use or promote the use of national legal systems to achieve effective remedies for child rights violations. Discussion included: What we mean by “effective remedy”; what can reasonably be achieved in national legal systems in particular regions; what can be expected to be the most common difficulties in using national legal systems to pursue children's rights violations within a particular region (for example: long delays, children being unable to bring cases, corruption, high court costs or legal fees); suggestions for addressing these; and what the roles that NGOs can and should play using national

justice systems to remedy child rights violations.

There are a number of ways in which NGOs can help enforce the CRC in national systems. These include:

Advocate for comprehensive legal reforms:

This includes fundamental rights, such as pushing parliaments and governments to introduce a legal ban on all forms of violence in all settings, including corporal punishment in the family. It also includes other, arguably less obvious, rights, such as the right to non-discrimination, the right to health care, and the rights to information and expression. But what is the right of children to initiate a lawsuit when these rights have been violated? In other words, do they have standing - at least from a certain age? All rights included in the CRC must be enforceable in national systems. If not, they will continue to be considered only principles to aspire to.

Become “friends of the court” (produce

amicus curiae briefs): Some national jurisdictions allow NGOs – but also governments, interest-associations and groups, to submit legal briefs in support of a party or a judgment. This is sometimes possible for regional courts or commissions, such as for the Inter-American Court on Human Rights. Child rights NGOs can analyse existing national, regional and international jurisprudence on similar cases; they can make use of relevant concluding observations by the Committee on the Rights of the Child and other Treaty Bodies; and they can suggest specific interpretations of the relevant legal obligations using the General

Comments of the CRC Committee.

Become a “friend of the litigant”: When Human Rights NGOs or Bar Associations litigate cases before any court that have strong child rights implication, child rights NGOs should provide support, for example by raising issues that may otherwise not be incorporated.

Refer cases and denounce violations: NGOs can refer cases of child rights violations that they are confronted with in their daily work to litigating organisations, bar associations, children’s ombudspersons to public prosecutors or regional and international human rights mechanisms. Hopefully, they will also be able to refer cases to the CRC Committee in the near future when a communications procedure is in place.

Legal aid for children: Legal representation is very important for children in all proceedings involving them, although it may sadly often not be

provided by the government. NGOs may be able to fill this gap.

Remember:

“These activities may seem overwhelming, and they require in-house legal capacity, dedicated resources, long term investment, counting on external expertise, the willingness to take the risk of becoming confrontational. But these reasons – as relevant as they are - should never be used as excuses for non-action, but on the contrary challenges to face and address”

Elisabeth Dalhin

A) The importance of choosing the right case: What makes a case strategic?

- It is **emblematic of a wider problem** and has an impact beyond the specific case at hand.
- It is **part of a broader advocacy strategy:** Advocates can use the courts to bring about legal and social change. This is often part of an overall advocacy

What is a remedy?

A remedy is something you seek to address a violation of someone’s rights. Litigation involves seeking a judicial remedy: there is a complaint, a case, an arbiter (e.g. a Judge), and a decision. Depending on the court you file in, the remedies you can seek in your case may also be vastly different. Remedies might be restorative, punitive or preventative (for example, the Child Law Centre in South Africa prevented the deportation of unaccompanied foreign children). Some courts may only be able to offer monetary compensation, whereas others will have broader declaratory powers.

By the same token, the impact of your success or loss may be dramatically higher or lower depending on the court or tribunal that issues the order or decision. As a general rule, the higher the court or tribunal, the broader and more powerful the impact. You might wish to choose a well-known or respected court whose judgments will be influential not only on a national level, but potentially on an international scale as well.

campaign and does not begin and end with a decision on the case. What is important is what happens after the case has been won and to think about how the decision can be used to influence public policy and generate awareness.

- **Innovation:** the case should seek opportunities to expand national and/or international jurisprudence.
- **Multi-disciplinary approach:** cases brought are not just a matter for lawyers; psychologists and a wide range of other social actors should be involved.
- **Timing:** Cases may be timed to coincide with other relevant/ significant processes on the public agenda, in political or media discussions, for example.
- **Participation and empowerment:** The victim and their family should not be used for the purpose of obtaining a decision, and a focus on rights must not be lost. The process itself should be used as an opportunity for empowering those involved and for seeking justice for the victim and their family. A case should not just be taken on behalf of children; it should be taken with them, and with their informed consent. The victim should also have the psychological strength to go through with the case.
- **Structural change:** Ineffective state structures can be changed, for example, as resulted from a case involving forced disappearances of children during the internal armed conflict in El Salvador (the Serrano Cruz sisters vs. El Salvador: <http://www.crin.org/Law/instrument.asp?InstID=1403>), brought before the Inter-American Commission the Asociación Pro-Búsqueda and the Centre for Justice and International Law (CEJIL). Although the transformations that resulted

from the case were not radical, one of the most important achievements was the creation of informal mechanisms for dialogue which meant that families had a space to negotiate with the State.

- **Building strategic partnerships:**

Working in partnership was key to the progress made in the case above as CEJIL, which specialises in strategic litigation, teamed up with the Asociación Pro-Búsqueda which has experience of working with child victims and their families and was able to ensure that re-victimisation was prevented during the process.

- **The process is as important as the result:** The process and preparation of a case can be just as important, if not more so, than the case itself, for example by raising awareness, mobilising support, and building alliances.

“The use of legal procedures is more effective when used alongside other strategies.”

Delegate



B) Obstacles to litigation

It should be noted that, although lawyers may think that the courtroom is the centre of gravity for human rights protection, the

use of legal procedures is more effective when used along with other strategies.

Obstacles include:

- **Legal capacity.** In many systems, children cannot sue by themselves. So they have to rely on next of kin, or friends.
- **Locus standi.** Violations of children's rights are often not person-specific. A group of children may be involved. You can sue as an organisation, but you have to show special interest in the case (locus standi) - even those who are interested may struggle to overcome this requirement.
- **Access to legal representation** is another obstacle, and is interwoven with the role of the state. The State should provide legal resources, but often they don't. NGOs are again critical as they can provide services and litigation support.
- **Prolonged delays.** The legal process can take years.
- **High fees** mean impoverished people cannot even consider the prospect of litigation.
- **Judicial corruption** is a huge problem, and violators of children's rights may use their influence to block scrutiny of their actions.
- **Complex legal procedures** are a further barrier. Lawyers may not know where to begin because of complicated legal systems. For example, the law covering pollution in Nigeria is incredibly complex – polluting the water becomes a matter of maritime law.
- **A lack of access to information** creates further problems, and there is in particular a lack of child specific data.
- **Inconsistent legal regimes** may be a problem. Some rights are non justiciable, and the CRC may say one thing, but local

law means there is no jurisdiction to hear the case. In the UK, in the case of R v. F and another [2008] EWCA Crim 1558 (judgment delivered on 26 June 2008), the Court of Appeal considered the CRC when reviewing a child's prison sentence. However the Court was very dismissive about the use of the CRC as part of the argument saying it did not have any additional value. Ultimately, even though the child's claim was successful, the Court was explicit about rejecting the CRC.

- **A lack of political will.**
- **Cultural and social stigmatisation.** How is it possible to convince a child to take up a matter against their father, mother or member of the local community?
- **Crisis of perspective.** Do we help individual children or the system?
- **Finding the right court** may be difficult. For example, where would be the place to bring a case for Haitian children born in the Dominican Republic who have not been granted nationality, or for Mexican children living in the U.S.?
- **The definition of "child" is not universal.** The CRC sets out the age under which people are considered children as 18 *unless otherwise defined*, which has allowed India to fix the age at 14 and Islamic law at 15.
- **Different relationships between national and international law** (i.e., monist and dualist systems) mean that advocates cannot simply march into court and demand their rights under the Convention.
- **A general lack of knowledge awareness** in the legal community of the CRC and children's rights. For example, in Yemen, many judges are almost entirely unaware of the Convention and

what it stood for. Yet even where the CRC is largely enforceable law, as in the Philippines, there are concerns that NGOs, law enforcement officers, and members of the community might not know about those laws. In those circumstances, victims of child rights violations might not even know that they were victims, making them much harder to identify.

- **Bureaucracy**, for example in India, can make it difficult to report incidents to police, or obtain background documents or medical reports for the case.
- Victims, or their families, of child rights violations may **settle financially** with perpetrators, creating an impediment to building solid legal precedent.
- There is no **complaint/communications procedure for the CRC**, which means there is also no detailed jurisprudence developed by the Committee on the Rights of the Child.
- **NGOs' lack of funds** can be an obstacle as it costs a lot to develop and implement a strategic litigation strategy, taxes to pay in court, etc.
- There is sometimes **difficulty convincing children that they are victims** for the purpose of litigation
- There may be **no systems to hear the child as a victim**, e.g. special court rooms, specialised officers, etc.
- Confronting some States can be risky for NGOs, especially, where public services for children are subcontracted to NGOs and may affect their organisation's survival.

“Strategic litigation may come at a cost, but being confrontational is sometimes what is needed.”
Felix Morka

C) Overcoming obstacles

Think creatively about **standing**. For example, because the concept of best interests is so wide, NGOs can bring many legal challenges within that framework, as has happened in the past with health care providers obtaining court orders for blood transfusions over parents' religious objections.

NGOs may employ lawyers and plead cases for children, while at the same time lobbying governments to come up with their own representative for children in court. In some countries, like South Africa, courts can already appoint legal representatives for children involved in litigation.

There is a need to **build the capacity of staff at judiciaries** to deal with child rights issues. Working with courts has also led to the establishment of child courts.

NGOs can **work better with networks of organisations** – identifying problems that are occurring. Build partnerships with other civil society organisations which do not have a specific focus on children's rights.

Case outcomes need to be publicised. NGOs need to monitor court case outcomes, and can also be spokespersons who liaise with media. The role of media can be very important, not only for victories but also for defeats, and helping people to understand, and possibly engage in, the judicial process. Those working in repressive regimes, such as Ethiopia, might consider **working with both local lawyers** and international

NGOs, for example by giving them reports or information.

NGOs should be sure to **document experiences**, not just in terms of the practical steps taken, but lessons learnt during, and reflections on, the process. One participant from Venezuela described how CECODAP has tried to document the process of taking cases to create institutional knowledge, and so as not to be dependent on individuals should they leave the organisation.

Experts from India explained the concept of **Public Interest Litigation (PIL)**, under which cases of **children's rights violations could be brought without identifying individual victims**.

Be realistic in identifying which issues can be litigated. Strategic Litigation is not always the solution, but may be in some cases. A case can be pursued in a way designed to ensure that the result can

have an impact on many children, instead of taking the same case over and over which only helps one child each time.

Always **combine Strategic Litigation with other forms of advocacy**, lobbying and training. Raise awareness to counteract the lack of knowledge. For instance, the Council of Europe may be able to help by offering training to judges.

"In any case, or strategy, it is crucial that the interests of the victim remain central, and come before any broader goals."

Delegate



2.2 Working Group 2: Using international and regional systems to address violations of child rights

2.2.1 Speeches

Susanna Villaran, Committee on the Rights of the Child – Using international and regional systems for the effective protection of children's rights

Ms Villarán's presentation discusses the relationship between regional systems and the Convention on the Rights of the Child, including an overview of the European, Inter-American and African systems.

Lilla Farkas, CFCF, Hungary - Bringing a case to a Regional Court - Case study of the Roma Children in Special Education Classes case (DH and Others v. Czech Republic) in front of the European Court of Human Rights

Drawing on personal experience, this presentation focuses on a strategic litigation case brought before the European Court to enforce the right to education for Roma children. It addresses

Exhaustion of national remedies

Exhaustion of remedies. In order to have your case heard by some international or higher national courts, you must have exhausted your remedies. This means that you must first go through other judicial channels available before the new court will hear your claim. In terms of international tribunals, this may mean that you will be required to go through the national courts of the jurisdiction in which you would file your claim until you can no longer appeal. Once you have done so, there may be a time limit on how long you have to bring your claim to a higher court, or else the last court's opinion or order may stand. Many international tribunals set this limit at six months.

Exceptions. There may be exceptions made both for the exhaustion of remedies requirement and for any time limits set. For example, if you can prove that the courts in the jurisdiction you would file your claim in are corrupt, you may not be required to pursue a remedy in those courts. Or if you can show why you could not bring your case within the expected time limit, you may be given an extension.

(Geary P, (2009) 'Children's Rights: A Guide to Strategic Litigation, Child Rights Information Network: London)

background issues of discrimination, relevant case law, and the procedural aspects of group litigation.

Gisela de Leon, litigating lawyer CEJIL Mesoamerica - The case of las Hermanas Serrano Cruz v. El Salvador versus el Sistema Interamericano de Derechos Humanos

Ms de Leon outlined the litigation strategy for the Las Hermanas Serrano Cruz v. El Salvador case - a successful example of the use of the Inter-American Human Rights system for the implementation of children's rights.

Peter Newell, Chair of CRIN Council, and Vice President of the NGO Group on the CRC – The need for a complaints procedure under the CRC

This speech focuses on what is needed to ensure the new communications procedure is used effectively, rather than on the need for the procedure itself, which is already well established.

2.2.2 Working Group

This working group explored the use of international and regional human rights mechanisms to achieve an effective remedy for child rights violations. The discussion varied according to the nature of the mechanisms available across the different regions, but focused on the potential of these mechanisms to provide a remedy when none is offered by the national system. Discussions included consideration of which of the regional and international human rights mechanisms are most suitable for addressing child rights violations; what human and financial



resources are required for an NGO to make an application to an international or regional mechanism; and which remedies are available in the different regional and international human rights mechanisms. **Note that national courts should usually be the first place to seek remedies** for violations as:

- There is usually **compulsory jurisdiction** over nearly all matters. However, this is not always the case. In one example, there was a military government that had suspended the national constitution, so there was no prospect of getting a judicial remedy in the national courts. The plaintiffs were instead compelled to go straight to the African Commission to find a judicial body that could inquire into the case. Most regional and international mechanisms (with a few notable exceptions such as ECOWAS) require that domestic remedies are exhausted before a case can be brought. However, there may also be ways to bypass the rule, for example when bringing a case nationally is too costly, or when it takes an unreasonable period of time.
- There is often **no quick fix at regional or international level**. There are no police to enforce decisions. With these cases, however, it is not always about the decision but also about the process.

Different regional systems

A) *The African system*

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC)(<http://www.africa-union.org/child/home.htm>) has adopted rules on communications. **Article 44** of the African Charter on the Rights and Welfare of the Child empowers the Committee to consider individual communications alleging a violation of any of the rights enshrined in the Charter. Any individual, group or non-governmental organisation recognised by the African Union, by a Member State, the UN, or children themselves may bring a complaint. The current chair of the Committee seems very keen on dealing with communications, so plaintiffs are urged to submit them.

Communications made to the ACERWC cannot be submitted anonymously, but it is possible to request **anonymity** in the Committee's treatment of the case, i.e. to ask the Committee not to reveal the name(s) of the individuals involved. A rule stipulates that communications may generally not concern members of the African Union that have not ratified the African Charter on the Rights and Welfare of the Child, but there is an exception allowing the Committee to admit **communications regarding non-members in the best interests of the child**. A communication can also be presented on behalf of a child without their consent, provided it can be shown to be in the best interests of that child or the victim.

Communications can only be submitted

to the Committee where **local remedies have been exhausted**. In some cases, it may also be possible to submit a communication where the applicant has not been satisfied with the local remedy provided. This is open to test. Communications cannot be based exclusively on information in the media, and must be brought within a reasonable period of time.

When the Committee receives a communication, it can undertake an investigation independently or at the request of a State party. NGOs can suggest which experts are part of these investigations. Experts do not necessarily have to be Committee members. Following an investigation, the Committee can make any recommendations it sees fit. Since AU States work so closely together, it is important to that Member States support these recommendations. The Committee appoints **one member to follow up on implementation of the recommendations**. The Committee can also tell the African Union if the decision is not being implemented.

Despite a number of structural problems relating to political issues and a lack of resources, there is still a lot of potential for working with the Committee. This goes beyond making complaints and includes strengthening the working methods and mandate of the mechanisms.

The Committee can only be good as its experts, and NGOs must also scrutinise how appointments are made to the Committee. There is a real opportunity to get effective, qualified people to become

members of the Committee when elections take place. One option is to contact local African Union representatives to find out which candidates have been nominated. NGOs can also propose candidates.

“The rules are there to be tested.”
Edmund Foley



B) The Inter-American System

The Inter-American human rights system comprises the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both are organs of the Organization of American States (OAS).

Individual complaints can only be taken directly to the Court by States Parties to the American Convention. Other parties must submit their case to the Commission which may then refer this to the Court.

Read more here: <http://www.crin.org/RM/Inter-American-Commission.asp>.

The Inter-American human rights system is a toolbox. Bringing individual cases before the Commission is just one way of using the system. Other options include: holding thematic hearings, referring cases to legal organisations, presenting amicus

briefs and creating a direct link with the Rapporteur on Children's Rights. These avenues can be less costly and less time-consuming than bringing cases.

Many of the participants had used the Inter-American human rights system in one of these different ways. There was, however, a general consensus that the system is still not used enough, and that child rights NGOs often choose to use the UN system over the regional human rights system.

Governments in the Americas have differing views of the Inter-American Commission on Human Rights. In Peru and Argentina, for example, the Commission's legitimacy is widely recognised, said participants. Susana Villarán, a member of the UN Committee on the Rights of the Child, even credited the Commission with helping to recover democracy after the fall of dictatorships in some countries.

Enormous progress has been made on child rights in the region since the first hearing on children's rights at the Inter-American Commission in 2002. The Commission's recent work on corporal punishment, for example, culminated in a resolution issued by the Inter-American Court confirming the prohibition of corporal punishment. This was accompanied by a report published by the Commission with recommendations for States. These advances were made after petitioners - Save the Children Sweden, the Global Initiative to End All Corporal Punishment of Children and partners - had asked the Commission to present a request to the Court for an advisory opinion, and civil

society organisations had participated in thematic hearings and rapporteur visits across the region.

One participant suggested that bringing cases carries more weight than thematic hearings, and that reparations offered by the Inter-American system are the most "pro-victim" of any system because they go beyond purely financial compensation. For example, in the case of Villagran Morales and Others v. Guatemala, the Inter-American Court on 26 May 2001, ordered the State of Guatemala to:

- build a school with a plaque in memory of the victims
- pay compensation to the victims' families
- investigate the facts of the case and identify and sanction those responsible, and
- change its domestic legislation in accordance with Article 19 of the American Convention.

Find details of other reparations here: "Las reparaciones en el Sistema Interamericano de Protección de los Derechos Humanos", CEJIL (2004): www.cejil.org/gacetitas.cfm?id=74

The Commission also has the power to issue precautionary measures which freeze the situation and ensure that no further irreparable harm can be done (see examples here: <http://www.crin.org/resources/infoDetail.asp?ID=13930&flag=report#p>). Such measures can also put pressure on States to respect rights and draw international attention to a particular situation. The Inter-American Court of Human Rights is interested in receiving cases on

new issues, as it is frequently deals with the same topics. In this respect, it is also worthwhile broadening alliances to join forces with an organisation or coalition taking a case or presenting a hearing on another human rights issue to find opportunities to look at how children's rights are affected by the situation.

The aim of bringing a case to the Commission's attention should not just be to obtain a positive decision. The participants agreed on the importance of linking strategic litigation to broader advocacy work. They stressed that litigation is just the beginning: what matters is what happens when the petitioners return from the Commission.

Despite the advances made in the system's work, some challenges remain.

State cooperation: Where countries do not cooperate with the Commission and do not, for example, send an official to represent the State in a case or hearing, the authority of the Commission can be undermined.

Collective cases: When taking a case as a coalition, priorities may be different and there may be questions over leadership, as well as gaps in technical capacity and resources.

Bureaucracy: The Inter-American system can be bureaucratic and unresponsive. The Commission establishes its priorities based on the information it receives. Child rights organisations therefore have a responsibility to supply the Commission with good quality information. NGOs

should also keep more permanent avenues of communication open with the Commission, for example, by providing information to the lawyers working there.

C) Dearth of continental human rights system in Asia

There are unique challenges to working with regional systems in Asia given the lack of a continental child rights convention or formal human rights oversight body. While there is no regional or subregional complaints mechanism yet in play, participants did discuss three existing frameworks that might eventually be able to host such a mechanism: SAARC (South Asian Association for Regional Cooperation), which has fostered agreements on child trafficking and overall child welfare; The Arab Charter on Human Rights; and ASEAN (Association of Southeast Asian Nations), which has established a regional human rights committee.

However, there is concern that both that SAARC's collective commitment to child rights is more on paper, and that ASEAN's human rights monitoring mechanism has yet to be tested and could be watered down to accommodate a wide range of governments.

Given the dearth of regional mechanisms, participants felt that using the Universal Periodic Review (UPR) (<http://www.crin.org/HRC/UPR.asp>) and UN Special Procedures (http://www.crin.org/UN/special_procedures.asp) might be a good way to highlight violations.

D) The European System

In addition to its focus on the rights granted all Europeans under the European Convention on Human Rights, a number of decisions taken by the European Court of Human Rights (http://www.echr.coe.int/ECHR/Homepage_EN) have also referred to the CRC. For example, the judgement in the case of *Saviny v Ukraine* (18/03/2009) used the preamble of the CRC to support the right to full development in a family environment. In that case, the applicants had alleged that the placement in public care of their three minor children infringed their rights guaranteed by Articles 6 §1,

8 and 14 of the European Convention. [Full details of the European Court cases can be found at the following link <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>]

In *Sahin v Germany*, Grand Chamber (08/07/2003), the Court stated that the CRC provides the standard for children's rights in Europe. Regrettably, however, the Court is still not applying the CRC consistently. NGOs can work to change this by monitoring cases involving the CRC before the European Court and submitting legal briefs on the Convention as "amicus curiae."

Summary: Using regional and international systems

Plan your strategy well.

- Since regional and international mechanisms usually require the exhaustion of local remedies, you must almost always begin the process in the national legal system. International and regional mechanisms may also be unsatisfying because of a lack of enforcement mechanisms.
- Where there is no effective remedy in national law or where seeking an effective national remedy would result in an unduly long delay, however, complaints may be filed directly with the treaty bodies without exhausting domestic remedies.
- Most treaty bodies take roughly one to two years to review complaints for admissibility and judge them on the merits, although the current backlog of cases before the Human Rights Committee means that complaints brought under the International Covenant on Civil and Political Rights may not be resolved before three or four years.
- Unlike in most national systems, there are no minimum age requirements for filing complaints with treaty bodies, meaning that children can use them freely. Children will often need help from NGOs to use international complaints mechanisms or other human rights procedures.
- Data collection and qualitative research are important, particularly when designing strategic litigation, and NGOs can have a very important role in the collection of statistics. This may even save children from having to appear in court directly if there is sufficient evidence to show that a violation of their rights are systemic.
- Follow up activities are also very important, and NGOs can help to identify whether successful strategic litigation had the desired impact on the ground.
- Before bringing strategic litigation, think through the whole process of finding and taking a

case, consider whether strategic litigation is the most appropriate for that particular issue in that particular context, and ultimately determine whether it is right for your organization's goals.

- If you do not decide to bring your own case, there may be other opportunities to get involved in strategic litigation that is already under way by, for example, filing papers as amicus curiae, providing evidence, or linking plaintiffs with valuable contacts.
- Always remember that strategic litigation is only one form of advocacy and that for it to have the greatest impact, it must be integrated into a broader campaign for change.

Use regional and international human rights and child rights mechanisms.

- In addition to raising issues before the Committee on the Rights of the Child, NGOs should consider using Special Procedures and the Universal Periodic Review (UPR) process at the Human Rights Council to highlight violations of children's rights.
- For Special Procedures, NGOs need only send letters with allegations of human rights violations to raise issues internationally, and all Special Procedures have the power to address children's rights issues so long as these issues are within their mandate.
- By taking up child rights violations with Special Procedures, NGOs can encourage them to request country visits to investigate those violations
- Bringing a case before regional mechanisms, such as the Inter-American Commission, can raise the profile of a particular issue, even if the decision is not favourable. At the international level, strategic litigation is also just the beginning.

Work with others.

- NGOs and others can link up with legal clinics, for example at universities, to keep costs down.
- Consider different ways of working and forming partnerships with child rights NGOs and regional or national networks or coalitions.
- It is generally a good idea to form coalitions with other human rights organisations. Nonetheless, it is important to be mindful that when taking a case as a coalition, individual priorities may be different and there may be questions over leadership as well as gaps in technical capacity and resources between members.
- NGOs should also explore and invest in new technologies to enable them to work more closely together.

Document and share your work.

- Bringing a case is about more than just obtaining a favorable decision; even losing in the courts can draw attention to a problem.
- It is important for NGOs to systematically document experiences and lessons, and to freely share and disseminate relevant knowledge with one another.
- There may already be some examples of best practices to follow – for example, INTERIGHTS, the European Human Rights Advocacy Center, CEJIL and the Kurdish Human Rights Project all have experience with strategic litigation and children's rights.

Include awareness raising activities and training.

- NGOs should strive to educate the public on the availability and use of complaints mechanisms.
- Some organisations might consider organising seminars for judges to raise awareness within the court system or training lawyers on the use of international instruments in domestic courts.
- NGOs can also monitor cases at the international, regional, national, and local levels, publicising and reporting on their progress.

Influence the composition and priorities of the regional and international human rights/child rights mechanisms

- Elections to different regional mechanisms can be crucial for ensuring good people are reviewing child rights claims.
- There are opportunities for NGOs to play a role in the selection process for important regional actors like the African Committee on the Rights and Welfare of the Child or the Inter-American Commission by, for example, nominating or campaigning for candidates with a positive record in children's rights.
- NGOs can also strive to influence the priority working areas for regional and international human rights mechanisms once members have been selected.

2.3 Working Group 3: Designing a strategic litigation strategy

2.3.1 Speeches

Ann Skelton, Director for the Centre for Child Law, South Africa - When and how should you consider Strategic Litigation and alternative practices (litigation, threat of litigation, friend of the court - *amicus curiae*)

This speech addresses the practicalities of strategic litigation, emphasising the need to think carefully about strategy, and the importance of prioritising the rights of the client above all else. Ms Skelton contrasts the South African rules of standing with other countries, using the example of the Children's Commissioner of Northern Ireland whose case on corporal punishment failed on the basis of standing. The presentation also looks



at alternatives to litigation, and considers the use of '*amicus curiae*' (ie. third-party interventions).

Felix C. Morka, Director of SERAC, Nigeria – A case study of successful strategic litigation, the Social and Economic Rights Action Center and the

Center for Economic and Social Rights vs. Nigeria

Mr Morka spoke of a case, brought in 1996, where NGOs filed a communication with the Gambia-based African Commission on Human and People's Rights against the Government of Nigeria challenging the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror that has been visited upon the Ogoni community in violation of their rights to health, a healthy environment, housing and food. He talks about how and why the case was brought, and about the outcome and implementation of the decision.

Sheela Ramanathan, Lawyer, Human Rights Law Network, India – A case study of successful strategic litigation – the India right to food case

Ms Ramanathan drew on the work of the Human Rights Law Network in India to explain how the courts had been successfully used to implement children's rights – in particular the right to food. The presentation details Public Interest Litigation cases in which such rights were enforced, and explains the legal strategies deployed.

Edmund Amarkwei Foley, Institute for Human Rights and Development, Gambia - Why child focused NGOs should consider adding litigation to their range of tools
Mr Foley makes the case for child-focused NGOs to seriously consider adding litigation to their range of tools. He discusses litigation as a single strategy,



and litigation as a part of a broader strategy, discussing ways in which cases may be brought. The speech draws on examples from the work of the Institute for Human Rights and Development in Africa (IHRDA), a pan-African, international non-governmental organisation working for the protection of human rights through litigation.

Vipin Bhatt, Programme Coordinator, Child Protection Unit, HAQ: Centre for Child Rights, India - Involving Children in Litigation – the do's and don'ts

Mr Bhatt drew on his experience of the Indian legal system in dealing with juvenile justice matters, and children in need of care and protection. He explains how most children are fearful of, and confused by, the court process. They are often not the priority in cases. The presentation addresses different court processes, and looks at the instrumentalisation of children. It concludes with 'important do's in handling cases of children in the court'.

Solomon Areda Waktolla, Vice-President of the Federal First Instance Court of Ethiopia - Case study: The creation of child friendly courts in Ethiopia

The presentation focuses on the creation, functioning and procedures of child friendly courts in Ethiopia. It highlights some of the positive impacts that they have had on children both as victims and when they are in conflict with the law.

Renato Roseno, Lawyer, National Association of Centers for the Defence of Child Rights (ANCED), Brazil

Mr Roseno drew on his experience as lawyer to make the case for child-focused NGOs to include strategic litigation within their activities. He stresses that strategic litigation is never a product of a mono-disciplinary approach but it must be integrated with other actions. For successful strategic litigation, a participatory approach with children, family and the community is crucial.



2.3.2 Working Group

This working group focused on designing a litigation strategy for bringing a case to challenge a violation of children's rights. Among other things, it involved (1) selecting a suitable case or group of cases, (2) identifying an appropriate victim(s), (3) navigating the appellate process (e.g. judicial review and

exhaustion of domestic remedies), (4) applying to regional or international mechanisms, and (5) linking the case with other forms of advocacy.

“Litigation is an efficient way to develop jurisprudence and expand the frontiers of existing child rights norms.”
Edmund Foley

A) Designing a strategic litigation strategy: suggestions for NGOs

- There are many ways to approach strategic litigation and it is important to **think through the strategy carefully** before embarking on a particular approach. Do a thorough situational analysis.
- Think about which **forum** is likely to provide the best outcome.
- It is important to look at the broader **political context** in which you are working. The time must be right for the litigation (though sometimes a client's needs are urgent, and timing then becomes secondary).
- Bear in mind the projected **costs**.
- Issues relating to **separation of powers** should be considered: would it be better to lobby for law reform?
- Issues relating to **standing** can also be important in deciding which approach to take: Will the case be driven by an individual client or group of clients, or by an organisation?
- Not all cases are suitable material for strategic litigation, so identifying a **good case** is an important skill.
- The **client's needs** must be considered first, so beware of any

What strategic litigation is

Strategic litigation, sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

Advocacy. Through filing lawsuits, advocates for social justice can use the courts to bring about legal and social change. This is often a part of an overall advocacy campaign designed to raise awareness on a particular issue or promote the rights of a disadvantaged population. Many groups or individuals who bring strategic litigation also seek to convince others to join their cause, or to influence the government to change its laws.

Results. When it is successfully used, strategic litigation can bring groundbreaking results. It can spring a government into action to provide basic care for its citizens, guarantee the equal rights of minorities, or halt an environmentally damaging activity. There are no set limits as to what strategic litigation can accomplish.

Strategic litigation vs. Legal services. It is, however, important to note that strategic litigation is very different from many more traditional ideas of legal services. Traditional legal service organizations offer valuable services to individual clients and work diligently to represent and advise those clients in whatever matters they may bring through the door. But because traditional legal services are client-centered and limited by the resources of the providing organization, there is often no opportunity to look at cases in the bigger picture. Strategic litigation, on the other hand, is focused on changing policies and broader patterns of behavior. Because of this, strategic litigation is not designed to provide the best services to the largest number of people possible as traditional legal services would.

(Geary P, (2009) ‘ *Children’s Rights: A Guide to Strategic Litigation*, Child Rights Information Network: London)

conflict of interest between the goal of the broader public interest approach and the outcome for the client. The client’s rights must be paramount. Sometimes children can risk being exploited in test litigation.

- As such, ensure that **assistance for families is holistic**, and that children and their family understand the process step by step. A child must not

be re-victimised during the process.

- Sometimes the **threat of litigation** can achieve the desired result. This works best if the organisation or the litigators already have a profile so that the respondents know that you mean business.

- Consider that a **friendly settlement** might be a better outcome for your client.



- It is important to make sure your successes are in the news and on a website. Have a **media strategy** in place. In the early days of their strategic impact work, litigators have the advantage that the respondents do not expect you to go all the way to the superior courts. However, once you have been to court before, future respondents are likely to take you more seriously. An extreme approach to test litigation would say that a settlement (unless it is an order of court) is of little use as it does not create a precedent that can be easily identified. However, once again, the client's needs are central.

- We tend to focus on test cases that are strategically built from the start (e.g. a constitutional challenge to life imprisonment). However, sometimes **injustices in criminal or administrative proceedings** (which often play out at the lower levels of the court system) can be taken on appeal or review. Where this is done by strategic litigators the arguments will provide a full background and context, perhaps demonstrating the wider injustice and showing why it is important that a precedent be set at a

higher level. To identify suitable cases, a monitoring process or a network may be necessary.

- Different legal systems have different rules about the role of the **amicus curiae** (and also other names such as 'third party intervener'), and NGOs may be able to take a very active role without actually bringing a case themselves.

- Consider **working with others**.

- **Synchronised action** may be possible, for example several countries bringing cases to the European Court of Human Rights.

- Good quality **data and research** could be pivotal.

- Think of **follow-up activities from the beginning**, since a judicial decision is not the only goal.

"Litigators must know the rules of the game. There are many ways to approach strategic litigation and it is important to think through the strategy carefully before embarking on a particular approach."

Ann Skelton



B) Africa: some case studies

A strategic litigation strategy for the right to education in *Ethiopia*

This fictional case study was undertaken during the working group on designing a strategic litigation strategy.

The discussion began with the selection of a case. There was some concern about choosing an economic/social/cultural right because of the ability of African States to provide services due to resource constraints. However, it was agreed that, while the point was pertinent, a lack of resources should be no excuse, given for example expenditure on defence budgets. The right to education was chosen.

In Ethiopia, education is only partially free – there are hidden costs. The Constitution explains that every child has the right to education, but it does not require that such education be free. Standing was raised as an issue. It is possible to find a child who has been prevented from being educated because of the cost, but under the law only parents and guardians can bring a case, so their cooperation would be needed. Perhaps a teachers' association could bring a case, as they would have an interest? Possibilities for change:

1. Get legislature to adopt new law
2. Use the present legal framework, for example get Supreme Court to pass precedent that will be binding on all other courts.

A discussion ensued about the competence of different courts to accept cases. The House of Federation, made up of elected representatives, and assisted by the Council of Constitutional Inquiry, has the final say. The House may or may not accept the opinions of a high court. Plaintiffs could take the matter straight to the House of Federation or also take an individual case to a lower court to plea for an interpretation from the House of Federation. Regional mechanisms could also be used, by arguing Ethiopia is violating its treaty obligations.

Identification of potential partners:

Legal research – universities, the Bar Association, children's legal aid centres

Fact research – children's NGOs, UN agencies

Child protection during the process (including not only physical protection from threats or harassment, but also explaining the case to children, managing expectations, etc.) - social workers, NGOs.

(Note that participants felt this was a national issue, and that international organisations should only give technical support)

Assessment of damages – Bar Association in collaboration with others

Litigation – lawyers, Bar Association, NGOs

Financing – Initially from domestic partners, and then international. The violation of human rights is not the concern of one society. Could be a joint proposal, say, between local and international NGOs (e.g. Soros and McArthur both fund litigation work).

Media: needed to raise the issue, and this may also help with funding.

Concerns:

What is the remedy required? The government may have a policy on free education - is it that we want this to be implemented? Maybe we don't actually need a new law.

When we pick a child victim(s), how do we choose the child? Should we assess the child to see if s/he would be able to cope with participate in the case?

What is our objective? What is our end point through all these measures, if the Constitution already says children have the right to education? Is the violation of this right because of lack of access, or not enough schools, or not enough teachers? The practical objectives of the litigation must be determined first.

A strategic litigation strategy on sexual violence against children in Kenyan Schools

Sexual violence in schools is an issue that has received a lot of public attention, particularly in light of schoolgirls who have become pregnant as a result of sexual abuse by teachers.

Possible respondents:

- Minister of Education, prosecuting authority/Attorney general, Teachers' Service Commission (TSC), Minister of Police, head teachers of the schools concerned (although there was some fear of potential victimisation of plaintiffs). So as not to confuse matters, a civil claim for damages against the individual teachers would be lodged as a separate suit.
- Individual children in selected schools may be involved – a clear case might be girls who have been impregnated. These children's parents will be involved in supportive capacity.
- Parent teacher associations.
- There was some discussion to include a national NGO, e.g. CRADLE as a co-applicant, but members of the group raised concerns around locus standi.
- CLAN, another national NGO, could file an Amicus brief.
- There was some discussion that TSC might join as applicant, rather than respondent, if positive response to initial letter of demand (see below)

Potential partners:

- University of Kenya school of law – research
- Anmani counselling society.
- Student councils – sharing information, identification of applicants.
- As there are two credible national coalitions, CLAN and CRADLE, they could have different roles.

Concerns

- Conscious of having too many plaintiffs/respondents.
- Child must be at centre of whatever we do.

Strategy

- First step is letter to the Teachers Service Commission, asking them what they are do-

ing about this issue, which has been revealed in one of their own reports. Give them a deadline within which to respond. They could be invited to join the NGOs.

- Forum: high court.

Potential Remedies (Note: Crucial that child is not restigmatised)

- Possibly as first phase, order TSC to release information.
- Order the prosecuting authority to investigate cases.
- Order Minister of Education to establish Commission of enquiry.
- Order Minister of Education to follow up in order to prevent future cases.

C) The Americas: Devising a common regional agenda on child rights litigation

The Americas Working Group discussed the importance of, and challenges to, devising a common agenda for NGOs considering child rights strategic litigation at regional level.

All the participants agreed that the first step must be to continue discussions at the regional level and to work on a common agenda for the region. The Red latino americana y caribeña por la defensa de los derechos de los niños, niñas y adolescentes (Redlamyc) counts 22 coalitions among its members and has a number of working groups, one of which is focused on justiciability. It is therefore one possible forum for establishing a common regional agenda on strategic litigation. The Global Movement for Children regional office has also coordinated strong regional work on violence, budgets and accountability.

Deciding a common agenda may be fairly straightforward because, although the state of children's rights varies across the region, there are some salient areas of common concern, such as violence

against children and juvenile justice issues. Several countries have already organised a joint thematic hearing on juvenile justice. Institutional and technical capacity is a more difficult issue. When the Inter-American Commission sees a joint request for a hearing from a coalition, it takes this very seriously and more efforts should be made to sign amicus briefs as a collective.

One participant commented on the need to reflect on perceptions of children in the region. In some contexts, human rights are regarded as a way of protecting 'delinquents', and human rights and human rights defenders are perceived as lacking legitimacy. Participants agreed that in countries across the Americas, marginalised children have been criminalised and have had their rights restricted in ways that other people have not, for example, unconstitutional curfews have been imposed on children across the region to restrict their freedom of movement and association.

Other options for joint action

The Rapporteurship on the Rights of the Child establishes its priorities based on information it receives. Child rights organisations therefore have a responsibility to supply the Commission

with good quality information to influence the Commission's agenda. As one participant said, "The power that we don't use, others will - and then other organisations who may not share our vision will be setting the agenda. It is a question of who has control over the system."

Child rights NGOs can establish links with other thematic rapporteurships, beyond the Rapporteurship on Child Rights.

NGOs can also participate in appointment processes. Once the Commission learns that a special rapporteur post will become vacant, it organises a public competition and announces it widely. Member States and civil society organisations can submit their observations on selection criteria the Commission should apply. NGOs can also lobby their government to nominate effective candidates as members of the UN Committee on the Rights of the Child. The Brazilian government for example has been strong on taking up suggestions and proposing strong candidates in the past.

There is also a need to learn more about how to form and maintain networks from the grassroots level upwards, according to some participants. The best networks for child rights litigation are often those that do not do direct work with children. Working on a regional level is important, but this should not supplant national agendas and national networks should also be created. In the Dominican Republic, a network has been established which could be mobilised to secure community involvement in taking cases. Local child protection focal points and

small networks have been created in communities and linked up to a broader network. This structure has been helpful in applying pressure on the State. If cases are taken, they can therefore be grounded in grassroots support and the network can generate awareness.

While INGOs' dialogue with national NGOs may be very useful and necessary, INGOs should be wary of imposing their own agendas. The agendas of INGOs and donors do not necessarily match the agendas of local and national NGOs and regional networks.

A more comprehensive approach should also be taken by donors, paying more attention to sustainability.

*"The Inter-American Commission on Human Rights helped us to recover democracy in Peru: it is in our guts"-
Susana Villarán, member of the UN Committee on the Rights of the Child.*

D) Asia: Preparation for NGOs planning strategic litigation

The **careful selection of a suitable victim of child rights violations** is an important and necessary step. Be prepared for the possibility that the victim, or his/her family, may accept compensation if offered. It may be necessary to fully explore the context of the victim's family, including their economic situation. Brief and prepare participants before going to court, and weigh the benefits of a good settlement for the client against the desire to create

Strategic litigation strategy to allow street children in Vietnam to receive identity cards

A participant from Vietnam presented an issue she had run across in her work with street children, and the group agreed to use that case as an example. Specifically, the group addressed the problems these children ran into in trying to obtain national identity cards, which are necessary in Vietnam to go to school, find employment, and register for social services, among other things. Typically, children would go to the police station at age fifteen with their birth records to obtain national identity cards.

But children who have been abandoned by their families, escaped from institutions, or otherwise ended up on the streets often do not have the papers or permanent address necessary to obtain identity cards, rendering them virtually invisible to the government.

As a first step, the participants discussed the need to identify national provisions that could be used to challenge the government's practice of denying identity cards to street children, finding a "hook" to link the case to a violation of rights. They suggested exploring the full set of consequences that might result from living without an identity card, looking for as many rights violations as possible to increase the chances of a successful legal challenge. In this case, above and beyond the rights to identity and nationality, these might include infringements on the rights to housing, education, and social assistance.

Participants next addressed the legal nature of the claims, looking to whether and how the violation could be challenged. As an initial matter, it seemed important to first establish whether the victims would be able to bring lawsuits to enforce their rights. If the victims could not sue either because they were children or because they did not have identity cards to register with the court system, it would then be important to think about who else might be able to bring a case, potentially including NGOs, human rights lawyers, and legal aid organisations.

If it still seemed impossible or impractical to bring a legal challenge in court, alternative solutions were proposed. Informal administrative compromises might be possible, for example giving a relative's address or an approximate birth date. In some circumstances, the threat of litigation might itself be enough to convince the government to remedy violations.

A Vietnamese NGO might meet with government authorities to communicate its intention to challenge the denial of identity cards. If this failed, they might try to get experts to explain the issue, launch a public campaign, or look to raise international support. In particular, using new technologies to spread awareness of the rights violations was discussed, as happened over the Internet when women were punished for drinking in public in Malaysia and wearing trousers in Sudan. A parallel legislative advocacy campaign could also be launched, demanding a new law to provide a means for all children to be able to obtain identity cards.

It was important to consider the wider political context of the case even outside the court, as timing could hugely impact chances of success. For example, a participant from Pakistan shared how citizens who had been unable to register with the government but were entitled to vote suddenly became relevant to local legislators as an election approached. Lastly, participants briefly discussed the importance of choosing the best court to bring the case in, considering the remedies available, resources required, and level of judicial activism.

legal precedent. Where class actions are possible, as is the case in India with Public Interest Litigation, there may not be a need for individual victims at all. Rather, larger groups of victims can serve to illustrate a systemic violation.

Consider where and **under what laws to bring the case**. Strategic litigation is not impossible in “weak” legal systems (i.e., those without an independent judiciary or involving very lengthy delays). Successful cases have been brought in such circumstances, for example child marriage in Yemen.

It may be possible to **join cases to existing proceedings** that are less controversial and more likely to be looked upon favourably, or to **become involved as *amicus curiae*** (a friend of the court). Regional and international systems are always there as an alternative means of accessing justice, although in Asia they are less present than on other continents.

A **good ‘hook’** is needed to bring strategic litigation related to children’s rights in national courts. Children’s rights advocates can start by looking at national constitutions, then move on to other forms of substantive law including legislation, regulations, and case law. For example, if the complaint centred on the non-existence of a law to protect against systemic violations of children’s rights, it might be worth trying to link that claim to constitutional provisions. In many instances, it might also make sense to link violations to as many rights as possible in order to strengthen the legal basis of the case.



“Forum shopping” - picking the best legal system to bring a case in – may be required. In particular, the differences between religious law, civil law, and common law systems could be pertinent. Bringing criminal cases can be difficult as it requires both the commission of an offence and the willingness of the government to prosecute that offence. However, one possible advantage of criminal cases over civil cases might be that once proceedings were launched, cases could continue even if the victim no longer wished to be involved. In some countries, it may be possible to attach civil cases to criminal cases already in progress and avoid certain court fees.

Beyond taking action in the courtroom, **several other advocacy strategies to accompany strategic litigation** may be useful. In India, for example, NGOs may be able to help organise public hearings with experts for a judicial audience. These hearings could put pressure on the government to remedy ongoing violations, although they are more a means than an end. Opportunities for bringing publicity and media attention to children’s rights violations should also be explored. The media could raise awareness of a cause,

bring international pressure, and even take up the role of investigators in some cases.

Initiating legislative reform in response to strategic lawsuits may be possible, as happened in Yemen when the government raised the minimum age for marriage to 17 following a high-profile child marriage case.

Better links between NGOs and the

legal community need to be built.

“Strategic litigation does not begin and end with a decision on a case.”

Delegate

E) Europe: some case studies

Strategic litigation strategy on corporal punishment of children

- There are real opportunities for using domestic courts to challenge the legality of corporal punishment, in particular under the European Convention because of the discrimination in protection between children and adults (and also between children at home and children in e.g. foster-care).
- A useful start is to commission a detailed legal opinion (from a lawyer who must be fully sympathetic to the aim of banning all corporal punishment) on how a challenge could be mounted in domestic courts or whether, because children have no real domestic remedy, they could make an immediate application to the European Court of Human Rights.
- There could be simultaneous applications to the Court on this issue from various countries, which might help to provide a positive judgement.

Strategic Litigation Strategy to allow access to inclusive education for children with disabilities in Germany

The following key points were among those to be discussed:

Legal system

- An obstacle was recognised in Germany’s federal system, which means that legislation varies across the country.

Partners

- Consult with experts, e.g. disability organisations.
- Identify NGOs that may share your aims (note, if they have different aims, this could be very detrimental).
- Networking brings together NGOs and lawyers on different issues and builds links with different/complementary specialisms.
- **Advocacy**
- Link with a national coalition to develop a media strategy, taking a coordinating role. Lobby political and elected actors. Mobilise communities to get grassroots support.

Implementation

- Develop a clear implementation strategy.
- Include follow up activities.

3. CONFERENCE OBSERVATIONS AND CONCLUSIONS

Alan Kikuchi-White, NGO Group for the CRC – closing speech

Mr Kikuchi-White offers some closing remarks on the conference, and presents a list of possible future activities. They include internal and external awareness raising, training, mentoring, and capacity-building, establishing and strengthening strategic partnerships and networks, and planning and preparing activities to take up the legal use of the CRC.

3.1 Main conclusions

Participants concluded that **strategic litigation is little used by child rights NGOs**. The bulk of work on strategic litigation is being carried out by creative lawyers, usually working independently from NGOs.

At the same time, there was overall agreement that the CRC has not been used enough in courts, and there was certainly a **growing interest in doing so**. NGOs are still largely engaged in lobbying, rather than litigation.

Some reasons for this include a **lack of funding, skills and knowledge** as they all impede the development of strategic litigation strategies.

Everyone also agreed, however, that **litigation is just one of many strategies** that can be used to enforce children's rights. NGOs need to consider integrating strategic litigation into their work – not necessarily undertaking it themselves but

perhaps just identifying new allies.

Child rights organisations need to become **more creative and efficient in using the CRC as a legal tool**. A case taken by a coalition carries more weight than if taken by single organisation, it was observed. Process and preparation can be just as important if not more so than the case itself, and can help to build alliances and generate public awareness.

And finally, but crucially, the **well-being of a victim should never be sacrificed** for the greater good.

On the basis of the discussions and sharing of experiences during the two days of the conference, participants agreed on a set of broad recommendations.

We must

- Convince our own organisations to adopt this new approach and use the CRC as a legal instrument.
- Step up efforts to campaign for the establishment of a communications procedure to the CRC.
- Gather and share knowledge on child rights litigation systematically.
- Lobby governments to ensure the best people are sitting on child rights committees.
- Make efforts to network with new allies (such as legal clinics, bar associations, human rights organisations) both within and outside our countries.
- Educate and train lawyers and judges on children's rights and child protection.
- Make more active use of existing

human rights and child rights mechanisms at the regional and international levels.

3.2 Follow-up actions

At the closing, several actions for follow-up were suggested to the participants. These included:

1) Internal and external awareness raising:

- Arrange the translation of the outcomes of this conference into national/local languages.
- Hold internal and external workshops to discuss and explore the integration of a legal approach to the CRC within NGOs and child rights coalitions.
- Make use of media contacts to educate a wider audience in child rights legal issues.
- Design and deliver in-house and external training programmes on child rights litigation, for example through “certified training” and “action learning”.
- Organise national/regional conferences along the same lines as this event.

2) Training, mentoring, and capacity-building; establishing and strengthening strategic partnerships and networks:

- Sign up to the new CRINMAIL on strategic litigation (<http://www.crin.org/email/subscribe.asp>) and contribute documentation on your experiences and other resources to the service.
- Form a Working Group to explore the feasibility of, and need for, establishing a global focal point to promote the legal use of the CRC.

3) Start using the CRC as a legal instrument:

- Undertake a comprehensive review of national legislation to identify legislative gaps relating to the Convention.
- Undertake specific child rights situation analysis to identify broad social issues with a view to identifying potential cases.
- Undertake an analysis of previous strategic litigation in the national context and the factors behind its successes and failures.
- Conduct an examination of the national rules and procedures of court systems in respect of, for example, the standing of children or NGOs before the court, the rules of evidence, and appeals procedures – including possible avenues for complaint.
- Consider establishing working relationships between NGOs and university legal clinics. It is clear from the jurisprudence presented in the conference literature that such clinics have played an important role in many specific cases.
- Child rights NGOs can also bring their specific expertise and experience into legal proceedings in a number of ways to support existing litigation. For example, NGOs can provide the court with expert guidance, research on violations, reviews of jurisprudence, and the Concluding Observations of the Committee on the Rights of the Child, in the form of Amicus Curiae briefs.

“We must...take matters of violations, accountability, and redress into our own hands as defenders of children’s rights.”

Alan Kikuchi-White

ANNEX: GLOSSARY OF LEGAL TERMS

From Geary P, (2009) 'Children's Rights: A Guide to Strategic Litigation', Child Rights Information Network: London

Amicus curiae means “friend of the court,” and many jurisdictions permit interested organizations to prepare and file legal papers in support of one of the parties in the case as amicus curiae.

Appeals are cases where a lower trial court has already made a determination and the losing party has asked a higher court to review that decision. Appeals can be key to strategic litigation, both in terms of ensuring that your case will be fairly heard and in terms of getting access to higher, more prominent courts to raise the profile of the case and offer a deeper impact.

Civil cases are generally brought by individuals or organizations seeking remedies from the court to cease or compensate for damage caused by the defendants.

Defendants. Once a case is filed, the parties being sued are usually known as a defendants, although in some courts they may also be referred to as respondents.

An **exhaustion of remedies** requirement means that you must first go through other judicial channels available before a court will hear your claim. For instance, before appealing to an international court, you are usually expected to go through the national court system first.

In a **group action lawsuit**, also known as a class action, collective action or group litigation, a small group of people or a representative organization sues on behalf of a much larger group.

Jurisdiction. If you file your case in a local, state or national court, the place where you file will be known as your jurisdiction.

Legal systems. The three major legal systems in the world are common law, civil law and religious law:

- In **Common law systems**, most prominent in the United Kingdom and former British colonies, the law is determined not only by written laws, but by court decisions. This means that when a judge looks at your case, he or she will not only look to the statutes, regulations, guidance, code, or other written laws you reference, but will also look for any past court decisions that might relate to your case. In common law systems, precedent – the body of past court decisions – plays a much larger role than in other legal systems.
- **Civil law** is the most widespread system of law, and is in place across most of the

continent of Europe and many former European colonies. Civil law relies more heavily on written codes than common law. As a result, precedent plays less of a role and judges are less likely to give weight to past decisions in civil law jurisdictions.

- In **Religious legal systems**, religious doctrines or texts take a primary role in the crafting, interpretation and application of the jurisdiction's laws. The importance of court decisions and precedent varies depending on the predominant religion and the precise legal system in place, but judges in many jurisdictions do give at least some weight to both previous court decisions or orders and the opinions of respected religious legal scholars.

Monist and Dualist systems. In general, there are two ways jurisdictions approach treaties and other international agreements. In what are called monist systems, international laws and agreements can be enforced directly by national authorities and in national courts once a treaty or agreement has been signed, ratified, and entered into force. In dualist systems, however, treaties or agreements cannot be enforced by the authorities or in the courts until there are national laws passed to incorporate the principles behind those treaties or agreements.

Plaintiffs, also called complainants, claimants and petitioners, are people who can bring the case to court that supports your goal or cause.

Pro bono legal services are provided free of charge.

Provisional measures, also called **provisional remedies**, **interim measures**, **interim injunctions**, and **preliminary injunctions**, are designed to prevent any further harm to the parties while the case is being decided, so the court or tribunal may order the defendants to cease certain actions at the outset of the case or prevent a potentially harmful law or policy from going into effect.

The **Rules of Evidence** determine what kind of proof you will be allowed to present to the court.

Standing is just another way to figure out who should bring a lawsuit. For example, in some countries, in order to have standing to bring a lawsuit, you must have been directly damaged or victimized by the person, organization, or government you are suing.

Strategic litigation: sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand.

Third parties are people or organizations who were not directly damaged by actions or behavior of the person, organization, or government you are suing, but retain a strong interest in the outcome of the litigation.



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