

ACCESS TO JUSTICE FOR CHILDREN: BELGIUM

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

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

The CRC was ratified by Belgium on 16 December 1991, and entered into force on 15 January 1992. Belgium also ratified the Optional Protocol on the involvement of children in armed conflict, the Optional Protocol on the sale of children, child prostitution and child pornography, and the Optional Protocol on a communications procedure,¹ in 2002, 2006 and 2014 respectively.

Belgium has a civil law system and, as a result of its ratification, the CRC forms part of domestic law.² However, implementation of the provisions of the CRC is complicated by the complex nature of the Belgian federal system.³ Furthermore, whether a certain provision of the CRC has direct effect in the national legal order depends on whether it is determined to be “self-executing” (see part I.D below).

B. Does the CRC take precedence over national law?

The CRC takes precedence over statute law and the Constitution if it is determined that a specific provision is “self-executing” (see part I.D below).

C. Has the CRC been incorporated into national law?

Belgium has a civil law system and, as a result of its ratification, the CRC has been incorporated into domestic law.⁴

¹ Belgium has accepted the “inter-state” communication procedure which will allow one state to bring a complaint against another: <http://ratifyop3crc.org/2014/05/31/belgium-ratifies-op3crc/#.U9Dwffhx0xA>.

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http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf.

³ Belgium has a federal structure: the country’s administration is the responsibility of the unitary federal State, but is also shared between the federal State and a number of federated authorities: the three Communities (French, Flemish and German) and the three Regions (Wallonia, Flanders and Brussels). They have clearly defined powers (e.g. the Communities have responsibility for young people, education and culture) which have been transferred to them. The federal State has, more particularly, retained residuary powers (e.g. in the areas of justice, social security and asylum) which it also exercises independently. Things can get even more complicated, e.g. care for unaccompanied asylum-seeking minors has to be carried out by the Communities in the framework of youth care, while their status is defined at the federal level.

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http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf.

However, Belgium maintains its declaration on article 2 on the principle of non-discrimination, which restricts the enjoyment by non-Belgian children of the rights contained in the Convention, and on article 40 on the review of penal decisions by a higher judicial body. The Committee on the Rights of the Child has recommended that Belgium withdraw these declarations.⁵

The Belgian Constitution has only one explicit reference to the rights of children; Article 22bis provides that “each child is entitled to have his or her moral, physical, mental and sexual integrity respected” and that “[t]he law, federate law or rule referred to in Article 134 guarantees the protection of this right”.

There is no single Belgian consolidated “act” on children’s rights. Instead, provisions are to be found within both federal and community legislation. At the federal level, certain provisions of the CRC have been explicitly incorporated into national law. For example, the right to be heard (Article 12 CRC) is guaranteed through Article 1004/1 of the Belgian Judicial Code,⁶ as well as in the preliminary chapter added to of the Belgian Youth Protection Law in 2006.⁷ As noted above, the right to be heard in Article 12 could in fact have been invoked before the Belgian Courts before the 2006 amendments to the Belgian Youth Protection Law entered into force, given that it was considered to be self-executing. At the level of the Communities, for example, the Flemish Parliament Acts on Integrated Youth Care 2004 and 2013⁸, dealing with youth care and the legal position of minors in such care incorporates certain provisions of the CRC into Community law.

The Committee on the Rights of the Child has noted that there is a disparity between the three Communities in their progress with harmonising their legislation with the principles and provisions of the CRC. In particular, the Committee noted that “the German-speaking Community has not kept pace with development in the other two Communities”.⁹

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

Whether a certain provision of the CRC has direct effect in the national legal order depends on whether it is determined to be “self-executing”. A

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⁵ UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Belgium*, CRC/C/BEL/CO/3-4, 18 June 2010, para. 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBEL%2fCO%2f3-4&Lang=en.

⁶ As modified by the Law creating a Family and Youth Tribunal, 30 July 2013. Article 1004/1 available in French at : http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1967101004&table_name=loi.

⁷ Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1965040803&table_name=loi . See also Ibid., arts. 51 and 52ter.

⁸ Available at: http://www.etaamb.be/fr/decret-du-07-mai-2004_n2004036491.html, and http://www.etaamb.be/fr/decret-du-12-juillet-2013_n2013035791.html respectively.

⁹ Ibid., para. 11.

provision will as a general rule only be “self-executing” provided that the signatories to the treaty at least implicitly intended to render it self-executing (subjective criterion) and the relevant provision is sufficiently clear, unconditional and does not call for additional measures (objective criterion). Analysis of whether the CRC has direct effect therefore requires an article-by-article approach.

Article 12 of the CRC (right to be heard), for example, is often considered to be formulated clearly and therefore to be self-executing. Article 3 (best interests of the child), on the other hand, has been considered to have direct effect by some courts,¹⁰ while other courts have denied such a direct effect.¹¹ The Court of Cassation (*Hof van Cassatie / Cour de Cassation* i.e. Supreme Court of Belgium) has ruled that Articles 7 (preservation of identity),¹² 2(1) and 26(1)¹³ do not have direct effect in the Belgian legal order. The Supreme Administrative Court of Belgium (*Raad van State / Conseil d’Etat*) has determined that several provisions of the CRC are not self-executing, while not explicitly denying the possibility that other provisions of the CRC would be self-executing.¹⁴ Other decisions of the Supreme Administrative Court and the Court of Cassation go even further and provide that the CRC does not create any effects for the internal legal order.¹⁵

However, the Constitutional Court uses the CRC as an interpretive tool and, in general, the legal status of the CRC means that it is regularly invoked and used in litigation.¹⁶

Notably, certain provisions can be invoked not only against the Belgian authorities but also against other individuals.¹⁷ For example, transfers of minors in sports are often linked to the freedom of association of children as determined in Article 15 of the CRC and are directly enforced by Belgian courts.

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

The CRC is invoked frequently in litigation.¹⁸ See examples provided above.

¹⁰ See e.g. Jeugdrb. Luik 17 April 1997, R.R.D., 1997, 335 and Jeugdrb. Verviers, 2 December 1998, J.L.M.B 1999, 1445.

¹¹ See e.g. Arbh. Antwerpen, 7 May 1999, T.J.K, 2001, 21-34.

¹² Court of Cassation of Belgium, *WN v. DMJ*, appeal in cassation, C.09.0236.F, 2010.

¹³ Court of Cassation of Belgium, *DD v. HDP*, appeal in cassation, S.06.0105.F, 2008.

¹⁴ For example, the *Conseil d’Etat* denied the direct effect of Articles 1, 2, 3, 5, 6, 9, 10, 20, 22, 23, 24, 27, § 1, 28 and 35 of the CRC.

¹⁵ See e.g. *R. v. St.*, D.O. nr. 60.010, 11 juni 1996, not published, provides that the CRC “*n’est pas directement applicable en droit interne*”. Or *R. v. St.*, E.N., nr. 65.348, 20 maart 1997, provides that the CRC “*ne produit pas des effets directs dans l’ordre interne belge*”. Or Court of Cassation of Belgium, *WN v. DMJ*, appeal in cassation, C.09.0236.F, 2010.

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http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf

¹⁷ See e.g. Arbitragehof nr. 110/89, 4 November 1998, *A.A.* 1998, 1369.

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http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport%20FINAL%20PDF%20version.pdf

II. What is the legal status of the child?

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

*Lack of capacity to initiate judicial proceedings, with certain exceptions*²⁰

Minors, as a general rule, cannot initiate proceedings before a Belgian court.²¹ In order to participate in judicial proceedings as a party, the minor must be represented by a legally competent person (i.e. his/her parents, his/her guardian, etc). These persons can take all procedural steps in the name and on behalf of the minor.²²

Nevertheless, certain exceptions apply to this general rule. A minor who has the required discernment could in principle initiate proceedings in a Belgian court, in which case the competent judge will not be able to declare the claim inadmissible (a Belgian court could not automatically raise the objection of non-representation because the matter is not a matter of public policy). A minor can initiate judicial proceedings for more personal issues,²³ with respect to the right to education,²⁴ or paternity or adoption proceedings.

However, under these more specific exceptions, full access to the judicial system will only be granted to minors who have reached a certain age. For example, a minor aged 12 years or over will be able to intervene independently in litigation with respect to filiation issues.²⁵ Another example is the intervention of a minor aged 12 or over in an adoption proceeding which is not the subject of a conflict between the parties involved.²⁶ In other cases, the minor will be allowed to initiate proceedings under certain conditions. For example, when a minor wishes to marry, he/she will be able to independently initiate the dispensation request at the juvenile court when the parents refuse to give their consent to this judicial action.²⁷

In some proceedings, the minor will have to give consent, which qualifies

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¹⁹ An overview of Belgian court judgments regarding the direct effect of provisions of the CRC can be found in A. Vandaele, "De directe werking en capita selecta uit het IVRK", *Kinderrechtengids*, o.c., Commentaren, deel 1-11, Van Daele (2003), pp. 1-30.

²⁰ For a general overview on this topic, please see I. Vervoort "De procespositie van minderjarigen: onbekwaam dus (on)beschermd?", *Jura Falconis*, jg 36, 1999-2000, nr 1, p. 31-78.

²¹ In Belgium, the age of majority is 18 years; at this age, persons in Belgium are capable of all acts of civil life: Civil Code, Article 488.

²² D. Ballet and A. Wylleman, "Proceswaarborgen voor minderjarigen in procedures die hen aanbelangen", *R.W.* 1989-90, (793) 802.

²³ See e.g. *R. v. St.* 22 February 1989, *J.L.M.B.* 1989, 826.

²⁴ See e.g. *Cass.* 26 January 1931, *Pas.* 1931, I, 4; *Cass.* 8 January 1934, *Pas.* 1934, I, 133; *Cass.* 30 March 1953, *Pas.* 1953, I, 597; *Cass.* 23 July 1987, *Pas.* 1987, I, 1341, *R.W.* 1987-88, 622 and *J. dr. jeun.* 1988, 29; *R. v. St.* 28 January 1953, *Arr. R. v. St.* 1953, 109-110.

²⁵ Civil Code, Articles 318, 325-3, 325-7 and 330.

²⁶ *Ibid.*, Article 348, § 1.

²⁷ *Ibid.*, Article 145.

him/her as a party to the proceedings (e.g. with respect to the recognition of the child by the father). Such consent will usually only be requested from minors aged 15 or over. The consent of a minor aged 15 or over will also be requested during adoption proceedings.

Generally, minors under 15 years old lack the capacity to initiate judicial proceedings for purely personal matters.

Right to be heard

A minor under the age of 12 can, upon his/her request to the judge, the request of the Crown Procurator or of parties to the proceedings, or by decision of the court, be heard by the court in proceedings concerning him/her and relating to parental authority, residence and personal relationships.²⁸ Such a request can only be dismissed if it originated from one of the parties and on the grounds of a well-reasoned decision, based on the child's inability to form his/ her own views. If the judge decides on a hearing, the minor may refuse to be heard. Minors aged 12 or over must be informed of their right to be heard by the judge. The hearing takes place wherever the judge deems appropriate, and minors are heard alone unless the judge decides that they should be assisted in their own interest. The hearing of a minor does not confer on him/her the status of party to the proceedings.²⁹

The juvenile court must summon minors aged 12 or over in civil proceedings in which matters affecting their personal interests, the administration of their property, rights of access or the designation of an unofficial guardian are at stake.³⁰ The juvenile court can also decide to summon minors aged under 12, if deemed appropriate. The Youth Protection Act also guarantees the right of the minor to be heard in person before any measure affecting him/her is taken or amended.³¹

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

Aside from the exceptions listed in part II.A above, a minor needs to be represented by the competent person (i.e. his/her parents, his/her guardian, etc.) in order to participate in judicial proceedings. These persons can take all procedural steps in the name and on behalf of the minor.

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

²⁸ Judicial Code, Article 1004/1 and 1004/2.

²⁹ *Idem*.

³⁰ *Idem*.

³¹ Youth Protection Act, Article 52ter, available in French at:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1965040803

Despite the exceptions listed in part II.A above, infants and children who do not have the required discernment (i.e., children younger than 12, in most cases) remain incompetent to initiate or participate in legal proceedings. They would need to be represented by their parents, guardian, etc., who can take all procedural steps in their name and on their behalf.

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

Under the Belgian Constitution, all individuals have the right to legal assistance, which is provided in the form of advisory services (primary legal assistance) and representation in judicial proceedings (secondary legal assistance).³² Primary legal assistance is provided by a local Legal Assistance Commission in short consultation sessions with lawyers who provide limited legal advice, or refer persons to lawyers or a specialised body capable of providing secondary legal assistance. Secondary legal assistance is organised by a Legal Assistance Bureau and consists of more sophisticated legal advice and/or assistance and representation in judicial or administrative proceedings.³³ All areas of law are covered in both primary and secondary legal assistance.³⁴

Primary legal assistance is always provided for free, and secondary legal assistance is provided for free to certain persons, including minors (see part IV. C below).³⁵

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

In certain cases where there is a conflict of interest between the minor and his/her representative, the minor might be represented by an *ad hoc* guardian. However, the minor cannot himself/herself request to be represented by an *ad hoc* guardian; the *ad hoc* guardian can however be appointed by the judge or the public prosecutor or any other interested party. Furthermore, the *ad hoc* guardian can only be appointed in certain situations, e.g. with respect to paternity disputes and conflicts of administration.³⁶

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

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

³² Constitution, Article 23, 3, 2°; Judicial Code.

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<http://www.probonoinst.org/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>.

³⁴ <http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>.

³⁵ For more information, see: <http://www.belgium.be/nl/justitie/slachtoffer/rechtsbijstand/kosten/>.

³⁶ See Civil Code, Article 378, 3th line,; see also D. Ballet and A. Wylleman, l.c., (793) 804.

Civil and criminal proceedings

If a minor claims that his/her rights under the Constitution or other principles established in domestic law, or under the CRC or other ratified international/regional instruments have been violated by another legal subject, his/her representative can – depending on the type of act that led to that violation – initiate civil or criminal proceedings to obtain compensation for the damage suffered.

Legislative norms

Legislative norms can be challenged before the Belgian Constitutional Court by every (natural or legal) person that has an “interest”.³⁷ This means that this person must be directly and adversely affected by the challenged regulation. The Constitutional Court can verify the legality of a legislative norm by referring to the equality and non-discrimination principle of Articles 10 and 11 of the Belgian Constitution read together with the provisions of the relevant treaty that is binding upon the Belgian state (i.e. the CRC). As a general rule, legislative norms are challenged by filing an action for annulment in the Constitutional Court. Legislative norms can also be challenged before the lower courts in the context of an actual dispute. In such a case, the lower court can decide to stay proceedings and refer the matter to the Constitutional Court through what is called a “preliminary question”.³⁸

Administrative decisions or regulations

If a minor wishes to challenge the legality of an administrative decision or an administrative regulation, his/her representative could directly request a judge not to apply that particular decision or regulation for that specific case (plea of illegality (*exceptie van onwettigheid / exception d’illégalité*)).³⁹ Alternatively an action for suspension and annulment of a particular decision or regulation can be filed.⁴⁰

Ombudsmen

Children may make complaints about violations of their rights to the ombudsmen institutions. Currently there exist separate ombudsmen institutions in the Flemish, French and German Communities, each with varying legislation, mandates and capacities, as well as two separate ombudsmen institutions at the federal level.⁴¹ The federal ombudsman can receive complaints that any person concerned, whether a minor or an adult,

³⁷ The Constitutional Court has determined that persons whose situation could be directly and negatively affected by the contested norm have the required ‘interest’.

³⁸ See e.g. A. Alen, 20 jaar Arbitragehof, Kluwer, 2005.

³⁹ See Constitution, Article 159.

⁴⁰ See Coordinated laws on the *Conseil d’Etat*, Article 14, §1.

⁴¹ See a list of different ombudspersons and their remit here:

<http://www.ombudsman.be/fr/ombudsman/domain/all>.

may make in relation to the operation and acts of the federal administrative authorities. If the federal ombudsman receives a complaint concerning the rights of the child which does not fall within its jurisdiction, it forwards the complaint to the French Community's Delegate-General for Children's Rights or to the Flemish Community's Commissioner for the Rights of the Child (*Kinderrechtencommissariaat*), both of which have the power to investigate complaints in their respective communities.⁴²

European Court of Human Rights

The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.⁴³ Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,⁴⁴ but the complaint will be admissible only if all domestic remedies have been exhausted.⁴⁵ Anonymous complaints are not permitted.⁴⁶ The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.⁴⁷ After examining the case, the Court renders a judgment which is binding on the State⁴⁸ and also has powers to award monetary compensation to the victims of human rights abuses.⁴⁹ It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

Third Optional Protocol to the CRC

Finally, once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child under the third Optional Protocol to the CRC,⁵⁰ which Belgium has ratified. Complaints can be made directly by both an individual child or a group of children, or indirectly, on their behalf by an adult or an

⁴² *Third and fourth periodic report of Belgium to the UN Committee on the Rights of the Child*, CRC/C/BEL/3-4, 4 December 2009, para. 26. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBEL%2f3-4&Lang=en.

⁴³ European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 1950, Articles 19 and 32, available at: <https://www.crin.org/en/library/legal-database/european-convention-protection-human-rights-and-fundamental-freedoms>.

⁴⁴ *Ibid.*, Article 34.

⁴⁵ *Ibid.*, Article 35.

⁴⁶ *Ibid.*

⁴⁷ Rules of Court, July 2014, Rule 36, available at: http://www.echr.coe.int/documents/rules_court_eng.pdf.

⁴⁸ European Convention on Human Rights, Article 46.

⁴⁹ *Ibid.*, Article 41.

⁵⁰ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en.

organisation.⁵¹ The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children or the Optional Protocol on the involvement of children in armed conflict⁵² and must have occurred after the entry into force of the Protocol on 30 August 2014.⁵³ Anonymous complaints are inadmissible and so are complaints not made in writing.⁵⁴ In addition, only complaints made in one of the working languages of the UN will be accepted.⁵⁵ After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.⁵⁶

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

The powers of the different courts depend on each court's competences. The below list provides a brief overview of each court's powers:⁵⁷

- *Constitutional Court*: reviews the infringement by a law, decree or order of the Articles included in Title II of the Constitution ("The rights of Belgian people"), as well as Articles 170 and 172 which relate to taxation and Articles 191 which broadens the scope of those rights to any individual on Belgian territory.⁵⁸

In cases where the parties question the compatibility of a legal provision with a provision of the Constitution or the CRC, the competent judge can suspend proceedings and request a preliminary ruling from the Constitutional Court. If the Constitutional Court determines that a certain legal provision violates the Constitution or a treaty provision with respect to the interpretation that was given by the lower court to that norm, its decision will in principle only be binding for the referring court, or for other courts that have the power to decide on "similar topics". However, the legislative norm will continue to exist. Nevertheless, in most cases, the Belgian legislator will 'fix' the unconstitutionality by amending the legislative norm.⁵⁹

- *Council of State of Belgium (Conseil d'Etat) and administrative courts*: examine the legality of the measures taken in the implementation of legislative standards (royal and ministerial decrees, decisions of the regional and community governments, provincial and municipal regulations and other

⁵¹ Ibid., Article 5.

⁵² Ibid.

⁵³ Ibid., Article 7(g).

⁵⁴ Ibid.

⁵⁵ Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

⁵⁷ For more information on the competences of each court, see:

http://ec.europa.eu/civiljustice/org_justice/org_justice_bel_en.htm.

⁵⁸ Law on the Constitutional Court, 6 January 1989, Article 1-2, available in French at:

http://www.const-court.be/fr/textes_base/textes_base_lois_01.html.

⁵⁹ See A. Alen and K. Muylle, "Compendium van het Belgisch Staatsrecht", Part 1B, Kluwer, 2004, pages 461-462.

individual administrative decisions). Courts can decide not to apply a particular administrative decision or regulation in the specific case if it is found that they do not conform to the laws and legal standards of equal or higher rank. Alternatively, the Council of State, which is Belgium's Supreme Administrative Court, may suspend and annul a particular decision or regulation.⁶⁰

- *Court of Cassation*: examines whether the decisions referred to it contravene the law or the rules of procedure. If the Court of Cassation finds that a particular decision contravenes the law or the rules of procedure, the case will be sent back to another court of the same level of the court that decided in last instance.⁶¹

The Court of first instance is composed of civil courts, criminal courts and family and juvenile courts.

- *Civil Courts (Justice of the Peace, Commercial Court, Employment Tribunal, Civil section of the District Court, Labour Court and Court of Appeal)*: issue judgments in civil matters within their respective fields. Civil Courts can offer both compensation and injunctions.

- *Criminal Courts (Police Court, "correctional tribunal", and Criminal Court (Hof van Assisen / Cour d'Assises))*: issue judgments in criminal matters. These courts will also decide on civil actions (essentially relating to claims for damages and interests) entered by civil plaintiffs, that is, victims of crime in the broader sense. The court shall, if it considers the offender guilty, impose a penalty or another measure and can award damages to the victims who identified themselves as parties in civil matters and filed for civil action.

- *Family and juvenile Court*⁶²: It is composed of a family chamber in charge of the civil matters as regard to family disputes; a juvenile chamber, for minors at risk or in conflict with the law and which will include a specific section for the minors over whom jurisdiction has been declined; and a chamber for amicable resolution that has as purpose to reconcile the parties in complete confidentiality. With respect to minors, the court may impose measures of preservation, protection and/or education. Appeal is possible before the family and juvenile court within the court of appeal.

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

A plaintiff cannot file a claim without possessing the required capacity and

⁶⁰ http://www.raadvst-consetat.be/?page=about_organisation_council_page12&lang=nl.

⁶¹ http://justitie.belgium.be/nl/rechterlijke_orde/hoven_en_rechtbanken/hof_van_cassatie./.

⁶² See Law creating a Family and Juvenile Court, 30 July 2013, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013073023&table_name=loi.

interest.⁶³ This interest must already have been in place and should be immediate.⁶⁴ An interest is also required in annulment proceedings before the Supreme Administrative Court and the Constitutional Court. This means that a person filing the action must be directly and negatively affected by the relevant legislative or administrative norm.⁶⁵

However, an association (e.g. protecting children's rights) can file an action for annulment of a law or administrative decision or regulation in the Constitutional Court without naming specific victims. In order for an association to be able to file a claim by basing itself on a collective interest, the following conditions must be met: (1) the object of the association should be special and distinct from the general interest; (2) the collective interest is not limited to the sum of the individual interests of its members; (3) the association's object is affected by the challenged norm; and (4) it is not apparent that this object is being pursued, or it is no longer being pursued.⁶⁶

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

As a general rule, collective action is not possible. Under Belgian law, the claimant must have a direct, personal and actual interest to institute legal proceedings, which prevents a claimant from bringing claims in a single action on behalf of others.⁶⁷

However, multiple claimants may be able to join their individual claims into one action if they are so closely connected that it is appropriate to try them together.⁶⁸ Each claimant must be identified and have an immediate, personal and actual interest in the claim.⁶⁹

In the future there could be certain circumstances where claimants grant a mandate to a certain organisation to act on their behalf, for related actions with the same cause or raising the same legal issues, or for the initiation of an action to intervene. On 13 March 2014, for example, the Belgian Parliament enacted a law providing for the introduction of class actions into the Belgian judicial system. It will be inserted as Title 2 in Book XVII of the Belgian Economic Code and will enter into force on a date to be determined by Royal Decree. This new system cannot be used in the context of a violation of children's rights.⁷⁰ A decision by the Constitutional Court in

⁶³ Judicial Code, Article 17.

⁶⁴ Ibid., Article 18.

⁶⁵ <http://www.const-court.be/>.

⁶⁶ See e.g. Arbitragehof, nr. 72/2002, 23 April 2002 and Arbitragehof, nr. 35/2003, 25 March 2003.

⁶⁷ www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf.

⁶⁸ Judicial Code, Article 30.

⁶⁹ www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf.

⁷⁰ Only violations of a limited list of Belgian and European legislative acts, mainly centred on consumer protection, give rise to the right to initiate a class action. See the exhaustive list in Article XVII.37 of the law. Furthermore, a class action can only be initiated by a limited number of consumer associations fulfilling specific criteria (to be established by a Royal Decree) or by other associations fulfilling the restrictive conditions of the new bill. The federal ombudsman can also start a class action, but only in order to reach a settlement. For more information on this new bill, see:

2013 has however opened the possibility for NGOs to bring forth collective actions challenging human rights violations, pending appropriate legislation (see part V below).

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

Actions in which a litigant (e.g. a non-governmental organisation) only acts in the public interest are as a general rule excluded under the current legislation, as a direct and personal prejudice is required. This rule applies to proceedings before ordinary courts, to become a civil party in criminal courts, and for proceedings before the Supreme Administrative Court. However, as described in part III.C above, associations may file actions for annulment provided it can justify its interest. Furthermore, as mentioned in part III.D above, certain organisations (i.e. consumer organisations) are granted a collective right of action.

Belgium has ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints,⁷¹ meaning that complaints of violations of children's rights contained in the European Social Charter⁷² can be made to the European Committee of Social Rights. Such complaints of unsatisfactory application of the Charter may only be submitted by international NGOs that have participatory status with the Council of Europe.⁷³ The Committee reviews the information provided by both sides and writes a report with its conclusions, which is sent to the Committee of Ministers of the Council of Europe that adopts a resolution and makes a recommendation to the State.⁷⁴ The State then must provide information about the steps taken to comply with the recommendation in its next report under the Charter.⁷⁵

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

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

Civil matters

A minor, or his/her representative, can initiate civil proceedings before the Civil Courts (i.e. Justice of the Peace, Commercial Court, Employment Tribunal, Civil section of the District Court, Labour Court and Court of

<http://www.whitecase.com/alerts/032014/class-actions-now-in-belgium/>.

⁷¹ Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm>.

⁷² Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.

⁷³ Additional Protocol for a System of Collective Complaints, Article 1. See also:

http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp.

⁷⁴ Ibid., Articles 8-9.

⁷⁵ Ibid., Article 10.

Appeal) to obtain compensation for any damages suffered as a result of e.g. extra-contractual liability of another party. Civil proceedings will as a general rule be opened through a subpoena, but can also be opened by a petition or any voluntary appearance.

Criminal matters

If a child has suffered personal loss caused directly by an offence, he/she can: (1) bring a civil action to obtain compensation for the damage. To initiate proceedings, the victim must make a complaint to the investigating judge (*juge d'instruction*) and constitute himself/herself as a civil party (*partie civile*); or (2) intervene in a public prosecution at the pre-trial investigation or the hearing.

Proceedings will take place in the:

- Police Court (a criminal court that has jurisdiction over so-called “minor offences” or contraventions, which are punishable by either a prison sentence of one to seven days, a penalty of 20 to 45 hours of work or a fine up to 143€. or misdemeanours where mitigating circumstances are involved, and a number of specific offences, such as traffic offences);
- “correctional tribunal” (a court for minor offences or sitting in criminal matters either as original jurisdiction for misdemeanours or as court of appeal for police offences);⁷⁶ It has jurisdiction over serious offences, punishable by either a prison sentence of eight days to five years, a penalty of 45 to 300 hours of work or a fine of more than 143€. or
- Criminal Court (a court composed of a jury of peers and charged with the judgments of crimes, political crimes and press offences (except those related to xenophobia and racism). “Crimes” is the most serious category of all offences - typically, murder, manslaughter or serious sexual offences).

Constitutional matters

Any natural or legal person can submit an action for annulment to the Constitutional Court, provided he/she proves his/her interest. Furthermore, any court, or tribunal may refer a preliminary question to the Constitutional Court either on its own initiative or at the request of one of the parties, with respect to the observance by a legislative norm of the provisions that the Court should check. After being entered on the docket, each case is assigned to a particular bench. In order to avoid an overload of work, there is a summary procedure to deal with certain cases, for example, for cases that are inadmissible or are relatively straightforward.⁷⁷

Administrative matters

There are a large number of administrative courts across all branches of law, government departments and geographical areas around. In addition,

⁷⁶ Belgian criminal law uses the term "correctional" to indicate the middle category of crimes (so-called misdemeanours) and “correctionalised” crimes (offences for which the court took certain mitigating circumstances into account).

⁷⁷ For more information on the filing process, see: <http://www.const-court.be/>.

virtually every administrative court has a specific jurisdiction, composition, organisation and procedure. Regarding the Supreme Administrative Court, procedures can be initiated by an application for annulment⁷⁸ or an application for suspension.⁷⁹

Juvenile matters

Children have to appear before the juvenile court: (i) in cases of crimes committed by children; (ii) if the child is in a difficult situation and it is considered that help for the child or the parent(s) is necessary; or (iii) if the parents do not fulfil their duty to maintain the child, or if there is evidence of maltreatment, abuse or neglect by the child's parents. In principle, a minor who commits an offence cannot be punished because Belgian law considers that the minor has no sense of guilt. Nevertheless, in exceptional cases, minors aged 16 and over who have committed a serious offence or who were previously the subject of imposed measures can be referred to another court. In that case, the minor will be tried as an adult, either by a special chamber of the Juvenile Court, composed of two judges of the juvenile court and a judge of the correctional tribunal,⁸⁰ or by the criminal court.⁸¹

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

Through the legal aid system, a minor who is a party to a case will, upon request, be automatically exempted from paying all costs related to judicial and administrative proceedings (such as the payment of stamps, registration, notarial and issue rights and all other costs resulting from the administration of justice, as well as the cost of the intervention of public and ministerial officials such as notaries and bailiffs, as well as lawyers in the Court of Cassation) and be assisted by a lawyer completely free of charge. However, the assistance is granted only for a particular proceeding, and the applicant must indicate in a precise and exhaustive manner for which proceeding(s) he/she requires assistance. A decision whether or not to grant legal aid will not be based on the merits of the case.

⁷⁸ For more information on the filing process, see:
http://www.raadvanstate.be/?lang=en&page=proc_adm_annul_page1.

⁷⁹ For more information on the filing process, see:
http://www.raadvanstate.be/?lang=en&page=proc_adm_susp_page1.

⁸⁰ See Youth Protection Act, Article 57bis §1 and Judicial Code, Article 119, as supplemented by the law of 31 July 2009.

⁸¹
http://justitie.belgium.be/nl/rechterlijke_orde/hoven_en_rechtbanken/rechtbank_van_eerste_aanleg/jeugdrechtbank/welke_zaken/; for more information on the filing processes for each of these courts, see:
http://justitie.belgium.be/nl/rechterlijke_orde/hoven_en_rechtbanken/ or
http://justice.belgium.be/fr/ordre_judiciaire/cours_et_tribunaux/.

The application for legal aid is made to the Legal Aid Office.⁸² If the Office grants the applicant's request, it will appoint an attorney to deal with the case. Persons also have the right to choose any lawyer qualified by the local Bar Association for secondary legal assistance. However, if the applicant files the request for legal aid after the case has been set, it is the court before which the dispute has been brought which decides on the request. There is no legal aid office at the justice of the peace court or the police court. In such a case, it will be the justice of the peace or the chief judge of the police court who will rule on the application for legal aid.⁸³

Under the Bar Associations' rules, lawyers cannot accept contingency fees from clients.⁸⁴

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

While Belgium has a comprehensive legal aid system, law firms are permitted to provide pro bono legal assistance at their discretion to anyone, regardless of their ability to pay, and have commonly provided pro bono services to NGOs seeking legal advice.⁸⁵

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

Generally speaking, the limitation period is 15 years for crimes that cannot be "correctionalised", 10 years for other crimes, five years for offences, and six months for violations. Crimes that have been "correctionalised" will be subject to a limitation period of five years, with the exception of certain sex crimes committed against minors where the limitation period will remain at 10 years, and other sex crimes against minors (i.e. indecent assault and rape, corruption of a minor and prostitution, genital mutilation and human trafficking) where the limitation period is 15 years.⁸⁶ Furthermore, for sex offences that are committed against minors, the limitation period will only start running once the minor turns 18.⁸⁷ War crimes, genocide, and crimes against humanity are not subject to a limitation period and can thus be prosecuted before a Belgian criminal court at any time.⁸⁸

⁸² See Judicial Code, Article 675.

⁸³ For more information on the requirements and procedure to obtain legal aid, see: <http://www.advocaat.be/page.aspx?genericid=75> or <http://www.avocats.be/l-avocat.php?page=combien&rubrique=moyens>.

⁸⁴

<http://www.probonoinst.org/wpps/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>.

⁸⁵ Ibid.

⁸⁶ Code on Criminal Procedure, Article 21bis, para. 2 Preliminary Title.

⁸⁷ Ibid.

⁸⁸ Ibid.

With respect to the limitation period in civil law, it should be noted that an action *in rem* (i.e. against things like property) will be time-barred after 30 years.⁸⁹ Personal claims will lapse after 10 years, subject to certain exceptions, while the limitation period for extra-contractual liability is set at five years starting from the moment the victim became aware of the damages or 20 years starting after the offence occurred.⁹⁰ Furthermore, in civil matters, the limitation period does not run against minors and legally incompetent persons,⁹¹ except as provided in Article 2278 of the Civil Code, and other cases stipulated by law.⁹²

Additional rules on limitation periods are laid down in the law for specific cases. For example in filiation proceedings, the general rule is that the limitation period is 30 years from the birth of the child or the year when the parents stop acting as the child's parents.⁹³ A child of at least 12 years of age, until he/she turns 22 years old, or within a year from discovering that one of his/her parents is not his/her parent, can file a claim for filiation recognition.⁹⁴

An action for annulment submitted to the Constitutional Court must be filed within six months after the publication of the norm of a legislative nature in the Belgian Official Gazette, whether or not that norm entered into force. There is no limit regarding preliminary questions.⁹⁵

In annulment proceedings before the Supreme Administrative Court, the application for annulment must in general be filed within 60 days after the contested administrative decision or regulation has been published/notified to the relevant person.⁹⁶

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

In civil proceedings, a distinction is made between written evidence (i.e. deeds or documents), testimonial evidence (only accepted in certain cases), confessions and suspicions, all of which will have a different evidential value, depending on the particular circumstances of a case. In criminal proceedings, courts will rely on, amongst other things, study of formal statements, examination of witnesses, the written declarations of third parties, expert research, etc. The evidential value of these factors will again depend on the particular circumstances of a case. As a matter of principle, there is no hierarchy between the different forms of evidence in criminal

⁸⁹ Civil Code, Article 2262.

⁹⁰ Ibid., Article 2262bis.

⁹¹ Ibid., Article 2252.

⁹² This article does not require that "other cases stipulated by law" be recorded in an express statutory provision. It is sufficient that the intention of the legislature to depart from the Article 2252 Civil Code rule result from the object or purpose of the law imposing a special limitation.

⁹³ Civil Code, Article 331ter.

⁹⁴ Ibid., Article 330.

⁹⁵ <http://www.const-court.be/>.

⁹⁶ http://www.raadvanstate.be/?page=proc_adm_annul_page1&lang=en.

proceedings. The judge in criminal proceedings takes a decision based on his/her inner conviction (*innerlijke overtuiging / l'intime conviction*).

When the victim or the witness is a minor, he/she can make a statement to the police, alone or with the assistance of a counsellor (*vertrouwenspersoon / conseiller*). The interrogation of the minor can in principle take place without the presence of his/her parents, however, the minor cannot waive his/her right to be assisted by a lawyer during an interrogation where he/she is deprived of his/her freedom. The counsellor should not necessarily be one of the parents. The assistance of a particular counsellor can sometimes be refused, in the interest of the investigation. The minor can in such a case decide to be assisted by a different counsellor. A minor younger than 15 who is interrogated as a witness does this by way of simple explanation. Testimony under oath is not possible.

The interrogation of a minor victim or witness may be videotaped. Since 1 January 2013, in numerous offences the interrogation of minors must be videotaped.⁹⁷ It is called an audio-visual interrogation and is governed by Articles 91bis, 92 to 101 of the Code on Criminal Procedures. The Law of 30 November 2011 requires the mandatory recording of the hearing of minor victims or witnesses of an indecent assault or rape,⁹⁸ incitement to prostitution,⁹⁹ or genital mutilation,¹⁰⁰ in which they were involved. The consent of the minor over 12 years is necessary. The public prosecutor or the investigating judge might decide not to record, due to the circumstances of the case or in the interest of the minor. They may also order the audiovisual recording of the hearing of child victims or witnesses of other crimes referred to in Article 91bis. Minors who have made statements during an audiovisual interrogation may in principle not be called as a witness during the trial. It is believed that the declaration made during an audiovisual interrogation has the same value as oral testimony in court, and that the absence of the minor would not be harmful to the defence. The prosecutor or the investigating judge may recommend audiovisual interrogation of minors who are the victim or witness of certain crimes listed in the law.¹⁰¹ An audiovisual hearing can only be ordered for other offences where serious and exceptional circumstances are found to exist (e.g. to avoid additional trauma due to multiple hearings).¹⁰² Furthermore, the hearing of a minor who has allegedly committed an offence that is classified as a crime can also be videotaped, in practice.

Minors over the age of 12 must give their express consent to an audiovisual hearing. If the minor refuses an audiovisual hearing, the interrogator can propose an audio recording. If the minor also refuses an audio recording, a

⁹⁷ Code of civil procedure, Article 92.

⁹⁸ Criminal Code, Articles 372-377.

⁹⁹ Criminal Code, Articles 379-380, para 4-5.

¹⁰⁰ Criminal Code, Article 409.

¹⁰¹ I.e. kidnapping, rape, indecent assault, sexual abuse or prostitution, dissemination of advertising for sexual services from minors, dissemination of (child) pornography, public indecency, deliberate assault, genital mutilation, gross negligence, child abandonment, deprivation of food or care, and abduction of minors.

¹⁰² http://www.jeugdrecht.be/?action=artikel_detail&artikel=136&select_page=314.

classic interrogation procedure can be followed, with a possibility that the minor will have to appear at trial. If the minor is allegedly involved in other offences, an audiovisual hearing may be ordered only where serious and exceptional circumstances exist for this purpose. It is up to the magistrate¹⁰³ conducting the hearing to assess whether this is the case or not.

Finally, there are provisions allowing for the protection of children's privacy in court proceedings. For example, a party may request that the court hear the case in closed session for all or part of the proceedings where the interests of child or the protection of privacy so requires.¹⁰⁴ For proceedings related to sexual abuse, a party or the victim, adult or child, may request that the court meet in closed sessions only.¹⁰⁵ For other offences, the judge can also decide on a closed hearing on the basis that a public hearing would go against public order or morals,¹⁰⁶ which may include the interest of a child or the right to private and family life. The Criminal Code prohibits the publication or dissemination of discussions relating to proceedings before the Youth Court or its appeal court, by the media or any other way. Only the judgment is pronounced in a public hearing.¹⁰⁷

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

Based on our own estimations, civil proceedings will take on average one year to 18 months in first instance, while criminal cases can take longer.

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

In criminal and civil proceedings, a distinction is made between two forms of appeal: (i) ordinary appeal through the court of appeal; and (ii) a special appeal on points of law to the Court of Cassation. The time limit for lodging an appeal before the Court of Appeal is in civil proceedings one month from the notification of the decision of first instance and in criminal proceedings 15 days after the decision is rendered, and three months in proceedings before the Court of Cassation (except in those cases where the law sets a shorter time limit).¹⁰⁸

In criminal proceedings, it is important to note that the victim acting as a party in civil matters can only appeal the court's decision whether or not to grant compensation or the amount of compensation granted. A victim cannot appeal the sentence that has been imposed or the fact that the offender has been acquitted.¹⁰⁹

¹⁰³ Ibid.

¹⁰⁴ Judicial Code, Article 446ter.

¹⁰⁵ Code of Criminal Procedure, Article 190.

¹⁰⁶ Constitution, Article 148; Judicial Code, Article 757.

¹⁰⁷ Criminal Code, Article 433bis; see also:

<http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Belgium.pdf>.

¹⁰⁸ https://e-justice.europa.eu/content_procedural_time_limits-279-BE-en.do?clang=en#toc_12.

¹⁰⁹ See e.g.:

http://justitie.belgium.be/nl/binaries/BROCHURE_DROITSVICTIMES_NL_new_tcm265-138458.pdf.

Judgments of the Criminal Court are only open for appeal before the Court of Cassation, which is limited to examining the legality of judicial decisions and does not verify the facts of a case (in other words, the Court of Cassation will only verify whether a judgment or order violates the law or a rule of law).¹¹⁰

- H. **Impact.** What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

If a minor, or his/her representative, challenges the legality of an administrative decision or an administrative regulation, and the Supreme Administrative Court annuls that particular decision or regulation, such an annulment will have retroactive effect and apply to all, and the decision or regulation will be deemed never to have existed.¹¹¹

If a legislative norm is challenged before the Constitutional Court, and the Court rejected the action for annulment, the decision of the Court will be binding for all courts, which can no longer raise the issue in a preliminary question. If the legislative norm has been annulled by the Court, the Court's decision will have absolute authority and retroactive effect.¹¹²

A negative decision in criminal and civil proceedings issued in last instance will only affect the parties involved in that particular case. The losing party is generally condemned to the legal cost of the proceedings (between EUR 165 and EUR 33,000 per instance) and any potential expert's costs. A losing party can be condemned to additional civil damages only in frivolous and vexatious actions.¹¹³

- I. **Follow up.** What other concerns or challenges might be anticipated in enforcing a positive decision?

If a Belgian court issues a positive decision, certain concerns may arise if such decision would need to be enforced abroad or in case of insolvency of the opposing party.

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

The decision n°133/2013 by the Constitutional Court prompted the Belgian legislator to create a possibility for NGOs to file complaints "corresponding to their purposes under their articles of association in order to protect fundamental

¹¹⁰ http://justitie.belgium.be/nl/themas_en_dossiers/straffen_en_boetes/na_uitspraak/beroep/.

¹¹¹ See Law on the Supreme Administrative Court, Article 14, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1973011202&table_name=wet; see also S. Lust "Rechtsherstel door de Raad van State", Jura Falconis, jg 36, 1999-2000, nr. 3, pp. 445- 460.

¹¹² <http://www.const-court.be/>.

¹¹³ <http://www.advocaat.be/UserFiles/file/RPV.pdf/>.

freedoms as recognised by the Constitution and by the international treaties to which Belgium is a party”.¹¹⁴ The government has not yet drafted the law permitting such collective actions.

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

¹¹⁴ Belgium Constitutional Court, case n°133/2013, 10 October 2013, available in French at : <http://www.const-court.be/public/f/2013/2013-133f.pdf>. Summary in English: http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=3580.