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**The human rights of the child:
the case of street children in Central America**

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of the requirements of the degree of Master in International Law

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Street children in Central America are largely denied protection of their human rights. They live in difficult situations of poverty, inappropriate work and neglect, and thus are not able to enjoy most of their rights and basic needs.

The international framework for children's human rights law, composed primarily of the Convention on the Rights of the Child and the principles inherent to it, can be described as based on a doctrine of integral protection, a notion developed primarily by Central American legal scholars. At the same time, however, most Central American states ignore their obligations to conform their domestic legislation to these standards.

This thesis is meant to provide Central American countries with guidelines captured by a model referred to as UPPP2. Its main objective is for States to acknowledge that the plight of street children needs to be *understood*; *prevented* by adequate domestic legislation; and requires *protection* by effective implementation and *provision* of justice.

*In dedication to thousands of street children
that have been victims of human rights violations
around the world
and may God provide consciousness to those that
prefer indifference from justice*

and

*in appreciation to my family, who gave me the
opportunity, the support, the courage
and the strength
to fulfill this stage of my life*

** * **

*Special recognition to my supervisor and friend,
Professor Shauna Van Praagh,
a person that had the ability to understand the
inner most essence of this thesis and had the
patience of guiding me throughout*

*Thank you to Rebecca and Erica for your help
and support in order to finish my thesis*

August 2002

En Amérique Centrale, les enfants des rues se voient pour la plupart nier toute protection de leurs droits fondamentaux. Ils vivent dans des situations d'extrême pauvreté, doivent se livrer à des tâches inappropriées pour survivre et souffrent de négligence. Ainsi, ils ne peuvent ni jouir de leurs droits ni satisfaire leurs besoins essentiels.

Le cadre international légal des droits de l'enfant, composé principalement de la Convention relative aux droits de l'enfant et des principes inhérents, peut être décrit comme étant fondé sur une doctrine de protection intégrale, notion essentiellement développée par les juristes d'Amérique Centrale. Toutefois, paradoxalement, la plupart des Etats d'Amérique Centrale négligent leur obligation de rendre leur législation nationale conforme ces normes.

Cette thèse vise à fournir aux pays d'Amérique Centrale des lignes directrices issues du modèle désigné UPPP². Son principal objectif réside dans la prise de conscience par les Etats de la nécessité de *comprendre* le sort des enfants des rues, de l'améliorer à travers une législation nationale adéquate, aussi bien que dans l'exigence de leur protection par une application efficace et une garantie réelle de justice.

THE HUMAN RIGHTS OF THE CHILD: THE CASE OF STREET CHILDREN IN CENTRAL AMERICA

INDEX OF CONTENTS

	Page Number
Index of Contents	i
Introduction	1
 Chapter 1. The Violation of the Human Rights of Street Children in Central America. "Understanding Realities as the first step of the UPPP ² model."	 7
Section 1. Why Street Children in Central America? The Links to poverty	8
Section 2. What are street children?	13
Section 3. What happens to street children in Central America? Levels of Abuse.	19
Section 4. Difficulties faced in the solution of street children's human rights violations	26
 Chapter 2. Responses to Street Children: "Preventing and protecting human rights of street children as the second step of the UPPP ² model."	 29
Section 1. Who cares about street children?	30
Section 2. International Children's Framework	34
A. The Doctrine of Integral protection and principles inherent to it	34
1. Children as individual subjects of the law	37
2. The best interests of the child	38
3. New legal relations regarding children and adults	41
B) Convention on the Rights of the Child	42
C) The international framework for the protection of specific children's rights	45
 Section 3. Adapting Central American Domestic Law to International Standards	 48
1. State Responsibility	48
2. State Assessments on Adaptation of Internal Laws to Basic International Standards	52

A) The response under the Traditional Doctrine	54
1. Guatemala	54
a) General Situation of Human Rights	54
b) Responses to the Need for Improving Protection of the Human Rights of Children	56
c) Programs supporting street children's human rights	59
 B) Response by adapting certain existing national laws	63
1. El Salvador	
a) General Situation of Human Rights	63
b) Responses to the Need for Improvement of Children's Rights Protection	65
c) Programs supporting street children's human rights	65
 C) Response by Adapting Existing Laws and by Creating a New Code for Children and Adolescents under the Principles of Integral Protection	67
1. Honduras	67
a) General Situation of Human Rights	67
b) Responses to the Need for Improvement of Children's Rights Protection	69
c) Programs supporting street children's human rights	70
 2. Nicaragua	71
a) General Situation of Human Rights	
b) Responses to the Improvement of Children's Rights Protection	72
c) Programs for the Protection of Street Children's Human Rights	76
 3. Costa Rica	77
a) General Situation of Human Rights	77
b) Responses to the Need for Improvement of Children's Rights Protection	79
c) Programs for the Protection of Street Children's Human Rights	82

Chapter 3. Comparative Analysis of Central American Responses to Street Children. <i>Villagrán et. al v. Guatemala</i>	84
Section 1. Analysis of State's Responses in Central America	86
A) The Notion of a Code as a means for Protecting Children's Human Rights	86
B) Need to Adapt National Laws and Consequent Implementation	90
Section 2. Basic Facts in <i>Villagrán et. al v. Guatemala</i> . State Responsibility for Violations to Human Rights of Street Children in Central America. The Need for a Response from the State	94
A) Violation to Rights to Judicial Protection and a Fair Trial	98
B) Violation of Rights prior to the incident: "the pre-stage violations"	101
C) Violation of rights after the incident: "the post stage violations"	106
Section 3. Lessons from <i>Villagrán</i>	117
Conclusions	120
Bibliography	iv

THE HUMAN RIGHTS OF THE CHILD: THE CASE OF STREET CHILDREN IN CENTRAL AMERICA

Introduction

*"In the little world in which children have their existence, ...
there is nothing so finely perceived and so finely felt,
as injustice..."¹ - Charles Dickens*

In the least expected places in Central American cities, groups of long-faced street children dressed in rags are constantly repeating ... *"una monedita, porfavor"*, *"me regala algo"*² ... It is their daily chore, in order to take some bread back to their younger brothers and sisters, who stay home alone.

This is an everyday scene in any city of the central region of America. It occurs before the eyes of the society and the State, whose lack of action to address the problem has allowed the situation to dramatically worsen, leading non-governmental organizations, international organizations and United Nations bodies to intervene with the drama. These organizations have denounced the large-scale violations of street children's human rights, which include torture, cruel and inhumane treatment and illegal executions, as well as a lack of social and judicial remedies for victims of such abuses.

In this thesis, I will analyse the plight of street children in Central American countries, motivated by my personal concern with the hardships that street children endure in their struggle to survive. This happens not only in my country of origin, Costa Rica, where I have been able to witness the problems in many corners of the city, but also in other parts of Central America where the situation can be even more serious and

¹ Dickens, Charles. *Great Expectations* (1860-61). Chapter 8. Literature Homepage <<http://www.literature.org/authors/dickens-charles/great-expectations/>> (accessed 2 July 2002).

² In English these words mean: "some change please," "can you give me something."

complex. Breakdown of the family and poverty are closely linked to the injustices and horrors that a child experiences on the city streets: child labour, begging, sexual abuse, diverse forms of commercial sexual exploitation, intolerance and involvement in addictive drugs, among others.³ Their lives in the streets encompass violations of the majority of their rights protected by international human rights law.

The framework of international law on children was created to fit the different cultural, religious and traditional backgrounds of nations around the world. This framework includes the development of the Convention on the Rights of the Child, among other international instruments, and the elaboration of the “doctrine of integral protection.”⁴ The latter has led to the rise of a new legal area for the protection of children, based on three main pillars: the superior interest of the child, the child as subject of rights, and a respectful relation between parents and children with autonomous fundamental rights.⁵ The “doctrine of integral protection” is the most recent foundation and essence of the human rights system for children in Central America. This framework of laws on the child represents the primary tool for governments in the promotion and protection of these rights and includes international instruments that provide guidelines in the design of policies, strategies and plans of action against violations at the national level. The model system aims to be functional and practical, not to be ignored or forgotten; this can easily lead the state into a violation of its responsibilities as the primary vigilant protector of the rights of the child in general, and to street children,

³ M.E. Caballero, *La Paz no les ha llegado: Niños y niñas de la calle en Centroamérica*, 1 ed. (San José: Hivos Costa Rica Casa Alianza Internacional, 2000) at 46 [hereinafter *La Paz*].

⁴ R. Maxera, “Los derechos humanos de los niños, las niñas y los adolescentes”, in UNICEF-Costa Rica, ed., *Análisis Situacional de los Derechos de las Niñas y las Adolescentes en Costa Rica* (San José: UNICEF, 1999) 1 at 7 [hereinafter *Maxera*][translated by the author].

⁵ *Ibid.*

specifically. In other words, this international framework is useless if left aside and not applied. National policies and programs as well as government action remain key issues in the implementation of measures that will ensure the rights of street children in Central America. Unfortunately, the spectrum of problems linked to street children is broad, creating a web of causes and consequences, which leads children from poverty to the streets. International law on children needs to work in conjunction with national actions, to **understand**, **prevent**, **protect**, and **provide justice and punish** human rights violations against children, thereby integrally respecting all children's rights. Applying this analytical process, which in this thesis has been called "the *UPPP*² model," it is possible to link the specific real-life stories of street children in Central America with relevant protective guarantees that can help arrive at effective responses from states and regional structures. It can serve as a guide to specify what needs to be done nationally in each country in order to provide better protection for street children's human rights.

Thus, with the "*UPPP*² model," we start by working to "*understand*" the real situation of street children, including the totality of violations against their development and their lives. This first step should be followed by *preventing* such violations, through the adaptation or creation of the necessary tools: national programs, policy development, general and guiding international human rights principles, legislation, all in accordance with the current international doctrine of integral protection arising from the Convention on the Rights of the Child in 1989. The doctrine of integral protection embodies the idea that children are subjects of certain rights and duties, and should have an active participation as human beings, enabling them to express themselves and live in dignity in a safe environment. The next step is that of *protecting* street children's rights by

monitoring the implementation and enforcement of policies and laws and measuring their results.

Finally, we must *provide access to justice and must punish* violations of human rights by guaranteeing a transparent judicial system, which street children can access on an unconditional and equal basis. This includes proper investigations of their cases and eventual compensation for themselves or for their families, acquired either within the domestic jurisdictions or presenting petitions before international or regional tribunals; in case where domestic remedies have already been exhausted.

The “doctrine of integral protection” creates a theoretical legal link between the framework of children’s human rights and functional national legislation. As already stated, the “UPPP²” model for street children emphasizes the necessary overlap and collaboration between international and national legal frameworks through the doctrine of integral protection. The doctrine of integral protection provides an adequate response to the problematic realities of these children. Street children in Central America can be saved from suffering by understanding their plight and preventing abuses by amending existing laws or creating new ones. These measures effectively protect children with proper enforcement mechanisms and access to justice through the punishment of those who violate their rights.

One of the cases that will help to join the current reality, domestic laws and international human rights law comes from the Inter-American Court of Human Rights. This Court found that the State of Guatemala breached its duty to protect street children’s lives, as well as the obligation to provide a fair trial to members of their families. The Court encouraged Guatemala to take steps towards the proper protection of street children, as a country that has accepted the jurisdiction of the Court in human rights

issues. Based on this case, an analysis of international normative violations is necessary, in order to address the need for the rapid creation and implementation of measures at the national level, designed to eradicate the suffering of children. The study of street children leads us to many questions, uncertainties and doubts about the international human rights system, the credibility of the State as vigilant and protector against human rights violations, the responses of Central American countries to the protection of children and the limitations that countries face to provide the proper care for their children.

The structure of the present thesis is based on the idea that the international legal framework that protects children, specifically street children, has been created by the international community as a legal model of human rights protection, or rather a protective paradigm to be applied in practice. States are responsible, through the implementation of domestic laws, to apply modern standard principles according to street children's realities and needs. Governments can assess the adequacy of existing national laws and the need for the creation of new legislation for children by analysing the diverse political, social, economic and legal problems that constitute the street children phenomenon. However, laws must be followed with their proper implementation in order to be effective. Domestic legislation, working hand in hand with international laws and principles, provides a comprehensive protection of children's rights and in our case, street children.

The first chapter illustrates violations against street children, starting in their homes and ending in the streets. The objective of this section is to present the realities of street children's lives through the exploration of particular cases, violations, abuses and provisions in international laws that could protect these aggressions, if applied properly; to show the street children's need for protection from abuses of their human rights; and

to present the different actors that play significant roles in the general panorama of the lives of street children.

The second chapter is a comparative analysis of the reforms made by Central American countries after signing and ratifying the Convention on the Rights of the Child. Throughout this section some reflections should be kept in mind. First, the process of bringing domestic law into compliance with the Convention on the Rights of the Child and other related human rights instruments is an immediate duty of the state. Second, States should carry out their obligation to safeguard human rights of children with due diligence. Third, the failure of countries to adopt laws embodying the principles of the doctrine of integral protection constitute a violation of the duties they acquired upon ratification of the Convention on the Rights of the Child. Fourth, the disparity in the potential violations of human rights under the laws and policies of each State reflects the corresponding difference in levels of compliance.

The third chapter consists of a discussion of a specific case ruled on by the Inter-American Court of Human Rights. The case describes violations against street children in Guatemala, and has been known as the first and most horrific case dealing with this issue that has successfully reached an international forum. The chapter addresses several issues, such as procedural violations carried out in that case, particularities of street children cases making it more difficult to resolve with positive results and how the application of international laws in the domestic spheres of Central American countries can help to find a solution for the violation of street children's human rights.

These three chapters summarise the *realities that street children experience*: what countries have done to protect children's rights *nationally*; what is established in the *international* framework and doctrine; and the obstacles to solving the problem of street

children (based on a case study). These aspects are drawn together to respond to the thesis proposed: The international laws protecting children's human rights are not only abstract and ideal. International law provides a useful tool and model for countries to identify and adopt a common pattern of standard guidelines, principles and practices. The countries in Central America can successfully solve the problems of street children by adopting internal measures based on the framework of children's international law and the doctrine of integral protection.

Chapter 1. The Violation of the Human Rights of Street Children in Central America. "Understanding Realities as the first step of the UPPP² model."

Understanding the whole reality that street children live requires the description and exploration of several real cases, ranging from the simplest violation of their rights, such as an insult, to the gravest violation, that of the deprivation of their lives. Street children's lives reflect a picture of marginalization and social exclusion. The majority of violations of children's rights find their corresponding norms in the international framework of protection (both universally and regionally). These norms create a direct relationship between the reality of street children and the prevention of their suffering and of violations of their rights. International norms for the protection of street children human rights and the creation of pro-children national policies, laws, and programs must be put into practice and are the responsibility of each State. The first part of the UPPP² model which has been defined in this chapter as "understanding," will give an idea of the scope of the violations and the need to emphasize that inhumane treatment towards street children should stop. To do so, the realities and the violations of children's human rights violations will be described as the basis for analysing the later sections of the thesis.

Section 1: Why Street Children in Central America? The Links to Poverty

Poverty in Central America intensified during the 1980's and 1990's, when the region was plagued by civil wars, armed conflicts and natural disasters, including droughts, floods, earthquakes and hurricanes, mainly Hurricane Mitch.⁶ These incidents provoked immense damage to national economies and distracted the attention of governments while street children's difficulties worsened.

Even today, a high percentage of Central America's population faces a deteriorated quality of life, and the region is still experiencing extreme poverty levels. As a logical result of such poverty, many people also lack adequate health and education. Street children originate mainly from families that are in this situation, and whose only means for survival is the participation of all members of the family in some kind of job. These facts weaken the natural affective patterns of the family group, destroy the natural role that each member should carry out and diminish the mutual respect that must always be present within family circles.

Poverty⁷ is the first and most significant factor, which leads street children to the streets. Poverty in itself presents a violation of the human dignity and basic needs of

⁶ Proyecto Estado de la Nación, "Efectos del huracán Mitch en el sector agropecuario", *Un análisis amplio y objetivo sobre la Costa Rica que tenemos a partir de los indicadores más actuales* (San José: Editorama, 1999) 197 at 199 [hereinafter Estado de la Nación].

⁷ "Hunger... Poverty is the lack of shelter. Poverty is being sick and not being able to see a doctor. Poverty is not being able to go to school, not knowing how to read, not being able to speak properly. Poverty is not having a job, is fear for the future, living one day at a time. Poverty is losing a child to illness brought about by unclean water. Poverty is powerlessness; lack of representation and freedom... poverty is a situation from which people want to escape... So poverty is a call for action, ...a call to change the world." "Understanding and Responding to Poverty", online: The World Bank Group Homepage <<http://www.worldbank.org/poverty/mission/up1.htm>> (date accessed: 4 October 2000) (last modified: 13 March 2000). Also, P.J. Malton, "Hunger and Free Trade" [1999] Am. Soc. Int'l L. Proc. 126-130 suggests in a special panel organized for the discussion of poverty and food security, and as representative of the United Nations Development Program (UNDP) that: "poverty is the most important

street children. It is also the root of other violations of their human rights. The street children "syndrome" is a specific part of a chain of causes⁸ and consequences that relate directly to poverty.

Street children living in poverty reflects the overwhelming symptom that most regions in the world face, and of which Central America is not an exception: the overpopulation phenomenon. Countries in this region have encountered the serious situation of providing for a large population that at times appears to be growing out of control. For economic reasons, the majority of underdeveloped nations in Central America do not have enough resources to respond to everyone's basic needs, such as food, jobs, housing, or even water. Overpopulation further endangers the availability of resources, with the result that only a limited sector of the community can benefit from productive lands, existing space and basic resources, thus exacerbating to the problem of poverty.

Environmental degradation creates increased rates of poverty in Central America by restricting the accessibility of resources as it further endangers the situation of

structural determinant of hunger... It would be wrong to think that poverty is solely a matter of low incomes. Human poverty also entails: low education, high illiteracy rates, low levels of access to information, low levels of access to health care and perhaps most important, low levels of access of the poor and vulnerable to the political processes at all levels that would ensure that they participate in decisions affecting their well-being."

⁸ Some authors have divided the causes for street children's existence into four basic types: Socio-cultural – the social differences and the inequitable distribution of wealth produces a great number of poor people who struggle for survival. These people include boys and girls who pursue productive activities to ensure their survival and to help their families; Violence – many street children are forced out of their homes by the violence that prevails; Family-the street child's family is usually highly dysfunctional and pervaded by physical and verbal aggression. Such a family easily expels the child from its nucleus; and Educational – schools in poor neighbourhoods are unable to adjust to the demands and expectations of children. They are exclusive, intolerant and unable to understand the reality surrounding the children and their families." Inter-American Commission on Human Rights, "The Rights of the Child, Chapter XIII, The Situation of Street Children," online: Inter-American Commission on Human Rights Homepage <<http://www.cidh.oas.org/countryrep/Colom99en/chapter-13.htm>> (accessed 11 October 2001)[hereinafter Report on Colombia].

children, who are forced to look for jobs in the streets. Harmony between the natural environment, sustainable development and human well-being is crucial for the availability of resources for children in Central America and can be achieved only if three main aspects are respected:⁹ the appropriate use of land, forests and water; the conservation of biodiversity; and the prevention of contaminant effects on humans.

Thousands of families in Central America survive by planting crops in their backyards or in abandoned properties, by cutting down forests to use the wood for shelters, and by washing their clothes in rivers due to the lack of water services, contaminating it with detergents. For example, the inadequate use of forests can be counterproductive in the levels of environmental degradation. Forests protect biodiversity, prevent erosion and provide humidity for the supply of water springs. By affecting one of the factors involved, the rest are disturbed as well. The degradation of nature restricts productivity of the land, minimizes access to food and detrimentally affects poor people. As a result of this process children go out to the streets and look for jobs that can help them acquire food.¹⁰

The rise of birth rates is another contributing factor for overpopulation and also an increase in the number of street children wandering in the alleys of our cities. First, the rural poor often lack information about family planning due to lack of educational

⁹ *Estado de la Nación*, *supra* note 6 at 48.

¹⁰ Nature can fail when water and soil are deteriorated and/or polluted, by the incorrect and intensive use of fertilizers and chemicals. In other cases, this deterioration of fertile land occurs due to the extensive and prolonged use of land. Many countries have faced with the problem of poor people tearing down a vast number of trees, that with time will cause deforestation and the loss of other natural resources, species, fauna and flora. How do governments deal with this problem? How can we prefer a tree to a human being? Well, it is not a question of preferences, but a question of balance and education. Poor people do not understand (due to lack of education) the effects of overusing the soil for raising their crops. Survival will definitively come first for them.

programs and birth control. It is essential that governments include in their national agendas these kinds of educational objectives so that the children of their communities do not have to go out to the streets looking for a few extra "pesos" to be able to eat.¹¹

Furthermore, poor people in the Central American region usually think that a larger number of sons and daughters will contribute to the family's overall economic situation, as there will be more hands available to earn an income. This mentality is particularly strong in rural areas where they help parents produce more their lands. However, the reality is quite different because the incomes keep being low to feed all. So, children are forced to go to the streets of the city and there, the cycle of poverty continues.

In general, poor families in Central America lack a basic level of education and many of them are even illiterate. These problems appear because children are often forced out of school to work in order to support their families and to avoid living under the extreme poverty line (usually established as less than \$1 per day).¹² At the same time, since all these children are not being educated in schools, but rather in the streets, it is hard for them to find a decent job later. The cycle continues as when children become adults, as they are likely to be unemployed and once again send their children out to work in the streets.

In many instances the scarcity of employment in Central America results from the "boom" of advanced technologies. Job patterns along the years have changed from

¹¹ There is a famous story based on the following interaction of a Latin American pregnant mother with her ten-year old son. She starts saying: "Listen to me José. Poverty is too much. When the sixth baby is born, you will have to leave the house. I am sorry but I cannot feed you anymore. I love you. But for the well-being of your brothers and sisters, you really have to leave home." So, Jose leaves. He begs, he gets sick and the chain of horrors will be just starting for him, if he doesn't die before in the streets.

¹² Human Development Report, "Human poverty in developing countries" (Oxford: Oxford University Press, 2000) 169 at 170 [hereinafter Human Development Report].

manual labour to mechanized or high technology production. So, people that may be well prepared to work in factories, or even in farms, have been replaced by machinery. This is now more beneficial for companies since machinery only needs to be bought, whereas employees require a salary each month! This change in job pattern distresses thousands of families in Latin America and increases the need for children to go out to the streets and gain money to help their parents.

The creation of jobs has been one of the objectives of development projects in several institutions and countries around the region. Employment (even of a temporary nature) helps the poor not only to increase their incomes, but also their self-esteem as part of a productive society. This recovers their standards of living as a whole, improving relations between parents and consequently the treatment of their children, thereby reducing the possibility of domestic violence problems. The availability of a job can prevent other consequences of unemployment such as child labour, begging and involvement in illegal activities.

As is already apparent, the situation of street children and their world is complex and inter-linked with a series of other factors that create a second chain of negative effects around their poverty. These consequences seem to multiply and become more complex as time passes, because new events and complications usually have the harshest impact on vulnerable groups.¹³

Malnutrition, hunger, infant mortality, health problems, diseases, drug addictions, crime, migrations, child labour and family disintegration represent some of the realities that street children confront. Some of them have lived through one, two or all of these

¹³ Vulnerable groups may be children, women, single parents (either male or female), widows, people of age, orphans or disabled persons, but definitively the worst damage is done to the thousands of "street children" in no man's land: the streets.

experiences. Others have not lived long enough to witness them. They result from conditions of extreme poverty, analysed above, that are constantly pushing children away from home and into the streets, creating a vicious cycle that engenders further poverty and misery.

Section 2: What are street children?

In this paper, the term “street children” will include every child, under eighteen years old, who spends his or her time out of home, in the streets, or other dangerous place, carrying out jobs inappropriate for their age, their well-being and proper healthy development. Street children are those who wander around in the streets and markets, carrying out different activities in order to subsist and/or to economically support other family members.

However, the scope of the concept of “street children” in Central America varies drastically, depending on which individuals or sub-groups one includes within it. The different parties involved in the analysis of developing adequate measures to protect the lives of street children often do not agree on what should be included in this concept. Either they refer to street children as a general category, including market children, orphans, girls working as prostitutes, or simply poor children, or they limit the concept of “street children” to a more specific group of children.

Specific classifications have been given by international organizations, such as the World Bank, that have stated that “street children,” as they are known, are children who permanently work and live out in the streets. They usually do not have any type of contact with their family members. “Market children,” on the other hand, are those children working in the streets, especially in markets of big cities. These children are

usually accompanied by their parents, who do not earn enough money to be able to support their families, and are forced to send their children to work in these markets or other similar jobs.¹⁴

Other authors have similarly distinguished between “children on the streets,” and “street children” as such. The former refers to individuals that go out to the city’s streets to beg or work, do not attend school, and usually return at night to their families. These children are generally important sources of economic income in their houses. On the other hand, “street children” are boys and girls who live permanently in the streets, having no contact with their families.¹⁵

Street children in Colombia have been divided into five distinct groups. “Workers” form the largest group. They are engaged in informal economic activities such as selling cigarettes and candy. “Delinquents” are members of groups that engage in theft and armed robbery. Supposedly, they engage in extremely aggressive behaviour and generally return to their homes after committing illegal activities. “Beggars” constitute a significant number of street children, who beg for money or food. Their families often pressure them to be as a means of supplementing household income. “Sexually exploited” children are mainly girls (although some members of this group are boys), who assume this livelihood as a means of survival on the street. The typical “street urchins” are children distinguished by their rags, their tendency to live in the most

¹⁴ For further information, SEE: “Street Children in Central America: An Overview”, online: The World Bank Homepage <<http://wbi0018.worldbank.org/external/lac/lac.nsf>> (date accessed: 01 February 2001).

¹⁵ A. Salvado, *Las Niñas de la Calle en América Latina*, (San José, Casa Alianza, 1999) at 1 [hereinafter “*Las Niñas de la Calle en América Latina*”][translated by the author].

depressed parts of the city, and the use of psychedelic drugs, particularly substances such as hash, marijuana and cocaine.”¹⁶

In addition to the alarming socio-economic problems discussed in the first section of the chapter, street children face additional miseries that undermine their condition and quality of life. As pointed out by one author: “The problems affecting street children go beyond isolated pathological situations. They reflect a total economic imbalance and a breakdown in the structure of society that could be compared to a time bomb if preventive and corrective measures are not soon taken.”¹⁷

Malnutrition remains one of the most dreadful and common effects of poverty among street children. Poor communities in Central America, especially those in Honduras and Nicaragua, cannot satisfy the necessary calories to maintain children’s natural development and a normal weight.¹⁸ These conditions greatly affect children due to their vulnerability, their time out in the streets and mainly because their bodies consume all their caloric energy in their growth into adults. Children with nutritional limitations will face a series of health problems later in life. Dulled senses and weakened organs, gastrointestinal pains due to the lack of food and drug use, psychological and mental disorders, death caused by prolonged periods of malnutrition, hunger and starvation, have been the reality for a large majority of street children in the area.

High levels of undernourishment also make street children prime targets for viruses and bacteria, leading them to acquire severe infectious diseases. Housing conditions, lack of food and clean water, and constant exposure to a harsh, humid climate

¹⁶ *Report on Colombia, supra* note 8.

¹⁷ *Report on Colombia, supra* note 8.

¹⁸ *La Paz, supra* note 3 at 63ff.

with drastic changes (cold, rain, high or low temperatures) all promote the increase of diseases for small children in our streets. In the Central American region, the most fatal diseases for street children in the past decades have been malaria, cholera,¹⁹ the Acquired Immune Deficiency Syndrome (AIDS),²⁰ pneumonia (particularly in countries with drastic changes of temperature), dehydration, tuberculosis, sexually transmitted diseases (STD's) and dengue fever.²¹ Health complications among the poor increase the infant mortality rates,²² and consequently have the logical result of lowering life expectancies.²³

Many children living in poor conditions out in the streets suffer from addictions to drugs, alcoholism, and other substances.²⁴ In some cases, it is difficult to establish if drugs and alcohol push children into poverty and into the streets, or poverty is the cause for their addiction. According to the World Health Organization, of the approximate 100

¹⁹ Pan American Health Organization, "HIV/AIDS Pandemic Poses Challenge to Reform of Health Systems in the Americas" (2002), online: Pan American Health Organization Homepage <<http://www.paho.org/English/DPI/pr020219.htm>> (date accessed: 23 March 2002).

²⁰ *La Paz*, *supra* note 3 at 69.

²¹ M.Dobson, "Targeting Malaria in Africa" (Development: the Need for Reflection, Centre for Developing Area Studies, McGill University, 21 September 2000) [unpublished].

²² CELADE (Central American Centre for Demography), "Latin America Life Tables", online: CELADE Homepage <http://www.eclac.org/Celade/publica/bol67/DE_SitDemBD67.html> (date accessed: 23 August 2001)[hereinafter CELADE]. Based on CELADE (Central American Centre for Demography), the infant mortality rates in the Central American countries total a 38,2% for the period 1995-2000. Rates per country were: Guatemala (46%), Honduras (35%), El Salvador (32%), Nicaragua (43,4%) and Costa Rica (12,1). Mortality rates here should be defined as "the number of annual deaths of children under one year per 1000 born alive. It is the probability of dying during the period between the birth and the one year."

²³ *Ibid.* The life expectancies in these same countries range between two extremes: the highest for Costa Rica at 76,5% and the lowest at 64,2% in Guatemala, for the period 1995-2000.

²⁴ In the Honduran capital, Tegucigalpa, street children make up "more than 1,200 from which 90% get involve in the inhalation of toxic glue products"²⁴, in order to "forget" about their misfortune, fears and sufferings. See more at: "Casa Alianza Honduras: Niños y Niñas de la Calle en Honduras", online: CASA ALIANZA Homepage <<http://www.casa-alianza.org/ES/lmn/>> (date accessed: 21 March 2001).

million children in the streets²⁵ (around the world) and of the 40 million in Latin America,²⁶ a very high percentage consume alcohol and drugs to erase the feelings of stress, pain, fear and uncertainty in their daily lives. One out of ten children in Central American countries is addicted to sniffing paint, glue, or “basuko,” which is a compound of several chemicals mixed with cocaine.²⁷ The effects of “basuko” mixed with cigar smoking create a sensation of euphoria stronger than that of drugs such as crack and marijuana.²⁸ Many street children consider drugs and other addictive substances as the solution that takes them out of their reality, and not as one of their problems. Drugs represent their only escape to alleviate their constant hunger.

Drugs have serious effects on street children, including brain damage, as well as injuries to their lungs and liver. However, the worst consequence of the consumption of drugs in street children is the possible acquisition of HIV, the virus that causes AIDS, due to the lack of precautions and information about the dangers they face in using and sharing needles for the consumption of drugs.²⁹ This problem needs to be solved at once, due to the serious implications it carries such as: a) the continued spread of HIV, b) the potentially lethal consequences for infected children, and c) the fact that the use of strong drugs usually creates violent behaviour. This violent conduct makes children more likely

²⁵ UNICEF and University of Costa Rica, *Child Prostitution*, 1st ed. (San José: Universidad de Costa Rica, 1998) at 44 [hereinafter UNICEF].

²⁶ *Ibid.*

²⁷ *UNICEF supra* note 25 at 43ff.

²⁸ *Ibid* at 44ff.

²⁹ Street children Initiative, online: World Bank Homepage
http://www.worldbank.org/html/fpd/urban/st_child/st_child.htm (accessed 6 December 2000).

to become involved in petty crime, which constitutes another serious factor in this cycle of poverty in street children.

The connection between street children and crime has sparked a heated debate. Some people have stated that poverty and other unfair conditions lead to crime, and that this relation is obvious and indisputable. Others have rejected this theory, saying that: "It is plainly unfair to people in poverty to suggest that they are more disposed to crime than other people. There is no gene that has been identified linking disposition to crime with poverty."³⁰ Although it is true that not every poor person or street individual is a thief, a drug trafficker, or an assassin, it is fair to think that poverty may be a factor forcing some individuals into minor criminal activities. Involvement in criminal activities therefore stems from the vulnerability experienced by a person living in unhealthy conditions, without employment, in serious levels of depression and anxiety. In sum, the link between crime, poverty and street children does exist. Thus, poverty creates a vulnerability that may drive street children to commit minor crimes in order to survive.

Another consequence of the street children phenomenon tends to be the instability in their living situation, creating a specialized form of migration.³¹ These migrations usually take place either within their own country mostly from rural areas to urban areas

³⁰ J. Watson, "Poverty and Crime", [2000] Law Now.43.

³¹ International migrations of the entire family group also occur due to the lack of resources and opportunities in their country of origin, in areas such as employment, food, and social services. In some developing countries in Central America, especially Nicaragua, migrations have intensified due to long periods of political and economic instability. Migrant workers usually run away from poor conditions, thinking they will find a better life elsewhere, which many times does not happen. Nicaraguan migrants trespass their southern border into their neighbouring country, Costa Rica. They have settled throughout the country in abandoned lands or public properties, unable to meet their basic needs and without electricity or clean water.³¹ Other Central Americans have been more lucky, traveling north to countries like the United States or Canada, achieving what a century ago was the "American Dream" for thousands of immigrants arriving at Ellis Island in New York City in the late 1800's.

(national migrations or “urbanization”) or, international migrations that occur from one country to another, which in most cases is illegal.

The following case illustrates the type of situation that impels street children to migrate in search of a better quality of life, and an escape from the streets, labour, violence, fear and other unhealthy conditions for their development. Covenant House, a non-governmental organization, relates the story of Ramón, which describes the relation between the street children phenomenon and their constant tendency to be “on the move,” migrating or running away from where they have been abused or neglected. In January 2001, Ramón, a sixteen year-old Nicaraguan street child worked as a shoeshine boy in Chinandega, until he was beaten on several occasions by police officers. Once, he stayed in the hospital for two weeks. Afterwards, he slept on tree branches for fear of another beating. Ramón then decided to leave the country, and walked north for 13 months until he reached Arizona, United States. There, he was detained by the Immigration and Naturalization Service pending a final decision on his status.³² This is an example of the effort a child is willing to go through, in order to run away from the danger in street life.

Section 3: What happens to Street Children in Central America? Levels of Abuse.

The exposure of street children to disease, hunger, addiction and crime only represents the beginning of their battle against adversity. Although strangers perpetrate many of these abuses, in other cases parents or family members create abusive

³² V. Bucio, “*Where the streets are mean and brutal*,” The Houston Chronicle (22 January 2001) A18. Also see for further reading on this case: <<http://www.casa-alianza.org>>.

situations.³³ It is the latter that usually forces children to leave home, in order to avoid further humiliation and suffering.³⁴ Ironically, they feel the street as a less vicious and dangerous place to be, after what they have been through at home. However, as time passes, new street aggressions and other concomitant risks turn both of the worlds they have known to “intolerable”. Many of us cannot conceive the degree and magnitude of abuse and aggression children experience on the streets, particularly in the aftermath of leaving their homes.

The definition of “abuse” against street children can be conceptualized as: “[a]ny conduct or hostile attitude of aggression, slander, violence, rejection or neglect that damages the physical and mental well-being of those considered as vulnerable.”³⁵ There are several types of abuse against children, which are seen today as some of the worst breaches of their human rights: physical abuse, psychological or emotional abuse, abuse

³³ Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 Sept. 1990, G.A. Res. 44/25, 44 UN GAOR, Supp (No. 49), UN Doc. A/44/49 [hereinafter Convention of the Child]. The Convention on the Rights of the Child recognizes the right of children to a physical, psychological and social integral development. Violence against children by adults supposedly in charge of their protection constitutes an attack to their personal integrity, and must carry legal consequences. The Convention states in article 19 that: 1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for the other forms of prevention, and identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Every child has the right to be protected against any type of violation to the integrity, including the protection of their image, identity, autonomy, freedom of thought, dignity and values. These children have the right to receive protection from the State against any form of abandonment, intentional or negligent abuse, been cruel, inhuman or degrading.

³⁴ *La Paz*, *supra* note 3 at 18ff.

³⁵ National Security Academy of El Salvador (A.N.S.P.), “Módulo sobre Maltrato Infantil y Abuso Sexual” (San Salvador, 1999) [hereinafter National Security Academy] at 22ff.

due to negligence, gender-based abuse and finally, sexual abuse.³⁶ Of these five types of conduct, sexual abuse is usually the most traumatizing experience for children. This crime is usually committed under threat, fear and abuse of power by actors that can range from family members to simple strangers. In 1997, two cases well known in Guatemala City involved police and other adult strangers as perpetrators of abuse against street children.³⁷ The first case occurred when two uniformed members of the police detained a 16-year old street girl. They had no arrest warrant and the girl had not committed any crime. Inside the police station, one of these "public servants" raped the girl.³⁸ In the second case, the police arrested and detained Mario, an underage street child, for more than six months. Due to sexual abuse at the hands of adult prisoners, he was infected

³⁶ *National Security Academy, supra* note 35 at 18ff. The first case, physical abuse, is characterized by violently beating and striking children; or burns, whips, fractures, even physical lesions or injuries that could be lethal such as stabbing, suffocating, or internal hemorrhage due to the hits received. Street children are usually victims of physical abuse in family circles and by other third parties in a "superior" power position. The second kind of abuse is psychological abuse, described mainly as annulling the children's dignity, without necessarily including physical abuse. It is composed of insults, rejection, terms of inferiority, shouts, threats and lack of special attention. This treatment makes children feel depressed, sad, unsafe, and especially fearful. The third type of these abuses is neglect from their families. The major manifestations are lack of attention with respect to adequate food, health controls, hygiene, control of their school attendance, and others that is described generally as "abandonment of children." This lack of care towards children pushes them to become involved in dangerous activities in the streets in order feel part of a certain group, which we already defined as street children. In the case of "abuse due to gender," the girl is the victim of an extra kind of abuse not only by her parents, but also by boys who repeat the negative conduct of male adults. Girls not only are vulnerable as "children," but also as "girls" who are told to be weaker and inferior. The last type of abuse against children is sexual abuse. It occurs when an adult or adolescent uses his or her power over a child to involve or force him or her into certain sexual activity, using deceit, threats, or physical strength to convince them to do as they please, usually against their will.

³⁷ Many children living in the streets are in danger of getting arrested illegally and arbitrarily, imprisoned as adults or with adults, and beaten by policemen, who in some occasions use their power of authority to abuse them. Other times, it is the adults in jails, who sexually abuse them.

³⁸ B. Harris, Hearings on Latin American street children at the Organization of American States on 9 October 1997, online: Casa Alianza Homepage, <<http://www.casa-alianza.org>> (accessed 11 February 2001).

with HIV/AIDS. The case is currently under investigation under the supervision of the Human Rights Attorney General of Guatemala.³⁹

These and other similar cases illustrate how sexual abuse leaves multiple scars on street children that last forever. Sometimes "forever" for these children is shortened due to premature deaths caused by AIDS. Many street children victimized by sexual abuse and rape, can also acquire sexually transmitted diseases (STD's), and/or cause unwanted pregnancies in the case of girls. Sexual abuse goes hand in hand with psychological abuse. The most serious case in Central America took place in Honduras in 1995. Nearly 800 Honduran minors, some just ten years old, were detained in adult prisons. George Ivan, a street child at the time of his arrest, was detained illegally in a jail in San Pedro Sula for almost a year (from May 2, 1995 to February 15, 1996).⁴⁰ All of these children lived in imminent danger and psychological and/or sexual abuse while in jail. The situation also presented further concerns such as unhealthy conditions, inadequate environment for children, and prolonged periods of pre-trial detention.

Other forms of abuse often accompany the city streets. By necessity, children enter into commercial sexual activities, including prostitution, "sex tourism," pornography, the sale and trafficking of children or their organs, and other illegal

³⁹ Benitez M., Alma. "Sistema Penitenciario en Centroamérica o bodegas humanas", CODEHUCA, Costa Rica, 1999, at 87.

⁴⁰ *Minors in Detention v. Honduras* (Sept. 28, 1998), Inter-Am. Comm. H. R. No. 11.491/92 [hereinafter Case No. 11.491]. *Annual Report of the Inter-American Commission on Human Rights: No. 41/99*, OEA/Ser.L/V/II.102 Doc.6 rev. April 16, 1999. The Commission stated herein that: "On April 13, 1995, the Inter-American Commission on Human Rights [...] received a petition filed by the Centre for Justice and International Law (CEJIL) and the *Asociación Casa Alianza* against the Republic of Honduras, (hereinafter the "State" or "Honduras"), wherein the petitioners alleged the unlawful arrest of street children and their incarceration in Tegucigalpa's central prison facility. According to the petitioners, the juveniles were housed in cells 19 and 24, along with approximately 80 adult prisoners in each cell. At the time the petition was filed, Daniel Varela had already been incarcerated with adults for two years. Alex Hostilio Tomé Vargas had spent three months with adults in cell 24, a fact known to the judge in his case."

activities such as acting as intermediaries in drug trafficking and consumption, and small robberies.⁴¹ The participation of street children in sexual commercial exploitation often goes uncontrolled and unchecked. In these situations, the involvement of adults who often threaten children in order to continue exploiting them, makes these activities difficult to deter, since reports of these abuses never reach the authorities. The worst cases are those in which the authorities themselves are involved and therefore children's fear results in impunity.

Commercial sexual exploitation cases involve a series of illicit conducts, which violate the rights of the child. In January 25, 2001, twelve Central American girls from Guatemala, Honduras and El Salvador were rescued from brothels in the southern Mexican border town of Tapachula. All of them were between the ages of 13 and 17. They had been sold to the brothels for U.S. \$100-200 to be sexually exploited.⁴² In this case, the illegal activities were various: the sale of the girls to the Mexican brothels, the subjection of girls to inadequate and unhealthy forms of labour and child prostitution itself.

Child prostitution and/or "sex tourism" includes some of the worst violations against the rights of boys, girls and adolescents in most Central American countries. Diverse sectors of society benefit from this illegal form of commercial sexual exploitation of children under eighteen years old. The owners of bars, clubs and hotels, taxi drivers, policemen, tourists and some corrupt tourist guides represent the main actors and intermediaries of these misconducts. All of them create an illegal and inhumane

⁴¹ UNICEF, *supra* note 25.

⁴² Trafficked Central American Children Rescued from Brothels in Tapachula, Mexico, online: Casa Alianza Homepage <[http:// www.casa-alianza.org/EN/lastminute/rescate/htm](http://www.casa-alianza.org/EN/lastminute/rescate/htm) > (date accessed 3 March 2001).

commercial network, which has recently spun out of control, due to the technological facility of immediate Internet information services. In other words, prostitution remains an organized crime all over the world, and is further intensified in developing countries due to economic factors such as poverty and the need for food.

As we already stated, prostitution encompasses a series of consequences for the children involved. Some of them acquire sexually transmitted diseases. While others become pregnant. Abuse by policemen, humiliating insults by people in the streets, and beatings by their pimps include other consequences. Children are also neglected by their families and the likelihood and exposure to drugs is increased.

Since 1995, UNICEF has found that in Central America approximately half of the boys and girls in prostitution were between the ages of 9 and 13.⁴³ Also, half had been victims of abuse in their homes, where ironically, they are supposed to be protected and safe. Instead, adults in positions of power exchange the sexual services of innocent street children for money or goods. All of these activities represent derived forms of child labour,⁴⁴ strongly prohibited in several international instruments.⁴⁵ They imply the denial of children's social, economic and cultural rights.

⁴³ UNICEF, *supra* note 25 at 13.

⁴⁴ Child Labour is another consequence that children face when leaving their home into the streets. Street children generally get involved intensive jobs, with long hours in unsafe and exploitive employments, such as shining shoes, carrying goods, washing cars, begging, theft, sexual commerce, mining or drug trafficking.

⁴⁵ Convention concerning Minimum Age for Admission to Employment, 26 June 1973, Sess.58, U.N.T.S. 138 (entered into force 19 June 1976). Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999, Sess. 87, U.N.T.S. 182 (entered into force 19 November 2000) [hereinafter ILO Child Labour Conventions].

Prostitution, as well as other similar illegal activities, like child pornography,⁴⁶ represents a clear violation of the fundamental human rights of the children affected, because all dimensions of their lives are disrupted: their mind, their dignity, their body, and their self-esteem. The Stockholm Declaration states in its fourth point that:

The commercial sexual exploitation of children is a fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.⁴⁷

This statement in the Stockholm Declaration clearly sets forth the abuse of power used by adults, men and women, against the right to dignity of thousands of children in their early lives, especially on those who are more vulnerable: street children. The diverse sectors of society should take the proper steps to stop or at least decrease the use of children and adolescents for the production of pornographic materials, sexual tourism, and sexual exploitation.

In confronting the violations against the rights of street children and adolescents, analysed above, the necessity and utility of international regulations under the doctrine of

⁴⁶ Child pornography is "the sale, distribution and use of audiovisual materials that include girls, boys or adolescents in a sexual context." UNICEF, *supra* note 25 at 56.

⁴⁷ "What is Commercial Sexual Exploitation of Children, Declaration and the Agenda for Action Against the Commercial Sexual Exploitation of Children (Stockholm Declaration)" online: ECPAT International Homepage <<http://www.ecpat.net/eng/CSEC/faq/faq1.asp>> (date accessed: 22 December 2001). On August 31, 1996, the representatives from one hundred and twenty two states gathered in Sweden and signed it. At this point, the only articles referring to this topic were articles 34 and 35 of the Convention on the Rights of the Child. The Declaration came to fill-in an open gap and the omission existing for the protection of children against commercial sexual exploitation and similar activities. Other recent related documents are 1. Convention 182 on the Worst Forms of Child Labour adopted by the International Labour Organization in June 1999, 2. The United Nations General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted on May, 2000. 3. United Nations Convention against Trans-national Organized Crime.

integral protection becomes clear. By using a methodical model, such as the *UPPP² model* proposed in this thesis, the daily realities described in these previous sections can be *understood* in context, in order to then be able to *prevent* violations and *protect* street children's rights by *providing access to justice* and *punishment* to offences affecting these children. Violations of street children's human rights can be aggravated by certain obstacles to effective solutions, some of which are briefly described in the following section.

Section 4. Difficulties faced in the solution of street children's human rights violations

The difficulties faced while looking for an adequate solution for the violation of human rights in street children are various. It is possible to divide them into 3 groups: social and cultural, political and economic.

Socially, trust is the first issue involved within the obstacles to the solution of the problem of street children. Due to the danger of the streets, children learn to be defensive, fear abuse, and be distrustful of everyone. Their experiences of violence at home have lead them to protect themselves and distrust people as a survival mechanism. When special agencies approach these children to help them, feed them or to take them to foster homes or other types of refugees centers they avoid them or run away, making the alleviation programs both problematic and challenging.

The issue of trust takes us to the second aspect, namely the formation of groups of children and their involvement in the drug scene. The majority of street children in Central America join other groups of street children in order to be able to protect each other from the menaces and risks of the streets. Within these groups, they learn how to

acquire and use drugs, which leads to addiction and often false feeling of safety with their street comrades. This also places an immense distance between the organizations supporting the cause of street children and themselves.

Street children also typically lack any form of guidance. This is a typical problem in street children. Some are constantly in the streets, where there is no supervision of parents or other adults. Other street children go back to their families, only to find scenes of violence and aggression, which pushes them back to the streets. Others return home to absentee parents who are out working in attempt to survive.

This absence of adult guidance causes many conflicts with the police. Due to drug addictions (which, as said before, are usually marihuana, or glue inhalation), vulnerability and illegal activities, street children constantly confront problems with police authorities. They also get into trouble when they are found sleeping in abandoned old houses, alleys, or begging.

Additionally, the complexity and breadth of the problems of children greatly complicates any hope to get off the streets. As described in the first sections, social, economic and political issues must be solved. The broadness of the issues involved requires multi-dimensional solutions. Hunger, disease, lack of housing, family or education, extreme poverty, and the inherent vulnerability of children makes the problems confronting street children even more complex. Of these, lack of education leads street children to think it is not possible for them to reintegrate into mainstream society. Poverty forced them to drop out of school. Others never went at all. Furthermore, the mentality of the Latin American "macho" makes it very difficult to convince street children to leave the streets. Their answers are usually: "I can take care of myself" or "I am a boy, I can do it myself."

For these reasons, the first step must be to understand the reality of street children, in order to adapt and conform national policies and laws to principles of international law on children and implement them efficiently, creating preventative programs and additional remedies for punishment of violations. A process of conscience building must be present due to the ideas within Latin American societies that street children are all gangs and groups of criminals, as these attitudes only lead to their social exclusion and reject. This results in ideologies of social cleansing and contempt towards street children, ensuring that the only environment they know is violent and cruel. Street children trust no one; few fight to help them.

The corruption of police authorities in Central American cities also impedes the solution and eradication of street children problems. Many cases have demonstrated a tremendous abuse of power by the police, who threaten street children with arrests and beatings, if they do not provide sexual favours, especially with young girls. And if children are arrested, sometimes they are taken to adult prisons, or beaten to death as in the case analyzed in the previous section.

This reflects a lack of proper laws, such as specialized codes for children and adolescents, acts, or other legislation that effectively responds to current economic and social realities, in some Central American countries such as El Salvador and Guatemala, as will be described in Chapter 2 of this thesis. Fragile legal structures and processes have been further weakened by political instability (particularly in Guatemala, Nicaragua and El Salvador), and a lack of government initiative to make the problem of street children a priority.

Economically, street children face extreme poverty levels, primarily because unemployment and low income continually presents problems for their parents.. Due to

persistent funding problems, no economic public policies directly focus on the protection of this marginalized sector. The Government and a number of NGOs operate youth centres; however, Central American governments inevitably confront problems of inadequate resources and the insufficient funds devoted to them fail to effectively alleviate the problem. Due to the difficulties encountered in the efforts to eradicate the problems of street children, governments should consider seriously the implementation of forceful domestic laws, designed to fit the needs and realities of street children.

Chapter 2. Responses to Street Children: “Preventing and protecting human rights of street children as the second step of the “UPPP² model”

Prevention of further human rights violations against street children can only be achieved when the different actors involved commit themselves to finding a proper response to fight the complex human suffering illustrated in Chapter 1 of this thesis.

The first section of this chapter is a general introduction of the actors that play a role in the protection of street children in Central America. The second part of the chapter introduces the international human rights framework for the protection of children through the Convention on the Rights of the Child and examines the guidelines and integral protection it offers. This will set the conceptual background in order to then explore reforms that each Central American country has carried out in order to comply with the commitments and obligations set forth in the Convention, as well as the real improvements made at the national level in both legislative and administrative areas. The third section focuses first on an analysis at the state level, explaining how each country has responded to the problem of violations of street children’s human rights and

children in general. This will provide an understanding of the specific Central American context and a comparison of the different models of protection that exist or are in process of being adopted. In order to confront the issue of street children, States should employ laws, programs, policies and other tools, which ideally should be in harmony with the content of international laws for the effective defense of children's rights.

This chapter continues to advance the concept of what in this thesis is called the "UPPP²" effort: *Understand* the reality of street children (Chapter 1), *prevent* further violations to their rights, properly *protect* children through efficient implementation of proactive programs and policies (Chapter 2), and *punish* the perpetrators of crimes by guaranteeing and *providing* access to a transparent judicial system (Chapter 3). This effort of "UPPP²" awareness applies to governments and non-government entities in Central America, especially to those nations that have shown very little commitment to the welfare of their children.

Section 1. Who Cares about Street Children?

Several actors have a duty to supervise and monitor the protection of street children's human rights⁴⁸ in response to the reality of their lives described above. The State is the first actor responsible for monitoring the realization of all human rights for street children. However, it can be difficult to offer immediate solutions to the social, economic and political problems that a country or a community might face.

⁴⁸ Human Development Report, *supra* note 12 at 25. "Human rights are moral claims on the behaviour of individual and collective agents, and on the design of social arrangements. Human rights are fulfilled when the person involved enjoy secure access to the freedom or resource (adequate health protection, freedom of speech) covered by the right."

States must act to secure people's rights and well-being in the long-term, especially for vulnerable groups such as street children. In other words, state actions must not be directed only towards the street children's right to basic day to day needs, but also respond to potential future violations through effective preventative policies. These proactive plans and policies represent the best way to measure the progress of the State in protecting street children's human rights.

The policies implemented will vary depending upon the country's specific situation. In their process of policy-making, States have the obligation to open up participation to communities at risk and vulnerable groups, which would include street children. During this process, states can learn the immediate needs of these sectors of the population, and are able to prioritize the allocation of social welfare funds and gear policies specifically towards those most in need.

However, the State is not the only actor responsible for street children's human rights. At a national level, business corporations, employers, communities, and families carry a burden of responsibility, as well. All of them play a fundamental role in the protection of street children. Employers in corporations should cooperate by refusing to employ small children in factories, due to the already known prohibitions against child labour. Employers in these companies are also accountable for dangerous and inhumane labour conditions that could affect the health and dignity of children. They are responsible for respecting the conventions of the International Labour Organization and establishing codes of conduct within their companies to ensure the respect of fundamental human rights.

The family and community assume central positions because they can more closely monitor the real problems affecting street children. They retain a moral

obligation to report violations of human rights against street children, regardless of whether the perpetrator is a family member, a police officer, or a stranger. In the face of an abusive situation that seriously endangers a child's welfare, the silence of family and community only perpetuates existing problems and exacerbates the already grave abuse of children's rights. The worst crime committed against street children rights is to remain silent about an abuse or a situation of danger a child might be going through.

NGOs also play a key role in the protection of children's human rights in a broad context. Non-governmental organizations create policies addressing the various problems confronting the general population. They usually have expertise in listening to those in need, and making their ideas heard by the public and the government. Also, these organizations are starting to work in conjunction with the State in providing services where governments cannot, due to lack of human capital or economic resources. NGOs bridge the gap between actors at a national and an international level. The presence of NGOs in both spheres enables them to assess the problems of street children from a realistic point of view and helps the States to realize the magnitude of the problem and the need to find an effective solution.

Even if these actors comply with their responsibility of protecting the human rights of street children and children in other vulnerable situations, other steps must also be taken to secure their rights. Societies in Central America need to have standard models of laws and institutions, a strong legal framework and a stable economy, all of which require sufficient resources. Moreover, many countries lack not only resources, but also political will, training and, most importantly, cooperative action focused towards a common interest.

This joint action needs to be taken both nationally and internationally. Nationally, countries should strengthen the respect for street children's human rights through their laws and in their constitutions, and ensure that the laws are being enforced. They should create human rights institutions in which a specific government agency would protect and monitor street children's human rights and help satisfy their basic needs. Judicial systems also must be reformed with the purpose of promoting respect for the human rights of street children. This, in turn, will allow street children access to justice and judicial or administrative remedies. The following statistics of a Central American country illustrates this need:

"In Guatemala 392 cases involving street children were taken to court between March 1990 and September 1998. By the end of that period 47% had been filed for lack of investigation and 44% more were in danger of the same; 4% were closed for lack of evidence. Only 5% of cases – 17 in total – had been heard and concluded..."⁴⁹

Countries should implement new ideas, such as creating an ombudsman for children, and educating police, policy-makers, communities and companies in human rights issues.⁵⁰ Internationally, member states should report to United Nations, and other regional and international bodies, to fulfill and respect any relevant treaty obligations.

⁴⁹ Human Development Report, *supra* note 12 at 26.

⁵⁰ Costa Rica, Honduras and Nicaragua created Codes for Children and Adolescents to protect the rights of this part of the population.

States should also make great efforts to align national legislation with international standards set by human rights instruments.

Section 2. International Children's Framework

State efforts must be examined in the light of relevant international agreements and conventions protecting street children rights in order to be fully understood. The existence of an international legal system provides States with a convenient model to apply to domestic situations requiring a short-term solution. Possible long-term problems, even if not imminent or visible at the moment, can be addressed and remedied gradually. The international framework of laws concerning children includes the Convention on the Rights of the Child, other instruments that address specific violations and the "doctrine of integral protection," which is the essence of children's rights protection in the Central American region. This doctrine creates a common ground for action under international and national laws, as practiced in Central America, which has become the modern trend of children's rights protection. This doctrine forms a bridge that links national and international efforts and provides the basis for what has been called in this thesis as the "*UPPP*²" model or approach.

A. The Doctrine of Integral Protection and principles inherent to it

Today, international laws protecting children are based upon the recognition of children as individuals with their own rights and corresponding need for protection. The child is conceived as a person with rights and judicial guarantees, and their problems are solved through preventive and protective social policies closely related to international principles. This idea has been known and referred to by Central American authors as the

“doctrine of integral protection.”⁵¹ The discussions of the problems of street children in Central America develop in the context of this doctrine and its aim of ensuring that national legislation achieves real results in the promotion of human rights. The “doctrine of integral protection” also refers to the body of legal international norms approved by the General Assembly of the United Nations, that directly deal with the rights of children and adolescents. This doctrine states that children should be protected in society and in the law.

Governmental administrative agencies provide social protection through health, education and other programs benefiting the child. Legal protection, on the other hand, implies the responsibility of the country, through its judicial bodies, to protect the rights of children by punishing those activities that violate national laws. Consequently, states that have ratified international treaties regarding children’s rights should amend their laws to conform to the doctrine of integral protection. Each State should be vigilant to fully respect the principles established for the welfare of children. However, in most cases, Central American countries do not adequately follow or apply this doctrine.

As will be analyzed in the last part of this chapter, no State in Central America has fully complied with the doctrine of integral protection, inherent to the international conventions protecting children today. Instead, many countries still follow the old ideology known as the “doctrine of irregular situation,”⁵² which considers children and adolescents as objects of protection and care, not as subjects of rights and duties. This perspective does not recognize any individual rights belonging to children and negatively

⁵¹ Maxera, *supra* note 4.

⁵² M.A. Beloff, “Juvenile Justice: Courts in Irregular Situation”, Facultad de Derecho y Ciencias Sociales de la Universidad de Buenos Aires, online: University of Buenos Aires Homepage <http://www.rec.uba.ar/pc_98_00/htm/jd03.htm> (date accessed: 13 June 2001).

affects children, since it protects the authoritative and complete control of adults over children. The “doctrine of irregular situation” is based on the absolute power of decision of adults and a repressive tendency by the State, and results in the inability of children to participate in the definition of their needs in life.

Not long ago, the jurisprudence of Latin American countries centered only on minors who were under irregular situations or had broken the law. They had no norms that clearly recognized the rights to development and respect for all children without distinction of economic or social status. Laws distinguished between children who had their basic needs fulfilled and formed part of a stable family environment, recognized as “children and adolescents” and those whose basic needs were partially or completely unsatisfied (known just as “minors”). The latter consequently were referred to materially or morally abandoned children, or under an “irregular situation.” For the first group (“children and adolescents”), the law was totally indifferent and did not serve any purpose for them, and usually if a child was in conflict with the law, the judge would use its discretionary power to return him home. For “minors”, on the contrary, their “dangerousness” for the community and their lack of social inclusion pushed them into judicial processes in which the law could decide each and every aspect of their lives, with no judicial protection or guarantees.⁵³

With the approval of the Convention on the Rights of the Child, a new design for protecting children was born: the “doctrine of integral protection.” The three main elements that comprise the “doctrine of integral protection” are co-dependant and rely on each other for their effectiveness. These principles state that: 1. children are individual

⁵³ L. Guzmán, *Embarazo y Maternidad Adolescentes en Costa Rica*, 1ed. (San José: Comisión Nacional de la Adolescencia, 1997) at 79.

subjects of the law holding certain rights and responsibilities; 2. the law should operate in the best interests of the child (also called “superior interest”) for the child; 3. as a consequence, there is an obligation of the State and family to take care of and protect children and respect their rights.

1. Children as individual subjects of the law.

The fundamental rights of children result from the notion that they are individual subjects of the law in particular stages of development. They possess all the rights of adults in addition to particular special rights. These special rights derive from the fact that children usually are unaware of their rights and therefore cannot demand their proper protection. Children fail to meet their basic needs on their own; thus, the protection of the rights of the child are a duty of the family, the society and the State.

The Convention of the Child guarantees in Article 2 that every child be entitled to all rights without discrimination. It is closely linked to article 12, in which children’s capacity for judgement is protected through explaining that it is acquired in a process of gradual development. The portrayal of child as a subject of rights also raises other issues, such as the responsibility of children for the crimes they commit. Article 40 of the Convention declares this responsibility but leaves to each particular State the decision on issues such as rehabilitation programs, the duty for safe and healthy juvenile detention centres and the respect for due process of law.

Each country is responsible for deciding and determining the ages at which a person is considered to be a child or an adolescent, other legal categories ranging within the ages zero to eighteen years old as well as the rights they acquire. Countries usually use different criteria to determine legal categories on the age of capacity for certain

actions. For example, in the Republic of Costa Rica, the law follows the “presumed age criterion,” considering every person from the moment of conception until the age of twelve years to be a child. Additionally, an adolescent is a person older than twelve and younger than eighteen. The Code for Children and Adolescents in Costa Rica also states that the right to work and the right to be involved as a party in a judicial proceeding can be exercised starting at the age of fifteen years.

The recognition of children as subjects of law carries particular legal consequences for this group. They acquire specific responsibilities, freedoms, duties and rights depending on the extent of their development and age. These are intended to foster respect towards adults, their community, the law, the State and, above all, themselves.

2. The best interest of the child.

The best interest of the child refers to a legal principle that guarantees and assures the effectiveness of the rights of the child.⁵⁴ This principle demands that “all children should receive equal treatment without distinction of any kind, such as race, colour, sex, language, religion, ... or other status.”⁵⁵

This child’s “best interest” represents a principle of interpretation that recognizes the integral aspect of the human rights of children, while solving conflicts between one or more legal rights established in the Convention. It is also a principle of integration which occupies and fills legal vacuums present in the document. “The Convention does not seek to provide any definite statement of how a child’s interests would be best served

⁵⁴ Maxera, *supra* note 4.

⁵⁵ A. Lopatka, “The Rights of the Child are Universal”, in M. Freeman, ed., *The Ideologies of Children’s Rights* (Netherlands: Kluwer Academic Publishers, 1992) 47 at 49.

in a given situation. This is an acknowledgement that the precise implications of the principle will vary over time and from country to country.”⁵⁶ This statement reflects the idea that the Convention is not a rigid document, but, on the contrary, is flexible depending on the context. The “best interest of the child” principle is defined in Article 3(1) of the Convention on the Rights of the Child when it states that “[i]n 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.”

The principle should be applied according to the country and the needs of the time. The rights of children are universal, but can be interpreted and adapted to the social and cultural traditions of each nation, or to specific problems such as refugee children, street children, handicapped children, children of indigenous peoples, children involved in an armed conflict, orphans, and victims of child abuse.

Accordingly, the level of social and economic development in Central American states affect the application of the principle for “best interest of the child.” Due to economic need, many children are forced to work for long hours, are unable to attend school or are living on the streets where their marginalization makes it difficult to assess their best interest. However, it is possible to start applying this principle if its supporters can intervene and attempt to overcome these limitations. The first step is to examine each country’s legislation and adapt it to the doctrine of integral protection.

Some countries opted to make reservations to the Convention of the Child in regard to the best interest of the child and the rights to freedom of expression, religion,

⁵⁶ See M. Freeman, “Laws, Conventions and Rights,” *The Moral Status of Children: Essays on the Rights of the Child*, (Cambridge: Kluwer Law International, 1997) 47 at 57.

association, and privacy. Even if countries agree to give full rights to children, they could nevertheless retain the right of adults to decide on the children's best interests. This decision could be based on reasons of national values or religion.⁵⁷

Also, the best interest of the child makes children a priority within the context of national public policies. The Convention on the Rights of the Child stipulates in Article 3 that: "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 should be a primary consideration."

Among the codes of children in Central America, Article 5 of Costa Rica's Code of Children and Adolescents best describes this concept:

Best and Superior Interest. Every private or public action concerning a person under the age of eighteen, must consider the principle of the superior interest, which guarantees the respect of all human rights in a healthy physical and mental environment, in an attempt for a full personal development.⁵⁸

When considering what constitutes the best interest of the child, in particular cases, there are four aspects to be taken into account: the condition of the child as a subject of rights and duties; the age, decision-making capabilities, and other personal characteristics of the child; the socio-economic conditions in which he or she lives; and the harmony between the individual and the surrounding social environment.

⁵⁷ See P. Alston, *International Human Rights in Context*, 2nd ed., (Oxford New York 2000) at 522, where he refers to Singapore's reservation to this Convention, in which the state established that: The Republic of Singapore considers that a child's rights ...shall ... be exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions of Singapore's multi-racial and multi-religious society regarding the place of the child within and outside the family...The Republic of Singapore considers that articles 19 and 37 of the Convention does not prohibit ...the application of any prevailing measures prescribed by law to maintain order...and ... the judicious application of corporal punishment in the best interest of the child.

⁵⁸ *Código de la Niñez y la Adolescencia de Costa Rica*, Law No. 7739 of December 3, 1997, sec.1, (February 6, 1998).

The administrative and judicial authorities in charge of deciding upon the future of a child are responsible for considering not only the criteria above, but also the practices and traditions of the socio-cultural group in which the person lives.

3. New legal relations regarding children and adults.

The Convention on the Rights of the Child only subjects children to the legitimate and legal power of adults, parents, guardians, or others. In other words, adults exercise a legal power over children, but as a result of their obligation to give them the protection they need. It is important to emphasize that this power is not meant to be arbitrary; if it turns into an abuse of power by the adult, it is illegal and constitutes a violation of the rights of the child which necessitates a corresponding legal remedy.⁵⁹

This new relation has been quite controversial in regard to issues such as participation and freedom of expression of children. Children today are called to be active citizens in their communities; they express opinions and are heard. Traditionally, however, Latin American children have been limited in their ability to communicate with adults. In Costa Rica, for example, there is a very common expression among parents that "children speak when chickens are laying golden eggs." This is a good illustration of the traditional mentality in Latin America regarding the right of children to speak. The international law of children was built upon the three aforementioned principles, creating a model which countries around the world should follow in order to comply not only with their mutual commitment among themselves, but also to their own children and the protection of their human rights.

⁵⁹

Maxera, supra note 4 at 8ff.

B) Convention on the Rights of the Child

The Convention on the Rights of the Child⁶⁰ is the most important instrument for protecting the human rights of children. It embodies what the international community considers to be their fundamental rights and serves as the framework for state actors to follow, assuring each Central American country will protect its children. It also holds the special characteristic of being binding upon all state parties.⁶¹

This instrument protects a series of rights within a broad range of vulnerable situations in children's lives. It includes the obligation of States "to guarantee the creation of institutions and services for the care of the child and to adopt legislative, administrative, social, and educational measures to protect children from all forms of physical or mental violence, bodily harm, or abuse, negligent treatment, mistreatment, or

⁶⁰ Convention on the Rights of the Child, *supra* note 33. In 1979, Poland's representatives proposed the creation of a working group in charge of writing the Convention of the Rights of the Child. It was finally approved by the General Assembly of the United Nations on November 20th, 1989, entering into force on September 2nd, 1990 in accordance with article 49 of the same body.

⁶¹ *Maxera, supra* note 4. The need of a binding convention for the rights of the child was based on a series of legal reasons: a) The existence of international instruments in the form of declarations, like the Geneva Declaration (1924) and the Declaration of the Rights of the Child (1959), which contain a set of principles accepted by the signatory states, but do not imply specific nor binding obligations. b) There were more than 75 international instruments that in one way or the other could be applied to children. However, in these instruments, children's rights, if treated as an integral part of human rights, lack the specificity that the laws protecting children need. Children have particular situations and positions, due to their special vulnerability. As a consequence, they require a set of binding norms created to protect their needs as children. c) The increase on the number of violations of human rights against children alarmed the international community, and served as the starting point of a long debate that resulted in the text of the Convention. *Declaration of the Rights of the Child*, GA Res. 1386 (XIV), UNGAOR, 14th Sess., (1959). This Declaration was proclaimed by the General Assembly on November 20th, 1959. It states the need for "special safeguards" previously been established in the Geneva Declaration of the Rights of the Child of 1924, emphasizing in its preamble that "mankind owes to the Child the best it has to give", which was later recognized in the Universal Declaration of Human Rights and in the regulations governing international organizations concerned with the welfare of children.

exploitation, including sexual abuse, during the time they remain under the care of their parents, legal guardians, or any other person who has them within his/her charge.”⁶²

This extensive protection covers the phenomenon of street children in several ways because the State has an obligation to take the proper steps to prevent children from being compelled to become homeless. The Inter-American Commission of Human Rights has stated that the Convention on the Rights of the Child recognizes the right of the child “to a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development.”⁶³ As discussed earlier, poverty and the lack of basic necessities are the main causes and reasons why children find themselves on the street.

The Convention of the Child as well as the American Convention provide that the family and the state are responsible for guaranteeing adequate living conditions for the child. According to the Convention on the Rights of the Child, States “shall take appropriate measures to assist parents... to implement this right [to an appropriate standard of living] and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.”⁶⁴ Such protection can prevent children from going to the streets to look for the necessities they lack. The social and economic problems of street children could be decreased.

In addition to this protective guarantee, States in Central America have an obligation to eradicate other causes of the street children’s situation. Two examples of this duty, as expressed in the Convention, are the obligations of the State to make

⁶² A. Baratta, “The Child: A Citizen with Rights”, online: IIN, Inter-American Children’s Institute-OAS Homepage < http://www.iin.org.uy/discurso_un_ciudadano_derecho_ingles.htm > (date accessed: 15 July 2001).

⁶³ Report on Colombia, *supra* note 8 at 2.

⁶⁴ *Ibid.*

compulsory and free primary education accessible to all children, and to take steps to protect the child against any form of physical or mental abuse, or neglect. Furthermore, before the existence of this Convention, children were not seen as individuals with a full spectrum of rights. They were, in most cases, completely under the authority of their parents. However, the Convention on the Rights of the Child promoted the idea that children rely on parents for nurturing, basic moral education, and support that can lead to an independent and developed life.

The standards for the protection of children's rights, to which all governments must adhere, are articulated in the Convention. It opens the door for new law and a reformulation of the rights and status of children and adolescents as active subjects of this new perspective. For the principles in the Convention to succeed they have to be reflected in concrete actions. There must also be a comprehensive development in child policies, programs and an appropriate institutional framework in each country.

The Convention on the Rights of the Child is not meant to be an immediate solution to all the social problems that street children face in Central America. This instrument cannot stop children from begging and being hungry or sick; it will only provide a model for those countries that have the will to effectively apply their legislation and to implement comprehensive programs defending street children's rights. It can only offer a framework for the prevention of different harmful situations occurring in cities of the region. Its implementation has to be "human-driven," through which the "UPPP²" effort can be carried out in order to reach the desired "mirror effect" in which national laws for children reflect the doctrines of international laws.

The Convention is the most universally accepted human rights instrument in history. It has been ratified by every country member of the United Nations except

Somalia and United States of America (signature but no ratification).⁶⁵ By ratifying this instrument, national governments around the world have committed themselves to uphold children's rights and they have agreed to hold themselves accountable to the international community for this protection.

C) The international framework for the protection of specific children's rights

The description of what street children face daily, as established in Chapter 1, is protected among several conventions, rules and declarations that make up the international legal framework regarding children. A group of nine instruments seem to form the most complete and integral framework for protecting these children. They could serve as examples for creating and implementing diverse responses to violations of street children's rights in Central America.

In the area of juvenile justice, there are three main instruments that can be used at the national level to develop domestic legislation in accordance with international standards for children's rights:

1. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
2. The United Nations Minimum Rules to protect minors deprived of their liberty (Riyadh Guidelines); and,
3. The United Nations Rules for the Protection of Juveniles deprived of their liberty (the JDL Rules)

⁶⁵ United Nations Development Program, *"Informe de UNDP sobre la Pobreza 2000: Superar la Pobreza Humana"*, rev.ed. (New York, UNDP, 2000). See also: UNICEF, online: Unicef Homepage <<http://www.unicef.org/crc/convention.htm>> (date accessed: 10 July 2002).

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”)⁶⁶ are recommendations and are non-binding. However, some of the principles established in these rules have been included in the Convention of the Rights of the Child, which as stated before, is a binding document.

The Beijing Rules were adopted by the United Nations in 1985,⁶⁷ in hopes of protecting children’s rights and recognizing the need for a separate juvenile justice system. This international legal instrument is the first to outline regulations for the protection of children’s rights within the administration of juvenile justice. These standard rules function hand in hand with two other instruments also related with juvenile justice: the Riyadh Guidelines and the JDL Rules.

The United Nations Riyadh Guidelines are based on the creation of social policies to prevent and protect minors from committing crimes.⁶⁸ They are useful guidelines for states wishing to prevent juvenile crime. On the other hand, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“the JDL Rules”) are the guidelines established to re-integrate juveniles who have been deprived of their liberty. In other words, the underlying theory of this set of rules is that children who have broken the law and been deprived of their liberty, should be reintegrated into their communities with the help of special social programs. Detention and retribution should be avoided, and the best interest of the child or adolescent must always be the guiding principle.

⁶⁶ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), GA Res. 40/33, UN GAOR 96th Sess., Supp. No.53, U.N. Doc. A/40/53 (1948) at 207.

⁶⁷ *The Beijing Rules*, online: Defence for Children International Homepage <http://child-abuse.com/childhouse/childrens_rights/dci_beil.html> (date accessed: 28 June 2001).

⁶⁸ United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”), GA Res. 45/112, UN GAOR U.N. Doc. A/45/112 (1990), online: United Nations Homepage <<http://www.un.org/Depts/dhl/resguide/resins.htm>> (date accessed: 15 July 2001).

Within the international legal framework, problems faced by female children and adolescents as vulnerable groups are also addressed. This group, as well as women in general, are safeguarded by two important documents that are the product of international conferences: the 1994 United Nations Cairo International Conference on Population and Development and The IV International Conference for Women in Beijing in 1995.

The 1994 Cairo International Conference on Population made great advances in relation to reproductive rights of women and men in general, and of adolescents particularly. Governments and other groups promised to pursue two major objectives to benefit the adolescent population. The first objective was to promote a responsible, healthy, reproductive and sexual life for adolescents by offering access to appropriate counselling services. Second, the Conference aimed to substantially decrease adolescent pregnancies.

The IV International Conference for Women in Beijing in 1995, approved a Platform of Action to promote and protect full enjoyment of all human rights and fundamental liberties by women throughout their childhood and adolescence. The governments that participated in the Conference also approved the Beijing Declaration, which guarantees, among other things, the human rights of female children. This document addresses important issues like sexual education, family planning, responsible health issues, and the right of pregnant adolescent women to education.

The next category of international instruments related to "the doctrine of integral protection", are those that approach problems like illegal international adoptions and commercial sexual exploitation of children and adolescents, which are common human rights abuses street children suffer. These instruments are the International Labour Organization's Convention 138 and Recommendation 146, related to child labour; the

World Declaration on Education for All, adopted in March 1990, in Jomtien, Thailand,⁶⁹ addressing lack of education issues; the Convention concerning the protection of children and cooperation on international adoptions (Hague Convention);⁷⁰ and the Declaration of Stockholm, which has the purpose of establishing global cooperation against commercial sexual exploitation of children.

The framework formed by all of these international instruments provides a clear example of the need and importance for their creation and application due to the diverse abuses and situations they cover. Each of these conventions serves as a guideline for protecting minors from many different abusive situations, actions, omissions or neglect. Altogether, they work hand in hand, in order to achieve the integral protection of the rights of the child, guiding principle of international human rights law for children in Central America. Such a “common web of international protection” addresses the problem on a larger scale, which is essential for the implementation of national programs intended to safeguard the human rights of the child.

Section 3. Adapting Central American Domestic Law to International Standards

1. State Responsibility

Obligations of a state to respect and protect children’s human rights consist of preventing the abuse of children by any person, whether they are private individuals, a

⁶⁹ World Declaration for Education for All, online: UNESCO Homepage <http://www.unesco.org/education/information/standards/english/world_unesco.htm> (date accessed: 28 June 2001).

⁷⁰ Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Inter-country Adoption, online: Hague Conference on Private International Law Homepage <<http://www.hcch.net/e/conventions/menu33e.html>> (date accessed: 27 August 2001).

group, or state officials. The state is not only responsible for preventing and protecting children adequately, but also taking the appropriate legislative, administrative and judicial measures to achieve this goal.

There is a direct link between children's rights and the state's responsibility, as stated in Article 2 of the Convention of the Child: "... states parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind..." It also acknowledges that they "shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment..." States have a further responsibility to guarantee respect for the rights of children, due to their vulnerable situation, meaning total compliance with international obligations by public and private actors. As stated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."⁷¹

In this sense, it is important to point out the State's obligation to facilitate the integral protection of children, by state investment to improve community services and meet needs. Through such improvement children can develop fully while enjoying safety, education, health, entertainment areas and housing.

States can be responsible for violations of children's human rights as a result of both affirmative acts and omissions.⁷² To determine whether a State has violated human

⁷¹ *Declaration of the Rights of the Child*, GA Res. 1386 (XIV), UNGAOR, 14th Sess., (1959).

⁷² A clear example of this question is a recent case in Costa Rica, in which the Congress passed a law in 1998, that ordered the government to give 7% of its national tax income to the children's welfare protective institution, called 'PANI', which equalled approximately US\$42 million dollars. The lack of funds has limited the services and attention provided for children in various difficult risky situations (poorest children, children victims of sexual exploitation, street children, and others). This is a clear

rights in a specific case, two different circumstances should be considered. The first situation is when the state creates a series of plans and strategies to solve abuses against children's human rights. In other words, the government is acting in good faith and working on new ideas, but has difficulty applying them and achieving the intended results. Using Guatemala as an example again, it illustrates perfectly this first means of violation and state responsibility. Guatemala created a Code but allowed ten years to pass without being approved by the legislature. Such a code is ineffective without being formally enacted and applied.

The second situation is when the state achieves significant and successful results in a specific area like, for example, the eradication or elimination of extreme poverty within a certain period of time or in our case the improvement of street children's rights in general. This can be seen in cases such as Honduras, which has a totally new Code, as well as a complete system of institutions protecting children's rights. Though this may be a small difference, it can change the degree of the state's responsibility in the eyes of the international community and regional or international human rights tribunals.⁷³

omission of the state to ensure the protection of children's rights, deriving in responsibility of the state for violation of the rights of children to their right to food, right for shelter, right for a special attention due to their vulnerable situations.

⁷³ It could be helpful to use a hypothetical example in order to clarify the difference between these two circumstances. Same general **responsibility for State #1 and State #2**: Prevent and protect children's human rights violations by the implementation and application of all measures at the national and local level.

State #1 = Creates a new law protecting children's rights, establishes a national policy to follow, and assures that the local courts for children are working properly and solving cases expeditiously. It implements a state reform of the criminal code and other related documents, introducing new crimes in them such as the commercial exploitation of children and their sale and trafficking, although a norm protecting street children is not approved by the Congress. Now, some years after these reforms, the state has been accused to violate its obligations, having responsibility of omissions to provide a due care in the death of a street child in the hands of their police forces.

State #2 = Contacts the best known experts in the protection of children's rights, and they put together in a period of five years, the best program to ensure the welfare of their children in general. It was the most complete plan ever known. However, years passed and the project is never applied, except for a minimal reform in their Constitution. They are accused for the same reason as State #1.

The degree of responsibility in the case of street children, for example, can be measured in several ways:

- By results obtained from programs implemented for the elimination of violence against street children.
- By the effectiveness of available enforcement mechanisms.
- By investigating if the state has omitted preventive measures for the problem.
- By finding out if the state has carried out any necessary structural reforms to its judicial system, in order to provide access to justice for all, the right to a fair trial and the right to compensation in case of violation of children's rights.

Based on these possibilities, a violation of human rights is more evident in the first case, in which the state did not continue to take the necessary steps to protect children's rights. The state is responsible for respecting and protecting the rights of children. There should be no conceptual difference between the violation of the human rights of one child due to a state action or omission, and the violation of the rights of many children. Although there could be differences in the seriousness of the problem, the value and sanctity of the right is still the same. The state infringed its international obligations by not ensuring proper protection for their children and by failing to provide a Code for Children and Adolescents or any other kind of model as response. It has infringed a child's right that could be either the right to development or the right to life. So, the state's failure to observe its obligation to respect and protect the human rights of

Conclusion: State #1 has a lower degree of responsibility because it complied with its obligation to ensure the protection, and especially because the state applied the policies created and took all measures to achieve the purposes desired. It is still responsible, but the tone of the responsibility varies. *State #2* is totally responsible because did not implemented the measures of protection required for the children in the community.

children, and moreover, its responsibility for their violation, cannot be justified or diminished on the basis of the number of violations involved, or the steps intended that were never taken in order to avoid the danger.

2. State Assessments on Adaptation of Internal Laws to Basic International Standards

In general, the comparison of internal legislation in the countries of Central America shows that Honduras, Nicaragua and Costa Rica are the only governments that have created a totally new system for the protection of children and adolescents by creating a Code for Children and Adolescents, and have continued efforts to modify their laws. They have based these changes on the doctrine of integral protection and the best interests of the child, and have designated certain illegal activities as serious criminal offences punishable by their Penal Codes. They responded in two main ways: by reforming existing provisions of their legislation that were related to children and by creating a new Code for Children and Adolescents under the new approach of providing integral protection for all.

On the other hand, El Salvador has undertaken a series of legal reforms to conform to international laws, without creating a complete new code for children, while still following older ideas about child protection. Guatemala has edited a new code for children and adolescents, which has not been approved or applied due to a controversial debate in its Congress. Without this Code for Children it is violating its obligation to provide adequate protection for children, arising from its ratification of the Convention of the Child.

The five countries constituting Central America⁷⁴, have taken different steps to modify their laws in order to comply with the obligations contained in the Convention on the Rights of the Child. Depending on their own economic and political situation, each nation has achieved important improvements in the area of human rights, and specifically on issues related to children's rights. In most cases, however, it has not been enough to change or decrease violations of human rights suffered by street children.

At the national level, the *Constitution* of each of these Central American countries, in its own way, provides a set of fundamental and inalienable rights for all citizens. Other national laws and regulations translate these constitutional principles into specific norms within civil, commercial, criminal and administrative codes in order to guarantee the enjoyment of rights for all, and establish punishments in case of their violation.

It is important to compare the type and magnitude of the legal, historical and social changes taken in each country to be able to start measuring their commitment and compliance with the Convention. Also, in doing so, it will be easier to assess whether the international children's human rights system has been successful in each nation. Finally, this study can offer the possibility of categorizing these nations depending on their response to the protection of children. The three categories are:

⁷⁴ See E. Torres-Rivas, *Estado de la Nación en Desarrollo Humano Sostenible*, 1st ed. (San José: Editorama, 1999) at 281 [hereinafter Torres-Rivas], where it refers briefly to the composition of Central America. The territory of what has been known historically as "traditional Central America" is constituted by five nations from north to south: Guatemala, Honduras, El Salvador, Nicaragua and Costa Rica. However, some contemporary authors and historians include the countries of Belize and Panama, on a geographical basis.

- A. The response is to maintain the traditional doctrine of protection for children, based on the protection of children in “irregular situations” and the concept of “children as objects”.
- B. The response is to adapt certain existing national laws in order for them to comply with the obligations derived from the Convention of the Child.
- C. The response is the creation of a comprehensive Code for Children and Adolescents, along with the reforming of existing laws to meet the demands of modern doctrines defending children’s rights.

A. The response under the Traditional Doctrine.

1. GUATEMALA

a) General Situation of Human Rights

It is a shame that during the armed conflict in Guatemala, large numbers of people, including children, were victims of disappearances, executions, torture, rape and other violations of fundamental rights.⁷⁵ Today, such crimes are still occurring to a lesser degree and under different circumstances.

Despite its efforts, the government of Guatemala has one of the worst records of human rights violations in Latin America.⁷⁶ The lack of proper investigation and judicial

⁷⁵ *Torres-Rivas, supra* note 74. Regarding the violations of human rights during the armed conflict, it has been concluded that agents of the State of Guatemala, “within the framework of counterinsurgency operations carried out between 1981 and 1983, also committed acts of genocide against groups of Mayan people...” The Commission for Historical Clarification (CEH) was established through the Accord of Oslo on 23 June 1994, in order to clarify with “objectivity, equity and impartiality”, the human rights violations and acts of violence connected with the armed confrontation that caused suffering among the Guatemalan people. “The Commission was not established to judge – that is the function of the courts of law – but rather to clarify the history of the events”...of three decades of war.

⁷⁶ C. Quesada, “El Estado de los derechos humanos sigue siendo negativo y sombrío” CODEHUCA-Brecha 5:4 (November-December 1995) 29 at 30.

enforcement, are the two main causes of impunity for the perpetrators, which is due to threats against witnesses, judges, prosecutors and human rights advocates. This lack of investigation and trial of those responsible for cruel human rights abuses constitutes a denial of justice. Justice is also absent due to the failure to prevent such crimes and provide protection for the victims and their families. There has been a regular denial of *habeas corpus*, showing total indifference to torture and even disappearances of detainees. This has constituted serious violations of the right to due process, the independence of judges and the State's duty to investigate and punish human rights violations.⁷⁷

The armed conflict in Guatemala has left many children orphaned and abandoned. These children witnessed their families' destruction. Their personal tragedies and violations limited their normal development during childhood, pushing them into the streets without any other choice.

In Guatemala, the main problems faced by advocates for street children are: police involvement in crimes against them, impunity of the offenders, and lack of laws consistent with the Convention on the Rights of the Child due to the absence of an adequate Code for Children or another similar solution, like amending the laws or creating social policies for benefiting children.

Children living on Guatemala's streets face daily thefts, beatings, threats and sexual assaults at the hands of private security officers and the national police, who are part of the government's Interior Ministry. Serious crimes against street children,

⁷⁷ Report of the Commission for Historical Clarification, "Guatemala Memory of Silence" (1998), online: Guatemalan Commission for Historical Clarification Homepage
< <http://hrdata.aaas.org/ceh/report/english/concl.html> > (date accessed: 25 July 2001).

including assassinations and torture have decreased, but still occur. Fifty-seven street children were murdered in Guatemala between 1990 and 1999, all under suspicious circumstances and most involving crimes that have never even been investigated.⁷⁸

Crimes against street children in Guatemala are not a priority for police investigators, particularly when an active officer is involved or implicated. Justice for young people in Guatemala is severely defective. Street children are arrested and taken into prisons arbitrarily, sometimes for being homeless and other times for begging, loitering or for making streets look ugly. Children in detention receive no psychological treatment or education to reintegrate them into society. Many times they are jailed with adults, crowded together with no sanitation conditions, and are abused by older prisoners and staff members. Such conditions violate international standards such as the Beijing Rules.⁷⁹

b) Responses to the Need for Improving Protection of the Human Rights of Children

Presently, the government of Guatemala is deciding upon the implementation of a new Code for Children. If the Congress votes to approve the bill, the Code will help Guatemala comply with the Convention on the Rights of the Child (and therefore adapt

⁷⁸ *La Paz*, *supra* note 3 at 47.

⁷⁹ *The Beijing Rules*, online: Defence for Children International Homepage <http://child-abuse.com/childhouse/childrens_rights/dci_beil.html> (date accessed: 28 June 2001). The Beijing Rules were adopted by the United Nations in 1985, with the purpose of protecting children's rights and their need for a separate juvenile system of justice. This international legal instrument is the first to specify regulations for the protection of children's rights within the administration of juvenile justice. These standard rules function hand in hand with two other instruments also related with juvenile justice: the JDL Rules and the Riyadh Rules.

to the ideology), ratified on May 10, 1990, deposited in June 6 of the same year, and entering into force on September 2, 1991.⁸⁰

In comparison to other codes for children that are already in force in Central America, the proposed Guatemalan Child Code is a clear, well-organized piece of legislation that could give good protection to children's human rights, if it is ever passed. It contains three main sections. First, the doctrine of integral protection; second, social protection and social, economic and cultural rights; and finally, a section of legal protection. The Code creates a number of institutions and organizations in charge of implementing its provisions, including municipal protection councils and special judges for delinquent children and children in vulnerable situations. A new Code would serve to establish guidelines in order to prevent, protect and resolve abuses against the lives and dignity of children in Guatemala. This code will replace the present law known as "the Minors Code", which is based on traditional approaches and practices contrary to the Convention on the Rights of the Child. The two codes differ in at least two important ways.⁸¹

First, the existing code in Guatemala is completely incompatible with the principles included in the International Convention of the Rights of the Child. It was created in 1979 and only protects children in irregular situations. Title II of the Minors Code regulates the protection of children in the following terms: "Minors in irregular situations are minors who suffer or are disposed to suffer abnormality or disturbance in their physiological, moral or mental condition, or minors who have been abandoned or

⁸⁰ ILO-IPEC, *Trabajo Infantil en los países Centroamericanos: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Republica Dominicana, Panamá, 1st ed.* (Geneva:1998) ILO Doc.77 at 37 [hereinafter ILO-IPEC].

⁸¹ ILO-IPEC, *supra* note 80.

are at risk."⁸² The new code, on the other hand, focuses on all children, as subjects of rights and duties, abolishing the idea of children as "subjects of intervention".

The 1979 Code makes no distinction between children in conflict with the law and vulnerable children, who could also be victims of some type of abuse. The code under consideration by the Congress proposes real protection for these cases by introducing the idea of separate institutions with their own staff and proper treatment for each of these categories. This is very important because children in vulnerable situations include poor children, who under the existing code are treated as criminals due to the lack of separate special services for them. In other words, vulnerable children, which include street children, do not receive any special treatment or assistance from any organization under the current framework.

In general, Guatemala is still operating under a traditional protection system and seems to be undergoing a transition to a more modern approach defined by the doctrine of integral protection for children. There are clear signs of conscientious review of its laws and regulations by the government. However, until the new Children's Code gets approved, there is no useful internal legislation on which to rely in order to address the different violations of human rights of children in Guatemala.

⁸² The Minors Code of Guatemala (1995), online: United Nations High Commissioner for Human Rights Homepage
<http://www.unhchr.ch/tbs/doc.nsf/184758d9fcd7a2b1c12565a9004dc312/2f292f18d3c0e8d48025663c003575e7?OpenDocument> (date accessed: 27 June 2001).

Article 6 of this Code states that: "Minors may not be charged with a misdemeanour or crime, and their antisocial acts constitute disturbed behaviour requiring specialized treatment and not punishment"; and article 7 states that: "The parents, guardians or other responsible persons bear responsibility for any irregular situation affecting minors, be it abandonment, moral jeopardy or disturbed behaviour. Third persons harmed by antisocial acts committed by minors are entitled to take legal action to enforce this responsibility."

c) Programs supporting street children's human rights

Due to Guatemala's history of human rights violations there are numerous international organizations, non-governmental bodies and national programs working to defend street children's rights. The Social Welfare Department is part of the Office of Treatment and Guidance for Children, and provides comprehensive treatment for minors with behavioral problems. In June 1991, this Office was reorganized and a special program was introduced, called "Protection and Security of Street Children".⁸³ This was a response to serious social problems in Guatemalan communities, clearly evidenced by the number of children and adolescents who must go out on the streets in order to satisfy their basic needs. The program was created with the purpose of offering realistic solutions for approximately 1,500 minors involved in street activities. It focuses on protecting children between the ages of nine and eighteen, who live on the street and constantly look for money through illegal and insecure activities such as theft, prostitution, and drug trafficking.⁸⁴

The Social Welfare Department of Guatemala also manages programs promoting the welfare of children and their families by facilitating access to health, education and recreation services, and operating schools for parents. Such projects have already helped 25,000 families and are seriously committed to preventing children from turning to the streets.⁸⁵ It has a unique approach, as it targets not only street children, but also their

⁸³ Initial Reports of State Parties to the Committee on the Rights of the Child due in 1992: Guatemala 20 April 1995, online: Office of the United Nations High Commissioner for Human Rights Homepage
 <<http://www.unhchr.ch/tbs/doc.nsf/184758d9fed7a2b1c12565a9004dc312/2f292f18d3c0e8d48025663c003575e7?OpenDocument>> (date accessed: 27 June 2001) [hereinafter Guatemala Report].

⁸⁴ *Guatemala Report*, *supra* note 83.

⁸⁵ *Ibid.*

parents and other family members. It offers an integral solution to the root of the problem, which is generally a problem of unemployment that has led into extreme poverty.

The Governor of Guatemala City recently set up a campaign against family violence. It focused on the safeguard of emotional development of children who have been victims of psychological or physical abuse, or have suffered serious traumas caused by the harshness of street life and the daily threats to their lives. Fostering awareness about the kind of lives street children face at home is one of the main tools for the government in decreasing impunity for family violence and has helped women and children learn about and exercise their rights. Other countries in Latin America have also established ways in which victims of abuse can come forward with less fear. For example, Brazil has established "*conselhos tutelares*",⁸⁶ which are networks of police stations, staffed only with women, making it easier for women to approach. This type of project has the ultimate intention of protecting children from abuse, and offers a preventive measure to keep children home with their families in a caring and normal environment, rather than on the streets.

The Department of School Meals and Nutrition (part of the Ministry of Education), is also carrying out a program benefiting street children and others in difficult circumstances, known in Guatemala as the "school meals and nutrition program."⁸⁷ It provides children with "school biscuits, milk, oats, sugar, kitchen utensils,

⁸⁶ D. Green, *Hidden Lives: Voices of Children in Latin America and the Caribbean*, 1st ed. (Toronto: Between the Lines, 1998) at 28.

⁸⁷ Guatemala Report, *supra* note 83.

school vegetable gardens and plant inputs, monitoring of height and weight,”⁸⁸ and training and supervision in the school they attend. The training given to the school’s staff involves proper teaching on human rights, environment, health, food, nutrition, and work.

Programs in the realm of labour are also carried out in Guatemala. The Labour Ministry has a very interesting program to educate children, their parents, and employers on the rights of children in the labour market. However this program has been very difficult to implement and is not expected to achieve positive and tangible results, due to the high number of working children. Child labour is largely confined to agricultural work, “under-ground” jobs in shoe repair shops, supermarkets, and within informal sectors of the economy carrying out activities such as shoe shiners, cleaning windshields at traffic lights, singing on buses, selling things in the streets, washing cars, “keeping an eye” on cars, selling newspapers, collecting rubbish, and gardening, among dozens of others. The needs that many families in Guatemala face forces most of them to have their children perform some type of employment to help increase the family income. Until poverty is reduced, projects as these cannot meet their objective of avoiding child labour, especially on the streets.

Other than these government programs, which are limited due to scarce resources, international organizations and other national associations work together trying to cover the gaps the state is unable to fill. The largest non-government program in Guatemala is administered by Covenant House Latin America (Casa Alianza-Guatemala). Street educators for this program look for street children and provide them with various educational services. The program is divided into several areas such as: recruitment of

⁸⁸Guatemala Report, *supra* note 83.

children around the city; providing shelter; meals and hygienic needs; a Centre for Rehabilitation from Drugs; medical and psychological group therapies and a Legal Aid Office.⁸⁹

The most recent success of Covenant House–Guatemala is the “Police Training Initiative”, authorized by the government. Through this program, the National Civil Police will be trained by this organization to raise awareness about the lives and human rights of street children, and the need to respect them. This program lasts 10 months and is an effort of 3 organizations -the Human Rights Office of the Catholic Church (ODHAG), the Rigoberta Manchu Tum Foundation and Casa Alianza (Covenant House).⁹⁰

Furthermore, there are a large number of orphanages that constantly receive street children and provide them with a home, a medical clinic, and basic education. Some of these are: *Casa Bernabé* Orphanage, which works parallel to the organization Forward Edge International, House of Hope, and House for Children Aleluya.⁹¹ Other “multi-purpose” programs supporting Guatemala are sponsored by the World Bank, the Inter-American Development Bank and other multi-lateral donor agencies.

⁸⁹ Casa Alianza Guatemala Programs, online: Casa Alianza Homepage <<http://www.casa-alianza.org/ES/about/offices/guatemala/programs.shtml>> (date accessed: 25 October 2001).

⁹⁰ Helps Train Guatemalan Police: Such initiatives can make a real improvement to lives of country's children, online: boes.org Homepage <www.boes.org/world/america/central/casa000613.html> (accessed 20 August 2001).

⁹¹ Christian Orphanages, online: Mission Finders Ministries Homepage <www.mfinder.org/orphanagesb.htm> (date accessed 26 August 2001). See also <<http://www.casabernabe.org>> for more information and programs.

B. Response by adapting certain existing national laws

1. EL SALVADOR

In order to understand El Salvador's situation after the ratification of the Convention on the Rights of the Child and the reforms undertaken in its national legislation, it is vital to have a basic knowledge of its historical background before the 1990s.

a) General Situation of Human Rights

During the 1980s, El Salvador was troubled by an armed conflict in which extreme and gross human rights violations occurred. Thousands of people, including human rights defenders, lawyers, journalists, politicians and a huge number of children, were victims of extra judicial executions, "disappearances," torture and other violations. Children whose parents were victims of extra-judicial executions were then adopted either within the national boundaries or abroad.

In 1992, the government undertook a two-step project, which was designed to diminish post-war effects, create democratic institutions, and increase respect for human rights and the rule of law in El Salvador. The first part of the program was the Elections Project, intended to examine the new Electoral Code, the utility of the administrative institutions and the fairness and transparency of the electoral process. The second part focused on human rights, especially analyzing the effectiveness of the Office of the Ombudsman for Human Rights. This office was created as a response to the Agreements signed in 1991 between the government and the FMLN (*Frente Farabundo Martí para la*

Liberación Nacional) and was the first important amendment to the 1983 Constitution, adding the Ombudsman Office to Article 194.⁹²

Among other issues examined by this project were the extent of the protection of human rights in El Salvador, the adequacy of the mechanisms used to ensure human rights, and the role played by institutions such as the police and the judicial system. Projects related to children's human rights were scarce and indirect. For example, there were efforts made to reduce poverty and improve family stability in the country. The government also worked closely with national institutions related to children and with the United Nations Children's Fund to promote awareness of children and adolescent rights. However, as in other Central American countries, children are still victims of sexual and physical abuse, exploitation and abandonment.

⁹² The peace process for El Salvador started in 1987 with the Esquipulas II Agreement, which was signed by the five presidents of Central American countries, with the objective of securing peace. The peace negotiations ended with a peace accord in Mexico, signed by the government of El Salvador and the FMLN on January 16, 1992, and mediated by the Secretary General of the United Nations. The government of El Salvador and the FMLN signed the San Jose Accord on July 26, 1990. This was another effort towards peace in El Salvador, which for the first time included issues to increase respect for human rights. The two main issues were to give priority to the investigation of crimes related to human rights violations and to adequately punish those responsible for their execution. Another important part of this peace process was the creation of the Truth Commission on April 1991, which was in charge of investigating human rights violations that took place during the 1980's and to give binding recommendations. The report of the Truth Commission of El Salvador made a series of recommendations including extensive reforms to the judicial system, the police forces, and the armed forces, as well as the implementation of other projects against human rights violations.

Exactly the same year that the Truth Commission gave its recommendations and while some of these changes were just starting, the reform process was seriously weakened by the approval of the General Amnesty Law for the Consolidation of Peace ("*Ley de Amnistía Nacional para la Consolidación de la Paz*"). This Amnesty Law applied to the decade of human rights violations, killings, massacres and disappearances. It brought absolute amnesty to those involved and responsible for human rights' abuses in El Salvador before 1992, whether they had already been sentenced or not. This law allowed for no punishment and justice, making the judicial system and the government seem unreliable institutions in the eyes of the international community, the victims and their families.

US Department of State, "Salvador Human Rights Practices" (1995), online: U.S. Department of State Homepage <<http://www.usis.usemb.se/human/human96/elsalvad.html>> (date accessed 9 June 2001) [hereinafter Salvadoran Human Rights Practices]. See also: J.L.Roush, "The El Salvador Accords: A Model for Peace keeping Actions" (1997), online: American Diplomacy Electronic Journal Homepage <http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_5/roush.html> (date accessed 17 June 2001).

b) Responses to the Need for Improvement of Children's Rights Protection

The Government has implemented a National Plan for Infants, created to increase access to clean, potable water. It also takes care of other needs such as iodized salt, food supplies, and vitamins for children. Although these issues were covered in this plan, there have been no serious integral and systematic legal reforms to national legislation concerning children's rights and their welfare.

The failure of the State to adequately respond to the protection and welfare of children is a problem that should be dealt with in El Salvador. As analyzed in the first chapter of this thesis, poverty (extreme poverty index of 22%⁹³) and parallel socio-economic problems force children to the streets, increasing the risk of danger affecting their healthy development and safe lives. Even though El Salvador has undertaken minimal efforts for this area of the population, it has not been enough to decrease the number of street children, which totals 270,000 aged between five to seventeen.⁹⁴ Given that amendments and small reforms did not solve street children's problems in El Salvador, broad and complex changes should be made to meet the minimal human rights standards that a child deserves to live in.

c) Programs Supporting Street Children's Human Rights

The major advocate and resource for street children in El Salvador is the Olof Palme Foundation, a non-governmental organization committed to promoting children's rights throughout the country. Its most recent programs for street children and children

⁹³ *La Paz, supra* note 3 at 53.

⁹⁴ *Ibid.*

orphaned after the two earthquakes in recent years focus on decreasing the fear and loneliness they feel. The two main programs are the "Project on Recycling",⁹⁵ which is directed to the estimated 300,000 street children in El Salvador. It provides homeless youth with a combination of work and education and pays them \$150 per month if they help recollect recyclables around the city. The program has a center where they receive education on civil rights, health, labour laws and gender roles. Most children involved are "sifters,"⁹⁶ who are children that look into the dumps and garbage for food or things to sell. The program is intended to take street children away from the dangers of the city, protect them from hunger and, prevent them from sniffing glue and other toxics. The second program is the "Project to protect the street children's rights to entertainment". This program organizes soccer matches for 600 boys and girls from different poor communities. Its purpose is to help children cope with fear after the earthquakes, and keep them away from drugs.

Most children participating in these programs walk several hours to be able to attend them, thereby making their own effort to avoid the streets. This eagerness to participate shows hope in their acceptance for support and care from the people involved in these programs. However, many others remain more resistant and distrustful from this type of help.

⁹⁵ Street Children Programs, online: Pangea Homepage <www.pangea.org/street_children/latin/elsal4.htm> (date accessed 30 July 2001)[hereinafter Pangea].

⁹⁶ *Ibid.*

C. Response by Adapting Existing Laws and by Creating a New Code for Children and Adolescents under the Principles of Integral Protection

1. HONDURAS

Statistics show that there are a staggering 5,000 children in the streets.⁹⁷ In the Honduran capital, Tegucigalpa, street children number “more than 1,200 from which 90% get involved in the inhalation of toxic glue products”⁹⁸, in order to escape their problems and suffering.

During 1999, the number of children on the streets of Honduras increased extremely rapidly due to the devastation of hurricane Mitch, which also damaged the economy and consequently the ability of the population to have stable jobs and access to health services.⁹⁹ These factors directly affect the infant population of Honduras, who experience anemia and are limited to attend school. Most of these children die before turning five years old from illnesses that could have been prevented by a well structured health system. The high levels of violence towards boys and girls that live in the streets are the result of recent “social cleansing” operations, designed only to eliminate the socially excluded, poor, hungry and rejected. Despite supervision, even members of the police have continued to commit these types of human rights abuses affecting thousands of street children who are cruelly seen as useless delinquents in society.¹⁰⁰

⁹⁷ *La Paz*, *supra* note 3 at 66ff.

⁹⁸ “Casa Alianza Honduras: Niños y Niñas de la Calle en Honduras”, online: CASA ALIANZA Homepage <http://www.casa-alianza.org/ES/lmn/> (date accessed: 21 March 2001) [hereinafter Casa Alianza Honduras].

⁹⁹ *Ibid.*

¹⁰⁰ *La Paz*, *supra* note 3 at 65.

a) General Situation of Human Rights

In Latin America, Honduras has been known as one of the poorest nations due to an intense economic crisis in the eighties, intensified by the state's lack of attention to basic needs. Most of its population does not enjoy social and economic rights, it has high illiteracy and unemployment, inappropriate health services, and housing problems. In general, there is a high percentage of extreme poverty. Statistics show that 73% of the population live under the poverty line, and 49% of this figure live in extreme poverty.¹⁰¹ To solve this problem, families have used the only additional resource they have which is child labour. Consequently, 300,000 children¹⁰² are working in some type of activity without attending school, are dependant on their employers' orders, and work long inappropriate periods without the legal and social benefits they deserve.

A lot of these children help their parents maintain the family by working in the informal sector selling lottery tickets, fruit and many other things. Based on a Honduran newspaper, citing a report about the situation in the country, more than 100,000 children also rummage through trash to collect bottles, cans, and plastic bags that they can sell afterwards. Among the children that are involved in these activities, according to the National Commissioner of Human Rights, half work in the informal sector and are between 10 and 14 years old, 37% are less than 10 years old and only 14% over 14 years.¹⁰³

¹⁰¹ Human Development Report, *supra* note 12 at 176.

¹⁰² *Ibid.*

¹⁰³ *La Paz*, *supra* note 3 at 64.

b) Responses to the Need for Improvement of Children's Rights Protection

Since 1996, Honduras has a new Code for Childhood and Adolescence, which has been helpful in creating general public awareness about the importance of the protection of the rights of the child. This Code distinguishes itself from the principles in the previous legislation, which focused only on the protection of children under irregular situations and the supervision and control of children in conflict with the law. Even after creating this new Code, however, concepts of "control" and "protection" of children still predominate, thus requiring efforts to change attitudes towards ideals of "protection, promotion and defense" of the human rights of children.

The code has given priority to the problem of child labour and has implemented possible solutions aimed at its eventual eradication. The new regulations include strategies based on the vision of children as subjects of the law, and holders of all human rights. They have given special attention to this problem because working children need to be protected against all types of exploitation and should be able to exercise their rights.

The Honduran framework was designed to safeguard the rights of the child. It is comprised of several laws and reforms, but was basically started by the entry into force of Decree #131, dated January 11, 1982,¹⁰⁴ which recognized the existence of the rights of Honduran children for the first time.¹⁰⁵

The national laws protecting children include the National Constitution, the Labour Code, the new Code for Childhood and Adolescence, the Family Code, and new sanctions introduced into the Criminal Code in relation to the economic exploitation of

¹⁰⁴ ILO-IPEC, *supra* note 80 at 55.

¹⁰⁵ *Ibid.*

children. All these have served as sources for the new Code for Childhood, which has three fundamental principles. First, the Code proposes the eradication of all discriminatory provisions in other laws and regulations. Second, it recognizes rights and duties of all children, and third, the Code states that it is the responsibility of the State to provide adequate and equal protection to all children, since the violation of their human rights is a national problem, just like poverty and unemployment.

In brief, the Code for Childhood was created as a response to the international obligations undertaken by Honduras when ratifying the Convention on the Rights of the Child. The rest of the legislation was reformed pursuant to the doctrine of integral protection. Also, in October 1993,¹⁰⁶ as another step towards proper implementation, the National Commission for the Coordination of the Rights of the Child was created to ensure compliance with the main principles of the Code.

c) Programs supporting street children's human rights

The Committee for the Child in San Pedro (*Comité San Pedrano del Niño*) organizes a broad and helpful program to give street children an opportunity for a better life. They are received into the program, which provides them with a home and a workplace, so that they can become responsible men and women in their community. This program's half-way house is known as "the Children's Hostel" (*La Posada del Niño*) and has a shelter with a dental clinic, donated by the International Hospital for

¹⁰⁶

ILO-IPEC, *supra* note 80 at 55.

Children in Louisiana, United States of America, and a medical and psychological clinic with a pharmacy, nurses and twelve volunteer doctors.¹⁰⁷

A series of workshops are available which promote arts, crafts, games and recreation, education, guidance, discipline and love. To join this program and receive its benefits, children must be drug-free and unarmed. After they decide to stay in this "Children's Hostel" the staff learns about their family, tries to unite them again, and in the alternative looks for other relatives or other institutions to place them in a loving home. This program has been in operation for eight years, and has approximately helped two thousand children.

2. NICARAGUA

a. General Situation of Human Rights

The current constitution was created in 1986-1987 during the Sandinista regime.¹⁰⁸ The Constitution provides a complete protection of human rights. For instance, Article 46 recognizes (at the constitutional level) the protection of human rights

¹⁰⁷ Amparando el Futuro, online: Comité San Pedrano del Niño Homepage <<http://www.honduras.com/children/>> (date accessed: 20 August 2001).

¹⁰⁸ In 1934 Somoza killed Sandino and his men, and in 1936 he organized a coup d'état. Somoza ruled the country as a dictator and was killed in 1956. His sons Luis and Anastasio continued in power until 1979, when a popular revolution - lead by the Frente Sandinista - overthrew the last Somoza. The Sandinistas reformed the state based on the concept of popular democracy. They created strong links with Cuba and the Soviet Union. The North Americans organized the dissidents into a guerrilla army known as the "contras" and financed them. In 1984 the Sandinistas held elections and were victorious. In 1989 the Sandinistas and contras began negotiations in order to end the war. In 1990 another election was held and the Sandinistas were defeated by a coalition of opposition parties led by Violeta Chamorro. "Doña Violeta" brought peace to the country and initiated a process of economic reform designed to end inflation and to change the role of the state in economic affairs. In the elections of 1996 the liberal Arnoldo Alemán became president.

A. Bravo, Where old laws overshadow a new constitution , online: *Centre for Constitutional Rights in Nicaragua* <<http://www.ms.dk/Kampagner/Old/grundlov/constitution/nicaragua.htm> > (date accessed 2 August 2001).

as well as the full array of duties and benefits set forth in the Universal Declaration of Human Rights and other related conventions. However, the real situation is different. In the case of economic and social rights, the Constitution mentions the rights to health and housing, both of which a large percentage of the population lack. There has been no real progress in these areas, although efforts have been present and noticeable.

b) Responses to the Improvement of Children's Human Rights Protection

The Convention on the Rights of the Child was signed and ratified by the government of Nicaragua in April 1990.¹⁰⁹ It attained constitutional status in 1995 through a process of amending Article 71 of the Constitution.¹¹⁰ After signing this Convention, Nicaragua started a series of actions at the international and national levels.

Nicaragua has adopted the World Declaration on the Survival, Protection and Development of Children and the Plan of Action for the period of 1990 to 2000, signed at the World Summit for Children in New York. On the basis of the Declaration, Nicaragua started to organize the National Plan of Action for Human Development, Children and Youth. At the regional level, Nicaragua participated in the Sixteenth Meeting of Central American Presidents, at which national plans of action for the protection of children were reviewed and shared. The outcome of this conference was the adoption of a document known as the Agreements of Santiago de Chile.

¹⁰⁹ National Commission for the Promotion and Defence of the Rights of the Child, "Report of the State of Nicaragua complying with article 44 of the Convention of the Rights of the Child" (1998), online: Office of the United Nations High Commissioner for Human Rights Homepage <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.65.Add.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.65.Add.4.En?Opendocument)> (date accessed 10 July 2001) [hereinafter "Report of the State of Nicaragua"].

¹¹⁰ *Ibid.*

One of the most important efforts made by the Nicaraguan government to comply with the principles in the Convention on the Rights of the Child has been the elaboration of a national plan for the protection of children. This plan of integral care for children and adolescents includes four types of policies for children.¹¹¹ The first policy is to provide access to health care, education, and food to every child in Nicaragua, without any kind of discrimination or exceptions. The second part of the plan is a social policy supporting people who live in conditions of extreme poverty and who need extra help to improve their standard of living. The third is aimed at children who need a special type of protection. These are usually programs for abandoned children, victims of violence, street children, abused children and others in similar situations. Finally, the fourth policy is a project to protect the rights of children accused of having broken the law or committing crimes. The intention of this plan is to create an effective juvenile justice system, which defends the due process rights of children.

All of these policies and strategies are part of the new Code on Children and Adolescents. This Code includes principles such as freedom of expression, equality, the best interest of the child, family life, proper development of the child, and protection of all rights, all in accordance with the Convention on the Rights of the Child. Also, one of the most important provisions of the code states that childhood extends from ages zero to thirteen, and adolescence up to eighteen.¹¹² The approach adopted by the state of Nicaragua when creating the new Code and its policies was based on the need to relate social policies to legislation, so that both can work together simultaneously.

¹¹¹ "Report of the State of Nicaragua", *supra* note 109.

¹¹² *Ibid.*

A new Labour Code was also implemented. In this new Code, and for the first time in the Republic of Nicaragua, a special title was incorporated regulating child labour in a group of nine articles. It deals with the rights of children at work and inspection procedures, establishes the age of fourteen years as the minimum age to work, and sets the legal age for entering into a labour contract at sixteen years.¹¹³

Also, a series of institutions were created in order to carry out plans, policies and projects proposed by Nicaraguan government authorities. Some of these were the Office of the Attorney General of Human Rights, the Attorney General for Children, a Permanent Commission for Women, Children, Juveniles and the Family (1992), the National Commission for the Promotion and Defence of the Rights of the Child (1994), the Commissariat for Women and Children (1993-1997), the Initiative of Major Friends and Defenders of Children and the Nicaraguan Fund for Childhood and the Family (FONIF) in 1995.¹¹⁴

Even with a new Labour Code and all of these administrative developments, Nicaragua's Ministry of Labour in the 2000 authorized a new policy which allowed children twelve years and older to work on coffee plantations. As discussed, Nicaragua has otherwise made great efforts adapting and creating legislation to protect the rights of the child preventing child labour. This authorization from the ministry, however, violates the Constitution, the Code for Children and Adolescents (which prohibits employment of children in any type of job), the Labour Code (minimum age for working is 14 years) and violates various international treaties that have been signed and adopted,

¹¹³ "Report of the State of Nicaragua", *supra* note 109.

¹¹⁴ *Ibid.*

including the obligations set forth in international treaties of the International Labour Organization (ILO) and UNICEF.

Statements from the Human Rights Ombudsman's Office opposed this ruling: "The participation of minors in harvesting coffee is part of a culture that goes against human rights, since it limits the rights to education and recreation of minors."¹¹⁵ Some defend the employment of children in plantations because they say it helps families meet their basic needs. However, picking coffee is not a safe job for children. They have to carry large sacks and baskets of products, and walk long distances in the sun or rain, depending on the season. The greatest irony of this ruling is that "the Ministry of Labour leads the National Commission to Abolish Child Labour in Nicaragua."¹¹⁶

Finally there is another situation that violates internal and international standards in Nicaragua. Some articles in its Penal Code constitute grave violations of the rights of the child. This text does not meet the provisions of the Convention on the Rights of the Child, ratified by the government in 1990, which establishes that a person is a minor until he or she is 18 years old.¹¹⁷ The Penal Code states that a person is an adult when he or she turns 15 years old. Judges make no distinction in their judgments between offences committed by adults or by children. Children are sentenced from six months to 25 years. This problem is illustrated by the 300 minors who are jailed in adult prisons throughout

¹¹⁵ Nicaragua: Situation worsens for children in Nicaragua, online: Institute for Global communications Homepage <<http://www.igc.org/igc/pn/hl/1000411275/hl13.html>> (date accessed 8 October 2001)[hereinafter Children in Nicaragua].

¹¹⁶ *Ibid.*

¹¹⁷ Street Children in Nicaragua: An Overview, online: Casa Alianza Nicaragua Homepage <www.casa-alianza.org/EN/about/offices/nicaragua/children.shtml> (date accessed: 25 August 2001)[hereinafter Casa Alianza Nicaragua].

the country, violating international standards that require states to provide separate juvenile facilities.¹¹⁸

c) Programs for the Protection of Street Children's Human Rights

Casa Alianza Managua in Nicaragua, also working in Guatemala and Honduras, opened in August 1998. Its Crisis Center can accommodate up to twenty six boys and eight girls from fourteen to eighteen years old.¹¹⁹ It provides the following services: family reintegration, psychological therapy, medical services, a shelter, a drug rehabilitation program, and a program for teen mothers who have had babies and are in difficult conditions.

There are also private programs, such as the "Quincho Barrilete", and the "Las Chicas Program". The first was started by an Italian educator named Zelinda Roccia in 1991, and is a recovery program for street children who are addicted to intoxicants, such as sniffing glue.¹²⁰ The services include rehabilitating boys to re-enter society, providing medical attention, and urging children to attend school. This program removes many children from violent streets.¹²¹ The second program focuses on children in the outskirts of Managua, Nicaragua's capital. The program aims to prevent drug addiction in girls (mainly addiction to glue) and places them in workshops that teach them skills to become

¹¹⁸ Casa Alianza Nicaragua, *supra* note 117.

¹¹⁹ *Ibid.*

¹²⁰ Street Children in Nicaragua, online: Pangea Homepage <www.pangea.org/street_children/latin/nicaragua.htm> (date accessed: 23 July 2001). The project was named after an eight year old boy who lost his parents and his home in Managua's 1972 earthquake and managed to sustain and feed his family himself by selling kites.

¹²¹ *Ibid.*

self-sufficient, such as sewing and baking, which can help them start a new, healthy and safe life off the streets and as faraway as possible from the threats, dangers and abuses found in these type of living, where they have no protection at all from anybody.

3. COSTA RICA

In general, Costa Ricans enjoy all individual rights and freedoms. The Government respects the human rights of its citizens, and “the law and judiciary provide effective means of dealing with individual instances of abuse.”¹²² However, the judicial system is very slow, especially with criminal cases, which results in inadequate periods of pre-trial detention for some alleged criminals.

a) General Situation of Human Rights

Although the Government is committed to children's rights and welfare through well-funded systems of public education and medical care, recently there have been investigations to determine whether the resources for children have been administered properly. With respect to the administration of public funds

“the Government spends over 5 percent of GDP on medical care. In June [2001] the Legislative Assembly passed a constitutional amendment increasing spending on education from 4 percent to 6 percent of GDP. The country has a high rate of literacy (95 percent) and a low rate of infant mortality (13 persons per 1,000). The law requires 6 years of primary and 3 years of secondary education for all children. There is no difference in the treatment of girls and boys in education or in health care services”.¹²³

¹²² Costa Rica Country Report on Human Rights Practices for 1997 by the Bureau of Democracy, Human Rights and Labour, online: UD Department of State Homepage <http://www.state.gov/www/global/human_rights/1997_hrp_report/costaric.html> (date accessed: 1 September 2001)[hereinafter Costa Rica Report].

¹²³ *Costa Rica Report*, *supra* note 122.

The autonomous National Institute for Children (PANI) monitors implementation of the government programs for children. In December 1996, the Assembly passed a law strengthening PANI's role in protecting and promoting the rights of children. Its role is now focused on implementing the United Nations Convention on the Rights of the Child.

In recent years, the PANI has increased public awareness of crimes against children. In 1996, the most recent year for which statistics are available, the Institute intervened in "3,161 cases of abandonment, 1,030 cases of physical abuse, 1,195 cases of sexual abuse, and 98 cases of psychological abuse of children."¹²⁴ Traditional attitudes tend to treat such crimes as having low priority, making it more difficult to access justice before the corresponding tribunals.

In February 1996, the PANI created a comprehensive plan to improve the living conditions of poor children. According to this Institute, "17 percent of children between the ages of 5 and 17 are involved in income-producing activities, and 25,000 children work rather than attend school."¹²⁵ However these plans change each four years with little follow-up from the entering administration in the government.

The Government, police, and representatives of the United Nations Children's Fund acknowledge that child prostitution is a growing problem. Although there are no official statistics, the PANI has stated that street children in the cities of San José, Limón, and Puntarenas are at the greatest risk. The PANI estimates that as many as 3,000 children in metropolitan San José are involved in prostitution. The Institute has launched

¹²⁴ *Costa Rica Report, supra* note 122.

¹²⁵ *Ibid.*

a campaign against child prostitution in cooperation with police officers, taxi cooperatives, airport immigration authorities, and hotel managers.¹²⁶

The Constitution provides special employment protection for women and children. It establishes a minimum working age of twelve years old, and has special regulations for workers under the age of fifteen. Laws prohibit forced child labour, and the Government effectively tries to enforce this prohibition. Children between 15 and 18 years of age can work a maximum of seven hours daily and forty-two hours a week, while children between the ages of twelve and fifteen can work a maximum of five hours daily and thirty hours a week.¹²⁷ The PANI, in cooperation with the Labour Ministry, generally enforces these regulations in the formal sector. Even so, child labour is still an integral part of the large informal economy, and “according to a PANI survey, about 152,000 children worked during 1995, of whom nearly 93,000 had prior PANI approval.”¹²⁸

b) Responses to the Need for Improvement of Children’s Human Rights Protection

Costa Rica ratified the Convention on the Rights of the Child, under law number 7184, on July 18th, 1990. According to Article 7 of the Constitution, this Convention has a higher status than domestic laws. The Convention’s entry into force in Costa Rica demonstrated a change of perspective by considering children to be subjects of the law

¹²⁶ *Costa Rica Report, supra* note 122.

¹²⁷ *Ibid.* After two adolescents died from chemical poisoning while working on banana plantations in 1993, the authorities prohibited employment of youths under the age of 18 in the banana industry.

¹²⁸ *Costa Rica Report, supra* note 122.

and not as objects of protection as they were treated under the old regulations. Under the new legal approach, children's needs are actionable and enforceable rights.

After considering several proposals made by the government to regulate the protection of children and adolescents, two documents were approved by the Costa Rican Congress. The first one was a new Code for Children and Adolescents (Law 7739) approved in December 1997, which entered into force on February 6th, 1998. The second document is the actual Law for the Protection of the Adolescent Mother (Law 7735), which entered into force in January 1998.

The Code for Children and Adolescents deals with topics such as public social and economic policies and individual rights of children. To pursue its goals it creates the "National Integral Protection System"¹²⁹ in charge of guaranteeing the integral protection of children through its constituent institutions. The three organizations for the protection of minors are:¹³⁰ the National Council for Childhood and Adolescence and the different institutions linked to it; the Boards of Protection; and the Defence and Tutelage Committees of the Rights of Children and Adolescents.

The National Council for Childhood and Adolescence is part of the Executive branch of the government, and constitutes a forum for deliberation, unification, settling differences of opinions, and coordination between the executive and other government institutions, such as the Ombudsman for Children.¹³¹ The Council's function is to assure

¹²⁹ ILO-IPEC, *supra* note 80.

¹³⁰ UNICEF, *supra* note 25 at 5.

¹³¹ M. Freeman, "Beyond Conventions-Towards Empowerment" in *The Moral Status of Children: Essay on the Rights of the Child* (The Hague: Kluwer Law International, 1997) 63 at 77. An ombudsman for children was first created, established permanently and is still in operation in three countries: Norway, New Zealand and Costa Rica. "It by no means follows that the same model is

that the formulation and execution of public policies are consistent with the doctrine of integral protection of the rights of the child, and comply with the guiding principles of the new Code for Children and Adolescents.

The Boards of Protection are in charge of local administrative procedures when a child needs to be protected as a result of an act or threat of violence, aggression, or abandonment, or any other similar case. As stated before, these are local bodies with the duty of taking precautionary, administrative, and other protective measures to avoid placing the child in any position of danger. This approach complies with the policy of decentralization and the new idea of non-judicial conflict resolution, which takes place outside the Judicial System.

The Defence Committees are community associations dedicated to ensure and supervise that the rights of every child are respected within their jurisdiction. Moreover, they are responsible for addressing the special needs of children, and act as mediators to resolve disputes involving children and adolescents in their geographic area.

The Code regulates, as a fundamental human right of children, the right of access to justice and due process of law, within the framework of the principles of the doctrine of integral protection and the constitutional guarantees to respect the human rights of every human being. The ratification of the Convention of the Rights of the Child and the creation of a new national Code for Children provides a new approach to children rights by framing their needs in terms of enforceable rights in Costa Rica.

c) Programs for the Protection of Street Children's Human Rights

The creation of the National Permanent Working Commission¹³² in 1996 to combat commercial sexual exploitation of children under eighteen years of age, is the result of efforts made by several institutions in the country.

In order for the programs of this Commission to succeed, it coordinates, monitors, reflects, discusses and analyzes proposals from the different national institutions, international organizations and other groups involved in it. The Commission works within a theoretical and conceptual framework that guides its actions and defines the desired objectives. It works with a clear understanding of the problems to be prevented and addressed, regarding the commercial sexual exploitation of children. The four main aspects of this problem are child and juvenile prostitution, pornography, sexual tourism and trafficking of minors for illegal purposes.¹³³

The "plan of action" of this project covers several dimensions in society:

- 1) Political Dimension: Authorities have to take a clear position, and show political will to solve and eradicate the problem.
- 2) Legal Dimension: The government must ensure that laws exist to punish the perpetrators of commercial sexual exploitation crimes.

¹³² The Commission is presently composed of the Secretaria Técnica de Proinfancia y Juventud, Patronato Nacional de la Infancia, Ministry of Security and Government, Municipality of de San José, Ministry of Health, Departament of the Control for HIV/AIDS, FUNDESIDA, Centre for the Woman and the Family, Ministry of Tourism (ICT), Defensoría de los Habitantes (Ombudsman), Instituto del Niño de la Universidad Nacional, Unión de Instituciones Privadas de Atención a Menores (UNIPRIM), Defensa de los Niños Internacional (DNI- CR), Fundación PANIAMOR, PROCAL, ILPES, and Fundación de Lucha Contra la Prostitución Infantil (LUCOPI), IPEC/ILO, UNICEF.

¹³³ ILO-IPEC, *supra* note 80.

- 3) Preventive Dimension: The government must take all measures necessary to attack the roots of the problem and train communities in detecting the wrongdoers.

One of the program's sub-projects is a Cooperation Plan that the Commission signed with UNICEF, in which it commits itself to launching a public campaign explaining the legal consequences of sexual commercial exploitation. This campaign is intended to educate the public about the physical and psychological damage suffered by children who are sexually exploited.

Other similar programs include the creation of non-governmental organizations. "Preventing Violence"¹³⁴ is the first program that the institution PANIAMOR for children has monitored. The main objective of the project is the development of human resources that can help prevent violations of the rights of the child. The organization has given a large series of workshops, in which health care professionals, teachers, social workers, personnel from the justice system, parents, children and adolescents have participated. The program has four basic themes: prevention of abuse against boys and girls, justice for children, professional strengthening and self-improvement and orientation.¹³⁵

¹³⁴ Paniamor Programs for Children, online: Paniamor Homepage <<http://www.paniamor.org.cr/revista7.shtml#7>> (date accessed: 30 August 2001).

¹³⁵ *Supra* note 68.

The second program is "Political Incidence" which promotes a process of societal reflection regarding the treatment of children, and the recognition of the child as a subject of rights and duties.

The third program created by PANIAMOR is the "Social Exclusion Project". The objective of this project is to educate and train poor adolescents to be able to insert them into the formal labour market. This program targets adolescents between the ages of thirteen and eighteen years only.¹³⁶ Its five year plan aims to help a total of 3,500 adolescents from the "Guidos" area in San José (one of the poorest areas in the capital) and the rural area of Cot in the province of Cartago.

CHAPTER 3. Comparative Analysis of Central American Responses to Street Children. *Villagrán et. al v. Guatemala*

When a State fails to respond appropriately to alleged human rights violations against street children or other similar situations, certain international bodies¹³⁷ possess the capabilities to provide the proper response to the victim's case. After all domestic remedies have been exhausted within a State, individuals are able to access justice and have the right to a due process of law at the international level.

The failure of a State to respond could be of diverse nature and results from different situations. It could result from a lack of government initiative to carry out proper investigations or to provide judicial guarantees; or, on the other hand, it could be

¹³⁶ *Supra* note 68.

¹³⁷ For example, regional human rights tribunals such as the Inter-American Court of Human Rights; or other international bodies like the United Nations Human Rights Committee or the Inter-American Commission on Human Rights, part of the Inter-American System.

the existence of inadequate domestic legislation and an improper judicial system that is unable to respond fairly to human rights violations. *Villagrán et al. v. Guatemala*, provides a perfect example of effective recourse to an international body. In this case, the absence of a Code for Children and Adolescents definitively increased the magnitude of the offences against them and has taken this particular case on street children to the Inter-American Court of Human Rights.¹³⁸ This regional tribunal was the international forum where the victims' family members, supported by non-governmental organizations, obtained a fair trial and due access to justice, among other judicial guarantees.

In several of its judgments, the Inter-American Court of Human Rights has established the obligation of the State to "design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities."¹³⁹ This clearly shows the interdependence and connectivity between Articles 1, 8 and 25 of the American Convention in establishing guarantees to protect rights enshrined in an international instrument through domestic legislation.

The similarity between the facts of the present case (*Villagrán et al. v. Guatemala*) and the content of these three articles present a clear example of why this thesis has been structured within the scope of a model of *UPPP*². The provision of prevention, protection, and punishment must be guaranteed in the domestic laws of each

¹³⁸ The Inter-American Court of Human Rights (with its seat at San José, Costa Rica) is an autonomous judicial institution with the main purpose of applying and interpreting the American Convention on Human Rights of 1969 in those cases in which States have accepted and recognized its jurisdiction. When the Court finds that there has been a violation of rights protected by the Convention, this Tribunal is able to rule that the injured Party be insured the enjoyment of his right or freedom. It can also rule a fair compensation when it deems appropriate. I.A.C.H.R. Advisory Opinion OC-1/82 of September 24, 1982. "*Other Treaties*" Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights). Also see: I.A.C.H.R. Advisory Opinion OC-16/99 of October 1, 1999. "*The right to information on consular assistance in the framework of the Guarantees of the due process of law*".

¹³⁹ *Villagrán et. al v. Guatemala*, *supra* note 171 at para. 237 [hereinafter *Villagrán, Merits*].

country. International human rights laws and principles in this case responded effectively to a violation of street children's human rights through the involvement of the Inter-American Court of Human Rights as a regional responsive organ, that provided recourse to justice when the domestic authorities failed to properly respond.

Section 1. Analysis of State's Responses In Central America

Even when many approaches exist for a single problem, governments usually find themselves confined to only one option due to political and economic limitations. This section purports to reinforce the importance of an active role for government entities in the eradication of violations against street children's rights. Actors that violate the human rights of street children do not only include those that actually commit violations, but also those who remain silent, passive and indifferent and refuse to fight the injustice before them. The State bears the responsibility to enact or reform laws responding to the serious realities of their communities, one of which is the phenomenon of street children.

A. The Notion of a Code as a Means for Protecting Children's Human Rights

The notion of a code for children and adolescents in Central America seems to have grown stronger after the ratification of the Convention on the Rights of the Child. This is significant because a code is a country's principal instrument for shaping the ethical and social environments necessary for child protection as well as ensuring they are included within the legal framework. A code obliges government authorities and the community in general to study, research, and define the problems of children and document the reality of the on-going violations of their human rights. Governments must consult the diverse sectors of society in order to realize full participation for the creation

of the Code. The process of creating a Code seems to bring about an inherent sense of public awareness that must start with a complete *understanding* of the problem, necessary for a future solution.

It is also important to emphasize that Codes are approved by the legislative branch itself, composed of members elected democratically and directly by the citizens of Central American countries. They have elected these deputies to represent their interests and decide on their behalf about issues concerning the nation and its communities. If a Code is approved, the citizens usually respond by supporting it. A code for children tackles a large array of interests, positions and delicate issues that, if approved, will bring about positive social, political and cultural changes to the general situation of children.

Codes cannot and should not be uniform for all countries. Each nation has to assess how best to protect the rights of the child based on their other laws and their own circumstances. The Code has to protect all children integrally, emphasizing the most critical problems that each country faces as a result of historical processes in the political, economic and social areas. To do so, countries should concentrate on the particular areas in which they seek the most substantial improvement. For example, a country may evaluate its particular situation and decide to focus on education, which could be its greatest weakness.

A code, as a national legal instrument, can achieve its objective only if it is realistically applied to the daily life of children. Enforcement remains the key element for a code to be successful. In other words, codes need to include "mechanisms of enforcement," that are available and accessible to every person in the community, including children and adolescents. Means of enforcement may include local offices or

institutions, in which claims of violations can easily be made and receive a proper response. Also, it must be possible for anyone to report violations against children's human rights at any time.

The protective provisions included in a Code can help citizens understand the complexity of children's rights and the need to become involved in the protection of these rights at a local level. Codes transform the mentality of the people by helping them value the social, economic and political needs of children as creating rights.

A Code for Children and Adolescents, as seen in Central America, reflects the values and issues confronting a society. Codes address complex problems that these societies face in regard to their children. Getting communities involved achieves positive results in protecting the rights of the young generations of Central American nations.

For example, the existence of a Code for Children and Adolescents in Nicaragua has facilitated the fight against violations and strengthened arguments for prosecution when domestic laws are being broken. "A certain level of political maturity on the part of the government is necessary to recognize the seriousness of the problem, as opposed to the ostrich syndrome," said Bruce Harris, the chief director of a child advocacy group in Latin America working on human rights.¹⁴⁰ Codes for Children represent positive responses to the defense of children's rights in Latin America, but must be complemented by other national laws in order to reach positive and effective results. Justice can be realized only when properly codified, well-implemented and properly applied to children and adolescents that are either victims of violations, or are law-

¹⁴⁰ Covenant House Managua, Nicaragua Services, online: Casa Alianza Homepage <http://www.covenanthouse.org/loca_nicaragua.html> (date accessed: 3 September 2001).

breakers themselves who deserve certain rights, conditions and treatment during their detention and the processing of their cases.

Furthermore, the creation of a Code for Children presents an important vehicle for adapting national laws to the international standards established by the Convention on the Rights of the Child and other agreements like the Beijing and Riyadh Rules. Codes in Central American countries as Nicaragua, Costa Rica and Honduras reconcile international and national laws, and have raised certain public awareness about the best interests of the child. A useful and effective code regulates the fundamental rights of all children and adolescents without making any distinctions or hierarchies. These codes should ideally focus not only on each country's limitations and weaknesses, but also on the vital importance of integral development and the protection of the child. A code represents a positive step towards the protection of children's rights because it shows in one document the multidimensional spectrum of problems that surround children, and also deals on many levels with those responsible for the offences against children's rights or the failure to protect them. As Central Americans traditionally blame the family for such violations and hold them responsible for their children's needs, codes present a vital method for transferring the protection of children and adolescents from the private family sphere to that of the public where the whole community has responsibility.

Finally, codes create a new awareness of children's rights at the national level based on the doctrine of integral protection and on the *UPPP*² approach, as described in this thesis. This culture of awareness focuses on the ethical, philosophical and legal issues that must be addressed by this new approach.

B. Need to Adapt National Laws and Consequent Implementation

In order for Central American states to achieve a successful reform of domestic laws in order to meet international standards and implementation, they must begin with two basic premises: First, there must be a well-organized independent judicial system, based upon principles of fairness and impartiality. Second, there must be national or regional policies for effectively protecting children.

A well-organized judicial structure should exhibit several characteristics. These characteristics require that all citizens have access to the judicial system without discrimination. This requirement opens the door to justice for street children, who in the majority of the cases are treated unfairly because they are considered to be “criminals,” or “gang members” due to their low socio-economic status. The judiciary also needs to operate with efficiency. It must carry out proper investigations of cases and follow the procedures in an orderly process, resolving cases in a timely manner that will avoid delays that damage the credibility of the system. The resolution of cases and disputes should be based on legal standards and values, and operate with transparency. The fight against corruption in the judicial system is one of the most complex and pressing issues in the context of street children. Policemen, judges, and lawyers have been involved in the violations of rights of street children in Central America. However, their position, power and influence has allowed them to go unpunished. All branches of government must be held accountable for these actions. Many judges have stood up for street children’s human rights and have consequently received threats encouraging them to ignore violations and be silent about the problem.

The different countries in the region must strive to effectively implement these requirements and guarantees within the judiciary. Until then, neither the rule of law nor

the autonomy of the courts will assure a universal respect for children's human rights. These necessary conditions are set forth in an interesting and recent resolution of the General Assembly of the United Nations: the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. It states in article 9(2) that:

... everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent judicial or other authority established by law and to obtain from such authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.¹⁴¹

This document contains an important summary of the rights to justice, due process of law, and fair compensation. The concept of due process refers here to the way in which the state protects all rights, including an entitlement to a fair trial and/or public hearing. Such a failure of due process constitutes one of the main weaknesses found in the cases of street children in Central America. This problem is severe in Guatemala, where violations to street children are numerous. According to the Legal Aid Office of Casa Alianza in Guatemala, a non-government organization working in favour of street children, "there were 392 cases presented to the correspondent judicial authorities. From these, 47% were filed due to lack of investigation or lack of interest from the parties involved; 44% were in the investigation phase; 4% was filed by orders from the Public

¹⁴¹ *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res.53, UN GAOR, 53rd Sess., UN Doc. A/53/144 (1999).

Prosecutors and another 4% (17 cases from 392) were concluded (most absolved the accused).”¹⁴²

From the above statistics, it seems that the problem is not necessarily a failure to recognize human rights, but a difficulty in reforming domestic laws to ensure adequate responses to such violations. Every country in Central America (except El Salvador and Guatemala) has created a new Code for Children and Adolescents along with supervisory institutions, evidencing a recognition of children’s rights. However, problems persist in the promulgation and implementation of the law. One example is the problem resulting from the attempted adaptation of the penal code in Nicaragua to the doctrine of integral protection. This code considers a person to be an adult starting at fifteen years of age. This clearly contradicts the Convention on the Rights of the Child, which defines a child as any person eighteen years old or younger, as well as Nicaragua’s own Code for Children. The obstacles presented in the reform of national laws is thus a problem of providing adequate control and enforcement mechanisms. Central American countries have made some advances in creating new laws or amending old ones, but they must show more improvement in practice and not just in theory.

A second example illustrates Guatemala’s failure to protect children’s rights under the doctrine of integral protection. Its code is controversial and has not yet been approved by the Congress. There is no political ambition to do so, and its implementation will continue to be far from reality until pressure from the public is felt.

States that currently have national laws in force that are incompatible with the Convention of the Child must carry out a comprehensive study of the changes, reforms or amendments needed in order to comply fully with the commitments accepted upon

¹⁴² *Supra* note 3 at 47.

ratification of this instrument. A state cannot invoke their own domestic law as a justification for avoiding its international commitments. Many times, countries face problems and obstacles in both preventing and solving violations (procedural limitations), as well as addressing the substantive issues involved. Although states can encounter some legal, political, economic or ideological obstacles to enforcing children's human rights, as well as human rights in general, their inaction is not justified on those grounds. Local problems in a country, such as extreme levels of poverty, external debts, civil wars, natural disasters or economic crisis, do not allow a state to avoid its obligations acquired in Conventions. There are always alternatives available to meet with social needs of street children. Numerous financial institutions have funded countries with difficulties in meeting international obligations or developing plans of social action, especially if these efforts are directed towards street children.

The proper reform and implementation of national laws constitutes a necessary prerequisite for meeting the international obligations provided for in several treaties and conventions, in particular the focal treaty related to children, the Convention on the Rights of the Child. Such implementation at the national level is included in the "protection" step of the "UPPP²" effort set up in this thesis, which requires States to implement international norms in order to prevent violations and thus protect and secure the rights of the child, either by creating a completely new code for children, by adapting existing laws to the principles of the Convention on the Rights of the Child, or by using both methods together, as a mixed response to the incompatibilities between domestic law and international responsibility commitments. However, *understanding, preventing and protecting* is not enough to secure street children's human rights. It is also necessary to *provide justice and to punish* those responsible for violating human rights, in order to

comply with the responsibilities derived from principles of children's international laws and the doctrine of integral protection, such as the "*best interests of the child*" and "*children as subjects of rights and duties*."

Section 2: Basic Facts in *Villagrán et. al v. Guatemala*.¹⁴³ State Responsibility for Violations to Human Rights of Street Children in Central America. The Need for a Response from the State.

The realities of abuses against street children corresponds closely with a series of international and regional norms and guarantees that exist to protect the rights of street children, as outlined in the first two chapters of this thesis. In order to realize a complete analysis of the complexity inherent to the violations occurring against street children in Central America, it is necessary to consider *Villagrán et. al*, which sparked deep concern in the national and international human rights communities.

According to the petition presented before the Inter-American Court of Human Rights in San José, Costa Rica, in June 15, 1990, a massive violation against street children's rights occurred in the area of "Las Casetas" in the city of Guatemala. The petition before the Court alleged that Guatemalan police officers¹⁴⁴ were responsible for the kidnapping, torture (the bodies were discovered in an area called "Bosques de San Nicolás," with their tongues cut off, their ears were cut, their eyes burned) and execution of Julio, Jovito, Henry, Federico and Ansträum.

¹⁴³ *Villagrán et al.* Case (Guatemala) (1999), Inter-Am. Ct. H.R., Ser.C No.32. Also referred to as "Inter-American Commission of Human Rights v. State of Guatemala."

¹⁴⁴ The police officers were arrested only to be released days later, even though the bullets that killed the children, perfectly matched with those of the police officers' weapons. In addition, two of the most important witnesses in favour of the children were killed; one was stabbed and the other died suddenly in a car accident. Casa Alianza Guatemala, online: Casa Alianza Homepage <<http://www.casa-alianza.org/ES/about/guatemala/html>> (date accessed: 20 July 2001).

Due to the inefficacy of the Guatemalan judicial system to properly investigate and solve this criminal case, and the failure to obtain justice from the courts after having exhausted all domestic procedures, two non-governmental organizations, the Center for Justice and International Law (CEJIL) and Casa Alianza-Covenant House, decided in 1994 to sue Guatemala for the death of these street children. They petitioned the Inter-American Commission on Human Rights,¹⁴⁵ calling for a search for justice, investigation of the children's deaths and the punishment for the worst case of violations of human rights of street children in Guatemala.¹⁴⁶

The Commission spent three years trying to obtain a friendly agreement between Guatemala and the NGOs acting on behalf of the street children. This friendly agreement forms part of the procedure established in the American Convention of Human Rights in Article 48(f) of Section 4. It states that, "the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly agreement of the matter on the basis of respect for the human rights recognized in this Convention."

However, since the state of Guatemala refused to accept responsibility for the violations of human rights against these five children, or to meet with the petitioners to reach a friendly settlement, the Commission sent the file to the Inter-American Court of Human Rights in San José, Costa Rica in 1997. The application submitted by the Commission stated that Guatemala had violated the Inter-American Convention of Human Rights, and that consequently the case should be examined, processed and

¹⁴⁵ The application was submitted to the Inter-American Commission on Human Rights on September 15, 1994; and it was presented before the Inter-American Court on January 30, 1997.

¹⁴⁶ "Casa Alianza Celebra Condena de la Corte Interamericana de Derechos Humanos al Estado de Guatemala," online: Casa Alianza Homepage <<http://www.casa-alianza.org/ES/Imn/docs/199991203.0320.htm>> (date accessed: 21 March 2001).

resolved by the Court. After ratifying the American Convention of Human Rights on May 25, 1978, and recognizing the compulsory jurisdiction of the Court on March 9th 1987, Guatemala accepted this jurisdiction (of the Inter-American Court) over all of its domestic cases.¹⁴⁷

In January 1999, witnesses and expert witnesses for both parties appeared before the Court in a public hearing. The petitioners of the case requested fair compensation for the families of the street children who were murdered. On June 8th 2001, the Inter-American Court ordered Guatemala to pay reparations for damages in the amount of US\$508,865.91. These reparations included compensation for moral damages suffered by the families¹⁴⁸ and the legal fees of the plaintiffs. The court also requested that the State re-open the investigation of the murder, create a plan of action to protect street children that are forced to work in the streets, build schools named after each of the children killed during this massacre, implement measures and programs designed to protect street children, and educate its police corps in topics of human rights.

¹⁴⁷ "American Convention of Human Rights": online: Organization of American States Homepage <<http://www.oas.org>> (date accessed: 28 March 2001) [hereinafter American Convention]. The Convention has two additional protocols: The San Salvador Protocol, additional document on the protection of social, economic and cultural rights, subscribed in the OAS General Assembly Session in 1988; and the Protocol that relates to the abolition of the death penalty, subscribed in 1990.

¹⁴⁸ Jurisprudence from the European Court of Human Rights has made a step forward in the definition, interpretation and content of "cruel, inhuman and degrading treatment." In *Kurt v. Turkey*, the European Court stated that, "when fundamental human rights are violated, such as the right to life or the right to humane treatment, the persons closest to the victim may also be considered victims." This Court had the opportunity to analyze the condition of victims of cruel, inhuman and degrading treatment of a mother due to the illegal detention of a son, the gravity of the ill-treatment and the absence of information and access to justice in order to clarify the real facts of the case. In view of this consideration, the European Court concluded that this person (mother) had also been a victim and the State had responsibility for the violation of the right protected under Article 3 of the European Convention. The Inter-American Court adopted this same approach in regard to the street children's families in Villagrán in deciding upon fair compensation and declaring violations of Articles 5(1) and 5(2) of the American Convention, among others.

The Court found the State responsible of breaching its international obligation on the protection of children, by failing to ensure their rights and freedoms protected by the American Convention on Human Rights, the Convention on the Rights of the Child and the Inter-American Convention to Prevent and Punish Torture. The responsibility of the State of Guatemala in the “Street Children case” serves as a clear example of the social reality that needs to be effectively addressed. The situation that has been portrayed in this thesis guide the reader through a step by step analysis of what could and should be done by a State in order to protect their children. States must understand and accept the harsh realities that street children in their respective countries face, in order to be able to provide the proper measures of prevention and protection of children’s rights. The State also bears responsibility of creating and maintaining the necessary legislative and judicial mechanisms to provide adequate recourse to justice in cases of violations of children’s rights and to punish those responsible for committing these crimes. The following sections provide a short analysis of the violations present in *Villagrán*, supported by some comments on the judgement of the Court. These last sections of the thesis illustrate the consequences of Guatemala’s failure to take steps to eradicate the street children phenomenon. The first step requires that the mechanics of understanding, preventing, protecting, and punishing violations be put into practice within its national judicial system, under the *UPPP² model* set forth in this thesis, or any similar method that can evaluate and solve the problem.

A) Violation to the Rights to Judicial Protection and a Fair Trial

In Articles 8 and 25¹⁴⁹ of the American Convention the right to be heard by a fair and competent tribunal and the right to a prompt and effective recourse were violated by Guatemala when they failed to carry out the proper investigations¹⁵⁰ into the circumstances of the case, and accept responsibility for the protection of the rights of these children, through effective prosecution of these crimes within the domestic courts.¹⁵¹

The international responsibility of the State for any act or omission committed by any of its members in violation of rights protected in international treaties constitutes an important international principle, and its parameters are well defined by Article 8 and 25 of the American Convention. The Court has repeatedly established that the international procedure for the violations of human rights differs greatly from domestic criminal procedure laws. In the Paniagua Morales et al. Case, it stated that

¹⁴⁹ *American Convention, supra* note 147 at Article 8(1) (Right to a Fair Trial), which states that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature." Article 25 of the Convention (Right to Judicial Protection) states that: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such a violation may have been committed by persons acting in the course of their official duties."

¹⁵⁰ *Ibid* at Article 1. The American Convention establishes that the State is obliged to investigate and punish any violation of the rights protected by this treaty. This article titled as the Obligation to Respect Rights states that "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

¹⁵¹ In respect to this issue, the Court has previously established that "[t]his Court must decide in the present Judgment whether the facts demonstrated may or may not be imputed to the State. This calls for a detailed examination of the conditions in which a particular act or omission that impairs one or more of the rights enshrined in the American Convention may be attributed to a State Party and, consequently, calls into question its responsibility in accordance with the rules of international law." *Paniagua Morales et al. Case*, Judgment of 8 May 1998, Series C, Inter-Am. Ct. H.R., No.37, para.91.

[u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations.

According to the proven facts of this case, the State of Guatemala carried out several judicial proceedings; however, these proceedings did not include a proper investigation and failed to punish those responsible, thus violating Article 1 of the Convention. The investigation proved to be defective in two ways: "[F]irst, investigation of the crimes of abduction and torture was completely omitted. Second, evidence that could have been important for the due clarification of the homicides was not ordered, practiced or evaluated."¹⁵²

Some examples of the inadequacies of this investigation include the fact that "autopsies were incomplete,"¹⁵³ the "fingerprints of the corpses were not taken or preserved"¹⁵⁴ the bodies were not photographed completely, some witnesses were not summoned to make official statements, and there was no research conducted on the vehicle used, even though one witness provided license plates numbers.

From the analysis of these facts, the honourable Court has stated as one of its main considerations that

¹⁵² *Villagrán*, Merits, supra note 139 at para. 230.

¹⁵³ *Ibid.* at para.231.

¹⁵⁴ *Ibid.*

the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.¹⁵⁵

These children also suffered inhuman and degrading treatments that are prohibited under the umbrella of the Inter-American System of Human Rights and the American Convention, Guatemala has accepted the jurisdiction of the Inter-American Court.¹⁵⁶ Further, these violations can be analyzed through all the different instruments that comprise the Universal Human Rights System, but especially under the Convention on the Rights of the Child. However, we should not only see these crimes as violations against international human rights laws, both regional and universal, but as criminal acts that deprive children of their lives.

The following analysis of the rights violated against these street children will be divided into two parts: the violation "before" (pre-stage rights) and "after" the incident (post-stage rights). Before the incident, the children's rights were violated as a result of the lack of protection from the State, the family and the community at large; after the incident, their rights were deliberately violated by the perpetrators and the authorities. The violated rights protected by the American Convention on Human Rights include the right to personal liberty and security; the obligation of the State Parties to the Convention to respect the rights and freedoms recognised in this instrument; the right to life; the right to a humane treatment, including the right to have one's liberty, dignity, and physical,

¹⁵⁵ Villagrán, Merits, *supra* note 139 at para. 235.

¹⁵⁶ All countries in Central America have signed the American Convention of Human Rights.

mental and moral integrity respected; the right to a fair trial; and the right to judicial protection. Also, other rights protected in the Inter-American Convention to Prevent and Punish Torture were violated and will be further analysed.

B) Violation of rights prior to the incident: “the pre-stage violations”

As with any other minor or adolescent, street children’s rights are indivisible, and contain no hierarchies. They are all essential and they all complement each other to create a totality of rights for the integral protection of the child. Long before *Julio, Jovito, Henry, Federico and Anstrum* were murdered, signs of violations of their human rights had manifested themselves. Some of them had run away from home and had no family, others lacked shelter, food, and suitable health conditions. Even though they had been robbed of nearly all their rights no one had noticed until they were deprived of their life. Hence, the prior breaches of their economic and social rights had not been treated with importance, care or due diligence.

The five murdered children were either “children of the streets” or “children on the streets.” In other words, some were children without families or without any contact with them, so they spent their days wandering around in the city. Others were children who had families, but who, for different reasons, (lack of resources, absentee parents, single-mother difficulties or even possibilities of abuse, among others) left home for some days and then came back. Their fundamental right to a stable family environment was never met, contravening the Convention on the Rights of the Child.¹⁵⁷ The right to a

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Supra note 33. In its article 20, this international instrument states that:
1. A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. State parties shall in accordance with their national laws ensure alternative care

family includes the right to be raised and educated by “the nuclear family and to be separated from it exceptionally under serious circumstances, and only if that has been decided by a judicial and legal order.”¹⁵⁸

Although some of these children had a family, they were not being raised under the conditions necessary for their full and proper development, and the State was negligent in not defending their rights and preserving their innocence as children. The State should intervene when parents cannot provide the basic needs for a child, including minimum standards of food, housing and health services.¹⁵⁹ The Convention on the Rights of the Child provides for this basis requirements in Article 18:

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities, and services for the care of children.

3. State Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.¹⁶⁰

for such a child.”³ Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing, and to the child’s ethnic, religious, cultural and linguistic background.

¹⁵⁸ UNICEF, *supra* note 25 at 9.

¹⁵⁹ *Supra* note 33. The right to health is clearly established in the Convention on the Rights of the Child in its article 24, stating that: “State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and for the treatment of illness and rehabilitation of health...” The right to food and housing is immersed within the ‘right to adequate standard of living’ in article 26 ... “State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents ... with regard to nutrition, clothing and housing.”

¹⁶⁰ *Supra* note 33.

Further, in *Villagrán*, children were not receiving adequate education in their local schools. Instead they were in the streets, without supervision or acknowledgement of the dangers they could face. The Convention on the Rights of the Child stipulates that schools have a fundamental socializing role, because it is there that children learn how to live in community and in a “free society.”¹⁶¹ Two specific and important articles (Articles 28 and 29 of the Convention on the Rights of the Child) summarize the right to education, as well as the obligations that the State assumes to protect it. Article 28 states that “...Parties recognize the right of the child to education” and to achieve this right “on the basis of equal opportunity,” these states shall take measures, such as:

- a) “Make primary education compulsory and available free to all;
 - b) Encourage the development of different forms of secondary education, including general and vocational education...
 - c) Make higher education available to all...
 - d) Make educational and vocational information and guidance available and accessible to all children;
 - e) Take measures to encourage regular attendance at schools and the reduction of drop -out rates.
2. State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.
3. State Parties shall promote and encourage international cooperation in matters related to education...”¹⁶²

The first paragraph of article 29¹⁶³ of this Convention summarizes the objective of children’s and adolescent’s education and has the purpose of reminding States that

¹⁶¹ *Supra* note 33 at article 29d.

¹⁶² *Ibid.* at article 28.

¹⁶³ *Supra* note 33 at article 29. State Parties agree that the education of the child shall be directed to:

- a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;

children have the right to receive education on human rights, cultural values, and respect and care for the natural environment surrounding them. States seem to forget that “education for all” includes the key phrase “all.” Education should be guaranteed to street children, by setting up a means to provide assistance and support their families. If States consider they have no available funds to facilitate this goal, they should look for other viable alternatives to give these children the support to have a decent life. States possess the responsibility and duty to make the welfare of their children a priority within their budgets and agendas, as a central interest and concern.

The State cannot keep evading the problem of street children’s lack of education, which is closely related with their involvement in child labour, which is another right violated in the lives of Julio and the other kids. Children have the right to be protected from carrying out jobs that are prejudicial to their development in childhood. They should, instead, be developing motor skills and expanding their language and creative abilities in kindergarten and broadening their knowledge in primary and high school, where they belong at those respective stages of development. The Convention on the Rights of the Child dedicates Article 32¹⁶⁴ to the right of children to be protected from

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- b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national, and religious groups and persons of indigenous origin;
 - e) The development of respect for the natural environment...

¹⁶⁴

Supra note 33. Article 32 states that:

1. State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is hardly to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

labour. In order to comply with this provision, State Parties shall “provide for a minimum age or minimum ages for admission to employment; provide for appropriate regulation of the hours and conditions of employment; and provide for appropriate penalties or other sanctions to ensure ... effective enforcement of the present article,” responsibilities that definitively were not met by Guatemala in relation to the street children in the *Villagrán et al.* case.¹⁶⁵

Another right that had been unmistakably infringed upon in the lives of Julio, Jovito, Henry, Federico and Anstrum is the right to recreational activities and entertainment as children. The right to entertainment is a necessary right for children to develop during their childhood and adolescence.¹⁶⁶ Child labour, poverty, and indifference from the community restrain children from the rights to sports, recreation and culture.¹⁶⁷

2. State Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article...

¹⁶⁵ *Supra* note 33 at article 31. *Also see, supra* note 25 at 17. International Labour Organization Convention 138 also addresses this issue. It states that, in seeking the total and absolute abolition of child labour, the minimum age for admission to work has to be progressively increased, until it reaches a level in which it is possible for children and adolescents to develop completely, physically and mentally. This age cannot be inferior to the age for finishing compulsory primary education, which is normally around 15 years. The Convention lets some States with difficult economic situations establish the age at 14 years temporarily. However, there are certain areas of work for which no exceptions are permitted, such as mines, manufacturers, construction sites, electricity, gas and water services, transportation, communications, plantations, and other agricultural exploits, specially those destined to trade, with the exception of production for family consumption. *Supra* note 33 at article 31. *Supra* note 25 at 17.

¹⁶⁶ *Supra* note 45.

¹⁶⁷ *Ibid.* The Convention on the Rights of the Child recognises this compound of children's human rights in Article 31. State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2. State Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

The rights that have been breached of the five street children murdered in this case-study, encompass what is described by United Nations agencies as “the freedom for the realization of one’s human potential.”¹⁶⁸ In other words, issues like health, nutrition and education of children are now considered to have a major importance not only for their intrinsic value but moreover for the positive impacts on human attitudes towards participation and re-insertion into their communities.

As previously mentioned in this paper, the articles violated also form the basis of the Court’s ruling, and are closely related to the kidnapping (right to personal liberty), torture (right to humane treatment) and murder (right to life) of the victims, which are described below as “post-stage violations” of street children’s rights.

C) Violation of rights after the incident: “ the post-stage violations”

Human life is the most precious right in the “survival rights”¹⁶⁹ category, which has been degraded by the killing of street children in Central America as shown by this Guatemalan example. In the context of *Villagrán*, the first deals with the most sacred right in the American Convention on Human Rights and other international human rights

¹⁶⁸ *Supra* note 12 at 34.

¹⁶⁹ “It’s Only Right,” online: UNICEF Homepage <http://www.unicef.org/teachers/learner/only_rt.htm> (last modified: April, 1999). UNICEF states that even though the Convention contains 54 articles each of which entails a different type of right, they have been able to categorize them into four groups:

1. Survival rights specifically include the right to life, and other basic needs such as health conditions, nutrition, and shelter. In general, it includes an adequate standard of living.
2. The second type are rights of children’s development, involving their right for education, freedom of expression in areas such as thought, conscious, and religion, as well as their right for leisure, playing and other activities.
3. Protection rights are those referring to the neglect, abuse and exploitation of children. Some activities covered within these set of articles are: child labor, drug traffic, sexual exploitation, abuse by authorities, and torture.
4. Participation rights are the group of rights focused to let children express their opinions within their families and their communities.

instruments such as the Convention on the Rights of the Child, in which the right to life¹⁷⁰ is in Article 4 and states:

Right to Life

“Every person has the right to have his life respected. This right should be protected by law, and in general, from the moment of conception. No one should be arbitrarily deprived of his life.” (emphasis added)

This provision makes an explicit referral to the due protection of the right to life by law, which the internal laws of each country should guarantee. It is essential that countries protect the right to life of all children, specifically of those who are living under special conditions of vulnerability and danger, such as street children.

The right to life includes not only the protection against the arbitrary deprivation of life (negative obligation), but also the responsibility of each State to protect and preserve life in dignity (positive obligation).¹⁷¹ In other words, the right to life of these five children also entails the necessary prevention from threats, harassment, verbal aggression and psychological abuse and other detriment that could hinder their development. The right to life of a street child (and of every human being) is not defined as being alive and breathing, but is more broadly conceptualized in terms of the treatment, conditions and environment in which a child develops.

The right to life implies the obligation to respect and guarantee personal integrity and humane treatment within the jurisdiction of each of the Central American nations.

¹⁷⁰ Universal Declaration of Human Rights, 1948, U.N.T.S., GA Res. 217 (III), 3d Sess., Supp. No. 13, UN Doc. A/810, 71 [hereinafter Universal Declaration]. The right to life is also stipulated in the Universal Declaration of Human Rights in Article 3, in the American Declaration of Human Rights in Article 1, and in Article 6 of the International Covenant for Civil and Political Rights and in Article 6 of the Convention on the Rights of the Child, which states that: “States Parties recognize that every child has the inherent right to life” and “shall ensure to the maximum extent possible the survival and development of the child.”

¹⁷¹ Villagrán, Merits, *supra* note 139 at para. 144.

However, the American Convention in Article 5¹⁷² sets forth a separate provision for the respect of the integrity of all human beings (logically including children), as well as the prohibition of torture or cruel, inhuman and degrading treatment, all of which are present in the case at hand. The violation of the right to life is stipulated in the American Convention of Human Rights. However the Court has repeatedly emphasized the importance of perceiving these violations as part of the universal system and against the Convention on the Rights of the Child. This case not only involves the homicide of a child, but also its impunity, thus violating the right to life of the child protected in Article 6(1) of the Convention on the Rights of the Child. It is contemplated not only in Article 6(1) of this Convention, stating that "States Parties recognize that every child has the inherent right to life,"¹⁷³ but also in Article 6 of the Covenant on Civil and Political Rights, similarly indicating that: "Every human being has the inherent right to life. This right shall be protected by law. No one should be arbitrarily deprived of his life."¹⁷⁴

With respect to this right, the Inter-American Court of Human Rights stated in its judgment for *Villagrán*, that

The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental

¹⁷² American Convention on Human Rights, signed 22 Nov. 1969, entered into force 18 July 1978, OASTS No. 36; O.E.A. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev.6 (1979) at article 5.1 and 5.2. These state that:

1. "Every person has the right to have his physical, mental and moral integrity respected."
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

¹⁷³ Convention on The Rights of the Child, *supra* note 33 at Article 6(1).

¹⁷⁴ Martin Imbleau, ed., *International Human Rights Code: Covenant on Civil and Political Rights*, (Québec: Yvon Blais, 2000).

right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.¹⁷⁵

In this case, it has been established that the five murdered street children were illegally detained by members of the police force of Guatemala, causing them psychological harm through severe anxiety and suffering, and their detention was not communicated to a competent judge or to their next of kin. With respect to this conduct, the Court has repeatedly established that a “person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated.”¹⁷⁶ The Inter-American Court of Human Rights has also reaffirmed that the “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.”¹⁷⁷ The hours of detention of these children constituted a violation to Articles 5(1) and 5(2) of the American Convention due to the proven fact that they were subjected to torture and inhuman

¹⁷⁵ Villagrán, Merits, *supra* note 139 at para. 144.

¹⁷⁶ Inter-American Court of Human Rights. *Cantoral Benavides Case*. Judgment of August 18, 2000. Series C. No. 69, para.90; *Villagrán Morales et al. Case (the “Street Children” Case)*. Judgment of November 19, 1999. Series C. No. 63, para.166; and similarly, Eur. Court H.R., *Case of Ireland v. The United Kingdom*, Judgment of 18 January 1978, Series A no. 25 para. 167.

¹⁷⁷ *Fairen Garbi and Solís Corrales Case (Honduras) (1989)*, Inter-Am. Ct. H.R. (Ser.C) No.6 at para. 149.

treatment, that the Court has described as “moral and psychological suffering in the detainee.”¹⁷⁸

Article 37 of the Convention on the Rights of the Child likewise prohibits violations of the right to life and the right to personal integrity of children. This section addresses specific situations in which children shall not be tortured or subjected to inhuman and cruel treatments.¹⁷⁹ The situations include the prohibition of capital punishment, life imprisonment, and arbitrary or illegal arrest of children under eighteen years old. The latter prohibition was present in the instant case.

Arbitrary arrests of street children are very common in Central American countries. They not only constitute a violation of integrity but also of the right to personal liberty and security.¹⁸⁰ In this case, the five children were forced into a car by police officers against their will. Article 7 of the American Convention gives complete protection against such actions, clearly stating that:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

With respect to the issue of illegal detention, the Court’s rulings have tended to specify that Article 7 of the Convention contains in its second and third clauses “specific guarantees against illegal or arbitrary detentions or arrests” and that “... no person may

¹⁷⁸ *Bámaca Velásquez Case (Guatemala) (2000)*, Inter-Am.Ct. H.R. (Ser.C) No.70 at para. 150.

¹⁷⁹ *Ibid.* at art. 37.

¹⁸⁰ This article is supported by article 37 of the Convention on the Rights of the Child.

be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect).” It stated also that “[t]he second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.”

The allegations made by the representatives of the victims and affirmed by the Court, stated that the police officers had the duty to present the five children before a competent judicial authority, which is a procedural requirement and a fundamental right of a detainee. The right to personal liberty is a fundamental right. If it is violated by arbitrary detention, other rights are also infringed, such as the right to receive humane treatment and the right to life in dignity, which were both threatened in this case. Therefore, the arbitrary detention and failure to present the children before a judicial and competent authority, led the Court to conclude that due process guarantees were not provided in theory or in practice, in other words, neither the material nor the formal aspect of the due process for detention were met.¹⁸¹

The three principal rights violated in this case were the right to personal liberty, the right to personal integrity, and the right to life. Likewise, there are three illegal actions,

¹⁸¹ In relation to this, the European Court of Human Rights has also considered this issues in several of judgments such as *Aksoy v. Turkey*, among others, stating that the emphasis on the promptness of judicial control of arrests is of special importance for the prevention of arbitrary arrests. Prompt judicial intervention allows the detection and prevention of threats against life or serious ill-treatment that violate fundamental guarantees contained in the European Convention for the Protection of Human Rights and Fundamental Liberties. *Aksoy v. Turkey* (18 December 1996), VI Eur.Ct. H.R., (Ser.A) at 2282.

which respectively violated the rights of the street children mentioned in this section: the kidnapping, torture and murder of the five children.

1. The kidnapping of the five children

In the case described above, children were kidnapped from a park they frequented, in broad daylight and in the presence of many observers. This case shows the confidence that these police officers felt in order to commit such a crime, without even fear of being identified. Members of the police should respect every person's security and humane treatment, instead of perpetrating these types of violations against these and any other street children.

2. The torture of the children

In the majority of cases, the violations of street children's right to life are due to the abuse of power by the police. The murder of these children is the consequence of arbitrary and illegal conduct carried out by public and/or private police agents, both on and off their working hours. However, it is necessary to point out this is not always the case, as there are several known instances in which civilians have been responsible for the murders of street children.¹⁸²

The murders of children typically result from shootings, or also from torture which inflicts more prolonged suffering on the victims. The most common methods of torture intend to cause the most acute pain, including slaps, cuts, kicks to especially

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The following incident occurred in Guatemala City in September 1994. Marcos, a street child who was 13 years old, begged outside a fast food restaurant, when two male adults approached him. The two strangers gave him a bag of food, which he accepted happily. Two minutes later, however, the grenade inside the package exploded, killing Marcos. This is a case presented before the Commission of Human Rights. See more in: *La Paz supra* note 3 at 50ff.

sensitive parts of the body, torture to the internal ear, asphyxia, hanging the victims from their wrists, electric shocks or the use of detergents and other toxic substances. As already noticed in the case described in this section, five street children were subjected to the torture of cutting their tongues, eyes and ears, and burning body parts with an unknown substance, and then killed.

There are two main trends illustrated by different cases of violations against street children's life: The first one is that children are often tortured and killed in a way that suggests that their death resulted from a struggle with the police. The problem in such cases is that usually the authorities investigating the incident know the officers involved, which results in a high degree of impunity. The second trend is that street children are tortured and killed brutally, leaving behind clear evidence of actual malice, and *mens rea*, or criminal intent, as in the case discussed.

The Inter-American Convention to Prevent and Punish Torture, ratified on January 29th 1987 specifically prohibits torture:

Article 1. The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 6: In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The State parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Article 8: The State Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the State parties shall guarantee that their respective authorities will proceed

properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

3. The murder of the children

The life of any child is inviolable, without regard to age, ethnicity, race, sex, colour, religion, nationality, status or even economic situation. The most severe violation of street children's rights throughout Latin America has been the systematic murder of thousands of children, motivated by their low socio-economic status. Some people believe that they degrade the appearance of cities and are criminals. The perpetrators of crimes against them have the main purpose of washing away the impurities of society.¹⁸³ This cruel ideology has come to be known as "social cleansing."¹⁸⁴ In other words, the high levels of violence towards boys and girls that live in the streets supposedly result from by these recent "social cleansing"¹⁸⁵ operations. Thus, the sole rationale for these crimes is that street children are hungry and rejected. Social cleansing has been defined as "the threat of being murdered through a deplorable practice ... an euphemism for extermination by extra judicial killing sometimes attributed to the police... In other cases, paramilitary groups or paid "social cleansing" groups commit the murders..."¹⁸⁶ Sometimes, social cleansing also involves gangs of other children hired to kill street children. This produces a vicious cycle in which children kill children.¹⁸⁷

¹⁸³ B. Harris, *The Murder of Children in Honduras is a Crime against Humanity*, online: Casa Alianza Homepage < <http://www.casa-alianza.org> > (accessed: 20 September 1999).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Report on Colombia, supra* note 8.

¹⁸⁷ *Ibid.*

Thousands of people in this central region of Latin America live in constant fear of the aggression and violence of others. Street children constantly feel naturally insecure and afraid of several specific forms of violence. They fear that the state and its public agents could physically torture them, or conduct arbitrary arrests and detentions of children in adult prisons. These children feel exposed to street violence in all of its forms, as already mentioned. They fear the danger of domestic violence, rape and abuse at home. Children in the streets are defenceless from abuse from third parties (such as sexual commercial exploitation, prostitution, child pornography). They are exposed to threats from other groups of people, such as social cleansing groups, and those who discriminate, hate, and insult them, as well as consider them criminals. Street girls suffer additional threats of gender bias and social rejection.

The young population included within the categories of "street children and adolescents" hold the same rights as adults, as well as some specific ones as a consequence of their special condition of being underage, immature and vulnerable. They therefore need vigilance from the state, their families and their community, especially at stages when they are still unable to make certain decisions. The American Convention on Human Rights, in Article 19, provides this protection by stating that:

"Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state."

As part of the duties of protection guaranteed in the Convention, each state must assume responsibility for the activities and crimes committed in its streets. The Convention has established the main guidelines for protection of children's rights. These efforts should come from different actors through national policies, programs and

budgets, efficiently targeted towards the positive development of children in a safe environment where their well-being and security will be taken care of. The international and legal community should analyze the problem as a whole, in order to defend the human rights of the most vulnerable children that are marginalized in their families, their communities or their countries. They have little, if any, support from their parents, are rejected by the society, and are not adequately protected by their governments.

Each country should choose the most adequate response according to their specific problems regarding street children. As countries identify the most effective solution and analyze the situation of street children, they must take into account and understand the *UPPP*² model main steps, in which stories, international human rights norms and the doctrine of integral protection overlap. When these three aspects are well understood, prevention and protection goals can be reached by embodying the international human rights law on children as well as its guarantees for a dignified development and life in domestic law. As we have mentioned throughout this thesis, the first step in the model is “understanding” emphasized in the first chapter through a survey of the factors behind and the realities of the street children phenomenon in Central America. When a country succeeds in “understanding” the situation of its street children, it is able to connect that situation to the corresponding guarantees and norms of human rights protection. Then, that country can begin to shape an adequate response to violations of street children’s rights.

An investigation of state and international protection of street children is a central point in the process of understanding in order to protect these children effectively. This deep investigation will help to target what Central American countries, in effect, need to change in the protection of their street children. If street children in the countries facing

these problems are not protected soon, they will continue to be subject of indifference in Central American nations.

Section 3. "Lessons from *Villagrán*"

In the years of existence and history of the Inter-American Court of Human Rights, the only one case involving the violation of rights of street children was studied, delivered and resolved. It established an important precedent for future violations especially for those countries that are subject to the Court's jurisdiction. This case showed the need to implement measures of prevention, protection and punishment of violations against street children providing justice within each state's boundaries as described by the *UPPP² model* in this thesis, in order to erase the need for domestic cases like *Villagrán* to seek recourse in international forums.

As we already mentioned earlier in this thesis, several street children's rights were violated including the right to life, dignity, security and liberty as well as others related to the provision of services such as the right to education for all, health care, housing and food. Although rights of children are imprinted in instruments that Central American countries have signed and ratified, there is a clear problem in regard to the control and assurance of fulfillment of the obligations contained within these instruments.

In the past, the discussions about the duties of the State surrounded the idea that the State must respect the rights of all persons by not interfering with or limiting them. For example, respecting the right to a fair trial implies the obligation of the State to provide every person with recourse to access justice in an organized judicial system. However, as situations evolve, new realities bring a broader perspective of the duties of

the State. In the case of street children, these duties also include the obligation and responsibility of the State to protect street children from abuses and violations as their kidnap, torture and murder. The previous threats and attempts to injure these street children by police officers should have been sufficient to put the State on notice of the potential danger to the children's security. The State's intervention and involvement at this point was vital to the lives of these five street children, especially when dealing with violations committed by members of their own governmental institutions: the national police. It is part of the duty of the State to promptly and effectively respond to signs of violations of street children's rights in their jurisdictions.

The State bears the obligation to observe closely the alerts sent to them by non-governmental organizations, community leaders, religious groups and street children themselves. In order for states, in this case Guatemala, to engender respect for street children's rights, a series of measures have to be taken. First, it is essential for the governments to have an adequate framework of institutions and human resources to supervise and monitor the observance of all rights for children.

"Institutions" include a well trained police force with human rights education, an independent judiciary, a group of professional judges, prosecutors and lawyers, and the proper tools for these individuals within the State to be able to defend the rights of the child. These tools include a system of laws adjusted to the current realities that children face. Laws protecting children should be in accordance with international standards, the doctrine of integral protection for the child and the adequate available mechanisms to enforce these laws as stated earlier in this thesis.

In *Villagrán*, the government should implement certain steps in order to avoid similar violations of human rights. The state can promote ideological changes to

transform the social exclusion of street children into tolerance and respect, by raising awareness about the struggles present in their lives and the spectrum of poverty and suffering, described in the first part of this thesis.

However, these duties to provide protection, security and prevention of violations, must be accompanied by support for housing, food and health care needs. The need for protection applies to all street children equally and individually.

Equal distribution of social services for the population in need is a difficult goal for the governments of Central America, due to the lack of available public funds. However, if governments commit themselves to use and manage the resources directed to this purpose, they comply with their duties, within the scope of their economic possibilities and contribute to an eventual solution for the situation of street children across the region.

Constant efforts from the diverse actors that play a role in the lives of street children can be key elements to the eradication of their suffering. However, this has to be accomplished parallel to appropriate domestic legislation according to the principles inherent to the “doctrine of integral protection” and through a process of acknowledgment, understanding and protection (such as the “UPPP² model”) of the drama lived by street children in Central America.

Conclusions

Internal laws should protect children thoroughly by reflecting the essence of the Convention on the Rights of the Child and the principles that are pillars of the “doctrine of integral protection”. This particular theory has been described and related throughout this thesis as the “UPPP² model.” Furthermore, I have found that this theory can be backed up by the General Assembly Resolution known as the “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms”.¹⁸⁸

The particular article in this Declaration that summarizes the whole purpose of the “UPPP² model” states that:

Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights [in our case, mainly the Convention on the Rights of the Child] and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion and effective realization of those rights and freedoms should be conducted.

The Declaration includes the prime responsibility and duty to protect and implement all human rights by creating the necessary conditions in the social, economic and political areas. It provides a particular emphasis on the responsibility of “international cooperation” in which individuals, groups and associations in nations are

¹⁸⁸ OAS, General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and protect universally recognized human rights and fundamental freedoms*,.... Res. 53/144 GA (1999) [hereinafter *Declaration on Responsibility*].

held accountable for the elimination of all violations against human rights. States are responsible primarily for the promotion and protection of human rights, but also to adopt administrative, legislative measures to ensure human rights' protection, and the "promotion of the necessary understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights."¹⁸⁹ This takes us back to the "UPPP² model" first step which is to visualise the necessity to "understand" the realities, the existing violation of street children's rights and the need to stop the tragedy in the life stories of children that deserve full respect and protection from the State, their family and community.

The Convention on the Rights of the Child is the first legal instrument on children's issues that treats children as subjects of rights. The Convention opens the doors for a new formulation of internal laws in Central America, for a restructuring of the social approach in which all children and adolescents should be active subjects of this new paradigm: the doctrine of integral protection the acknowledges the child as subject of rights. It is necessary for this "new" principle to be reflected in concrete actions; there must be a comprehensive development of child policies.

Through the implementation of the Convention on the Rights of the Child in the juvenile codes and laws in the various countries of the Central American region, or by the adaptation of laws to the principles of the doctrine of integral protection, there is an attempt to close the gap between the current conditions in which street children live, laws that can protect them and their legal rights.

¹⁸⁹*Declaration on Responsibility, supra* note 188.

In the fight against violations of street children's rights, it is imperative to give participation to local governments, seeking their support, efforts and initiative in building child policies (design, supervision, implementation, execution and evaluation of policies) as needed in specific communities. Without the articulated participation of different actors neither the State nor the legal structures will be capable of getting the real situation close to the normative development established on children's rights.

The different actors (government and non-governmental) involved in the design and implementation of the policies must be capable of developing plans and projects that go beyond the immediate solution of children's problems and should also have a long-term vision and comprehensive study of the conditions of children. Civil society must participate in the implementation of the principles and standards of the Convention, generating levels of support as well as urging the State to act accordingly. To do so, the political and economic order in Central America should be capable of ensuring that production and distribution of wealth are oriented to human needs and social development. Without these, it is difficult to achieve structural and financial conditions necessary to implement the Convention nationally, which can better protect human rights of street children.

The problems surrounding the lives of street children are multidimensional before and after they leave home. They are subject to family conflicts, abuse, violence, which in the majority of the cases is originated from a marginalized social and economic status that vices the family circle and compels children into the streets.

Central American governments are known for their inability or unwillingness to comply with a real enforcement of their national legislations. This has made necessary the involvement of other actors such as NGOs, national and international organizations,

local communities and international pressure in the real fight against the violations of street children's fundamental rights and freedoms.

Basically, street children lack the vast majority of their rights as children and human beings. Not only they go through difficult situations in which they are deprived from the enjoyment of their basic needs, but also the state ignores its obligations to them, avoiding to comply with their right to be respected and treated equally, without underestimating their right to dignity.

Even if states in Central America have achieved some superficial positive changes, the development and application of effective measures to remedy violations against children and to ensure the observance of their obligations to respect and protect children's rights, are still not a concrete reality. Governments should use all their means to take reasonable steps to investigate alleged violations of human rights committed in their countries and to impose proper punishment on offenders and fair compensation for the victims or their family.

There are no limitations or lack of laws, regulations or jurisprudence in Central American countries. On the contrary, innumerable worldwide and regional efforts have been taken during the past decade, to create international standards to defend children's human rights. Such standards have the purpose of serving as common guidelines and principles for governments around the globe, including those in Central America. There is no valid excuse for a country to fail to protect its children. Even if countries face difficulties training judges, have lack of resources for the infrastructure of courts, or lack adequate personnel, they are obliged to make their best efforts to provide access to justice for all, as part of the state's responsibility towards the protection of children's human rights.

Nations should take firm steps within a reasonable period towards the observance of human rights laws for children, especially after the ratification of the Convention on the Rights of the Child, with which many countries are not complying. It is clear that if a state fails to adapt its laws or does not take proper actions for children's protection, including the development of national plans and policies to secure their rights, violations, deaths and suffering will continue and those guilty of violating children's rights will be treated with impunity.

The phenomenon of street children will continue to exist until the governments in each country makes itself accountable of its duties and responsibilities of prevention, protection, provision of justice and punishment, inserted in what has been called in this thesis the "*UPPP² model*", which has been used to illustrate the realities of street children and what needs to be done to avoid further impunity.

Impunity in Central American countries and the exhaustion of every domestic remedy available for street children human rights violations ends up in the hands of international regional tribunals, that is the last possible resort for a case to be investigated, heard and judged. In the *Villagrán and others Case*, Guatemala is not only part of the OAS but has accepted also the jurisdiction of the Inter-American Court of Human Rights to solve cases like the massacre of the five street children in said case.

In this judgment, the Inter-American Court leaves an important precedent in regional jurisprudence that enables other states to distinguish between the theoretical existence of judicial remedies and its real and effective application in practice, especially before a case that involves not only the additional vulnerability of a street child, but also the involvement of State responsibility in acts of inhumane treatment, torture and death of street children, who should be protected by the government, instead of being killed.

The Inter-American Court of Human Rights analyzes superficially rights that were violated by the State in this case, which according to the “UPPP² model” are the beginning of the violation *per se*. These include the right to education, recreational activities, family and food.

Finally, the violation of the right to life of a street child in Central America cannot be seen strictly as the act that ends with his or her physical life. The violation of the human rights of street children includes also the inertia of the State before innumerable street children that do not live in dignity as human beings. The physical and mental deterioration of these vulnerable children in abusive homes and dangerous streets cannot be classified within parameters of dignity and integrity, neither within the principle of social justice. States should find a responsible manner to end and eradicate the phenomenon of street children within their cities. Children, as future leaders of communities and countries, deserve the integral protection of their rights and their lives as human beings.

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