

Children's Rights And the question of their application

Yangon Seminar 2002

Jean Zermatten
Paola Riva Gapany (Eds.)

**Working Report
7 - 2002**

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This working report presents the various conferences of the Yangon Seminar, held in Myanmar from July 8th to 12th 2002.

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Organised by
Institut International des Droits de l'Enfant (IDE)

In collaboration with
The Centre for Humanitarian Dialogue (HD Centre)
The Myanmar Human Rights Committee
The International Association of Magistrates for Youth and Family (IAMYF)

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PART I : GENERAL PRESENTATION

OPENING SPEECH

Dr. Bernard COMBY
Former Minister of Education, President of the IDE

“The hand that gives is always on top of the hand that receives” I am submitting to you as an introduction, at this important seminar dedicated to the rights of the child, this maxim for you to reflect on. I am hoping that aid for development will be done with true cooperation, solidarity and the respect of human conditions...

Mr. Minister of the Interior for Myanmar
Mr. President of the International Association of Youth and Family Judges and Magistrates (IAYFJM)
Mr. President for UNOCAL
Mr. President for the Centre of Humanitarian Dialogue
Mr. Director of the International Institute for the Rights of the Child

Dear Ladies, Gentlemen and dear friends,

As the former President of the government of the Republic of Valais in Switzerland, and the current President of the International Institute for the Rights of the Child (IDE), I am very happy to be in your magnificent country and bring to you very cordial salutations from Switzerland.

The International Institute for the Rights of the Child (IDE) engages itself in actively promoting the culture on the rights of the child in the world, and contributes to training individuals in this important field.

The respect of human dignity and the fundamental rights of youth constitutes without a doubt the sine qua non condition for the personal growth and development of society.

To obtain this objective, we must convey and be familiar with the International Convention on the Rights of the Child. On this point, we would like to congratulate the initiators of the seminar, in particular, the Centre for Humanitarian Dialogue, the Human Rights Commission of Myanmar as well as UNOCAL, who have understood the necessity of having a seminar

As for the IDE, it is still pursuing relentlessly information activities and training programs in the area of the rights of the child. The IDE was mandated by the Swiss Agency for Development and Cooperation (SDC) to create and manage an interactive platform, <http://www.childsrights.org> in the area of the rights of the child which has had great success. I hope that your friends from Myanmar can have access to this interactive platform which is full of information on the rights of the child in the world.

Also, with the close collaboration between the University of Fribourg in Switzerland, and the Institut Universitaire Kurt Bösch (IUKB), the IDE decided to start its first Executive Master on the Rights of the Child. The training is geared towards specialists in the area of the rights of the child and will begin in 2003. We are also looking forward to welcoming students from Myanmar.

The work involved in order to accomplish the implementation of the Convention on the Rights of the Child is immense.

Poverty certainly is a major obstacle for the harmonious development and respect of rights of the child. Children are dependent on the family, social, economic and the cultural environment. The physical and psychological development as well as the personal growth and social integration are strongly influenced by the environment in which a child lives. When the fundamental conditions for the child's life are not met, the result is a great amount of fragility.

This is the reason why the fight against poverty must be considered as a priority in order to apply concretely and permanently the International Convention on the Rights of the Child.

The phenomenon of poverty exists in all countries including the countries in the North. However, there is no comparison with the southern countries. Certain groups of people in the northern countries, particularly single women with children, old age and young individuals are in a precarious situation and suffer from poverty.

In the majority of countries in the South, precariousness and poverty are inherent to the structure of the state. The fragility of the economic infrastructure, the serious gaps in the technical and socio-economic infrastructure as well as a strong external dependency creates an endemic state of poverty.

Yet, the quality and quantity of natural and human resources are rarely in default in many countries in the South. Myanmar is a good example in this respect.

There is always hope to escape the vicious cycle of poverty. Poverty is not a fateful coincidence and it should not be used as an excuse for non-action.

Thus, we must actively fight against poverty, by all means possible, within all parameters, because children are often the first victims.

The fight against poverty starts by reinforcement at the local economic level and by using pragmatic methods. Elaborated and structured economic development begins with family activities, arts and crafts, the promotion of small and medium size businesses and even micro-enterprises.

It is in my opinion that women have an important role to play in this area.

With the assistance of humanitarian aid and cooperation for development, it is important to have large and specific consented efforts. To accomplish the mission, the countries from the north are indispensable. This, no doubt, must be reinforced.

However, it must be reminded, as was stated in the report by the “Commission of the South” in its paper entitled: “Defi au Sud”, that the responsibility for development remains incumbent upon the south and its inhabitants.

The support of the population of the South should be orientated towards a spirit of shared responsibility. They must be able, with dignity, serenity and democracy, to take hold of their own destiny, while respecting their identity, their culture, their values, their social and economic structures.

Effective strategies for development must imperatively respect the rights of the child, and in particular the right to education.

If we want to lessen the gap between the rich and the poor countries, it is urgent to put in place programs of solidarity, that aim progressively at achieving the fundamental right to education for everyone, in all countries in the world.

Before concluding, I would like to briefly mention the Special Session on Children's Rights held in New York in May 2002.

The Special Session, organized by the United Nations was supposed to take place in September 2001 but due to the horrible tragedies of September 11 in New York 2001, it was postponed to the United Nations Special Session on the Rights of the Child, 2002.

Having had the honour to Participate at the Special Session, as an expert from Switzerland accompanied by Mr. Jean Zermatten , Director of the IDE and his Assistant, Paola Riva Gapany, I would like to transmit some information to you:

Firstly

The Special Session deserved to have taken place even though it was a little bit of an anticlimax! However, it permitted incontestably to demonstrate the evolution of the rights of the child in the world and resulted in a deep reflection of the problematic.

All the countries on the planet, again, had to look into this important issue by examining the commitments that they took and the slim concrete results to this day. Thousands of NGO's in the world found themselves in a similar position...

Secondly

In spite of the withdrawn position of the United States in the subject matter, the Special Session permitted to clearly reaffirm the necessity of having at our disposal a fundamental Charter in favour of the child in the world, which we currently find into the International Convention on the Rights of the Child of 1989.

Undeniably, the Convention by excellence, remains a great tool for all areas in the field.

Today, the Convention should inspire new legislations in countries in order to better integrate this new dimension for the future of our world. Nevertheless, the protection of the child is not clearly defined which can be seen for example in the European Union legislation and in other regions of the world. Surprisingly there are clear legal dispositions for animal rights but none for children!

The time to argue endlessly has past.

The time for action has come. Children want concrete action from their governments and parliaments as well as civil society.

Children that came from various continents stated this clearly in New York during the month of May, 2002.

Thirdly

Despite the weakness and the inherent gaps in such international events, the Special Session marked a new step for a better defence and advancement of the rights of child in the world. Henceforth, no country or human being can ignore the distress in which today millions of children find themselves. Thus, each country and human being has the imperious task to pursue this permanent battle so that the smallest of all men can benefit from fundamental rights. Amongst these are the right to education, health and peace which should be considered as a priority.

Before concluding, I would like to reiterate my recognition to all those who actively contributed to the launching of the second Seminar in Yangon. I would like to make a special mention to the Myanmar Authorities; the Human Rights Commission of Myanmar; the Centre of Humanitarian Dialogue; UNICEF; ICRC; IAJFCM as well as the entire team of the IDE. Finally, I would like to warmly thank UNOCAL for it's unwavering support.

The Yangon Seminar has the capacity to promote the respect of human dignity in a new international and national cooperation for children and youth!

THE BEST INTERESTS OF THE CHILD : A QUESTION OF REFLEX

Paola RIVA GAPANY, Director Assistant, IDE

I. 1. Short History of the Concept

The concept of the best interests of the child illustrates the image of Man at a precise moment in time; it is related to sociology and anthropology. This means that the concept evolves throughout the ages.

For the Romans, the best interest of the child were strongly linked to the *patria potestas* (the father's power on his family). But it is interesting to notice that each time the father had to take a decision related to a child's severe punishment, he was forced to gather Family Council (domestic court) in order to get his approval¹. The best interests of the child were understood as the capacity of being able to run his own business and to be part of a community. This is why the *Pater familias* was bound by the custom of giving to his sons a *peculium*, money in order to start working on their own². In addition, when the son of a well known family was 16 years old, he had to participate to the *res publica* (public life) and start learning about politics and rhetorics³. We can find the first origin of the modern and actual principle of participation in the Roman law. Best interests of the child and participation... Two principles which are connected and which represent nowadays the goal that all children's defenders want to reach.

During the Middle Ages time, abandoning children was very frequent and it was considered in their best interests to give them for custody to the Church or to rich families in order to serve them⁴. The best interests of the child was linked to food and shelter, but with a counterpart which was working.

During the Industrial Revolution, children's labour was legally prohibited⁵ but it is since 1870 with the social changes that the modern concept of the best interests of the child emerged; feudalism was over, there was a new social class, the bourgeoisie, and new family structures appeared; the mother could stay at home and looked after her children⁶. Thus, the best interests of the child laid in the concept of the family, which is still true nowadays. The modern concept also refuses the idea of counterpart services (children/family, children/Church, children/army): now the concept lies on a one way service in favour of the child.

In 1924, the League of Nations adopted the Declaration of Geneva, which was the first international instrument recognizing that children are entitled to special care and protection; it was also the first step toward protecting children's rights in a broadest

¹SCHMIDLIN Bruno, CANNATA Carlo Augusto, Droit Privé Romain, Tome I, 1984, p.52.

²SCHMIDLIN, CANNATA, supra.

³SCHMIDLIN, CANNATA, at. 1, p. 55.

⁴NAVE-HERZ Rosemarie "Eine historisch-soziologische Analyse zum Begriff Kindeswohl" Symposium interdisciplinaire, le bien de l'enfant en perspective, Université de Fribourg, 1er et 2 mars 2002.

⁵United Kingdom Minors Act of 1866.

⁶NAVE-HERZ, at 4.

sense⁷. In 1959, the United Nations gave official recognition to the human rights of children by adopting the Declaration of the Rights of the Child⁸, a ten principles document inspired by and expanding on the rights put forth in the 1924 Declaration⁹. Principle 2 of the Declaration of Geneva states *The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.* The concept of the best interests of the child, became a principle.

The year 1979 was designated the International Year of the Child and Poland proposed for this occasion to draft an international treaty which would put into legally binding language, the 10 principles of the 1959 Declaration¹⁰. After 10 years of meetings, work, discussions and negotiations, the Convention on the Rights of the Child was adopted without vote by the General Assembly on November 20th, 1989¹¹. Article 3:1 CRC states that :*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

An analysis of the various discussions of the Working Group in charge of the drafting of the CRC shows that the best interests of the child was a perpetual concern and that it governs not only the spirit of the CRC but also its implementation¹². However no definition or even explanation on this principle was given. This task was left to national interpretation.

I. 2. The Sources of Principle

The principle of the best interests of the child lies out in article 3 para 1 CRC, as a general concept, a guiding principle for the understanding and implementation of the CRC. This is why it has been placed at the beginning of the CRC, just after the preamble, definition and the principle of non-discrimination.

This general guiding principle is explicitly repeated in a number of other provisions of the CRC:

Article 9 (separation from his parents): a child shall not be separated from his or her parents against his/her will, except when competent authorities determine, in accordance with legislation or procedures in force, that such separation is necessary in the best interests of the child.

Article 18 (education): both parents have common responsibilities for the upbringing and development of the child, and the best interests of the child will be their basic concern.

⁷ PRICE COHEN, Cyntia, "The Human Rights of Children", 12 Capital University Law Review, 1983.

⁸ 14 U.N. GAOR Supp. (No 16), U.N. Doc. A/4059 (1959).

⁹ PRICE COHEN, Cyntia, " United Nations : Convention on the Rights of the Child", International Legal Materials N°28, V2, 1989, 1448.

¹⁰ U.N. Doc A/34/424 (1976).

¹¹ U.N. Doc. A/44/736 (1989).

¹² PRICE COHEN, at 7.

Article 20 (protection without the family environment): when it is in the best interests of the child not to remain in the family environment, the child is entitled to special protection and assistance provided by the State.

Article 21 (adoption): In the system of adoption, the best interests of the child must be a paramount consideration.

Other international conventions, like the Hague Convention on Adoption, or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) embrace the principle of the best interests of the child. The principle is not explicitly mentioned in the International Covenants, but the Committee of Human Rights, in his general observations related to the International Covenant on Civil and Political rights indicated that the child's interest were the paramount consideration in case of divorce¹³. The UN High Commissioner for Refugees underlined that in all decisions affecting children, children's rights, particularly the best interests of the child principle must be a paramount consideration¹⁴. Regional instruments, like for example the Beijing Declaration on Commitments for Children, adopted during the Fifth East Asia and Pacific Ministerial Consultation from May 14th to 16th 2001, referred especially to the best interests of the child principle¹⁵. National legislation also reflects this concern.

I. 3. Which actions are affected and covered?

- Article 3.1 applies widely to all actions concerning children. It is not confined to actions and decisions concerning the rights and freedoms set out in the CRC¹⁶.
- An action '*concerns*' children not only when it is directly about them, or in reference or relation to them, but also when it regards or touches them. Even if the child is not the object of the decision, the principle applies if the decision affects her or him¹⁷.
- A broad reading of the provisions in Art. 3, one which gives to the word concerning a wide-ranging application, is more likely to achieve the objects of the convention¹⁸.
- Article 3 para 1 concerns actions, not omissions. However, it can also involve a negative obligation, from example to refrain from taking actions which would be contrary to the bests interests of the child¹⁹.
- The best interests principle applies to children (a human being under 18 years old), without difference between a single child and a specific group of children; it has to be understood as a global concept²⁰.

¹³ Comité des Droits de l'Homme, Observations générale 17, par.6 et 19, par.6, HRI/GEN/1/Rev.2.

¹⁴ UNICEF, Manuel d'Application de la Convention relative aux droits de l'enfant, 1999, 39-40.

¹⁵ UNICEF, Beijing Declaration on Commitments for Children in the East Asia and Pacific Region for 2001-2010, Shaping the Future for Children in East Asia and the Pacific, Fith East Asia and Pacific Ministerial Consultation, 14-16 May 2001, Beijing China.

¹⁶ Australia: Human Rights and Equal Opportunity Commission, 1999. Date of last amendment: March 1999. Contributing authors: Merryl Lees, Meredith Wilkie. ISSN Number: 1442-0813. http://www.hreoc.gov.au/human_rights/briefs/brief_1.html#sources.

¹⁷ Australia: Human Rights and Equal Opportunity Commission, *supra*.

¹⁸ Australia: Human Rights and Equal Opportunity Commission, ad 15.

¹⁹ PAS Wouter, VANDAELE Arne, " International Human Rights Treaties and their Relation with National Law : Monism, Dualism and the Self-executing Character of Human Rights " Understanding Children's Rights, University of Ghent, December 2000, 343.

Whose actions are covered?

As a general principle, it applies to public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. It's not an exhaustive list, except that it doesn't apply to private family decision, because it does not concern private family affairs²¹. The primary responsibility for the upbringing of children lies in the family and the State must provide help or assistance if parents or others legally responsible, fail in their duties²². But, parents' decision-making in the course of the upbringing and development of their children must make the children's best interests the basic concern as set out in article 18.1²³.

I. 4. The Principle and the CRC

Article 3 CRC as a general principle influences the entire CRC and cannot be read as an isolated article; the principle acquires its full meaning and importance in connexion with other articles or principles, especially with the principle of non-discrimination (art. 2 CRC) or the right for the child to express his/her views (art. 12 CRC). It is in a child's best interests to enjoy the rights and freedoms set out in CRC. For example, it is in children's best interests to develop respect for human rights and for other cultures (article 29.1(b) and (c)). It is in a child's best interests to maintain contact with both parents in most circumstances (article 9.3). It is in the best interests of Indigenous children to be raised in the Indigenous community (articles 5, 8.2 and 30)²⁴.

It is the basis for a new status. Child as a law subject²⁵ and not as an object of law.

I. 5. Characteristics of the Principle

- a) While most of articles of the CRC, article 3 is not a right, not a duty, but a guiding principle for interpretation which has to be applied in each intervention related to children²⁶.
- b) The principle of article 3 is legally undetermined and it is up to practice to define it according to some implementation criterias. In this concept, court decisions play an important role²⁷.
- c) The principle of the best interests of the child is defined and understood at a certain time and in a certain place. Time, because the interpretation of the principle is linked to the progress of medicine, sociology and psychology and reflects the superiority of one theory on another one. Place because the principle takes into account the law in a certain region²⁸. To illustrate this statement, I will present you the case of Taiwan. A study of Taiwan court decisions related to child custody showed that before 1996, fathers were

²⁰ DOEK Jacob Egbert, "Socio-political aspects of a child's best interests", Symposium interdisciplinaire, le bien de l'enfant en perspective, Université de Fribourg, 1er et 2 mars 2002.

²¹ DOEK, supra.

²² VERHELLEN Eugeen, "The Convention on the Rights of the Child", Understanding Children's Rights, University of Ghent, December 2000, 21.

²³ Australia : Human Rights and Equal Opportunity Commission, ad 16.

²⁴ Australia : Human Rights and Equal Opportunity Commission, ad 16.

²⁵ ZERMATTEN Jean, "L'intérêt supérieur de l'enfant", Symposium interdisciplinaire, le bien de l'enfant en perspective, Université de Fribourg, 1er et 2 mars 2002.

²⁶ ZERMATTEN, supra.

²⁷ VAN BUEREN Géraldine, "The international Law on the Rights of the Child, Martins Nijhoff; The Hague, 1998, 46.

²⁸ ZERMATTEN, ad 25.

favoured by the courts; judges' decisions were motivated by stereotyped gender roles and the tradition of parents' long term financial support for their children. Public welfare programmes were lacking. In 1996, this country adopted the best interests of the child standard to substitute for the presumption of paternal custody. Since then, custody has been overwhelmingly awarded to mothers. This change in court decisions, was not only motivated by the influence of women's movement, but by the adoption of a public welfare programme for children and by the legal-socio-economic improvement of single mothers' status. At the reading of the various court decisions taken after 1996, it is clearly stated that judges should stop using economic competences as a necessary factor in determining custody, but should pay more attention to the child's psychological and emotional needs. In addition, they should give visitation orders more often.²⁹

- d) The concept of principle is subjective: a social subjectivity, by the image of child's interests in society at a certain time – for example child in conflict with the law: at the beginning of the juvenile justice system, imprisonment was the only sentence provided, then alternative measures (social work, file...) were created and now we assist to a reintroduction of conservative and punitive measures, like imprisonment. A personal subjectivity: the parents know what the best interests of their children are, the child himself and the judge or the official decision person³⁰.
- e) No derogation to this principle is permitted, even in case of emergency. For example, the Committee on the Rights of the Child stated in his report regarding children in armed conflict, that the *general dispositions of art. 2,3, and 4 CRC couldn't suffer any derogation in case of war or emergency*³¹.

These characteristics show that the concept of the best interests of the child is difficult to determine; subjectivity may lead to partiality. But a flexible notion is adapted to each particular case, to each culture, to each religion, to each socio-economic situation and to each legal system. The diversity of minority groups for example may be respected within the frame of the national legislation. The case of Taiwan illustrates this statement very well.

1.6. Aims of the Principle

The principle of the best interests of the child is applicable in different main ways:

- a) it supports a child-centred approach in actions and decisions affecting children (control criteria)
- b) it serves as a mediating principle and can help to resolve confusion between different rights (solution criteria)
- c) it provides a basis for evaluating the laws and practices of States Parties with regard to the protection provided to children (promotion criteria)³²
- d) it gives birth to national program on childhood

²⁹ HUNG-EN Liu, International Journal of Law Policy & the Family, Volume 15, Issue 2, 185-225.

³⁰ ZERMATTEN, ad 25.

³¹ Rapport sur la deuxième session, septembre/octobre 1992, CRC/C/10, par.67.

³² UNICEF, Human rights for children and women : how UNICEF helps make them a reality, June 1999, p.9.

- e) it supports the adoption of a national policy for children.

The control criteria

It sets a quality standard for the child's way of life. The principle of the best interests helps to check if all obligations and duties related to children are implemented in a correct way, respecting his/her best interests. According to art. 3 CRC both public authorities and private institutions should fulfil the duty of seeking to realise the interests of the child and the control criteria shall apply in this field³³.

The solution criteria

The principle helps the people in charge of children to take the best decision, which respects his rights and gives him/her the opportunity to develop his/her personality. The decision will be taken in the best interests of the child and the solution criteria of the principle helps to choose between several solutions and resolves confusion between different rights³⁴. The solution criteria is the most important tool for judges, and official decisional persons.

The promotion criteria

Art. 3 CRC must also be seen in connection to the art. 4 CRC: *States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present convention. With regards to economic social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of the international co-operation.*

II. THE CONTROL AND SOLUTION CRITERIAS

The control and solution criterias have in common that an authority (legal, administrative or private) has to interpret the principle of best interests of the child. Once in order to take a decision related to the child and his welfare, and once to check if the decision is implemented in respecting the best interests of the child.

II. 1. The solution criteria

We said that the solution criteria aims to choose between several solutions and resolve confusion between different rights³⁵. There are two major stages in the implementation of the principle: to assess what is the best for the child and to balance her best interests against competing requests or rights. For the first stage it's essential that the child himself be heard and his opinions taken seriously. For the second stage, it is important to remember the basic idea that priority should be given to the child. When preparing decisions which appear to affect a child or children there should always be a systematic attempt to analyse and evaluate the consequences of the proposed actions. Once and before the decision taken, children should be heard

³³ The Joint Custody Association of Norway, The Human Rights and the Norwegian Children's Act – A judicial report (an assessment of the legal aspects), Part 1, 5, 1999
http://www.f2f.no/eng/hrnca_part1.html.

³⁴ ZERMATTEN ad 25.

³⁵ The Joint Custody Association of Norway, The Human Rights and the Norwegian Children's Act – A judicial report ad 33, Part I, chapter 6, para. 6b.

whenever possible.³⁶ This principle has been developed especially in the fields of child custody (divorce), adoption, and medically assisted procreation³⁷. Two illustrative examples will show the application of these criterias.

a) *The solution criteria and child custody*

The facts are simple: parents split or divorce. Each one requires the custody of his/her child/ren. The judge has to determine which one is able to care of the kids in the best way. He thus decides what is in the best interests of the child. To be in the custody of the father or of the mother? Or of other concerned persons?

First of all, some clear tendencies are relevant in court decision³⁸:

- the so-called doctrine of the young age, criticized, but applied: the younger the child is the greater are the chances of the mother to get his custody
- the importance of the main care provider
- to keep the statu quo

Some Anglo-Saxon countries have tried to create a kind of guideline for judges which establishes principles to take into consideration when deciding for child custody. These guidelines represent an attempt to clarify the principle of the best interest of the child, whose vagueness has been criticized. For example, in Canada, the project of Divorce Act modifications states that the notion of the best interests of the child has to be interpreted in the lights of the following elements³⁹:

- a) Nature, stability and intensity of the relationship between the child and the persons concerned by the procedure
- b) Nature, stability and intensity of the relationship between the child and other members of the family either because they care for him or because they live with him
- c) Child's hobbies
- d) Capacity of each person to bring the child a frame of living, education and care
- e) Cultural and religious links of the child
- f) Importance and advantages of sharing custody, which guarantees an active implication of both parents after separation or divorce
- g) Importance of the relationship between the child and his grand-parents or other members of the family

³⁶ HAMMARBERG, Thomas, Ambassador of Sweden, Best interest of the child : how to make real the basic principles of the Convention, IFCW Worldforum 1999, 30 August-4 September 1999, Helsinki.

<http://www.congcreator.com/ifcw99/other.html#keynote>.

³⁷ STETTLER Martin, "Le bien de l'enfant au regard de la jurisprudence de ces quinze dernières années" Symposium interdisciplinaire, le bien de l'enfant en perspective, Université de Fribourg, 1er et 2 mars 2002.

³⁸ BALA Nicolas, Droit de la Famille : Pas si simple le divorce, Le magazine Transition, été 2000, Vol. 30, N°2

<http://www.vifamily.ca/ivf/tm/302/2.htm>.

³⁹ BALA Nicolas, The best interests of the Child in the post-modern Era : a central but paradoxical Concept, Law Society of Upper Canada, Special Lectures 2001.

- h) Parents' proposals
- i) Child's ability to fit his parents' opinions
- j) Parents' ability to facilitate and keep the relationships with other members of the family
- k) Previous signs of violence shown by one of the parents towards the child
- l) Exclusion of gender custody
- m) The proven will of one of the parents to take part to educational reunions
- n) Other factors which may influence the decision

This long list isn't exhaustive and the points to examine haven't been classified by importance order. Nevertheless this principles represent a good attempt to create a working method to apply the best interests of the child principle⁴⁰. United Kingdom as well is establishing a guideline for judges, which take into account the best interests of the child principle as stated in the *Children Act of 1984*: Special attention is drawn on⁴¹:

- a) the child opinion
- b) child's physical, educational and emotional needs
- c) the impact of a change on his personality
- d) the problems he has gone through or he is living with
- e) the ability of each parents to respond to his needs

I believe that an important criteria is missing on both examples: the criteria of predictability. As a matter of fact, the best interests of the child principle has to be analysed not only when the decision has to be taken but also in the perspective of the evolution of the concerned persons' situation.

b) The solution criteria and conflict of rights

The solution criteria of the best interests of the child is also used when there is a conflict between different rights. The following Spanish example illustrates the case⁴²:

A mother of two children, 5 and 12 years old presents a request of separation. She wants to get separated because her husband the father of her children has joined a religious movement which is contrary to her belief and the education of the kids. She doesn't want the father to have joint custody and asks the court to deprive the father of visitation rights. The father pleases he is protected by freedom of religion. Children have been heard.

⁴⁰ZERMATTEN, ad.25. For more information on this law project :www.parl.gc.ca (2 N° du rapport 02) <http://www.Canada.justice.gc.ca>.

⁴¹Children Act of 1984 can be found on the Canadian Web site : <http://www.Canada.justice.gc.ca> in Child and Custody Access.

⁴²STC 141/2000 del Tribunal Constitucional, de 29 Mayo 2000, España
<http://www.tribunalconstitucional.es>
<http://www.childsrights.org> .

Fig. 1 : Rights under the CRC and fundamental freedom

<p>Mother Art. 14 .2&3 CRC</p>	<p>Father Freedom of religion Art. 14 .2 &3 CRC</p>
<p>Children Art. 14 1 CRC Art. 12 CRC Art.3 CRC Art. 9.3 CRC</p>	

District court : the father is protected by freedom of religion. The religion he has embraced isn't dangerous for the psychological and physical development of children. He got joint custody on his children and visitation rights (one half of the holidays and one week-end out of two). The father is prohibited to have his kids participating to any ceremony his religion supports.

Provincial court: even if it's important to maintain personnel relationships between the father and the children, some restrictions have to be implemented in order to protect the children from the religious movement. No joint custody for the father, no holidays and a restricted visitation right.

Supreme court: the issue is: what is in the best interests of the children: to be protected from a religious movement while respecting their right to embrace their own religion but in violating the father's freedom of religion or to keep relationship with their father and by the same way respecting the fundamental freedom enjoyed by the father?

Fig. 2 Confusion of rights: best interests of children

<p>Children Art. 14 CRC Protection Rights Relationship with parents</p>	<p>Father Art. 14 2& 3 CRC Freedom of religion Relationship with children</p>
<p>Best Interests of the children? Art. 3 CRC</p>	

When confronted to a conflict of freedoms and rights, in this case the freedom of religion of both father and children, and the children's protection rights it's important to keep in mind the principle of the best interests of the child and to decide consequently. The Supreme Court of Spain adds that the best interests of the child under a constitutional approach means the optimal development of the child's personality in respecting his fundamental rights.

In this case, there was no evidence of a negative influence of the religion's father on the children's development. In addition, there were no evidence of children's participation to any religious ceremonies which could endanger their personality and the right to choose their own religion. This is why the Supreme Court has decided to attribute joint custody to the father and full visitation rights.

II.2. The control criteria

According to art. 3.2 CRC, States have to ensure children protection and care, which are necessary to their welfare in taking into consideration the rights and the duties of the parents, tutors or people who respond for them. Many parents cannot comply to the obligation of care and protection. This is why States must create a security system which guarantees to all children and in all cases or circumstances their welfare⁴³. For example, street children, gypsy children, disabled children and in general all children from minority groups. According to art. 3.3, State has to elaborate norms related to institutions and services for children. It has to control thanks to an appropriate survey, if these norms are respected and implemented. This article also applies to persons who are responsible for children protection, that is to say for those who are working for public, private, religious or benevolent organisations, especially in the field of health and security⁴⁴.

III. PROMOTING AND MAINSTREAMING THE PRINCIPLE

III.1: Introduction

The CRC has brought a new concept and new evidences: child is a subject of rights and thus has the right to exercise them even against the will of the adults. The group of under 18 years old is a recognised social entity even if divided into three stages, childhood, adolescence and youth. But the CRC goes further than simply recognizing a new concept and new evidences: it gives the child an important role to play in the life of society; child has the right to participate. The CRC gives him the right to express himself and us, the adults have the obligation to listen to him. This is the most important achievement of the CRC⁴⁵: But we need to distinguish between the principle of having rights and the possibilities of exercising them, with the Convention foundations of the best interests of the child and the evolving capacities of the child as guidelines for exercising these rights⁴⁶.

III.2: Participation and Best Interests of the Child: three examples

I believe that children participation and best interests of the child are strongly connected. The articles on children's participation rights, though highly controversial, are fundamental parts of the CRC. Further more, the UN Committee on the Rights of the Child has argued that participation is critical to the achievement of the Best interests of the child participation. Children should have a voice because of their need for protection, so that their needs are properly met and, more generally, because participation is central to healthy social and psychological development⁴⁷ On August 2001, preparing the UN Special Session on Children for September, the Children and Young people of the East Asia Pacific Region met in order to attend

⁴³ Manuel d'Application de la Convention relative aux droits de l'enfant, ad 14, 44.

⁴⁴ Manuel d'Application de la Convention relative aux droits de l'enfant, ad 14, 45-46.

⁴⁵ ZERMATTEN, ad 25.

⁴⁶ FLEKKOY Malfrid Grude, "A framework for Children's Participation" in Understanding Children's Rights, Collected papers presented at the fifth International Interdisciplinary Course on Children's Rights, University of Ghent, Belgium, December 2000, p.130.

⁴⁷ HART Roger, « Cultural Issues and Participation » Proceedings of the 2nd International Conference on Children's Rights Education: Creating a Culture of Human Rights, Democracy and Peace in the New Millenium, Victoria August 18-22nd, 2001.

two forums⁴⁸. Delegates from China/Hong Kong, Myanmar, Lao, Cambodia, Thailand, Vietnam, Philippines, Indonesia, Malaysia, Mongolia and South Korea attended these meetings. They emphasize the need to participate actively in society, because young people believe that they need to take a lead in their own life. This skill can be taught by adults in letting them being a part the decision making process⁴⁹.

Participation rights or self-expression rights reflects the person's rights to self determination and include the rights to receive adequate information, to be heard in matters that concern the child, to freedom of expression and to share in the decision making process gradually making more and more important decisions as the child matures⁵⁰. There are two groups of participation rights: the first one focuses on the form of participation (arts. 12,. 13,14, 15, 37 and 40 CRC) and the second one on the requirements of participation (*evolving capacities*)⁵¹. Presently, there are three tendencies in recognizing children' rights to exercise:

- a) a reformist tendency which aims to impose a progressive acquisition of rights,
- b) a radical tendency fighting discrimination based on age and allowing them full exercise of civil and civic rights and
- c) a third tendency which gives children all the rights except those listed exhaustively⁵².

Why is participation so important? Experience and studies have demonstrated that children, who are active in decision-making, who learn from their own experience, are less prone to depression, hopelessness, and suicides, because they believe they can contribute to making a change⁵³.The participation rights have been developed mainly in the fields of child hearing and urbanisation/environment⁵⁴. However, many opinion surveys were conducted in order to listen to children and to learn about which problems they may be confronted and how they face them⁵⁵. The following examples will show you how this principle has been implemented in the best interests of the child.

a. Developing the future with children⁵⁶

As mentioned above, children and young people from East Asia Pacific Region met last August in order to attend to forums to prepare the UNGASS. The process of these forums were the following⁵⁷:

⁴⁸ "Do you best for children, And let children do their best for the world" Developing the Future with Children, Children and Young people Forum, East Asia Pacific Region, August 2001

⁴⁹ "Do you best for children, And let children do their best for the world", supra,p. 3

⁵⁰ FLEKKOY, ad 46 p. 130-131.

⁵¹ FLEKKOY, ad 46 p. 131-132.

⁵² FLEKKOY, ad 46 p 129 ss.

⁵³ RAUNDALEN, T.S. 1984 ; ESCALONA 1982 ; SCHWEBEL, 1982, cited by M.G. FLEKKOY, ad 49.

⁵⁴ HOPFLINGER François, « Etre enfant hier et aujourd'hui », Colloque national Etre enfant aujourd'hui, Lausanne, 23 mai 2002.

⁵⁵ UNICEF, Speaking out for Children, Voices of Children and Adolescents in East Asia and the Pacific, A regional opinion survey, September 2001

⁵⁶ Do you best for children, And let children do their best for the world, at 48

⁵⁷ Do you best for children, And let children do their best for the world, at 48, p. 7

- getting to know each other
- from country situation to common problems
- discussions and recommendations for governments and NGO
- preparations for the presentation of their output statements
- visitors' presentations
- fun and visits
- opening and closing ceremonies, press presentations.

Each participant from each country presented a report on the situation in his country. For the participants from Myanmar, the situation was the following⁵⁸:

Being done

Health : vaccination campaign of children, more clean water readily available, improved sanitation, HIV/AIDS education given.

Education: Life skills given and schools constructed in remote areas

Social: Drop in centres for street children and anti-narcotic campaign

Not done:

Health: not enough medical centres

Education: learning by heart system and teacher-student ratio too big

Social: poverty creating serious problems and child participation not encouraged.

The children notice that share the same preoccupations and problems. They decide that they should address to governments and NGO some recommendations to improve their situation.

Priority was given to the following topics⁵⁹:

- 1) Education
- 2) Basic needs and survival
- 3) Child abuse and exploitation
- 4) Child participation
- 5) Health
- 6) Child protection and Gender, cultural and geographical equality
- 7) Legislation and political constraints
- 8) Information technology and Communication
- 9) Environment

⁵⁸ Do you best for children, And let children do their best for the world, at 48, p 32

⁵⁹ Do you best for children, And let children do their best for the world, at 48, p. 11

The strategies for promoting the prior issues are:

- a) Fight poverty
- b) Increase budget for children
- c) Fight corruption in the governments
- d) When there is a political crisis, don't change children's policies too often.
- e) Avoid child soldier and armed conflict for children
- f) Quick law enforcement
- g) Adopt gender cultural and geographically sensitive programs for children
- h) Draw attention to children's issues
- i) Promote children's rights to children
- j) Don't forget environment
- k) Pay attention to globalization consequences.⁶⁰

Children also commented the UN Document entitled *A World fit for children*⁶¹ and the Beijing Declaration on Commitments for Children⁶². Their commentaries were sent to their government, NGO and the United Nations.

Critics related to the consequences on these forums, like on children's participation in general are numerous. The main point is that all these meetings are worthless because any way States do what they want, despite children's recommendations. In my opinion, we mustn't forget that children once will become adults, with political powers like voting, for example. It's important to make them aware of their duties and responsibilities. Promoting their participation means preparing them to a responsible adult life. In addition, States and especially NGO do take into consideration children's opinion, as the following examples show.

b. Environment/Urbanisation: the program Growing up in cities by UNESCO⁶³

Presently many projects related to encourage young people to build their own environment are well implemented. The idea is simple: trying to make problematic neighbourhood more suitable for children in asking them what would be the nicest place to live in. The very first kind of project initiated in the late 1970, when UNESCO decided to conduct a study on the effect of urbanization on childhood and youth. The results showed that more and more children and young people live in cities. In industrialized countries, a half to three-quarters of all children live in urban areas; in the developing world, the majority of children and youth will be urban in the next few decades. Urbanization may have negative impacts on the live of young people, such as increasing of delinquency, drug

⁶⁰ Do you best for children, And let children do their best for the world, at 48, p. 22

⁶¹ ANNAN Kofi, A World fit for Children, September 2001, <http://www.unicef.org>

⁶² UNICEF, Beijing Declaration on Commitments for Children in the East Asia and Pacific Region for 2001-2010, at 15

⁶³The program is presented on UNESCO Web site : <http://www.unesco.org/most/guic/guicmain.htm>

addiction and health problems. UNESCO decided to launch the program entitled Growing up in cities and to address several ranges of issues:

What does the process of urbanization mean in the lives of young people?
From young people's own perspectives, what makes an urban neighbourhood a good place in which to grow up?

Can cities be positive places for young people-places that support and nurture their development as constructive, contributing members of a civil society?

The Growing up in Cities program is based on a strong collaboration between UNESCO and interdisciplinary teams of municipal officials, urban professionals, and child advocates around the world, working with young people themselves to create communities that are better places in which to grow up-and therefore, better places for us all.

In 2002 more than 15 Growing up Cities program exist all around the world. The results of the experience are clear such as the Polish program demonstrates: in the capital of Warsaw, young people were required to improve one of the poorest working-class district, Powisle. In general, the young people rated Powisle more positively than the rest of the city, although they considered Warsaw as a whole more interesting, often visiting big city stores, fast food restaurants, nearby streets and squares, and the Palace of Culture and Science. For these children, Poland's entry into the free market consumer culture was a taken-for-granted fact, and the momentous events of the fall of Communism in 1989 were already a vague and uncertain matter of history. When they were asked about changes in Powisle, nearly half said that they observed none, although many noticed new street names and store windows, increasing air pollution from increasing traffic, and other environmental gains and losses. About 80 per cent who noticed changes were of the opinion that the changes were for the better; but in study results that pose a challenge in terms of these young people's civic development, the majority expressed a distrust of politicians and the political system, and few believed that they could have any influence in shaping their area, despite their eagerness to work for the improvement of their environment if they could.

c. Child hearings

Child's participation has been especially developed in this field. Many national law have introduced child hearing during judicial or administrative procedures⁶⁴. For example, modification of divorce legislation provides that child has to be heard about his parents conflict especially in order to determine child custody. Child hearing asks many questions.

- a) What are the impacts of such a procedure on children? Psychologists estimate that it is important to associate a child in family life, even if this one is chaotic. It is important to make children understand that they are member of this family, that there is a problem and that everybody tries to solve the problem. Listening to him, taking his opinion into consideration reinforce his position within his family and his self esteem. Hiding conflicts is worthless, because children feel it anyway and may interpret it in a wrong way. In addition, children do not decide which parent will get their custody.

⁶⁴ For example Switzerland, Code Civil suisse, Titre quatrième, Du divorce 1.1.2000, RO 1999 1118 1142.

The judge must precise this point to them and tell them clearly that the decision belongs to him. Conflict of loyalty between their both parents is avoided. As far as the age of the child is considered for hearing, psychologists estimate that a seven years old child may be heard by a judge; below this age limit, he should be heard by a specialist.

b) **Qualification**

Are judges qualified to hear a child? They haven't studied children psychology and few of them are childhood specialists. In the countries where judges have to go through a school of magistrates, there are few classes dedicated to psychology and among them very few concern children. There is a lack of qualification and countries who have adopted child hearing in their legislation, should organize special training for judges or power decision authorities.

In administrative procedure, child hearing should be obligatory but few administrative authorities are conscious of their duty, when a decision to be taken concerns a child. An enormous legislative work still needs to be done. The same statement is true for school regulations⁶⁵.

III. 3 Promoting the Participation and Best Interests Principles

As I've said before, the best interests of the child principle finds one of his implementation by the participation of children. Thus it is important to promote this principle and mainstream its most important aspects. In other words, we need to adopt a real promotion policy. It is up to us adults, to enable children to participate actively to social life. That is to say:

a) diffusing the CRC

The participation rights have to be known by everybody. According to art. 43 CRC, States have the obligation to promote and diffuse the CRC. I believe that three categories of people are concerned by this article: children themselves, State, and concerned citizens.

b) adopting a policy for children

children's participation has to be implemented at two different levels. The first one allows children to make plans or projects for themselves, to realize them without adults intervention. This kind of participation also shows their sorrows and preoccupations. The Growing Up in cities Program is a good example of this kind of participation⁶⁶. School is an interesting place for encouraging student's participation; many initiatives have been developed, like mediation by pupils in case of conflict between teachers/students or among students. I believe that this form of participation is one of the most important, for the children and for the adults. Consequently, budgets have to be adopted in order to favourize the adoption of such a program and laws have to be adapted as well.

The second level of children participation is related to political participation. Children's Parliament have been created in many different countries and till now, the success are quite limited. But Children's Parliament are recent: time and

⁶⁵ ZERMATTEN, ad 25.

⁶⁶ Growing Up in Cities Program, ad 53.

experience will help increasing the quality of the debates and the importance of their decision.

c) State policy

State policy has to be influenced by children's participation in many different fields:

National Budgets must take into consideration child's issues, especially participation.

Structures have to be created in order to ensure children's participation, such as Parliament, children's forum, Youth centres and so on.

Protection services have to be adopted, like for example the Norwegian office for the child.

Child's representation has to be ensured by Ombudsman (Scandinavian countries) or commissioner for children like in Belgium. In legal procedure, children must have a representative, who is a solicitor appointed by the court to represent a child during a dispute to ensure that the best interests of the child are met⁶⁷.

Special training for judges and lawyers have to be implemented in order to learn about the concrete mechanisms of children's participation.

When adopting a law, even if not directly related to children, the State or Parliament has to get the reflex of wondering if children's rights are fully respected.

d) Adults

Adults also bare the responsibility to ensure children's participation. First of all parents, who need to understand that their own children have the right to express their opinion and to be listened. Even in case of a family dispute, the child has to express his feeling on a situation which deeply concerns him. Psychologists or family counselling services have to be required in case of difficulties.

Teachers must understand that school isn't a one way service, but that each part students/professors have to interact and exchange ideas and opinions. Pupils must have the opportunity to express themselves about an issue which preoccupies them and they have the right to get an answer.

Consumers' services providers, such as medias, or factories must wonder if their activities and/or services are respectful of the principle of children's participation and comply with best interests of the child principle.

Specialists of childhood must get the reflex of the best interests of the child in their day to day professional life. Practitioner check lists have been created in order to help them. For example the practitioner list for Australian social workers:

⁶⁷ Family Law Act of Australia on <http://www.childsrights.org>.

Practitioner checklist - Best interests of the child⁶⁸

Concerning a child?

Does the action or decision complained of affect a child or children (eg denial of Parenting Payment)?

Whose actions?

- a) If a child is affected, list the relevant actions and decisions and, for each, identify the decision-maker.
- b) Is the decision-maker covered by CROC (eg Centrelink, police, education department?)

Best interests considered?

- a) If the decision-maker is covered by CROC, did it take the child's best interests into account?
- b) How were best interests defined? Were the child's views taken into account (if the child is capable of forming a view)? Were the parents' views taken into account?
- c) Were the child's best interests made a primary consideration or the paramount consideration as relevant?
- d) If you are unable to judge, consider how you might find out.

Challenging the decision

- a) Raise your concerns with the decision-maker or on review or appeal (eg at the Social Security Appeals Tribunal or in a bail application).
- b) If the decision breaches the child's rights, explore possible remedies. If the decision-maker is subject to HREOC's jurisdiction (discretionary decisions of federal agencies such as Centrelink and DETYA), consider submitting a complaint

Specialist advice

For assistance, contact a specialist youth advocacy or legal centre or your local legal aid office.

The Committee on the Rights of the Child has established a guideline for States which have to report on the situation of children in their country⁶⁹.

As far as art. 3 CRC is concerned, the Committee requires that State mentions in his report:

- mention of this principle in the Constitution and in national laws
- is this principle respected by courts, administrative authorities or legislative organs, and by public or private institutions of protection
- how is the principle of the best interests of the child considered as a primordial in family life, school life, social life and in fields like credits

⁶⁸ Australia: Human Rights and Equal Opportunity Commission, 1999, ad 16.

⁶⁹ CRC/C/5, par.13 et 14.

attribution, environment, transportation and housing policies, adoption, social security, juvenile justice and placement in institutions?

- are there legal norms related to organisation of institutions?

In addition, the Committee recommends that each national plan adopted by State should integrate the principle of the best interests of the child by adopting a mechanism of evaluating the impact on children of measures taken by public authorities. The results of this evaluation should be integrated in political agendas⁷⁰. The questions of the Committee are also more and more based on the budget policy of the reporting States: How much of the budget is dedicated to social spending for children? Are children concerned by budget restrictions?⁷¹

The principle of the best interests of the child should guide Parliament deliberations as well as Governmental policies and should be reflected in national law⁷².

III.4 Mainstreaming the Participation and Best Interests Principles

Promotion isn't enough. Some issues related to children's participation may be put aside or left to the discretionary power of a State. This is why it is important not only to promote, but to mainstream children's participation. Mainstreaming means bringing something from the margin into the mainstream, thereby making it acceptable to the majority. Mainstreaming children's participation means turning children's participation from a fringe of issue to one that is at the centre of public attention and debate. It means getting institutions which have so far ignored children's participation to incorporate the issue in their agenda⁷³. For the UNDP, mainstreaming involves bringing the outcomes of socio-economic and policy analysis into the core decision-making process of an organisation⁷⁴. Mainstreaming is the duty of everybody, especially of those who are active for the protection of children.

Conclusion

The concept of the best interests of the child is hard to define, because it evolves with social, medical and legal changes. It finds one of its best implementation in the light of the participation rights.

Talking about the right for the child to express his view, let's listen to him and see what he has to tell us. From May 8th to 10th, the United Nations General

Assembly held a special session on children⁷⁵. Children were present and participated actively to conferences, debates and side-events. One conference was on children's

⁷⁰ Manuel d'Application de la Convention relative aux droits de l'enfant, ad 14, 41.

⁷¹ Manuel d'Application de la Convention relative aux droits de l'enfant, ad 14, 42 and Pakistan, RIOF, Add.18, par.26.

⁷² Manuel d'Application de la Convention relative aux droits de l'enfant, ad 14, 43.

⁷³ CRIN NEWSLETTER, « Mainstreaming child rights » Number 15/March 2002, 13.

⁷⁴ CRIN NEWSLETTER, supra and

www.sdn.undp.org/gender/capacity/cb_programme_description.html.

⁷⁵ For last up dated information on the Special Session, <http://www.childsrighs.org>.

participation and was animated by children themselves⁷⁶. For the young Norwegian delegate, participation meant being seen by adults: seen physically and by a booklet they have created for the event⁷⁷. For Manuel from Spain, participation meant respecting child's opinion and associating him in various kind of organisations, associations, schools and so on. The delegate from Cuba explained that the Children Parliament was very active and worked closely with the Adults Parliament, like in writing laws together. He explained that in his country, child's participation started in school in working on the school regulation and in hospitals, where children were asked to paint the walls of the building. But the final conclusion belonged to a little guy from Peru, who said: *I don't understand why it's so complicated for adults to listen to us; they were children once, and thus they must know that a child feels exactly what is good or not for him. It's just a question of respect.*

⁷⁶ Promoting Children's Participation, General Assembly Special Session on Children, New York, May 8th 2002.

⁷⁷ Forum for the Convention on the Rights of the Child – Norway, Hello, is anyone there ?, 2001.

THE CONSTRAINTS IN IMPLEMENTING THE CRC IN MYANMAR

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The Convention on the Rights of the Child was recognized by the United Nations General Assembly held on 20th November, 1989. Myanmar, reserving its article 15 and 37, signed CRC on 16th July 1991 and the signatory was recognized on 14th August, 1991. Article 15 is prescribed that the state parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly. Article 37 is prescribed that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, shall be deprived of his or her liberty and neither capital punishment nor life imprisonment.

During two years after signatory State Party of CRC, the Child Law was enacted on 14th July 1993 in conformity with the accent of CRC. In the Child Law, under section 15, it was described that:

Every Child:

- (a) has the right to freedom of speech and expression in accordance with law;
- (b) has the right to freedom of thought and conscience and to freely profess any religion;
- (c) has the right to participate in organizations relating to the child, social organizations or religious organizations permitted under the law.

Under Section 37, it was prescribed that:

A police Officer or a person authorized to take cognisance shall abide by the following when arresting a child accused of having committed an offence:

- (a) shall not handcuff the child or tie with a rope;
- (b) shall not keep the child together with adult prisoners: if it is a girl, shall keep her with a woman guard;
- (c) shall not maltreat or threaten the child;
- (d) shall not send the child together with adult prisoners from one place to another; if it is a girl, shall send her with a woman guard;
- (e) shall inform the parents or guardian concerned as soon as possible;
- (f) shall send up the arrested child to the relevant juvenile court as soon as possible;
- (g) shall release the child on execution of a bond, if the child cannot be sent up as soon as possible to the juvenile court under sub-section ;
- (h) shall send the child to a temporary care station or to another appropriate place, if the child is not released on a bond under sub-section.

Under Section 45, it was also prescribed that-

Notwithstanding anything contained in any existing law, a death sentence, transportation for life or a sentence of whipping shall not be passed on any child.

Under the Section 59 (b), it was prescribed that:-
may pass an order to transfer a child undergoing imprisonment to a training school or to a custodian till the day of 18 years, if it is considered beneficial for the child.

Under the Section 48(b), it was prescribed that:-
"if in conformity with the following conditions, pass an amending order to entrust a child who has complied with the order passed under section 47 sub-section (c) or sub-section (d) for at least one year, to the custody of the parents or guardian concerned, with or without abond:

1. improvement in the moral character of the child;
2. being a child who has parents or guardian;
3. not being an offence of violation of the Narcotic Drugs and Psychotropic Substances Law;

These reservations in concern with CRC article (15) and (37) were withdrawn on 4th November 1993 and the CRC was totally recognized by Myanmar without reservation. After then, Myanmar is striving to implement the provisions of CRC in accordance with the Child Law in order to enjoy fulfillment for the children in Myanmar.

After enacting the Child Law of Myanmar, National Committee on Child Rights was formed on (30.9.93) acting the Ministry of Social Welfare, Relief and Resettlement as the Chairperson of this committee. Under the National Committee, the Working Committee of the CRC was formed acting the Deputy Minister of the Social Welfare Relief and Resettlement as the head of the committee.

Under the working committee, nine sub-committee of the CRC and States and Division and District and Township levels of the CRC were already formed in order to uplift of the acceleration of the CRC implementation. Though the NCRC and Working Committees held regular meetings to assist the implementation of CRC, the Sub-committees are delaying in implementing and reporting CRC. As the Chairpersons of the State/Division and District/Townships CRC Committees are the respective heads of General Administration Department, they have their mother units' responsibilities. Therefore the respective State/ Division and District/ Township Committees are facing up lack of power in implementing CRC and they cannot held regular meeting on CRC. The sub-committee of States/Divisions and Districts/ Township are always lack of implementing on CRC until the chairperson of NCRC and vice chair of working committee meeting them and giving necessary guidances. It is learned that there are many weak points in implementing CRC at District/Township levels because of meagre supervision of the State/ Division Committee. The causes of delay in implementing CRC are: - first, many responsibilities of mother unit of sub-committees heads and the second: lack of financial allocation.

Regarding to CRC, though above mentioned efforts are being provided with cultural traditions, it is found many weak points in cooperation with NCRC and other NGOs. Because of this, there is a vital constraint to understand CRC not only CRC committee members themselves but also public including children. Relating to CRC, workshops, distribution of child law with free of charges translation and distributions

of child law in 6 ethnic languages, distribution of posters, pamphlets and calendars have been implemented by NCRC in cooperation with UNICEF. But awareness raising (or) advocacy of CRC between respective committee members and public is not effective and we need to try to get advocacy in concern with CRC.

As the result of lack of advocacy on CRC, the efforts in the best interest of the children are rare among the public. The children, themselves cannot find out the opportunity for their development. For the weakness of awareness raising on CRC among the public, the public cannot help the children who are able to seek their development opportunity themselves.

The respective Governmental Departments are carrying out the tasks relating to CRC. The Department of Health is taking responsibility for the survival of children and the Department of Education is performing measures in concern with the development of children. While the Department of Social Welfare implementing child protection services, the Department of Information and the Department of Culture are undertaking the child participation services. However, it is found out that the cooperation on CRC among NGOs, INGOs and NCRC, Sub-committee, State/ Division Committees, District/ Township Level Committee is weak.

In order to study and find out those advantages and disadvantages systematically, monitoring and evaluation measure (or) system is also debilitated. A task can be developed by research, monitoring and evaluation. The National Committee on Child right needs to fill up the strength of its staff and to build the capacity of the staff. Moreover there is also necessary to strengthen in the areas of research, knowledge and information, distribution of information, data collection and record keeping, national and international relation, management and office work as well as to fill up office materials such as computer, fax, E-mail, internet, copier and paper etc.

Regarding implementation of CRC in Myanmar, following constraints are being emerged objectively:

- weakness of sub-committees, State/Division Committees and District/ Township level committee in implementing CRC because of the chairs have their mother unit responsibilities,
- weakness in understanding CRC of respective committee members,
- less practise of children in finding development opportunity themselves,
- less help for children from the public because of lack of understanding of the public in concern with CRC,
- Lack of cooperation between respective committees and NGOs, INGOs
- need of monitoring and evaluation services,
- need to build capacity of NCRC's staff.

In compare with those constraints, as the more advantages in implementing CRC of Myanmar, UNICEF Executive Director recognized in her report that Myanmar has clearly mentioned the implementation for child development in the Second National Report on the Implementation of the Convention on the Rights of the Child which was reported to United Nation by NCRC of Myanmar.

In conclusion, by finding out means and ways to rectify those constraints, it is believed that Myanmar children will be enjoyed their rights fully in accordance with Myanmar cultural traditions and CRC provisions.

TRANSFORMING THE GUIDING PRINCIPLES OF THE CRC INTO ACTION IN MYANMAR

Daw Su Su Lwin, Project Officer, UNICEF Myanmar

Distinguished guests, ladies and gentlemen, Mingalaba. First of all, I would like to thank all the organizers of this Seminar for giving UNICEF the opportunity to be part of this very important occasion. Given this opportunity, today I would like to talk about how we are striving to transform the guiding principles of the Convention on the Rights of the Child (CRC) into practice in this country.

Since the latter part of the 90s UNICEF's programming has taken a new direction. Seeing development from a rights prism, UNICEF's programmes currently follow a rights-based approach. This means that human rights are fundamental to UNICEF's work and that the key human rights guiding principles and the foundation principles of the CRC are integral to all our programmes. With such principles as our framework of action, in a nutshell, our country programme in Myanmar is not just concerned with what it is we should be doing, but much more so with how we should be doing it.

I. Key human rights guiding principles

Accountability:

The authorities of Myanmar, in ratifying the CRC agreed to implement the treaty and to be accountable for meeting the rights and providing the needs of its children. Having the special mandate to advocate for the protection of children's rights, UNICEF in Myanmar vis-a-vis the country programme of cooperation provides assistance to the State in realizing its CRC commitment towards its children. The specific programme activities of the country programme are founded on the view that children are to be regarded as subjects of rights to whom others have responsibilities. They are not seen as objects of charity and patronage approaches. Families are recognized as primary caregivers, protectors of children's rights and guides of children. The civil society including communities, families, parents and caregivers are all considered to have obligations towards their children. Therefore, UNICEF's assistance includes those activities which enable such members of the civil society to fulfil their responsibilities

Universality:

The country programme of cooperation recognizes the universality of rights and considers the rights of children to apply to all children, in all situations, all of the time, everywhere. The implication of this is that inclusiveness will be a principle which will be more rigorously applied than had been in the past. Thus making exclusion, disparity and injustice regarding children up to the age of eighteen, central concerns of the country programme.

Indivisibility:

The indivisibility and interdependence of rights is well respected in the country programme of cooperation. UNICEF recognizes all rights as equal in status and understands the need to look at the full range of human needs which are: physical, psychological, developmental and spiritual. Although in this respect, its vision and analysis can be holistic, UNICEF in its programming process however has to make

choices and its interventions must be prioritised. As a result of such a process the programme activities focus mainly upon the most strategic and viable interventions and the most urgent of the needs to be addressed.

Participation:

Participation has generally been viewed as a concept closely interrelated to ownership and sustainability. However, in adopting a rights-based approach, UNICEF views participation in a much broader sense. It believes the promotion of rights of all people to participate in the decision-making processes which effect their lives to be of utmost importance in development processes. It also understands that enabling beneficiaries access to information relating to such decision making is integral to participation. Based on this premise, the project activities of the present country programme recognize women and children to be central actors in their own development.

II. Foundation principles of the CRC

Non-discrimination:

The principle of non-discrimination is closely related to the principle of universality. The principle of non-discrimination, on the basis of race, colour, gender, language, religion, opinion, origin, disability, birth, or any other characteristic, means that all children have the same right to develop their potential. To identify discrimination, data should be broken down and analysed by age, ethnic group, geographic area and gender. Such information becomes essential in making rights-sensitive decisions regarding policies, services and allocation of resources. The collection and processing of data which will lead to the fulfilment of this fundamental right, is of major concern in the current country programme.

Best interest of the child:

The CRC refers to the best interests of the child as 'a primary consideration' in all actions regarding children. This principle is applicable in three ways: First, it supports a child-centred approach in actions and decisions affecting children. Second, serving as a mediating principle, it can help to resolve confusion between different rights. Third, 'the best interest' principle provides a basis for evaluating the laws and practices of States Parties with regard to the protection provided to children. The 'best interest' principle has been invoked to argue that basic services for children and women must be protected at all times, including during wars or periods of structural adjustments and other economic reforms. Despite efforts to apply all the three ways of the 'best interest principle' across all programmes and projects, the conditions and situation which prevail at present poses major challenges to UNICEF in their applicability.

Right to life, survival and development:

Ensurance of access to basic services which enable the right to life, survival and development is the main thrust of UNICEF's country programmes.

Respect for the views of the child:

This principle calls for the views and the voice of the child to be heard and respected. This principle means that children's opinions are important and that views and voices must be taken into account concerning the realization of their rights. They should

also participate in decision-making processes that effect them, in ways that are appropriate for their age. The extent to which this principle can be applied across the projects in the country programme is another major challenge in the present country context. Despite such circumstances, project activities where ever possible will integrate and promote children's participation especially in those related to their development process.

III. UNICEF programming process

UNICEF's programming process follows a simple approach which is based on the Triple-A model (Assessment, Analysis and Action). It can be said to be an interactive process of learning and doing, with no marked beginning or end. Human rights principles are applied throughout all phases of the programming process. Among the human rights instruments CRC and CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women) are the most directly relevant instruments to the UNICEF mandate.

Assessment:

In the assessment phase, undertaken jointly with national and international cooperation partners, the condition of children and their families is broadly examined. It is also an assessment of how children and women fare in relation to the full range of rights addressed by CRC and CEDAW.

Analysis:

The analysis phase, explores the various levels of causality of identified problems, and determines the role played by various actors. The analysis provides the basis for determining the country programme objectives and the strategies.

A rights perspective requires us to enhance the process of assessment and analysis through a full understanding of the legal framework of a country, and the factors that create and perpetuate discrimination and social exclusion and hinder many children from realizing their potential. A rights perspective, therefore, helps us to more fully understand how law, social norms, traditional practices and institutional responses positively or negatively affect children and women. Among those problems identified to be addressed by UNICEF, some will be dealt with through service delivery and capacity building while others will be acted upon directly or indirectly through monitoring and advocacy.

Action:

Our actions for the present country programme cycle are outlined in detail in our Master Plan of Operations Myanmar UNICEF Country Programme of Cooperation for the period of 2001-2005.

Before discussing the status to date regarding some of the important programme interventions or actions from the present country programme, I would like to highlight some salient features of the assessment and analysis phases of the programme process.

The findings of some of the studies used in the assessment were quite telling of the socio-economic conditions and were indicative of the range and degree of the social sector issues that needed to be addressed. The level of commitment demonstrated by

means of the resources allocated to the social sector by the various actors including the State, was not so encouraging either. The following are among those findings which warrant attention.

- Nearly ¼ of all households had expenditures below minimum subsistence level in 1997
- The average household allocates 70% of its expenditure on food
- The financial crunch which affected the social sector was the decline in the public expenditure in the health and education sectors (Please see Figure 1)
- This was exacerbated by the level of the overseas development aid (ODA) which the country receives

Confronted by such issues, carving out its future tasks for UNICEF meant a great challenge. Bearing in mind the limited resources and funding which it may have, and basing on the lessons learnt from the previous programme cycle, UNICEF had to make tough choices. There was a need to find the right balance between activities that respond to the urgent survival and protection needs while contributing to the larger social, economic and legal transformation which will guarantee sustained protection and fulfilment of children's rights.

Thus, the analysis process resulted in the identification of UNICEF's strategic role in addressing the underlying causes which is impacting negatively particularly on the most vulnerable children and the communities in which they lived. Some of the shortcomings found in the previous vertical approach in its programming also lead to the decision to adopt a more horizontal approach to programming. This meant that the different programme activities which aim to address and fulfil the different basic needs of the children and their communities will now converge and be implemented in the same area. Targeting the areas of the most disadvantaged children also meant that disparity reduction was another important strategy consideration of the country programme. The unit area for the programme convergence was determined to be the township and this also meant the decentralization process was being introduced in the new country programme.

A three-step analysis was carried out in the selection process of project interventions. First the fourteen states and divisions (i.e. 7 states and 7 divisions) were ranked according to a child risk measure which used a composite indicator of twelve indicators. Next the townships within each of the state and divisions were further ranked based on three indicators to determine the townships to be targeted for the projects. The townships identified were designated as the area focus townships (AFTs). (Please see Figure 4). Thirdly, a survey using eight indicators was conducted in each of the AFTs in order to determine their baseline.

IV. Myanmar UNICEF Country Programme of Cooperation (2001-2005)

Country programme goal:

The country programme goal which is stated as "Advocate for and contribute towards the progressive establishment of an environment where the rights of children and women are realized according to the obligations and responsibilities assumed by

Myanmar as a State Party to the CRC and CEDAW” is directly related to UNICEF’s Mission Statement which is mandated by the general Assembly to advocate for the protection of Children’s Rights.

The present country programme as shown in the diagram below comprises five programmes and eleven projects. The interventions or the actions of the country programme can be seen to be at three levels. At the national level UNICEF’s work is mainly related to advocacy, partnership building and coordination. The next level of UNICEF’s work is concerned with the projects aimed to have universal or nationwide coverage. These projects which are proven to be low cost but high impact are projects such as immunization, vitamin A, sanitation, iodised salt and the promotion of Facts for Life (FFL) messages. The third type of action as mentioned above is the AFT initiative which is the convergence of selected project interventions in selected townships.

The present year is the second year of the 2001-2005 country programme. And today, I would like to take this opportunity to share with you the status of the programme implementation against the five country objectives stated in the Master Plan of Operations or country programme.

Objective 1:

To build new and strength existing partnerships for the promotion and realization of CRC and CEDAW.

We are fully aware of the fact that UNICEF alone cannot realize the rights of children and women and considers partnership building to be an important element transforming CRC and CEDAW a reality. In addition to the counterpart line departments concerned we are working in partnership with a number of local and international NGOs. There is also increased collaboration at the township level especially with the newly formed Township Child Development Committees. We are continuously in search of new partners; especially with civil society organizations (CSOs) and community-based organizations (CBOs).

Objective 2:

To reduce disparities through universal coverage of: immunization, vitamin A supplementation, sanitation, consumption of iodized salt, access to FFL messages on childcare and HIV/AIDS.

Progress to date has been on the following:

- Measles control and maternal and neonatal tetanus elimination plans have been finalized
- Global Alliance on Vaccine and Immunization applications have been approved and the hepatitis B immunization will start in November
- 1,800 communicators have been trained to on the dissemination of FFL messages
- 20 CSOs have been involved in this activity

Objective 3:

To reduce the transmission of HIV/AIDS and its impact on children, women and young people.

Progress related to this objective have been in the development of behaviour change communication materials such as the 100 Qs&As on HIV/AIDS, the training of 8,000 out of school youth on life skills by the Myanmar Red Cross Society, Prevention of mother to Child Transmission of HIV/AIDS project to twelve townships and the introduction of project interventions on home-based care for the HIV infected in four townships.

Objective 4:

To explore and develop well coordinated multi-sector efforts to provide the essential care and satisfy needs during pregnancy and childhood and have impact on the survival and development of children in one third of the townships with an emphasis on the most disadvantaged.

This objective is directly concerned with the AFT project initiatives mentioned earlier. Another aspect of this AFT initiative is that it is not only multi-sectoral in it's programme design but it is also adopts a life cycle approach. This means that the project activities which strengthen the basic health, education and other related services implemented in the project areas will have a direct impact on quality of life throughout the whole life cycle of the target beneficiaries. The different project activities which merely converge at the initial stage of the project will eventually become integrated and are expected to have synergistic effect.

Progresses to date regarding the project activities implemented under the AFT project are the following:

- appropriate child care services are being provided for 18,350 children either pre-Kg classes or community based ECD centres
- 2,000 parents have participated in parenting education activities
- over 3,500 teachers have received teacher training in child-centred teaching learning methodologies in 40 AFTs
- nearly 40,000 parent member of PTAs have attended orientation workshops on the Child Friendly Schools primary school project
- by the end of June 2002 47% of schools in phase 1 AFTs will have water facilities and by the end of 2002 the facilities would have increased to 71% (in 2001 it was 21%)
- new IEC materials have been developed to promote improved sanitation and hygiene behaviours

Objective 5:

To increase the availability, reliability and use of essential data on children and women for planning, programming and monitoring.

Regarding this objective, regular monitoring of project implementation is carried out monthly, quarterly, mid-yearly and annually. Field visits to project sites have also been conducted. Various surveys, studies, and evaluations are being conducted to assess the progress of selected projects. Activities to promote and establish management and information systems for health, education and vital registration are also in progress.

Finally, I would like to explain briefly about our regular monitoring system. Mainly this is done in two ways. In order to assure close monitoring at the grassroots level, we have six out-posted field officers who are strategically located to monitor constantly the project activities in the field. Our Yangon based staff also plan field monitoring visits throughout the year to provide timely support and to make adjustments if necessary in the implementation process. The extent of such monitoring visits to date, for the current year can be seen in the following map.

PART II : SOME SPECIAL TOPICS

CHILDREN IN ESPECIALLY DIFFICULT CIRCUMSTANCES

Aneeta KULASEGARAN, Advocate & Solicitor, Malaysia

Protection from drug abuse

Although the Malaysian government is committed to eradicate drug addiction, the numbers of drug users are rising. In 2001, 32,000⁷⁸ people were reportedly abusing drugs, out of which 51% were new users and 49% were repeated users. There seems to be an average of a 7% increase every year. Majority of the users are male, under 40 years old and educated only to be 15 years old on average. At least 10% are HIV+. How did they start this addiction? Many factors were cited: peer pressure, curious to know how it felt and tried it for fun or tried to escape from problems at home. Almost half of the addicts use heroin, about 20% used morphine and grass. However youth were attracted to ecstasy and cocaine which was easily available though illegal.

The enforcement of laws have resulted in about 25,000 abusers being caught and almost 2000 have been charged under s.39B of the Dangerous Drugs Act, 1952 which carries the mandatory death sentence. The agencies involved in enforcement are the police, customs and pharmacies. There are many activities for the prevention and rehabilitation of drug addiction. These include anti-drug, leadership and awareness programmes in schools, anti-drug campaigns in the mass media, spot checks and taking urine samples in schools. In one week alone in February, 2002, 170 boys and 26 girls were committed to one drug rehabilitation centre. The success rate of rehabilitation is only about 3.2% a year with the release of about 7,392 people being released. However relapses are high and are attributed to the unsupportive system and/or families of the ex-addicts.

⁷⁸ National Drug Agency, Malaysia. www.adk.gov.my

**CHILDREN'S RIGHTS AND WELFARE IN THE ASIAN REGION:
THE PHILIPPINE EXPERIENCE IN WORKING WITH STREET
CHILDREN**

Teresita L. SILVA, CHILDHOPE Asia Philippines

I am greatly honored to be involved in this seminar on "Children's Rights and Welfare in the Asian Region." I would like to share the Philippine experience in working with street children in particular because they are one of the most vulnerable groups of children in the world today.

I. Children in Need of Special Protection: The Street Children

Who are Street Children?

The term "street children", probably the largest number of vulnerable and exploited children in many countries, was aptly coined sometime in the 1980s as a definite term to identify children who have been pressured to spend much of their time on the streets in various "occupations". With ages ranging from five to 18 years old, these children ply the sidewalks in a desperate attempt to eke-out whatever meager amount they can earn for their survival, as well as bring home to their families for their day-to-day experience.

Different countries describe street children in different ways. However, three general categories have been frequently used to identify them as in Metro Manila:

- children who maintain regular contacts with their families, but spend a majority of their time working on the streets; and
- children who actually live and work on the streets and are abandoned and neglected or have run away from their families; and
- children of families living on the streets.

In Metro Manila, population growth, urbanization, and migration have increased through the years. Children are often forced by circumstances to help their family eke out a living or fend for themselves on the streets. Most of them are the children of poor parents who migrated from rural areas in the hope of finding better job opportunities in the city but whose lack of education rendered them ill-equipped to struggle for survival in the urban jungle and are thus confined to a life of abject poverty. According to some estimates, there are approximately 20,000 street children in Metro Manila and the National Capital Region. Studies conducted revealed that the number of street children ranges from two to three percent of the child and adult population.

It was estimated that in 1985, sexually exploited children in the Philippines numbered around 20,000. Current estimates place their number at 60,000. This includes the victims of intrafamilial sexual abuse like incest since this is generally unreported. Cases of sexual abuse of children included those children as young as three years old. The problem however, does not lie so much on the magnitude but on the dehumanizing consequences of exploitation. Children who are sexually exploited

have low-self-esteem; manifest repressed anger, guilt and fear; are susceptible to drug abuse, AIDS and other sexually transmitted diseases.

The majority of children visible on the streets are boys ranging from 56 to 70 percent. Girls are fewer because, among other reasons, they are generally helping younger siblings, they are usually hired as domestic helpers within private households, they are lured or trafficked into prostitution and are housed in brothels. It is speculated that the male child is expected to do less work at home than the female child.

A bleak present, an uncertain future--this is the life on the streets for street children. For them, life on the street is a constant struggle to overcome the various negative elements that threaten to overtake him and destroy his hope for survival. He/she works under the heat of the sun or in the dark of the night from six to 16 hours, seven days a week, often in a combination of "occupations," each considered a legitimate way to survive.

II. Causes of their Problems and Needs

Studies have consistently pointed to at least three major immediate factors that push children to stay or live on the streets. These are the poverty of the family, family relationship factors, child physical or sexual abuse and peer-gang influence. Poverty and peer influence when compounded with problems and stresses in family life such as family break-up, child abuse and neglect, woes related to stepparents, under-employed parents, etc., altogether create undue pressure on the child to leave home and find solace, protection, and support from his peers on the street, and eventually become susceptible to their influence and lifestyle.

Poverty and Lopsided Development as the Root Cause

As the street child has become part of the urban landscape, so has its root cause, the inequitable socio-economic structure and poverty of majority of the population.

Socio-economic and political factors directly impinging on the physical, economic, and psycho-social dynamics and conditions within the family are all pervasive and constantly threaten the family's existence and survival. This crisis has its roots primarily in the overall economic arrangement, global as well as national, particularly globalization, and for which reason a growth-centered development paradigm has continued to dominate our socio-economic and political spheres of life for several decades; and secondly, on the consequent requirement of, and the need for growth-centered adjustment policies imposed on the debtor nations which are unjustly disadvantageous to all the developing nations. Hence, the absence of strong political will in some countries to adopt and to implement poverty alleviation programs.

Causes of the street children phenomenon can be categorized in the following:

Immediate Causes (Factors which have to do with the children and family):

- Poor and large families
- Unemployed/underemployed of parents/children
- Irresponsible parents
- Family values which are materialistic/consumeristic
- Family conflict
- Family environment
- Vices of parents
- Child himself
- Degradation of morals, violent upbringing by parents
- Traditional family values which dictate that girls should merely stay at home
- Lack of knowledge and parenting skills
- Emerging social values conflict with traditional values

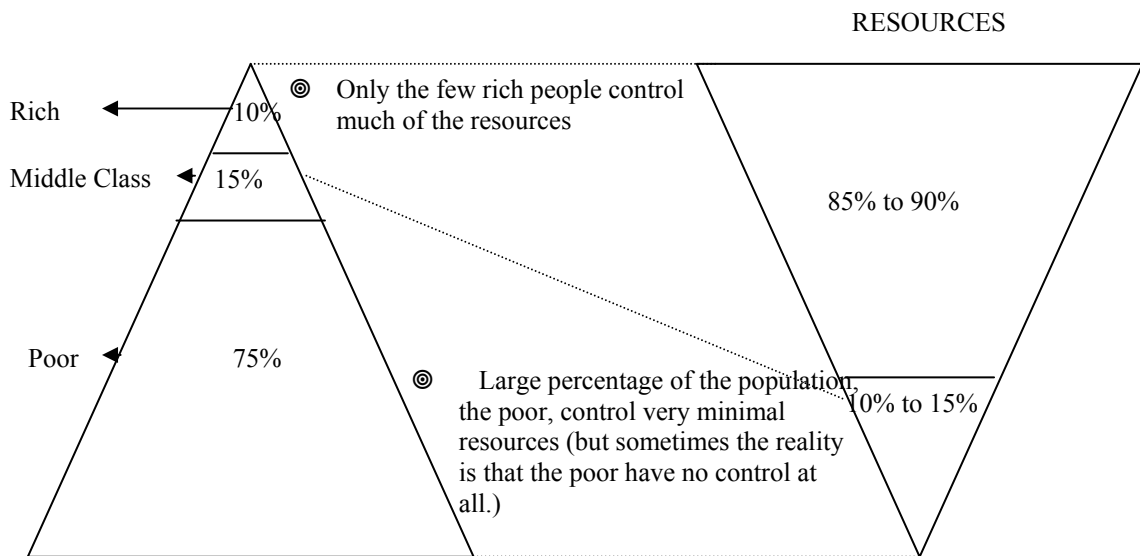
Underlying Causes (Factors which have to do with the community):

- Ineffective access to basic services
- Non-availability of adequate employment opportunities
- Inequitable distribution of resources and opportunity in the community (e.g. land ownership)
- Nature and conditions of work/employment: formal and informal sectors
- Congestion in slum areas
- Inadequate housing/poor housing facilities
- Poor law enforcement/exploitation by law enforcers
- Only one style of delivery of education exists
- Deterioration of values
- Central body provides no/few activities for children

Root Causes (Factors which have to do with society):

- Economic, political and ideological superstructure
- Structural roots of poverty and underdevelopment
- The unequal world order and the debt burden

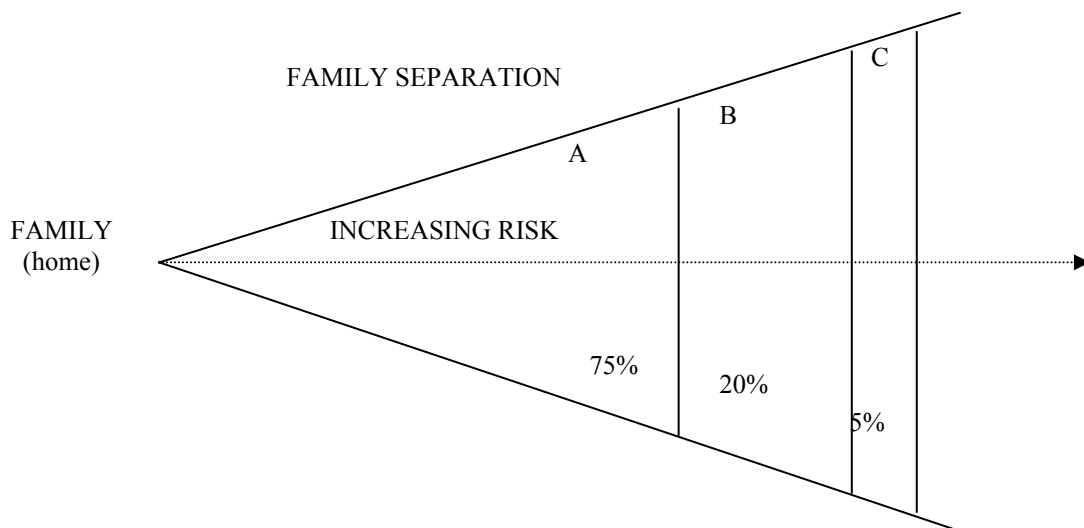
In understanding the root causes of street children in the Philippines, a Structural Analysis, as shown by the illustration below, will be helpful.



3 Classes in Philippine Society

Clearly, street children and their families and urban poor families are an indication of an unequal social order, nationally and internationally, that is pervasive in our midst and manifested in the family and the community. Poverty and the deterioration of moral and spiritual values represent glaring indicators, as well as consequences of both the helplessness and powerlessness of these children and their families, and the inability of most developing nations to meet the basic needs of their people.

The direct relationship between family separation and risk is illustrated below. It is shown that the greater the separation from the home/ family, the greater the risks/ hazards:



Hazards and Risks Encountered:

- a. Health Hazards
 - Generally malnourished and anemic
 - Physically stunted
 - Exposed to polluted environment
- b. Threats to Physical Safety
 - Prone to street fights and bullying from bigger youth
 - Harassed by police and other law enforcers
- c. Exploitation by Adults
 - Forced to work, beaten up by own parents
 - Victimized by syndicates/ police
- d. Sexual Exploitation and Prostitution
 - Street girls are particularly vulnerable to sexual exploitation
 - Boys are the preferred victims of foreign pedophiles and local homosexuals
- e. Sexually Transmitted Diseases and AIDS
 - Exposed to sexually transmitted diseases
- f. Drug Addiction
 - Exposed to substance abuse
 - Used by drug syndicates as drug runners/ carriers
 - Children in prostitution are also drug users
- g. Other negative practices and attitudes
 - Create their own norms and speak their own language
- h. Threat to emotional well-being
 - Influence of deviant behavior, deprivation of basic education, etc. may find release in wild and destructive behavior

III. Approaches and Strategies

The situation of street children challenges us to "trace the paths of deterioration that led to their present situation at home, on the streets, or in institutions; "begs us to understand what led people within such families to move apart, lose family connections, and become socially isolated? Which factors led to loss of self-esteem by parents and children and to the downward spirals of severe distress? Which combination of factors seemed to lead certain families or certain children in those families along this path?"

I would like to share some strategies identified and applied in the Philippines and some other countries which are aimed at addressing family and community issues toward promoting a caring society for children. A philosophy that recognizes and gives importance to the development of the child within the family unit should be the foundation for development strategies in working with families and children at risk.

Resilience of children result from unconditional adult support and a sensitive balance between risk factors and protective factors.

Experience has shown that if preparatory activities such as conducting situation studies, advocacy/consciousness-raising, formation of networks among government and non-government organizations are undertaken and supported before the formal launching of projects and programs, wider interest in and concern for street children is generated. In the Philippines, a national project on behalf of street children was initiated in 1986 with UNICEF support to coordinate programs on behalf of street children on a national level.

A. Situation Analysis

Efforts to rationalize services for street children began with the network facilitating the process of conducting a situation analysis to determine their actual conditions and needs. Through this process, it was discovered that by involving various sectors of the community and in some cities, the children themselves, as active participants in the situation study, greater community interest and action for and on behalf of street children could be generated. The participatory, conscientizing and action-oriented methodologies in situation analysis emerged based on the assumptions that:

1. The phenomenon of street children is a structural problem and not an isolated phenomenon;
2. Ordinary people, not only professionals, are capable of doing situation analysis-research; and
3. Relevant understanding of social situations, particularly their own, can be arrived at with the active participation of the children themselves.

Because the situation study is aimed at generating critical awareness of the problem, its root causes, and its relationship with the problems/issues, all parties concerned are enabled to translate into action whatever new insights and reflections emerge from the analysis.

B. Advocacy and Social Mobilization - Influencing Public Policy

Our collective experience has shown us that advocacy and social mobilization as strategies raising public consciousness and political will are primary prerequisites for program development and the delivery of basic services. We are grateful to national and international partners for supporting these strategies even before direct assistance to projects.

Based on the findings of the situation analysis, advocacy for street children was and continues to be directed to various groups and audiences: we reached out, invited ourselves and are now invited by community leaders, parish/religious groups, police, park wardens, some hotel owners, city government officials, city fiscals and judges, schools, universities, academe, mass media and the general public.

Regular advocacy sessions are held to orient the different groups on the situation of street children and on what they can do to help advocate and reach out to street children and their family in their local community. Use of print media, radio, TV, as well as sound slides and mobile theater groups including street children theater

groups have proven effective in raising public awareness and concern for their plight and in generating programs and services in support of street children.

The First Regional Conference on Street Children in Asia was sponsored by CHILDHOPE and UNICEF and organized by NGO's with the National Council for Social Development (NCSD) in Manila in May 1989. This major event served as the occasion for the creation by former President Aquino of a special fund for street children amounting to one million US dollars and subsequently, another \$100,000 fund from the printing of Christmas greeting cards made by and for the children.

Advocacy in the Philippines also resulted in Presidential Proclamation 20 that enjoins all GO's and NGO's to involve themselves in the work on behalf of street children and other CEDC. It is also through advocacy and social mobilization that the ranks of NGO's working for street children have grown from three in Metro Manila in 1984 to 18 in 1986 and 110 in 1990. At present there are over 300 programs of both government and NGO's in 21 cities all over the country.

In terms of legislative support, we as advocates have been pushing for legislation to outlaw pedophilia and for the restoration of the Juvenile and Family Relations Court (JFRC) in major cities. Republic Act 7610, "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act" was signed into law on February 2, 1992 signifying the government's commitment in providing special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development. Also passed into law is Republic Act 8369 which is an act establishing Family Court, granting them exclusive original jurisdiction over child and family cases.

Advocacy with the police and other law enforcement agencies for more humane treatment of the children was a major thrust in the early 1990's. In October 11, 1994, a Memorandum of Agreement to resume advocacy and training session among police officers on the situation of street children was signed. With the signing of the MOA, the Department of Social Welfare and Development, the National Police Commission, the Commission on Human Rights, the Local Government Units, the Philippine National Police, and the non-governmental organizations agreed to cooperate in the institutionalization of the Child and Youth Relations Section, the designation of Child and Youth Relations Officer, and the conduct of training of police officers in the management of cases of children in especially difficult circumstances.

The right of children to empowerment in effecting services and responses that affect their lives was and has been recognized through creative opportunities and events. Advocacy activities by the children themselves were intensified through regional and annual national conferences. In these conferences, the children had the opportunity to experience solidarity with other children, to develop their communication skills and to dialogue and advocate with government officials at the local and national levels. Several national street children's congresses have been conducted.

In addition, street educators, through their outreach work among street children, formed a core group of street-based street children who represented them in various street children congresses. The formation of similar street children groups would signify their resolve to wage a stronger campaign for wider support for themselves and their families.

CHILDHOPE Asia has been in the forefront of training children to become junior advocates and junior health workers through its child-to-child training workshops. The child-to-child approach train street children to take on the responsibility of reaching out to fellow street children. This approach is being used by junior educators and junior health workers to teach values and health education to other street children. An organized group of Junior Health Workers (JHWs) meets every month to discuss matters on health and medical services among themselves. These JHWs reach out to other street children in different areas in Metro Manila to help street educators and assist children about issues and problems on health like prevention of substance use and education on Hepatitis B and HIV and AIDS.

C. Program Development

An important grassroots strategy in program development and in team building among NGO's and GO's is the process of clarifying philosophy, vision, mission and goals to ensure a common understanding and direction among NGO development organizations/grassroots workers supporting street children. This common vision should then become the basis for program planning.

IV. Program Categories

Current efforts in helping street children fall under three broad types of programs/services that were evolved in response to an analysis of three major categories of street children and their specific needs and circumstances:

1. **Community-based Programs.** These programs target the children who maintain regular contacts with their families. Preventive in approach, community-based programs try to address the problem where it starts--the family and the community of the child. It addresses the problems in the family and community that, from the perspective of the residents, lead to the situations that force the children to go on the street. It is the goal of the community-based program to help communities identify their problems, mobilize their internal, as well as external resources, and involve themselves in their solutions.

The empowerment of communities that results in their capability to identify needs, seek and solve their own problems leads to a greater ability on the part of the residents to participate in the life of the larger community, thus breaking the barrier that alienates poorer communities from the mainstream of society. In some districts of Metro Manila, NGO's are training the families of street children and other urban poor families to organize Local Committees for the Protection of Children (LCPC) in each *barangay* (smallest unit).

The community-based process focuses on the families of street children and other urban poor children and their community to enable them to make those changes within themselves that will lead to changes in opportunities for their children and to keep them off the streets. It has several main components: advocacy on child rights, protection and referral, community organization, livelihood development and social credit, educational assistance including value clarification, and skills training.

Local Councils for the Protection of Children (LCPC) have been organized by Childhope's sister organization (FCED - Families and Children for Empowerment and Development Foundation) in thirteen (13) barangays/communities in Metro Manila. These LCPC's have committees on protection, health, education, and livelihood.

Community-based programs offer an alternative to "institutionalization" of street children. It utilizes capacity building and community organization as its main strategy to empower parents and children to organize themselves and to develop alternative opportunities for access to basic social services.

CHILDHOPE Asia initiated a pilot project five years ago, with support from ILO IPEC and Alger Foundation, called "Community Mobilization for the Protection and Rehabilitation of Girl Children in Prostitution" in two cities of Metro Manila. The strategy of the project therefore focuses on a strong advocacy program among all sectors of the community and in each of the priority *barangay* communities; preventive, protection and rehabilitation thrust; i.e., information, education, advocacy, capacity building of staff and volunteers, as well as referral for rehabilitation, including the development of alternative skills through referrals for skills training or vocational training which will lead to alternative sources of income and livelihood. The thrust of rehabilitation is to assist the girls to move toward a different lifestyle in a supportive and non-judgmental manner.

From 1995-2000, advocacy sessions were conducted in all *barangays*, churches, and schools in each of the above cities. Training sessions among volunteer advocates were also conducted in order to form a core group of volunteers who conducted advocacy sessions within their communities. A referral system of reporting child abuse case is also in place.

Peer counseling is also another important feature of the project. Volunteer peer counselors among the youth in target communities were trained to enable them to conduct counseling sessions among identified abused and exploited children and/or their parents. Youth volunteers also underwent a training workshop on value clarification/education.

Advocacy through media was also conducted. Project staff were interviewed in radio and television programs where they shared the objectives and components of the project.

Because of the positive feedback from the two cities, a similar project has been started in Manila.

2. **Street-based programs.** The street-based program reaches out to children right on the street where they live and work, particularly to those children who are abandoned or have irregular contacts with their families. This strategy recognizes the child's need for survival, protection, and income, but ultimately, it aims to motivate and assist the child to go back to their families or to enter a temporary shelter. Street educators and field workers and volunteers conduct informal dialogues and alternative education and value clarification sessions with the children, to know them and understand their

situation or simply to offer friendship, protection, referral to temporary drop-in centers or residential care, and to humanize their environment.

The street education program was initiated in the Philippines in 1989 by both government and non-government agencies.

3. **Center-based Programs.** The center-based program reaches out to children who have run away from home, totally orphaned, abandoned, or have severed ties with their families. This program involves setting up a "home" where children can find support and help. Drop-in centers usually provide children with hot meals, a space for the night, clothing, first aid/health examination, counseling, case work, work with families where possible, and a supportive and caring environment.

An alternative to residential care is the foster family care and adoption program for street children and adoption. It is a novel concept in the Philippines and has not been tried by many street children programs. CHILDHOPE Asia and Norfil Foundation, with support from Stichting Kinderpostzegels Nederland (SKN), started a foster care program for street children in 1995. Its purpose is not only to find foster homes for street children but to train foster parents and strengthen the skills of social workers in foster care. The first year implementation of the project proved that foster care of street children can be done--all selected 10 children were placed in foster homes. Families were available to receive them. Foster care is a promising alternative to the overburdened residential centers and group homes.

These various program categories aim to support street children and/or their families through non-formal and formal education, organization of parents and children, health services, counseling and case work with families, vocational and other skills training, value clarification, paralegal training, social credit/loan assistance to parents, and foster home care.

These programs and services operationalized the strategies specified in UNICEF's urban work section plan:

1. Extension and adaptation of basic education
2. Community-based development and services
3. Preservation and support for family stability
4. Promotion of legal means for the protection of the legal rights of the child
5. Support to environmental protection.

The Philippine National Program on Street Children, while not failing to support center-based interventions, has demonstrated that the needs and problems of street children are better addressed in the context of a larger program, e.g., Urban Basic Services Program with its strong emphasis on community participation and community empowerment.

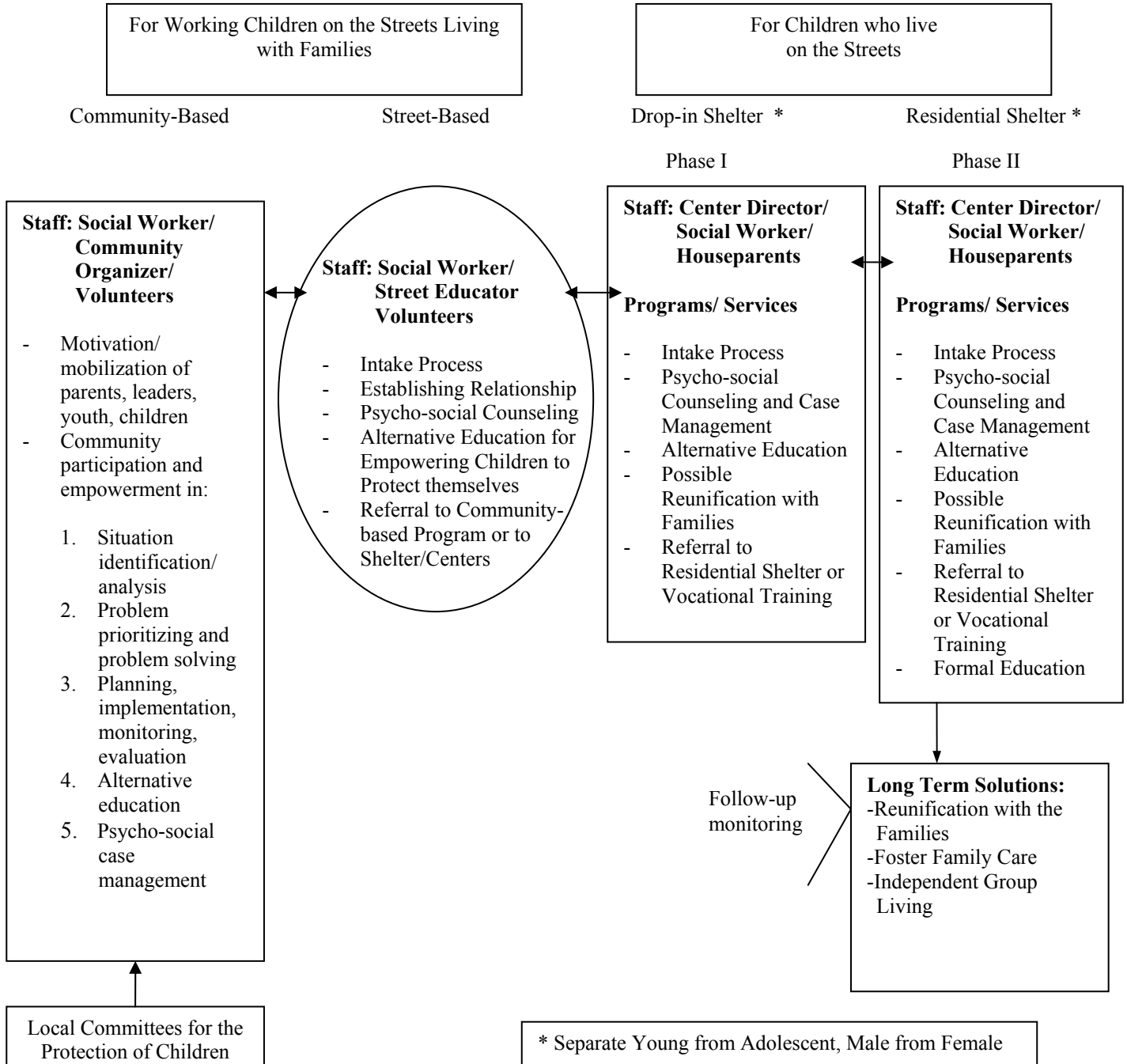
An Inter-Sectoral Committee on Urban Basic Services in the city government to initiate and facilitate active coordination and networking among government, NGO's and representative of people's organizations was organized. The members of these committees work in sub-committees on health, education, livelihood, social welfare, and community upgrading. These network committees have met regularly. In cities which are part of the National Program on Street Children, a sub-committee on street children composed of all NGO's and government organizations working with street children meets to plan and implement advocacy, training, technical support activities, and resource mobilization.

There is convergence and complementation of sectoral services of the government and NGO's as a result of the above process, where field workers coordinate and deliver services which can be complementary--health, education, livelihood, and protection for example.

However, the existing programs and initiatives for and on behalf of street children--even with emphasis on community organization/community participation/community empowerment in the case of community-based programs--are only able to address the immediate and underlying causes of the street children phenomenon. The basic causes--the structures of poverty, underdevelopment and justice--are still largely beyond the existing street children programs. Thus, the need to link street children programs with broader and long-term development initiatives.

The framework for the existing comprehensive program is illustrated below:

COMPREHENSIVE PROGRAM FOR STREET CHILDREN
 (Collaboration between Government and NGO's)
 Prepared by Childhope Asia Philippines



D. Human Resource Development

As programs expand and cover more ground, so should the capability of the people and organizations managing these. As a means to upgrade the capability of organizations in developing programs for street children, Asian regional, as well as country-level training workshops have been conducted by CHILDHOPE for community organization volunteers (COVs), street educators, social workers, counselors, houseparents, and program managers.

E. Program Policy Formulation

As a result of lessons learned from initial experiences in managing programs among street children, policies and procedures were formulated by workers from NGO's and government agencies to guide the conduct of interventions. Guide policies are developed by NGO's in the network for interventions such as outreach, intake, street education, temporary shelter and residential care, alternative education, working with families, provision of skills training and income-generating opportunities, adoption and foster care.

F. Resource Mobilization

The role of inter-agency/community group networks in mobilization of local and external resources to generate more programs and services and to support program implementation is essential. This may be viewed as one of the results of the continuing advocacy being done among the different sectors and groups. From three to six programs in 1984, the number of programs working among street children has increased to about 100 programs in Metro Manila and about 350 in the whole country.

G. Evaluation and Monitoring

This essential component, though not neglected, is still inadequate. Monitoring and evaluation of projects have been conducted, a directory of organizations working among street children in Asia has been published, and documentation of training workshops and seminars conducted have been consolidated. Indicators for monitoring programs and services have been developed by the National Council for Social Development Foundation and UNICEF. However, there is still limited commitment and resources for monitoring among the non-government organizations to systematically document program results and impact on the children, families and communities. A new development is the setting up of a Management Information System (MIS) by the Alger Foundation - Philippines which aims to provide a systematic monitoring of program progress and results.

H. International Networking

As an evolving strategy, **International networking** aims to establish linkages with programs in other countries to provide a means of sharing individual and country experiences in working with street children. It also provides opportunities for coordination on global issues, i.e., the Convention on the Rights of the Child, and as a means to gain access to resources not locally available.

In the forefront on behalf of street children is CHILDHOPE Asia Philippines which was organized as part of an international movement in 1986 of individuals and organizations working for the cause of street children worldwide. CHILDHOPE Asia

Philippines was established in 1989 as a regional organization to support regional networking in Asia.

CHILDHOPE Asia Philippines has organized and held various Asian regional and country-level workshops on street children and youth, street girls and victims of sexual exploitation, on street education, and non-formal education, child-to-child approach, on psycho-social interventions, on management of centers of community-based programs for street children and philosophy for children. It has rendered technical assistance for situation analysis, program development, and training in countries in South Asia and South East Asia, and has hosted field study visits in the Philippines for program workers and street educators from different countries of Asia, including Mongolia and People's Republic of China. It has published CHILDHOPE Asia Newsletter quarterly but now only semi-annually, and has published several studies on street children in the region such as on street girls in Metro Manila, street children in Jakarta and Cambodia; case studies of programs in the Philippines; a "Profile of Street Children in Asia," guidebooks for drop-in centers, center-based programs, and community-based programs; a "Directory of Organizations Working with Street Children in Asia," case studies of successful former street children, and a Manual for Street Educators on Non-Formal Education Program. CHILDHOPE, maintains a databank/resource center on street children and makes this available to those desiring to conduct studies on street children.

V. Concluding Remarks

Our challenge is to convince policy-makers to rely less on the trickle down policy and give priority to development with a human face, with emphasis on people and alleviation of poverty rather than on macro economics.

In addressing the problem of poverty, our government needs to make a thorough evaluation of its role and strengthen the delivery of basic services such as adequate shelter, food, and clothing to the less fortunate members of the community. The same holds true for support services such as education, employment and recreation. Since the immediate cause of the situation of street children lies in the home and in the community, these two venues should serve as the priority arena through which solutions may be addressed. While these efforts may not address the root of the problems faced by the street children, they may somehow soften the harshness of living in an urban poor settlement.

We must bear in mind that no effort to help street children will be in vain. There is great potential for personal development and creative productivity which these children possess. Let us not ignore the positive traits they possess. Unruly and unkempt as they appear, we are witnesses to the tremendous courage, strength, resiliency, and resourcefulness with which they are able to stand up to the challenges of their day-to-day existence.

The experience that we have shared would hopefully lead to strengthening advocacy at the international level, sharing of programs and activities as well as wider cooperation and joint actions for street children. There is so much that we can gain from international networking such as we are doing now. International organizations are in an important position to influence discussions on global trade and liberalization and on adjustment policy to participate in the formulation, execution, and monitoring of poverty alleviation policies.

In conclusion, the seminar today is a continuation of international collaboration and joint efforts that have been on-going on behalf of street children in Asia since 1989.

CHILD IN CONFLICT WITH THE LAW

Lucien BEAULIEU, Judge of the Superior Court of Justice, Toronto

Introduction

"In their little words in which children have their existence, there is nothing so finely felt as injustice".

Charles Dickens

We are once again gathered precisely to examine how we ensure that children are not the victims of injustice. Dealing with the child in conflict with the law evokes images of a child acting in a manner that is contrary to the law. We are not, and in my view should not be, confusing such active conduct with the condition of the vulnerable, impoverished or even disturbed child who is the subject of other person's conduct or actions. But in either case, we all must ensure that children do not feel injustice as a result of their involvement in the system.

I. The Active Conduct of Delinquency

Both the active conduct and "delinquency" and the actor's age of responsibility have been the subject of universal examination and debate for decades. This is despite the fact that while each generation and each society believes that they are the first to discover these "problems", forgetting the nature of its own youth, there is little evidence to suggest that youth today are necessarily any worse than they were five, twenty-five, or even twenty five hundred years ago. For those of you who doubt this proposition, consider the following observation made by Socrates almost four thousand years before Christ:

"The children now love luxury. They have bad manners, contempt for authority, they show disrespect for adults and love to talk rather than work or exercise, they no longer rise when adults enter the room. They contradict their parents, chatter in front of company, gabble down food at the table, and intimidate their teachers."

When we look at the "problem" of youth crime we must examine it in the context of today's values, attitudes and general social climate, but we must also keep an eye on the past to avoid the mistakes that we have made with respect to our youth. We must also look to the past to reinforce the one universal truth that exists with respect to youth justice, and that is, that there is no simple solution.

II. The Historical Development of Addressing Delinquency in Canada - Some Failed Simple Solutions

If we look to the past however, we will find a series of failed simple solutions of addressing youth crime.

In the English common law prior to the 1300s, the solution was to do nothing. There was no need to distinguish between young children, adolescents and adults, as all individuals were equally responsible for their actions. In the 1600s, criminal responsibility was based on age and the Roman doctrine of *doli incapax* that stated that a child under the age of seven could not be held criminally responsible. Children

between the ages of 7 and 12 were only responsible if it could be shown that they understood the difference between good and evil, and children over the age of 14 were held fully responsible. Canada's first Criminal Code expressly incorporated the *doli incapax* doctrine.

This doctrine remained our "simple" solution for dealing with youth crime until the turn of the last century, with the development of the "child savers" movement in both Canada and abroad. This movement brought the "problem" of juvenile delinquency to the forefront. It was based on a growing ideological shift in criminology and other social sciences from the classical explanations of crime to a new belief in positivism.

Positivism suggested that it might actually be factors in the youth's environment that led to delinquent behaviour. If one wanted to stop such behaviour then, the solution was "simple"; change the youth's environment. For this reason, the child-savers drew little distinction between the 'neglected' and the 'delinquent child'. Those unwanted children orphaned or abandoned, were essentially the same as the delinquents. They were all in "need of protection" from the evils of the outside world. If a child could be protected from such evils, it could grow up to be a respectable and an upstanding member of the community.

As such, Canada's first legislation to specifically address juvenile delinquency, the *Juvenile Delinquents Act* (the "*JDA*") in 1908, looked very similar to child welfare legislation that was passed by the provinces during this time. Underlying all of these acts, was the belief that the state and the court should act in its fatherly role based on its *parens patriae* jurisdiction of the English Chancery Court and do what was in the best interests of the child.

Under the *JDA*, a separate youth justice system, with separate courts, probation services and correctional facilities, was established to do this. However, the juvenile delinquent was not considered a criminal, but as "as one in a condition of delinquency and therefore requiring help and guidance and proper supervision".

The *JDA* was Canada's simple solution to youth justice until the early 1980s when it was replaced by the *Young Offenders Act* (the "*YOA*"). The *YOA* appears to have been the culmination of a number of different factors. In part, there was a due process revolution going on in both the United States and Canada during this time. Eventually, the *Canadian Charter of Rights and Freedoms* recognized these due process rights.

The *YOA* also eliminated the status offences under the *JDA*, such as truancy and delinquency, with youth now only being able to be charged with *Criminal Code* offences, and raised the minimum age of criminal responsibility to twelve.

Despite its intentions, the *Young Offenders Act* appears to have been viewed by the public as a failure almost from the moment it was past. Early in February of this year, the *Act* was dealt its final blow by the *Youth Criminal Justice Act* that will replace the *Young Offenders Act*. The new *Act* will eliminate the current transfer procedures to adult court, and instead allow youths 14 or older to be given an adult sentence for serious offences once there has been a finding of guilt. It clearly shows a movement towards a more justice oriented system for youth, with an emphasis on proportionality and severity of offence, while considerations of rehabilitation and

special needs are secondary. It has also already been criticized as one more simple solution to a complex problem.

III. Solving the Problem

Many of these trends have occurred elsewhere as well. What these trends reveal, is that if we wish to truly solve the problem of youth justice, we must face certain realities including that there is no simple solution.

Historically, this concession or allowance has not been made. The various causal theories that have been offered for delinquency over time are further examples of applying simple solutions to a complex problem. What these theories, and the legal systems that they produced, failed to recognize, is that individuals may commit crimes for a variety of reasons including, but not limited to, choice and social situation. They also reveal a further reality that we must face when addressing the specific issue of youth justice. We would like to believe that youth justice is similar to adult criminal justice. But youth have fundamentally different developmental needs than adults.

Another reality that we must face in attempting to solve the problem of youth justice, is that in the 21st century, young people have rights as found in the *United Nations Convention on the Rights of the Child*. The *UN Convention on the Rights of the Child* and the Model Law on Juvenile Justice drafted by the Centre for International Crime Prevention at the United Nations of Vienna.

Finally, we must also face the reality that if we are serious about youth justice, we will need to take both a proactive and a reactive approach to the problem. What is required is a complex solution that involves a firm societal and political commitment to three levels of recognized prevention - primary, secondary, and tertiary - because a complex problem cannot be solved by a simple solution.

Primary prevention concerns the designs and implementation of policies and practices aimed at the whole population. (Head Start Program, the School Breakfast Program, and the National School Lunch Program). Secondary prevention seeks to identify children at risk so that programs may be provided that reduce reoffending. The underlying premise of secondary prevention to ensure that specific services targeted at specific children will have a preventive effect. There are six stages in secondary prevention:

- (a) Identifying the problem;
- (b) Locating the problem;
- (c) Identifying the children;
- (d) Setting the time frame for action;
- (e) Monitoring; and
- (f) Follow-up.

Tertiary prevention is a term used to describe targeted measures for individual children to reduce recidivism.

One promising approach in tertiary prevention is multisystemic therapy or MST. MST adopts a socio-ecological approach to understanding of anti-social behaviour. The underlying premise of MST is that criminal conduct is multi-causal and has its source not only in youth (values, social skills, biology) but in the youth's ecology (the family, school, peer group and neighbourhood). MST uses the family preservation model of service delivery in that it is home based, goal oriented and time-limited. Because MST recognizes that criminal conduct is multi-causal, it looks for a multi-tiered, flexible solution, that focuses on the individual needs of the young person in question. While such an approach can be very effective, it does have certain problems, most notably the demand it places on human resources. Because MST therapists carry only a few cases, a large number of therapists are needed to make any real impact. Because of the intensity of the services provided, MST also places an incredible demand on those therapists with a high burn out rate.

One further reality that we must face when addressing youth justice, is the truth is that no matter what we do as a society, there will always be some crime, there will always be some youth crime, and some youth will re offend. While MST may offer a better solution, there is no perfect one-fits-all solution. It does appear however, that by implementing similar innovative approaches at all three levels of prevention, we may have the ability to ensure less youth end up before the court in what Anthony Doob suggested should not be the "Emergency Room of the Children's Service System". But there remains much more work to be done, there is a need for evaluative research, and societies must give increased priority for funding of proactive prevention programs.

Finally, we will also need the human resources and an overall commitment to youth justice. As Crozier suggested in his book *The Stalled Society*

A society's capacity for action, its ability to reveal its own problems, to discover solutions to them and to put these solutions into effect, and its aptitude for innovation, all depend essentially on its established resources. Formal or informal institutions are the instruments of human co-operation. There can be no more exalted task than to be concerned in their development. Imagination is not enough here. We must summon up other virtues whose intellectual qualities have long been forgotten, of which the most important are patience and courage.

These are the virtues that we will need to address the "problem" of youth justice with a keen eye on the past, the present and the potential future of our most important social asset - our children. They must through us, feel worthy of respect and fairness. After all, is that not what justice is about?

CHILD IN JAIL

Christoph HARDMANN, ICRC

On behalf of the Delegation of the International Committee of the Red Cross (ICRC) in the Union of Myanmar, I would like to thank you for this opportunity to give a short presentation on the topic "Children in detention"⁷⁹.

I would like to structure my speech as follows:

- First, to recall some basic facts on the presence of the ICRC in the Union of Myanmar as well as on the mandate of the ICRC in general;
- Second, to give an overview over the protection activities that the ICRC currently carries out in favour of persons deprived of their freedom under the Ministry of Home Affairs of the Union of Myanmar, with special attention to minors;
- Third, to determine the legal frame of reference for ICRC's protection activities in favour of detained minors;
- finally, to list ICRC's main legal and humanitarian recommendations aimed at ensuring correct treatment and decent conditions of detention of minors deprived of their freedom;

Please let me begin with some words on the...

I. Presence of ICRC in Myanmar and ICRC mandate

Present in the Union of Myanmar since 1986 with an orthopaedic program, the ICRC, in coordination and collaboration with the Ministry of Home Affairs as its Ministry of reference, subsequently expanded its humanitarian activities in the country significantly:

- its support to two civilian and two military prosthetic/orthopaedic workshops gradually increased over time. In the course of this year, a new Ortho centre will start its activities, an achievement reached through collaboration between the Ministry of Health, the Myanmar Red Cross Society, and the ICRC, aimed at offering prosthetic and orthopaedic assistance to amputees in the South-eastern part of the country;
- through a joint program with the Ministry of Health and the Myanmar Red Cross Society, amputees are identified and provided free transport to the prosthetic centres;
- In Eastern Shan State, a health promotion program is being carried out;
- In Mon State, Kayin State, and Taninthanay Division, the ICRC provides assistance to the rehabilitation of health structures, focusing on access to safe water supply and to the safe disposal for medical waste and sharps;

⁷⁹This text does not necessarily reflect the institutional position of the ICRC. Only texts bearing an ICRC signature may be ascribed to the ICRC.

- the ICRC cooperates closely with the other components of the International Red Cross and Red Crescent Movement present in Myanmar, namely the Myanmar Red Cross Society and the International Federation of Red Cross and Red Crescent Societies, with the main aim to strengthen the Myanmar Red Cross Society to fulfil its mandate in the field of dissemination of International Humanitarian Law, in emergency preparedness, and in tracing, in conformity with the Movement's seven fundamental principles, which are Humanity, Impartiality, Neutrality, Independence, Voluntary service, Unity, and Universality.
- the ICRC undertakes activities aimed at ensuring protection of and respect for the civilian population living in border areas;
- finally, the ICRC carries out visits to persons deprived of their freedom, and given the subject of this seminar, it is of course on this issue that I will elaborate further in a minute.

To date, ICRC maintains offices in Yangon, Hpa-an, Kiang Tong, Mawlamyine, and is about to open an additional permanent structure in Mandalay. Currently, the delegation of the ICRC in Myanmar counts some 155 staff, out of whom some 35 are expatriates.

II. Overview on the detention activities of the ICRC Delegation in the Union of Myanmar

At an early stage after the beginning of its presence in Myanmar with an orthopaedic program, the ICRC offered also its humanitarian services to pay visits to persons deprived of their freedom under the authority of the Ministry of Home Affairs.

In May 1999, the *State Peace and Development Council*, in response to ICRC's offer, granted access to detainees deprived of their freedom in prisons in relation to the security situation. Just a short time later, the ICRC was requested to pay visits to all detainees held under the responsibility of the Ministry of Home Affairs, including those detained in labour camps. So far, the ICRC did not pay visits to persons held under the authority of the Myanmar Police Forces.

Since the beginning of its detention activities in Myanmar, the ICRC carried out some 150 visits to detainees in some 70 places of detention. It registers four categories of detainees according to its own criteria, and by doing so commits itself to ensure an individual follow up of each of these registered detainees until the day of his or her release. The four categories are:

- persons deprived of their freedom for reasons of State security;
- foreigners who wish to be notified to the representation of their respective home country, or who are in need of protection;
- minors, meaning detainees below 18 years of age;
- persons deprived of their freedom following criminal charges who are in need of protection.

This gives occasion to briefly recall the ICRC mandate with regard to persons deprived of their freedom:

ICRC delegates visit detainees in conflict situations or other situations of violence. Repeated visits to places serve to

- prevent disappearances of detainees;
- combat torture and inhuman treatment;
- and to guarantee acceptable conditions of detention.

The ICRC enters into a confidential dialogue on these topics with the authorities in charge; the visits of its delegates are the subject of reports and representations, either oral or written, concerning the fate and integrity of the visited detainees. The aim of this confidential reporting is to share the findings of the ICRC and to address relevant and constructive recommendations to the authorities if necessary.

ICRC visits are carried out in conformity with established working procedures which apply regardless of the country in which they take place, and include

- to see all detainees falling within ICRC's mandate and have access to all places where they are held;
- to interview detainees of their choice in private, meaning without witnesses;
- to draw up, during the visits, lists of detainees within ICRC's mandate or to receive from the authorities such lists which the delegates may verify and if necessary complete;
- to repeat visits to detainees of their choice as frequently as they may feel necessary.

It is also very important that the ICRC be able to restore contacts between detainees and their families. It uses Red Cross Messages for this purpose, which in their open form allow both the detaining authorities as well as the ICRC to ascertain that strictly family news are exchanged by this means.

In the some 60 countries where it is currently working, the ICRC regularly comes across children imprisoned either for criminal law offences, because they have been caught up in the turmoil of situations of violence, or even because they have been enrolled as combatants.

For minors, the loss of freedom may be particularly hard to bear and have lasting effects on their development. This is especially true in situations of armed conflict or violence, where the traumatism of being exposed to such a hostile environment may be aggravated by the experience of being detained and thus separated from the next of kin and the usual social environment. But in any case, whether arrested and detained in an environment of violence or not, minors in detention are particularly vulnerable, depending on others and exposed to a variety of potential risks for their physical and psychological integrity. Being among the weakest of the prison population, they may suffer from inappropriate treatment by their fellow inmates, in the worst case from abuse and exploitation which occur in many forms. But minors

are also less likely to understand the internal rules of a place of detention, including the disciplinary system, and run the risk of disregarding such rules and subsequently of being subject to disciplinary punishment. The breaking of family links, the absence of appropriate conditions of detention, which may include exposure to adult fellow detainees, lack of adequate and sufficient food, and the absence of education, represent a multitude of negative factors which indeed may not only put the child's integrity at risk while in detention, but might have lasting serious consequences for the concerned child's future development.

It is with this experience resulting from working in many different countries and contexts, and on the basis of its particular concern for the integrity of children deprived of their freedom, that the ICRC in Myanmar visits and systematically registers detainees below the age of 18 years, regardless of the nature of charges brought against them. Since the beginning of its detention activities in the Union of Myanmar, the ICRC registered some 1100 detainees belonging to this category in different places of detention, and to date it still follow some 800 of them individually and actively.

In its confidential dialogue with the detaining authorities of the different places of detention as well as with the representatives of the Prison Department, a relationship which by the way the ICRC finds to be well established, substantial and constructive at all levels, the particular situation of minors regularly lists among the main issues of discussion. In this ongoing dialogue, the ICRC is well aware of and takes carefully into consideration the fact that neither the Prison Department nor the Ministry of Home Affairs are judicial authorities, and that any question related to the conformity with the law of the deprivation of liberty of a person as a result of a conviction by a court of law, is beyond the authority of the Ministry of Home Affairs.

Ladies and Gentlemen, please allow me to elaborate on the question of relevance for the ICRC of legal aspects of deprivation of freedom, given that this issue is of particular interest when talking about detained minors visited by the ICRC.

As you are well aware, ICRC's mandate pertaining to persons deprived of their freedom is humanitarian in nature. Given this, it becomes clear that the goal of its visits to detainees is not to focus on the question of the legality of deprivation of liberty of a detainee, but to seek to ensure, in collaboration with the responsible authorities, that the conditions of detention for a person deprived of his or her freedom are human and appropriate to maintain his or her integrity at all times.

However, respect of fundamental judicial guarantees, at any stage from the arrest, while under trial, and during the term of imprisonment handed down by a court of law, represents a requirement in the absence of which a detained person can hardly live without negative consequences for his or her psychological integrity. Lack of conformity with the law when ordering or executing detention inevitably influences negatively a detainee's psychological integrity, and it is for this reason that the ICRC, if considered necessary in a given situation, promotes respect of such fundamental legal safeguards.

Given the particular vulnerability of children in detention, and the variety of factors which potentially put at risk a detained minors' integrity, full respect of the

requirements of the law pertaining to the legal grounds allowing for detention of children as well as pertaining to the detention regime is crucial.

Having explained why the ICRC might feel necessary not only to focus on the immediate material conditions of detention of a detained child, but might actively - but of course still confidentially - promote enhanced respect of the law applicable on juvenile offenders and children deprived of their freedom, it reveals necessary to say a word about the

III. Legal frame of reference for ICRC's protection activities in favour of detained minors in Myanmar

Of course domestic law is the main reference for any queries on the legal status of a juvenile offender and on the law applicable on him, including the regime applicable on minors deprived of their freedom. Given this, the Child Law, 1993, but also the Penal Code, the Code of Criminal Procedure, and the Prisons Act, are the main texts of reference, also for the ICRC. Administrative rules, such as the Burma Jail Manual, and the Courts' Manual, but also administrative instructions issued by the Ministry of Home Affairs or the Prison Department, contain specific provisions applicable on detained minors, which the ICRC carefully takes into account in its assessment.

Where there are differences between Myanmar domestic law on one side, and international law or internationally recognised legal standards applicable to the administration of juvenile justice and to the protection of minors deprived of their freedom on the other side, the ICRC promotes the application of those standards which provide for the child's maximum protection and best interest. This includes that in Myanmar ICRC follows the definition of a child in the UN Convention on the Rights of the Child and registers detainees below the age of 18, although the domestic Child Law, 1993, defines a child to be a person below 16 years of age.

The distinction between child and youth in the domestic Child Law, 1993, is fortunately of no relevance for the question of the legality of transfers to and detention in labour camps of minors, given that the Child Law equally expressly prohibits any exaction of labour from both children and youth.

To be actually able to benefit from the special protection provided under both domestic and international law to juvenile offenders and detained minors, a minor has first to be identified as such. What sounds blatantly obvious in theory reveals however surprisingly challenging in reality. The ICRC is aware of the complexity and difficulty of this task for the authorities, but it cannot but avail itself of any opportunity to stress the importance that at all stages and at all times, all concerned authorities undertake a maximum of efforts and apply a high level of professionalism in the determination whether an offender of the law or a detainee is minor or adult. This includes that minors are identified in order to refer them to a Juvenile Court or to a Juvenile Judge, and also that upon admission to a place of detention, newly arriving detainees be carefully screened by competent medical personnel in order to identify minors.

Given what I have explained so far, it will not come as a surprise to you to learn that ICRC has the privilege of an ongoing dialogue with representatives of the Myanmar Judiciary on questions related to administration of juvenile justice and detention of

minors, notably with the Supreme Court of the Union of Myanmar and with the Juvenile Court Yangon.

Please allow me to introduce the list of

IV. ICRC's main legal and humanitarian recommendations aimed at ensuring correct treatment and decent conditions of detention of minors deprived of their freedom

The ICRC insists on the psychological and emotional equilibrium, development and education of young detainees being maintained as far as possible, and urges the detaining authorities to see that the following minimum requirements are met at all times:

- the questioning of children and all other necessary procedures and judicial proceedings must take place without delay;
- Children in captivity must always be kept in quarters separate from adult quarters, unless housed with their families;
- if they are not released and their detention is extended, children must be transferred as soon as possible to a specialised establishment for minors;
- Children must receive food, hygiene and medical care suited to their age and general condition;
- as far as possible, child detainees must spend much of the day outdoors;
- Children must be able to continue their schooling and vocational training;
- Children must be able to keep in regular contact with their families.

Thank you very much for having followed my presentation so far. I would like to conclude by saying the following:

Children deprived of their freedom, whether on criminal grounds or whether in relation to a situation of violence or armed conflict, represent in any case a particularly vulnerable group amongst the detainee population. To reduce the potential negative lasting effects of detention, it is essential that detained children can actually benefit from the legal protection to which they are entitled by law. The ICRC, through its various activities, in particular by its visits to children in captivity and its assistance programs, helps to render more effective the protection which detained children so sorely need. But it is above all by taking preventive action, notably by making the rules of International Humanitarian Law and the rights of the child as widely known as possible, that genuine respect for the dignity and integrity of children can be secured.

**PRE-TRIAL DETENTION
AND THE RIGHTS OF THE CHILD.
BETWEEN THEORY AND PRACTICE.**

Jean ZERMATTEN, Director, IDE

Pre-Trial detention is probably one of the methods used by authorities with the less discernment. It is frequently used as a pretext for many offences and can infringe on the fundamental rights of children who are not necessarily the authors of offences. There must be objectivity, invariability, severity, and verifiability when examining the criterias. However, too often, pre-trial detention is used in a wide range of situations by authorities who act arbitrarily and without

1. Pre-trial Detention and the Rights of the Child

a) Pre-trial Detention

Pre-trial detention is a measure used in penal procedures to constrain individuals and is used during the investigation process. The magistrate, responsible for the investigation, is entitled to order a pre-trial detention, but must act objectively and within guidelines. The interpretation of the conditions is restrictive and can not be used in an extensive manner.

In general, the legal system in place in countries with a constitutional state, have defined conditions for pre-trial detention based on the suspicion of the offence, the possibility of fleeing, destroying proof, repeat offences. The situation is not identical in every country, however the strict criterias for pre-trial detention should be respected everywhere in order to prevent unjust arrest, extended detainment in prisons and unjustified detention of those having nothing to do with the penal enquiry.

b) Pre-trial detention and the rights of the child

1) The Convention on the Rights of the Child.

- It is article 37 that is interesting for the theme. Article 37 section b, c, and d of the CRC addresses the issue of deprivation of liberty in general, but also addresses pre-trial detention.
- The above stated provision establish the following rules:
- The necessity to submit legal motives for a deprivation of liberty and ensuring that the length of time is kept to the shortest period. Also, pre-trial detention should only be used as a last resort.
- The mandatory separation of detained adults and children and the necessity of being able to maintain family ties.
- The quick access to judicial assistance or other appropriate means, the right to contest the legality of the decision in a court hearing and the right to a speedy process.

2) The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

The Beijing Rules is the most important text for the penal procedure. The Beijing rules sets out a guideline for states to help them respect the rights of the child and the respect of their needs when forming specialized centres for minors. What is of interest is article 13 entitled Detention pending trial which states:

- Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time (13.1)
- Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home (13.2)
- Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations (13.3)
- Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults (13.4)
- While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality (13.5). Understandably this article has such importance because it clearly sets out how and when detention pending for minors should be used and the rules that should be follow in order to apply it.

3) The UN Minimum Rules for the protection of Juveniles deprived of their Liberty (Havana Rules)

- Article 17 reminds us that pre-trial detention should be used avoided if possible and replaced by other alternative measures. There should be an expeditious process in place when a juvenile is held in detention before process and there should be a separation between untried detainees (adults) and convicted juveniles.
- Article 18 establishes the conditions in which a juvenile should be detained such as when he/she should have access to a lawyer and to benefit from judicial assistance. Juveniles should have the right to work, study and receive training where it does not prolong the detention. Juveniles should also receive material for hobbies and recreation which are compatible with the objectives of detention.

4) Model Law on Justice for Minors The CRC and the two texts stated above are destined to assure a proper administration of justice for minors and can be considered as a fundamental reference tool for those who want to legislate on in the area. There has also been the birth of a model law that we will discuss.

The model law on Justice for Minors was created in 1997 and was prepared by the United Nations Centre for International Crime Prevention (Vienna)

Article 3.2-17, of the model law addresses pre-trial detention for minors in indicating that it is possible to issue when:

- there is suspicion that an offence of serious nature has occurred (the ML mentions an offence punishable by 2 years or imprisonment) and the following conditions are met.
- The necessity to protect the evidence
- The risk of collusion
- The risk that the accused will flee.

The ML does not address the risk of a repeat offence but that the detention must be held in a area that is separate from that of adults;

That the duration of the pre-trial detention depends on the gravity of the offence. If the offence is criminal for example, the detention could last six months and can be renewable. If the offence is a misdemeanour, the detention can be of 3 months, which can be renewable ;

That pre-trial detention can not be pronounced for minors under 15 years old;

It is still indicated that a minor who is detained can make a complaint in regards to the decision at any moment during his/her detention before the judgement.

5) Penal Reform International

The NGO, Penal Reform International, recently produced a very interesting document on Juvenile Justice, and enumerates 10 theses that should be followed in all legislations that deal specifically with justice for minors. One of the argument is consecrated solely to pre-trial detention;

- Point number four foresees the following conditions:
- Pre-Trial detention should not be pronounced if there is the possibility that the juvenile can be placed in his/her own family.
- Pre-trial detention should not concern children under 14 years old.
- The duration of the detention should be as short as possible and should be in accordance to the age and gravity of the offence
- The separation of youth and adults for detention is imperative. There should also be measures in place for accompaniment and assistance for the juvenile and his/her family.

2. Particular Questions

It seems useful to address two questions that seem to come up regularly in the outlined problems and conditions in the international and national texts.

a) Separation of Minors/Adults

If pre-trial detention is included in the international and national texts as a measure, with certain conditions, that can be used by magistrates dealing with youth, it is important that the requirement that youth be separated from adults be applied unilaterally. All of the texts emit the same antiphony: CRC, Rules of Beijing, Rules of Havana, the Model Law.

Separation between adults and minor is mandatory and should not be left to the discretion of States. This is also supported by the Penal Reform International (PRI). The issue of separation is a reoccurring question. The majority of the work in criminology discusses the negative Effects of prison and the role that adult detainees have towards young detainees. We often speak in polite terms in regards to situations that occur in prison however, we know very well that children are not only victims of the bad examples given by adults but they are also, subjected to the villainies that adults may commit against them. This is not an exaggeration or a diabolism of the prison system but it is a reality of those that have been detained, have experienced.

b) The role of defence

Another aspect that is worth developing is the one of defence of minors held in pre-trial detention. It was indicated in the evocation of international standards that:

Article 37 d) of the CRC states that a child should have access to judicial assistance, or other appropriate assistance.

According to article 13 (3) of the Rules of Beijing, minors, who are in pre-trial detention must benefit from all the rights that are guaranteed by the UN treaties (making reference more specifically to art. 9 and art. 10 of the International Covenant on Civil and Political Rights)

That the Model Law fixes the right for a minor to the assistance of a lawyer at the very first moment of police custody (art. 3.2-2) or rather from the first moment of pre-trial detention.

We can say that there is an international tendency, influenced by the above mentioned text but also by the ECHR, which is geared towards an active participation for the defence of minors in criminal law. The same principles that apply to adults should also apply to children.

3. To Conclude : The rights of the child and pre-trial detention: Conflicting Topics?

Are the rights of the child and pre-trial detention two conflicting topics?

I would respond yes to all situations:

- where the motives for detention do not correspond to the strict criterias indicated in the national laws or in the CRC or the Rules of Beijing;
- When the detention is preformed in prisons for adults, without a separate section for children and there is promiscuous dangers
- When the privation of liberty last longer than the necessary time to respond to the objectives of the quest for truth.
- When pre-trial detention is accompanied by measure that are vexatious or discriminatory
- When the detained youth does not have legal assistance to a lawyer or does not have the possibility to complain about the decision.
- When the young accused is not presented before a judge within a reasonable delay and he/she is still waiting for a judgement
- When the dignity of the child is ridiculed

I would however say that pre-trial detention and the rights of the child can work in synchrony if the legislative system that is put into place by the interested countries, and if the magistrates in charge, respect the norms that derive from international , regional and national standards from texts and Jurisprudence such as:

- Pre-trial detention must respect strict criterias, restrictively enumerated by the law;
 - Pre-trial detention should be lifted once that it has attained it's goal;
 - The pre-trial detained minor has the right to be defended and to complain about the decision
 - The carrying out of the detention must preserve the dignity of the child as a human being : He/She must not be treated as a toy in the hands of adults, and must receive all necessary sanitary, educative, psychological care.
 - That this measure must always be considered as a serious measure and must be used with parsimony.
-

INTERCOUNTRY ADOPTION

Paola RIVA GAPANY, Director Assistant, IDE

I. International Normative Framework

Besides many conventions and/or declarations which exist at the regional level, such as the European Convention on Adoption⁸⁰, and which may be legally binding or not, the principles and standards regarding intercountry adoption are set out in the following international documents:

- The 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally⁸¹.
- The 1989 Convention on the Rights of the Child (CRC), especially art. 21, but also art. 8 (right to identity), art. 7 (the right to know and be care by his / her parents), art. 12 (self expression), art. 20 (alternative care) and art. 25 (periodic review of placement). These articles must be read in the light of art. 3 CRC, related to the best interests of the child⁸².
- The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (THC), adopted on 29 May 1993 and entered into force on May 1st 1995. As at June 4th 2002, 61 States have ratified it⁸³.

II. Some definitions

*Child Welfare Measure*⁸⁴

If despite appropriate assistance and support, a child's family is unable to ensure his or her development, a form of alternative care needs to be implemented, such as:

Institutional placement the simplest response to a child need of care and protection, usually carried out because no viable alternatives have been set in place, because due account is not taken of existing alternatives, or because ongoing specialized care is required.

Fostering an authorized placement with a foster family, supervised by the social services and usually involving financial compensation to cover the additional expenses incurred.

Guardianship a socio-legal process where a person, generally a relative, is appointed to take responsibility for the child and his or her property until the child reaches the age of majority.

Kafala a form of care under Islamic Law, recognised by legal act and considered definitive. Under kafala, the child doesn't take the name of the host family, nor does

⁸⁰ European Convention on the Adoption of Children, Council of Europe, Strasbourg, 24.IV.1967, <http://www.europa.eu>

⁸¹ <http://www.childsrights.org>

⁸² <http://www.childsrights.org>

⁸³ <http://www.hcch.net/f/members/index.html>

⁸⁴ Intercountry Adoption, Innocenti Digest 4, UNICEF, December 1998 p.3.

he or she acquire inheritance rights, reflecting the precept of Islamic law whereby blood ties cannot be modified.

Adoption⁸⁵

Adoption is a welfare and protection measure that enables an orphaned or definitively abandoned child to benefit from a permanent family. The adoption may be **simple** in which case the child maintains some financial and legal ties with his or her birth family (ex. Inheritance rights) and may even retain their name.

The vast majority of adoption today are **full**, which means that they irrevocably and completely terminate the relationship between the child and his or her birthparents and create in its place an analogous relationship between the child and the adoptive parents.

The practise of adoption is divided into:

A **domestic** adoption is an adoption that involves adoptive parents and a child of the same nationality and the same country of residence.

An **intercountry** adoption is seen as one that involves a change in the child's habitual country of residence, whatever the nationality of the adopting parents.

An **international adoption** applies to an adoption that involves parents of a nationality other than that of the child, whether or not they reside, and continue to reside in the child's habitual country of residence.

Example 1: a Brazilian boy adopted by Brazilian citizens living in Switzerland is involved in an intercountry adoption, but not international.

Example 2: the Brazilian boy adopted by Swiss citizens living in Brazil, this is an international adoption, but not intercountry.

Example 3: the Brazilian boy adopted by Swiss citizens in Switzerland, is in both international and intercountry adoption

III. Aims of the Hague Convention on Intercountry Adoption

Aims of the convention: Art. 1 THC⁸⁶:

- to ensure that the best interests of the child during intercountry adoptions are respected, such as his or her fundamental rights and freedoms
- to establish a system of cooperation amongst contracting States to ensure that those safeguards are respected
- to ensure that adoption in Contracting States are made in accordance with the THC.

The THC establishes a mechanism for international cooperation between States parties in order to implement the articles of the CRC. The THC covers only adoptions which create a permanent parent-child relationship⁸⁷. Adoption is not an individual affair, which can be left to biological and adoptive parents. It's a State

⁸⁵ Intercountry Adoption, Innocenti Digest 4, ad 5 p.3

⁸⁶ The Hague Convention on Intercountry Adoption, <http://www.hcch.net>

⁸⁷ Art. 2 (2) THC, supra

concern and it is up to them to adopt procedures for intercountry adoption which guarantees the respect of the best interests of the child.

The THC turns the principle of subsidiarity into a rule: **intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin**⁸⁸. Intercountry adoption should be the last solution to be adopted, when the following options are worthless:

- 1) **family solutions** (return to the birth family, foster care or adoption) should be preferred to institutional placement
- 2) **permanent solutions** (return to birth family, adoption) should be preferred to provisional ones (institutional placement, foster care)
- 3) **national solutions** (*return to birth family, national adoption*) should be preferred to international ones (*intercountry adoption*)⁸⁹.

IV. Mains Actors of the Hague Convention on Intercountry Adoption

- 1) the government of the country of origin
- 2) the central authorities
- 3) the judiciary
- 4) the government of the receiving country
- 5) the intercountry adoption agencies⁹⁰

To facilitate the cooperation among States, the THC states that each contracting **State**, either of **origin** or **receiving**, should establish a **Central Authority** responsible for protecting children involved in intercountry adoption⁹¹. The Central Authority may act through another public authorities or an accredited body, the **intercountry adoption agency**; in such a case, the State has the obligation to supervise the composition of the accredited body, its composition and the financial conditions it apply. In many countries adoption is a judicial decision⁹². The **judge** has the obligation to check if the child's case is fully and properly prepared and that the recommendation on matching are well documented.

Other potential actors may be involved, such as the **Committee on the Rights of the Child** who pays attention to adoption issues when reviewing State report; the **UN Working Group on Contemporary Forms of Slavery** has added to its agenda a specific item devoted to illegal adoption. **UNICEF** which provides technical assistance on intercountry adoption issues to government, NGO and the Committee on the Rights of the Child. Human rights and child focused **NGO** which may include in their agenda the promotion and mainstreaming of adoption issues.

Lawyers should refuse to perform adoption procedure which may go beyond their formal role as a legal representative and which doesn't respect the required

⁸⁸ Preamble of the THC, ad 7

⁸⁹ Intercountry Adoption, Innocenti Digest 4, ad 5, p.5

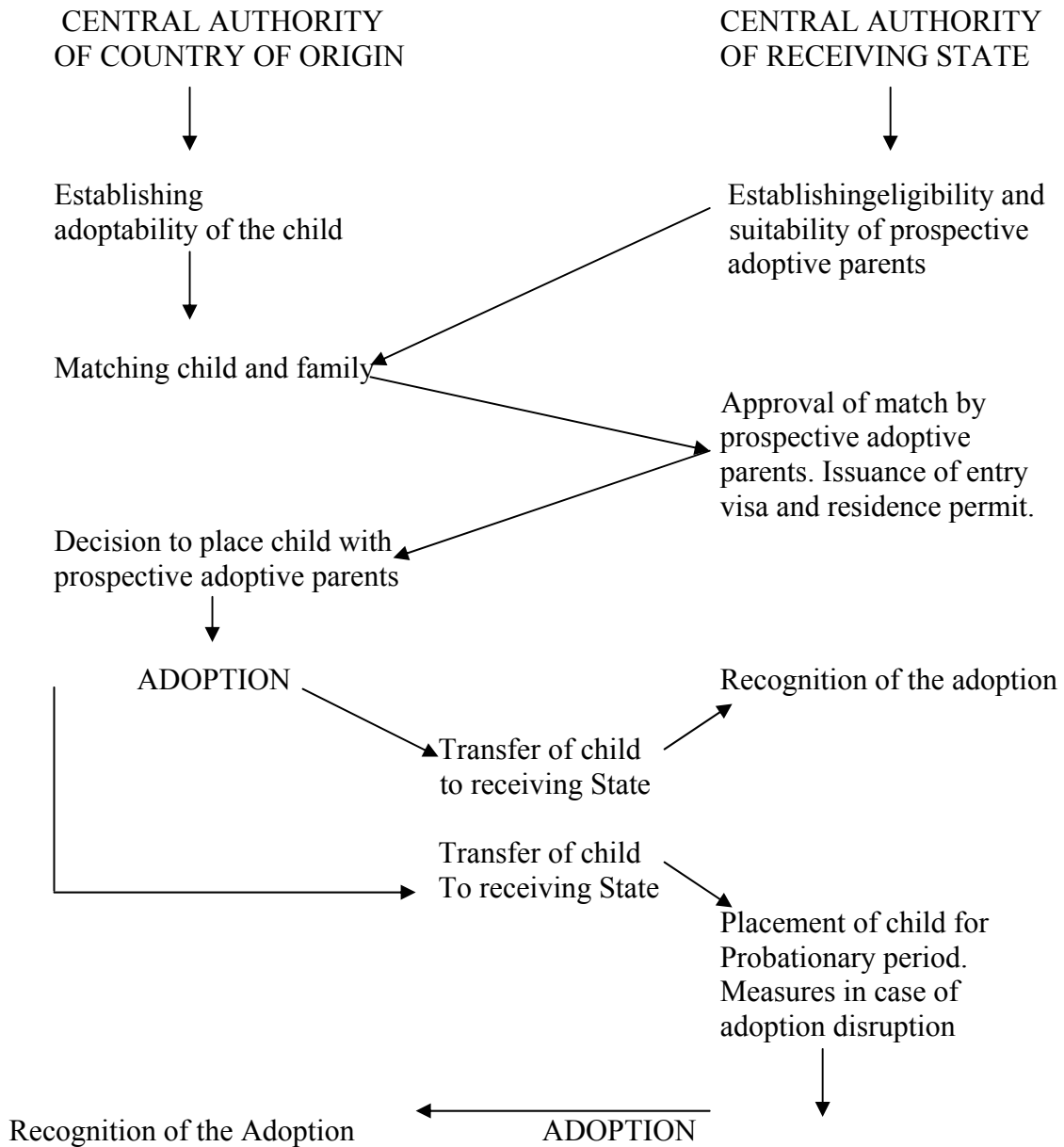
⁹⁰ Intercountry Adoption, Innocenti Digest 4, ad 5, p.15-16

⁹¹ Chapter III. Central Authorities and Accredited Bodies, THC, ad 7

⁹² Arts. 7 and 8 THC, ad 7

procedure. **Medias** could play an important role in drawing public awareness on illegal adoption and in helping to promote national adoption⁹³.

V. Procedure of intercountry adoption of the Hague Convention on Intercountry Adoption⁹⁴



⁹³ Intercountry Adoption, Innocenti Digest 4, ad 5, p. 16

⁹⁴ BUCHER, 1996

Adoptability of the Child⁹⁵

The Central Authority of the Child's origin has to ensure that the competent authorities **establish the child's adoptability in a report**. The adoptability of a child means that he is legally, psychology, medically and socially suitable for adoption. This report has to demonstrate that the adoption procedure has been approved by the biological parents, the concerned institutions and the child if his or her degree of maturity permits it.

Eligibility and Suitability of the Prospective Adoptive Parents⁹⁶

The Central Authority of the receiving State has to do a similar study and demonstrate that the possible adoptive parents are qualified and eligible to adopt. It's not just an economic and legal concept, but a psychological, medical and social dimension too.

Matching

Means the quest for an appropriate adoptive family for a given child, taking into account of the child's history, characteristics and needs. This procedure intervenes after that child's adoptability and parents' eligibility and suitability have been established. Matching is the primary responsibility of the receiving State.

Preparing the Child and The Family to Adoption

The adoptee child must be prepared to adoption; he will leave a familiar surrounding, meet new faces, new country, new language, new habits. He will have to travel with foreigners. The prospective family and the adoptee must have the chance to know each other better, before leaving the State of origin. The biological parents, if known, must be prepared as well and the adopting parents must be prepared and accept that once their child will seek for his or her origins.

Adoption

THC provides for the automatic recognition by all contracting States of adoption made under the THC, whether in the receiving country or country of origin⁹⁷.

V. Abuses of Intercountry Adoption⁹⁸

- Adoption for commercial purposes
- Seeking changes in policy or practice
- Illegally obtaining children for adoption
- Illegally securing permission to adopt
- Illegally avoiding the adoption process

Abuses in intercountry adoption are more likely in countries where there are no effective legislation, administrative structures nor coherent child and family welfare policy. Cases of abuses are especially prevalent in⁹⁹:

⁹⁵ Arts. 4 and 16 THC, ad 7

⁹⁶ Arts. 5 and 15 THC, ad 7

⁹⁷ Art. 23 THC, ad 7

⁹⁸ Intercountry Adoption, Innocenti Digest 4, ad 5, p 6-7

⁹⁹ Intercountry Adoption, Innocenti Digest 4, ad 5, p 7-9

- private adoptions
 - armed conflicts period
 - natural disaster period
 - socio-economical upheaval
 - economic crisis
-

PREVENTION: A FEW PRACTICAL EXAMPLE OF MYANMAR

U Myint Thein, The Department of Social Welfare

I. Introduction

Children are in especially difficult circumstances when their basic needs are not met. This difficult circumstance has created a category of children in need of protection. Therefore children in need of special protection (CNSP) can be defined as groups of children who face special problem as result of abuse, neglect, exploitation or various types of handicaps. The convention on the rights of the child sets the standard for the rights of all children to survive, to develop, to be protected and to participate fully in their family and society. These rights are all equally important. They must be seen in relation to each other in promoting a multi disciplinary and cross-sectoral perspective. The aim is to focus on the whole children, recognizing the interrelationship between different rights and needs. The State, institutions, individual and children themselves all have the responsibility to exercise and respect these rights.

II. The key features of a Rights-Based approach

Children are entitled to help. Governments have binding legal and moral obligations. Children are active participants by right. All children have the same right to fulfil their potential. There is an overarching goal to which all work contributes. All adults can play a role in achieving children's rights. Analyses root causes.

III. Strategies for Prevention

- (1) There are two categories of CNSP children. These are children in need and care of protection (abandoned children, orphans, street children, working children, children in institutions, children with disabilities) and children in conflict with the law (Pre-delinquent children, Delinquent children).
- (2) Prevention goals are macro-overall and micro-specific. Micro-overall means optimum social functioning for individuals and groups as they perform their expected roles. Micro-specific means Remedial, eg. children abuse case (case), preventive, eg. youth centre (group) and Developmental, eg. public awareness (community).
- (3) Types of prevention are primary prevention, secondary prevention and tertiary prevention. Primary prevention means underline problem by promoting social environment in which all children can grow without fear of , becoming a child in especially difficult circumstance. Secondary prevention means, identify vulnerable groups and prevent them from being forced into difficult circumstance. Tertiary prevention means, providing support and treatment to those who are already in difficult circumstance in order to reduce harm.
- (4) Level of interventions are primary, secondary and tertiary intervention. Primary intervention means effort to modify the precondition and prevent the specific causes from occurring. Secondary intervention means working on specific causes and the immediate effects. Tertiary intervention means, effort to ameliorate the consequences of the problem.

- (5) Intervention continuum has developmental (community), preventive (group) and remedial (individual).
- (6) Achievements are as follows:
 1. Primary Prevention are situational analysis, advocacy meeting, awareness raising programme, capacity building, promotion of CNSP issue through IEC materials and community development programme.
 2. Secondary Prevention are review the child law, production of rules and regulations, capacity building, establishment of protective centre and protection of children, family and community.
 3. Tertiary prevention are non-institutional care and institutional care. Non-institutional care means probation, national adoption and foster care. Institutional care means parole, reintegration and after-care service.

IV. Conclusion

Future programmes are as follows:

- Development of preventive measures through social mobilization and community participation.
- Development of protective measures through social legislation.
- Development of monitoring and evaluation mechanism.
- Expansion of CNSP, awareness programme by producing IEC materials and manuals.
- Promotion and protection of protective children by focusing child-friendly approach through training, education, reintegration and after-care service.
- Expansion of capacity building for service providers and community in implementing of prevention, protective and rehabilitative measures for CNSP.

PART III : CHILD ABUSE

HOW TO CREATE A TRAINING MANUAL?

Aneeta KULASEGARAN, Advocate & Solicitor, Malaysia

Consider some of these pertinent matters when creating a training manual

1. What is your focus or objective?
2. Who is your target audience?
3. What will be the topics that should be covered?
4. What materials are available?
5. Who are some possible speakers and from what field?
6. What is your expected outcome?

Example of Manual on “Identification and Awareness-raising Workshop on Child Abuse and Neglect (CAN)” created by the Malaysian Association for the Protection of Children

1. What was the focus or objective?

The objective of the seminar was to create awareness of CAN and to educate people on how to identify possible CAN cases and what to do about them,

2. Who is the target audience?

Community leaders, medical personnel, law enforcers, social welfare, teachers and social workers from NGOs and children’s homes in a specific area.

3. What were the topics covered?

- a) Definitions of Abuse – community, legal and medical definitions
- b) What are the causes of CAN?
- c) Prevention of CAN?
- d) Responding to the abuse child
- e) The CRC and Child Protection
- f) The Law and its implementation
- g) Recommendation for the future

4. What materials that were available?

Materials used were newspaper print, cards, games, marker pens, blu tack, transparencies, slide projector, videos, powerpoint presentations.

5. Who were possible speakers and from what fields?

Medical, legal, social welfare, sociologists.

6. What was our expected outcome?

Networking opportunities and heighten awareness of the participants on CAN.

PRESENTATION OF A PRACTICAL CASE

Renate WINTER, Justice at the Special Court of Sierra Leone (SCSL)

I. Facts

Approximately three weeks ago the police of an Asian Country was informed by a NGO of child prostitution going on in a certain brothel and rescued 14 girls between the age of six and eighteen. All 14 girls have been arrested afterwards by the same police because they had no valid travel documents. All girls were trafficked from abroad and the very few of them, who were in possession of travel documents were deprived of them by the brothel owner.

The girls were brought before the investigating magistrate. He released the three youngest who were under the age of criminal responsibility and kept all the others in detention for illegal border crossing. He claimed that it was none of his business to take into consideration why or for what purposes the girls had crossed the border. As they were not in possession of valid travel documents they had infringed administrative dispositions and therefore got administrative punishment. As they were, of course, not in possession of money as well, he had to apply deprivation of liberty. Concerning the issue of trafficking he argued that a penal judge had to lock into this matter, as this was not his responsibility or mandate.

The penal judge did not find any misbehaviour, but could not release them as they were in administrative detention. He could as well not act against the clients of the girls or the brothel owner and the pimps, as no investigation had been opened against any one of them.

II. Issues

I would not like to talk about the details of criminal procedure of a given country, not about Myanmar nor any other codification. I do not want as well to discuss the CRC, although the CRC is of course of special interest for us. I rather would like to invite you to jointly think about, as to how a “criminal intervention” regarding a child should look like.

Criminal intervention in cases where children are involved requires first of all the highest standard of carefulness. This goes for both, for children as perpetrators and children as victims. We know it all: the investigating bodies are by far more interested in obtaining results than in protecting the needs of children involved. Prosecutors and judges, even juvenile judges are often, due to their workload, interested more in rapidly solving a case than in safeguarding the **best interests** of a child, be it victim, witness or offender. Even worse, very often the legislator himself shows by means of penal procedural law, that he is first of all interested in a witness, being useful in the criminal procedure than in a victim, who needs help. How otherwise to explain that in a case of child abuse the prosecutor requests the testimony of a three year old victim to be heard at the main trial?

As I said before: we know it all. But we have, especially while dealing with children, to question us over and over again: is all of this procedure necessary? Is it correct? Is there something better?

There are procedures outside the criminal law, where problems can be handled without resorting to unnecessary punishment on the one side and without re-victimisation of the victim at the other. Customary Law in all continents provide for such out-of court settlements to allow eventually re-establishing of peace by reconciliation.

But there is another point as well:

One can and should apply one more criterion in regard to conducting a criminal intervention: the principle of human rights and fair play. It is of course possible to use the penal procedural dispositions to “destroy an enemy” or to “win a case”, but it should be far more important to find truth and justice under the aspects of basic human standards. Those basic standards are known worldwide in almost all systems of law, and we find them codified in many international conventions, as for instance in the European, African, American and UN Human Rights Conventions.

To apply them is not a matter of knowledge, it mostly is a matter of respecting them. It is the internal attitude of the implementing agent, be it the police-officer, the prosecutor or the judge, which makes the difference. Are they merely solving a case or would they be prepared to solve a problem, considering correct, applicable and meaningful measures in the light of justice?

We can agree that a code of procedural rules makes sense as a collection of all rules to be taken into account for the application of the material criminal law. Investigation, main trial, verdict, sentence and its eventual execution are implementing material criminal law, but they are not part of it. The material law regulates, **what** can be done. The procedural part speaks about **how** to do it. This is exactly our subject here.

How to do what has to be done, when children are involved in a procedure, taking into consideration the international dispositions of Human Rights and fair play.

III. Questions

First of all:

Do we have rules regulating the competence for the police in relation to the prosecutor and the investigating judge?

Are there mechanisms in place to facilitate and speed up communication in the interest of children?

Do we have rules as to the territorial jurisdiction for the prosecutor, especially when child victims and offenders are from different countries? Is the principle of **universality** respected?

Do we have legal deadlines in place and legal remedies to guarantee a quick and appropriate handling of children?

How can we solve the conflict between the principle of legality and the principle of opportunity in the best interest of the child?

Has the child, any child, the right to defence, assistance, interpretation, representation?

Are the rules of evidence respected as well for children? They are by far easier frightened, intimidated and abused by excessive investigation and interrogation methods.

Is the juridical personnel, the police, the prosecutor, the judge, social worker, the lawyer, the prison guard trained and aware enough to conduct his or her part of the criminal procedure in a way a child can **understand and follow**?

And finally: Is justice to be done at any costs or is the life and the integrity of a child, be it victim, witness or perpetrator, a factor to be taken in consideration at an equal level?

What are the aims of justice with regards to children?

A child victim should be assisted, any further damage should be avoided, care and, if necessary, treatment should be provided. Is this the case, if a three-year-old child

Has to testify at court? If a raped girl has to testify in open court in countries, where she will be punished and even killed by her family for having brought shame to the family?

A child witness needs assistance as well but most of all he/she needs protection. If the police officer cannot guarantee this protection, if he doesn't understand the child's reluctance to speak up because of threats, he cannot expect any collaboration. Nor can the court. The practice to trick a child into a statement and then to leave it alone, victim to revenge might lead to solving a case but is highly immoral.

A child offender is a child as well and all legal guarantees concerning children in conflict with the law have to be provided and applied. This is especially important, if the child is victim and offender at the same time as for instance child soldiers, abducted perhaps by rebels or pressed into military service. In all those cases the "best interest" of the child does certainly not mean that a criminal act should remain unpunished. It means that a child must be brought to take over the responsibility for what he/she did in a way the child can understand and to accept that there must be consequences. Those consequences must be quick first of all, as time is an important factor in the development of a child, and flexible to allow for assistance in the field of (re-) education, conflict resolution and reconciliation.

If a child doesn't understand why he is involved in a criminal intervention, if he/she doesn't have the emotional means to cope, if there is no mental capacity to understand why something was wrong or is necessary, the best interest of the child are not met, nor the interests of justice.

Let us go back to our case at the beginning:

We have the impression that every thing went wrong. What exactly went wrong?

Police:

The police got the information about the trafficked girls from an NGO. As this NGO ostensibly was involved in the case in a positive way, trying to protect those girls, why was it not possible for the police to hand over the girls to this NGO, awaiting the decision of the magistrate?

Why put them in pre-trial detention? Where to should they flee without travel document, without money and without knowledge of the country? How could they impede the procedure by influencing or threatening witnesses, being threatened themselves to an almost unbearable extent? How could they re-offend? By crossing illegally another border without any means to do so as stated above, or by prostituting themselves again after the terrible experiences they have had?

No, there was no legal ground for pre-trial detention at all. The police and the magistrate involved could have found other measures, such as handing them over to a shelter, instead of putting them in prison.

Magistrate and judge:

How comes, that a magistrate is not willing to consider the difference between illegal border crossing out of free will or because of abduction? How comes that there was no communication between the magistrate and the penal judge? How is the principle of proportionality observed? Is it really in the interest of any state to have children punished by incarceration for illegal border crossing instead of making sure that they are sent home as quickly and correctly as possible?

III. Conclusion

And last but really not least:

Why for god's sake nothing has been done against the real perpetrators, the abductors, the pimps, the brothel owner, the clients?

Why should justice tolerate that criminal interventions are directed against the victims instead of the offenders? That organized crime and economic interests go hand in hand to the detriment of the victimized children?

We cannot change politics, certainly.

We are perhaps too weak to tackle the problem of organized trafficking of children.

But we can, in our small part in the course of criminal intervention, try at least to uphold the basic principles of international Human Rights: to assist the child victim and to guarantee fair treatment to the child offender on the view of bringing him/her back to the society, where he/she belongs; to respect all safeguards, even if economic reasons are not in favour of it; to rather settle a problem than a case: in one word to conduct criminal intervention respecting the rights of a child.

PART IV : CHILDREN IN CONFLICT WITH THE LAW

ALTERNATIVES TO CUSTODY

Willie McCARNEY, Law Magistrate and Vice President of IAMYF

I. Introduction

When we are talking about children, the first thing to note is that the distinction between offenders and non-offenders is to some extent artificial. Research findings indicate very high rates of admitted law violation among the young. In a recent survey in England, one in four teenage schoolchildren admit they have committed a crime in the past 12 months.

A child who commits a criminal offence is not a criminal. Our response to the offending must ensure that he/she does not become one.

The most effective approach to youth offending is to concentrate on prevention, to stop children getting involved in criminal activity in the first instance. Where they do offend, our aim must be to prevent them slipping into a life of crime.

Some young people will inevitably fall through the net, no matter how good our strategies for prevention and become involved in youth crime. Our aim must be to prevent further offending and to make the young person a productive member of society instead of a drain on the resources of the community and of the State.

England has adopted A 'tough on crime' approach and now locks up more people per head of population than most other countries. In July 2002 the prison population reached a record 73,000 - almost 10,000 over capacity. This represents a rise of 8,000 prisoners in just two years.

Sending people to prison is not having the desired effect. Indeed it looks as if it is having a negative effect with the crime rate rising along with the prison population. There is abundant evidence that sending people to prison will increase the likelihood of their re-offending on discharge.

The use of prison does not make economic sense. Keeping an offender in prison in the UK costs up to £36,000 a year (that's US\$53,178 or 345,658 Kyats). This is roughly twice as much as hostel accommodation and ten times as much as constructive community programmes which have much more positive outcomes.

II. Restorative Justice

The most effective way of dealing with offending behaviour, particularly amongst young people, is to use a Restorative Justice approach.

The conventional criminal justice system focuses on the 'public interest' as the principal consideration to be taken into account when deciding whether or not to prosecute an offender. Restorative Justice seeks to address and balance the rights and responsibilities of victims, offenders, communities and the government.

Restorative Justice processes are built on the philosophy of the 'Four R's': Responsibility, Restoration, Re-integration and Respect.

Responsibility:

One of the primary aims of most Restorative Justice approaches is to engage with offenders to try to bring home the consequences of their actions and an appreciation of the impact they have had on the victim(s) of their offences.

Restoration:

A second aim is to encourage and facilitate the provision of appropriate forms of reparation by offenders, towards either their direct victims (provided they are agreeable) or the wider community.

Re-Integration:

A third aim is to seek reconciliation between victim and offender where this can be achieved and, even in cases where this is not possible, to strive to re-integrate both victims and offenders within the community as a whole following the commission of an offence.

Respect:

One single principle underpins the entire process: respect. Respect is essential if there is to be any hope of breaking the spiral of offending behaviour. Respect holds the best hope of dissolving alienation.

Respect implies a belief that the individual has within him/herself the capacity to grow and to change. It implies an understanding that, out of defensiveness and inner fear, individuals can and do behave in ways which are incredibly cruel, horribly destructive, immature, regressive, anti-social, hurtful. Respect implies that, for all his or her failings, the individual is still part of the community. It implies an acceptance that the offender exists as a valued person with an identity.

If a person finds him/herself positively understood he/she will develop a set of growth-promoting or therapeutic attitudes towards self which is the first step in the change process. This is not letting the offender off the hook! Most find the thought of taking responsibility for self a frightening prospect and would rather leave it to the court. It is easier to shirk responsibility than to shoulder it. The restorative process will support the offender in facing up to his/her responsibilities. Respect is the key which will unlock the door and allow the rehabilitation process to begin.

III. Programmes in Northern Ireland

Spending on Juvenile Justice in Northern Ireland has increased three fold in the past few years. All of the increase has gone on diversionary programmes.

Our best programmes adopt a dual approach. Firstly, they work with families on the basis that for most people the family is a major influence on their behaviour at home, in school and in the community. Therapeutically this results in interventions designed to influence the adjustment of family relationships and interactions.

Secondly, programmes work with individuals with an emphasis on developing positive adult-child relationship with the possibilities this creates for appropriate role modelling and esteem building.

The development of partnerships is a feature in the delivery of all effective programmes. Partnerships are both multi-disciplinary and multi-agency.

a) Children who fall through the Net

In Northern Ireland, the police are the main gatekeepers in the criminal justice process. They have considerable discretion in how they deal with offenders. When a child (10-17) is reported to the police as having committed a criminal offence we say they have “come to the attention of the police”. The police have four options:

- a) to take no further action; about 19% of enquiries result in ‘no further action’.
- b) to issue an informal warning and advice — where the young person is warned about the consequences of his/her behaviour and given advice about staying out of trouble. No official record of such warning and advice may be cited in court at a later date, but the police may keep a note of such warnings for their own records. About 58% of enquiries result in ‘warning and advice’
- c) to administer a formal caution — which is officially recorded and may be cited in a court at a later date. The formal caution is usually administered by a senior officer in the presence of the juvenile and his or her parents. Approximately 15% of enquiries result in a formal caution.
- d) The police may decide to prosecute. This decision is taken where the members of the liaison scheme decide that a caution or less formal method of dealing with the juvenile is inappropriate. Such a decision may be taken, for example, where the offence is particularly serious and/or the juvenile has previous convictions.
Only about 8% of children who ‘come to the attention of the police’ eventually appear in court.

In Northern Ireland the police have operated a Juvenile Liaison Scheme, manned by specialist officers, since 1975 to assist them in reaching a decision as to which of these approaches is the most appropriate in the case of each individual. More recently the emphasis has been on the development of Juvenile Liaison Bureaux which promotes a multi-agency approach to the reduction of juvenile crime. The Bureaux are made up of representatives from the police, social services, probation and the education and welfare services. Such Bureaux meet regularly to discuss the cases of young offenders who have admitted offending and they help decide which cases should be prosecuted or diverted. The final decision still rests with the police.

Young people who receive ‘warning and advice’ may be referred to a range of projects.

b) Adjudicated Offenders :

When a child pleads guilty to having committed an offence, or is found guilty by the Court, the court has a number of options: Absolute Discharge, Conditional Discharge, Fines And Recognisance; Compensation Order; Probation Order (with or without conditions); Community Service Order; Attendance Centre Order.

These projects are aimed at those who have already offended and who are on the threshold of an offending career. We also have alternatives to custody for young people who are already well entrenched in an offending career.

The WATERSHED Project targets that minority of juvenile offenders who are responsible for a disproportionate amount of crime in their communities. These young people are likely to have exhausted the tolerance and patience of their families, communities and the juvenile justice system. Their lifestyle is likely to be characterised by chaotic episodes of crisis, in which they will be perceived as “out of control”. All the evidence suggests that their potential for serious offending in adulthood is high.

Placement within a residential or custodial institution may reinforce rather than change anti-social attitudes and behaviour.

The usual preventive or diversionary interventions are not a sufficient response to these offenders. Watershed offers an intensive community based programme over an extensive period of time which attempts to break the pattern of offending, sets clear boundaries for behaviour through rigorous and consistent enforcement of rules and works towards the development of a commitment to the possibilities for change in a young person's life.

PART V : APPLICATION OF THE CONVENTION AND PREVENTION

EDUCATION AS A METHOD OF PREVENTION (EXAMPLE OF INDONESIA)

Ms. PURNIANTI

I. Introduction

Indonesia is one of the countries that has ratified the Convention on Children's Rights in 1990, which was based on the Presidential Decision Number 36/1990 dated August 25 1990. Therefore, it is a duty for Indonesia to implement the Convention for the sake of Indonesian children.

Although the state has started to turn their attention to Children's rights but it is at a very initial stage yet, hence it has not been wholly implemented. Various violations of children's rights still take place in daily life. For instance, violence against children within a family, at school, in the community and that which is perpetrated by law enforcers still occur in spite of the ratification of the Convention 12 years ago.

II. Education as a Preventive Strategy

Indeed the prevention of the violation of human rights as stated in the Convention can be viewed upon through two kind of challenges :

1. To try to find or invent ways to stop the occurrence of the violation
2. To prevent the violation of the Children's Rights before it takes place

The strategy of prevention covers a relatively large measures, which is with the objective to put right the position of children in the community. Consequently an increase in the amount of information given about the Convention on Children's rights to the public is the key to a decrease in its violations; a build up of understanding can be carried out and will even support a variety of alternative activities.

As a civilized community with very rich cultural inheritance, one of the ways to put this into practice is by taking advantage of it by using some that has been proven to be timeless. As an example, traditional entertainment such as shadow puppet (*wayang kulit*), Javanese stage show of *wayang* (*wayang orang*) and play can be used as an attractive education media.

In addition, for a community whose reading ability is low, let alone its reading habit, it is reasonable to suggest that Social Institutions pay attention to children's welfare by, among others, publishing 'comics' and 'pocket books written in question-and-answer form' that bring in them the subjects related to children's rights. Difficult issues like child abuse and domestic violence, for instance, are easier to digest for children when presented to them in forms that they are familiar with. Radio is also one form of media that still attract a large number of listeners. For that matter, a training carried out for radio announcers is another way of exposing the issue to a larger audience. As what can be said about the socialization of the issue among the

Police, despite its limited scope, the socialization of the Convention on Children's Rights has also been carried out within the environs of children penitentiaries. Meetings can begin with a presentation about what the Convention of Children's Rights is, in particular the related chapters.

III. Action Programs That Has Not Been Implemented

The Convention on Children's Rights has not been socialized among children. If there is any, the activities are limited and the participants are relatively few. This has an affect on children's attitude and action when they are confronted with violation of their rights in any of its forms. Therefore, it is very difficult for them to help each other – they, for instance, don't know the practical knowledge about where they can go to report the incidence, to whom should they ask for help, and so on.

IV. Conclusion

Public education, family education, social institutions and religious institutions need to be involved in the socialization of children's rights. In any way it will help in changing people's attitude and views on children and the instruments of their human rights, which in turn will minimize the number of children as victims of crime of humanity. Indonesia has done it but the frequency of its occurrence and the existing numbers of institutions are very limited.

CHILDREN IN DIFFICULT CIRCUMSTANCES AND THE CRC NEW PRINCIPLES

Renate WINTER, Justice at the Special Court of Sierra Leone (SCSL)

- Right to rehabilitation of children who have suffered various forms of cruelty and exploitation
- Obligation of governments to take measures to abolish traditional practices harmful to children's health
- Parents (or others responsible for the child) should provide guidance to the child in exercising his or her rights in accordance with the child's "evolving capacities"

Art. 19

Protection from abuse and neglect

- Physical or mental violence
- Injury or abuse
- Neglect or negligent treatment
- Maltreatment or exploitation (sexual abuse)

Recommended:

Protective measures

- Establishment of social programs (support for children and caretakers)
- Other forms of prevention (community programs)
Identification, reporting, referral, investigation,
- treatment and follow-up of instances of child maltreatment (judicial involvement)

Art. 20

Protection of children without families

- Children deprived temporarily or permanently of family environment
- children removed in their best interest from family environment

Recommended:

Alternative care

- Foster placement (host families)
- Kafalah (Islamic law)
- Adoption
- Placement in suitable institutions

Art 22

Refugee children

(Children seeking refugee status or considered a refugee unaccompanied or accompanied) shall get

- appropriate protection
 - humanitarian assistance
- } in accordance with the CRC
and all other international
humanitarian instruments

Recommended

- Cooperation with UN Organizations, IGO's, NGOs
- Assist the child
- Trace the parents/families
 - reunification
 - protection as for children deprived of family environment (art.20)

Art 23

Handicapped children

(Mentally or physically disabled children)

- ensure to enjoy a full and decent life in dignity
- promote self-reliance
- facilitate active participation in the community
- ensure special care
 - (free of charge for: - education
 - training
 - health care services
 - rehabilitation services
 - preparation for employment
 - recreation opportunities

Recommended

- Exchange of information (preventive health care, medical, psychological and functional treatment)
- Dissemination of methods of rehabilitation, education and vocational services

Act 30

Children of minorities or indigenous groups

- ethnic
 - religious
 - linguistic
 - indigenous origin
- } minorities

have the right to

- enjoy their own culture
- to profess and practice their own religion
- to use their own language

Art. 32

Child labor

Protection from

- economic exploitation
- performing hazardous work
- performing work interfering with the child's education
- performing work harmful to health, physical, mental, spiritual , moral, social development

Recommended

- To take into consideration CRC and other international instruments
- (ILO Conventions 138,182)
- Provide for a minimum age for admission to employment
- Provide for appropriate regulation of hours and conditions of employment
- Provide for appropriate penalties for those not respecting this article

Art 33

Drug abuse

Protection of

- Illicit use of narcotic drugs and psychotropic substances
- Prevention of use of children in illicit production and trafficking of such substances

Art 34

Sexual exploitation

- Protection of sexual exploitation (sexual abuse)
- prevent inducement of a child to engage in any unlawful sexual activity
- prevent exploitative use of children in prostitution or other unlawful sexual practices (pedophilia)
- prevent exploitative use of children in pornographic performances and materials

Recommended:

Consideration of all national, bilateral and multinational measures (Optional Protocol II)

Art. 35

Sale, trafficking and abduction

Prevent

- sale of children
 - traffic in children
-] for any purpose, in any form

by taking all appropriate national, bilateral and multilateral measures

Art 36

All other forms of exploitation

protection against all forms of exploitation prejudicial to any aspects of the child's welfare (Street Children)

Art 38

in respecting all relevant rules of international humanitarian law applicable (Optional Protocol I)

- ensure that persons under 15 years do not take a direct part in hostilities
- refrain from recruiting any person under 15 years into the armed forces
- giving priority in recruiting persons between 15 years and 18 years to those who are oldest
- protect all children who are affected by an armed conflict in accordance with international humanitarian law

Art 39

Rehabilitative care

- promote physical and psychological recovery
 - promote social reintegration
 - in an environment which fosters health, self-respect and dignity for a child, victim of :
 - any form of neglect, exploitation, abuse
 - torture, cruel, inhuman or degrading treatment or punishment
 - armed conflicts
-