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The Right to Effective Participation of Refugee and  
Migrant Children:  
A Critical Children's Rights Perspective

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## Abstract

Refugee and migrant children comprise one of the most vulnerable groups in the context of world-wide migration flows. The vulnerability and precarious situation of refugee and migrant children calls for a strong legal position in asylum procedures. Effective participation in asylum procedures – based on child-friendly and age-appropriate communication and adapted procedures – can strengthen the legal position of refugee and migrant children and contribute to the perceived fairness of complex procedures and outcomes. In this paper, through critical analysis of legal instruments, a nuanced understanding of the meaning of the right to participation for refugee and migrant children will be sought. This right will be conceptualised from a children’s rights perspective, with the aim of investigating its meaning for this specific group of children. Moreover, the meaning and scope of participation will be studied in relation to other children’s rights and principles. It will be shown these rights and principles, such as the right to participation, the right to information, access to justice, child-friendly justice and the best interests of the child principle are closely connected in relation to the involvement of children in asylum procedures.

**Keywords:** *Children’s rights, refugee children, migration, participation*

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## 1. Introduction

Worldwide, the number of child refugees has more than doubled in the last decade. Nearly one in every 200 children in the world today is a refugee (UNICEF, 2016a). In Europe, one in four asylum seekers is a child (European Commission, 2017:6). According to UNHCR, UNICEF and IOM (2018), around 20.000 unaccompanied and separated children arrived in Europe in 2017. Although, the total number of children arriving in Europe has decreased by almost 70% between 2016 and 2017, the number of unaccompanied and separated children has increased by 31%. In Greece, most children arrived in the company of parents, whereas in Italy most children arrived alone.

Refugee and migrant children comprise one of the most vulnerable groups in the context of current migration flows; they often experience a dangerous journey, traumatic events and often lack access to essential necessities, such as food, shelter, medical aid and a healthy and stimulating environment for growing up (UNICEF, 2016a; 2016b; Council of Europe, 2016). These children are often not recognised and respected as rights holders and thus as active agents in asylum procedures (Vandenhoele, 2016; Muftee, 2015; Wernesjö, 2011; Bushin, 2009; Kohli, 2006; Crock, 2015). However, a one-sided view of refugee and migrant children as vulnerable objects is not in coherence with international children's rights law and standards, including among others the UN Convention on the Rights of the Child (hereinafter CRC), that see all children as autonomous subjects and full bearers of rights (Doek, 2007; Sloth-Nielsen, 1995). A rights-based perspective counters the sole protectionist view of refugee and migrant children as vulnerable objects in need of protection only. As such, the vulnerability and precarious situation of refugee and migrant children calls for a strong legal position in asylum procedures. Effective participation in asylum procedures – based on child-friendly and age-appropriate communication and adapted procedures – can strengthen the legal position of refugee and migrant children and contribute to the perceived fairness of complex procedures and outcomes.

In this article, the right to participation of refugee and migrant children will be conceptualised from a children's rights perspective, with the aim of investigating its meaning for this specific group of children. Moreover, the meaning and scope of participation will be studied in relation to other children's rights and principles, in particular the best interests of the child principle (art. 3(1) CRC).

## 2. Children in asylum procedures

Regardless of age, everyone who seeks asylum in the EU will enter a formal asylum procedure that will assess whether one has a legal ground to stay in the country one entered (hence, receiving or host country). In this formal procedure, multiple phases can be distinguished. The first phase comprises identification and possibly age-assessment, registration, applying for asylum and a resting period for the applicants. The second phase comprises investigations into the applicant's asylum claim and whether he needs protection against persecution or serious harm in the home country (i.e. principle of non-refoulement) (art. 1A(2) 1951 UN Geneva Convention relating to the Status of Refugees (hereinafter Refugee Convention)). At the end of the second phase for every asylum seeker, status will be determined in either a right to residence, or an order to return to their home country. When the latter decision is made, every individual has a right to appeal, before return procedures are commenced.<sup>1</sup>

The Refugee Convention is the core international instrument regarding the application of refugee status to people who have fled their country. Refugees are individuals who have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (art. 1A(2) Refugee Convention). In EU law a distinction is made between refugees who fear persecution on their home country and people who fear serious harm and therefore qualify for international protection (Craig & Zwaan, 2019; art. 15 EU Directive 2011/95/EU (recast)).<sup>2</sup> The Refugee Convention applies to persons of all ages, although no specific references are made to children in article 1A(2) (Pobjoy, 2017). Pobjoy (2017) argues that the convention is not sensitive to the specific situation and vulnerabilities of children and adult-focused (see also UN Committee on the Rights of the Child (hereinafter CRC Committee), 2017b, para. 3).

Under the CRC children are defined as persons up to the age of 18 (art. 1 CRC). In the EU Directive 2013/32/EU it is stated that a minor is 'a third-country national or a stateless person under the age of 18 years' (art. 2(l)). The UN Convention on the Rights of the Child 'goes so far as to accord asylum seeker children the same rights and entitlements as refugees – whatever their actual status under the Convention relating to the Status of Refugees and its related Protocol' (Crock, 2015). Moreover, the CRC Committee states in General Comment No. 6 on *the (t)reatment of unaccompanied and separated children outside their country of origin*<sup>3</sup> that all asylum-seeking children, irrespective of their age, must be given access to

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<sup>1</sup> The right to appeal has among others been recognized in accordance with the Universal Declaration on Human Rights (UDHR) United Nations General Assembly, General Assembly resolution 217 A, 10 December 1948.

<sup>2</sup> Serious harm may consist of: (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment in their country of origin; (c) serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict.

<sup>3</sup> The UN Committee on the Rights of the Child is the monitoring body of the UN Convention on the Rights of the Child. Next to monitoring the implementation of the convention in the states parties it produces authoritative

asylum procedures (para. 66). Crock explains that children 'appear in the universal protected group of 'children' no matter what classifications – legal or illegal, regular or irregular migrants – states choose to superimpose on them' (Crock, 2015: 223). In this paper, the analysis covers both children who are regarded as refugees, under the Refugee Convention, as well as children who seek international protection or migrate for other reasons and apply for asylum in a host country.

In light of the different categories of asylum-seeking children, one can differentiate between, unaccompanied, separated and accompanied children. The CRC Committee (2005) has defined unaccompanied children as 'children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so' (para. 7). The CRC Committee defines separated children as: 'children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members' (para. 8). The third group of refugee children arrives with their parent(s) or primary caregiver(s). Despite their shared commonalities as being minors separated from their parents, it is important to realise that unaccompanied and separated children are a heterogeneous group, 'not only in terms of gender, age, ethnicity and religion, but also in terms of their past experiences and present life situations.' (Wernesjö, 2012: 496).

When children enter a receiving country, the question how they are and should be treated is key. Whereas it would be easy to view minor refugees as children in need of protection, adult supervision and mere victims of circumstance, it is possibly even more important to see them as (individual) rights holders, who have the right to be heard in the procedures affecting them (see also Vandenhoele, 2016; Crock, 2015: 237). Since refugee and migrant children find themselves in a particularly vulnerable position, often having experienced traumatic events that cause insecurity and anxiety, they have a lot to gain from being regarded as active agents in legal procedures (Van Os et al., 2016; Kalverboer et al., 2016; Derluyn & Broekaert, 2007).

### 3. The right to participation

In 2017, the European Commission stated in a Communication to the European Parliament and the Council on the protection of children in migration, that appropriate safeguards must be applied to all children in all stages of the asylum procedure. Specifically, access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments are named as key protection measures (European Commission, 2017:9). Moreover, it is recommended that

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recommendations as to how to implement certain provisions of the CRC, in the form of General Comments (see for example Liefwaard, 2013). Since 2001, the CRC Committee has issued 23 General Comments.

children need to be informed – in a child-sensitive and age – and context – appropriate manner – on their rights, on procedures and on services available for their protection (2017:14). In the same year, the Council of Europe issued the Action on Plan on Protecting Refugee and Migrant Children in Europe in which it highlights the importance of access to rights, access to information and child-friendly procedures (Council of Europe, 2017:1-2). Many of the elements of child-sensitive practices that are brought forward in these documents, touch upon the right to participation. In this section, the right to participation will be further analysed, specifically in relation to the position of refugee and migrant children.

### **3.1 The right to be heard**

The right to be heard, as it is laid down in article 12 CRC, can be seen as part of the broader umbrella term 'participation' (Lundy, 2007). The right to participation as such is not enshrined in the CRC, however, several participatory rights can be found in the CRC (Parkes, 2013). Participation can be seen as a fundamental human right, because it enables children to exercise their rights effectively (Freeman, 2007). The CRC is the first international children's rights instrument in which participatory rights for children are laid down and therefore the convention is of particular significance for children (Cantwell, 1992; Van Bueren, 1995; Tobin, 2013). The right to be heard serves the purpose of acknowledging the growing autonomy of children and granting them the possibility to participate in decisions that affect their lives (Van Bueren, 1995). As explained by the CRC Committee (2009), the phrasing "shall assure" puts states parties under the strict obligation to undertake appropriate measures to fully implement this right for all children, leaving no leeway for states parties' discretion (para. 19). The child's right to be heard is one of the general principles of the CRC (next to the right to non-discrimination (art. 2), the best interests of the child principle (art. 3) and the right to life, survival and development (art. 6)), CRC Committee, 2003, para. 12). As such, the right to be heard should be considered in the interpretation and implementation of all other rights, and vice versa (Herbots & Put, 2015). Moreover, hearing children's views should not be an end in itself or taking place as a matter of formality, but a means through which children can exercise their rights (CRC Committee, 2003, para. 12).

The right to be heard implies that children, who are capable of forming their own views, have the right to express those views freely in all matters affecting them (art. 12(1) CRC). Moreover, it is specifically laid down that children should be provided the opportunity to be heard in any judicial and administrative proceedings affecting them (art. 12(2) CRC). This right applies both to proceedings which are initiated by the child, such as complaints procedures, as well as to those initiated by others which affect the child, such as an asylum determination procedure (CRC Committee, 2009, para. 33). This implies that article 12 CRC has significant practical value for the protection of the participatory rights of the child involved in any procedure (see Rap, 2013). The views and opinion of the child should be taken into account giving due weight to the age and maturity of the child (art. 12(1) CRC).



Article 5 CRC gives further guidelines on how to interpret the term maturity in article 12. Children's growing capacities should be taken into account in the exercise of their rights (art. 5 CRC). This implies that a balance must be found between on the one side treating children as active agents, who have the right and capacity to exercise their own rights and on the other side providing children with protection, because of their on-going development and immaturity (Lansdown, Jimerson & Shahroozi, 2014).

Because of the dynamic nature of the child's right to be heard the CRC Committee (2009) recommends the states parties to the CRC to not establish fixed age limits with regard to the exercise of this right (para. 21). Ideally, in every case an individual assessment should be made regarding whether the child is capable of expressing his<sup>4</sup> views (Lansdown, 2005; Saywitz, Camparo & Romanoff, 2010; Beijer & Liefwaard, 2011). Specifically, in relation to refugee and migrant children the CRC Committee has recommended that children should be provided with all relevant information, concerning for example the asylum process, to allow them to express their well-informed views and wishes. The information should be adapted to the level of maturity and understanding of the child (CRC Committee, 2005, para. 25). Moreover, in order for refugee and migrant children to enjoy the right to participation in an asylum procedure, states must provide all children access to the procedure in a child-sensitive and age-appropriate manner, hereby having due regard for the age and evolving capacities of the child (CRC Committee, 2017a, para. 35).

Every child, however, also has the right not to exercise their right to be heard – it is a choice, not an obligation (CRC Committee, 2009, para. 16). The CRC Committee explains that states parties have to ensure that the child receives all necessary information and advice to make a decision in favour of his best interests, which leads to the second core component of the right to participation: the right to information (see also further below; CRC Committee, 2009, para. 16). An important implication of the right to be heard is that the child's opinion must be taken seriously (CRC Committee, 2009, para. 28) and that the child must be informed about how his opinion was taken into account in the decision-making process (CRC Committee, 2009, para. 45; see also Council of Europe, 2010, Guidelines on Child-friendly Justice, IV, A, para. 1(g); Explanatory memorandum IV, A, para. 55). This feedback must ensure that the child has not only been heard by way of formality, but that his opinion has been seriously considered by the decision-making authority (CRC Committee, 2009, para. 45; CRC Committee, 2013, para. 6). The environment or setting in which the child is heard has an important influence on whether the child can express his views freely. When a child is heard, this should take place in a setting that contributes to being able to give his opinion freely. This means that the environment may not be intimidating, hostile or otherwise inappropriate to the age of the child (CRC Committee, 2009, paras. 23, 34, 60;). Specifically, the CRC Committee recommends that children are heard behind closed doors in court, also in order to protect the child's privacy, and that adjustments are made to the design of the courtroom, the clothing of judges and lawyers and the waiting areas for children (CRC

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<sup>4</sup> For practical reasons, in this article it is referred to children and adults in the masculine form. Feminine children and adults are to be considered included in the references as well.

Committee, 2009, para. 34; Guidelines on Child-friendly Justice IV, D, paras. 54-63). Research, however, shows that children prefer informal forms of participation with professionals they know and trust, rather than participation in a formal setting with adults they do not know. The impressing and exciting setting and the presence of a larger number of adults makes it more difficult for children to express their opinions and wishes (Cashmore, 2002; Kennan, Brady & Forkan, 2018; Lundy, 2007; Rap 2013).

The CRC Committee (2006) has emphasised that special attention has to be paid to the right of the child to be heard in immigration, asylum and refugee procedures (para. 54). Therefore, it is crucial to fully implement refugee children's right to express their views on all aspects of the immigration and asylum proceedings (including any decision on care, shelter or migration status) (see art. 12(2) CRC; CRC Committee, 2017a, para. 37). In the case of an asylum claim, the child must have the opportunity to present her/his reasons that lead to the asylum claim (CRC Committee, 2009, para. 123). According to the UNCHR 'effective participation recognizes children and adolescents as right-holders, it builds their capacity and resilience, and allows them to protect themselves and their peers' (UNHCR, 2006: 16). In order to fully understand the entire procedure and to participate, appropriate communication methods need to be applied. Therefore, the asylum interview needs to take into account the age, gender, cultural background and maturity of the child. However, also the circumstances of the flight and mode of arrival need to be taken into account. Useful non-verbal methods that can be applied include drawing, role-playing, storytelling, singing and playing (UNHCR, 2009, para. 71). It must be acknowledged that children are different from adults. They may experience fear or a lack of education. Therefore, during the interview they might omit vital information or are unable to differentiate reality from fantasy. Interviews need to take place in friendly, accessible settings in order to make children feel safe (UNHCR, 2009, para. 72). Moreover, the interview has to be conducted by a professional trained in communicating with children (CRC Committee, 2017b, para. 17(c)). Also, children should be heard separately from their parents. The CRC Committee (2017a) notes that 'children should be heard independently of their parents, and their individual circumstances should be included in the consideration of the family's cases. Specific best-interests assessments should be carried out in those procedures, and the child's specific reasons for the migration should be taken into account' (para. 37). Also, the child's right to be heard should be ensured in the immigration procedures concerning their parents, specifically when the decision could affect the rights of the child, such as the right to not be separated from parents (CRC Committee, 2017a, para. 38).

The right to be heard as laid down in the CRC shows the growing recognition of the international community for the child as a rights holder and an autonomous and active human being, rather than a silent and passive being that only needs protection from adults (Liefwaard, 2016; Hanson, 2016; Doek, 2007; Lansdown, 2005; Lückner-Babel, 1995; Freeman, 1992). The CRC Committee (2009) acknowledges that giving due weight to children's views is challenging and it requires change (paras. 49, 76, 136). Moreover, to ensure that the views of the child are taken seriously the decision-maker should provide the child with feedback on the outcome of the process and the extent to and manner in which the child's views were

considered (CRC Committee, 2009, paras. 45; 134(i); Lundy, 2007). This is even more important when decisions are taken that go against the wishes of the child (Leviner, 2018; see also Minkhorst, et al., 2016). Research shows that the final decision of a judge is better understood and accepted by children when the reasons that led to a particular decision have been explained to the child (Cashmore & Parkinson, 2007; Tyler, 2003).

To interpret and implement the right to participation, one should look at the conditions and safeguards needed to participate effectively. There are several elements that enable children to fully exercise their right to participation, core components being the right to be heard and the right to information (CRC Committee, 2009, paras. 13 and 25). Other additional components that are of importance are for instance the right to (legal) representation and right to access to justice and remedies (CRC Committee, 2009, paras. 34 and 38).

### **3.2 The right to information**

The right to information is laid down separately in article 17 of the CRC. However, the CRC Committee (2009) states that 'children should be provided with full accessible, diversity-sensitive and age-appropriate information about their right to express their views freely (para. 134(a)). This implies an explanation of what is expected of the child (where and when he is allowed to give his opinion, how this will be asked and in what setting) on the one hand and to explain the content of the case concerned, the possible decisions that can be taken and the consequences of those decisions on the other hand (CRC Committee, 2009, paras. 25, 45, 47, 48; UNHCR, 2009). Giving child-friendly information makes it possible for the child to form his well-informed opinion (CRC Committee, 2009, paras. 25, 34, 60, 82; Guidelines on Child-friendly Justice IV, D, 3, para. 48). This requires trained professionals who are able to provide age-appropriate information in a way that is understandable to the child (CRC Committee, 2009, paras. 34, 49, 134 (a), 134 (g)). However, it must also be made clear to the child that his opinion will not necessarily be decisive in the final decision taken (Guidelines on Child-friendly Justice IV, D, 3, para. 48). 'To allow for a well-informed expression of such views and wishes, it is imperative that specifically asylum seeking and refugee children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17 and 22(2))' (CRC Committee, 2005, para. 25). Refugee children who are old enough to understand what is meant by status determination should be informed about the process, where they stand in the process, what decisions have been made and the possible consequences (UNHCR, 1994: 102). The UNHCR Guidelines on International Protection (2009) indicate that children should be given 'all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them' (para. 70), among others on the right to privacy and confidentiality and the age-assessment procedure (paras. 70, 75). Moreover, children should understand the procedure and its consequences, have access to age-sensitive information about reception, registration, refugee or statelessness status determination and

other procedures and services, and decisions should be communicated to children in a language and manner they understand (UNHCR, 2012). Finally, children should be informed about the decisions that are taken 'in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment' (UNHCR, 2009, para. 77). In case of a negative decision, particular care should be taken in communicating the message and explaining what the next steps are that can be taken in the procedure (UNHCR, 2009, para. 77). The recently adopted UN Global Compact for Safe, Orderly and Regular Migration (2018) confirms that migrants should be provided with 'gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations' (para. 19(d)). To receive adequate information is seen as a precondition for the child to be able to give his informed views and make clarified decisions (CRC Committee, 2009, paras. 25, 80). As such, the right to information has close ties to the right to be heard and should be regarded as a fundamental element of the right to participation.

### **3.3 The right to (legal) representation**

An important starting point concerns the fact that the right to be heard implies a choice for the child and not an obligation (CRC Committee, 2009, paras. 16, 58). If a child decides to give his opinion to the relevant authority in a certain (legal) procedure, he then has the choice to do this himself or through a representative (art. 12(2) CRC). The representative of the child can be a parent, but also a lawyer, a guardian (*ad litem*) or a social worker (para. 36). The child should preferably be heard personally (para. 35) and when this take place through the intervention of an adult, this person must have sufficient knowledge and understanding of the procedure and have experience with working with children (para. 36). However, the CRC Committee notes that there are risks of a conflict of interests between the child and their most obvious representative(s); parent(s) (para. 36). Therefore, they prescribe that: 'representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. The representative must be aware that he or she represents exclusively the interests of the child and not the interests of other persons (parent(s)) ...' (paras. 36-37).

It is of importance to distinguish between the guardian, who is appointed to safeguard the best interests and general well-being of the unaccompanied or separated child, and the legal representative (i.e. a lawyer). The guardian acts as a statutory representative of the child in all proceedings in the same way a parent represents his/her child and complements the limited legal capacity of the child. The guardian must be accessible to unaccompanied children at all stages of the asylum procedure (FRA, 2015). The CRC Committee (2005) notes that unaccompanied children should only be referred to asylum or other administrative or judicial procedures when they have been appointed both a guardian and a legal representative free of charge (paras. 21, 36, 69). The guardian should be appointed as soon as the child has been identified and until the child has either reached the age of majority or

has permanently left the country (para. 33). For unaccompanied and separated children, the presence of a guardian or legal representative is required in all planning and decision-making processes, including interviews conducted by the refugee determination authority and any appeal hearings (paras. 33, 69 and 72). Moreover the CRC Committee (2017b) has specified that all children, including those with parents/in parental care, should be appointed a legal representative to provide representation at all stages in the proceedings and with whom they can communicate freely (para. 17(f)).

Under the EU Directive 2013/32/EU states must assure that unaccompanied minors are appointed a representative who can assist them in benefitting from the rights under the Directive and to comply with its obligations (art. 25(1)(a)). A representative should assist and represent the unaccompanied child, ensure the best interests of the child in the procedure and exercise legal capacity when necessary (art. 2(n)). In the context this Directive the term guardian is not used, but the role of the representative can be seen as equalling the role of the guardian as identified by the CRC Committee. During all phases of a formal asylum procedure, a qualified representative should be available free of charge (arts. 7(3), 19, 20 and 21). The child should be informed immediately of the appointment of a representative. States must ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the personal interview and how to prepare him or herself for the interview. The representative must also be able to attend the interview and to ask questions or make comments. Even if the representative is present, states may still require the presence of the child (art. 25(1)(a)-(b)). Unaccompanied children and their representatives must be provided, free of charge, with legal and procedural information (art. 25(3)(b)) in the procedures at first instance (in accordance with art. 19(1)). States may also provide asylum applicants with free legal assistance in the procedures at first instance (art. 20(2), in which case art. 19(1) does not apply). As a minimum applicants have to be provided with free legal assistance and representation in appeals procedures (art. 20(1)).

Recent research shows that having a representative, in the form of a lawyer or a guardian ad litem, contributes positively to being able to participate in legal procedures. The representative can help the child influence the decision and can urge the other professionals to give the child feedback on the decision that is taken. Again, it is important that a relationship of trust exists between the child and the representative (Kennan et al., 2018).

### **3.4 Access to justice**

The availability of child-sensitive procedures can be seen as a requirement for the child's access to justice (Liefwaard, 2019). Access to justice refers to 'the ability to obtain a just and timely remedy for violations of rights' (UN Human Rights Council, 2013, para. 4). Liefwaard (2019) notes that a clear relation exists between access to justice and the right to an effective remedy. Moreover, access to justice should be understood as a procedural (e.g. access to courts, legal representation) as well as a substantive concept (e.g. financial compensation,

reparation of damages). However, specifically for children this right is not self-evident and they face challenges in exercising access to justice. To make access to justice for children procedurally more child-sensitive or child-friendly, Liefwaard (2019) distinguished three elements: child-friendly information, child participation in procedures and child-friendly outcomes and remedies. As the first two have been dealt with above, the latter will be addressed here.

Access to justice means that states parties need to ensure that children are provided with access to authorities and facilities that can help them to be heard, informed, and represented. Also, children must have access to appeals, complaints procedures and an ombudsman or children's rights commissioner (CRC Committee, 2009, paras. 46-47). For instance, in the Concluding Observations by the CRC Committee to France, the Committee noted its concern for specifically the situation of unaccompanied migrant children and their difficulties to access the child protection system and legal representation (CRC Committee, 2016, para. 73). Subsequently, the CRC Committee addressed the number of asylum seeking children who were 'subjected to administrative detention in 2014, in degrading conditions and without access to a judge' (para. 73). Without access to a judge, these children were unable to appeal the administrative detention, and these children did not have the proper safeguards to be heard effectively in a formal asylum procedure. The CRC Committee recommended the state to, in line with article 12 CRC, 'establish systems and/or procedures for the participation of children, the training of social workers and administrative or court authorities, and the provision of support by a professional (lawyer, ad hoc administrator or social worker)' (para. 30). Furthermore, the Committee recommended the state to '[d]evelop effective avenues for children's views to be heard and adequately inform children of such channels' (para. 30(a)). By that, access to justice and child-friendly justice aim to be more responsive to the child's right to participate in all formal and informal decision-making concerning them, and more focused on children's rights in general (Liefwaard, 2016). However, Liefwaard (2016) acknowledges that international (children's rights) standards do not give much guidance on what child-friendly remedies should entail. For the purpose of this study, the procedural element of access to justice is of particular importance, because it implies that legal procedures should be child-sensitive and child-friendly in order to be accessible to children.

#### 4. Participation in practice

The participation of children in asylum procedures is still an underdeveloped field of research. As explained above, it is acknowledged in international standards that the right to be heard should be upheld for these children, however little sound academic research has been conducted on the implementation of this right in asylum procedures (Van Os et al., 2016; Stalford, 2018). The limited research that has been conducted indicates that refugee and migrant children are not sufficiently enabled to participate in predominantly adult-oriented asylum procedures (Smyth, 2014; Kilkelly & Kennan, 2015; Stalford, 2018; Mannion,

2016). Information about the rights of refugees and asylum seekers is generally aimed at adults. When children are accompanied by parents or other caretakers it is assumed to be sufficient when the adult is informed and heard within the procedure (De Kinderombudsman, 2016; ENOC, 2016; Cederborg, 2015; Crock, 2015; Lansdown, 2010). Asylum application procedures can even be perceived as traumatic events in itself (Darmanaki Farahani & Bradley, 2018; Chase, 2013). It has also been shown, however, that informing people and having them to participate in the process of integration empowers them and helps them to regain control over their life (Valenta & Berg, 2010; Chase, 2013).

## 4.1 Participation of children in asylum procedures

In general, it can be stated that children experience a serious lack of information before and during their journey to the host country, regarding the journey itself, the authorities, procedures and access to rights and services (see for example Kloosterboer, 2009). Also, children indicate that upon arrival they are overwhelmed and are not able to process information or are not given adequate information at all. Exchanges and communication with peers are seen as a reliable way of getting access to information, from those they trust (Council of Europe, 2018; see also Chase, 2010).

Despite the fact that unaccompanied and separated children should be heard in the asylum application process, they do not always find it easy to disclose their story to adults (Kohli, 2006). Chase shows in her study among unaccompanied children in the UK that they selectively share information with adults and peers 'to maintain a sense of agency and control over their lives' (Chase, 2010:2065). These young people displayed a sense of distrust towards social workers or others representing the asylum system, but also protected themselves from getting upset by memories of the past (Chase, 2010; Kohli, 2006).

Kohli (2006) explains that unaccompanied children may have been instructed by parents or smugglers to present a certain story to the authorities. These are called 'thin stories' which are 'purposefully constructed as an acceptable amalgam in compliance with international conventions related to the status of refugees' and which are perceived as the key to entering or staying in the host country (Kohli, 2006: 711). Stalford (2018) sketches a rather grim picture of the current state of affairs concerning the participation of unaccompanied children in immigration procedures in the UK. Although unaccompanied children are generally heard by the immigration authorities, the manner in which they are heard is very worrisome. Children experience hostile interrogation techniques, feel attacked and intimidated, suggesting that questions are asked to expose inconsistencies and to question the credibility of the child's story. The adversarial nature of asylum procedures and the importance attached to the child's testimony and evidence to be provided to substantiate the asylum application are named as causes of the non-implementation of the right to be heard for children (see also Shamseldin, 2012).

Concerning the (much larger) group of accompanied children the question arises to what extent they are able to participate in the asylum procedure independently or separately from their parents? Several studies indicate that the position of accompanied children receives far less attention compared to unaccompanied and separated children and they are not always provided with the same rights and safeguards (Duivenvoorde, 2018; Lidén & Rusten, 2007). When children are accompanied by parents it is often assumed that it is sufficient if the adult is informed and heard within the asylum procedure and authorities assume that being in the care of a parent excludes them from being in the need of assistance, protection or attention of the state (ENOC, 2016; Cederborg, 2015; Crock, 2015; Lansdown, 2005; Ottosson & Lundberg, 2013). 'Children are included as "accompanying family" or as "dependents" in applications made by adults and their faith is generally tied to those adults' (Crock, 2015: 238; see also Kalverboer & Zijlstra, 2006). Accompanied children usually depend on their parents' asylum claim and therefore, in practice, they are not automatically heard in the asylum procedure, although the international standards recommend to hear these children individually as well (Reneman, 2014). In Norway, the conversations with accompanied children have been characterised as being tokenistic and professionals need to be trained to a larger degree in conducting interviews with children and in identifying child-specific forms of persecution (Pobjoy, 2017; Lidén & Rusten, 2007). Moreover, countries apply different age limits to hearing accompanied children. For example, in the Netherlands accompanied children are heard by the immigration authorities from age 15. In Norway, children from the age of seven are heard by the immigration authorities (Lidén & Rusten, 2007).

## 4.2 Relevance of participation

In addition to the fact that the right to be heard is a treaty obligation that arises from the CRC, a large number of studies shows that participation for children has a number of positive effects. Positive experiences with participation can increase self-confidence, self-esteem and certain skills of children (Collins, 2017; Schofield, 2005; Saywitz et al., 2010). Moreover, participation in decisions may have a positive influence on the development of autonomy and growing up into an independent adult, who is capable of standing up for himself (i.e. empowerment takes place through participation) (Lansdown, 2005; Van Bijleveld et al., 2015). Children also learn important skills by participating in decisions, such as reasoning skills, learning to formulate an opinion and collaborating with others (Fitzgerald et al., 2009; Collins, 2017). Research in the field of health care shows that treatment outcomes are probably better when children are involved in decisions from the start of the procedure. Involving children in decisions improves their knowledge and understanding of the disease and the role they can play in it (Kilkelly & Donnelly, 2011; Vis et al., 2011). If participation is successfully given shape, this not only leads to more positive outcomes of the treatment offered, but also contributes to the child's well-being (although long-term effects are difficult to measure) (Vis et al., 2011).



Being able to participate empowers children and helps them to better understand and accept the decisions that are taken (Cashmore & Parkinson, 2007; Saywitz et al., 2010; Lansdown, 2005; Fitzgerald et al., 2009; Newbigging & Thomas, 2011). Participation facilitates children to grow up as responsible adults (Saywitz et al., 2010). Lack of regard for the agency of children promotes 'a self-fulfilling cycle of learned helplessness' and children feel as not being taken seriously by adults (Lansdown, 2005:24). Moreover, children themselves indicate that they value being an active participant in the decision-making process (Saywitz et al., 2010). Possibly, children's participation in asylum procedures prevents them from becoming a marginalised group from the start of their life in a new country, with a lack of self-confidence and active engagement with society as a consequence.

In accessing and participating in legal procedures, children are largely dependent on adults (Kennan et al., 2018). The relationship between for example social workers and children is seen as an important factor in making participation successful for children (Cossar, Brandon & Jordan, 2011; McCarthy, 2016; Kennan et al., 2018; Van Bijleveld et al., 2015). Professionals are judged to be more positive by children when they listen to them. In addition, when being able to participate children perceive their own input as more important, they feel that they are treated more fairly and respect the decision more quickly (FRA, 2017; Cashmore, 2002). However, despite the positive effects that are accorded to participation in decision-making procedures, several studies on children's participation in care arrangements show the image of professionals who believe that children do not have the skills and competences to be able to participate, but that they, on the contrary, should be protected against participation (Van Bijleveld et al., 2015). Various studies show that the wishes and opinions of the child are only brought forward when they correspond with those of the authorities or the court (Leviner, 2017 in Leviner, 2018). Collins (2017) notes that children's participation has a number of important challenges and difficulties, for example; the opinion of the child is asked but has no meaningful influence on the decision (i.e. tokenism), feedback to the child on how his opinion has influenced the final decision is lacking or the institutional structure impedes the meaningful, effective and sustainable involvement of the child (see also Bessant & Broadley, 2014; Van Bijleveld et al., 2015; Tobin, 2013). Two main challenges arise in this context: 1) a lack of understanding and feeling heard on the part of the children (Leviner, 2018; Block et al., 2010; Muench, Diaz & Wright, 2017; Pölkki et al., 2012; Cossar et al., 2011), and 2) a lack of skills and time on the part of professionals (Vis, Holtan & Thomas, 2012; Kennan et al., 2018; Bessant & Broadley, 2014; Pölkki et al., 2012; Van Bijleveld et al., 2015; O'Reilly & Dolan, 2017). Therefore, it is important that professionals recognize the importance of participation by children and that they not only see participation as a way to gather information or to have the decision already taken by the professional confirmed by the child (Van Bijleveld et al., 2015). The training of professionals in communication skills, specifically aimed at communicating with children, is of great importance, because this can significantly stimulate effective participation of children (O'Reilly & Dolan, 2017).

## 5. Balancing of rights and interests of refugee and migrant children

### 5.1 Best interests of the child

Article 3(1) CRC provides 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 shall be a primary consideration'. The principle has been criticised as being indeterminable and open-ended (Eekelaar, 2015). However, the CRC Committee (2013) describes the concept as flexible and adaptable; it should be adjusted and defined on an individual basis (para. 32). The expression 'primary consideration' means that the child's best interests may not be considered on the same (but a higher) level as all other considerations. This is justified on the basis of the special situation of the child: 'dependency, maturity, legal status and, often, voicelessness' and the fact that their interests are often overlooked by adults (para. 37). The CRC Committee stresses that the child's best interests principle is a threefold concept which operates variously as a substantive right, an interpretative legal principle and a procedural right. The first implies that the child's interests should be considered over and above other factors whenever a decision is made concerning the child, even if there are other compelling interests at stake. The second implies that if a provision is ambiguous, the interpretation which most effectively serves the child's best interests should be chosen; and the third implies that any decision which affects a child must be arrived at by a process which includes an evaluation of the possible impact on the child. This requires certain procedural guarantees (para. 6).

When looking at the substantive element of the best interests principle regarding refugee and migrant children the conceptual framework developed by Eekelaar (2015) is of relevance. Eekelaar (2015) makes a distinction between decisions affecting children directly and indirectly. In the first case, the decision-maker has the task to find a solution that has the best outcome for the child, also taking into account other considerations, but giving primary consideration to the interests of the child. In the latter case, the decision-maker has the task to find the best solution to the issue to be decided, whereby 'the interests of the child are part of the agenda' (Eekelaar, 2015: 5). When applying this to the matter of child refugees involved in asylum procedures the distinction should be made between accompanied and unaccompanied (or separated) minors. In the case of unaccompanied minors a decision has to be taken that directly affects the child (i.e. whether he is granted refugee status and can stay in the receiving country). This decision should, in line with article 3(1) CRC, take into account an assessment of the best interests of the child (see for more Van Os et al., 2016; Van Os, 2018). When it concerns an accompanied child, who has travelled to the receiving country with his parents or primary caregivers, the decision will indirectly affect the child. The parents will enter the asylum procedure and the child is dependent upon the decision that is taken in his parents' asylum claim. In other words, the asylum claim of the whole family will be evaluated and the status of the parents determines the status of the child (Kalverboer & Zijlstra, 2006).

Regarding the procedural element of the best interests principle the status of the refugee child is also of importance. Unaccompanied and separated children file their own asylum claim in the receiving country. This means that they are the main source of information about their situation and that they will be heard directly in the asylum procedure (UNHCR/UNICEF, 2014: 31). Moreover, a (more elaborate) best interests assessment can be carried out to evaluate their asylum claim (see Van Os et al., 2016). The CRC Committee (2013) states that '[t]he "best-interests assessment" consists in evaluating and balancing all the elements necessary to make a decision in a specific situation' (para. 47). Moreover, the child's views should be taken into account when making this assessment (para. 53). This should generally be the case with unaccompanied minors, because they have to be heard by an immigration officer to assess their asylum claim.

As said, accompanied children depend on their parents' asylum claim and the question arises to what extent they are able to participate in the asylum procedure independently or separately from their parents? As explained above, the position of accompanied minors receives far less attention compared to unaccompanied and separated minors and they are not provided with the same safeguards (Smyth, 2014; Duivenvoorde, 2018). The fact that children depend on the asylum application of their parents implies in many states that a best interests assessment might not take place and that the child's views are not heard with regard to the asylum claim or the best interests assessment (if taking place). This can be problematic when a separate claim for protection of the child could be considered, that could benefit both the child and his family (Crock, 2015; Klverboer & Zijlstra, 2006). Pobjoy (2017) goes as far as to argue that in case of a rejection of the asylum application, and where no individual status determination of the child has been carried out, this results in a violation of the duty of non-refoulement and the right to be heard (art. 12 CRC). States, therefore, have implemented status determination procedures for accompanied children, however this does not automatically mean that the child is heard or that this process takes place rigorously. A study conducted in Sweden shows that when the views of accompanied children are heard 'their stories are often used strategically to strengthen their parents' asylum claims rather than being assessed and valued on their own terms' (Ottosson & Lundberg, 2013). The opposite can also happen, however, where the story of the child contradicts the parents' flight story, which will question the credibility of the story presented to the immigration authority.

## **5.2 The relation between the right to participation and the best interests of the child**

The CRC Committee specifies that 'there can be no correct application of Article 3 if the components of Article 12 are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives' (CRC Committee, 2009, para. 74; CRC Committee, 2017a, para. 37). Moreover, the relation between assessing the best interests of the child and hearing the views of a child, as implied

by the CRC Committee, means that procedures should be of a child-friendly nature. When children are asked about their views, in light of this best interests assessment, this should take place in a child-appropriate and child-friendly manner (see for example Lundy, 2007). Otherwise, it can be argued that hearing the views of the child is not in his best interests at all, because it will result in adverse consequences for the (psychological) well-being of the child. This brings me to my last argument; whether hearing children in asylum procedures is in line with their best interests?

As argued before, refugee and migrant children comprise a particular vulnerable group, having possibly experienced violence, hardship and trauma in their home countries and during their flight. The right to participation can be scrutinised on the basis of secondary victimisation resulting from involvement in judicial procedures. Especially, with regards to child victims of (sexual) abuse strong evidence exists that being involved in judicial proceedings is particularly harmful for their well-being (Lamb et al., 2008; Quas & Goodman, 2012). Several international and European instruments state that special measures should be taken with regard to child victims' involvement in court procedures (ECOSOC, 2005, arts. 39-40; arts. 21(1) and 26 Directive 2012/29/EU; Beijer & Liefwaard, 2011). However, such protection does not exist for, in particular, unaccompanied minors. The starting point of article 12 CRC is that children have the right to be heard and not the obligation, but in asylum procedures unaccompanied children are heard in principle by an immigration officer in the asylum procedure. However, the right to be heard is also part of the general human right to a fair hearing, which speaks in favour of participation in asylum procedures (Smyth, 2014). In my opinion, this strongly calls for child-sensitive and child-friendly procedures, because involvement in asylum procedures is potentially harmful for children and therefore might not be in their best interests to take part in those procedures.

Whether hearing the views of children in asylum procedures is in their best interests also applies to a certain extent to accompanied children. As explained above, their involvement in the procedure depends heavily on their parents' involvement and their views will not always be heard. However, the question arises whether having these children heard separately will put them in a difficult position as well, causing loyalty conflicts between parents and children and the unethical practice of the state who might try to test the parents' story through hearing their child (see also Tobin, 2013). In this case, the purpose and aim of hearing the child should be very clear for the child, his parents and the authorities, whereby due weight is given to the views of the child (Lundy, 2007; art. 12(1) CRC). Moreover, the voluntary consent of the child to be heard is of utmost importance and again, child-friendly procedures should be in place. The children's autonomy principle as developed by Daly might be useful in this regard. This implies that children should be able to choose themselves whether they would like to be involved in the decision-making (process autonomy) and the outcome of it (outcome autonomy) (Daly, 2017). Furthermore, a broad conception of participation might be useful, acknowledging that participation does not imply hearing the child directly *per se*, but also comprising informing the child, representing the child and having access to remedies (Mannion, 2016).

## 6. Conclusion

Claiming the right to participation is not yet possible for many children across various settings (Fitzgerald et al., 2009), this is especially true for refugee and migrant children. In this article, the right to participation for this group of children has been analysed. The international children's rights framework paints us a rather clear and concise picture of how child participation in judicial proceedings should be implemented in practice. Influenced by the adoption of the CRC and related children's rights instruments and an increasing body of research evidence demonstrating the positive influence of participation, more and more attention and acceptance of the right to participation has emerged in the past decades. The conception of the child as an autonomous human being and rights holder, who can exercise his own rights has gained prominence, at least among Western countries. However, '(e)mbracing the child-centered, child-enabling and child-empowering values underlying participation is one thing. Putting these values into practice is quite another' (Woodhead, 2010). This seems to apply in particular to refugee and migrant children.

Refugee and migrant children find themselves in a vulnerable position, with regard to their precarious well-being and their status and dependency upon adults and authorities. The right to participation is seen as a tool to empower children, but for this particular group of children many challenges lie on the way in realising effective participation. The available research in this area shows a lack of attention for adopting a child-friendly approach in involving children in the asylum procedure. Children experience a gap in knowledge and understanding and hearing their views takes place in procedures developed for adults. Moreover, the distinction between unaccompanied and accompanied children is of particular relevance, because it influences the extent to which children can independently participate in the asylum procedure.

Applying child-friendly procedures is a way forward, however, a critical analysis of participation in light of what is in the best interests of refugee and migrant children is urgently needed. Article 12(2) CRC, explicitly obligates states to provide children the opportunity to participate in all judicial and administrative decisions affecting them. Furthermore, the right to participation should be granted to all children, including those in parental care (CRC Committee, 2017a, para. 36).<sup>5</sup> However, it may even be concluded that true participation – as envisaged in article 12 CRC – is not possible in the context of the current implementation of asylum procedures. In my view, the views and opinions of children themselves should be consulted in this regard as well. Only when truly listening to the opinions and experiences of children, it is possible to improve the procedures to which they are exposed.

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<sup>5</sup> Also, Articles 12 and 7(3) of the EU Directive 2013/32/EU confirm that children, whether or not arriving with their parents, have the right to participate in asylum procedures

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