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# Child-friendly Justice and Procedural Safeguards For Children in Criminal Proceedings

## New Momentum For Children in Conflict With the Law?

TON LIEFAARD\*

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### 1. Introduction

With the adoption of the United Nations (UN) Convention on the Rights of the Child (CRC) thirty years ago, juvenile justice was confirmed to be an issue of children's rights. As a result of this, juvenile justice matters have profited from the emerging attention to the rights of children throughout the past thirty years. Children's rights have become part of law and institutional reform in many of the 196 countries that have embraced the CRC, which has had a significant influence on domestic criminal justice systems and the treatment of children within these systems. One concept that has emerged as part of this development is the concept of child-friendly justice. Child-friendly justice has its focus on the effective participation of children in justice systems. Its emergence was largely fuelled by European case law on juvenile justice

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matters. The concept has become particularly meaningful for juvenile justice systems in Europe and beyond, on account of the adoption of child-friendly justice in international standards, including in legally binding instruments and jurisprudence.

It can be assumed that the concept of child-friendly justice will remain an essential element of children's rights implementation in the years to come. Despite its flaws and gaps,<sup>1</sup> it has the potential of making justice systems more accessible and understandable for children, including the (juvenile) criminal justice system with its particular complexity.<sup>2</sup> However, in order to understand its true potential more research is needed. Only then can one be sure that the growing attention to child-friendly justice has truly resulted in new momentum for children in conflict with the law.

This article elaborates on the concept of child-friendly justice and aims to shed light on a research agenda around its core elements. It starts with some reflections on juvenile justice and children's rights (section 2), followed by background information on the concept of child-friendly justice and its development (section 3), and the way that child-friendly justice has been included in international standards, agendas, jurisprudence and research, particularly in Europe (section 4). The article will conclude with some observations on the importance of developing an international, comparative research agenda that bears relevance for both academia and (legal) practice (section 5).

## 2. Juvenile justice: a matter of children's rights

### 2.1 Children's rights of children in conflict with the law

The CRC's core provisions on juvenile justice, articles 40 and 37, regulate the treatment of children in conflict with the law and aim to safeguard their human rights protection. Article 40 (1) provides that states parties to the CRC are under the obligation to:

*'[R]econize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'*

<sup>1</sup> See Liefwaard & Kilkelly, Child-Friendly Justice: Past, Present and Future, in *Juvenile Justice in Europe: Past, Present and Future*, ed. Goldson (Routledge 2019).

<sup>2</sup> For more on this complexity see Liefwaard, Juvenile Justice from a Children's Rights Perspective, in *The Routledge International Handbook of Children's Rights Studies*, eds. Vandenhoe et al. (Routledge 2015).

In other words, article 40 CRC serves to ensure that children in conflict with the law are treated in a manner that recognises their young age, lack of full maturity, lesser culpability, and human dignity, and that has as its key objective to reintegrate each child into society where he or she can play a constructive role. Consequently, article 40 (1) CRC rules out a purely or dominantly repressive approach.<sup>3</sup> In light of the other CRC provisions, children in conflict with the law have the right to be treated in a non-discriminatory and equal manner (art. 2 CRC) and not to be deprived of liberty unlawfully or arbitrarily (art. 37 (b) CRC). Regarding the latter, article 37 (b) CRC is explicit in the sense that it stipulates that deprivation of liberty of children may only be used as a last resort and for the shortest appropriate period of time.<sup>4</sup> Article 37 (c) and (d) CRC additionally provide for significant rights and protective mechanisms to secure humane and child-specific treatment, including the right to access to justice.<sup>5</sup>

The children's rights framework for children in conflict with the law essentially revolves around the notion that children are different from adults and have the right to be treated accordingly, and that children have the right to be treated with respect for their fundamental human rights and fundamental freedoms, like any other human being. Children in conflict with the law are thus entitled to be treated in a child-specific and fair manner. Child-specificity and fairness can be considered as the two pillars underlying the children's rights framework for juvenile justice. Since the adoption of the CRC in 1989, this has developed into a multi-layered, comprehensive legal framework<sup>6</sup> that regulates the juvenile justice system as a system that should be separate from the criminal justice system for adults, child-specific, and run by specialised professionals. International juvenile justice standards that have emerged over the past 30+ years deal with numerous aspects of juvenile justice, including: the prevention of juvenile delinquency; the use of diversion; the setting of age limits defining the scope of the juvenile justice system; the right to a fair trial, including the right to participate effectively and to be supported by parents; the prevention of ill-treatment (i.e., torture and other forms of ill-treatment or punishment, art. 37 (a) CRC); and the use of deprivation of liberty (i.e., arrest, detention, imprisonment, and other forms of deprivation of liberty used regarding children in conflict with the law).

<sup>3</sup> See Liefgaard 2015.

<sup>4</sup> For more on the implications of these requirements see Liefgaard, Deprivation of Liberty of Children, in *International Human Rights of Children*, eds. Kilkelly & Liefgaard (Springer 2019), pp. 321–357; see also UN Secretary-General & UN Independent Expert for the Global Study on Children Deprived of Liberty, *Global Study on Children Deprived of Liberty*, A/74/136 (UN 2019); Gröning & Svrljuga Sætre, Criminal Justice and Detention, in *Children's Rights in Norway: An Implementation Paradox?*, eds. Langford, Skivenes and Søvig (Idunn 2019); and Van den Brink, Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies, *Youth Justice* 19(3) (2019), pp. 238–261.

<sup>5</sup> See Liefgaard 2019.

<sup>6</sup> See further Liefgaard, Juvenile Justice, in *The Oxford Handbook of Children's Rights Law*, eds. Todres & King (Oxford University Press, 2020).

## 2.2 Domestic practice and reform

The children's rights approach towards children in conflict with the law has confirmed domestic practice and stimulated reform.<sup>7</sup> In many domestic jurisdictions the notion that children in conflict with the law should be treated differently from adults because of their immaturity and lesser culpability, their specific vulnerability, and their potential to change their behaviour and grow out of juvenile delinquency, was already present at the time that article 40 CRC and its predecessor, the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice<sup>8</sup> (also known as the Beijing Rules), were adopted.<sup>9</sup> For example, the first specialised youth courts date from the late 19<sup>th</sup> and the beginning of the 20<sup>th</sup> Century, following the example of the Illinois Cook County model from the United States, among others.<sup>10</sup> The notion that children in conflict with the law are better off with a constructive and non-retributive intervention, rather than a purely retributive one, also dates back to that era. In 1924, the Declaration of Geneva, adopted by the League of Nations as the first international instrument focused on children's rights, explicitly referred to the delinquent child as a child that 'must be reclaimed'.<sup>11</sup> Furthermore, the notion that children, like adults, are entitled to be treated in accordance with due process principles and the right to a fair trial was not introduced by the CRC, but had already found its way into the general human rights instruments at the UN and regional level<sup>12</sup>, as well as domestic jurisdictions.<sup>13</sup> The CRC, in particular articles 40 and 37, could therefore be seen as the result of domestic developments together with a growing desire to regulate juvenile justice matters at the international level, as part of international children's rights. At the same time, the CRC framework has generated law reform in countries that did not yet have a specialised system for children in conflict with the law, or that lacked compliance with children's rights standards. There is a significant number of countries in which the CRC and related instruments have stimulated both the adoption of special children's acts focused on juvenile justice, amongst other issues, and an increasing body of jurisprudence at the

<sup>7</sup> Ibid.

<sup>8</sup> GA Res. 40/33 of 29 November 1985.

<sup>9</sup> Trépanier, Children's rights in juvenile justice: A historical glance, in *The UN Children's Rights Convention: Theory meets practice*, eds. Alen et al. (Intersentia 2007).

<sup>10</sup> Weijers & Duff, Introduction: Themes in Juvenile Justice, in *Punishing Juveniles. Principle and Critique*, eds. Duff & Weijers (Hart Publishing 2002).

<sup>11</sup> Geneva Declaration of the Rights of the Child, adopted by the League of Nations on 26 September, 1924.

<sup>12</sup> See art. 14 & 15 ICCPR, art. 6 & 7 ECHR and art. 5 ACHR generally, and art. 14 par. 4 ICCPR, art. 6 par. 1 ECHR and art. 5 par. 5 ACHR for references to children; see also art. 24 ICCPR.

<sup>13</sup> See Weijers & Liefwaard, Youngsters, in *Dutch Prisons*, eds. Boone & Moerings (Boom Juridische Uitgevers 2007).

domestic and regional level.<sup>14</sup> In addition, reform of key criminal justice institutions across continents has been apparent since the adoption of the CRC,<sup>15</sup> together with an increased use of diversion as a way to secure a children's rights approach towards juvenile offending without going through lengthy and formal procedures.<sup>16</sup> The pressure put on governments by the UN Committee on the Rights of the Child<sup>17</sup> has also influenced a rise in the minimum age of criminal responsibility, among other changes. Despite some regressive trends, it is fair to say that the CRC and related standards have generated many activities around law and institutional reform in general,<sup>18</sup> and for juvenile justice in particular.<sup>19</sup>

### 2.3 A stronger scientific basis—General Comment No. 24

It is important to note that the two pillar approach advocated for by the children's rights framework (i.e., child-specific and fair treatment of children in conflict with the law) has gained a much stronger scientific basis than in the 1970s and 1980s, the decades in which the Beijing Rules and the CRC were drafted and subsequently

<sup>14</sup> See, e.g., Sloth-Nielsen, *The Role of International Law in Juvenile Justice in South Africa* (LLD thesis, unpublished, University of the Western Cape 2001); UNICEF Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child* (2007); Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *A Measure of Last Resort? The Current Status of Juvenile Justice in ASEAN Member States* (2015); and Zimring, Langer & Tanenhaus, *Juvenile Justice in Global Perspective* (New York University Press 2015). See also CRC Committee, General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, para. 4; Skelton, *Child Justice in South Africa: Application of International Instruments in the Constitutional Court*, *The International Journal of Children's Rights* 26/3 (2018), pp. 1–34; Liefwaard & Doek eds., *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015); in particular Ferial-Tinta, *The CRC as a litigation tool before the Inter-American System of Protection of Human Rights*, in the same work, pp. 231–248; Rapporteurship on the Rights of the Child of the Inter-American Commission on Human Rights, *The Rights of the Child in the Inter-American Human Rights System*, 2<sup>nd</sup> ed., OEA/Ser.L/V/II.133, Doc. 34 Eng (2008); and Rapporteurship on the Rights of the Child of the Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, OEA Ser.L/V/II, Doc. 78 Eng (2011).

<sup>15</sup> See Zimring, Langer & Tanenhaus, *Juvenile Justice in Global perspective* (New York University Press 2015).

<sup>16</sup> See, e.g., UNICEF, *Children's Equitable Access to Justice: Central and Eastern Europe and Central Asia* (UNICEF 2015).

<sup>17</sup> Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009).

<sup>18</sup> Arts, *Twenty-five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges*, *Netherlands International Law Review* 61-3 (2014), pp. 267–303.

<sup>19</sup> See also Lynch & Liefwaard, *What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law*, *The International Journal of Children's Rights*, 28(1) (2020), pp. 89-110.

adopted by the international community. On the basis of scientific research around child development and brain development, the case for the assumption that children should be treated differently than adults is much stronger today.<sup>20</sup> For example, the claim that children are as a category less culpable due to their ‘susceptibility to immature and irresponsible behavior’, as also observed by the US Supreme Court,<sup>21</sup> is much stronger than before. So is the claim made by the Supreme Court’s majority opinion that ‘it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed’.<sup>22</sup> The scientific findings have also started to inform the children’s rights framework and international juvenile justice standards. The Council of Europe, for example, adopted in 2003 the Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice in light of contemporary juvenile justice and scientific insights.<sup>23</sup> More recently, in 2019, the UN Committee on the Rights of the Child (CRC Committee) issued a new general comment (No. 24<sup>24</sup>) on juvenile justice replacing its previous general comment (No. 10<sup>25</sup>) on this matter. The Committee’s recommendations regarding a children’s rights compliant juvenile justice system<sup>26</sup> build more firmly on ‘new knowledge about child and adolescent development’ and ‘evidence of effective practices’.<sup>27</sup> On the basis of this new knowledge and evidence the Committee recommends, inter alia, establishing a minimum age of criminal responsibility of at least 14 years of age.<sup>28</sup> The committee also considers more extensively the treatment of children who age out of childhood and transition into adulthood<sup>29</sup> and it commends states who allow for the treatment of young adults within the juvenile justice system, either by way of exception or as a general rule.<sup>30</sup> Apart from this, the CRC Committee has confirmed its key assumption that securing the rights of children in conflict with the law will ultimately serve the interests of society at large.<sup>31</sup> According to the CRC Committee, ‘[e]vidence shows that the

<sup>20</sup> Scott and Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2010) and Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, *Temple Law Review* 88(4) (2016), pp. 675–716.

<sup>21</sup> US Supreme Court, *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>22</sup> Ibid.

<sup>23</sup> Rec(2003)20, 24 September 2003.

<sup>24</sup> CRC Committee 2019.

<sup>25</sup> CRC Committee, General Comment No. 10 (2007): Children’s rights in juvenile justice, CRC/C/GC/10.

<sup>26</sup> The Committee uses the term ‘child justice system’ instead of ‘juvenile justice system’; see CRC Committee 2019.

<sup>27</sup> CRC Committee 2019, para. 1.

<sup>28</sup> CRC Committee 2019, para. 22.

<sup>29</sup> CRC Committee 2019, para. 31.

<sup>30</sup> CRC Committee 2019, para. 32.

<sup>31</sup> See CRC Committee 2007, para. 3.



prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles'.<sup>32</sup>

### 3. The concept of child-friendly justice<sup>33</sup>

#### 3.1 The right to be heard and the right to effective participation

Child-friendly justice has been developed on the basis of what has been referred to as one of the most innovative provisions of the CRC: article 12, embodying the child's rights to be heard.<sup>34</sup> This provision reflects the very essence of the recognition of the child as rights holder and as a key actor in his life,<sup>35</sup> who has the right to express his views in matters that affect him, including, for example, an intervention following a criminal offence (allegedly) committed by the child. As far as juvenile justice is concerned, article 40 CRC builds on this notion, as explained in section 2, by recognising that the child who is accused of committing a criminal offence has the right to effective participation. This right includes, for example, the direction of legal counsel, the cross-examination of witnesses and the lodging of an appeal (article 40 (2) CRC). The right to effective participation as an essential element of the right to fair trial, with specific implications for children, was explicitly recognised by the European Court of Human Rights (ECtHR or the European Court) in the 1999 *Bulger* case.<sup>36</sup> This case law has formed the basis for the development of the concept of child-friendly justice.

#### 3.2 European case law paving the way

In the landmark judgments *T. and V. v. the United Kingdom*,<sup>37</sup> which concerned two 11-year-olds who stood trial for the brutal murder of a young toddler, the European Court held, with reference to article 40(2)(b) of the CRC, that 'it is essential that a child charged with an offence is dealt with in a manner which takes full account

<sup>32</sup> CRC Committee 2019, para. 3.

<sup>33</sup> This section has been based on the author's previous work, in particular Liefwaard, Child-friendly justice: protection and participation of children in the justice system, *Temple Law Review* 88(4) (2016), pp. 905–927 and Liefwaard & Kilkelly 2019.

<sup>34</sup> Cantwell, The Origins, Development and Significance Of the United Nations Convention On The Rights Of The Child, in *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'*, ed. Detrick (Nijhoff 1992), pp. 19–30.

<sup>35</sup> Where this article refers to he, him or his, it also means to refer to she or her.

<sup>36</sup> ECtHR, *T. v. the United Kingdom*, appl. no. 24724/94, 16.12.1999. This case is also known as the *Bulger* case.

<sup>37</sup> See footnote 37. See also ECtHR, *V. v. the United Kingdom*, appl. no. 24888/94, 16.12.1999.



of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings'.<sup>38</sup> In this case, the Court found that the two boys were unable to participate effectively and were therefore denied a fair trial. The Court held that it was 'highly unlikely' that they would have felt 'sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with [their lawyers] during the trial or, indeed, that, given [their] immaturity and [their] disturbed emotional state, [they] would have been capable outside the courtroom of cooperation with [their] lawyers and giving them information for the purposes of [their] defence'.<sup>39</sup> This judgment, for the first time, pointed out that a child accused of a criminal offence and brought before a court of law has the right to effective participation as part of his right to a fair trial under Article 6 ECHR.<sup>40</sup>

This does not mean that it is required that a child tried in court for a criminal offence should 'understand or be capable of understanding every point of law or evidential detail'.<sup>41</sup> That is, according to the European Court, not required under the right to a fair trial. The Court found, however, that 'effective participation' in this context presupposes '[...] a broad understanding of the nature of the trial process and of what is at stake [...], including the significance of any penalty which may be imposed'.<sup>42</sup>

The CRC Committee, informed by, among other things, this case law, embraced the notion of effective participation (which cannot be found as such in the text of article 40 CRC) in its 2007 General Comment on children's rights in juvenile justice (General Comment No. 10), noting that '[a] fair trial requires that the child [...] be able to effectively participate in the trial' and that as part of that the child 'needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed'.<sup>43</sup> The CRC Committee underscored the significance of acknowledging that juvenile justice proceedings 'should be conducted in an atmosphere of understanding, to allow the child to participate and to express herself/himself freely'.<sup>44</sup> This also comes with requirements to modify courtroom procedures and practices. The CRC Committee upheld these recommendations in General Comment No. 24 (replacing General Comment No. 10).<sup>45</sup>

<sup>38</sup> See case *T. v. the United Kingdom* para. 84, 85 and 74.

<sup>39</sup> See case *T. v. the United Kingdom* para. 88.

<sup>40</sup> Kilkelly, The CRC in Litigation Under the ECHR, in *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, eds. Liefwaard & Doek (Springer 2015), pp. 193–209.

<sup>41</sup> ECtHR, *S.C. v. the United Kingdom*, appl. no. 60958/00, 15.6.2004, para. 29.

<sup>42</sup> Ibid.

<sup>43</sup> CRC Committee 2007, para. 46.

<sup>44</sup> CRC Committee 2007, para. 46; see also rule 14 of the Beijing Rules.

<sup>45</sup> CRC Committee 2019, para. 46. Although the CRC Committee has upheld the right to effective participation, it has chosen not to elaborate on the implications of concepts of child-friendly justice and access to justice beyond the criminal justice system (CRC Committee 2019, para. 5).

Building on this, the CRC Committee noted in its General Comment No. 12 on the child's right to be heard that '[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age' and that '[p]roceedings must be both accessible and child-appropriate'.<sup>46</sup> This also means that '[p]articular attention needs to be paid to the provision and delivery of childfriendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers [...]'.<sup>47</sup> These recommendations of the CRC Committee, which build on the case law of the European Court and the explicit reference to child-friendly elements of justice proceedings, reflect the emergence of child-friendly justice as a concept meant to enable children to engage with and/or participate effectively in justice proceedings that are about them or affect them. As was mentioned before, the development relates to one of the guiding principles and most notable innovations of the CRC—article 12 concerning the child's right to be heard—which revolves around the recognition of children as rights holders,<sup>48</sup> as actors in their own lives with independent rights and interests,<sup>49</sup> and as interested parties in decision-making affecting them directly or indirectly.<sup>50</sup>

### 3.3 Towards the Guidelines on Child-Friendly Justice<sup>51</sup>

The concept of child-friendly justice has subsequently found its way to the Guidelines on Child-Friendly Justice (the Guidelines) developed by the Council of Europe and adopted by the Committee of Ministers in 2010.<sup>52</sup> The Guidelines provide the principles considered necessary to ensure that 'all rights of children' are fully respected, in formal judicial proceedings and also in alternatives to such proceedings.<sup>53</sup> They deal with 'the place and role, and the views, rights and needs of the child in [judicial and alternative] proceedings'<sup>54</sup>, and provide practical guidance for the 47 Council of

<sup>46</sup> Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, para. 34

<sup>47</sup> CRC Committee 2009, para. 34.

<sup>48</sup> See also Doek, The Human Rights of Children: An Introduction, in *International Human Rights of Children*, Kilkelly & Liefwaard eds. (Springer 2019).

<sup>49</sup> See also Freeman, Why It Remains Important to Take Children's Rights Seriously, *International Journal of Children's Rights* 15(1) (2007), pp. 5–23.

<sup>50</sup> See also Eekelaar, The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children, *International Journal of Children's Rights* 23(1) (2015), pp. 3–26.

<sup>51</sup> See also Liefwaard, Child-friendly justice: protection and participation of children in the justice system, *Temple Law Review* 88(4) (2016), pp. 905–927 and Liefwaard & Kilkelly 2019.

<sup>52</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice 1, 13 (2010), available at [www.coe.int/childjustice](http://www.coe.int/childjustice) (last accessed on 19 October 2020).

<sup>53</sup> Guidelines, First Part, ch. I, at para. 1-3.

<sup>54</sup> *ibid.*, para. 1.

Europe Member States to ‘give a place and voice to the child in justice at all stages of the procedures’.<sup>55</sup> The Guidelines focus on justice systems broadly, which includes juvenile justice systems as well as other justice systems relevant for children.

According to the Guidelines:<sup>56</sup>

*‘[C]hild-friendly justice’ refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.’*

The Guidelines thus aim to provide further guidance to Council of Europe’s Member States on how to ensure that justice systems are child-friendly. This includes: access to information; protection of private and family life; access to legal counsel and representation in the child’s own name; avoiding undue delay; the provision of an appropriate environment in and around judicial proceedings, including after the decision-making; and child-specific training for professionals. It also pays particular attention to the involvement of parents, the use of child-appropriate language, children’s access to justice, and the significance of providing feedback to children on the outcomes of the proceedings. In sum, the Guidelines concern the position of children before, during, and after justice proceedings.

The drafting of the Guidelines was informed directly by the views of children, which was a novelty in an international standard-setting process like this. Children’s views and experiences with the justice system were taken into account by means of a randomly administered survey of almost 3,800 young people from 25 Council of Europe Member States. In addition, a range of focus group discussions was organised with particularly vulnerable groups of children, including children in detention and refugee children. The input provided by children, of whom the majority were between 11 and 17 years of age, served as important insights into children’s experiences and perspectives.<sup>57</sup> Among other things, children underscored the importance of information on rights and the role of persons who can be trusted in the provision of information and in support, both before and during proceedings. They also highlighted the significance of direct involvement in decision-making affecting them and of clarification of the outcomes of justice proceedings. When asked about the key principles of the Guidelines, children put particular emphasis on respectful treatment, being listened to, being provided with explanations in a language they can un-

<sup>55</sup> Guidelines, Second Part, ‘Structure and Content’, at para. 16.

<sup>56</sup> Guidelines, First Part, ch. II, c.

<sup>57</sup> Kilkelly, Summary report on the consultation of children and young people concerning the draft council of Europe guidelines on child-friendly justice (Council of Europe 2010). See also Liefwaard & Kilkelly 2019.

derstand, and on receiving information about their rights.<sup>58</sup>

#### 4. The broader meaning of child-friendly justice

The cross-fertilisation between international children's rights and the European standard-setting has resulted in more legal clarity on the procedural legal status of children, particularly with regard to children's involvement in formal court proceedings. It has also provided governments with a reason to reflect critically on the legal position of children in the domestic justice system, for example on matters such as legal assistance and children's access to justice. In the context of juvenile justice, the European Union has adopted a Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.<sup>59</sup> This Directive, which serves as a legally binding instrument for most of the EU Member States, 'promotes the rights of the child' and has taken into account the Council of Europe's Guidelines.<sup>60</sup> The Directive elaborates on essential elements of child-friendly justice, including the right to legal assistance, legal aid, the protection of privacy and the role of parents or others who hold parental responsibility, and was required to be transposed into domestic law by 11 June 2019. It also pays particular attention to the right to information, which is key to fair and child-friendly treatment.<sup>61</sup> With these measures, the EU has recognised child-friendly justice as a foundational concept for criminal justice systems within EU Member States,<sup>62</sup> and for the protection of the rights of children in conflict with the law, including the right to a fair trial.<sup>63</sup>

<sup>58</sup> Liefwaard & Kilkelly 2019.

<sup>59</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800> (last accessed on 19 October 2020).

<sup>60</sup> Ibid., recital 7.

<sup>61</sup> Ibid., recital 18ff and Article 4. See also Directive (EU) 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Directive (EU) 2013/48 of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. See also Rap & Liefwaard, Right to Information: Towards an Effective Legal Position for Children Deprived of Liberty, *Today's Children are Tomorrow's Parents* 45–46 (2017), pp. 49–61.

<sup>62</sup> And in situations where children are subject to European arrest warrant proceedings (Directive (EU) 2016/800, recital 8).

<sup>63</sup> For more on the Directive see Rap & Zlotnik, The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused. Reflections on the directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *European journal of crime, criminal law and criminal justice* 26(2) (2018), pp. 110–131.

The development and adoption of the EU Directive forms part of the 2009 ‘Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings’,<sup>64</sup> and of the 2011 ‘EU Agenda for the Rights of the Child’.<sup>65</sup> The EU Agenda for the Rights of the Child found its legal basis in Article 3(3) of the Treaty on European Union, which requires the EU to promote the protection of the rights of the child as a result of international commitments as laid down in the CRC and as reflected in Article of the Charter of Fundamental Rights of the European Union.<sup>66</sup> It was meant to ‘reaffirm the strong commitment of all EU institutions and of all Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies and to turn it into concrete results’,<sup>67</sup> and it has stimulated many activities focused on certain children’s rights areas. One of these areas has been child-friendly justice, framed as ‘[l]egal and capacity-building measures [...] to ensure judicial systems in Europe adapt to the needs of children’.<sup>68</sup> The European Commission has proposed EU legislation (including the EU Directive mentioned above), carried out a large study on children’s involvement in civil, administrative and criminal judicial proceedings in the 28 EU Member States,<sup>69</sup> ‘promoted the Council of Europe Guidelines on child-friendly justice’, and ‘supported and encouraged capacity-building activities on child-friendly justice’.<sup>70</sup> These capacity-building activities were funded by the EU ‘Rights, Equality and Citizenship Programme’ (REC) and have, since 2013, contributed to a wealth of projects around child-friendly justice across the EU, led by civil-society, governmental organisations, and academic institutions.<sup>71</sup> Many of these projects had a focus on children in conflict with the law. In addition, the EU Fundamental Rights Agency (FRA) has conducted studies on the

<sup>64</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009.

<sup>65</sup> See European Commission, An EU Agenda for the Rights of the Child, COM(2011)60 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0060&from=EN> (last accessed on 19 October 2020). For more info on ‘EU action on the rights of the child’ see the European Commission’s website: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-action-rights-child\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-action-rights-child_en) (last accessed on 19 October 2020).

<sup>66</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

<sup>67</sup> European Commission 2011, p. 3.

<sup>68</sup> See [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en) (last accessed on 19 October 2020).

<sup>69</sup> See, e.g., Kennan & Kilkelly, *Children’s involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU. Policy Brief* (Publications Office of the European Union 2015). See also Directorate-General for Justice and Consumers (European Commission), *Summary of contextual overviews on children’s involvement in criminal judicial proceedings in the 28 Member States of the European Union* (2014).

<sup>70</sup> See [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en) (last accessed on 19 October 2020).

<sup>71</sup> See Summary of EU-funded projects (REC-programme) on rights of the child and violence against children 2013-2019, 23 October 2019, in particular p. 19ff. [https://ec.europa.eu/info/sites/info/files/20190401\\_compilation.pdf](https://ec.europa.eu/info/sites/info/files/20190401_compilation.pdf) (last accessed on 19 October 2020).



perspectives of professionals on children's involvement in judicial proceedings,<sup>72</sup> and on the perspectives and experiences of children involved in judicial proceedings as victims, witnesses, or parties in nine EU Member States.<sup>73</sup> The FRA has also developed a child-friendly justice checklist for professionals.<sup>74</sup> So far, there have been no attempts to assess the long term impact of the research nor of all the activities developed under the REC programme, either in terms of individual projects (although all projects had a dedicated evaluation component), or in terms of the projects altogether. It would be advisable to make such an assessment, also in light of the budget spent<sup>75</sup> and the overlap between projects, and explore what progress has been made at the national level across the EU compared to the situation before 2013. The European Commission's studies on children's involvement in civil, administrative and criminal judicial proceedings in the 28 EU Member States could serve as a baseline. So could the Mid-term Evaluation of the Council of Europe Strategy for the Rights of the Child (2016-2021), of which 'Child-friendly justice for all children' is one of the five priority areas.<sup>76</sup>

It is also notable that the European Court of Human Rights has increasingly engaged with the Guidelines on child-friendly justice in its case law on various aspects of the justice system, both inside and outside the juvenile justice system.<sup>77</sup> As far as juvenile justice is concerned, the Court has referred to the Guidelines as a relevant

<sup>72</sup> European Union Agency for Fundamental Rights, *Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States* (2015).

<sup>73</sup> European Union Agency for Fundamental Rights, *Child-friendly justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States* (2017).

<sup>74</sup> European Union Agency for Fundamental Rights, *Child-friendly justice – Checklist for professionals*, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/child-friendly-justice-checklist-for-professionals.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/child-friendly-justice-checklist-for-professionals.pdf) (last accessed on 19 October 2020). The FRA has also developed materials (such as videos) to make child-friendly justice more accessible for professionals and others. It has also commissioned the development of the Handbook on European law relating to the rights of the child, see European Union Agency for Fundamental Rights, *Handbook on European law relating to the rights of the child* (2015).

<sup>75</sup> Based on the Summary of EU-funded projects (REC-programme) on rights of the child and violence against children 2013–2019, 23 October 2019 this budget exceeded 4 million euro. This only concerns the projects that had an explicit focus on child-friendly justice and children in conflict with the law. The other projects may very well have had significance for child-friendly justice in the context of juvenile justice.

<sup>76</sup> See Council of Europe Strategy for the Rights of the Child (2016–2021) Mid-term Evaluation Report, Council of Europe (2019), available at <https://rm.coe.int/mid-term-evaluation-report-en/168098b162> (last accessed on 19 October 2020).

<sup>77</sup> See, e.g., ECtHR, *M. & M. v. Croatia*, appl. no. 10161/13, 3.9.2015; ECtHR, *N.T.S. and others v. Georgia*, appl. no. 71776/12, 2.2.2016; ECtHR, *D.M.D. v. Romania*, appl. no. 23022/13, 3.01.2018; ECtHR, *Roche & Roche v. Malta* 28 June 2018, appl. no. 42825/17 and 66857/17; and ECtHR, *A. and B. v. Croatia*, appl. no. 7144/15, 20.6.2019.

source of law. It has also directly engaged with the content of the Guidelines.<sup>78</sup> This shows the legal relevance of the document, which was primarily meant to serve as a set of recommendations to the 47 Council of Europe Member States. It can be argued that the European Court's jurisprudence has underscored that the Guidelines have legal meaning for the interpretation of European human rights beyond their status as a set of mere recommendations.<sup>79</sup>

There are some other developments that deserve to be mentioned here. The first development concerns the adoption of similar child-friendly justice standards outside of the European region.<sup>80</sup> In relation to this, one can observe a growing recognition of the concept of child-friendly justice in international standards and global and regional agendas or studies. Examples include the new General Comment on children's rights in the child justice system (No. 24) of the UN Committee on the Rights of the Child, the UN Global Study in Children Deprived of Liberty (launched in the autumn of 2019) and the European agendas discussed earlier.<sup>81</sup> A second development that ought to be mentioned is the increasing engagement of academia with

<sup>78</sup> See further Liefwaard & Kilkelly footnote 2. See, e.g., ECtHR (GC), *Blokhin/Russia*, appl. no. 47152/06, 23.3.2016, paras. 170 and 203.

<sup>79</sup> It should not be overlooked that the European Court has issued other jurisprudence that bears relevance for the juvenile justice system and that has informed European standard setting including EU legislation, such as the EU Directive mentioned earlier. This jurisprudence, which among other things focuses on the protection of children in detention and on legal assistance for children in conflict with the law, has also contributed to a higher level of protection of children in Europe, including proceedings that are more in line with the principles of child-friendly justice. See, e.g., ECtHR, *Güveç v. Turkey*, appl. no. 70337/01, 20.01.2009; ECtHR, *Korneykova v. Ukraine*, appl. no. 39884/05, 19.01.2012; ECtHR, *Nart v. Turkey*, appl. no. 20817/04, 6.5.2008; and ECtHR (GC), *Blokhin/Russia*, appl. no. 47152/06, 23.3.2016. See also ECtHR, *Salduz v. Turkey*, appl. no. 36391/02, 27.11.2008 and ECtHR, *Panovits v. Cyprus*, appl. no. 4268/04, 11.12.2008.

<sup>80</sup> See the Guidelines on Action in the Justice System for Children in Africa, adopted in Kampala in 2011 together with the The Munyonyo Declaration on Justice for Children in Africa, by the African Committee of Experts on the Rights and Welfare of the Child and the African Union among others, see [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political\\_declarations/munyonyo\\_declaration.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/munyonyo_declaration.pdf) (last accessed on 19 October 2020). See also the Guidelines on Children in Contact with the Justice System, adopted by the International Association of Youth and Family Judges and Magistrates (IAYFJM), which were developed on the basis of the child-friendly justice guidelines and its equivalents in Africa and Latin America (see p. 6). The IAYFJM Guidelines use the term 'child focused justice', which the IAYFJM deemed more appropriate in the context of juvenile justice (p. 11); [http://www.aimjf.org/storage/www.aimjf.org/Documentation\\_EN/AIMJF/Guidelines\\_-\\_ENG\\_-\\_Ratified\\_17.04.26.pdf](http://www.aimjf.org/storage/www.aimjf.org/Documentation_EN/AIMJF/Guidelines_-_ENG_-_Ratified_17.04.26.pdf) (last accessed on 19 October 2020). See also ACPF/DCI, Achieving Child-friendly justice in Africa (ACPF & DCI 2012) <https://www.childjusticeinafrica.info/index.php/resources/item/2-achieving-child-friendly2> (last accessed on 19 October 2020).

<sup>81</sup> See CRC Committee 2019 footnote 15, para. 5; as mentioned before, the CRC Committee has reconfirmed its recommendations regarding effective participation of children in conflict with the law in its 24<sup>th</sup> General Comment; see also UN Secretary-General and the UN Independent Expert for the Global Study on Children Deprived of Liberty, *Global Study on Children Deprived of Liberty* (UN 2019), pp. 301 and 306.



child-friendly justice both as a concept and a vehicle to strengthen the position of children in domestic justice systems. Research projects include comparative analyses of domestic justice systems on how these accommodate children,<sup>82</sup> and theoretical analyses of the concept of child-friendly justice in relation to other concepts, such as access to justice for children more broadly,<sup>83</sup> or child-sensitive proceedings for children as victims and/or witnesses,<sup>84</sup> and in relation to children's rights to be heard and to participation.<sup>85</sup> There is also an increasing number of domestic studies on whether and how child-friendly justice principles manifest themselves in domestic legal systems, both in juvenile justice and in other parts of these legal systems.<sup>86</sup> Although child-friendly justice as a conceptual framework may not always be explicitly addressed or recognised, many studies conducted at the domestic level contribute to the growing body of knowledge around children's participation in domestic formal and informal legal proceedings.<sup>87</sup>

A final development that should be mentioned here, although it as of yet bears little relevance for children in conflict with law, is the issuing of what could be referred to as child-friendly judgments. There are examples from England and Wales and from the Netherlands where courts are experimenting with the inclusion of child-specific clarifications in or as part of their formal judgments.<sup>88</sup> The majority of these examples relate to family law and child protection cases; just a few relate to ju-

<sup>82</sup> See, e.g., Rap, *The participation of juvenile defendants in the youth court: A comparative study of juvenile justice procedures in Europe* (PhD thesis, Pallas publications 2013), see also eds. Panzavolta et al., *Interrogating young suspects* (Intersentia 2015).

<sup>83</sup> See e.g. Liefwaard, Access to Justice for Children: Towards a Specific Research and Implementation Agenda, *The International Journal of Children's Rights* 27(2) (2019).

<sup>84</sup> See European Union Agency for Fundamental Rights, 2017.

<sup>85</sup> Daly & Rap, Children's Participation in the Justice System, in *International Human Rights of Children*, eds. Kilkelly & Liefwaard (Springer 2018), pp. 299–319. See also the author's publications referred to throughout this article.

<sup>86</sup> These studies may not have a specific focus on child-friendly justice, but bear relevance since they focus on elements of it, or on systems in which child-friendly justice is meant to play out, such as the family law system or the child protection and care system. See Jong-de Kruijf & van der Zon, Hoger beroep tegen een uithuisplaatsingsbeslissing en de rol van de minderjarige, *Trema Tijdschrift voor de Rechterlijke Macht* (2015), pp. 298–307; Rap, Verkroost & Bruning, Children's participation in Dutch youth care practice: an exploratory study into the opportunities for child participation in youth care from professionals' perspective, *Child Care in Practice* 25(1) (2019), pp. 37–50; Mol, Children's Representation in Family Law Proceedings, *International Journal of Children's Rights* 27(1) (2019), pp. 66–98; Rap, The participation of children in asylum procedures in *Safeguarding children's rights in immigration law*, eds. Klaassen et al. (Intersentia 2020), pp. 17–40; Rap & Liefwaard 2017 footnote 53; and Skivenes, International Perspectives on Child-responsive Courts, *International Journal of Children's Rights* 26(2) (2018).

<sup>87</sup> As far as informal justice mechanisms are concerned see, e.g., The African Child Policy Forum, Spotlighting the invisible. Justice for children in Africa (ACPF 2018).

<sup>88</sup> There are similar examples in countries outside of Europe, including Argentina, Colombia and Mexico. See e.g. <https://www.razon.com.mx/uploads/files/2020/10/18/AmparoJuzgado-Aguascalientes.PDF> (last accessed on 19 October 2020).

venile justice matters. It reveals a certain awareness among judges about the importance of making judgments affecting children more accessible and understandable for children. This certainly is an interesting development in light of child-friendly justice, since the Guidelines on child-friendly justice emphasise the significance of ‘judgments and court rulings affecting children [...] explained to them in a language that children can understand, particularly those decisions in which the child’s views and opinions have not been followed.’<sup>89</sup>

## 5. Conclusion: Towards a comprehensive, academic research agenda

There are a number of bases upon which one could argue that the concept of child-friendly justice, how it has developed, and the way it has been embraced by European institutions and beyond, is meaningful. The concept has the potential of becoming instrumental for the development and adjustment of domestic juvenile justice systems in order to make these more child-specific and fair, and to do this in a comprehensive manner. It is also clear that child-friendly justice has implications for many different aspects and stages of the juvenile justice system, ranging from the first contact with the system and exposure to police interrogations, to the different forms of disposition, including diversion, custodial and non-custodial sentences, and interventions. The child-friendly justice framework has implications that go beyond the right to effective participation, in the sense that it approaches children as actors, entitled to be protected against negative interferences with their short- and long-term interests, and to be empowered to engage with and participate in proceedings and decision-making in the context of a formal or informal state response to (alleged) criminal behaviour.

Yet, more work is required to assess the impact as well as the sustainability of child-friendly justice, especially in light of the assumption that child-friendly justice can contribute to proceedings and decision-making that are likely to have a more positive impact and effect, contribute to children’s sense of (procedural) justice, and are (more) in conformity with children’s rights principles.<sup>90</sup> The academic research that has been done so far on child-friendly justice as a concept, or on specific aspects of child-friendly justice in the context of juvenile justice and beyond, still leaves many questions unanswered. This is particularly true for systems other than the family law and child protection system. Moreover, the comprehensive studies commissioned by the EU, which have provided a baseline, have not been followed up. It is recommended to develop such follow-up studies. The significant amount of initiatives under EU funding schemes and the Council of Europe’s children’s rights agenda have undoubt-

<sup>89</sup> Guidelines, First part, ch IV, at 49. See further Stalford & Hollingsworth, “This case is about you and your future”: Towards Judgments for Children, *Modern Law Review* (2020), pp. 1-29 and Liefwaard, Child-friendly Judgments :-), *Leiden Law Blog*, 18.6.2017, available at <https://leidenlawblog.nl/articles/child-friendly-judgments> (last accessed on 19 October 2020).

<sup>90</sup> See, e.g., Rap 2013 footnote 74. See also Kilkelly 2010 and Liefwaard & Kilkelly 2019.

edly contributed to more awareness around and knowledge about child-friendly justice at the domestic level. It remains unclear, however, to what extent these activities have long-lasting impact and have resulted in tangible outcomes for children in conflict with the law, particularly because of the lack of systemic, rigorous, cross-disciplinary and comparative analyses. This makes a comprehensive academic research agenda an obvious next step, including legal and comparative legal analyses concentrated on both the child-friendly justice framework, with all its gaps, flaws and inconsistencies,<sup>91</sup> and its domestication at the national level.

In addition, it would be good to conduct more research on child-friendly justice for specific groups of children who find themselves in the juvenile justice system, including for example children (and arguably also young adults) with developmental delays or neurodevelopmental disorders or disabilities,<sup>92</sup> children who are refugees and migrants, and children who suffer from illiteracy. It needs no explanation that children themselves should be included in the research, building on their involvement in the preparation of the Guidelines on child-friendly justice. In addition, there is a need for research on the implications of child-friendly justice in those stages of juvenile justice proceedings that have not received much specific attention yet, such as child's participation in and engagement with diversion programmes, probation,<sup>93</sup> and deprivation of liberty (as of the moment of arrest<sup>94</sup>). More research on children's interaction with other systems, such as the child protection system or youth care system, would help to further academic understanding of the implications of children manoeuvring from one system to the other or within systems. Finally, it would be good not to overlook children who are in transition from the juvenile justice system to the adult criminal justice system, reaching the age of majority along the way, and who continue to be in need of assistance or (continued) protection in order to secure their effective participation and engagement with the system and the decision-making processes affecting them.<sup>95</sup>

With a comprehensive and dedicated research agenda, which should be legal, comparative and interdisciplinary, and include children, it is more likely that one will be able to assess the real added value of child-friendly justice as a concept and as a legal framework to ensure that all children can enjoy their rights, including when they are in conflict with the law.

<sup>91</sup> See, e.g., Liefwaard & Kilkelly 2019.

<sup>92</sup> See also CRC Committee 2019, para. 28.

<sup>93</sup> Cf. Goldstein et al., "You're on the right track!" Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths' Capacities to Successfully Complete Probation, 88(4) (2016) *Temple Law Review*, pp. 803–836.

<sup>94</sup> CRC Committee 2019, para. 85.

<sup>95</sup> See, e.g., Schmidt, Rap & Liefwaard, Young Adults in the Justice System: The Interplay between Scientific Insights, Legal Reform and Implementation in Practice in The Netherlands, *Youth Justice* (2020), pp. 1–20.