Child Participation in International and Regional Human Rights Instruments

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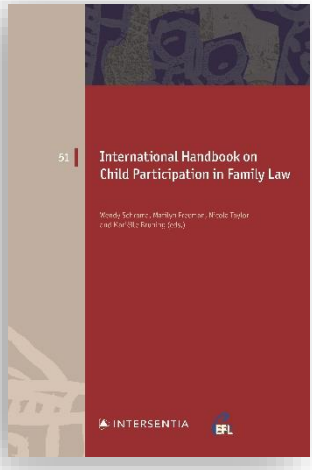

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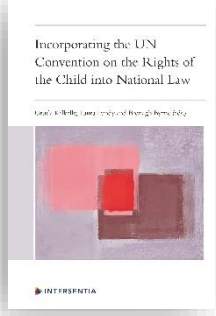

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CHILD PARTICIPATION IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

Mariëlle Bruning and Charlotte Mol

1. INTRODUCTION

The child's right to be heard in all matters affecting the child, including the views of the child being given due weight in accordance with their age and maturity, is not only one of the core elements of the UN Convention on the Rights of the Child (UNCRC), but can also be distilled from other sources of international and regional human rights. This right includes the opportunity to be heard in any judicial and administrative proceedings affecting the child, for example in family law proceedings. The child's right to be heard is a fundamental aspect of children's participation and has led to extensive research and policy on 'child participation', although the term itself does not appear in international and regional human rights documents.

The child's right to participate in legal proceedings encompasses the right to be heard directly or indirectly, a right to representation, and procedural rights such as the right to commence proceedings, access to all relevant files, or to appeal, as an independent party to the proceedings with legal status or indirectly via legal or other forms of representation.[1] The UNCRC and other international and regional instruments cover elements of the child's right to participate in legal proceedings. The relevant sources are covered in this chapter, both binding and non-binding, international and regional.[2] This chapter provides a foundation for the other chapters in this Handbook. It discusses the core themes related to child participation in legal proceedings which will also be dealt with in each corresponding country chapter: the types of proceedings in which children may participate, the forms of participation available to children, conditions for participation, the location in which participation ought to take place and the method of communication, and the role of information and feedback in the participation process. For each theme, the rights or guidelines provided by the international and regional instruments are described.

From a human rights perspective, Article 12 of the UNCRC is regarded as the foundation for the child's right to participate. The UNCRC, both generally and Article 12 specifically, was the catalyst for further international and regional developments on the topic of child participation. The African Charter on the Rights and Welfare of the Child (ACRWC) was a regional response to the UNCRC, which was adopted in 1990, coming into force in 1999.[3] Another regional response emerged from the Council of Europe (CoE) through the European Convention on the Exercise of Children's Rights of 1996 (ECECR), which entered into force in 2000.[4] More recently, two sets of guidelines have

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1 The right to access to justice for children will not be addressed in this contribution; this right is grounded in the right of the child to seek remedies in the event of (alleged) rights violations, hence the right to legal action against rights violations (see e.g. UN High Commissioner for Human Rights, *Access to justice for children. Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/25/35, 2013; this report stresses that children should preferably be heard directly in court and legal proceedings should be child-sensitive to safeguard effective access to justice, see also T. Liefaard, 'Access to Justice for Children: Towards a Specific Research and Implementation Agenda', *The International Journal of Children's Rights*, Vol. 27, No. 2, 2019, pp. 195–227). This chapter focuses on the right to participation of children in (family law) proceedings.

2 The Charter of Fundamental Rights of the European Union will not be addressed in this contribution as its scope of application is limited to the functioning of the EU institutions and the implementation of EU law and thus is of little relevance for the domestic laws on child participation. Additionally, the Brussels II*bis* or Brussels II*ter* Regulations, as well as the 1980 Hague Convention on the Civil Aspects of International Child Abduction, are discussed in the contribution by T. Kruger and F. Maoli in this Handbook, which deals with private international law and the relevant EU instruments in relation to international child abduction.

3 African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990).

4 European Convention on the Exercise of Children's Rights 1996, ETS No. 160.

been adopted: the Guidelines on Child-friendly Justice (CoE Guidelines) were adopted by the Council of Ministers of the Council of Europe on 17 November 2010;[5] and the International Association of Youth and Family Judges and Magistrates (IAYFJM) adopted and ratified the Guidelines on Children in Contact with the Justice System (IAYFJM Guidelines) in 2017.[6] Although the latter guidelines are not 'soft law' as the CoE Guidelines are, they do provide relevant best practice and are a form of international professional standards. Finally, a general regional source of human rights law is also of relevance for this topic, i.e. the European Convention on Human Rights 1950 (ECHR). Contrary to the UNCRC, the ECHR does not contain a separate article on the child's right to participate. Nevertheless, it is an important source for this right thanks to the unique position of the European Court of Human Rights (ECtHR) and its case law, as is explained below. We commence with a brief introduction of the status and relevance of these six sources.

2. THE SIX INTERNATIONAL AND REGIONAL INSTRUMENTS

2.1. UN CONVENTION ON THE RIGHTS OF THE CHILD 1989

Central to the UNCRC is the idea that children are no longer regarded as mere objects of rights, but rather as rights holders who have agency to realise their rights enshrined in the UNCRC. Article 12 adds to that, providing that every child who is capable of forming their own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (Article 12(1)). The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12(2)). It is important to underscore that the child has the right not to exercise their right to be heard: expressing views is a choice for the child, not an obligation.[7] Article 12 provides that states parties 'shall assure' the right of the child to express their views and thus imposes a clear obligation on states parties to introduce opportunities for the child to do so.

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5 *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 17 November 2010.

6 International Association of Youth and Family Judges and Magistrates, *Guidelines on Children in Contact with the Justice System*, 2017 (aimjf.org).

7 UN Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, CRC/C/GC/12, 20 July 2009, para. 16; CoE Guidelines, above n. 5, IV(D), para. 46.

The UNCRC Committee has pronounced this provision as one of the four general principles of the UNCRC.[8] This implies that the right to be heard is an overarching right that is particularly necessary for the fulfilment of all other rights. Article 12 is closely connected to both Article 5 UNCRC in which 'the evolving capacities of the child' are mentioned as a guiding tool to provide appropriate direction and guidance in the exercise by the child of the UNCRC rights, and Article 3 that is also considered as one of the four fundamental principles of the UNCRC ('in all action concerning children … the best interests of the child shall be a primary consideration'). In addition, Article 9 UNCRC can be seen as a specification of Article 12 for children who face or experience separation from their parents against their will. The UNCRC has almost universal ratification (by all countries in the world except the United States) and is therefore in this respect the most successful human rights document in history. The UNCRC Committee has launched a General Comment on 'The right of the child to be heard' in 2009 (General Comment No. 12) that can be seen as an interpretative tool. The aim of this General Comment was to provide a better understanding of what Article 12 entails and how to fully implement it for every child, taking into consideration the many impediments to fully realising this right.[9] The UNCRC is a binding convention to Member States and has had an enormous influence in recent history.[10] Although the UNCRC has recently celebrated its 30th anniversary, still many challenges lie ahead regarding the further implementation of its rights.

2.2. AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD 1990

The ACRWC echoes Article 12 UNCRC through Article 4(2): the right to be given an opportunity for the child's views to be heard either directly or through

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8 UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 12; this highlights the fact that Art. 12 UNCRC not only establishes a right in itself, but should also be considered in the interpretation of all other rights. The other three general principles are the principle of non-discrimination (Art. 2), the best interests of the child principle (Art. 3(1)), and the right to life, survival and development (Art. 6).

9 General Comment No. 12, above n. 7, para. 4.

10 See e.g. K. Arts, 'Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges', *Netherlands International Law Review*, Vol. 61, No. 3, 2014, pp. 267–303. It is relevant to note that internally states adopt different attitudes as to the enforceability of the UNCRC; this depends in part on whether a state has a 'monist' or 'dualist' system. In monist systems, ratified conventions can be enforced directly in national courts, whereas in dualist systems treaties cannot be enforced until they have been incorporated into national law via national legislation.

an impartial representative in all judicial or administrative proceedings affecting them and that those views must be taken into consideration. More generally, Article 7 provides children with the right to communicate views and express opinions freely. The ACRWC is a binding regional convention to which the African Member States of the African Union can be parties. At present, 49 out of 55 states have ratified the ACRWC.[11]

2.3. EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN'S RIGHTS 2000

The ECECR was intended to be a general European response to the UNCRC. However, it ended up focusing on procedural, rather than substantive, children's rights to complement the UNCRC in providing children with options to exercise their rights.[12] These rights include, amongst others, the right to express views and to be appointed a representative. The Convention has been ratified by 20 of the 47 CoE Member States. While not considered a 'key' convention, it is binding and has regular ratifications.[13]

2.4. EUROPEAN CONVENTION ON HUMAN RIGHTS 1950

The ECHR, as the general European human rights convention, does not explicitly recognise the child's right to participate. However, together with the ECtHR, it occupies a unique position within the human rights framework. This has led to the introduction of a child's right to participate through interpretations of Article 6 and Article 8 ECHR in the ECtHR's judgments.[14] By ratifying the ECHR, states accepted the establishment and jurisdiction of the ECtHR and the possibility of individual applications to this Court.[15] The monitoring system of the ECtHR combined with the 'golden rule' of evolutive interpretation is an important means

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11 See https://au.int/en/treaties/1168 for the current status list.

12 K. Herbots, 'Het nieuwe Europees Verdrag inzake de uitoefening van de rechten van het kind en de situatie in België', *Tijdschrift voor Privaatrecht*, 1997, pp. 1763–1823, p. 1767.

13 See the Report by the Secretary General on the Review of Council of Europe Conventions, SG/Inf(2012)12. In 2015 both Malta and Spain ratified the Convention. In total 20 states have ratified the Convention: Albania, Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Montenegro, Poland, Portugal, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Turkey and Ukraine. A further eight states have signed the Convention: Hungary, Iceland, Ireland, Luxembourg, the Russian Federation and Sweden.

14 See M.R. Bruning et al., *Kind in proces: van communicatie naar effectieve participatie*, Wolf Publishers, Nijmegen 2020, pp. 80–122.

15 Arts. 19, 32 and 34 ECHR.

of achieving children's rights in Europe.[16] Individuals (including children) can bring cases to the Court themselves and thus raise alleged (children's) rights violations.[17] In recent decades, the ECtHR has increasingly focused on children's rights and made use of children's rights in the UNCRC and other international documents as an aid to interpretation. In the Court's case law there is the explicit recognition of the child's right to sufficient involvement in the decision-making process under Article 8 ECHR. This was introduced in the *M and M* judgment, where the ECtHR concluded that the parent's right to sufficient involvement applies *mutatis mutandis* to children, meaning children ought to be provided the opportunity to be heard and express their views.[18] Additionally, the ECtHR has repeatedly held that 'as children become mature and able to formulate their own opinion … the courts should give due weight to their views and feelings and to their right to respect for their private life'.[19]

2.5. COUNCIL OF EUROPE GUIDELINES ON CHILD-FRIENDLY JUSTICE 2010

In addition to the ECERC and the ECHR, the CoE introduced its own guidelines in Europe. The CoE Guidelines focus on the broader right to participate and make very specific recommendations for child-friendly procedures. The Guidelines provide detailed guidance to the Council of Europe Member States; they are not binding but do provide impetus, amongst others, to the ECtHR's interpretation of children's rights. During the drafting process it was decided

16 U. Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', *Human Rights Quarterly*, Vol. 23, 2001, pp. 308–326, p. 311; and M. Burbergs, 'How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born' in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, Cambridge 2013, pp. 315–329.

17 Art. 34 ECHR. See also L. Graziani, 'Access to Justice: A Fundamental Right for All Children' in T. Liefaard and J. Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*, Brill/Nijhoff, Leiden 2017, pp. 125–141, p. 130.

18 ECtHR *M and M v Croatia* (Appl. No. 10161/13), 3 September 2015, para. 181. This principle has been reaffirmed in three subsequent judgments: ECtHR *NTs and others v Georgia* (Appl. No. 71776/12), 2 February 2016, para. 78; ECtHR *ES v Romania and Bulgaria* (Appl. No. 60281/11), 19 July 2016, para. 59; and ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 73.

19 ECtHR *Płaza v Poland* (Appl. No. 18830/07), 25 January 2011, para. 71; ECtHR *Gobec v Slovenia* (Appl. No. 7233/04), 3 October 2013, para. 133; and ECtHR *Khusnutdinov and X v Russia* (Appl. No. 76598/12), 18 December 2018, para. 86.

that the guidelines should not extend beyond the standards already set out in international law (e.g. Article 12 UNCRC; case law of the ECtHR).[20]

2.6. INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES GUIDELINES 2017

On a different note, in 2017, the IAYFJM adopted and ratified the Guidelines on Children in Contact with the Justice System (IAYFJM Guidelines).[21] These guidelines mirror many of the principles contained in the Guidelines on Child-Friendly Justice and reflect many aspects of the child's right to participation in court proceedings, more specifically in the context of family and child law proceedings. The guidelines are not binding, but can be seen as a reflection of youth and family judges' perceptions of the child's right to participate in family law proceedings and therefore as an international professional standard.

3. TYPES OF PROCEEDINGS

The first theme addressed is the type of proceedings in which children are provided the right to participate in each of the instruments. More specifically, the different types of family law proceedings are considered.

Children must be able to express their views 'in all matters affecting' them, according to Article 12(1) UNCRC. The UNCRC Committee supports a broad definition of 'matters' since a wide interpretation of matters affecting the child helps to include children in the social processes of their community and society.[22] Opportunities to be heard have to be provided, in particular, in 'any judicial and administrative proceedings affecting the child' (Article 12(2) UNCRC). The UNCRC Committee mentions in this regard proceedings of separation of parents, custody, care and adoption and explains that judicial and administrative proceedings may involve alternative dispute mechanisms such as mediation and arbitration.[23] The Committee also notes that the right to be heard applies both to proceedings which are initiated by the child as well as to those initiated by others which affect the child, such as parental separation or adoption.[24]

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20 T. Liefaard and U. Kilkelly, 'Child-Friendly Justice – past, present and future' in B. Goldson (ed.), *Juvenile Justice in Europe. Past, Present and Future*, Routledge, London/New York 2018, pp. 57–73; the Guidelines are seen as rather weak at certain points, including the relatively weak status, and not really adding anything new, p. 64.

21 IAYFJM Guidelines, above n. 6.

22 General Comment No. 12, above n. 7, para. 27.

23 General Comment No. 12, above n. 7, para. 32.

24 General Comment No. 12, above n. 7, para. 33.

According to Article 9 UNCRC, states parties shall ensure that a child shall not be separated from their parents against their will, except when this is in accordance with the law and necessary for the best interests of the child, such as 'where the parents are living separately and a decision must be made as to the child's place of residence' (Article 9(1) UNCRC). In any such proceedings all interested parties shall be given the opportunity to participate in the proceedings and make their views known.[25]

Turning to the regional sources, the right of the child to communicate views in Article 4(2) of the African Charter is provided for 'in all judicial or administrative proceedings affecting a child'. This phrasing mirrors the text of Article 12(2) UNCRC. The phrase can therefore be understood to include family law proceedings of all types which affect the child.[26]

The material scope of the ECECR is, in principle, limited to family proceedings according to Article 1(3) ECECR and, in particular, proceedings on the exercise of parental responsibilities. The Explanatory Report does suggest that states can opt to apply the Convention to any other proceedings; however, the focus is on family proceedings.[27] In the ratification process of the ECECR, states must specify a minimum of three categories of family proceedings to which the Convention is to apply.[28] The selection of types of proceedings has both benefits and drawbacks. It may make the ratification and implementation of the ECECR more accessible for states;[29] however, it may also lead to fragmentation of rights and a lack of uniformity between different proceedings.[30]

Contrary to the other regional sources, the case law of the ECtHR, by its nature, does not provide a specific scope of application for the child's right to participate. As the ECtHR deals with any complaints brought before it, the case law on child participation rights has not been limited to any type of proceeding.

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25 Some authors interpret this as another specification of Art. 12(1) UNCRC: the child's right to be heard should be respected in all cases when the separation of the child from their parents is under consideration, e.g. L. Krappmann, 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)', *The International Journal of Children's Rights*, Vol. 18, 2010, pp. 501–513, p. 504. However, Sandberg states that this provision was not meant to include children to be heard. See K. Sandberg, 'Alternative Care and Children's Rights' in U. Kilkelly and T. Liefaard (eds.), *International Human Rights of Children*, Springer, Singapore 2018, pp. 187–213, p. 200.

26 D. Kassan, 'The Voice of the Child in Family Law Proceedings', *De Jure*, Vol. 36, No. 2, 2003, pp. 164–179, p. 166.

27 Explanatory Report to the European Convention on the Exercise of Children's Rights, Strasbourg, 25 January 1996, para. 15.

28 Art. 1(4) ECECR.

29 I. Jansen, 'Europees Verdrag inzake de uitoefening van rechten van kinderen', *FJR*, No. 6, 1996, pp. 132–138, p. 134.

30 K. Herbots, above n. 12, p. 1774; and N. Lowe, 'The impact of the Council of Europe on European family law' in J.M. Scherpe (ed.), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law*, Edward Elgar, Cheltenham 2016, pp. 95–123, p. 104.

There are well-known cases on a variety of family law proceedings. For example, *Sahin v Germany* and *Sommerfeld v Germany* concerned access rights; *M and M v Croatia* concerned custody rights; *Havelka and others v Czech Republic* concerned care proceedings; and *Rouiller v Switzerland* concerned international child abduction proceedings.[31]

The CoE Guidelines on Child-Friendly Justice deal with the issue of children's rights and needs in judicial proceedings and in alternatives to such procedures. These Guidelines apply to all ways in which children are (likely to be) brought into contact with criminal, civil or administrative law. The IAYFJM Guidelines are focused on rights for children who come into contact with the law in any setting, including separation of parents, custody, protection and adoption.[32] They apply to all matters where children are in contact with the justice system. The non-binding nature of the CoE and IAYFJM Guidelines may explain the broad scope of their recommendations, as they concern not only family law proceedings, but also any other criminal, civil and administrative proceedings.[33]

To summarise, all the above-mentioned human and regional human rights sources provide for children's right to participate in family law proceedings. They therefore address all the proceedings central to this Handbook, such as the separation of parents, custody, care, adoption and international child abduction. Some of the instruments also cover alternative dispute mechanisms (e.g. mediation and arbitration). In fact, the scope of most Conventions and Guidelines reach beyond the field of family law – only the ECECR is limited to family law specifically.

4. FORMS OF PARTICIPATION

Participation in legal proceedings is broader than only the right to be heard; it also covers other forms of procedural inclusion in the proceedings discussed above. We now turn to discuss how the different human rights instruments construe children's participation rights.

Children have the right to be heard either directly or through a representative or an appropriate body according to Article 12(2) UNCRC. However, the UNCRC Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.[34] The representative can

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31 ECtHR *Sahin v Germany* [GC] (Appl. No. 30943/96), 8 July 2003; ECtHR *Sommerfeld v Germany* [GC] (Appl. No. 31871/96), 8 July 2003; ECtHR *Havelka and others v Czech Republic* (Appl. No. 23499/06), 21 June 2007; ECtHR *Rouiller v Switzerland* (Appl. No. 3592/08), 22 July 2014; ECtHR *M and M v Croatia* (Appl. No. 10161/13), 3 September 2015.

32 IAYFJM Guidelines, above n. 6, pp. 7–8.

33 CoE Guidelines, above n. 5, I(2).

34 General Comment No. 12, above n. 7, para. 35.

be the parent(s), a lawyer or another person, e.g. a social worker. The UNCRC Committee emphasises that indirect hearing via a family representative (often parent(s)) risks a conflict of interests and it is therefore of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative.[35] The representative must exclusively represent the interests of the child. The UNCRC Committee recommends that codes of conduct should be developed for representatives who are appointed to ascertain and represent the child's views.[36]

It is not clear whether states have the discretion to determine how the child's views should be heard[37] or have to provide for a representative as an option to children in proceedings.[38] According to Mol, it appears that states cannot simply decide to provide children with only one manner in which to be heard; children should – according to General Comment No. 12 – be provided with a choice between forms of participation.[39] Once a child has opted to be heard in a proceeding, they should be provided with the opportunity to decide how to be heard.[40] Still, neither Article 12 UNCRC nor the UNCRC Committee address the question regarding how children should be provided with representation in legal proceedings pursuant to Article 12 UNCRC, nor do they explicitly require representation forms to be available to children.[41] It remains unclear from these sources what the most suitable option is to hear children in family law proceedings.[42] Parkes forewarns that best-interests representation by a guardian ad litem as a means of indirectly hearing the child's voice should be accompanied with the guarantee of presenting the child's own views to the court; this could be realised by a 'tandem model' of both a guardian ad litem and a special lawyer representing the child.[43]

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35 General Comment No. 12, above n. 7, para. 36.

36 General Comment No. 12, above n. 7, para. 37.

37 R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, New York 2007, p. 157.

38 A. Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard*, Routledge, London 2013, p. 98.

39 C.R. Mol, 'Children's Representation in Family Law Proceedings', *The International Journal of Children's Rights*, Vol. 27, No. 1, 2019, pp. 66–98, p. 70.

40 General Comment No. 12, above n. 7, para. 35. See also G. Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, Save the Children Fund, London 2011; E.E. Sutherland, 'Listening to the Voice of the Child: The Evolution of Participation Rights', *New Zealand Law Review*, Vol. 26, No. 3, 2013, p. 345; and C.R. Mol, above n. 39.

41 C.R. Mol, above n. 39, pp. 74 and 94.

42 A. Parkes, above n. 38, p. 120.

43 A. Parkes, above n. 38, p. 255. With regard to international child abduction cases, Schuz prefers the child to be heard directly by the court; indirectly 'translating' the child's voice should be insufficient to guarantee effective participation of the child; R. Schuz, *The Hague Child Abduction Convention: a critical analysis*, Hart Publishing, Oxford 2013, p. 381.

General Comment No. 14 also addresses the way in which children should participate in court proceedings:

> In civil cases, the child may be defending his or her interests directly or through a representative, in the case of paternity, child abuse or neglect, family reunification, accommodation, etc.[44]

Consistent with the discussion about how an indirect hearing of the child should be shaped, General Comment No. 14 addresses representation of the child by others than the parent(s) or primary carer(s) to realise separate participation in legal proceedings. In paragraph 90 it is stated that in situations where the child's views are in conflict with those of their representative, a procedure should be established to allow the child to approach an authority to establish separate representation for the child (e.g. a guardian ad litem), if necessary. In cases where a child is referred to an administrative or judicial procedure involving the determination of their best interests, they should, according to the UNCRC Committee in General Comment No. 14, be provided with a legal representative, in addition to a guardian or representative of their views, when there is a potential conflict between the parties in the decision.[45] It appears that the UNCRC Committee is more explicit in General Comment No. 14 compared to General Comment No. 12 regarding the child's right to legal representation in situations of (possible) conflict of interests between the child and the (parent) representative.[46] In family law proceedings, the risk of a conflict of interests between parents and child is particularly apparent.

The UNCRC and General Comment No. 12 remain silent about the child's right to commence proceedings, file a request to access relevant files or appeal. However, when the right of the child to be heard in legal proceedings is breached, the UNCRC Committee notes that the child must have access to appeals and complaint procedures.[47] The UNCRC Committee also notes that the giving of feedback to the child by the decision-maker may prompt the child to file an appeal or a complaint.[48] States parties should review or amend their legislation to introduce mechanisms providing children with access to appropriate information, adequate support if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.[49] Thus the UNCRC

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44 UN Committee on the Rights of the Child, *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 29 May 2013, para. 29.

45 General Comment No. 14, above n. 44, para. 96.

46 M.R. Bruning et al., above n. 14, p. 90.

47 General Comment No. 12, above n. 7, para. 47.

48 General Comment No. 12, above n. 7, para. 45.

49 General Comment No. 12, above n. 7, para. 48.

Committee does not explicitly address the possibility of the child independently commencing proceedings or filing an appeal, but appealing against a decision in which the child is heard should be an option for children and they should receive appropriate information and support.

The text of Article 4(2) ACRWC refers to two forms of participation: the child may be heard directly or 'through an impartial representative as a party to the proceedings'. The direct form of participation is similar to that in Article 12 UNCRC, while the indirect form differs in wording. Article 4(2) calls for an 'impartial representative', adding an additional element of neutrality. The option of an indirect hearing through an 'appropriate body' has not been replicated in the ACRWC.[50] The wording of Article 4(2) does add to the direct hearing and the representative the phrase 'as a party to the proceedings'. Chirwa considers that this implies that 'a child has to be a party to given proceedings for him/her to be heard'.[51] It can be understood in this way as providing the opportunity for a child to be included as a party to proceedings, including in family proceedings.[52] However, it can also be understood to refer solely to the position of the impartial representative for the child.[53]

The ECECR provides a range of procedural rights, of which two are mandatory for states to provide, while the others are optional. States are obliged to provide the child with the right to express their views in proceedings, as provided by Article 3 (and mirrored in Article 6) ECECR. Additionally, when the holder(s) of parental responsibility cannot represent the child in the proceedings due to a conflict of interests, Articles 4 and 9 provide for the right to the appointment of a special representative. Article 5 lists a number of procedural rights that states could opt to provide for children. These rights are: the right to apply to be assisted by an appropriate person of their choice when expressing their views, the right to apply for the appointment of a separate representative, the right to appoint their own representative and, finally, the right to exercise some or all of the rights of parties to such proceedings.

The mandatory and optional procedural rights in the ECECR consist of various forms of participation. The first form is the expressing of views by being 'consulted' as provided in Article 3(b) ECECR; this refers to the hearing of the child, either directly by the judicial authority or indirectly through other persons or bodies.[54] Subsequently the ECECR provides for representation.

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50 See M. Gose, *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, Bellville 2003, p. 128.

51 D.M. Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, Vol. 10, 2002, pp. 157–177, p. 161.

52 D. Kassan, above n. 26, p. 166.

53 K.-A. Cleophas and U.M. Assim, 'Child Participation in Family Law Matters Affecting Children in South Africa', *European Journal of Law Reform*, Vol. 17, No. 2, 2015, pp. 294–304, pp. 296–297.

54 See Art. 6(b) ECECR and ECECR Explanatory Report, above n. 27, para. 45.

A representative is defined as 'a person, such as a lawyer, or a body appointed to act before a judicial authority on behalf of the child' in Article 2(c) ECECR. Representation is mentioned in four ways: the special representative,[55] the separate representative,[56] the 'own' representative,[57] and the holder(s) of parental responsibilities.[58] The difference between these representatives and their tasks or functions remains, to a certain extent, unclear within the ECECR and its Explanatory Report. The final form included in the ECECR is contained in Article 5(d): the option of the child as a party to the proceedings.

The forms of participation recognised and recommended by the ECtHR are found throughout its case law on the topic. Three forms of participation can be deduced from this case law: direct participation in the form of a direct hearing, indirect participation through representation, and indirect participation through expert reports.

The ECtHR has expressed general principles on children's right to participate in these ways. In *Sahin v Germany*, the Grand Chamber found that 'it would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.'[59] This principle has also been slightly amended to apply to other forms of participation. In *Sommerfeld v Germany* the ECtHR used the same formula with regard to the involvement of a psychological expert[60] and in *Wildgruber v Germany* the ECtHR applied the principle equally to the appointment of a curator ad litem.[61]

With regard to the option of representation, the judgment in *NTs and others v Georgia* is relevant as the ECtHR extensively discussed the role of the representative and the children's 'effective representation'. In this judgment, the ECtHR questioned whether the children's interests could be effectively represented if the representative that had been appointed to them in the proceedings had no 'formal procedural role' provided for by the Code of Civil

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55 Arts. 4 and 9(1) ECECR.

56 Arts. 5(b) and 9(2) ECECR.

57 Art. 5(c) ECECR.

58 Art. 10(2) ECECR.

59 ECtHR *Sahin v Germany* [GC] (Appl. No. 30943/96), 8 July 2003, para. 73. This principle was reiterated in ECtHR *Iglesias Casarrubios and Cantalapiedra Iglesias v Spain* (Appl. No. 23298/12), 11 October 2016, para. 36; and ECtHR *Getliffe and Grant v France* (dec.) (Appl. No. 23547/06), 24 October 2006.

60 ECtHR *Sommerfeld v Germany* [GC] (Appl. No. 31871/96), 8 July 2003, para. 71. This principle was reiterated in ECtHR *Moog v Germany* (Appl. Nos. 23280/08 and 2334/10), 6 October 2016, para. 78; ECtHR *Wildgruber v Germany* (dec.) (Appl. No. 32817/02), 16 October 2006; and ECtHR *Wildgruber v Germany* (dec.) (Appl. Nos. 42402/05 and 42423/05), 29 January 2008.

61 ECtHR *Wildgruber v Germany* (dec.) (Appl. No. 32817/02), 16 October 2006.

Procedure and no rights or official position in those proceedings.[62] The Court was critical of the fact that the type of representation, the functions, and the powers of the representative were ambiguous. In practice, this meant that during the duration of the domestic proceedings (two years) the representative appointed to the children were various persons of the Social Services Agency, who met the children only a few times, and who solely drafted reports on the situation of the children.[63] Referring to the international standards of the ECECR and the CoE Guidelines, the ECtHR concluded that the representation in practice could not be considered 'adequate and meaningful representation'.[64] More recently, in *C v Croatia* the ECtHR has emphasised that representation, for example by a 'special guardian ad litem', may be specifically relevant for children in a post-divorce custody battle.[65] A representative could then protect the interests of the child, explain to them the court proceedings, decisions and consequences thereof and 'liaise between the competent judge and the child'.[66] In this judgment the Court also emphasises the need for direct participation, particularly when there are 'flaws in the quality' of representation, i.e. when there was no independent representative appointed for the child in a conflict of interests with his parent.[67]

According to the CoE Guidelines, children should be consulted on the manner in which they wish to be heard.[68] These Guidelines also indicate that children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interests between the child and the parents or other involved parties;[69] they should have access to free legal aid;[70] and they should be considered as fully fledged clients.[71] The CoE Guidelines explicitly emphasise that in cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian ad litem or another independent representative for the child.[72] It is unclear whether best interests representation (e.g. via a guardian ad litem) is sufficient according to the Guidelines, since no mention is made of how to choose between a guardian ad litem or another representative.

Moreover, the CoE Guidelines assure access to court and to the judicial process (under D1) and indicate that the possibility of access to court for children who have sufficient understanding of their rights, as well as of the use of remedies to

62 ECtHR *NTs and others v Georgia* (Appl. No. 71776/12), 2 February 2016, para. 74.
63 ECtHR *NTs and others v Georgia* (Appl. No. 71776/12), 2 February 2016, para. 75.
64 ECtHR *NTs and others v Georgia* (Appl. No. 71776/12), 2 February 2016, para. 76.
65 ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 77.
66 ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 77.
67 ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 80.
68 CoE Guidelines, above n. 5, IV(D), para. 44.
69 CoE Guidelines, above n. 5, para. 37.
70 CoE Guidelines, above n. 5, para. 38.
71 CoE Guidelines, above n. 5, para. 39.
72 CoE Guidelines, above n. 5, para. 42.

protect these rights, should be facilitated.[73] This provision gives considerable discretion regarding the implementation of access to court for children and the criteria for determining 'sufficient understanding'. Any obstacles to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.[74] The CoE Guidelines require that children should be guaranteed equivalent levels of safeguards in both judicial and out-of-court proceedings.[75]

The IAYFJM Guidelines also aim at guaranteeing the child's right to participate either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law and thus follow closely the definition of Article 12 UNCRC. Furthermore, the IAYFJM Guidelines provide for extra support tools to enable children to participate in proceedings, such as a psychologist or other expert.[76] This expert support seemingly has two aims, namely both to explain the child's views and to support the child before, during and after the hearing. According to the IAYFJM Guidelines, children must be provided with access to legal assistance and representation in their contacts with justice whenever their interests are at stake. In cases where there is, or could be, a conflict of interest between children and their parents or any other party, children must have their own counsel and representation, in their own name.[77] The IAYFJM Guidelines explicitly indicate that the role of the child's representative is similar to an adult client representative's role, but this role should be executed in a manner that is consistent with the level of understanding and communication of the child.[78] Beyond the legal role, representatives should be aware of the needs of children for general and psychological support throughout the proceedings. Children should be provided with free legal aid and representatives should not be chosen and paid for by the parents, but rather supported by the state.[79] In the IAYFJM Guidelines specific consideration is given to conflicts of interests that frequently arise when children and parents interact within justice systems; for example, separated or divorced parents may be influenced by their personal interests when litigating over the legal custody of their children.[80]

The IAYFJM Guidelines also consider children's access to court or other bodies (section 4.4), comparable to the CoE Guidelines. All children must have access to remedies, and obstacles, such as the cost of proceedings or the lack of legal assistance and representation, should be removed.[81] No further explanation is provided on this aspect of children's participation in court proceedings.

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73 CoE Guidelines, above n. 5, para. 34.
74 CoE Guidelines, above n. 5, para. 35.
75 CoE Guidelines, above n. 5, para. 26.
76 IAYFJM Guidelines, above n. 6, para. 2.3.1.
77 IAYFJM Guidelines, above n. 6, para. 3.3.1.
78 IAYFJM Guidelines, above n. 6, para. 3.3.2.
79 IAYFJM Guidelines, above n. 6, para. 3.3.5.
80 IAYFJM Guidelines, above n. 6, section 3.3, pp. 32–33.
81 IAYFJM Guidelines, above n. 6, paras. 4.4.1 and 4.4.2.

Furthermore, the child's right to appeal is enshrined in paragraph 4.7: children must have the right to appeal decisions in which they have an interest. Their appeal must not be lesser than that which adults would have in similar circumstances. Hence, these Guidelines take children's legal rights very seriously and grant children the right to appeal.

Taking all of the human rights sources together, it is evident that there are multiple participation forms provided for children. The right to be heard directly is provided by all instruments. Indirect forms of participation, provided through representatives or other bodies, are also included in all sources, although there is a scale of different options for representation in this regard. The child's right to legal representation and professional support is recognised as important when there is a (potential) conflict of interests between the child and the parent(s). Specifically, in the ECECR, the CoE Guidelines and the IAYFJM Guidelines this right to legal representation and certain features thereof, such as free legal aid, are emphasised. Finally, although the UNCRC does not provide children with the right to party status in proceedings, the ACRWC, ECECR and both Guidelines do lean in that direction. It remains unclear, however, when and how the right to commence proceedings, file an appeal or have access to relevant files should be implemented in domestic law. Only the IAYFJM Guidelines are unambiguous in stressing that children must have the right to appeal decisions.

5. CONDITIONS FOR PARTICIPATION

Participation in family law proceedings is not an absolute right for children. Conditions are applied, mostly through the application of maturity requirements.

Article 12 UNCRC contains two conditions. The first is that the 'child capable of forming his or her own views' has the right to express views; the second, that these views should be given due weight 'in accordance with the age and maturity of the child'. While there is some contention regarding whether these conditions are separate conditions or overlap to form one condition, this debate is bypassed in this chapter except to say that the current interpretation tends to lean towards the conditions as separate.[82]

[82] See C.R. Mol, 'Maturity and the Child's Right to be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared' in K. Boele-Woelki and D. Martiny (eds.), *Plurality and Diversity of Family Relations in Europe*, Intersentia, Cambridge 2019, pp. 237–254, pp. 241–243; M.-F. Lücker-Babel, 'The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child', *The International Journal of Children's Rights*, Vol. 3, 1995, pp. 391–404, pp. 397 and 399; R. Thorburn Stern, *Implementing Article 12 of the UN Convention on the Rights of the Child: Participation, Power and Attitudes*, Brill/Nijhoff, Leiden 2017, pp. 56–58 and 62–64; A. Daly, 'No Weight for "Due Weight"? A Children's

So what do these two conditions refer to? The explanatory remarks of the UNCRC Committee provide some answers. With regard to the first condition, that the child is 'capable of forming his or her own views', the Committee provides five insights. Firstly, this is not meant as a limitation according to the Committee, but should be understood as an 'obligation for States parties to assess the capacity of the child to form an autonomous opinion.'[83] Subsequently, the Committee introduces a presumption of capacity for the child – placing the burden on states to assess whether a child is not capable of forming views.[84] How to determine a child's capacity to form an autonomous opinion, or to refute the presumption of capacity, is not further clarified. The UNCRC Committee furthermore discourages states from using the capability condition to introduce age limits 'either in law or in practice'.[85] The Committee adds that young children can be capable of forming views, even if they are not yet able to express them verbally.[86] Finally, it is clarified that the child should have 'sufficient understanding' to be capable of forming views, but that the child does not need to have 'comprehensive knowledge of all aspects of the matter'.[87]

The second condition concerns the due weight to be given to the child's views, which ought to occur 'in accordance with the age and maturity of the child'. The dual nature of the condition should emphasise that 'age alone cannot determine the significance of a child's views' according to the UNCRC Committee.[88] Instead, other factors drawn from research should also be considered, such as information provided to the child, experience, environment, social and cultural expectations and levels of support.[89] It is interesting to note that the Committee does not further elaborate on these factors nor does it make reference to the research mentioned. Age has to be considered together with maturity, neither of which can be determinative 'in isolation of the other'.[90] The views of the child are to be 'assessed on a case-by-case examination'.[91] The UNCRC Committee also

Autonomy Principle in Best Interest Proceedings', *The International Journal of Children's Rights*, Vol. 26, 2018, pp. 61–92, p. 68; and E.K.M. Tisdall, 'Challenging Competency and Capacity? Due Weight to Children's Views in Family Law Proceedings', *The International Journal of Children's Rights*, Vol. 26, 2018, pp. 159–182, p. 165.

83 General Comment No. 12, above n. 7, para. 20.

84 General Comment No. 12, above n. 7, para. 20; see also P. Alderson, 'Giving Children's Views "Due Weight" in Medical Law', *The International Journal of Children's Rights*, Vol. 26, 2018, pp. 16–37, p. 21; and C.R. Mol, above n. 82, p. 239.

85 General Comment No. 12, above n. 7, para. 21. It is interesting to note, however, that the Committee does accept fixed age limits with regard to the right to consent in healthcare matters so long as children under the age limit are allowed to express their views if they demonstrate the capacity to do so. See General Comment No. 12, above n. 7, para. 102.

86 General Comment No. 12, above n. 7, para. 21.

87 General Comment No. 12, above n. 7, para. 21.

88 General Comment No. 12, above n. 7, para. 29.

89 General Comment No. 12, above n. 7, para. 29.

90 See A. Parkes, above n. 38, p. 36.

91 General Comment No. 12, above n. 7, para. 29.

provides some guidance as to how 'maturity' should be understood, explaining it as 'the ability to understand and assess the implications of a particular matter'.[92] The Committee accepts that the term is 'difficult to define', but in the context of Article 12 it should be understood as 'the capacity of a child to express her or his views on the issues in a reasonable and independent manner'.[93]

How one should understand all these different comments, and the phrases used, remains a fertile topic for academic comment and discussion.[94]

In Article 4(2) ACRWC, the right for children to be heard in judicial or administrative proceedings is provided for 'a child who is capable of communicating his/her own views'. This phrasing is generally understood as being more restrictive than the phrasing used in Article 12(2) UNCRC.[95] Requiring capability to 'communicate' views instead of capability to 'form' views appears to imply a need for the child to be able to verbally communicate their views.[96] On the other hand, some argue that the threshold for children is lower in Article 4(2) ACRWC compared to Article 12(2) UNCRC. Article 4(2) does not make the weight given to the views of the child contingent on the 'age and maturity' of the child; instead the views 'shall be taken into consideration'.[97]

The mandatory procedural rights provided in the ECECR are (or may be if states so wish) limited to children with 'sufficient understanding'.[98] The Explanatory Report clarifies that the interpretation and implementation of this standard is left to states, who should define criteria to be able to evaluate 'whether or not children are capable of forming and expressing their own views'.[99] The Explanatory Report subsequently allows states to use age as a

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92 General Comment No. 12, above n. 7, para. 30.

93 General Comment No. 12, above n. 7, para. 30.

94 See, amongst others, M.-F. Lücker-Babel, above n. 82, p. 397; R. Thorburn Stern, above n. 82, p. 63; E.K.M. Tisdall, above n. 82, pp. 162–166; P. Alderson, above n. 84, p. 21; L. Lundy, '"Voice" is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child', *British Educational Research Journal*, Vol. 33, No. 6, 2007, pp. 927–942, pp. 937–938; D. Archard and M. Skivenes, 'Balancing a Child's Best Interests and a Child's Views', *The International Journal of Children's Rights*, Vol. 17, No. 1, 2009, pp. 1–21, p. 10; E.K.M. Tisdall, 'Children and Young People's Participation: A critical consideration of Article 12' in W. Vandenhole et al. (eds.), *Routledge International Handbook of Children's Rights Studies*, Routledge, London 2015, pp. 185–200; A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard*, Brill, Leiden 2018, p. 47; and L. Lundy, J. Tobin and A. Parkes, 'Art. 12 The Right to Respect for the Views of the Child' in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, Oxford 2019, pp. 397–434, pp. 405–406.

95 D.M. Chirwa, above n. 51, p. 161; M. Gose, above n. 50, p. 125; and K.-A. Cleophas and U.M. Assim, above n. 53, p. 296.

96 See M. Gose, above n. 50, p. 125; and K.-A. Cleophas and U.M. Assim, above n. 53, p. 296.

97 C. Du Toit, 'Legal Representation of Children' in T. Boezaart (ed.), *Child Law in South Africa*, JUTA Law, Claremont 2009, pp. 93–111, p. 95; and T. Boezaart, 'Listening to the Child's Objection', *New Zealand Law Review*, Vol. 26, No. 3, 2013, pp. 357–372, p. 361.

98 See Arts. 3, 6(b), 10(a) and (b) ECECR for the mandatory rights and Art. 4 ECECR for the mandatory right in which states are free to opt for this limitation.

99 ECECR Explanatory Report, above n. 27, para. 35.

criterion and notes that if states have not 'fixed a specific age' then the authorities will need to determine 'sufficient understanding' per case.[100] It is relevant to note that for the appointment of a special representative by the judicial authority 'sufficient understanding' is not required in Article 9 ECECR. In comparison to the UNCRC, the ECECR appears to include a more restrictive maturity condition.[101] Even though reference is made to the phrasing of the UNCRC in the Explanatory Report, the option of fixed age limits contradicts the UNCRC Committee's remarks. However, the UNCRC Committee itself has included 'sufficient understanding' in explaining the capability of children to form views.

The ECtHR has commented on the age and maturity for children's participation in its case law, specifically with regard to being heard directly. More generally, the ECtHR has found that whether a child ought to be heard directly depends 'on the specific circumstance of each case, having due regard to the age and maturity of the child concerned.'[102] Additionally, the ECtHR specified in *Płaza v Poland* that 'as children mature and become, with the passage of time, able to formulate their own opinion on their contact with the parents, the courts should give due weight also to their views and feelings as well as to their right to respect for their private life.'[103] The ECtHR therefore considers age and maturity to be relevant conditions regarding whether a child should be heard and how much weight should be given to the expressed views. How these conditions should be interpreted requires putting all the pieces from a range of case law together. In *M and M v Croatia* the ECtHR refers to and affirms the presumption of capacity as stipulated by the UNCRC Committee, thereby signalling an interpretation in conformance with the UNCRC.[104] However, the ECtHR does not adopt the duality of age and maturity in its case law, instead focusing mostly on the age of the child. The only other factors referred to are the intellectual capacities of the child,[105] the consistency of the views over time,[106] and whether the child is able to 'appreciate' or 'understand' the consequences of the decision.[107] Mol has previously analysed the case law of the ECtHR to determine the ages considered sufficient or insufficient by the ECtHR for both the child's participation and for

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100 ECECR Explanatory Report, above n. 27, para. 36. See also I. Jansen, above n. 29, p. 134; and C. Sawyer, 'One step forward, two steps back – The European Convention on the Exercise of Children's Rights', *Child and Family Law Quarterly,* Vol. 11, 1999, pp. 151–166, p. 156.

101 See C. Sawyer, above n. 100, pp. 155–156.

102 ECtHR *Sahin v Germany* [GC] (Appl. No. 30943/96), 8 July 2003, para. 73; and ECtHR *Sommerfeld v Germany* [GC] (Appl. No. 31871/96), 8 July 2003, para. 71.

103 ECtHR *Płaza v Poland* (Appl. No. 18830/07), 25 January 2011, para. 71.

104 ECtHR *M and M v Croatia* (Appl. No. 10161/13), 3 September 2015, para. 184. See also C.R. Mol, above n. 82, p. 245.

105 ECtHR *M and M v Croatia* (Appl. No. 10161/13), 3 September 2015, para. 186.

106 ECtHR *Płaza v Poland* (Appl. No. 18830/07), 25 January 2011, para. 86; and ECtHR *Glesmann v Germany* (Appl. No. 25706/03), 10 January 2008, para. 110.

107 ECtHR *Döring v Germany* (dec.) (Appl. No. 50216/09), 21 February 2012; and ECtHR *Gobec v Slovenia* (Appl. No. 7233/04), 3 October 2013, paras. 137–138.

due weight to be given to the child's views.[108] She identified very general age ranges in the case law of the ECtHR: children under six years of age are generally considered insufficiently mature to be heard, while children above the age of 11 are mostly considered sufficiently mature.[109] Additionally, there appears to be a very rudimentary age split as to when the ECtHR finds children sufficiently mature for their views to be given due weight around the age of nine years.[110] These age ranges, however, ought to be considered with great caution as the ECtHR is a subsidiary supervisory court. This means that it reviews domestic proceedings, but does not reassess the evidence or facts – that remains the task of the national courts. Thus the age ranges may be mostly indicative of the age ranges adhered to in European states.[111]

The CoE Guidelines do not set any age limits, but instead use the notion of a certain discernment, maturity or level of understanding; age limits tend to be too rigid and arbitrary and can have truly unjust consequences.[112] According to the Guidelines, capability, maturity and level of understanding are more representative of a child's real capacities than their age. The CoE Guidelines thus follow the UNCRC approach in this regard, although mention is made of the risks due to the wide margin of appreciation left to the judge in question to assess the child's capability. However, it is emphasised that concepts such as 'age and maturity' and 'sufficient understanding' imply a certain level of comprehension, but do not go as far as to demand, from the child, full comprehensive knowledge of all aspects of the matters at hand.[113]

The CoE Guidelines, comparable to the UNCRC, mention that the child's right to participate in proceedings includes hearing the child who is deemed to have sufficient understanding of the matters in question and giving due weight to the child's views in accordance with their age and maturity.[114] However, 'a child should not be precluded from being heard solely on the basis of age; whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case'.[115] Access to court should be facilitated 'for children who have sufficient understanding of their rights and of the use of remedies to protect those rights'.[116] The CoE Guidelines thus choose concepts such as 'maturity'

108 See C.R. Mol, above n. 82.
109 C.R. Mol, above n. 82, pp. 245–247.
110 C.R. Mol, above n. 82, pp. 247–249.
111 C.R. Mol, above n. 82, p. 250.
112 CoE Guidelines, above n. 5, para. 96.
113 CoE Guidelines, above n. 5, para. 108.
114 CoE Guidelines, above n. 5, paras. 44 and 46.
115 CoE Guidelines, above n. 5, para. 47.
116 CoE Guidelines, above n. 5, para. 34.

and 'capacity' and age as determining factors in realising the child's right to participate in proceedings, thereby optimising the child's effective participation.

Children who are capable of forming their own views have the right to participate according to the IAYFJM Guidelines. Their views must be given due weight in accordance with their age and maturity.[117] Comparable to the CoE Guidelines, both age and the concept of 'maturity' are used as defining elements for children's participation. An assessment should not be made solely on the basis of age: the individual child's maturity must be assessed on a case-by-case basis to see how capable the child is of forming their own views, according to the explanatory comments.[118] However, when children are too young or too immature to form and express their own views, independent representatives should be designated to bring forward their best interests and respect for their rights.[119]

All six international and regional human rights sources show that the core condition applied to children with respect to participation is one of maturity. The phrasing and packaging of the respective conditions vary greatly. Regarding the issue of participation itself, children ought to be 'capable of forming their own views', be 'capable of communicating' views, or have 'sufficient understanding', 'discernment', or 'age and maturity'. Subsequently, for the issue of affording due weight, 'age and maturity' are common factors (except in the ACRWC). Further specification of these requirements tends to be lacking. Although age limits are generally disapproved of, the ECECR and the ECtHR do appear to accept age limits as a practicality.

6. LOCATION OF PARTICIPATION AND METHOD OF COMMUNICATION

An important element of participation of children in legal proceedings concerns the context and location of their participation. In several sources this element is addressed in detail; in others it is more limited.

Article 12 UNCRC does not mention anything about the location, but General Comment No. 12 stresses that no effective hearing can be realised for the child where the environment is intimidating, hostile, insensitive or inappropriate for their age.[120] Therefore, accessible and child-friendly proceedings are necessary, but what this entails is not specified. However, the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately

117 IAYFJM Guidelines, above n. 6, para. 2.3.1.
118 IAYFJM Guidelines, above n. 6, pp. 16–17.
119 IAYFJM Guidelines, above n. 6, para 2.3.2.
120 General Comment No. 12, above n. 7, paras. 34 and 134.

trained staff, courtroom design, judges' and lawyers' clothing, sight screens and separate waiting rooms are mentioned as core elements of accessible and child-friendly proceedings. Furthermore, the context in which the child exercises their right to be heard has to be enabling and encouraging,[121] and, preferably, a child should not be heard in open court, but under conditions of confidentiality.[122]

With regard to the method of communication the UNCRC Committee encourages the format of a talk, rather than a one-sided examination.[123] Children are able to form views from the youngest age, even when they may be unable to express them verbally. Hence non-verbal forms of communication including play, body language, facial expressions, and drawing and painting should be recognised as modes of communication.[124] Training to acquire skills to effectively listen to, and engage with, children to facilitate their participation is essential.[125]

The ACRWC and the ECECR (or its Explanatory Report) do not provide any specifics on where participation should take place. Similarly, the case law of the ECtHR does not provide any clear guidance regarding the location of children's participation. The ECtHR also provides no additional information in its case law with regard to the method of communication. The other two instruments do.

In light of the phrasing in Article 4(2) ACRWC referring to the capability of communicating views, a number of authors infer that the ACRWC requires children to communicate verbally in judicial and administrative proceedings.[126] This is more limited than the UNCRC Committee's understanding.

Although the ECECR does not speak of how the child may communicate their views, the Explanatory Report does provide some information. Considering Article 10 ECECR on the role of the representative, the Explanatory Report clarifies that 'determining the views of the child' should not be interpreted strictly.[127] A child may express their views verbally, but determining the views can also be done through 'observations' of the child by the representative.

The CoE Guidelines address the need for a child-friendly environment in a separate paragraph,[128] which underscores that cases involving children should be dealt with in non-intimidating and child-sensitive settings. Furthermore, 'as far as appropriate and possible', interviewing and waiting rooms should be child-friendly. This framing seems to give some leeway to environments (interview location, waiting room) that are not child-friendly. The architectural

121 General Comment No. 12, above n. 7, para. 42.
122 General Comment No. 12, above n. 7, para. 43.
123 General Comment No. 12, above n. 7, para. 43.
124 General Comment No. 12, above n. 7, para. 21.
125 General Comment No. 12, above n. 7, para. 134.
126 See M. Gose, above n. 50, p. 125; and K.-A. Cleophas and U.M. Assim, above n. 53, p. 296.
127 ECECR Explanatory Report, above n. 27, para. 55.
128 CoE Guidelines, above n. 5, IV(D), para. 5.

surroundings of a courthouse can make children very uncomfortable; therefore, where possible, special interview rooms should be included.[129] Furthermore, child-friendly court settings may mean that no wigs or gowns or other official uniforms are worn. It is interesting that the CoE Guidelines specify that for some children the use of uniforms may have relevance and could enhance the child feeling that the matters affecting them are being taken seriously by the competent authority.[130] This could be applicable to many (older) adolescents who want to be taken seriously and would feel ridiculed in childish child-friendly interview rooms with judges without gowns. In other words, the specific nature of a child-friendly environment could be different for younger and older children. The CoE Guidelines point out that the setting could, depending on the child, be relatively formal but the behaviour of the officials should be less formal.

The CoE Guidelines also address the method of communication with children. Even young children can state their views clearly; the means to hear children should be adapted to the child's level of understanding of the matters in question and children should be consulted on the manner in which they wish to be heard.[131] Children can be heard by the judge or an appointed expert, depending on the child's wishes and interests. Language appropriate to children's age and level of understanding should be used and training for judges is vital. Besides this, children should have the opportunity to be accompanied by their parents or an adult of their choice, unless a reasoned decision has been made to the contrary.[132] Furthermore, court sessions should be adapted to the child's pace and attention span; regular breaks should be planned and the hearing should not last too long.

The IAYFJM Guidelines also address the context in which children exercise their right to participate; this context should be enabling and encouraging.[133] The explanations and comments refer to General Comment No. 12, paragraph 34 (discussed above). Children should have the free assistance of an interpreter if needed and children with communication disabilities should be provided with adequate and effective assistance by well-trained professionals (for example, in sign language).[134]

When hearing the child, language should be used that is easily understood by the child and at a speed that can be followed, keeping in mind the child's age and maturity.[135] Similar to the CoE Guidelines, it is further stated that children should have the possibility of being accompanied by their parents unless a

129 Explanatory Memorandum CoE Guidelines, para. 123.
130 Explanatory Memorandum CoE Guidelines, para. 123.
131 CoE Guidelines, above n. 5, IV(D), para. 44, and Explanatory Memorandum, para. 114.
132 CoE Guidelines, above n. 5, IV(D), para. 58.
133 IAYFJM Guidelines, above n. 6, para. 2.3.4.
134 IAYFJM Guidelines, above n. 6, paras. 3.6.1 and 3.6.2.
135 IAYFJM Guidelines, above n. 6, para. 3.4.2.

reasoned decision is made to the contrary, since this may be a reassuring factor for children.[136]

In implementing the right to participation, the location and method of communication are relevant aspects for making the procedure child-friendly. However, it is a topic that is covered only minimally in the binding sources of human rights law – except by the UNCRC Committee itself in the General Comment. The binding sources leave more leeway to states regarding how to implement the rights granted. In contrast, non-binding guidelines lend themselves better to providing details, suggestions and best practices. Both sets of Guidelines discussed also provide more input, considering amongst other things the 'child-friendly environment' of a courtroom and waiting room, appropriate language, the clothing of lawyers and judges and the possibility of the child bringing someone to support them during the hearing. The training of judges on listening and engagement skills are also considered vital.

7. INFORMATION AND FEEDBACK

A final important element of the child's right to participate in legal proceedings concerns the child's right to information and feedback. This is comprehensively addressed in various sources.

According to the UNCRC Committee, the realisation of the child's right to express their views requires that the child be informed about the decisions to be taken and their consequences by those who are responsible for the child. The child must also be informed about the conditions under which they will be asked to express their views. The child's right to information is essential, because it is the precondition for the child's clarified decisions.[137] Those responsible for hearing the child have to ensure that the child is informed about their right to express their opinion and about the impact that their expressed views will have on the outcome.[138] The child must be informed about the option of either communicating directly or through a representative and must be aware of the possible consequences of this choice. The child must be informed about how, when and where the hearing will take place and who the participants will be. Furthermore, those responsible for hearing the child have to inform the child of the outcome of the process and explain how their views were considered.[139] The feedback is a guarantee that the child's views are not only heard as a formality, but are taken seriously. Children are entitled to be provided with clear feedback on how their participation has influenced any outcomes.

136 IAYFJM Guidelines, above n. 6, para. 3.4.3.
137 General Comment No. 12, above n. 7, para. 25.
138 General Comment No. 12, above n. 7, para. 41.
139 General Comment No. 12, above n. 7, para. 45.

The right to information has a prominent position within the ECECR. Within the right to express views provided in Article 3, the child is provided with the right to receive all relevant information, together with the right to 'be informed of the possible consequences of compliance' with the views of the child and the 'possible consequences of any decision'. This information must either be provided by the appointed representative or the judicial authorities themselves.[140] The Convention defines 'relevant information' as 'information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child'.[141] The Explanatory Report adds two important reflections. The right to information does not mean that all information needs to be shared with the child, but the information that will be shared with the child must 'be adapted, both in form and content, to the age and understanding of the child'.[142]

Both the CoE Guidelines and the IAYFJM Guidelines extensively address the child's right to information and feedback. According to the CoE Guidelines, children and their parents should be promptly and adequately informed of, for example, their rights, the procedures involved and the role of the child and the different procedural steps, the existing support mechanisms and the availability of the services which can provide support.[143] This information should be provided to children in a manner adapted to their age and maturity in a language that they can understand and which is gender and culture sensitive. The CoE Guidelines underscore that provision of the information to the parents should not be an alternative to communicating the information to the child.[144] Independently of their parents, children should be provided with all necessary information on how effectively to use the right to be heard. Judgments affecting children should be duly reasoned and explained to them in child-friendly language, particularly those decisions in which the child's views and opinions have not been followed.[145] As regards family law cases, the CoE Guidelines emphasise that courts should exercise exceptional diligence to avoid any risk of adverse consequences on the family relations.[146] The child's lawyer, guardian ad litem or legal representative should communicate and explain the given judgment to the child in a language adapted to the child's level of understanding.[147] Children need to understand the nature and scope of the decision taken and its effects.

140 Art. 6(b) and 10 ECECR. See also K. Herbots, above n. 12, p. 1777.
141 Art. 2(d) ECECR.
142 ECECR Explanatory Report, above n. 27, para. 28.
143 CoE Guidelines, above n. 5, IV(A), para. 1.
144 CoE Guidelines, above n. 5, IV(A), para. 3.
145 CoE Guidelines, above n. 5, IV(D), para. 49.
146 CoE Guidelines, above n. 5, IV(D), para. 49.
147 CoE Guidelines, above n. 5, IV(E), para. 75.

While the judgment and the motivation thereof cannot always be recorded and explained in child-friendly wording, due to legal requirements, children should have those decisions explained to them, either by their lawyer or another appropriate person, such as a parent or a social worker.[148]

The IAYFJM Guidelines include similar provisions and standards and stress that in order to participate adequately, children must be provided with all necessary information.[149] When decisions are made, they should be explained to children in a language that they can understand, particularly when they conflict with their expressed wishes or views. Section 3.1 addresses information and advice and mentions this must be given about the same elements as those that are mentioned in the CoE Guidelines (as discussed above). The IAYFJM Guidelines are, to a large extent, similar to the relevant provisions in the CoE Guidelines, but remarkably no mention is made about giving feedback to the child after their views have been expressed.

Neither the ACRWC nor the case law of the ECtHR provide any clear guidelines for the information or feedback to be given to the child in light of their participation.[150] However, recently in *C v Croatia* the complaint was brought on behalf of the child that he was never 'informed in an appropriate manner' about the court proceedings, the opportunity to participate, nor the potential impact of these proceedings on his life.[151] The ECtHR does not directly respond to this complaint, but does note that a representative should have been appointed who could have explained the proceedings to the child.[152]

The final theme addressed in this chapter concerns the information and feedback given to the child when participating in family law proceedings. The UNCRC, ECECR and both Guidelines provide clear standards that require children to be informed before and after their participation. The child has the right to receive feedback about the extent to which their views and opinions were taken into account and what the nature and scope of the decision, and its effects, are. In that regard it is important to note that these instruments highlight the need for the information to be delivered in a fitting manner consistent with the child's age and maturity.

148 Explanatory Memorandum CoE Guidelines, para. 121.

149 IAYFJM Guidelines, above n. 6, para. 2.3.3.

150 Liefaard and Bruning argue, however, that Art. 6 ECHR and the right to a fair trial – which includes the equality of arms principle – should apply *mutatis mutandis* to children in child protection proceedings. See T. Liefaard and M. Bruning, 'Commentary on the Judgment of the *Hoge Raad* of the 5th December 2014' in H. Stalford et al. (eds.), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice*, Hart Publishing, Oxford 2017, pp. 173–191.

151 ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 65.

152 ECtHR *C v Croatia* (Appl. No. 80117/17), 8 October 2020, para. 77.

8. CONCLUSIONS

Children have the right to participate in family law proceedings, such as separation, adoption, custody and access, international child abduction and relocation proceedings. In a number of sources, they also have the right to participate in alternative dispute mechanisms such as mediation and arbitration on these topics. The child's right to participate in legal proceedings encompasses the right to be heard directly, or indirectly through a right to representation, and procedural rights such as the right to commence proceedings, access to all relevant files or to appeal – as an independent party to the proceedings with legal status or indirectly via legal or other forms of representation. These elements of the child's right to procedural inclusion have been discussed in relation to the six human and regional human rights sources.

Keeping children out of family law proceedings is not ideal; they have the right to be heard directly or indirectly. Preferably they are heard directly by the court, but there should also be an option for them to be heard via a representative, ideally one specialised in hearing children. More specifically, children should be supported by legal representation or other professional support whenever there is a possible conflict of interests between parent(s) and the child. It is important to note that in family law proceedings, which can be prone to high conflict and parental animosity, possible conflicts of interest are likely. Furthermore, according to some of the relevant sources, children also have the right to commence proceedings, file an appeal and have access to all relevant files. However, with regard to these procedural rights, much greater leeway is granted to states. In most sources the child's right to legal representation or professional support seems to be primarily aimed at supporting children in family law proceedings that are initiated by others (often their parents). However, the importance of independent representation or support is just as important in situations in which the child wants to initiate proceedings, file an appeal or have access to all relevant files.

The standard condition applied to the child's right to participate concerns their maturity, although this is phrased in differing ways in the different instruments. Relying solely on age limits is not endorsed by the sources cited, although it is permitted by the ECECR and relied on by the ECtHR. In denouncing age limits, more open norms are presented such as 'capacity', 'maturity' or 'discernment'. This provides discretion for those who ought to decide on the child's right to participate on the individual level but, given the lack of guidance, it can raise more questions than effectively offering children a right to participate. Practically, therefore, a recommendation could be to use flexible age limits – by which the possibility of younger children participating remains available.

Turning to the more practical issues of the location of the child's participation, the method of communication, and the right to information and

feedback, it becomes clear that, while the UNCRC Committee provides some direction, reliance must be mostly placed on both sets of Guidelines for input, as they outline a great number of factors to assist in providing child-friendly participation rights.

Of course, this may have been expected as there is a clear difference between the types of sources reviewed in this chapter. The binding conventions – the UNCRC, ACRWC and ECECR – required broad political agreement and thus could not be as specific as soft law instruments like the CoE and IAYFJM Guidelines.[153] Furthermore, all sources published after the UNCRC – including the UNCRC Committee's General Comment No. 12 – had the opportunity to build upon the general principle of Article 12 UNCRC and further explicate it.

More generally, we can conclude that these six international and regional human rights instruments send the clear message that children have the right to participate in family law proceedings that concern them. A blueprint for how to realise children's procedural inclusion is lacking, but the incentive to effectively include children is present. Much more remains to be achieved: the right of children to participate may be unambiguous from a human rights point of view, but the practical, effective and optimal implementation of child participation remains a work in progress.

[153] Note, however, that broad political agreement appears to be lacking with regard to the ECECR if we consider its ratification status.