

## **Access to justice for children: a comparative analysis of 197 countries**

*This document sets out the detailed findings of a comparative analysis of 197 national reports<sup>1</sup> prepared as part of CRIN's 'Access to Justice for Children' project. Examples of States given in brackets throughout the report are illustrative and do not provide an exhaustive list. For more information about the project, read our global report on access to justice for children '[Rights, Remedies, Representation](#)'.*

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<sup>1</sup> A full list of reports is available at: [www.crin.org/node/42362](http://www.crin.org/node/42362). Note that separate reports were produced for England and Wales, Northern Ireland and Scotland. The findings of this report are based on the content of country reports, as amended as of 1 November 2015.

## **I. Legal status of the Convention on the Rights of the Child**

*The Convention on the Rights of the Child (CRC) is the most comprehensive statement of children's rights at the international level. All States Parties to the CRC are obliged to take all appropriate measures to implement it. This includes ensuring that the Convention has the force of law in their State, that it takes priority over any contradicting provisions of national law, and that children are able to invoke it directly in court cases where one of their Convention rights has been breached.*

### **a. Force of law**

*"Monist" legal systems consider national and international law to be one and the same, therefore ratified international treaties are automatically regarded as having the force of law. "Dualist" countries regard international treaties as separate from their national law and do not accord a treaty the force of domestic law until it is domesticated through a specific piece of legislation (a process called incorporation). Generally, civil legal systems adopt the monist approach and common law legal systems the dualist approach, however, the distinction is not always clear-cut.*

The legal status of the CRC in national legal systems is mixed - it tends to be stronger in "monist" countries as the CRC is automatically incorporated into national law upon ratification, and weaker in "dualist" countries where a separate piece of incorporating legislation is needed.

The CRC is fully incorporated into the national law of 48 percent of all countries (94), either automatically (monist countries) or by a separate piece of legislation (dualist countries). Some countries explicitly incorporate the CRC (**Bosnia, Burundi**, and even **Kosovo**, which is not a UN member and has not signed the CRC)<sup>2</sup> or ratified international treaties generally (**Venezuela**) into their national legal systems through a constitutional provision. Only a few dualist countries have incorporated the entire Convention (**Finland, Hungary, Iceland, Italy**). In some dualist countries, the CRC has been incorporated by a judicial decision (see box below).

#### *Examples of judicial activism regarding the status of international human rights treaties in national law:*

The Supreme Court of **Belize** ruled that the CRC is partially incorporated into national law with "appropriate modifications to suit the circumstances in Belize".<sup>3</sup> The judges based their decision on Article 4(c) of Schedule 1 to the Families and Children Act, which states that "a child shall have the right... to exercise, in addition to all the rights stated in this Schedule and the Act, all the rights set out in the [CRC], with appropriate modifications to suit the circumstances in Belize, that are not specifically mentioned in the Act or this Schedule". This wording in the opinion of the Court meant that the legislature intended to give direct effect to the Convention.

<sup>2</sup> Country examples provided in brackets are for illustrative purposes only and do not represent an exhaustive list, unless otherwise indicated.

<sup>3</sup> *Anthony Bowen and David Jones v. Attorney General of Belize*, Claim No. 214 of 2007, (Belize Sup. Ct. 2010). CRIN summary available at: [www.crin.org/en/node/7040](http://www.crin.org/en/node/7040).

In **Bangladesh**, some provisions of the CRC are incorporated into national law following decisions of the Supreme Court. In *BNWLA v. Bangladesh*, having considered a number of international human rights treaties, the Court determined that “[w]hen there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard.”<sup>4</sup> However, another decision clarifies that international norms will only be relevant if the national law is absent or ambiguous: “Where the domestic laws are clear, but inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect national law.”<sup>5</sup>

Fourteen percent of all countries (28) have incorporated the CRC but subject to an official reservation or other limitation, which diminishes its effect in domestic law.<sup>6</sup> Some of these reservations have a religious basis. For example, some maintain a general reservation to any provisions contrary to the values of Islam (Islamic Republic of **Mauritania**) or to Islamic law (**Afghanistan, Saudi Arabia**). **Iraq, Oman** and **Somalia** have made reservations to Article 14 (right of the child to choose his/her own religion). The **Holy See** has entered a reservation that a number of rights, including Article 14, should be interpreted “in a way which safeguards the primary and inalienable rights of parents”. Other reservations are based on the traditions of the country (**Mali**, for example, has made a reservation to Article 16 (right to privacy) as parents have the right to supervise their child’s company and correspondence) or on its values (**France**, for example, does not recognise community-based rights and has made a reservation to Article 30 (rights of minorities)).

There are a few countries for which the legal status of the CRC is unclear - because the country’s approach to international law is not fixed (**Cambodia**) or because the rule of law is not respected by the regime in power (**Eritrea**). In addition, the application of the CRC in countries with federal systems can be a challenge. In some countries with federal systems, the local authorities hold some legislative power and it is unclear whether they are also bound by the federal government’s international obligations, resulting in incoherent legislation and children’s rights protection (**Belgium, Nigeria, Spain**). This is not an issue in those countries with federal systems where it is clear that the states and territories are also bound by the international obligations of the federal government (**Australia, Germany**).

In half of all countries (99), the CRC takes precedence over at least some conflicting provisions of domestic law. In 42 percent of all countries (83), the CRC takes full precedence over national legislation, although not necessarily over the country’s Constitution, which is usually considered as the supreme law of the land. In 16 countries, the Convention takes only partial precedence over national law. For example, in **Belgium**, only those provisions of the CRC which are directly applicable<sup>7</sup> take precedence over national law. In **Belize** and **Mongolia**, the CRC is only

<sup>4</sup> *BNWLA v. Government of Bangladesh and others* (14 BLC (2009) 703).

<sup>5</sup> *Ershad v. Bangladesh and ors* (Appeal, 21 BLD (AD) 2001, 69; ILDC 476 (BD 2000), 16 August 2000).

<sup>6</sup> A full list of reservations and declarations made by State Parties to the CRC is available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDeC](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDeC).

<sup>7</sup> See “Justiciability” below.

superior to some of the national laws. It is sometimes the provision which is most favourable to the child that will be applicable, following the principle of the child's best interests (**Cabo Verde, Democratic People's Republic of Korea, Portugal**).

Overwhelmingly across the Commonwealth,<sup>8</sup> the CRC does not have the authority of national law (exceptions include **Namibia, Kenya, Uganda**). In the mainly dualist Commonwealth countries,<sup>9</sup> the CRC has little effect, though it appears to be frequently cited by the courts in a number of Commonwealth jurisdictions.

## b. Justiciability

*To be effective, the rights conferred by the CRC must be justiciable. This means that courts can enforce provisions of the CRC directly (without having to apply a corresponding domestic legal provision) and award remedies for the violation of that right.*

The Convention can be directly enforced in its entirety in 48 percent of all countries (95). All countries in Central and South America except **Guyana** (which has a common law legal system), all countries in North Africa and most Council of Europe Member States<sup>10</sup> allow the direct enforcement of the CRC. However, only half of the MENA countries (12 out of 21) accord such power to the Convention, and less than half of Sub-Saharan African countries (21 out of 48). In over half of Asian countries, it is not possible to directly enforce any provision of the CRC (28 out of 48).

In **India**, the CRC has not been incorporated into the national legal system but the Supreme Court has held that treaties can be enforced directly if there is a vacuum in national law, as long as the international provision is not contrary to the Constitution or national laws. Also, according to the **Angolan** Constitution, judges must apply ratified treaties, including the CRC, in disputes concerning fundamental rights, whether or not the argument is raised by one of the parties, which the Constitutional Court has done in practice.

In 17 countries, only some parts of the CRC can be directly enforced by domestic courts. In **Madagascar, Vanuatu, Greece, Switzerland, Albania, Netherlands, Czech Republic, France** and **Belgium**, provisions of international treaties, which are considered clear enough so as not to require further implementing legislation, can be directly applied, whereas others can<sup>11</sup> only serve as a source of interpretive guidance when applying rights conferred by national law.

In a quarter of all countries (51), even though the CRC is not directly enforceable, it serves as a source of interpretive guidance (**Barbados, Singapore**), meaning that national law provisions are interpreted by the courts in line with the provisions of the Convention. Commonwealth

<sup>8</sup> The Commonwealth of Nations.

<sup>9</sup> There are, however, some monist Commonwealth countries such as Mozambique and Namibia.

<sup>10</sup> Thirty out of 48 countries. The exceptions are Albania, Austria, Belgium, Czech Republic, Denmark, Finland, France, Greece, Ireland, Liechtenstein, Malta, Monaco, Netherlands, Sweden, Switzerland and the United Kingdom (England and Wales, Northern Ireland and Scotland).

<sup>11</sup> Given that seven out of these nine countries are European (of which five are members of the European Union) and the remaining two have close ties with France, it is possible that this approach mirrors the 'direct effect' doctrine developed by the Court of Justice of the European Union. See <http://www.ejil.org/pdfs/25/1/2466.pdf>.

countries are disproportionately represented<sup>12</sup> in this group, as common law - inspired by the English legal system - does not allow the direct application of treaties but judges may refer to them as a tool for interpretation of national law. Most countries in Oceania are part of the Commonwealth (except for the Federated States of **Micronesia**, the **Marshall Islands** and **Palau**) and follow its traditions. In **Micronesia**, however, the CRC is directly enforceable by domestic courts.

In 17 percent of all countries (34), the CRC cannot be directly invoked in national courts nor used as interpretive guidance (**Lao People's Democratic Republic**, **Mongolia**). This is not to say of course that the provisions that have been implemented through national laws cannot be enforced in domestic courts. The status of the CRC may also be diminished in countries that have a dual legal system in which statutory law and customary or religious law cohabit, because the customary or religious courts may not be obliged to consider the rights of the child under the CRC (**Afghanistan**, **French New Caledonia**, **Nauru**, **Niger**, **Papua New Guinea**, **Zambia**).

Research as part of this project found that in only 20 countries have courts cited the CRC sufficiently - whether it is to directly enforce one of the rights contained in the Convention or to use its text as interpretive guidance - to amount to an established jurisprudence on the Convention. Amongst these 20 countries, the CRC can be directly enforced in 12 - either in full (**Argentina**, **Bolivia**, **Guatemala**, **Latvia**, **Luxembourg**, **Poland**) or in part (**Belgium**, **Finland**, **France**, **Kenya**, **Netherlands**, **United Kingdom (England and Wales)**) - and eight cite it as an interpretive tool only (**Australia**, **Canada**, **India**, **Israel**, **New Zealand**, **South Africa**, **United Kingdom (Northern Ireland, Scotland)**). In half of all countries (97), the CRC has been cited in a domestic court, though not frequently enough to amount to established jurisprudence on the Convention. Finally, there is no evidence of the CRC being cited in about 40 percent of countries (80), reportedly because of a lack of awareness, or of a reluctance to use international law. However, court judgments in certain countries are not available to the public, which limits our research on this matter.

*Examples of national courts directly applying the CRC:*

"[The applicants] indicate that the Colombian State incorporated into its internal legislation the regulation related to the free compulsory primary education contemplated in those systems of protection of rights. That international norm regarding free compulsory primary education should be considered incorporated into the Colombian constitutional order. In fact, the provisions regarding the subject are consecrated...in the Convention on the Rights of the Child (Art. 28)."

- *Decision C-376/10* (Constitutional Court of **Colombia** finding that the government has the obligation to not only guarantee access to primary education for all children, but to also guarantee that it is free of charge)<sup>13</sup>

"On the strength of Art. 5(4) of the Constitution of the Republic of Bulgaria, the [Convention on the Rights of the Child and Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption] shall constitute part of the country's internal law and shall prevail over those norms of the national legislation that contradict them..."

<sup>12</sup> Thirty five of the 51 countries are part of the Commonwealth of Nations.

<sup>13</sup> CRIN summary available at: [www.crin.org/node/7090](http://www.crin.org/node/7090).

- *Kerezov v. Minister of Justice* (Supreme Administrative Court of **Bulgaria** striking down a provision barring families with children from adopting)<sup>14</sup>

“The provision of Article 9, point (3), of the CRC is directly applicable since the right of the child to maintain regular contacts with both parents clearly follows from it.”

- *Maja Dreco et al. v. Slovenia* (Constitutional Court of **Slovenia** in a case concerning custody arrangements after parental separation)<sup>15</sup>

“Article 3(1) [of the Convention on the Rights of the Child] is enforceable by the Courts and no specific legislation is required to implement it as opposed to other Articles of the said Convention. In any proceedings before the courts for the legal custody or upbringing of a child... the Court must regard the welfare of the child as the first and paramount consideration and not the punishment of the guilty spouse/parent.”

- *Molu v. Molu* (Supreme Court of **Vanuatu** in a case concerning custody arrangements after parental separation)<sup>16</sup>

Examples of national courts using the CRC as a source of interpretive guidance:

“I am told that Nauru is a signatory to the Convention [on the Rights of the Child]. Whether it has become part of the domestic law of Nauru is a moot point. Whether it is or is not part of our domestic law, I feel able to take the Convention into account in considering the cases stated...”

- *In re Lorna Gleeson* (Supreme Court of **Nauru** ruling that a prohibition of adoption of Nauruan children by Nauruan citizens with a foreign spouse is inconsistent with the CRC)<sup>17</sup>

“This is a clear mandate to the courts of this country to have regard to the provisions of the Convention in appropriate cases. More than lip service must be paid to the provisions of the Convention... This overwhelming abundance of international authority shows how parties to the Convention on the Rights of a Child notwithstanding the lack of specific domestic legislation have imported the Convention, its underlying principles and philosophies into domestic law. In doing so these countries have breathed life into the CRC...”

- *Police v. Vailopa* (Supreme Court of **Samoa** ruling that a confession or a spontaneous declaration made by a child outside of the presence of a parent or guardian are not admissible evidence against them)<sup>18</sup>

Example of a national court refusing to directly apply the CRC:

“[T]he Convention on the Rights of the Child was included in section 2 of the Human Rights Act. It thereby became directly applicable as Norwegian law, so that in the event of conflict, the Convention takes precedence over any other Norwegian legislation [...] I cannot see that it can be assumed from the [...] preparatory works [...] that it should be possible to give a separate declaratory judgment also for breaches of the CRC, and in any case not for breaches of the principle in article 3. [...] unlike the ECHR and the ICCPR, the CRC does not

<sup>14</sup> CRIN summary available at: [www.crin.org/en/node/7016](http://www.crin.org/en/node/7016).

<sup>15</sup> CRIN summary available at: [www.crin.org/en/node/6978](http://www.crin.org/en/node/6978).

<sup>16</sup> CRIN summary available at: [www.crin.org/en/node/7048](http://www.crin.org/en/node/7048).

<sup>17</sup> CRIN summary available at: [www.crin.org/en/node/7086](http://www.crin.org/en/node/7086).

<sup>18</sup> CRIN summary available at: [www.crin.org/en/node/7025](http://www.crin.org/en/node/7025).



require an effective remedy [...]"

- *A, B, C, D and Norwegian Organization for Asylum Seekers (NOAS) v. The Immigration Appeals Board* (Supreme Court of **Norway** holding that it could not make a declaration that there has been a breach of the CRC)<sup>19</sup>

## **II. Legal status of the child**

### **a. Standing**

*In law, standing refers to the right to bring a case, to be heard in court, or to address the court on a matter before it. Children should have standing to bring a case before a court for any harm suffered as a result of a violation of their rights. Representation by an adult should not be required, but must be allowed if the child requests it. Where parents or others do represent a child, they must act in the child's best interests during the legal proceedings and not have any conflicts of interests with the child.*

In almost every country in the world, it is a general rule that children do not have standing to bring a case to court by themselves, and proceedings on behalf of a child are initiated by a representative (typically the child's parent, litigation guardian, guardian *ad litem* or 'next friend'). Out of 197 countries, only in **Argentina, Gambia, Lebanon and Zimbabwe** are there no age restrictions on children bringing cases on their own behalf, with the courts deciding on matters of representation if deemed to be in the child's best interests. Bringing a case in the child's name, however, is permissible in 97 percent of all countries (192); the exception are: **Brunei Darussalam, Equatorial Guinea, Eritrea, Kuwait and Somalia**.

Where representation is required for children, approaches vary among countries. Some implement a blanket rule where representation is required for all children below the age of majority - this is normally 18 years of age but is 21 in some countries such as **Liberia**. In **Paraguay**, civil capacity (the power to either create or enter into a legal relation - of a civil law nature in this instance - under the same conditions or circumstances as a person of sound mind or normal intelligence would have the competence/power to create or to enter) is only attained at the age of 20, reduced to 18 with parental consent, although any child has petitioning powers (the right to petition one's government for redress of grievances, seeking the government's assistance without fear of punishment or reprisals) in the face of any authority.

Other countries take a more graduated approach with regard to age, with a child's standing before court and their capacity to participate in the legal process increasing as they get older and approach the age of majority (see **Scotland** below). In **Comoros** and **Cameroon**, there is no uniform overarching definition of a child, with differing ages of majority stipulated in different sources of law. The result of this inconsistency is that the application of law to children may not be uniform throughout the country, creating a lack of certainty as to children's legal standing.

*Best practice:*

<sup>19</sup> CRIN summary available at: [www.crin.org/en/node/40375](http://www.crin.org/en/node/40375).

In **Scotland**, anyone over the age of 16 has full legal capacity. Children under that age are competent to instruct a solicitor and to sue, or to defend, in any civil proceedings, if they have “a general understanding of what it means to do so”, which is legally presumed for children over the age of 12.

There are limited exceptions to the aforementioned requirement for representation. For example, in **Barbados**, children may apply to the court to permit them to act on their own behalf without a “next friend”. Also, children have a right to request a hearing before a judge in some countries (**France, Belgium, Mauritius, Luxembourg**).<sup>20</sup> In **Tunisia**, where the parents refuse to request damages for harm caused to the child, children over the age of 13 can bring an independent action for damages.

Exceptions to the rule are also made in certain countries according to the type of proceedings. For instance, in **Macedonia** and **Croatia**, children aged 16 or above may submit a request for criminal prosecution or a private charge by themselves. Some countries (notably in Eastern Europe and Central Asia) allow for children, usually over 14 years of age, to initiate proceedings seeking a protection order against domestic violence (**Kosovo, Lithuania, Russia, Seychelles, Samoa**). In **Tunisia**, for “matters of special urgency and in the case of danger at home”, a case may be validly brought by a minor over the ‘age of discrimination’, which is 13 years. In **Greece** and **Switzerland**, children can appear before a court without a representative in “personal status” or “personal rights” matters. In **Hungary**, a minor with limited capacity (i.e. a child above 14 years of age) is permitted to take action by themselves in the protection of their ‘inherent rights’, violations of which include breaches of the principle of equal treatment, violations of the freedom of conscience, unlawful deprivation of freedom, injuries to body or health, and contempt for or insult to their honour, integrity or human dignity. A number of countries allow children to act in legal proceedings concerning labour law matters. For example, in the **Bahamas**, a child may pursue proceedings “to recover any sum of money which may be due to him in the same manner as if he were of full age”; in **Estonia**, children “between the ages of 15 and 18 will be considered to have capacity in relation to employment and conjugal matters”;<sup>21</sup> and in **Uzbekistan**, an exception to the rule requiring the representation of a child by their parent(s), adopted parents or guardian(s) exists in relation to labour law disputes.

The ability of parents to act on behalf of their child during legal proceedings is tempered by the principle of the best interests of the child to varying degrees. This principle is absent from the legislation of over 40 percent of countries (84). Half of all countries (99 States) recognise the best interests of the child principle generally, but not explicitly in relation to representation in legal proceedings. The laws of only 14 States require parents or other legal representatives to act in the best interests of the child in legal proceedings: five across the Americas (**Bahamas, Bolivia, Costa Rica, Ecuador** and **Venezuela**), four in the Middle East (**Bahrain, Iraq, Israel** and **Kuwait**), three in Europe (**Iceland, Romania** and **Spain**) and two in Africa (**Djibouti** and **Tanzania**).

<sup>20</sup> See “Right to be heard” below.

<sup>21</sup> The legal age for marriage in Estonia is 18; however, it is possible for persons of 15 years and above to request judicial permission for the conclusion of a marriage contract. Further information regarding the contraction of marriage in Estonia is available at: <http://www.tallinn.ee/eng/Contraction-of-marriage#age>.



## b. Limits

*Unjustified limits to the way that children and their representatives can bring cases to courts can seriously hinder children's access to justice, whether by preventing children bringing cases against family members, requiring only fathers to bring cases on behalf of their children or preventing women from acting on behalf of children. As a general rule, there should be no limits imposed upon children or their representatives hindering them from bringing a case to court.*

States impose a variety of additional limits on children's ability to bring cases before a court. In a number of countries, particularly in MENA, parental authority rests with the father (or the father's father, in his absence) - this is the case in **Algeria** and **Morocco** (which define a child's 'tutor' as their father only), **Kuwait**, **United Arab Emirates**, **Qatar** (the father is succeeded by his father and subsequently by a court-appointed custodian, where neither of the former are available, capable or willing), **Niger** (where authority is exclusively paternal where the parents are still married, until the child attains majority) and **Guinea-Bissau**. **Honduras** goes so far as stating that, under the rule of 'paternal power' (*patria potestad*), the father's almost exclusive authority entails "protecting and directing [the child] and administering their property".

### Gender discrimination:

Certain countries place restrictions on female complainants and their capacity to participate in legal proceedings concerning them. In **Myanmar**, for example, there is a provision in the Code of Civil Procedure preventing women and girls from appearing in court in person. Article 132(1) states that "[w]omen who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in court".

In some countries, children must have the consent of their parents to initiate proceedings, or are prohibited from initiating proceedings against their parents or family. In **Thailand**, children are prohibited from bringing a civil or criminal action against their parents, unless the case is taken up by the public prosecutor upon an application of the child or one of their close relatives. In **Lao PDR**, children require parental consent prior to lodging a complaint or seeking legal assistance. In **Turkey**, parental consent to initiate proceedings is required as a general rule, although this is mitigated by an exemption for children in criminal cases and where the parent(s) or guardian are the ones alleged to have violated the child's rights. In **Mauritania**, although a guardian has a general responsibility to exercise a child's rights, judicial permission is required in order for them to have capacity to initiate proceedings on the child's behalf. Furthermore, it is unclear whether a woman may be appointed as a guardian. In **Chile**, children who seek to bring legal action against one of their parents must request permission from a judge. There are also some more particular limitations. For example, in **Togo**, during childhood, only the mother is permitted to exercise a claim for the recognition of paternity. Finally, in **Mongolia**, legislation stipulates that children who are victims of crime must be represented by an adult, adding further that said adult has the right to withdraw the complaint at any time.

## c. Right to be heard

*The right to be heard is an integral component of children's access to justice; it allows children to participate directly in a judicial proceedings related to a violations of their rights. If a child is*

*not given a voice during proceedings, or exempted on the basis of a lack of competence, then any redress sought through the courts may not take sufficient account of their situation and sensitivities.*

Provisions ensuring the right to be heard for all children in all matters can be found in the national legislation of 55 countries, even if these may not specifically refer to judicial proceedings. Provisions illustrating a partial right to be heard for children can be found in 84 countries. This is where a restriction, such as age, is attached, or where the right to be heard is limited to a specific area of law or type of proceedings, such as adoption, family law or juvenile justice. However, this leaves 58 countries where a child's right to be heard is not recognised by law; these are primarily spread over the Americas, Asia and MENA. Children's right to be heard appears to be most secure in Europe and southern Africa and least secure in Asia and MENA.

Right to be heard provisions take various forms and can be found in various pieces of legislation. In **Egypt's** Child Law, the right to be heard is guaranteed for a child "who is able to form his own opinions, to access information which empowers him to form and express such opinions, and to be heard in all matters related to him, including judicial and administrative procedures, in accordance with the procedures specified by the Law". In **Finland**, a child's right to be heard has an age restriction and is available only to those over 15, who have the right to be heard independently alongside their representative.

**Best practice:**

In many countries with French legal systems,<sup>22</sup> a child capable of discernment or of forming his or her own views may request to be heard directly by a court or judge in any proceedings that concern them (**France, Mauritius, Belgium, Luxembourg**).

### **III. Remedies**

#### **a. Courts and complaints mechanisms**

*To ensure children's access to remedies, children should have access to all courts and complaints mechanisms to enforce their rights. Courts should have broad powers to remedy children's rights violations; they should be able to impose orders for restitution or compensation; to stop the enforcement of a law or subsidiary legislation; to repeal a law; to require the government to take steps to prevent a violation; and to guarantee non-repetition of a violation. Courts should also have powers to launch investigations or bring proceedings at their own initiative.*

<sup>22</sup> English-speaking countries tend to use common law systems, whereas the majority of francophone countries employ systems in the French civil law tradition. The main difference between the two systems lies in the main sources of law. In common law countries, in addition to statutes, case law - in the form of published judicial opinions - is a source of law that is of primary, precedent-setting importance. In civil law systems, in contrast, the use of codified statutes dominates the legal system. This division is not clear cut, however, and there is a degree of overlap between the two systems.

In only a fifth of all countries (44), children have access to civil, criminal and administrative courts and informal/alternative justice mechanisms to enforce their rights. Notably, children's access to the court system to defend and enforce their rights is explicitly guaranteed by law in few countries (see box below for examples).

**Best practice:**

In **South Africa**, the Children's Act guarantees every child's right to bring, and to be assisted in bringing, a matter to court - a guarantee that applies to all courts. In **Mozambique**, the Law for the Promotion and Protection of the Rights of the Child provides that all children are guaranteed access to the court system.

Courts can award the full range of remedies<sup>23</sup> in only nine countries (**Bangladesh, Brazil, Colombia, Grenada, Honduras, India, Kenya, Namibia, Samoa**), six of which are Commonwealth countries. Almost half (25 out of 55) of the countries with the highest scores for remedies (14 to 16 out of 16 points)<sup>24</sup> are also Commonwealth countries, even though Commonwealth countries make up just over a quarter of all countries examined. In three countries none of the above remedies are available (**Equatorial Guinea, Palestine, Suriname**).

*i. Civil*

*Civil claims can be lodged to obtain redress for violations of children's rights committed by other individuals, the government, businesses, and others. This is the most common way in which children may seek justice in order to settle a dispute. Remedies include monetary compensation for losses or injuries, restitution to restore the plaintiff's status to what it was before the violation, orders requiring a party to do or refrain from doing a specific act, and/or a declaration of rights.*

In the vast majority of countries (194), violations of an individual's rights can be challenged even if they are not crimes. In most cases this means that children through their legal representatives can bring civil claims to court against the alleged perpetrator to seek monetary compensation for their loss or injury, which is almost universally guaranteed. In several countries, compensation is the only judicial remedy available (**Cuba, Democratic People's Republic of Korea, Eritrea, Jordan, Lao People's Democratic Republic, Lesotho, Mozambique, Saudi Arabia, Tunisia**). Although it can be an effective remedy, compensation alone is not enough, especially if the perpetrator is not prevented from committing or continuing to commit the abusive practices.

In some countries, particularly many countries with French legal systems, it is possible for a victim of crime to join criminal proceedings as a civil party in what is known as a civil action (**Benin, France, Gabon, Togo**). While the criminal act is prosecuted by the State, the victim as a civil party can claim compensation for the damages caused by the offence, and this will be ruled upon by the judge at the same time as the criminal trial. This civil action can also be brought separately before a civil judge.

*ii. Criminal*

<sup>23</sup> See CRIN's access to justice scorecard for details, available at: [www.crin.org/en/node/42358](http://www.crin.org/en/node/42358).

<sup>24</sup> See CRIN's access to justice scorecard for details, available at: [www.crin.org/en/node/42358](http://www.crin.org/en/node/42358).

*Although prosecuting criminal offences is a function of the state, where public bodies fail to press charges or investigate offences, child victims of crime must be given the opportunity to bring the perpetrator to justice in the form of a private prosecution. In this type of proceeding, the law must ensure that children's standing is no less than that of an adult victim so as to avoid a situation of impunity simply because the victim is a child.*

Private prosecutions are permitted in just over half of all countries (100). Children's ability to initiate private prosecutions by themselves varies. Typically it would be required that the child's parent, guardian or other legal representative files the complaint on the child's behalf. But in certain countries, children aged 16 or above are permitted to bring a private action or submit a complaint, private charge or request for criminal prosecution by themselves (**Montenegro, Macedonia, Croatia, Sao Tome and Principe, Portugal**).

The ability to bring a private prosecution may be limited by certain conditions. For example, in **Singapore**, a private prosecution is permitted only once the complainant has attempted criminal mediation with the respondent. In **Nepal**, applications for private prosecution must relate to matters of concern to the government or the public interest. In many countries such as **England** and **Wales**, the State (Crown Prosecution Service) has the power to take over and continue or stop the proceedings in a private prosecution.

In some countries and for certain crimes, criminal prosecution can be initiated only after receipt of a victim's complaint or statement. For example, in **Russia, Kazakhstan, Tajikistan, Turkmenistan** and **Belarus**, "private" and "private-public" criminal prosecution can be initiated only if a victim files a statement. In **Russia** and **Kazakhstan**, however, a public prosecutor may initiate the case without a victim's statement if the victim is not able to defend his or her rights independently. In certain countries with influences from the Portuguese legal system,<sup>25</sup> if a child is a victim of a crime that is classified as "semi-public" (e.g. injuries due to negligence in **Sao Tome and Principe**) or "private" (e.g. crimes "against honour" in **Sao Tome and Principe**), a complaint must first be filed before prosecution will be initiated by either the public prosecutor or the victim. Similarly, in **Bolivia** and the **Dominican Republic**, for prosecution that is "public upon a private complaint" (e.g. rape or kidnapping in **Bolivia**), the victim must denounce the crime to the public prosecutor or attorney-general, which will then conduct the prosecution. However, if the child victim is an "incapable" person (**Dominican Republic**) or has not attained the "age of puberty" (**Bolivia**), has no representative, or the crime was committed by his/her representative, the public prosecutor or attorney-general directly initiates the prosecution.

The rights of child victims in criminal proceedings vary. In **Portugal**, child victims may intervene and participate in criminal proceedings as an *assistente* in order to defend their interests, either in conjunction with the public prosecutor (for "public" and "semi-public" crimes) or by themselves ("private" crimes). A child aged 16 or above can intervene personally in the procedure as *assistente*, but must have a lawyer. On the contrary, in **Mongolia**, child victims of a crime must be represented by an adult, who has the right to withdraw the complaint at any time.

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<sup>25</sup> Countries with influences from the Portuguese legal system include Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe and Timor-Leste.

**Best practice:**

In **Turkey**, child victims of crime can intervene in criminal proceedings and are automatically appointed representatives, if they wish to do so.

*iii. Administrative and constitutional (judicial review)*

*Violations of children's rights often stem from laws and the activities of government bodies. Complete access to justice means that children, both as individuals and as a group, are able to bring judicial review proceedings to challenge violations of rights under the Constitution or an international human rights treaty, such as the CRC - whether the source of the violation is a law, regulation, decision of a public body, or government policy. The law should permit judicial review proceedings to be brought by not only the victims of the violation but also any member of the public or organisation acting in the public interest.*

In 87 percent of countries (171), it is possible to challenge laws and/or government decisions through some form of judicial review brought under constitutional or administrative law. Two thirds (17) of the 26 countries in which judicial review of laws or government decisions is not available are located in Asia.

Constitutional lawsuits are available to redress violations of or threats to individual human rights in many countries. There appear to be two main types of constitutional lawsuits: an action for the protection or enforcement of fundamental rights (i.e. challenging violations of fundamental rights under the Constitution) and an unconstitutionality action (i.e. challenging the conformity of laws and/or government decisions with the Constitution generally). Constitutional lawsuits are usually only available to challenge laws and/or government acts or omissions, but in some countries they can be brought against non-state actors, such as private persons or companies as well.

**Examples of countries where constitutional lawsuits can be brought against non-state actors:**

In **Ecuador**, "protection proceedings" may be initiated to protect the fundamental rights of a child or group of children under the Constitution. Such proceedings may be filed against a non-state actor if the violation causes severe damage, if the non-state actor provides improper public services or acts by delegation or concession, or if the victim is in a position of subordination or defenselessness or suffers discrimination. If a judge finds that a violation of constitutional rights has occurred, they must declare the violation and attribute responsibility to the private person, and may order reparations, full compensation for pecuniary (financial) and non-pecuniary damage (pain and suffering) and/or restitution, and impose obligations on the perpetrator and the circumstances under which they must be complied with. Preventive measures can be ordered either jointly or independently of the constitutional actions for the protection of rights, for the purpose of avoiding or ceasing the violation or threat.

In **Papua New Guinea**, children through their representatives may bring human rights proceedings if their rights or freedoms under the Constitution are adversely affected or threatened by any act or omission of a private person or company. This includes a person

exercising public power or performing public functions, and any of a company's officers or employees exercising private powers or performing private functions. The court may make "all such orders and declarations as are necessary or appropriate" to enforce human rights, including orders for compensation.

In **Uruguay**, *amparo* proceedings for the protection of fundamental rights may be brought against any act or omission of a private individual that violates or threatens any of a child's rights or freedoms in the Constitution. A court may issue precautionary measures to avoid further damage being inflicted on the child, or order the individual perpetrator to do or stop doing a certain act. The court may also impose monetary sanctions, in case of non-compliance with the judgment.

Across Latin America, in addition to an action for the protection of fundamental rights (known as a writ of *amparo*, or *acción de tutela* in **Colombia**) and an unconstitutionality action, the constitutions of many countries provide for the writs of *habeas corpus* (for the protection of physical liberty - see below) and *habeas data* (for the protection of one's personal information) in various combinations (**Ecuador, Mexico, Uruguay, Nicaragua, Paraguay, Peru, Bolivia**).

The source of rights that can be enforced is usually a specific part or chapter of the constitution, which may be known as a bill or charter of rights (**Sudan, South Sudan, Seychelles**). But sometimes these constitutional lawsuits can be used explicitly to enforce rights under ratified international treaties, such as the CRC (**Mexico, Turkey, Sudan, Paraguay, Colombia**) or the European Convention on Human Rights (ECHR) (**Turkey**). In some cases, the type of rights that can be enforced is restricted. For example, in **Yemen**, a case may be filed directly before a court regarding violations of the Constitution, national laws or the CRC where the violations concern the civil and personal rights of the child, such as the child's right to food, housing or maintenance. In the **Philippines**, an *amparo* petition is only available for violations or threats to an individual's right to life, liberty and security.

Usually only individuals have standing to bring cases about violations of their individual rights, which would mean a child victim would challenge violations of their rights through their legal representative. However, in some countries, children above a certain age do not need to be represented to bring such an action. For example, in **Nicaragua**, children from the age of 16 may file a writ of *amparo* directly with the court without any representative.

**Best practice:**

In **Uruguay**, the action of *amparo* for the protection of children's rights is explicitly recognised in the Childhood and Adolescence Code. The legal requirements for the admissibility of an *amparo* action in cases of children's rights violations are more flexible in order to expedite the entire proceedings.

In **Mexico**, a child is entitled to bring an *amparo* action by themselves to protect their individual rights if their legal representative is absent, is prevented from bringing such a case, or refuses to bring such a case. The court will immediately appoint a special representative to appear in the case; if the child is over the age of 14, they may appoint a special representative themselves in the initial lawsuit.



Standing to bring a constitutional case, however, may be broader or narrower. In some countries, cases to enforce fundamental rights can be brought by a group (**Guyana, Turkey, Ecuador**) or NGO (see “NGO standing” below). In a few countries, courts or judges may initiate proceedings themselves, such as public interest litigation, where rights violations are concerned (**Bangladesh, India, Pakistan, Papua New Guinea**). In many countries, constitutional actions cannot be brought directly by an individual. Instead, a constitutional complaint can only be raised if a constitutional issue arises during a case and is referred to another court for a determination (**Peru, Sao Tome and Principe, Guinea-Bissau, Lithuania, the majority of MENA States**). In some countries, only specified persons or entities can bring a constitutional action, which, in most cases, excludes the participation of children.

*Examples of countries where children are excluded from participating in constitutional actions:*

In **Lithuania**, a petition concerning the constitutionality of a law can only be submitted to the Constitutional Court by the government, a group of members of the Seimas (Lithuanian Parliament), the courts or the President. In **San Marino**, the Panel (which functions as the constitutional court of San Marino) can review the conformity of laws with the Constitution on the request of 1.5 percent of the electorate (which consists of adult citizens only).

The availability of judicial remedies in constitutional proceedings varies. In several Commonwealth countries across Africa, the Caribbean and the Pacific, the court (usually the High Court) may make such orders as it considers appropriate to enforce fundamental rights, giving courts wide discretion to award remedies (**Swaziland, Mauritius, Kiribati, Barbados, Zambia, Jamaica, Belize, St Lucia, Guyana, Trinidad and Tobago, Nigeria, St Kitts and Nevis, St Vincent and the Grenadines, Botswana, Tuvalu**). Where the constitutionality of laws is concerned, some courts can strike down unconstitutional legal provisions (**United States**) or invalidate unconstitutional acts and norms (**Ecuador**), while others can only review legislation before it is enacted (**Sri Lanka, Finland**). Laws or proposed laws can be found to be unconstitutional or to violate nationally protected rights but passed by parliament regardless (**Sri Lanka, Canada**), and some courts can strike down secondary but not primary legislation (**United Kingdom**). In some countries, it is not possible for courts to review the constitutionality of laws, and this power is left to the legislature (**Ethiopia, Turkmenistan, China**).

*Examples of different forms of review of the constitutionality of laws:*

In the **United States**, the Supreme Court has the authority to strike down or invalidate legislation or executive actions that it rules to be incompatible with the Constitution, including the Bill of Rights. When the Supreme Court rules on a constitutional issue, its decisions can be altered only by constitutional amendment or a new ruling of the Court.

In **Canada**, courts are empowered to strike down legislation that contravenes a provision of the Canadian Charter of Rights and Freedoms. However, the parliament or legislature of a province can expressly declare that a law applies even if it contravenes the Charter. In such circumstances, the court must apply the law even if it violates a rights provision, though the law must be re-enacted after five years to remain in force.

In **Sri Lanka**, all “written law and unwritten law” which predates the 1978 Constitution is valid and operative notwithstanding any inconsistency with the fundamental rights guaranteed in the Constitution. Regarding laws proposed or enacted after the adoption of the 1978 Constitution, the Supreme Court can only determine the constitutionality of a proposed law within one week of the bill being placed on the Order Paper of the parliament. If a bill is found by the Court to be unconstitutional, it may be passed regardless of its unconstitutionality by a two-thirds majority of parliament. If a bill becomes a law, no court is allowed to review its validity.

In **Ethiopia**, constitutional disputes are settled by the House of Federation (the upper house of Ethiopia’s parliament), rather than the judiciary. Where it is alleged that a law violates the Constitution, including its rights provisions, a court first refers the constitutional questions to the Council of Constitutional Inquiry (CCI), which includes members of Ethiopia’s Federal Supreme Court, members of the House of Federation, and legal experts appointed by the President with the recommendation of the House of People’s Representatives (lower house of parliament). The CCI then submits recommendations to the House of Federation, which has the power to decide whether or not the law violates the Constitution. Any law that does violate the Constitution is void.

Administrative lawsuits usually involve judicial review of acts, omissions or any other decisions of public bodies. Administrative law remedies vary but generally include annulment or amendment of the administrative decision, or referral of the case back to the relevant administrative authority with instructions as to how the case should be handled. Commonwealth countries tend to have the following remedies in judicial review under administrative law: *certiorari*, to quash unlawful acts; *mandamus*, to require performance of a public duty; prohibition, to prohibit unlawful acts; injunctions, to require a person to do or cease doing a specific act; and *habeas corpus*, for judicial review of the lawfulness of an individual’s imprisonment or detention. In some countries, certain administrative remedies are not available against the government. For example, in **Singapore**, the High Court cannot grant injunctions against the government or its officers.

In just over three quarters of all countries (150), individuals, including children, have a right to challenge the deprivation of their liberty and/or the lawfulness of their detention. This right is often constitutionally protected, and commonly is enforceable through an application for a writ of *habeas corpus*.

#### *iv. Child protection*

*Children should have access to courts and other complaints mechanisms to put an end to abuse or neglect, particularly when it is inflicted by a parent or other caregiver. States should have child protection systems in place that enable any person, including a child, to report such an incident to authorities and bring legal proceedings for the protection of a child.*

In some countries, a Children’s Act or similar law - which mimics all or, in most cases, some of the provisions of the CRC - is the source of children’s rights that can be enforced in a court or other venue (**Mali, Sierra Leone, Bolivia**). The Children’s Act or a similar law often creates a child protection system under which specified persons or entities can commence court

proceedings for the protection of a child or report a case of a child in need of protection to a specified government authority. Aside from child-specific legislation, laws on domestic violence may also provide for judicial remedies for the protection of a child.

Some laws or systems enable a child to bring a case to court for their own protection without the assistance of a representative. For example, under the Children's Code in **Togo**, when a child is in a difficult or dangerous situation that may threaten their health, development or physical, moral or mental integrity, such as where they are exposed to sexual exploitation or abuse, are regularly maltreated, or lack education and protection, they can bring a case by themselves before a children's judge. Similarly, under the Children's Act in **Ghana**, a child may apply by themselves to a Family Tribunal for a care or supervision order to be discharged in their best interests. In **Samoa**, under the Family Safety Act, any child may apply to the court for a protection order regarding domestic violence without the assistance of a parent or legal guardian.

Judicial remedies in child protection cases vary but usually include orders for the temporary or permanent removal of the child or placement to ensure their safety, and/or provision of medical or psychological treatment to the child.

*Best practice examples:*

In **Grenada**, the Domestic Violence Act allows for the removal of the perpetrator of the abuse as opposed to the removal of the child. Similarly, under the Protection of Domestic Violence Victims Act in **Thailand**, the investigating officer may prohibit the perpetrator from returning to the home where the child resides, and the court has the authority to approve this order.

In some countries, local or community-level bodies exist for child protection, which can provide various remedies. For example, in **Iceland**, children and their representatives can bring cases before child protection committees, which are appointed by local governments to monitor conditions of child protection and apply remedies where appropriate. In **Sierra Leone**, the Child Rights Act creates a system for the protection of children's rights in which multiple institutions (Village Child Welfare Committees, District Councils, Child Panels, and Family Court) intervene, each with its own different proceedings and remedies. Under this system, children and their representatives have the ability to challenge violations of their statutory rights by bringing a case before the relevant institution. Proceedings are generally informal and non-adversarial (by inquiry).

*Best practice example:*

In **Nigeria**, the Child Rights Act has established committees known as the "Local Government Child Rights Implementation Committees", whose functions include initiating actions to ensure the observance of the rights of children contained in the Child Rights Act and the CRC.

*v. Customary courts and other traditional authorities*

*Customary courts and other traditional authorities, when compared with the formal justice system, can be a quicker and more cost-effective, accessible and informal means for children*

*and others to seek redress. Where they exist, they should not operate outside of ordinary law, but rather act as an effective, alternative means to access justice. Like ordinary courts, they should respect children's best interests and facilitate their right to be heard in proceedings without discrimination, as well as comply with all other provisions under the CRC and international human rights law. Children should have the right to appeal their rulings to ordinary courts, if they so wish.*

In many countries where customary law or religious law applies, traditional authorities rather than the formal justice system deal with many, if not the majority of, disputes. These authorities are typically familial, community, and spiritual authorities, such as customary courts, religious courts, village courts, village chiefs, clan elders, and the family, and are commonly used to resolve disputes in private matters, such as those involving family disputes, personal status, adoption, guardianship, inheritance and marriage.

There are some positive examples of where customary or traditional justice mechanisms ensure more meaningful access to justice for children when compared with the formal justice system. In some countries, customary or traditional justice is the basis for restorative justice mechanisms<sup>26</sup> for dealing with children in conflict with the law.

*Examples of restorative justice mechanisms based on customary or traditional justice*

Family group conferencing is a model deriving from traditional means of dispute resolution implemented by the Maori in **New Zealand**, which has been incorporated into the formal system of juvenile justice through the New Zealand Children, Young Persons and Their Families Act 1989. The principle of collective responsibility is at the heart of this practice, focusing on decision-making and wrong-doing, as well as the appropriate measures to address any harm caused. The community is involved in considering the underlying factors contributing to a child's commission of the crime. The "presumption in favour of diversion" means that offences will primarily be referred to this mechanism, keeping children away from formal court proceedings. This mechanism has been widely adopted in **Australia, Brazil, Canada, Peru, the Philippines, Thailand, South Africa** and the **United States**, among others.<sup>27</sup>

Peacemaking circles are a traditional mechanism implemented by the indigenous peoples of **Canada** and the **United States**. The system requires mutual forgiveness, placing added responsibility on every member of the community to forgive. The modern application of such circles is a hybrid mechanism whereby traditional justice rituals are fused with criminal justice procedures. As well as the victim, offender and their respective communities, the judge and

<sup>26</sup> Restorative justice mechanisms consist of any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by the crime, together participate actively in the resolution of matters arising from that crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles. With regard to children in particular, the aim is to promote the child's rehabilitation and reintegration within the community. See Special Representative of the Secretary-General on Violence Against Children, *Promoting Restorative Justice for Children*, 2013. Available at: [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/srsgvac\\_restorative\\_justice\\_for\\_children\\_report.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf).

<sup>27</sup> *Ibid.*

court personnel, prosecutor, defence lawyers, police and community members with an interest in the matter are involved. The court judge presides over the circle and participates in it as an equal party.<sup>28</sup>

However, it is reported that customary law and religious law practices often conflict with international human rights law, including the CRC. In particular, customary justice mechanisms often discriminate against children and women, and have allowed perpetrators of child abuse, sexual assault and domestic violence to go unpunished. In **Guinea**, the Criminal Code does not criminalise sexual acts with a child aged 14 to 18 in the context of a marriage celebrated under customary laws. In **Kiribati**, the traditional response to crimes of sexual abuse is the cultural practice of “*te kabara bure*” (formal apology), which may reduce a perpetrator’s sentence or even result in impunity for the perpetrator. In cases of domestic violence or abuse, traditional authorities applying customary law have been known to offer a compensation settlement to the victim’s family (typically a male relative) and emphasise reconciliation between the victim and the perpetrator rather than provide redress to the victim such as by issuing a domestic court order (**Papua New Guinea, Solomon Islands**). In **Swaziland**, Swazi National Courts, which have jurisdiction in matters falling under customary law, are perceived to be lenient towards male offenders, especially in matters of domestic violence; men who are perpetrators of domestic violence are shielded by the family, therefore children and women who suffer violations of their rights cannot obtain protection from the perpetrators. In **Timor-Leste**, most domestic violence claims are still settled by informal justice systems. A widely held belief that such matters should be dealt with within customary law may lead to social rejection of anyone who asserts family claims outside of the community, which acts as a deterrent to many claims entering the justice system in the first place.

There are cases of customary justice discriminating against girls and adopted children in inheritance matters. In **Chad**, Ordinance No. 6-67 on reform of the judicial system allows inheritance matters to be governed by customs, which mostly provide that girls inherit only one half of the share inherited by boys. In a case in **Nauru**, the Nauru Lands Committee, which is the statutory successor to the chiefs of Nauru, held that a child who was adopted by a man from outside his family did not have the same rights to succeed to land, in custom, as biological children. The Supreme Court, however, held that any adopted child, whether from within the family or outside, had the same rights of succession as a biological child.

In many countries, customary law limits or fails to respect children’s right to be heard and the best interests of the child principle under the CRC. In **Eritrea**, customary laws regarding testimony are inconsistent - *Fitihi Mehari Woadotat* customary law states that only adults can be witnesses, while the *Higy Adgena-Tegeleba* customary law says that a person who does not have a conflict of interest can be a witness if they are at least seven years old. In **Swaziland**, certain cases are submitted to the Swazi National Courts under customary law where no formal legal representation is allowed. In **Palau**, decisions of clan elders with respect to family law, which are granted legal recognition, are believed to most commonly reflect the principle of “best interests of all concerned” rather than the “best interests of the child”. In **Namibia**, community courts are authorised only to implement customary law, which does not yet incorporate sufficient protection for the best interests of children in all contexts.

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<sup>28</sup> *Ibid.*



Examples of the operation of religious courts:

In the **Occupied Palestinian Territory**, within the religious courts system (which handles personal and religious matters), children do not have a right to address the court during proceedings and, as such, their testimony and statements do not seem to be required when deciding cases. By contrast, in regular civil and criminal proceedings, children under the age of 15 are considered to have the capacity to testify, though they may give evidence to the court “for information only” without taking an oath. Furthermore, the religious courts do not appear to be subject to oversight by the judicial system. Consequently, religious judges are not required to apply the CRC, Palestinian Child Law (PCL) or any other pertinent laws when ruling on matters which fall under their jurisdiction. However, the Palestinian National Authority reported that in 2009 the Chief Islamic Justice Tamimi provided a non-binding internal memorandum, circulated to all Islamic religious judges, requesting that they consider the PCL when dealing with children’s issues. This action provides some indication that the improved justiciability of children’s rights within religious courts may be possible in future. Palestine’s recent accession to the CRC may further encourage and enhance the application of the CRC.

In **Israel**, the High Court of Justice in June 2014 overturned a decision by a court of rabbis which had ordered a mother to have her son circumcised against her will, having considered an *amicus* brief<sup>29</sup> that questioned whether the rabbinical court had taken into account the child’s welfare. Under Jewish religious tradition, boys are circumcised on the eighth day after birth. But according to the mother’s lawyer, there is no legal obligation in Israel to circumcise infants. The mother in this case had previously agreed to the procedure with her former husband. Following their divorce, however, she said that her subsequent “objection to circumcise my son came after I was exposed to all the information on the issue, and studied and investigated it. I realised that it was healthier not to circumcise.” The High Rabbinical Court ordered that the boy be circumcised to comply with the prior agreement. But the High Court said that in ordering the circumcision of the boy, the rabbinical court had overstepped its jurisdiction (over religious matters, primarily in cases of marriage and divorce of Jewish citizens), as the issue of circumcision is not tied to divorce proceedings. Prior to the ruling, the Supreme Court had requested the opinion of Attorney General Yehuda Weinstein, who also said that the rabbinical court had exceeded its authority and that “it is doubtful whether the court’s decision was based on the principle of the child’s welfare.”<sup>30</sup>

In some countries, sentences under traditional and tribal justice systems or by religious courts violate the rights of children in conflict with the law. For example, in the **Democratic Republic of Congo**, the application of customary justice is reported to result in excessive punishment that is cruel, inhuman or degrading, with the range of possible sanctions including moral sanctions, supernatural sanctions,<sup>31</sup> and corporal punishment.<sup>32</sup> Corporal punishment may be ordered for

<sup>29</sup> For an explanation of *amicus curiae*, see “NGO standing” below.

<sup>30</sup> RT, ‘Israeli top court rules against child’s forced circumcision’, 30 June 2014. Retrieved from <http://rt.com/news/169368-israel-court-child-circumcision/>; Ynetnews, ‘Rabbinical court cannot force circumcision’, 12 February 2014. Retrieved from <http://www.ynetnews.com/articles/0.7340.L-4487436.00.html>.

<sup>31</sup> For more information on moral and supernatural sanctions, see M. Fortes and E. E. Evans-Pritchard (eds), *African Political Systems*, Routledge, 2015; Travis Hirschi and Michael R. Gottfredson, ‘Punishment of



criminal offences under customary law in other countries as well (**Tuvalu, Kiribati, Swaziland**). Sharia law also permits orders of corporal punishment and/or the death penalty for child offenders in many countries (**Brunei Darussalam, Egypt, Iran, Libya, Malaysia, Maldives, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, United Arab Emirates, Yemen**).

#### *vi. National human rights institutions*

*National human rights institutions (NHRIs), like civil society, serve an important “watchdog” function to ensure that government officials and public bodies act in a manner that is consistent with the State’s human rights obligations. Every country should have an NHRI, ombudsperson, human rights defender and/or children’s commissioner that is independent from the government and has the powers to receive and investigate individual complaints, including from children directly and NGOs; to bring legal proceedings in its own name and on behalf of children; to promote and protect human rights, including children’s rights; and to monitor compliance with international human rights treaties, including the CRC.*

In almost three quarters of all countries (146), there is some mechanism to investigate allegations against officials. Such a mechanism, which usually takes the form of a national human rights institution, is available in almost all of Europe, most of the Caribbean, the Americas, Africa and Oceania, and more than half of Asia, but in less than one-third of countries in MENA (6 out of 21). In 40 percent of countries (80), there is either a child-specific institution (such as a children’s ombudsperson or commissioner), or a specific department or person within the NHRI that explicitly deals with children’s rights.

NHRIs have varying degrees of power. Almost two thirds of all countries (129) have an NHRI that is empowered to receive and address complaints in relation to violations of the rights of individuals, including children - whether directly submitted by children or their representatives. In most of these countries, children can submit complaints directly to the institution without needing to be represented by a parent or guardian. In some countries, the complaints may only be submitted by a parent or guardian (**Ethiopia’s** Deputy Chief Ombudsman for Women and Children). In other countries, NHRIs allow collective or representative complaints to be submitted by or on behalf of persons with similar causes of complaint (Human Rights Commission of **Malaysia**, **Fiji** Human Rights Commission). Very rarely, the institution can receive complaints by NGOs, but not individuals, on human rights violations (**United Arab Emirates’s** Human Rights Committee in the Federal National Council). Remedies issued by NHRIs vary but usually include issuing recommendations to government authorities to review decisions, acts or omissions; to amend a law or rule that infringes on children’s rights; and/or to provide compensation to the victim. However, these recommendations are usually not binding or enforceable.

Some NHRIs have wide powers with respect to initiating or participating in legal proceedings. They may instigate proceedings in their own name without a victim for the protection of human

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children from the perspective of control theory’ in M. Donnelly and M. Strauss (eds), *Corporal Punishment of Children in Theoretical Perspective*, Yale University Press, 2008.

<sup>32</sup> Open Society Institute and AfriMAP (Africa Governance Monitoring & Advocacy Project), *Customary courts in the Congolese judiciary system: a reform for better administration of justice*, September 2006. Available at: [http://www.afriMAP.org/english/images/paper/Customary\\_Jurisdictions\\_DR Congo\\_EN.pdf](http://www.afriMAP.org/english/images/paper/Customary_Jurisdictions_DR Congo_EN.pdf).

rights (**Scotland's** Equality and Human Rights Commission, **Northern Ireland** Human Rights Commission, **Irish** Human Rights and Equality Commission, Ombudsman of **Seychelles**, **Slovenia's** Ombudsman for Human Rights, **Thailand's** National Human Rights Commission, Public Defender of **Georgia**, Public Defender of **Kyrgyzstan**); bring suits on behalf of victims of rights violations (**Thailand's** National Human Rights Commission), including a class of people (**Fiji** Human Rights Commission, **New Zealand's** Director of Human Rights Proceedings); intervene in cases (**Scotland's** Equality and Human Rights Commission, Ombudsman for **Bosnia and Herzegovina**, **Zambia** Human Rights Commission, **India's** National Human Rights Commission) or act as *amicus curiae* ("friend of the court") (**Irish** Human Rights and Equality Commission); appear as a party to proceedings concerning human rights violations with the court's permission (Ombudsman of **Seychelles**); require or request that proceedings be instituted and participate in proceedings (**Poland's** Ombudsman for Children); and assist a complainant in legal proceedings challenging a human rights violation (Ombudsman of **Seychelles**) or provide legal aid, including legal representation (**Irish** Human Rights and Equality Commission). Other NHRIs have powers to challenge government actions that infringe upon human rights but in practice only refer cases to the public prosecutor (**Timor-Leste** Ombudsman for Human Rights and Justice).

With respect to child-specific NHRIs, some have the powers to bring and represent children's interests in legal proceedings. **Jamaica's** Office of the Children's Advocate may bring non-criminal proceedings, intervene in or act as an *amicus curiae* in any proceedings in any court or tribunal involving law or practice concerning the rights or best interests of children, and provide legal assistance to a child in certain cases. In **Namibia**, the Children's Advocate in the Office of the Ombudsman has the power to bring proceedings in a children's court, acting on behalf of a child or children generally. **Bolivia's** Ombudsperson for Childhood and Adolescence (*Defensoría de la niñez y adolescencia*) can bring and intervene in administrative and judicial proceedings for the defence of children and restitution of their rights. The **Northern Ireland** Commissioner for Children and Young People (NICCY) may bring or intervene in proceedings concerning the rights or welfare of children or young persons, where the case raises an issue of principle, and in some circumstances may assist a child in legal proceedings. In **India**, the National Commission for the Protection of Child Rights or the State Commission on the Protection of Child Rights may also approach the court for orders or directions regarding the protection of children's rights.

**Best practice:**

In **Panama**, the Children's Ombudsperson must act as a representative in all proceedings involving minors, and any proceedings that do not comply with this requirement shall be subject to nullity, except in circumstances expressly provided for by law. The Children's Ombudsperson represents minors, who have the right to be represented at no cost in proceedings, before the High Courts and the Youth Section Courts.

**Examples of cases brought or supported by NHRIs:**

The **Northern Ireland** Human Rights Commission brought judicial review proceedings in its own name concerning the compatibility of an adoption order with the ECHR to ensure that the best interests of children in Northern Ireland would be protected. The adoption order banned unmarried couples "irrespective of sexual orientation" and those in a civil partnership

from being considered as potential adoptive parents. In October 2012 the High Court found in favour of the Commission, agreeing that to prevent someone from being eligible to apply to adopt on the basis of their relationship status is discriminatory.<sup>33</sup> Appeals by the Department of Health, Social Services and Public Safety were rejected by the Divisional Court<sup>34</sup> and Supreme Court in 2013, thereby allowing the ban to be lifted.<sup>35</sup>

The **Fiji** Human Rights Commission intervened as *amicus curiae* in a case in the High Court concerning the constitutionality of corporal punishment in Fiji. Although the case concerned a person who was convicted and sentenced to whipping, the Commission in its submission requested that corporal punishment in schools also be considered, arguing that all corporal punishment is against the Constitution and international human rights law. In its ruling in 2002, the Court declared corporal punishment both as a judicial sentence and, in light of the State's obligations under the CRC, in schools, to be unconstitutional. Since this judgment, Fiji has reformed its laws to prohibit corporal punishment in the penal system. It has banned corporal punishment in schools as a matter of policy and expressed a commitment to reform its laws to prohibit corporal punishment in all settings, including the home.<sup>36</sup>

In **New Zealand**, the Office of Human Rights Proceedings represented Child Poverty Action Group in a case claiming that the In-Work Tax Credit (a payment of NZ\$60 per week to a primary caregiver for the first three children and NZ\$15 per week for each child after that) discriminated on the ground of employment status because it is available to working but not beneficiary families, and this disadvantages children in beneficiary families.<sup>37</sup> In 2013 the Court of Appeal found that there was discrimination against all beneficiaries with children, and that, as part of the test for discrimination, this different treatment causes material harm. However, the Court declared that the discrimination was justified because it was aimed at getting beneficiaries into work.<sup>38</sup> Although ultimately unsuccessful, the case raised awareness of serious harm to around 230,000 of the most disadvantaged children in New Zealand.

In 2015 **Colombia's** People's Defender (Ombudsman) petitioned the Inter-American

<sup>33</sup> *Northern Ireland Human Rights Commission's Application* [2012] NIQB 77. Available at: [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2012/%5B2012%5D%20NIQB%2077/j\\_j\\_TRE8624Final2.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2012/%5B2012%5D%20NIQB%2077/j_j_TRE8624Final2.htm).

<sup>34</sup> *Northern Ireland Human Rights Commission's Application* [2013] NICA 37. Available at: [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NICA%2037/j\\_j\\_GIR8921Final-PUBLISH.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NICA%2037/j_j_GIR8921Final-PUBLISH.htm).

<sup>35</sup> Northern Ireland Human Rights Commission website, 'Supreme Court refuses appeal on adoption law'. Retrieved from: <http://www.nihrc.org/news/detail/supreme-court-refuses-appeal-on-adoption-law>; BBC News, 'Gay adoption: Northern Ireland ban lifted', 11 December 2013. Retrieved from: <http://www.bbc.co.uk/news/uk-northern-ireland-25332917>.

<sup>36</sup> *Ali v The State*, High Court of Fiji, FJHC 123, HAA0083.2001 (21 March 2002). See CRIN's case summary, available at: [www.crin.org/node/6998](http://www.crin.org/node/6998).

<sup>37</sup> The Office of Human Rights Proceedings website, 'Cases of interest'. Available at: <https://www.hrc.co.nz/ohrp/our-work/cases-interest/>.

<sup>38</sup> *Child Poverty Action Group v. the Attorney General* [2013] NZCA 402. Available at: <http://www.cpag.org.nz/assets/CPAG%20v%20Attorney%20General/130830%20CPAG%20Court%20of%20Appeal%20Decision%20CA4572012.pdf>. For further information, see CPAG website at: <http://www.cpag.org.nz/campaigns/cpag-in-the-court-of-appeal-4/the-case-in-a-nutshell-1/>.

Commission on Human Rights to grant an interim injunction as a matter of urgency in a case concerning the right to water of the Wayuu tribe. Since a dam was built, the only river to which the tribe has access - the Rancheria River - has completely dried out. At least 5,000 children have died from starvation and many more continue to suffer from malnutrition. The petition is seeking an order from the Commission to open the floodgates that would allow water to reach the Wayuu, instead of redirecting it to large estates and industrial sites in the region.<sup>39</sup> The Commission issued an order for precautionary measures requesting that the State takes “immediate steps to [guarantee] access to drinking water and food of sufficient quality and quantity” and to “secure the availability, accessibility and quality of health services, with a culturally appropriate and comprehensive approach, in order to address child malnutrition.”<sup>40</sup>

## *vii. Regional courts and complaints mechanisms*

*Access to regional courts and complaints mechanisms allows cases that have been unsuccessful at the domestic level to be heard by another judicial or quasi-judicial body, giving children another opportunity to obtain effective remedies for violations of their rights. Decisions by regional bodies may be binding on governments or persuasive, and can pressure governments to change their laws, policies or practices in order to comply with their regional treaty obligations. The decisions of regional bodies have created a wealth of jurisprudence on children’s rights which is often relied on by domestic courts in their decision-making. States should ratify all available regional treaties and their optional protocols to enable access to redress at the regional level.*

Regional human rights courts and complaints mechanisms exist in Africa,<sup>41</sup> the Americas<sup>42</sup> and Europe.<sup>43</sup> Africa is the only region with a complaints mechanism that explicitly addresses violations of children’s rights to which individual child victims may submit complaints - the African Committee of Experts on the Rights and Welfare of the Child - though all other regional mechanisms can technically be used to address violations of children’s rights under their respective treaties.

Generally, complaints may be submitted to a regional body by individuals, groups, or NGOs about violations of the corresponding regional treaty if the State has ratified it. The European Committee of Social Rights is the only regional body that does not accept complaints about violations of an individual’s rights, and instead deals with collective complaints submitted by certain international NGOs and, in the case of Finland, national NGOs. Generally, all available

<sup>39</sup> El Nuevo Siglo, ‘Piden a CIDH tutelar derechos de Wayúu’, 15 March 2015. Retrieved from: <http://www.elnuevosiglo.com.co/articulos/3-2015-piden-cidh-tutelar-derechos-de-way%C3%BAu.html>; Apporea, ‘Colombia: De hambre y sed mueren 5000 niños wayuu’, 17 March 2015. Retrieved from: <http://www.aporrea.org/ddhh/n267082.html>.

<sup>40</sup> Europa Press, ‘La silenciosa muerte de los niños wayúu’, 20 December 2015. Retrieved from: <http://www.europapress.es/internacional/noticia-silenciosa-muerte-ninos-wayuu-20151220082935.html>.

<sup>41</sup> African Committee of Experts on the Rights and Welfare of the Child, African Commission on Human and Peoples’ Rights, African Court on Human and Peoples’ Rights, ECOWAS Community Court of Justice and East African Court of Justice.

<sup>42</sup> European Court of Human Rights and European Committee of Social Rights.

<sup>43</sup> Inter-American Commission on Human Rights and Inter-American Court of Human Rights.

domestic remedies must have been exhausted before bringing a case to a regional body; exceptionally, this is not required to submit a complaint before the ECOWAS Community Court of Justice, the East African Court of Justice or the European Committee of Social Rights. Complainants may request to remain anonymous before certain bodies (African Committee of Experts on the Rights and Welfare of the Child, African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, Inter-American Commission on Human Rights). The decisions of regional bodies range from legally binding judgments on the State (African Court on Human and Peoples' Rights, East African Court of Justice, ECOWAS Community Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights) to non-binding recommendations to the State (African Committee of Experts on the Rights and Welfare of the Child, African Commission on Human and Peoples' Rights, European Committee of Social Rights, Inter-American Commission on Human Rights).

Children across Asia, Oceania and the Middle East do not have recourse to regional complaints mechanisms to enforce their rights.

*Examples of complaints involving children's rights submitted to regional bodies:*

In April 2014 the **African Committee on the Rights and Welfare of the Child** found **Senegal** in breach of the rights of around 100,000 children, aged 4 to 12 years, who were forced by their Qur'anic school instructors to beg for their own survival. The complaint was submitted in 2012 by the Centre for Human Rights, University of Pretoria and the NGO *La Rencontre Africaine pour la Defense des Droits de l'Homme*. They alleged that the children (known as *talibés*) were removed from their families and placed in Qur'anic schools in the urban centres of Senegal. They were then forced to work on the streets as beggars, beaten, chronically underfed, and housed in unsafe and unhygienic living conditions without access to medical care. The Committee found that Senegal had failed to effectively implement its laws protecting children, thereby violating several rights of the *talibés* under the African Children's Charter, even though the schools were non-state entities.<sup>44</sup>

The Socio-Economic Rights & Accountability Project has taken **Nigeria** to the **ECOWAS Community Court** over violations of the rights of internally displaced persons (IDPs), across the country, including children. The case was brought in the context of the ongoing conflict between Boko Haram and government forces, which has led to the displacement of around 3.3 million people across northern and north-eastern Nigeria since 2010. The government has closed several displacement camps in central and northern Nigeria, and in other camps the living conditions are reportedly inadequate. The complaint alleges that the government has failed to protect the rights of IDPs by failing to provide protection and assistance and systematically assess their conditions and situation, in breach of its obligations under the African Charter and other international instruments.<sup>45</sup>

<sup>44</sup> See CRIN's case summary, available at: [www.crin.org/node/41561](http://www.crin.org/node/41561), and CRIN's case study, available at: [www.crin.org/node/41817](http://www.crin.org/node/41817).

<sup>45</sup> The NGR Guardian, 'SERAP sues govt at ECOWAS Court over IDPs rights', 13 May 2015. <http://www.ngrguardiannews.com/2015/05/serap-sues-govt-at-ecowas-court-over-idps-rights/>; Complaint submitted by Socio-Economic Rights & Accountability Project, available at: <http://media.premiumtimesng.com/wp-content/files/2015/05/SERAP-VS-FG-INTERNALLY-DISPLACED-PE-RSONS-CASE-BEFORE-THE-ECOWAS-COURT.pdf>.



In March 2015 the **European Committee of Social Rights** found that **Ireland, Slovenia, Belgium, the Czech Republic and France** had violated the European Social Charter due to their failure to explicitly ban corporal punishment in all settings. The Committee concluded that the States had breached the prohibition of violence against children under Article 17 of the Charter, noting that there is now a consensus in Europe and abroad that corporal punishment of children should be expressly banned. No violation was found, however, in relation to the complaint against Italy. The cases were brought by the Global Initiative (registered under the name 'APPROACH') using the Charter's collective complaints procedure.<sup>46</sup>

In July 2014 the Grand Chamber of the **European Court of Human Rights** found that **Romania** had violated the right to life of an 18-year-old who had spent his life in state institutions. The victim - who was of Roma origin - had been abandoned at birth and placed in an orphanage, and diagnosed as being HIV-positive and severely mentally disabled. The case was brought by a Romanian NGO, the Centre for Legal Resources, on behalf of the victim following his death after being transferred to an ill-equipped psychiatric hospital in 2004. On the issue of standing, the Court found that, while the Centre was not itself a victim of the alleged violations of the ECHR, it should be allowed to represent the victim because of "the exceptional circumstances of this case and bearing in mind the serious nature of the allegations". This case was the first time that the European Court recognised the standing of an NGO to bring a case on behalf of a victim and represent them without their prior authorisation. The Court ruled that the victim's rights to life and an effective legal remedy had been violated because he had not received adequate care or appropriate treatment for his condition, and the authorities, aware of the lack of resources in the hospital where he had been placed, had unreasonably put his life in danger. Moreover, the State had failed to conduct an effective investigation into his death. The Court recommended that Romania ensure that mentally disabled persons in a comparable situation are provided with independent representation enabling them to have complaints relating to their health and treatment examined before an independent body.<sup>47</sup>

In July 2014 the **Inter-American Court of Human Rights** found that **Guatemala** failed to protect the right to life and personal integrity of a 15-year-old girl who was sexually assaulted, tortured and brutally murdered in 2001. During the investigation of the girl's abduction and murder a number of irregularities occurred, including failure to take appropriate steps when she was reported missing, flaws in the preservation of the crime scene when her body was discovered, and deficiencies in the handling and analysis of the evidence that was gathered. The Court found that not only had the State failed to properly investigate the murder, it had also failed to address and resolve the ingrained culture of violence and discrimination against women that permeates Guatemalan society, which led to a flawed investigation. Therefore the State had failed to protect the girl's right to life and

<sup>46</sup> See CRIN's case summary, available at: [www.crin.org/en/node/41168](http://www.crin.org/en/node/41168), and CRIN's case study, available at: [www.crin.org/node/41959](http://www.crin.org/node/41959).

<sup>47</sup> See CRIN's case summary, available at: [www.crin.org/node/41242](http://www.crin.org/node/41242).



personal integrity as well as her family's right to a fair judicial process and legal remedy.<sup>48</sup>

#### *viii. International complaints mechanisms*

*Access to international complaints mechanisms, like regional mechanisms, allows cases that have been unsuccessful at the domestic level to be heard by another quasi-judicial body, giving children another opportunity to obtain effective remedies for violations of their rights. Although these mechanisms tend not to be legally binding, their decisions place human rights violations committed by governments under an international spotlight and can pressure States to change their laws, policies or practices in order to comply with their obligations under international human rights treaties. States should ratify all international treaties and their optional protocols to enable access to redress at the international level.*

Complaints procedures exist under all nine UN human rights treaty bodies, which can address violations of the rights of children within their respective treaties.<sup>49</sup>

#### *Examples of complaints involving children's rights submitted to international bodies:*

A group of seven parents challenged the mandatory Christian education subject in the **Norwegian** school system called "Christian Knowledge and Religious and Ethical Education" (CKREE), which required religious education in the Christian tradition and only provided for exemption from certain limited segments of the curriculum. Four sets of parents opted to take their case to the **UN Human Rights Committee** (*Leirvåg and ors v. Norway*), and the remaining three sets of parents took their case to the European Court of Human Rights (*Folgerø and others v. Norway*, 15472/02, judgment of 29/06/2007 – Grand Chamber). In 2004 the Human Rights Committee concluded that, in its present form, Norway's CKREE curriculum, along with the system of exemptions that had been developed, breached Article 18(4) of the International Covenant on Civil and Political Rights on freedom of religion and was incompatible with other international instruments including the CRC. The European Court found that the CKREE violated Article 2 of Protocol No. 1 of the ECHR. In 2008 Norway introduced amendments to its Education Act "to respond to the concern of qualitative equality between Christianity and other religions and philosophies," and that changes have been

<sup>48</sup> Amnesty, 'International Court exposes Guatemalan State role in horrific death of teenage girl', 30 July 2014. Retrieved from: <https://www.amnesty.org/en/latest/news/2014/07/international-court-exposes-guatemalan-state-role-horrific-death-teenage-girl/>.

<sup>49</sup> Human Rights Committee, Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Rights of the Child (CRC), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED). Note, however, that the complaints procedure for the CMW has not entered into force. For a comparative guide to the international communications procedures, see Annex 2 of CRIN's 'CRC complaints mechanism toolkit': [https://www.crin.org/sites/default/files/crc\\_complaints\\_mechanism\\_toolkit.pdf](https://www.crin.org/sites/default/files/crc_complaints_mechanism_toolkit.pdf).

made in the exemption provisions. The Norwegian Humanist Association was heavily involved in both cases.<sup>50</sup>

In July 2014 the **UN Committee on the Elimination of Discrimination against Women** held **Spain** responsible for failing to prevent the death of a seven-year-old girl who was killed by her father during a court-approved visit in 2003. The mother of the girl filed more than 30 complaints against the man between 1999 and 2001 and had petitioned the court for a restraining order. The father had nonetheless been granted unsupervised visits with the girl and, during one visit, shot his daughter before killing himself. The Committee found that the State could have foreseen that the father posed an imminent danger to the child's life and well-being and that the Spanish authorities showed a lack of interest in properly evaluating all aspects of the case. The Committee has ordered Spain to submit a report within the next six months on steps taken to comply with the decision.<sup>51</sup>

Once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child if the State has ratified or acceded to the Third Optional Protocol to the CRC on a communications procedure (OP3).<sup>52</sup> Complaints can be made directly by both an individual child or a group of children, or indirectly, on their behalf by an adult or an organisation.<sup>53</sup> The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children<sup>54</sup> or the Optional Protocol on the involvement of children in armed conflict<sup>55</sup> and must have occurred after the entry into force of the Protocol.<sup>56</sup> Anonymous complaints are inadmissible and so are complaints not made in writing.<sup>57</sup> In addition, only complaints made in one of the working languages of the UN will be accepted.<sup>58</sup> After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.<sup>59</sup> As of 1 November 2015, 20 countries have ratified or

<sup>50</sup> See CRIN's case summary of the UN Human Rights Committee complaint, available at: [www.crin.org/node/6977](http://www.crin.org/node/6977).

<sup>51</sup> See CRIN's case summary, available at: [www.crin.org/node/40184](http://www.crin.org/node/40184).

<sup>52</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at: [http://tbineternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en](http://tbineternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en). Table of ratifications available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en).

<sup>53</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 5.

<sup>54</sup> An exception is Ireland, which has ratified the third Optional Protocol and the Optional Protocol on children in armed conflict, but not the Optional Protocol on the sale of children. Currently, this is the only exception for those States that have ratified the third Optional Protocol as of the time of writing of this report.

<sup>55</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, Article 5.

<sup>56</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 7(g). This is either 14 April 2014 (for the first ten States to ratify the protocol), or three months after the date of ratification for each State (for all subsequent ratifications).

<sup>57</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 7(g).

<sup>58</sup> Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at: <http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

<sup>59</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

acceded to the OP3.<sup>60</sup>

## b. Child victims

*Participating as a victim in legal proceedings can be daunting and difficult - for children as well as adults. Bringing cases without the need for individual child victims preserves children's right to privacy while enabling them to benefit from a court ruling that could have a significant impact on them, their families and/or their communities. It also enables widespread human rights abuses to be challenged without placing the burden on a single child.*

In just over a third of all countries (71), there is at least one court mechanism through which victims need not be named.

Opt-out class actions are one of these mechanisms. Class actions are court proceedings whereby multiple individual claimants/victims bring a lawsuit on behalf of a larger group, or "class", against the same defendant(s) for the same, similar or related loss or damage in a single action.<sup>61</sup> In opt-out class actions, class members do not need to be identified as the injured person is automatically a member of the class if they fit the criteria and will be automatically bound by the class litigation, unless they choose to opt out, in which case they will not be bound by the decision (**United States, Canada, Australia, Thailand**). This contrasts with opt-in class actions, where individuals must identify themselves to be included in the class action (**Sweden, Italy, Austria**).<sup>62</sup>

Some countries permit an individual or group of individuals to bring cases in the public interest - commonly known as "popular actions", "citizen actions" or "public interest litigation" - without needing to name specific victims (see "Collective action" below).

Alternatively, in some countries, litigation can be brought by a national human rights institution or NGO without naming victims in the public interest or on behalf of a class of persons (see "Collective action" below).

## c. Collective action

*Collective action refers to court proceedings in which a number of claimants/victims with similar or related interests group together to bring a combined action against a defendant or group of defendants, or any other type of proceeding which may be brought by or on behalf of a group of claimants/victims.*<sup>63</sup> *Collective action enables multiple individual victims to jointly seek redress*

<sup>60</sup> Albania, Andorra, Argentina, Belgium, Bolivia, Chile, Costa Rica, Denmark, El Salvador, Gabon, Germany, Ireland, Monaco, Mongolia, Montenegro, Portugal, Slovakia, Spain, Thailand, Uruguay.

<sup>61</sup> Linklaters guide, *Collective actions across the globe – a review*, 2011. Available at: [www.linklaters.com/pdfs/mkt/london/1103\\_Collective\\_actions.pdf](http://www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf); Cornell University Law School Legal Information Institute, 'Class action: An overview'. Available at: [https://www.law.cornell.edu/wex/class\\_action](https://www.law.cornell.edu/wex/class_action).

<sup>62</sup> Baker & McKenzie, 'Class Action Regime: A new legal landscape for Thailand and its potential impact on business', August 2015. Available at: <http://bakexchange.com/rv/ff00212a5a0bfcfe6b741ab8ab45acbed2fd59ae/p=2231022>.

<sup>63</sup> Linklaters guide, *Collective actions across the globe – a review*, 2011. Available at: [www.linklaters.com/pdfs/mkt/london/1103\\_Collective\\_actions.pdf](http://www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf).

*against the government, a corporation or other private entity before a court for mass violations of their rights. States should provide for multiple types of collective action that enable victims to remain anonymous but still benefit from a court ruling. Courts should be empowered to join similar cases so that they can efficiently deal with multiple cases at once and deliver consistent decisions.*

Collective actions, whether or not individual victims need to be named, are available in just over 40 percent of countries (82) , and come in many different forms, including class action, group action, and representative action.

In just over a quarter of all countries (52), the law provides for collective action on any type of issue and individual victims need not be named. This may take the form of an opt-out class action (see “Child victims” above), which is permitted in some countries (**United States, Canada, Australia, Thailand**). There are usually specific requirements to be met to bring a class action. For example, the class of plaintiffs must share certain characteristics; the class must be defined with sufficient precision that a particular individual’s membership can be objectively determined; and/or there must be issues of fact and/or law that are common to all members of the class.

Alternatively, collective action may take the form of a “popular action” (*actio popularis*), “citizen action”, or “public interest litigation”, which is typically brought by individuals or groups on behalf of the public or collective interest in general, without specifying individual victims. For example, in **South Africa, Kenya and Zimbabwe**, public interest litigation and proceedings claiming violations of the Bill of Rights (or Declaration of Rights, in the case of Zimbabwe) may be brought by a person acting as a member of, or in the interest of, a group or class of persons or in the public interest, and need not name individual victims. In **South Africa**, this is guaranteed in the Children’s Act as well. Similarly, in **India, Pakistan and Bangladesh**, public interest litigation provides a means for a person or organisation to bring a suit on behalf of a large group of people without naming individual victims to challenge laws and government actions that violate fundamental rights under the Constitution. In **Argentina**, a collective action may be initiated under the Constitution without naming individual victims. In **Colombia**, actions brought by citizens to prevent or redress a violation of collective rights or interests do not require the identification of victims. In **Peru**, a popular action can be submitted by any person, including a child, against various types of administrative regulations that contradict the Constitution or a law. In **Japan**, in certain cases provided by law, “citizen actions” may be filed by individuals, irrespective of their legal interest, to correct an act by a public body that does not conform to laws, regulations or rules.

**Best practice:**

In **South Africa** and **Namibia**, the Children’s Act and Child Care and Protection Act respectively grant wide standing, allowing cases to be brought in children’s courts by, among others, anyone acting as a member of, or in the interest of, a group or class of children or anyone acting in the public interest.

Less commonly, class actions or popular actions may be brought by NHRIs or public bodies, which can instigate proceedings in their own name. For example, the **Fiji** Human Rights

Commission, **New Zealand's** Director of Human Rights Proceedings,<sup>64</sup> and the **Irish** Human Rights and Equality Commission have the power to bring proceedings on behalf of a class of persons to vindicate their human rights. The Public Defenders of **Kyrgyzstan** and **Georgia** have the power to bring a popular action to challenge legislation without naming a specific victim if he/she considers that constitutional rights are violated. In **Sweden**, A government authority may bring a “public class action” and act as a plaintiff to litigate the action on behalf of a group of class members. In **Zimbabwe**, the Attorney-General has the right to institute a class action on behalf of a class of persons if it appears to be “necessary or desirable to do so in the public interest”.

In 30 countries, the law provides for collective action where individual victims need not be named, but the type of action or issue that can be litigated is restricted. Typically these areas are consumer actions, environmental actions and/or labour actions (**Sweden, Togo, France, Mexico**). For example, in **China**, the 2012 amendments to the Civil Procedure Law allow a government authority or “relevant organisation as prescribed by law” to bring a class action challenging conduct that pollutes the environment, infringes upon the lawful rights and interests of vast numbers of consumers, or otherwise damages the public interest. In **Bolivia**, a popular action can be filed by any person, either individually or on behalf of a community, against any act or omission of the authorities, individuals or groups who violate or threaten to violate collective rights and interests related to the homeland, public spaces, safety and public health, the environment and other rights of a similar nature as recognised by the Constitution. In **Portugal**, a popular action (*acção popular*) may be brought by a representative on behalf of a larger group of persons to protect, among other things, public health, the environment, quality of life, consumer rights, and cultural heritage. In several countries, collective action where individual victims need not be named is generally restricted to consumer actions only (**Chile, Azerbaijan, United Kingdom (England & Wales), Greece, Russia, Belgium, Ukraine**).

Often, the power to bring a collective action on behalf of multiple claimants is restricted to particular representative bodies, such as consumer protection groups and environmental organisations. For example, in **France**, certain non-profit organisations have the power to initiate representative actions before civil and criminal courts to seek compensation for consumers, investors, and victims of environmental risk. In **Belgium**, under a new law introducing class actions into the Belgian legal system, a class action can only be initiated by a limited number of consumer associations fulfilling specific criteria (to be established by a Royal Decree) or by other associations fulfilling the restrictive conditions of the new law.

In three quarters of all countries (148), collective action is permitted but only where each victim is specified. This includes group actions, where multiple victims who would otherwise bring separate cases related to individual abuses of their rights are able to join their individual claims into one action if they are affected by related or common issues, and their cases will be heard and tried together. Courts also have the power to join proceedings that are affected by related or common issues. This is usually done for case management reasons. In a few countries, there are legal provisions that explicitly allow multiple proceedings involving children to be joined. For example, under Law 147/99 to Protect Children and Young People at Risk in **Portugal**, group litigation is permitted if a given situation affects more than one child; if several actions have

<sup>64</sup> See examples of cases involving the Fiji Human Rights Commission and New Zealand Office of Human Rights Proceedings under “National human rights institutions” above.



been filed that involve children stemming from the same situation or family, the joinder of parties (where the issues may be addressed in one hearing) is permitted. Many countries also permit representative proceedings, where one claimant represents all, but each claimant is specified. Typically, where several persons have the same or a similar interest in the proceedings, the court may appoint one or more of those persons to represent all or some of the persons (**Barbados, United Kingdom (England & Wales, Northern Ireland), Nauru, Fiji, Samoa, Ireland, Belize**).

*Examples of collective action involving children's rights brought in domestic courts:*

A group of 113 children who filed a lawsuit in Cancún, **Mexico** for the protection of their constitutional right to a healthy environment have been granted their request to permanently suspend a development project that would have seen the razing of dozens of hectares of mangrove forest. In order for the ruling to take effect, however, the fourth district judge in Cancún has ordered the children to pay the developers compensation to offset their losses in the amount of 21 million pesos (US\$1.2 million). The group's lawyers have appealed the judge's decision regarding the damages, on the basis that it violates the children's best interests under article 3 of the CRC as well as various provisions of the American Convention on Human Rights. The lawsuit is the first filed in Mexico advocating for the collective rights of children over corporate interests in order to protect the environment.<sup>65</sup>

In the **Philippines**, a group of children brought a lawsuit in conjunction with the Philippine Ecological Network, Inc. to stop the destruction of the fast-disappearing rainforests in their country. The children based their claims on the 1987 Constitution of the Philippines, which recognises the right of people to a "balanced and healthful ecology" and the right to "self-preservation and self-perpetuation". In 1993 the Supreme Court of the Philippines ruled in favour of the children, finding that the rights to a clean environment, to exist from the land, and to provide for future generations are fundamental; each generation has a responsibility to the next to preserve the environment, and children may sue to enforce that right on behalf of both their generation and future generations; and the Constitution requires that the government "protect and promote the health of the people and instill health consciousness among them."<sup>66</sup>

Twenty-three Liberian children sued Firestone Natural Rubber Company in a **US** court, alleging that Firestone used hazardous child labour on its 118,000 acre rubber plantation in **Liberia** and that these conditions violated international law. Firestone does not actually employ children, however Firestone imposes strict production quotas which its Liberian employees must satisfy. The plaintiffs argued that these strict quotas encouraged employees to enlist their children as helpers. The US Court of Appeals, Seventh Circuit found that a corporation can be held liable under the Alien Tort Statute, but Firestone did not violate customary international law and therefore dismissed the case. Although the case was

<sup>65</sup> Quartz, 'Kid environmentalists have derailed a \$900 million development in a popular Mexican resort town', 13 November 2015. Available at: <http://qz.com/548754/kid-environmentalists-have-derailed-a-900-million-development-in-a-popular-mexican-resort-town/>; El Economista, 'Piden 113 menores revisión de fianza en Caso Tajamar', 12 November 2015. Available at:

<http://eleconomista.com.mx/estados/2015/11/12/piden-113-menores-revision-fianza-caso-tajamar>.

<sup>66</sup> See CRIN's case summary, available at: [www.crin.org/node/6943](http://www.crin.org/node/6943).



ultimately unsuccessful in court, Firestone took steps to curb child labour at the farm and conditions were improved due to the attention that the case drew to the issue.<sup>67</sup>

Several lawsuits have been brought in the **United States** and **Nigeria** over Pfizer's alleged testing of an experimental antibiotic drug, Trovan, on about 200 children during an epidemic of bacterial meningitis in Kano state, Nigeria in the 1990s. Lawsuits were filed in the United States under the Alien Tort Statute alleging that the company had violated customary international law by administering the drug to the children without the informed consent of the children and their parents, and further claiming that the drug trial led to the deaths of some children and serious injuries to many others. The cases were consolidated into a single lawsuit in the course of legal proceedings. In February 2011, the parties reached a settlement.<sup>68</sup> Lawsuits were also filed in the federal courts of Nigeria. While those filed by individual plaintiffs in 2001 were eventually withdrawn, a lawsuit initiated in May 2007 by the state of Kano raising criminal charges and civil claims against Pfizer and seeking over US\$2 billion in damages and restitution was settled out of court.<sup>69</sup> Furthermore, a lawsuit filed in 2007 by the Nigerian federal government against Pfizer and several of its employees in 2007 seeking nearly US\$7 billion in damages for the deaths of children involved in the drug trial was resolved in a final out-of-court settlement in 2009 for US\$75 million. In November 2013, 186 victims filed a new lawsuit in the Federal High Court in Kano, arguing that Pfizer was allegedly in breach of the 2009 settlement agreement for limiting the criteria for compensation. The hearings on this latest claim commenced in May 2014. In November 2014 the company agreed to pay out compensation according to the original agreement.<sup>70</sup>

In the **United States**, consumers have filed three class action lawsuits against the chocolate manufacturing giants Nestlé, Hershey and Mars over the companies' alleged use of child labour in the **Côte d'Ivoire**. According to the complaints, the companies regularly import cocoa beans from plantations in Côte d'Ivoire, which force children trafficked from neighbouring countries to work in hazardous conditions, under physical violence and without pay. The lawsuits state that the companies do not disclose that their suppliers rely on child labour, in violation of California state law. Legal firm Hagens Berman brought the cases on behalf of private consumers who say they would not have purchased the companies' chocolate products if they had known they were produced through child labour.<sup>71</sup> Nestlé and

<sup>67</sup> See CRIN's case study, available at: [www.crin.org/node/41133](http://www.crin.org/node/41133), and CRIN's case summary, available at: [www.crin.org/node/40084](http://www.crin.org/node/40084).

<sup>68</sup> The terms of the settlement are confidential. However, a joint statement issued by the parties explained that the plaintiffs in the US lawsuit will join the ongoing Healthcare/Meningitis Trust Fund process, which is being managed by an independent board of trustees in Kano, Nigeria. See Law360, 'Pfizer Ends Suits Over Nigerian Trovan Deaths', 22 February 2011. Available at: <http://www.law360.com/articles/227350/pfizer-ends-suits-over-nigerian-trovan-deaths>.

<sup>69</sup> BBC News, 'Pfizer and Nigerian state in deal', 30 July 2009. Available at: <http://news.bbc.co.uk/2/hi/africa/8177388.stm>.

<sup>70</sup> Information available at: <http://business-humanrights.org/en/pfizer-lawsuit-re-nigeria#c106513>.

<sup>71</sup> Confectionery News, 'Mars, Nestlé and Hershey face fresh cocoa child labor class action lawsuits', 30 September 2015. Available at: <http://www.confectionerynews.com/Commodities/Mars-Nestle-and-Hershey-face-fresh-cocoa-child-labor-law-suits>.

Hershey also face other lawsuits in the United States over their alleged use of child labour, including one brought by former child slaves that has now reached the US Supreme Court<sup>72</sup> and another by American investors seeking to force disclosure of company records about cocoa supply.<sup>73</sup>

In **Australia**, a six-year-old girl is leading a class action against the Australian federal government and the Immigration Minister over their failure to provide adequate healthcare to injured asylum seekers held in immigration detention. The pro bono case was filed in the Victorian Supreme Court in August 2014 by law firm Maurice Blackburn on behalf of the girl and potentially hundreds of other asylum seekers who have suffered an injury while detained on Christmas Island in the past three years. The lead plaintiff, a six-year-old girl known as A.S., arrived on Christmas Island with her parents but was separated from her mother soon after arrival, and has since suffered from post-traumatic stress disorder, an ongoing dental infection, allergies, separation anxiety and bed-wetting, has developed a stammer and is refusing food. The class action seeks compensation for the people who have suffered injuries as well as court orders that the Commonwealth has to provide the medical care that these people need.<sup>74</sup>

#### d. NGO standing

*Civil society plays an important role in monitoring and holding to account the expansive powers of government and the private sector, including through legal advocacy. NGOs should be able to file and intervene in cases in their own name without the need for individual victims, thereby enabling cases to be brought to redress widespread violations caused by laws, policies or practices while maintaining the anonymity of those affected. Where there are limitations to filing or intervening in a case, NGOs should be given the opportunity to demonstrate their interest in a matter before a fair and impartial court or judge; their ability to be involved in legal proceedings should not be arbitrarily restricted by the government.*

In about half of all countries (99), NGOs can bring cases in their own name on behalf of victims, its members or in the public interest. In just over half of all countries (107), NGOs can intervene in cases that have already been filed, usually as an *amicus curiae* or interested party. Interested

<sup>72</sup> Epoch Times, 'Can a US Court Hold Nestlé Responsible for Child Slavery in Africa?', 2 June 2015.

Available at:

<http://www.theepochtimes.com/n3/1377512-can-a-us-court-hold-nestle-responsible-for-child-slavery-in-africa/>.

<sup>73</sup> Bloomberg Business, 'Hershey Investors Suing Over Child Labor Can Pursue Files', 19 March 2014.

Available at:

<http://www.bloomberg.com/news/articles/2014-03-18/hershey-judge-says-shareholders-can-seek-child-labor-files-1->.

<sup>74</sup> The Sydney Morning Herald, 'Injured asylum seekers sue Scott Morrison, government over Christmas Island treatment', 16 August 2014. Available at:

<http://www.smh.com.au/federal-politics/political-news/injured-asylum-seekers-sue-scott-morrison-government-over-christmas-island-treatment-20140825-108epm>; Pro bono Australia, 'Six Year Old Detainee Takes Feds to Court', 26 August 2014. Available at:

<http://www.probonoaustralia.com.au/news/2014/08/six-year-old-detainee-takes-feds-court#>; Further information available at:

<http://www.mauriceblackburn.com.au/current-class-actions/people-detained-on-christmas-island>.

parties have a stake or legal interest in the proceedings, but are not directly involved in the case. An *amicus curiae* can offer particular expertise in a relevant subject matter. *Amici curiae* may be invited by the court or apply to enter into a matter. They are generally permitted to present written and oral submissions through counsel, and may lead evidence at a superior court level.

*Examples of interventions and amicus briefs submitted in domestic court cases involving children's rights:*

In **South Africa**, *amicus curiae* interventions have played a highly important role in several children's rights cases. For example, in October 2015, the Supreme Court of Appeal upheld children's right to participate in public interest litigation to ensure their views are heard in court. The case originated as a complaint by Hoerskool Fochville, an Afrikaans single-medium school, which opposed the placement by the Department of Basic Education of 37 English-speaking children in the school. The Centre for Child Law and Legal Resources Centre intervened to represent the interests of the children, and requested that the children fill in questionnaires about their experiences at the school. The school demanded access to the questionnaires, which CCL refused as the responses were to be kept anonymous. Reversing a lower court's decision, the Supreme Court of Appeal recognised the children's right to be heard and decided that the questionnaires should not be disclosed because it was not in the children's best interests.<sup>75</sup>

In the **United Kingdom (England & Wales)**, the High Court was asked to rule whether the anonymity provided to children previously involved in court proceedings automatically expires once they turn 18. The claimants, aged 17 at the time, had the benefit of an order under section 39 of the Children and Young Persons Act 1933 restricting the media from reporting on their identifying details. Just For Kids Law intervened on behalf of the claimants, arguing that "once a child concerned in proceedings, always a child concerned in the proceedings", regardless of whether the child turned 18 or the proceedings concluded. In June 2014 the High Court concluded that an order made under section 39 cannot extend to reports of the proceedings after the child has turned 18, a decision that was upheld by the Court of Appeal. However, both Courts were critical of the legislation.<sup>76</sup> New legislation has since been passed enabling courts to grant lifetime reporting restrictions for child victims and witnesses, but with no equivalent protection for defendants.<sup>77</sup>

In 2011 the **Australian** Human Rights Commission intervened in a case concerning two Afghan asylum seekers who were detained upon their arrival at Christmas Island (an

<sup>75</sup> Legal Resources Centre, 'Press Release: SCA upholds children's right to participation in public interest litigation', 8 October 2015. Available at:

<http://lrc.org.za/press-releases/3613-press-release-sca-upholds-children-s-rights-to-participation-in-public-interest-litigation>; See CRIN's case summary, available at: [www.crin.org/en/node/42070](http://www.crin.org/en/node/42070).

<sup>76</sup> See CRIN's case summary of the High Court decision, available at [www.crin.org/en/node/39441](http://www.crin.org/en/node/39441); Court of Appeal judgment available at: <http://www.yjlc.uk/wp-content/uploads/2014/12/JC-RT-v-CCC.pdf>.

<sup>77</sup> Just for Kids Law, *Further evidence to be submitted to the Joint Committee on Human Rights*. Available at:

[http://www.parliament.uk/documents/joint-committees/human-rights/Further\\_Submission\\_Just4Kids\\_Law\\_09\\_0315.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Further_Submission_Just4Kids_Law_09_0315.pdf); Youth Justice Legal Centre, 'Changes to anonymity for children in criminal cases', 9 april 2015. Available at: <http://www.yjlc.uk/changes-to-anonymity-for-children-in-criminal-cases>.

Australian territory) and subject to removal to Malaysia under a bilateral arrangement. This agreement provided for the transfer of asylum seekers arriving in Australia to Malaysia without prior assessment of their claims by the Australian authorities. The Australian Human Rights Commission stated in support of the second plaintiff - an unaccompanied 16-year-old - that the arrangement was not in the best interests of the child.<sup>78</sup> In August 2011 the High Court held that the Immigration Minister, as the child's guardian, must give written consent before an unaccompanied child is removed from Australia and that the Minister's decision is subject to judicial review. It also ruled that asylum seekers, including unaccompanied minors, arriving at Australia's offshore territories could only be transferred to another country if that other country provided certain safeguards for them.<sup>79</sup>

The **Irish** Human Rights Commission intervened as *amicus curiae* in a case in the Supreme Court in which non-national parents of Irish-born children had received deportation orders pursuant to an administrative scheme.<sup>80</sup> The Irish Human Rights Commission drew the Court's attention to the relevant principles relating to the protection of children, private life and family life in an immigration context, the principle of the right to an effective remedy and relevant European case law. In May 2008 the Supreme Court affirmed the High Court's decision, quashing the parents' deportation orders. The Court held that in the exercise of his discretion under the administrative scheme, the Minister for Equality and Law Reform was required to consider the parents' and children's constitutional rights and their rights under the ECHR. This must include express consideration of, and a reasoned decision on, the rights of the citizen child.<sup>81</sup>

Whether an NGO can file or intervene in cases usually depends on their standing under the law. In many countries, an NGO's standing to sue or intervene in a case depends on it having an interest in the case; often this interest must be "direct", "substantial" and/or "sufficient". Courts or judges have discretion as to whether or not to allow an NGO to file or intervene in a case - whether on behalf of a victim or without a victim - and thus NGO standing is determined and granted by a court or judge on a case-by-case basis. This is particularly the case for judicial review proceedings, especially in many Commonwealth countries, in which an NGO must demonstrate that they have a "sufficient interest" in the matter (**United Kingdom (England and Wales, Scotland, Northern Ireland), Barbados, Fiji, India, Tonga, Burkina Faso, Ireland, Zambia, Solomon Islands, Bahamas, Kenya, Mauritius, Nigeria**). The "sufficient interest" requirement has been interpreted broadly by courts in some countries to enable NGOs to bring public interest cases (**England and Wales, Northern Ireland, Kenya**) and narrowly by others (**Nigeria, Scotland**). Similarly, in many Commonwealth countries across the Caribbean, an

<sup>78</sup> Australian Human Rights Commission, 'High Court decision provides better outcome for unaccompanied children', 31 August 2011. Available at: <https://www.humanrights.gov.au/news/stories/2011-news-high-court-decision-provides-better-outcome-unaccompanied-children>.

<sup>79</sup> CRIN case summary available at: [www.crin.org/en/node/7191](http://www.crin.org/en/node/7191).

<sup>80</sup> Irish Human Rights Commission, *Amicus curiae* available at: <http://www.ihrec.ie/legal/amicuscuriae/nonnationalparents.html>

<sup>81</sup> *Oguekwe v. Minister for Justice* [2008] IESC 25. Available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IESC/2008/S25.html&query=%22amicus+and+curiae%22+and+%22convention+and+on+and+the+and+rights+and+of+and+the+and+child%22&method=boolean>.

NGO can demonstrate “sufficient interest” in the subject matter of a judicial review application if it acts at the request of the person who has been adversely affected by the administrative decision, or can show that the matter is of public interest and that it possesses expertise in the subject matter of the application (**Jamaica, St Lucia, Antigua and Barbuda, Belize, Dominica, Grenada, St Kitts and Nevis, St Vincent and the Grenadines**). In **Trinidad and Tobago**, if an NGO does not meet the “sufficient interest” test, it may still be granted leave to apply for judicial review in cases of particular public interest. In **Papua New Guinea**, a constitutional right is enforceable in the Supreme Court or the National Court on an application “by any person who has an interest in the protection and enforcement of human rights and freedoms”, which the Supreme Court has interpreted to include NGOs. In most countries with a French legal system, only individuals with a direct and personal interest in the matter have standing to bring a case. This effectively prohibits NGOs from bringing proceedings. However, in contrast with most Francophone countries, in **Côte d’Ivoire**, associations and NGOs have standing to bring litigation in their own names to challenge abuses of human rights. In **Togo**, this requirement can be interpreted slightly more broadly in administrative matters, but claimants still need to prove their interest to act.

In other countries, a sufficient connection is demonstrated if the interests the NGO represents are covered by their operations or activities. For example, in **Norway**, an NGO is permitted to file proceedings in its own name for non-compensatory relief to protect the interests of the general public or a specific group, provided the claim concerns matters and interests which are within the purpose and normal scope of the organisation. Similarly, in the **Netherlands**, associations and foundations with full legal capacity can bring a collective action to obtain a declaratory judgment on behalf of other persons, provided they can represent the interests of such persons according to their articles of association.

**Best practice:**

In some countries, although an NGO’s interest must normally be demonstrated, an NGO’s standing to sue or intervene in cases concerning children’s rights is explicitly recognised in law. In **Togo**, as a general principle, only a person having a legitimate direct interest to act (i.e. a child victim or their representative) can bring a case to court. However; the Children’s Code specifically states that any organisation working for the defence and protection of children’s rights can bring a case before a children’s judge. In **South Africa**, common law dictates that a litigant may sue or intervene in proceedings if it has a direct and substantial interest in the subject matter of the litigation, however an NGO may file challenges to violations of children’s rights under the Bill of Rights or the Children’s Act if it acts in the interest of the affected child, in the interest of a group or class of children or in the public interest. Similarly, in **Namibia**, generally an organisation must be able to show “a direct or substantial” interest that is more than just “abstract, academic, hypothetical or too remote” in order to bring a case. However, the recently enacted Child Care and Protection Act allows cases to be brought in children’s courts by anyone acting on behalf of a child who cannot act in his or her own name, anyone acting as a member of, or in the interest of, a group or class of children, or anyone acting in the public interest.

In some countries, organisations or associations are explicitly entitled to act on behalf of their members. For example, in **South Africa, Kenya and Zimbabwe**, the right of associations acting in the interests of their members to bring proceedings to enforce the Bill of Rights (or



Declaration of Rights, in the case of Zimbabwe) is constitutionally guaranteed. In **Andorra**, NGOs can challenge potential children's rights violations in criminal and civil courts if they seek to defend the interest groups they represent.

Many countries place other conditions or restrictions on NGO involvement in proceedings. Where an NGO acts on behalf of a victim in a case, they may be required to obtain the consent of the child or the child's legal representative (**Poland**). In some countries, there are restrictions on the types of cases an NGO can file, or on the types of organisations that can bring cases. For example, in **Portugal**, a popular action (*acção popular*) may be brought by associations and foundations that defend, among other things, public health, the environment, quality of life, consumer rights, and cultural heritage, regardless of whether they have a direct interest in the claim. In **Poland**, non-governmental organisations are permitted to intervene or bring challenges in cases concerning, among other things, discriminatory treatment and the child's allowance. In **Brazil**, an organisation may bring a public civil suit, provided that it has been incorporated for at least one year and its organisational purposes include, among other things, the protection of the public interest, the environment, consumers, or the rights of racial, ethnic or religious groups.

In a few countries, NGOs must first be approved by the government before they can conduct certain activities, such as file or intervene in court proceedings. For example, in **Lao People's Democratic Republic** and **Cambodia**, all activities of NGOs, including filing or intervening in cases, must first be approved by the government. In **Sudan**, all NGOs must register with the governmental Humanitarian Assistance Commission, which regularly places restrictions or bans on the operations of NGOs. It is reported that security forces prevented NGOs and human rights advocates from submitting complaints to the National Human Rights Commission on several occasions. In **Iran**, under the recently enacted Law of Penal Judgment, children's rights organisations must obtain authorisation to act as plaintiff on behalf of children under their protection from the Ministry of Justice.

Examples of children's rights cases brought by NGOs to domestic courts:

In **Colombia**, the Colombian Coalition for the Right to Education and New York's Cornell Law School International Human Rights Clinic assisted two citizens in bringing a lawsuit to challenge the imposition of fees for primary education under a law authorising the government to regulate fees charged for attending public schools. In 2010 the Constitutional Court agreed that the government has the obligation to not only guarantee access to primary education for all children, but to also guarantee that it is free of charge, and held that the law in question should be interpreted in light of this obligation. More than 12 million students are now guaranteed an education free of fees thanks to the result of this case.<sup>82</sup>

In **Kenya**, following the birth of a child, known as Baby 'A', who was born intersex, with both male and female genitalia, the hospital had entered a question mark for the child's biological sex in the documentation. The Registrar of Births and Deaths refused to issue a birth certificate without selecting one of only two available options - male or female. The CRADLE together with Baby A, through the mother, brought a case to the High Court, alleging a

<sup>82</sup> See CRIN's case summary, available at: [www.crin.org/node/7090](http://www.crin.org/node/7090), and CRIN's case study, available at: [www.crin.org/en/node/42344](http://www.crin.org/en/node/42344).

violation of Baby A's constitutional rights and relying on Article 7 of the CRC and the African Charter on the Rights and Welfare of the Child. In December 2014 the High Court of **Kenya** ordered that a birth certificate be issued to the child. The decision will, however, have a wider impact as the Court has asked the Attorney-General to designate a body which will collect data about intersex people in the country. The Attorney-General will also have to submit to the Court a report on the status of a statute regulating the place of intersex as a sexual category and guidelines and regulations for corrective surgery for intersex persons. The judgment is seen as a "landmark ruling" and a "first step towards recognising intersex people".<sup>83</sup>

In **South Africa**, the Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) successfully sued to invalidate statutory rape and statutory sexual assault laws which criminalise consensual sexual behaviour between adolescents. In October 2013 the Constitutional Court ruled that laws that criminalise consensual sexual behaviour between adolescents violate their rights to dignity and privacy and the best interests principle under the Constitution, and are therefore invalid.<sup>84</sup>

In **Bangladesh**, Bangladesh Legal Aid and Services Trust (BLAST) and Ain o Salish Kendro (ASK) filed a public interest litigation case under the Constitution to address the caning, beating and chaining of children, both boys and girls, studying in public and private schools, including madrasahs. The case alleged the abuse and failure of the government to comply with statutory and constitutional duties to investigate allegations of corporal punishment. In 2011 the Supreme Court found that corporal punishment was a violation of children's rights, and ordered that the practice be prohibited not only in schools, but across all settings.<sup>85</sup> In reporting to the UN Committee on the Rights of the Child in 2015, the government noted that a number of legislative measures are still being developed, including the "Ban on Corporal Punishment Policy and Guideline 2015" and the Children Rules 2015. The government also reported that a law to ban corporal punishment of children in all educational institutions and workplaces is being drafted, as well as a comprehensive law to ban all forms of violence against children, including corporal punishment.<sup>86</sup>

In **India**, Bachpan Bachao Andolan filed a public interest petition under the Constitution concerning the serious violations and abuse of children who were forcefully detained in circuses. The children were trafficked from impoverished parts of Nepal and India and forced to stay and perform in circuses where they were frequently sexually, physically and emotionally abused and kept in inhuman conditions. In April 2011 the Supreme Court ordered, among other things, that the employment of children in circuses be prohibited; raids be conducted on all circuses to liberate the children and examine the violations of their

<sup>83</sup> See CRIN's case summary, available at: [www.crin.org/node/40827](http://www.crin.org/node/40827), and CRIN's case study, available at: [www.crin.org/node/41811](http://www.crin.org/node/41811).

<sup>84</sup> See CRIN's case summary, available at: [www.crin.org/node/41741](http://www.crin.org/node/41741), and CRIN's case study, available at: [www.crin.org/node/41745](http://www.crin.org/node/41745).

<sup>85</sup> See CRIN's case summary, available at: [www.crin.org/node/7080](http://www.crin.org/node/7080).

<sup>86</sup> Global Initiative to End All Corporal Punishment of Children, *Country report: Bangladesh*, last updated January 2016. Available at: <http://www.endcorporalpunishment.org/assets/pdfs/states-reports/Bangladesh.pdf>.

rights, and that the rescued children be kept in the Care and Protective Homes until they are 18; and the state frame a proper scheme of rehabilitation of rescued children from circuses.<sup>87</sup>

Following a case litigated by the Mental Disability Advocacy Centre together with a human rights lawyer, the Supreme Court of **Slovakia** ruled in October 2015 that denying individualised support to children with disabilities so that they can be educated at mainstream schools could amount to unlawful discrimination, citing the CRC and the UN Convention on the Rights of Persons with Disabilities. The decision was issued in relation to a case of a 10-year-old girl with an intellectual disability and a hearing impairment who was refused enrolment at the local primary school because the school would not be able to cope with her disabilities. The ruling is of significance to more than 20,000 children with disabilities in Slovakia who end up placed in segregated schools.<sup>88</sup>

In **Australia**, the Public Interest Advocacy Centre together with the law firm Maurice Blackburn brought a class action on behalf of children who had been unlawfully arrested, imprisoned and in some cases strip-searched by New South Wales (NSW) Police due to errors in the police database. In a decision handed down in September 2013, the Supreme Court of NSW found that the NSW Police had unlawfully imprisoned a large number of children in recent years.<sup>89</sup> In July 2015 the NSW Police agreed to pay a total of A\$1.85 million in compensation to affected children across the state.<sup>90</sup>

#### **IV. Practical considerations**

*Practical obstacles such as a long distance to travel to a court, the financial burden of seeking legal advice and filing court documents or intimidating courtroom procedures can be difficult to overcome for many adults. For children these can render access to justice impossible. Therefore, it is crucial to ensure that formal restrictions are relaxed as necessary and appropriate, offering children and their representatives the opportunity to work constructively with the judicial system to challenge rights violations.*

##### **a. Venue**

In more than half of all States (108), the formal restrictions related to the venue or the filing of a case are relaxed in some form or another. Most advanced in this respect are the legal provisions in **Panama** (see box below).

<sup>87</sup> See CRIN's case summary, available at: [www.crin.org/node/7184](http://www.crin.org/node/7184).

<sup>88</sup> MDAC, 'Slovakia: Supreme Court rules that denial of inclusive education to children with disabilities can amount to discrimination', 29 October 2015. Available at: <http://www.mdac.org/en/news/slovakia-supreme-court-rules-denial-inclusive-education-children-disabilities-can-amount>.

<sup>89</sup> *Konneh v State of NSW* (No.3) [2013] NSWSC 1424. Available at: <https://www.caselaw.nsw.gov.au/decision/54a63b193004de94513db1ae>.

<sup>90</sup> The Sydney Morning Herald, 'Wrongful detentions: NSW Police to pay \$1.85 million in compensation after settling class action', 3 August 2015. Available at: <http://www.smh.com.au/nsw/wrongful-detentions-nsw-police-to-pay-185-million-in-compensation-after-settling-class-action-20150802-gipqqu.html>.

**Best practice:**

In **Panama**, youth courts have exclusive jurisdiction over every proceeding in which a minor is involved. The law stipulates that child plaintiffs may file cases in the court of their domicile or habitual residence, thereby removing the need for children to travel long distances in order to challenge violations of their rights. Furthermore, the case process shall be strictly confidential, without solemnities or formalities, and shall be held in a simple and natural environment, even in a place different from the headquarters of the Court, depending on the circumstances of the case.

Research identified specialised children's courts in at least 40 percent of all countries. However, some States have limited the jurisdiction of juvenile courts to cases involving children under the age of 16 only (**Nepal, Malta and Singapore**).

Specialised children's courts should have wide jurisdiction to hear all types of cases concerning children. The child courts in **Bolivia** and **Ecuador** can hear any case falling within the countries' Child Codes. In other countries, however, the jurisdiction of the specialised courts may be narrowly limited. Often they can only hear juvenile justice cases (where the child is charged with a criminal offence) (**Australia**, some countries in MENA (**Bahrain, Egypt, Libya, Morocco, Qatar, Syria and Tunisia**), **Barbados, Croatia, Malta, St Lucia, Fiji, Ghana, Guinea, Mauritius, Samoa, Singapore, Spain, Sri Lanka, Switzerland, Turkey and England and Wales and Northern Ireland**). It is also common that specialised courts are empowered to decide on cases involving children in a vulnerable situation (**Angola, Latvia, Lesotho, Liberia, Monaco, Namibia, Zimbabwe**) or a combination of juvenile justice and vulnerable children cases (**Antigua and Barbuda, Bahamas, Belgium, El Salvador, France, Gambia, Greece, Guatemala, Italy, Kenya, Nigeria, Peru, South Africa and Uganda**).

The minimum number of specialised courts is sometimes prescribed by law in order to ensure that children do not have to travel long distances to seek justice (**Bangladesh, Algeria and Kazakhstan**). However, in other countries, the number of specialised courts is clearly insufficient: **Tanzania** has only one court located in Dar Es Salaam; in **Haiti**, despite a 1961 law requiring the establishment of a total of five children's courts, to date just one operates in the capital; and in **Myanmar** only two courts exist to serve a population of more than 16 million children. Although legislation to that effect has been passed, **Mauritania** and **Trinidad and Tobago** do not yet have any functioning specialised courts.

Where separate juvenile courts do not exist, States must at least ensure that the judiciary has specialist expertise in children's rights. To that end, designated judges or divisions of the ordinary courts have been established to handle cases concerning children in several African countries (**Algeria, Togo, Swaziland, Madagascar**) but also in **Macedonia, Kosovo and Lao People's Democratic Republic**.

Some countries have relaxed the formalities of lodging a case in court in relation to child complainants. An administrative action for the protection of rights may be filed verbally in **Ecuador** and the assistance of an attorney is not required at that stage. In the **Democratic Republic of Congo (DRC)**, proceedings may be initiated by the child's spontaneous

declaration. Proceedings may also be initiated orally in **Paraguay** and, if the court considers it necessary or reasonable, in the **Solomon Islands**.

Filing a complaint with a national human rights body is usually far more straightforward than filing a court case. Ombudspersons in **Slovakia**, **Kosovo** and **Serbia** accept complaints made verbally or in writing and in **Israel** the complaints may be submitted online via a website or email.

Formalities are further relaxed in those countries which have provisions for the court to sit at a place and time aside from the regular courtroom (**Panama**, **Tanzania**, **Antigua and Barbuda** and **Trinidad and Tobago**). And in the **Dominican Republic** the law requires judges and the public prosecutor not to wear a cap or a gown, to facilitate better communication with children. More generally, **Zimbabwe**'s children's courts must follow procedures different to those in the ordinary courts and conduct the proceedings in a manner that is best to do "substantial justice."

Finally, a number of **francophone countries**<sup>91</sup> rely on mobile courts (called *audiences foraines*) to facilitate the rural population's access to justice and to lessen the backlog of cases that is endemic in some of these countries.<sup>92</sup> Not much research has been undertaken to determine how effective these hearings are and whether the procedural rights of the parties involved are observed.

## **b. Legal assistance**

*Justice is expensive. But it is also a human right. States must ensure that no person is prevented from seeking justice because of an inability to finance their case out of pocket. Given that children are almost always at a disadvantage when it comes to financial means to pay lawyers or court fees, it is essential for effective access to justice that a legal aid system is in place to enable children to bring challenges to violations of their rights in any manner of legal proceedings.*

### *i. State-funded legal aid*

#### Availability of legal aid for children

Functioning state-funded legal aid systems are lacking in over a fifth of countries worldwide (42). In the remaining countries, some form of legal aid is available, though only 28 countries have secured legal aid for all types of cases. Of these, 18 are in Europe,<sup>93</sup> five in the Americas;

<sup>91</sup> Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Comoros, Congo, Djibouti, DRC, Gabon, Guinea, France, Mali, Madagascar, Niger, Senegal.

<sup>92</sup> See *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, Democratic Republic of Congo and Somalia: Summary*, May 2014, available at: [http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP\\_ROL\\_Mobile%20CourtsEvaluation\\_Nov2014.pdf](http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_ROL_Mobile%20CourtsEvaluation_Nov2014.pdf).

<sup>93</sup> Belgium, Bulgaria, Croatia, Estonia, Finland, France, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Portugal, Romania, San Marino, Slovakia, United Kingdom (England and Wales, Northern Ireland and Scotland).



<sup>94</sup> Africa is represented by **Djibouti** and **Gambia**; Asia by **India** and **Kazakhstan**; and the **Marshall Islands** for Oceania.

The right to legal aid for children is sometimes guaranteed by the Constitution (**Marshall Islands, Egypt, Oman**) or by the Children's Act (**Bulgaria**) though this is not always a guarantee that free legal assistance is in practice available to children. Implementation is a major problem in various countries, many of which are in Africa (**Benin, Burundi, Cameroon, Côte d'Ivoire, Gambia, Malawi**). In **Nigeria**, the Child Rights Act's provisions on legal aid have not been implemented in all states. Sometimes legal aid may be inaccessible simply for practical reasons, like in **Lesotho** where the only Legal Aid Office is located in the capital city, leaving a large part of the population without access to its services, or due to a lack of awareness among the population of the existence of such services (**Gambia**).

As already mentioned, most countries only provide legal aid for particular types of cases. Very commonly, this is restricted to legal representation for the accused in criminal cases (**Azerbaijan, Bahrain**). In **Kuwait**, criminal legal aid is always automatically available to defendants charged with felonies but only available on a discretionary basis for misdemeanours. Some States only have criminal legal aid for capital offences (**Brunei Darussalam, Bahamas**). In 31 countries, legal aid is fully available from arrest to trial and then to appeal, and partially available in 103. This means that in 63 or almost a third of all countries, children against whom charges are brought do not fully have access to free representation. Legal aid for victims of crime is provided in some countries but it is not widespread (**Sweden, San Marino, Moldova, Greece, Chile**). Although both children accused of committing offences and child victims of crime in **Pakistan** are granted the right to free legal assistance at the expense of the State by law, no government funding has yet been allocated for this purpose.

Civil and administrative cases are also commonly covered by legal aid. Some countries specifically provide legal aid for cases brought in the public interest (**Pakistan**). In **Angola**, however, legal aid for administrative matters is only possible in cases heard by the Constitutional Court. Finally, children are sometimes specifically guaranteed free legal representation before the juvenile courts (**Algeria, Botswana**).

#### Eligibility of children for legal aid

Some States provide legal aid to children automatically (**Belgium, Fiji, India, Luxembourg**), while most have eligibility criteria that need to be met. Typically, the eligibility criteria relate to the financial status of the applicant (**Montenegro, Finland**). In some countries, the financial status of the child's parents will not be considered (**Lithuania, Luxembourg**) or considered only if they are assisting the child in bringing the case (**Finland**), but elsewhere the financial status of the child's parents or other persons in their household might be taken into account when determining a legal aid application.

In some places, obtaining legal aid is less than straightforward for people in financial difficulty. In **Zambia**, legal aid beneficiaries need to pay a fee equal to almost half the average monthly income for the country. And in **Singapore**, legal aid is not free, but it is subsidised.

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<sup>94</sup> Canada, Colombia, Paraguay, United States and Venezuela.

Additional criteria which may be considered in the determination of legal aid applications include the necessity of the lawsuit to protect the individual's legal rights (**China**) or whether the suit is reasonable and the interests of justice require the applicant to be represented (**Namibia**). Decisions regarding legal aid applications should be subject to review. In **Croatia**, even if an application for legal aid has been rejected, courts may order legal aid for reasons of fairness in any judicial procedure, upon the request of a party.

In 29 countries,<sup>95</sup> children who have been granted legal aid have the right to appoint a lawyer of their own choosing. But in only nine countries, legal aid beneficiaries are entitled to a lawyer with experience commensurate with the seriousness of the case (**Argentina, Belgium, Dominican Republic, Finland, Honduras, Iceland, Latvia, Liechtenstein**).

*Best practice examples:*

**Belgium** rises to the top of the table in our global ranking of States, but it is also the only country which has managed to secure full points in the legal aid section of the survey.<sup>96</sup> The right to legal assistance is constitutionally guaranteed in Belgium. Everyone is entitled to free legal advice and some categories of people, including minor children, are entitled to free legal representation. Child beneficiaries of legal aid have the right to a lawyer of their own choosing to represent them.

Also worthy of highlighting is **Argentina's** Law 26061 which requires that children are provided by the State with free representation by a lawyer specialising in children's issues (*Abogado del Niño*).

*ii. Non-state*

*Pro bono* services by law firms, legal clinics, university law departments, legal charities and others should complement State legal aid systems but, in countries where legal aid is non-existent, such services have turned into a substitute (**Ethiopia, Swaziland, Bahamas**). The research revealed that active providers of *pro bono* legal services who may assist with children's rights cases operate in less than 60 percent of countries (113). The provision of *pro bono* is particularly patchy in certain regions - only half of the African continent (28 out of 54 countries), less than a third of MENA (6 out of 21)<sup>97</sup> and just three of the 14 countries in Oceania<sup>98</sup> were found to have active providers of *pro bono* services who may work on children's cases.

Systematic provisions for the promotion of *pro bono* culture exist in far fewer countries (26). In some countries, lawyers are required to undertake a certain number of hours of *pro bono* work per year in order to continue practising; for example, all practising lawyers in the **Philippines** must provide a minimum of 60 hours of free legal aid services annually and in **Uganda** - 40 hours. In others, Bar Councils or other professional organisations are heavily involved in

<sup>95</sup> Andorra, Argentina, Azerbaijan, Belgium, Brazil, Canada, Cyprus, Denmark, Djibouti, Finland, France, Guatemala, Iceland, Italy, Liechtenstein, Macedonia (FYROM), Malawi, Maldives, Mauritania, Slovenia, Spain, Sudan, Sweden, Switzerland, Syria, Trinidad and Tobago, United States, Uruguay and Venezuela.

<sup>96</sup> See CRIN's access to justice scorecard, available at: [www.crin.org/node/42358](http://www.crin.org/node/42358).

<sup>97</sup> Egypt, Iraq, Israel, Lebanon, Palestine and Qatar.

<sup>98</sup> Australia, New Zealand and Papua New Guinea.

coordinating and promoting *pro bono* practice (**France, India, South Korea**). Members of the Bar in **Tajikistan** are expressly required to provide free legal aid, among other cases, to children under 18 years of age who don't have a legal guardian. Clearinghouses (institutions which match clients seeking *pro bono* assistance with lawyers who can take their case) exist in **Poland, Romania, Australia, England** and others.

Unfamiliarity with the concept of *pro bono* is a significant challenge in some countries. For example, although no legal provisions prohibit or restrain *pro bono* work in **Romania**, it is reported that lawyers are generally reluctant to engage in it due to hesitation related to professional rules prohibiting advertising and unfair competition among lawyers. Similarly, other countries in Eastern Europe and Central Asia lack an established tradition of *pro bono* (**Ukraine, Azerbaijan, Kazakhstan, Mongolia**). There is a distinct lack of *pro bono* services in the MENA region. In one instance a lawyer in **Jordan** has been disbarred for providing *pro bono* legal help to refugees. Finally, a further difficulty is the shortage of legal practitioners in some countries as is the case in **Mozambique, Rwanda** or **Tuvalu**, which is reported to have just seven practising lawyers for its entire population of almost 10,000 including 4,000 children.

### *iii. Court costs*

Even where free legal assistance covers the expense of the advice of and representation by a lawyer, there may be additional financial outlays such as fees for filing court documents. The research showed that children can be excused from such payments in at least some circumstances in approximately 60 percent of countries (119).

Few countries have automatic exemptions for child plaintiffs. All proceedings involving children in **Costa Rica** must be free, and the State has the obligation to provide free technical defence and legal representation. Filing fees and other court costs are automatically waived for cases relating to children in **Belgium, Uruguay** and **Venezuela** or for cases involving the protection of children's rights in **Romania, Moldova, Russia** and **Georgia**. In **Vietnam** social organisations bringing legal action in the public interest are explicitly exempted from having to pay court charges. Plaintiffs in certain types of actions may be automatically excused from paying the court costs, e.g. domestic violence cases in the **Seychelles** and **Moldova**, a human rights enforcement application in the National Court or human rights application in the Supreme Court in **Papua New Guinea**. In several countries, all legal costs are covered by legal aid (**Algeria, Djibouti, San Marino** and **Sao Tome and Principe**).

In other countries general provisions allowing a party to be excused from payment of court costs, wholly or partly, on the basis of their indigent financial status could be applied to child plaintiffs. Examples include: **Bhutan, Bosnia and Herzegovina, Estonia, Guinea-Bissau, Iran, Liberia, Russia, Serbia, Singapore, Tuvalu, Vietnam**. Additional factors may also be considered: in **Kuwait** the court's decision depends on the prospect of success of the claim and in **Poland** the court will assess whether granting legal aid is necessary to protect the interests of the plaintiff. It must be noted that, despite provisions to that effect, qualifying for such fee waivers may be difficult in practice because there is no legal definition of the term 'indigent' (**Burundi**) or because the document required to prove poverty itself costs money and it is not always accepted by the court (**Mozambique**).

The English legal term ‘pauper’ (meaning a destitute person who must be supported at the public’s expense) appears on the statute books in many countries with a common law legal system (**Sierra Leone, Eritrea, Burma, Namibia, Lesotho, Uganda**). Persons bringing lawsuits *in forma pauperis* will not be required to pay court costs but some money may be recoverable if their action is successful (**Bangladesh, Pakistan**).

Filing complaints alleging rights violations with a national human rights body or an Ombudsman is always free of charge (**Andorra, Montenegro, Kosovo**). The same is true for complaints to the UN bodies, including complaints to the UN Committee on the Rights of the Child under OP3, and regional mechanisms.

### c. Timing

*Strict rules regarding the time by which a case must be initiated are one of the biggest obstacle to access to justice for children. Such limits should not be applicable at least until the child turns 18 and in some cases of serious violations they should not be applicable at all.*

Provisions which allow for the time limits to be relaxed in certain situations exist in 84 or just 43 percent of countries.

#### *Criminal law*

For any criminal offence, the operation of the statute of limitation is suspended until the child reaches 18 in **Angola** and **Guatemala**, 16 in **Norway** and 21 in **Burundi**. Many countries have no time limitation for the prosecution of the most serious criminal offences - **Australia, Finland, Ireland, Liberia, Liechtenstein, Netherlands, St Kitts and Nevis** and others. In other countries, the statute of limitation is suspended until the child is 18 (**Croatia**) or 23 (**Hungary**). In **Lithuania** the limitation period cannot expire before the victim turns 25 years old, while in **Greece**, the time limit for criminal offences is suspended until the age of majority and an additional period of one year for misdemeanors or three years for felonies.

Research identified provisions for the suspension of limitation periods for the prosecution of child sexual abuse in at least 24 countries. Most suspend the statute until the child reaches 18 years of age (**Andorra, Brazil, Chile, Iceland, Liechtenstein, Madagascar**), but **Denmark** suspends until 21 and **Poland** until 30. In **Finland**, the period cannot expire before the victim turns 28 years of age. Any sexual offence against a child under the age of 12 will not be subject to a statute of limitations in **Switzerland** and for other serious offences against older children, the limitation period cannot expire before the victim turns 25. In **Israel**, however, the statute is suspended only in relation to sexual abuse committed by the child’s parent.

**Czech Republic** and **Hungary** have specific provisions concerning child victims of trafficking that suspend the running of limitation periods while they are under the age of 18. And **Turkey, Israel** and **Guinea** have specific provisions for the suspension of limitation periods in relation to crimes perpetrated against a child by their parent or guardian or other relative.

Finally, legal provisions prohibiting the application of any periods of limitation in relation to serious breaches of international humanitarian law were identified in just a third of countries (64).

*Best practice examples regarding statutory limits in relation to sexual offences:*

In 2015 **Iceland**'s Penal Code was amended to provide that the running of the limitation period in relation to some serious sexual offences against children does not begin to run until the victim turns 18. Previously, the suspension operated only until the victim reaches the age of consent which is 15 years old.

In **Finland** the Supreme Court has ruled that victims of child molestation could bring a civil action for damages even after the 10-year limitation period had passed, as the symptoms that constituted the injury arose later. Also in the **Netherlands**, a court has ruled that the period of limitation must be deemed to only start when the harm manifests itself in the case of a victim of child sexual abuse who suffered Post Traumatic Stress Syndrome (PTSS) some years later.

*Civil and constitutional law*

About a third of all countries have provisions relaxing the law on statutory limitations for civil and constitutional matters concerning children. In legal systems based on English common law, the running of the limitations period is commonly suspended in relation to 'persons under a disability'<sup>99</sup> - **Bahamas, Ghana, Kenya, Nigeria, Samoa, Singapore, Solomon Islands, Uganda and Zambia**. The typical age at which the time to bring a claim starts to tick is the age of majority, or 18 in most countries, but it can be a higher age, as is prevalent in African countries, e.g. 20 in Burkina Faso, 21 in the **Solomon Islands, Papua New Guinea, Kenya and Liberia**. Limitation periods in **Ghana** are suspended for "infants" though a legal definition of an infant could not be located. The age can also be lower, for example, **Nepal** only allows the suspension of the statute of limitations until the child turns 16, though the court may still accept the filing if the plaintiff can, within 15 days, demonstrate why it was not possible to file the suit within the limitation period.

**Nigeria and St Lucia** have eliminated any time limitations for filing a case alleging a violation of fundamental rights. In common law systems, judicial review proceedings are typically constrained by a short limitation period (e.g. three months in New South Wales and 60 days in Victoria, **Australia**, 30 days in **Marshall Islands**, three months in **Belize, Trinidad and Tobago, Ireland**, 90 days in **Pakistan**), however, courts may be given the power to admit cases on a discretionary basis (**Trinidad and Tobago, Vanuatu, Uganda**). In **Scotland**, there is no specified time limit on seeking judicial review but the court does have discretion to refuse to grant a review if there is any delay on the part of the applicant which has appeared to impair the proper administration of the case. In **Bangladesh**, challenges to public actions are subject to a strict one-year limitations period, however, for children this period does not begin to run until the child turns 18. In **Australia**, limitation periods are not being enforced in relation to civil claims against the State for child sexual abuse in New South Wales and Victoria.

Sometimes, special provisions relaxing the limitations period only exist in relation to certain types of proceedings, e.g. filiation or paternity proceedings (**Belgium, Croatia, Netherlands**

<sup>99</sup> Meaning persons who lack legal procedural capacity by reason of their health or age. Usually all children under the age of majority will be considered to be under a disability in law.



and **Nicaragua**) or child maintenance (**Croatia** and **Nicaragua**). In **Togo**, **Slovakia**, **Uzbekistan** and **Turkmenistan** no statute of limitations will be deemed to apply to civil claims for harm to a person's life or health. Other countries only relax the limitation period in relation to children who are unrepresented - **Kazakhstan**, **Estonia**, **Romania**, **Portugal** and **Sao Tome and Principe**.

In **Guatemala**, although there is no relaxation of time periods to bring a case for a children's rights violation, children can bring an action against their parent or guardian for failing to do so within the limitation period.

#### *NHRIs and regional mechanisms*

Complaints to a national human rights body or the Ombudsman are generally subject to short limitation periods: six months in **Montenegro**, one year in **Denmark** and two years in **Bulgaria**. There is no specified deadline to submit the complaint to the Ombudsman in **Belize** though he may refuse to bring an investigation if the complainant has deferred for too long. The Ombudsman of **Montenegro** may waive the limitation period in light of the importance of the complaint. Research did not identify provisions in any country which extends this time limit specifically in relation to complaints filed by children.

Complaints to regional mechanisms must usually be submitted within a "reasonable time" (**African Committee of Experts on the Rights and Welfare of the Child**, **African Commission on Human and Peoples' Rights** and **African Court on Human and Peoples' Rights**) or two months (**East African Court of Justice**) or six months (**Inter-American Commission on Human Rights** and **European Court of Human Rights**) or one year (**UN Committee on the Rights of the Child**) after exhaustion of domestic remedies.

#### **d. Evidence and Privacy**

*Even once legal advice has been obtained, the necessary documents are filed and the action has been ruled admissible by the court, there may still be practical obstacles which prevent children from meaningfully participating in the judicial process. In particular, children must be allowed a voice in the courtroom and an opportunity to give evidence free of intimidating procedures that may hinder their ability to express how their rights have been violated.*

Six countries failed to score any points in our ranking for provisions on evidence by children and protection of children's privacy (**Botswana**, **DRC**, **Equatorial Guinea**, **Palestine**, **Palau** and **Somalia**). On the opposite end of the spectrum, full points were awarded to a total of 48 or almost a quarter of all countries.<sup>100</sup>

#### *Ability to give evidence*

<sup>100</sup> Albania, Australia, Azerbaijan, Bahamas, Belgium, Belize, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Fiji, Finland, Gambia, Georgia, Grenada, Iceland, Italy, Jamaica, Republic of Korea, Latvia, Luxembourg, Macedonia (FYROM), Mauritania, Mauritius, Namibia, Netherlands, New Zealand, Nicaragua, Panama, Poland, Portugal, Romania, St Lucia, St Vincent and the Grenadines, Samoa, South Africa, Sweden, Tanzania, Thailand, Togo, Turkey, Uganda, Ukraine, England and Wales and Northern Ireland and Vanuatu. See CRIN's scorecard for details, available at: [https://www.crin.org/sites/default/files/access\\_to\\_justice\\_scorecard.pdf](https://www.crin.org/sites/default/files/access_to_justice_scorecard.pdf).

Failing to secure the possibility for children to provide evidence in court, should they wish to do so, violates their right to participation and is contrary to their best interests. Though children should be allowed to give evidence in all types of proceedings if they would like to, regardless of their age, a quarter of countries surveyed fall short of making that a reality by imposing a minimum age for appearing as a witness or by attaching limited weight on testimony provided by children. **Lao People's Democratic Republic** bars children altogether from giving evidence in court and in **Kosovo** children under the age of 14 will only be called to testify if "necessary to solve a case".

Rigid age limits fail to recognise the evolving capacities of the child and the fact that some children may be mature enough to testify at an earlier age than others. The research established that, where they do exist, minimum ages for giving testimony vary greatly - from 7 to 16 (see table below). No age limit for testifying exists in **Scotland, Eritrea** and **Palau**, but rather the court determines whether to allow evidence by a child. In **Kenya, Pakistan** and **Nepal** children may give evidence provided they are able to understand and give rational answers to the questions asked of them.

| <u>Minimum age:</u> | <u>Countries:</u>  |
|---------------------|--|
| 7                   | Cabo Verde, Mongolia, Mozambique, Sao Tome and Principe, South Sudan;                    |
| 12                  | Venezuela;   |
| 13                  | Monaco, Tunisia;   |
| 14                  | Brazil (criminal cases), Guatemala (without parental consent), Libya, Paraguay, Uruguay; |
| 15                  | Palestine, Indonesia, Iraq;  |
| 16                  | Burkina Faso, Burundi, Morocco (civil matters).  |

### *Oaths*

Less than half of all countries (92) allow children to give testimony without taking an oath in certain circumstances and without being liable to any penalty for potentially false evidence. However, the ability to give unsworn evidence is usually reserved to younger children, e.g. children under the age of 12 (**Pakistan, Rwanda**), 14 (**Afghanistan, Italy, Ireland, Kiribati, Jamaica**) or 16 (**Cambodia, Netherlands, Comoros, Burkina Faso, Georgia, Niger**). In **Belize** and **Malaysia**, the decision whether to absolve a child from the oath rests with the court. Whereas in **Kosovo** and **Dominica** on the other hand children are never required to take an oath.

### *Value accorded to children's testimony and provisions pertaining to false evidence*

It is not uncommon for a child's testimony to be accorded lesser value than that of an adult, especially in criminal trials. In **Malaysia** and **Jamaica** it is not possible to convict a person of a criminal offence solely on the basis of a child's testimony. Corroboration of the child's testimony is also required in **Kenya** to convict someone, unless the crime is a sexual offence and the court is satisfied that the victim is telling the truth. In **Iran** children can testify if deemed mature enough, but evidence provided by females is accorded less value than that provided by males and some offences can only be proven through evidence provided by males.

More generally, other vague provisions may allow the courts to avoid relying on children's evidence, for example, in **Paraguay** child testimony must be taken into account in accordance with the child's age and maturity, allowing significant discretion to the court. Further, the Juvenile Court in **Tanzania** has discretion to act on or disregard the child's testimony depending on their credibility and whether the court believes that the child understands and appreciates his or her duty to tell the truth.

Some countries have enacted protections for child witnesses from criminal responsibility in relation to providing evidence which is false, e.g. **Kazakhstan** (though the protection only applies to children under the age of 16). Elsewhere, however, children may be criminalised for giving false evidence the same way as adults would be, e.g. **Kiribati** and **Tonga** where the applicable sentence is a term of imprisonment of two years or, for male children only, a sentence of whipping. In **Dominica**, children who take the oath may be liable for perjury or if they don't swear an oath, the Children and Young Persons Act creates a specific offence for children who give unsworn false evidence.

#### *Additional limitations*

Some countries impose further limitations on children's ability to testify which directly impact their access to justice. In **Guatemala** children under 14 may only testify with parental consent. In **Indonesia**, children testifying in court must be accompanied by their parents and/or confidants. And in **Sao Tome and Principe** a "personality check" may be undertaken for children under 16 years old testifying on sexual abuse.

In several MENA countries, the possibility for children to give evidence is severely restricted. In **Yemen** children are only allowed to testify about events where no adult person was present. In **Qatar** children may not testify against their parents and in **Bahrain** children may not testify against certain relatives even when the child is the victim of a crime at the hands of that relative.

#### *Child-friendly procedures*

Even where children are capable and eligible to give testimony, it is important to facilitate the process through child-friendly procedures so that child witnesses are able to participate effectively in judicial proceedings affecting them. This is especially true in cases where the child is the victim of a crime and the process of testifying should not re-victimise them.

No child-friendly procedures for hearing evidence could be identified in 67 or over one third of countries. In the remaining two-thirds (130), the most common are provisions allowing for certain persons to be excluded while the child is giving evidence (for example, the accused in a criminal trial), provisions requiring the presence of a person charged with working with the child

(for example, their parent, a social worker, therapist or other) and provisions for the use of technology that allows the child themselves to give evidence from a remote location, thereby avoiding their presence in the intimidating environment of the courtroom.

However, child-friendly procedures for hearing evidence are occasionally limited to younger children only, e.g. children under 16 in the **Marshall Islands**.

***Best practice example:***

Proceedings in **South Africa**'s children's court must be conducted in an informal, relaxed and non-adversarial manner. The court may require that certain procedures be undertaken in the best interests of the child, including: intervening in the questioning or cross-examination of a child; questioning of children serving as a party or witness in proceedings through an intermediary; and removal of any person present in the room where the proceedings take place if a child is present at the proceedings.

In criminal proceedings, if it appears to the court that a child witness may be exposed to undue mental stress or suffering if they testify at criminal proceedings, the court may appoint an intermediary through which the child can give their evidence. The court may also direct that the child witness give their evidence via an intermediary at any place which is informally arranged to set that witness at ease, or is so situated that any person whose presence may upset that witness is out of their sight and earshot.

***Protection of the child's privacy***

Almost three quarters of countries (146) have legal provisions to protect the privacy of children involved in legal proceedings in some form. These could range from closed door hearings of sensitive cases to criminalising the publication of identifying information of children involved in court proceedings. Such provisions are present in all countries of the European Union.

Children's access to justice requires that trials are closed where necessary to protect the rights of children or open to the public and media where the child willingly chooses to bring attention to their challenge. In some countries, however, trials involving children are by default closed to the public (in the Youth Courts in **Samoa**), but more commonly judges will have the power to order a closed trial on a request by a party to the case. Such orders may be based on the need to protect the interests of the minor (**Guinea, Moldova**) or young person (**Nauru**) involved. In other countries, closed trials are permitted not explicitly for the protection of minors, but on other grounds, such as for the protection of public morality (**Guinea-Bissau**) or decency (**Vanuatu**).

The publication of identifying information of children involved in judicial proceedings by the media is prohibited in a number of countries. In **Bangladesh, India** and **Nepal** such materials cannot be published without the prior approval of a court.

Confidentiality of documents related to complaints to national human rights bodies and Ombudspersons must also be in place, as is the case in **Afghanistan** and **Bulgaria**.

**e. Resolution**

*As the passage of time affects children differently, delays of justice can have worse consequences for children than for adults. It is essential, therefore, that all cases involving children are subject to speedy determination. This means that procedures which entail unnecessary delays should be avoided as long as fairness is preserved.*

The time taken to resolve court cases involving children varies. Our research estimated that cases involving children are resolved without undue delay in just 15 percent of countries (77). Some countries allow for proceedings involving children (**Montenegro, Bolivia**) or rights violations (**Bosnia and Herzegovina**) to be treated with urgency. In **Nepal**, priority is given to cases involving children, specifically children under the age of 16 who do not have the support of a parent or guardian. Practice directives by the Supreme Court of the **Seychelles** state that cases involving children should be given some priority in court so as not to prejudice the well-being of the child. In **Montenegro**, proceedings for the protection of a child's rights shall be particularly urgent and the first hearing must take place within eight days.

Serious delays of justice are recorded in a staggering 45 percent of all States (89), including **Bolivia**, where there is a shortage of judges and a problem with corruption and the **Bahamas**, where "poor court infrastructure", including a malfunctioning air conditioning system and a leaking roof, contributes to the backlog of cases; among other problems. **Italy** faces a serious challenge in delivering justice in a timely manner as its time limitation periods continue to run while a case is being heard.

In **Jamaica**, measures to relieve the backlog of cases include the use of alternative dispute resolution and the operation of a night court. **Macedonia** has taken measures to compensate plaintiffs who have experienced unreasonable delays. And finally, in **Israel**, the Ombudsman of the Judiciary accepts complaints related to judicial misconduct, including complaints regarding the manner in which trials are conducted, such as unreasonable length of proceedings.

## **f. Appeal**

*Children and their representatives must be able to appeal a first instance decision to a higher court. This should hold true across all lower courts. Appeal procedures and appellate courts must be accessible to all children and time limits within which to appeal must be reasonable.*

In the vast majority of countries, the possibility to appeal a judicial decision to a higher court is guaranteed by law, and often is a constitutional right. There are, however, very few legal provisions regarding appeal that are specific to children. Access to appeal for children must therefore be taken in the wider context of children's access to justice, their legal capacity and ability to access courts. The right to appeal can be impaired by a lack of appellate courts. In some countries, such courts are only found in major cities and decisions are therefore rarely appealed in cases filed in remote areas. The insufficient number of courts of appeal is an issue reported in **Benin, Cabo Verde** and the **Central African Republic**.

Delays in, or lack of, notification of the court's decision is another barrier to appeal. This barrier is amplified when children are seeking to appeal, because they would have to be notified of the decision personally and in a child-friendly manner in order to be able to appeal it.

### *Child-specific provisions*



In some countries, where children would normally have restricted or no legal capacity, children can appeal decisions from a child-specific jurisdiction (**Togo, Madagascar, Mali, Lesotho**) or certain types of decisions (for instance, decisions in child protection cases in **France**, or in cases involving a child in conflict with the law in **Burundi**).

In only eight countries, the right to appeal a decision is subject to limitations that specifically apply to children (**Colombia, El Salvador, Equatorial Guinea, Kuwait, Malawi, Peru, Palestine** and **Sao Tome and Principe**). In **Malawi**, as of 2012, the High Court did not have any judges designated to review cases from the Child Justice Courts. In **Colombia**, cases brought before family judges can generally be brought at one level only and, therefore, no appeal is possible. Only some cases brought before a family judge that involve specific children's rights allow for a second level of appeal. Examples of such cases would be matters relating to forfeiture, suspension and rehabilitation of parental authority and administration of a child's property.

In some countries, minors are restricted in their ability to waive their right to appeal, or to oppose an appeal filed on their behalf. For instance, in juvenile justice cases in **Kosovo**, the defence counsel, the public prosecutor, the parent, adoptive parent or guardian, a relation by blood in a direct line to any degree, the brother or the sister may file an appeal on behalf of the child, even against their will. Similarly, in criminal matters in **Latvia**, when a request for withdrawal of an appeal is filed by a child appellant or their representative or counsel, it is not binding on the court, which can decide to go ahead with the appeal proceedings.

Limitations applicable to children can be designed as a safeguard to protect the child's best interests. In **Lebanon**, a decision can be enforced despite the lodging of an appeal whenever the child's best interests are at stake.

***Best practice examples:***

In **Nepal**, when a case cannot be appealed to the Supreme Court, the Court may nonetheless revise a judgment or final order issued by the Court of Appeal where, among other things, justice is impaired due to lack of proper representation of a child.

In **South Africa**, all custodial sentences on child offenders go on automatic review to a High Court in chambers. This provides an important safeguard for young offenders and also helps to maintain a steady growth of jurisprudence on sentencing.

***Non-child specific provisions***

In States where access to the highest courts is restricted to matters of particular legal or public importance, cases involving serious or large-scale violations of children's rights should be considered as such. This is not the case in **Liechtenstein**, where decisions of the Administrative Court and the Constitutional Court cannot be appealed, even though they are decisions of first instance in their respective domain of Liechtenstein's public law. There is no exception to this rule, even if the matter involves a child.

There can also be limitations to which parts of the verdict can be appealed. In **Belgium**, victims acting as a civil party in criminal proceedings can only appeal the court's decision about whether or not to grant compensation or the amount of compensation granted. A victim cannot appeal the sentence that has been imposed or the fact that the offender has been acquitted as this is a prerogative of the public prosecutor.

Finally, in some countries (**Gambia, Malawi**), the decision of an ombudsman can be appealed to a court.

### **g. Impact and follow-up**

*A judicial decision is useless if it is not enforced, but many factors come into play when it comes to actually remedying violations and making sure they do not recur. Enforcement requires an independent judiciary, space for civil society, financial and human resources and monitoring mechanisms. Decisions in cases involving children, for instance child custody decisions, may also require additional services to make sure the psychological needs of the child are met.*

In nearly half of all countries (90), enforcement and follow-up of judicial decisions cannot be guaranteed, and in a further 17 percent of countries (34), there are reported issues with enforcement and follow-up of judicial decisions. In most cases, a decision's impact is heavily dependent upon the strength of the rule of law and general political and human rights situation in the country.

#### *Impact of decisions*

The impact that a decision might have differs in civil law and common law jurisdictions.

In common law countries, judicial decisions are considered binding on subsequent cases, however, where there are difficulties in accessing recent decisions, judges cannot apply recently established jurisprudence. Judicial precedent can have a negative effect, as a negative decision would have long-lasting effects on subsequent decisions. However, it can also be an opportunity for the courts to develop the law to ensure the observance of children's rights, as the Supreme Court of **Belize** did in the *Bowen* case, by holding that the CRC is applicable in the country. The case involved two individuals who challenged their sentencing to life imprisonment for murders they committed while they were children. The Court held that "by signing and ratifying an international treaty, agreement or convention, a state assumes obligations and later domestic legislation inconsistent with a treaty obligation does not justify the nonobservance of that obligation" and that the CRC had direct effects in Belize, recalling that the Convention was expressly referred to in the country's Family and Children Act. The Court therefore concluded that "the sentences of mandatory life imprisonment without possibility of release imposed upon [the claimants] for the offence of murder committed when they were juveniles, [were (...)] not in keeping with the obligations of Belize under the CRC, in particular Article 37(a) of the Convention."<sup>101</sup>

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<sup>101</sup> *Anthony Bowen and David Jones v. The Attorney General of Belize*, Supreme Court of Belize, 27 September 2010. CRIN's case summary available at: [www.crin.org/en/node/7040](http://www.crin.org/en/node/7040).

In civil law countries, judicial precedents are taken into account and referred to, however they do not generally have a binding effect. Failure to publish decisions<sup>102</sup> is even more widespread than in common law countries, further limiting the effects of case-law on subsequent cases. Legal provisions can however give certain decisions a binding effect. This can be the case for final administrative decisions nullifying an act (**Bulgaria, Belgium, Luxembourg**), some decisions of Supreme Courts (**Bulgaria, Albania**) and some decisions of Constitutional Courts (**Albania, Belgium, Croatia, Kosovo, Luxembourg**). In **Kazakhstan**, the Supreme Court periodically analyses the practical application of law by courts and issues statements (called “normative resolutions”) aimed at resolving uncertainties in the law. Such resolutions are binding and, pursuant to the Constitution, become a part of Kazakhstan’s law.

In civil law countries where the legal system is based on French law, Codes of Criminal Procedure may allow defendants to ask for damages to be paid by the *partie civile* (in most cases the victim) when public proceedings end with charges being dropped (*ordonnance de non-lieu*). This is the case in **France, Benin, Togo, Central African Republic, Chad** and **Gabon**.

#### Example of negative impact

In 2014<sup>103</sup> the Inter-American Court of Human Rights (IACtHR) condemned the **Dominican Republic** for a decision of its Constitutional Court<sup>104</sup> refusing to give “in transit” individuals from Haiti - mainly children - Dominican nationality, which was found to be inconsistent with provisions of the CRC. As a result, the Dominican Republic’s Constitutional Court declared in a subsequent decision<sup>105</sup> that the Dominican ratification of the IACtHR was unconstitutional. The Office of the UN High Commissioner for Human Rights expressed its concern over the possibility of the Dominican Republic confirming its decision to withdraw from the IACtHR.<sup>106</sup> Such an event would greatly affect the enforcement of the CRC as well as other human rights treaties.

#### *Follow-up*

Courts can be in charge of guaranteeing the enforcement of their own decisions through a dedicated department, a specialised judge or a bailiff. Alternatively, there can be a specific body in charge of enforcement (**Armenia, Israel**). In criminal matters, the public prosecutor may in a few countries be responsible for enforcement (**Oman, Qatar**). In the **Dominican Republic**, there are Children Enforcement Courts in charge of enforcing irrevocable judgments and solving any matter related to the enforcement of judgments within the scope of the Code for the System for the Promotion and Rights of Children and Adolescents.

In common law countries, contempt of court proceedings can be used to enforce judicial decisions. In other countries, failure to comply with a court order is considered a criminal

<sup>102</sup> Reported for instance in Haiti and Vietnam.

<sup>103</sup> Decision of 28 August 2014, available at: [http://corteidh.or.cr/docs/casos/articulos/seriec\\_282\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf).

<sup>104</sup> TC/0168/13, available at: <http://www.tribunalconstitucional.gob.do/node/1764>.

<sup>105</sup> TC/0256/14, available at: <http://www.tribunalconstitucional.gob.do/node/2762>.

<sup>106</sup> UN News Centre, ‘UN rights office voices concern over Dominican Republic’s ruling on regional court’, 7 November 2014. Available at: <http://www.un.org/apps/news/story.asp?NewsID=49285#VXH8ubk>.

offence. This is the case in **Bosnia and Herzegovina**, where public officials who obstruct or refuse to enforce a final decision of the Constitutional Court are punishable by a six-month to five-year prison sentence. In contrast, in **Senegal**, there are no apparent legal consequences when the government fails to adhere to court decisions.

In **Namibia**, **Uganda** and the **United Kingdom**, judicial review proceedings often do not provide directly enforceable remedies. Rather, judges tend to issue “quashing orders”, which overturn an unlawful decision but do not force a public body to follow any particular course of action. Instead, the body need only approach the decision again bearing the ruling in mind, and may ultimately opt not to alter its stance. In **Poland**, in situations when an Administrative Court refers cases back to the relevant administrative body, it can only give guidance on how the case should be handled, and cannot force the authority to follow any particular course of action.

Delays in or lack of enforcement of individual decisions are generally due to high levels of corruption, government interference with or obstruction of the enforcement of decisions,<sup>107</sup> or political situations affecting the normal functioning of institutions<sup>108</sup> (such as armed conflict). A lack of independence of the judiciary can lead to impunity, and/or victims suffering serious backlash, especially in cases involving human rights violations by government officials.<sup>109</sup> In **Chad**, only 20 percent of judicial decisions are enforced, as a result of the interference of other actors (local administrative agencies, executive power, law enforcement, etc) in the judicial system.<sup>110</sup> According to UNICEF, in **Côte d’Ivoire**, perpetrators are punished in only eight percent of cases of child rights violations.<sup>111</sup> In **Guinea-Bissau**, the judiciary is completely dependent on the executive in terms of the allocation of funds, and on the armed forces for protection and implementation of decisions. Therefore, cases involving these agents are rarely resolved.<sup>112</sup>

In some countries different legal systems coexist, which can lead to disparities in decisions or even contradictory decisions and a conflict over which one should be enforced. These include countries where customary or religious legal systems are in place (**Botswana**, **Chad**, **Democratic Republic of the Congo**, **Federated States of Micronesia**, **Lebanon**, **Maldives**, **Namibia**, **Niger**, **Nigeria**, **Palau**, **South Sudan**, **Vanuatu**, **Zimbabwe**); countries with some provinces obeying common law and others civil law (**Cameroon**, **Canada**, **Nigeria**). In countries

<sup>107</sup> Such interferences are reported in Cambodia, Democratic Republic of the Congo, Ecuador, Gabon, Ghana, Honduras, Lao People’s Democratic Republic, Mauritania, Mongolia, Nauru, Democratic People’s Republic of Korea, Panama, Saudi Arabia, Sudan, Swaziland, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen, among others.

<sup>108</sup> Somalia, parts of Syria, Iraq.

<sup>109</sup> Cases of serious backlash suffered by claimants are reported in Belarus, Benin, Cameroon, Comoros, Cuba, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Guinea, Haiti, Madagascar, Maldives, Myanmar, Syrian Arab Republic, Zimbabwe, among others.

<sup>110</sup> PRAJUST, *Contexte sectoriel*. Available at:

[http://www.minjustice.org/prajust/index.php?option=com\\_content&view=article&id=96&Itemid=108](http://www.minjustice.org/prajust/index.php?option=com_content&view=article&id=96&Itemid=108).

<sup>111</sup> UNICEF and Save The Children, *Vulnerabilities, Violence & Serious Violations of Child Rights*, November 2011, p. 30. Available at:

[http://www.protectingeducation.org/sites/default/files/documents/vulnerabilities\\_violence\\_and\\_serious\\_violations\\_of\\_child\\_rights\\_report\\_on\\_the\\_impact\\_of\\_the\\_post-election\\_crisis\\_on\\_the\\_protection\\_of\\_children\\_in\\_cote\\_divoire.pdf](http://www.protectingeducation.org/sites/default/files/documents/vulnerabilities_violence_and_serious_violations_of_child_rights_report_on_the_impact_of_the_post-election_crisis_on_the_protection_of_children_in_cote_divoire.pdf)

<sup>112</sup> Guinean Human Rights League, Report 2010-2012.

where customary law can affect sentencing, this influence may reduce a sentence if there has been forgiveness, or even result in impunity for the perpetrator (**Kiribati**,<sup>113</sup> **Solomon Islands**).

Deeply entrenched traditional practices are also reported to impair prosecution or enforcement of positive decisions, especially in rural areas (for instance, in **Ethiopia**, **Ghana**, **Senegal** with regard to *talibés* children, and in **Bolivia** with regard to child marriage).

Difficulties in enforcing decisions may also stem from practical issues. For instance, delays in issuing decisions in writing (as reported in the **Central African Republic**, **Guyana**, **Mali**), lack of human and financial resources (**Burkina Faso**, **Burundi**, **Colombia**, **Indonesia**) or the necessity for the winning party to pay a fee prior to the enforcement of a decision (**Democratic Republic of the Congo**).<sup>114</sup> Such impediments can be dramatic when a decision is declared void after a certain period of time. For instance, in the **Central African Republic**, a decision is declared void after six months if it has not been enforced in cases where the defendant did not appear in court. In **Iraq**, failure to implement a measure relating to a crime results in its nullification after the passage of 15 years; for all other matters, the measure(s) will be nullified after three years. In **South Africa**, orders made by the Children's Court expire at most after two years unless extended by the court.

Finally, in some instances, the law itself can lead to a decision not being implemented. In a few States, the independence of the judiciary is not guaranteed by law (**Brunei Darussalam**). In administrative cases in **Viet Nam**, the Prime Minister has the right to ask the Supreme People's Court and the Supreme People's Procuracy to revise and settle the case, then report back to the Prime Minister within 30 days. As such, any high-impact, high-profile legal decisions may face invalidation at the discretion of the State. In **Kuwait**, civil procedure permits the challenging of a court decision prior to enforcement. Such a challenge has the effect of postponing the execution of a judgment should it be defeated.

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<sup>113</sup> *Summary prepared by the Office of the United Nations High Commissioner for Human Rights*, para. 23; *Compilation prepared by the Office of the High Commissioner for Human Rights*, Universal Periodic Review, A/HRC/WG.6/8/KIR/2, 19 February 2010, paras 27-28. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KISession8.aspx>.

<sup>114</sup> *République démocratique du Congo - Le secteur de la justice et l'Etat de droit*, AfriMAP and Open Society Initiative for Southern Africa, July 2013, p.135.



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Our goal: A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

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