

ACCESS TO JUSTICE FOR CHILDREN: COLOMBIA

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

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

In accordance to Article 93 of the Political Constitution of the Republic of Colombia (*Constitución Política de Colombia*)¹ in order for international treaties to be enforced in Colombia, they must be ratified by Congress and, therefore, incorporated into Colombian legislation. The CRC was ratified by Colombia according to Law No. 12 of 1991 “whereby the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1989, is approved”.

B. Does the CRC take precedence over national law?

Article 93 of the Political Constitution of Colombia states that “International treaties and conventions ratified by Congress which recognize human rights and prohibit their limitation in a state of exception shall prevail in the internal order. The rights and duties enshrined in the Constitution shall be construed in accordance with international treaties on human rights ratified by Colombia.” According to that article, international treaties on human rights, such as the CRC, are made a part of the constitutional block and, therefore, they prevail in the internal order.

C. Has the CRC been incorporated into national law?

As set out in A above, the CRC was incorporated into national law through Law No. 12 of 1991. Furthermore, the CRC is part of the constitutional order as determined by the Constitutional Court in judgment C-355/2006², which means that the rights articulated in the Political Constitution and, specifically, the rights of children, ought to be construed in light of the rights included in the CRC.

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

Since it has been ratified by Colombia and incorporated into its legislation through Law 12 of 1991, the CRC may be enforced by the tribunals and courts of Colombia. The rights

¹ See http://www.senado.gov.co/images/stories/Informacion_General/constitucion_politica.pdf

² Constitutional Court, Judgment 355/2006. Justices in charge: Dr. Jaime Araújo Rentería, Dra. Clara Inés Vargas Hernández. At: <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm>

granted in the Constitution must be construed in accordance with international treaties on human rights as set forth in the aforementioned Article 93 of the Constitution.

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

There are some examples of the CRC having been applied by domestic courts or judges. The Constitutional Court - the highest tribunal in matters pertaining to reviewing the constitutionality of laws and also in charge of examining actions of protection³ submitted in the State – has applied the CRC in different cases. It has analyzed the principle of the child’s best interest; the right to privacy and to protection of personal information as well as of private life in the social networks with respect to boys, girls and adolescents⁴; the right to the due process of law; family unity; the child’s right to be heard⁵; the process for the custody and personal care of minors⁶; and the right of children to have a family and not to be separated from it⁷, among others.

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

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

Children and adolescents, through their legal representatives, may submit claims to domestic courts and tribunals for purposes of reporting any specific events to the competent authorities and seeking to restore their violated rights. As stated in Article 11 of Law 1098 of 2006 – known as the Childhood and Adolescence Code⁸ “any person may request the competent authority the enforcement and reestablishment of the rights of children and adolescents. The State in representation of every one of its agents has the inexcusable responsibility to act promptly to ensure the realization, protection and restoration of the rights of children, and adolescents.”

Within the Colombian Family Welfare Institute, the Family Defender’s Office is designated as the department “in charge of preventing, protecting and restoring the rights of children and adolescents”⁹

The aforementioned Code sets forth two kinds of proceedings to redress a child’s damaged rights: (1) Administrative, consisting of all actions carried out by the competent authority

³ The action for protection is a recourse similar to the *juicio de amparo* (a constitutional process), that seeks the immediate protection of fundamental rights. For more, see Article 86 of the Political Constitution of Colombia, 1991.

⁴ Constitutional Court, Judgment T260/2012. Justice in charge: Dr. Humberto Antonio Sierra Porto. At: <http://www.corteconstitucional.gov.co/relatoria/2012/t-260-12.htm>.

⁵ Constitutional Court, Judgment T276/2012. Justice in charge: Dr. Jorge Ignacio Pretelt Chaljub. At: <http://www.corteconstitucional.gov.co/relatoria/2012/t-276-12.htm>

⁶ Constitutional Court, Judgment T557/2011. Justice in charge: Dra. María Victoria Calle Correa. At: <http://www.corteconstitucional.gov.co/relatoria/2011/t-557-11.htm>

⁷ Constitutional Court, Judgment T884/2011. Justice in charge: Juan Carlos Henao Pérez. At: <http://www.corteconstitucional.gov.co/relatoria/2011/t-884-11.htm>

⁸ Childhood and Adolescence Code available in Spanish at: http://www.procuraduria.gov.co/portal/media/file/Visi%C3%B3n%20Mundial_Codigo%20de%20Infancia%202011%281%29.pdf

⁹ Article 79 of the Childhood and Adolescence Code.

(Family Defender, Family Commissioner, or Police Inspector) tending to restore the rights of children, such proceedings last no more than six months in order to submit evidence and carry out the steps to protect children and adolescents; (2) Judicial, i.e. a proceeding conducted by the Family Judge (in the ordinary jurisdiction) for purposes of adopting measures to protect children and adolescents who have had their rights violated. This latter proceeding reviews the decisions issued by the Family Defender or the Family Commissioner and resolves the restoration of the rights of children or adolescents when the Family Defender or the Family Commissioner has forfeited competency (after six months).

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

In accordance with article 306 of the Civil Code, children may be represented by either parent. In the case of minors not subject to *patria potestas*, they are represented by a curator who is a person designated by the Family Judge according to the provisions of Law 1306 of 2009 “whereby rules are issued to protect mentally disabled persons and a regime for the legal representation of incapable emancipated persons.”

Finally, Article 82 of the Childhood and Adolescence Code establishes the functions of the Family Defender, among which are the following: “(12) To represent children or adolescents in judicial or administrative actions if they do not have a representative, or if the representative is absent or unable to act, or if he is a means for threatening or violating rights.”

In the event of an administrative proceeding, children and adolescents may approach the Family Defender directly to request protection and restoration of their rights.

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

In the case of infants and young children, and as explained above, the cases would be brought by the child’s parents and, if the parents are absent, by the child’s legal representatives (said legal representatives will be designated by the parents in a testament or by the Colombian Family Welfare Institute if no parents exist). Such cases can also be brought by the Ombudsman.

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

If the children or their representative are unable to obtain any assistance, the Ombudsman may designate a defender *ex-officio* who will represent the interests of the children involved. In all events there will be someone in charge of representing the children.

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

It is not necessary for the parents to agree to a claim being brought or to initiate a case on

behalf of a child. The Ombudsman is authorized to commence the necessary steps when the parents are the origin of a threat or if they violate the rights of children.

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

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

The mechanism established in the Constitution of Colombia to cover or protect the fundamental constitutional rights of individuals, whenever they are violated or threatened by the act or omission of any public authority is called *acción de tutela*. It is comparable to the *amparo* used in many other latin american countries, such as Mexico.

The *accion de tutela* is available to be claimed before the judges by any person, at any time and place, through a preferential and summary procedure for themselves or anyone acting on their behalf, for the immediate protection of their fundamental constitutional rights whenever they are violated or threatened by the act or omission of any public authority¹⁰.

Colombia allows a public action on unconstitutionality seeking to remove from the legal framework any norms that are contrary to the Political Constitution or to international treaties which, by virtue of the constitutional order, are made a part of the legal framework. Such an action may be brought by any citizen enjoying citizenship rights and, therefore, it is not necessary for a person bringing such action to be a professional or to have undergone any specific training. Furthermore, no lawyer is necessary in order to bring such an action.

Individuals or groups of individuals, including children, and NGOs may submit petitions to the Inter-American Commission on Human Rights (IACHR),¹¹ on their behalf or on behalf of third persons, regarding alleged violations of the American Convention on Human Rights¹². A petition can only be lodged after domestic remedies have been exhausted, and normally must be filed within six months after the final judgment.¹³ The petition must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, the name(s) of the victim(s) if possible, and whether the petitioner wishes to remain anonymous and the respective reasons.¹⁴ The victim may designate a lawyer or other person to represent him/her before the IACHR, but this is not

¹⁰ Article 86 of the Political Constitution of Colombia.

¹¹ The Inter-American Commission on Human Rights is one of two bodies within the Organisation of American States (OAS) for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. The Commission benefits from a “dual role” as its mandate is found in both the Charter of the Organisation of American States, and in the American Convention on Human Rights (ACHR). As an OAS Charter organ, the IACHR performs functions in relation to all OAS Member States. As an organ of the Convention, its functions are applicable only to States that have ratified the ACHR: Charter of the Organisation of American States, Chapter XV, available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm; American Convention on Human Rights, ‘Pact of San Jose, Costa Rica’, Chapter VII, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

¹² American Convention on Human Rights, Article 44.

¹³ Rules of Procedure of the Inter-American Commission on Human Rights, Articles 31-32, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

¹⁴ Ibid., Article 28.

compulsory.¹⁵ When a petition is declared admissible, the IACHR attempts to reach a “Friendly Settlement” between the parties concerned. If this is not possible, the IACHR will reach a decision on the merits, which consists of non-binding recommendations to the violating State, aimed at ending the human rights violations, making reparations, and/or making changes to the law.

If the State does not comply with the recommendations of the IACHR, the IACHR may refer the case to the Inter-American Court of Human Rights (IACtHR).¹⁶ Individuals do not have direct recourse to the Court, and must submit their petitions to the IACHR. The IACtHR interprets and applies the ACHR and other Inter-American human rights treaties and issues a judgment, which may include an order to pay reparations to the victim(s) of human rights violations.¹⁷ The Court’s judgments are legally binding on the State against which they are made.

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

According to the functions set forth in Article 241 of the Political Constitution, the Constitutional Court decides on claims on unconstitutionality brought by citizens with respect to laws regarding content as well as any procedural defects in their creation. After examining the challenged norm, the Court may declare it unenforceable, which means that the norm is unconstitutional and, hence, is removed from the legal framework.

The Court may also declare a norm enforceable, which means that the norm is constitutional if the Court finds that, after the necessary examination, it is in keeping with constitutional and international parameters depending on the subject matter involved. Finally, the Court may also declare the norm to be enforceable but in a conditional fashion, which means that the Constitutional Court will establish which interpretation is to be given and the scope of the norm so that it will be in keeping with the Constitution.

The state may also be financially liable for any wrongful injury attributable to it, caused by the acts or omissions of public authorities, for which it will have to compensate such damages.

When filing for an *accion de tutela*, the protection will consist of an order directed to the person to act or refrain from doing so. The ruling, which will be of immediate compliance may be challenged before the competent court and , in any case, may be forwarded to the Constitutional Court for possible review¹⁸.

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

A public action on unconstitutionality does not require identifying the victim. In such a

¹⁵ Ibid., Article 23.

¹⁶ Ibid., Article 45.

¹⁷ American Convention on Human Rights, Article 63.

¹⁸ Article 86 of the Political Constitution of Colombia.

proceeding there is no victim because such an action is an action seeking to remove a norm from the legal framework because it is contrary to the provisions of the Political Constitution. A decision from the Constitutional Court is effective *erga omnes*, i.e. for the entire society at large and for any persons affected by the application of such norm specifically, since such norm ceases to exist in the legal framework.

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

In Colombia there is a “group action” which is similar to a class action in the United States. Such a group action seeks to redress damage arising from the same source and inflicted on multiple persons, and to grant the applicable indemnities. In a group action, it is necessary to identify the victims.

In addition, actions may be brought by citizens seeking to protect collective interests in order to prevent a contingent damage or a danger, a threat, a violation or an injury inflicted on collective rights or interests, or to restore things to their previous condition if feasible. Such actions do not seek an indemnity. In this case it is not necessary to identify the victims.

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

If a non-governmental organization is not a party to a specific proceeding it cannot intervene in cases involving violations. However, non-governmental organizations can report threats or violations of children’s rights to competent entities so that the authorities may employ the necessary measures.

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

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

As provided in the Childhood and Adolescence Code, two proceedings are available: administrative and judicial. Administrative proceedings are implemented by Family Defenders and Family Commissioners and commence with a request filed before the Family Defender or Commissioner or otherwise before the Police Inspector. Such requests are filed by the legal representative of the child or adolescent or by the person in charge of the child or adolescent’s custody and care for purposes of protecting their rights. It is also possible for the child or adolescent to file the case directly. Once the Defender, Commissioner or Police Inspector becomes aware of the nonobservance, violation or threat against any of the rights of children and adolescents, he will begin an investigation if competent to do so. Otherwise, he must inform the competent authority. The foregoing is in accordance with articles 96 *et seq* of the Childhood and Adolescence Code.

A judicial action is filed before the family judge under the ordinary jurisdiction of civil law

and begins upon petition of the Family Defender, the legal representative of the child or adolescent or the person having custody. A judge may also commence the case *ex officio*. This is in accordance with articles 119 *et seq* of the Childhood and Adolescence Code

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

If the necessary resources are not available, the Ombudsman may designate a defender *ex officio* who will represent the interests of the child complainants.

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

Certain law firms offer pro bono assistance and certain non-governmental organizations working for children's rights agree to work on certain cases at no cost to the child complainant. Whether or not such legal aid is available is determined on a case by case basis and depends on each providing law firm or non-governmental organization.

Local non-governmental organizations such as Fundacion Pro Bono Colombia and universities throughout Colombia provide free legal representation to litigants that otherwise would not be able to pursue their claims.

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

There is no specific timing for a case to be brought unless criminal matters are involved because the statute of limitations operates only in that area.

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

The rules specified in article 165 *et seq* of the General Procedural Code (Law 1564 of 2012) regarding proof are applied. In administrative as well as in judicial proceedings it is possible to hear – and they should be heard, if deemed necessary – children and adolescents in order to make a decision seeking protection and restoration of their rights.

As stated by the Childhood and Adolescence Code, children and adolescents may be called as witnesses in criminal charges brought against adults. Their statements can only be taken by the Family Defender, outside the site of the hearing, with a questionnaire previously sent by the prosecutor or the judge. The defender will only formulate questions that apply

to the children's best interests. The same procedure is adopted for statements and interviews that must be made before the Judicial Police and the Prosecutor during the stages of inquiry or investigation. At the discretion of the judge, the testimony may be performed via audio visual communication, in which case the child's physical presence is not required¹⁹.

In addition, children below the age of 12 years shall not give evidence under oath as witnesses²⁰, as they are not subjects to criminal liability.

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

The timing of obtaining a decision from the court as to whether there has been a violation cannot be stated generally because it depends on the specific circumstances of the case at hand. In addition, judicial congestion tends to hold up the process further.

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

Generally, cases brought before family judges can be brought at one level only and, therefore, no appeal is possible. However, this depends to some extent on the particulars of the case since there are some cases brought before a Family Judge that involve specific children's rights that allow for a second level of appeal in accordance with Article 22 of the General Procedural Code. Examples of such cases would be matters relating to forfeiture, suspension and rehabilitation of the *patria potestas* and administration of a child's property.

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision? What other concerns or challenges might be anticipated in enforcing a positive decision?

In principle, there would not be any political backlash in the case of a positive decision. Nevertheless, one seemingly permanent challenge in enforcing a positive decision is the lack of sufficient resources for the efficient conduct of proceedings and effective enforcement of the final decision. Private individuals as well as certain institutions may resist the obligation to comply with certain orders.

- I. Privacy.

Hearings involving children are closed to the public.²¹ In order to protect children's privacy when involved in legal proceedings, the law has determined that communication media must "refrain from interviewing, naming, disclosing information that could lead to the identification of children and adolescents who have been victims, authors or witnesses to

¹⁹ Article 150 of the Childhood and Adolescence Code.

²⁰ Article 383 of the Code of Criminal Procedure of Colombia. Available in Spanish at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=14787>

²¹ Article 147 of the Childhood and Adolescence Code.

crime, except for when necessary to ensure the right to establish the identity of the child or adolescent victim of the crime, or that of his family if it were unknown”²².

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

Unknown.

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

²² Ibid., Article 47, 8