

# Speakers' Contributions



## THE RIGHTS OF THE CHILD IN PRACTICE: EXPLORING A MULTIDISCIPLINARY APPROACH TO CHILD-FRIENDLY JUSTICE IN EUROPEAN LAW



115DT100 Vilnius, 16-17 September 2015



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# **THE RIGHTS OF THE CHILD IN PRACTICE:**

## **EXPLORING A MULTIDISCIPLINARY APPROACH TO CHILD-FRIENDLY JUSTICE IN EUROPEAN LAW**

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### **Speakers Contributions**

#### **Rebecca O'Donnell**

- GENERAL PRINCIPLES & BASIC INSTRUMENTS ON PROTECTING CHILD RIGHTS IN JUSTICE SETTINGS IN THE INTERNATIONAL & EUROPEAN CONTEXT
- WORKSHOP I: Case study on trafficked child: the interplay of criminal and child protection laws

#### **Dr. Aisling Parkes**

- Ensuring Effective Participation: The Child's Right to be Heard
- Workshop II
- Ensuring Effective Participation, Part 2: Involvement of the Child in Legal Proceedings
- Workshop III

#### **Ankie Vandekerckhove**

- Best practice guidelines for interacting with children in legal situations

## **GENERAL PRINCIPLES & BASIC INSTRUMENTS ON PROTECTING CHILD RIGHTS IN JUSTICE SETTINGS IN THE INTERNATIONAL & EUROPEAN CONTEXT**

ERA Seminar on “The Rights of the Child in Practice:  
Furthering Child-Friendly Justice in European Law”  
**Rebecca O Donnell**

## **CHILDREN INVOLVED IN JUSTICE PROCEEDINGS**



## OVERVIEW OF SESSION

- **Part One: The Legal Framework Of Children's Rights In Justice & The Actors Involved In Applying Them In Justice Settings**
- **Part Two: Key EU Law Relevant To Children In Justice Settings And Resources Available To Support Its Implementation & Application**
- **Workshop For Exchange And Discussion**

## GOALS OF THIS SESSION

- **To be familiar with the implications of a rights-based approach to justice**
- **To explore the practical side of child friendly justice: the actors involved and how they cooperate**
- **To ensure awareness of the EU acquis and resources**
- **To facilitate an exchange of views and experience between different actors & different national settings**

# **PART ONE**

**The Legal Framework Of Children's Rights In Justice & The Actors Involved In Applying Them In Justice Settings**



## **KEY SOURCES OF CHILD RIGHTS**

- **UN CRC and its Optional Protocols**
- **European Convention on Human Rights**
- **Other Council of Europe Conventions**
- **EU law and institutions (Part Two)**

## ORIGIN, STATUS & FEATURES OF THE UN CRC

- **The UN CRC was adopted in 1989**
- A **rights-based**, as opposed to a needs-based, approach, introducing key principles of best interests and participation
- **Most signed and ratified** of the International Conventions
- **Progress on child rights monitored by the UN Committee on the Rights of the Child**

## SCOPE OF THE UN CRC – 8 CLUSTERS

- **Definition of a child**
- **general principles**
- **civil freedoms**
- **family environment and alternative care**
- **basic health and welfare**
- **education, leisure and cultural activities**
- **special protection measures**
- **general measures of implementation**

## ARTICLE 3 (1) OF THE UN CRC

***“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”***

## BEST INTERESTS (ARTICLE 3)

- ***All actions – both general and individual***
- ***Best interests generally taken as a primary consideration, sometimes paramount or determining in other provisions of the CRC and elsewhere***
- ***Dimensions of best interests principle – interpretative, procedural and substantive***

## FACTORS IN ASSESSING BEST INTERESTS: GEN COMMENT NO 14

- Child's identity
- Preservation of family environment & maintaining relations
- Care, protection & safety of the child
- Situation of vulnerability
- Child's rights to access health services
- Child's right to access educational services

## RIGHT TO BE HEARD (ARTICLE 12)

- Child who is capable of forming his or her own views to be afforded the right to **express these views freely in all matters affecting them**
- Due weight to be given to these views, **in accordance with the age and maturity of the child**
- in any judicial and administrative proceeding children shall be heard either **directly or through a representative** or appropriate body



## THE ACTORS IN CHILD FRIENDLY JUSTICE

- Actors directly involved in the judicial procedure (lawyers, law enforcement, may also include social workers)
- Actors supporting the child (NGOs providing information and support, guardians, advocates)
- Actors generally involved in the child's situation and can contribute information and contribute to implementation of the decision (e.g. family, care providers, doctors, NGOs)
- Actors with particular expertise in children's issues (e.g. clinical child psychologists, actors with particular expertise e.g. FGM)

## WHAT MAY THESE ACTORS NEED?

- A particular authority (e.g. guardian may need to be appointed)
- Expert qualifications in a specific field (e.g. clinical child psychologist for child abuse cases)
- Specialised skills (asylum officer will need to be trained on how to elicit and understand information from children)
- Specialised tools (e.g. guidance for interviewing children)

## MULTI-DISCIPLINARY & INTER-AGENCY APPROACH

- Multi-disciplinary approach: “the existing and growing understanding of children’s psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement area”
- Examples of cooperation:
  - Case management meetings
  - Information sharing protocols between agencies with due regard for confidentiality
  - Co-location of services (e.g. Children’s Houses in Scandinavia)
  - Joint training of professionals

## PART ONE: SUMMARY CONCLUSIONS

- Rights are universal and imply obligations on duty bearers and entitlements for children
- Child is an active agent and access to justice needs to be facilitated
- Need to carefully consider how CRC affects procedural safeguard, substance and outcomes
- Need to involve actors who support participation, can contribute perspectives from different disciplines, may be involved in implementation

## **CHILD RIGHTS AT EU LEVEL**



## **OVERVIEW OF SESSION**

- **Child Rights at EU level: areas & types of EU action**
- **Types of EU Legislative Obligations**
- **Recent Jurisprudence**
- **Key Tools**

## GOALS OF THE SESSION

- Ensure awareness of different areas & types of EU measures on child rights for child friendly justice
- Identify the types of EU obligations relevant to child friendly justice
- Highlight recent regional jurisprudence from the European Court of Justice and the European Court of Human Rights
- Ensure awareness of EU resources that may be particularly relevant to your work in this field, including guidance, studies and projects

## EU POLICIES & CHILDREN'S RIGHTS

- **Examples of Key EU Policy Areas Affecting Children in Justice: Justice & Home Affairs**
  - EU citizens moving between countries, cross border parental disputes
  - Crimes with a cross border dimension, trafficking & sexual abuse
  - Common victims' rights & common rights for child suspects
  - Asylum & migration

# TREATY PROVISIONS

## **Article 3** of the Treaty of the European Union

... It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

## **European Charter of Fundamental Rights** (Art.24)

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

# TYPES OF EU ACTION 1/3

## **Key EU laws affecting children in Justice:**

- **Brussels II bis Regulation on conflict of law issues in family law between Member States; in particular those related to divorce, child custody and international child abduction.**
- **Victims Directive,**
- **Trafficking Directive**
- **Sexual Abuse Directive**
- **EU International Protection instruments**
- **Return Directive**
- **Proposal in relation to safeguards for child suspects and children accused of crime (draft legislation)**

## TYPES OF EU ACTION 2/3

### Key EU Policy Frameworks relevant to Children in Justice

- EU Child Rights Agenda 2010 – 2014
- EU Action Plan on Unaccompanied Children 2010-2014
- Development of EU guidance on integrated child protection systems

## TYPES OF EU ACTION 3/3

### EU Practical Measures of Support

- Contact committees of the Commission for implementing directives (e.g. guidance on Victim's Directive)
- Work of the EU agencies:
  - FRA (e.g. Child Friendly Justice research)
  - EASO (e.g. Interviewing Children Training Modules)
  - Frontex (e.g. Training for Border Guards)
- EU funded projects
  - Training
  - Tools

## **EU LEGAL FRAMEWORK – KEY PROVISIONS 1/5**

### **DEFINITION OF CHILD & OFFENCES AGAINST CHILDREN/CHILD SPECIFIC GROUNDS FOR INTERNATIONAL PROTECTION**

- Better definition of a minor
- Age Assessment Provisions
- Definition of offences relating to children/grounds of claims

## **EU LEGAL FRAMEWORK – KEY PROVISIONS 2/5**

### **BEST INTERESTS' PRINCIPLE**

- Factors for assessment
- Outcomes which are specifically relevant to children – Durable Solutions

## **EU LEGAL FRAMEWORK – KEY PROVISIONS 3/5**

### **RIGHT TO INFORMATION & RIGHT TO BE HEARD**

- Child Specific Information
- Access by Children to Procedures
- Right to be Heard
- Access to Redress

## **EU LEGAL FRAMEWORK – KEY PROVISIONS 4/5**

### **ACTORS ENGAGED WITH CHILDREN**

- Guardians
- Legal Assistance
- Training



# EU LEGAL FRAMEWORK – KEY PROVISIONS 5/5

## CHILDREN'S RIGHT TO PROTECTION

- Assistance to victims
- Specially adapted Procedures
- Protection of Privacy
- Non prosecution & non punishment
- Detention safeguards
  
- Cross border procedures
  - Jurisdictional rules
  - Provisions for exchange of information

## BEST INTERESTS PRINCIPLE: CASELAW

- Some examples of examining the best interests in the migration context:
  
- **Rahimi v. Greece** (European Court of Human Rights)
  
- **M.A, BT, DA v Secretary of State for the Home Department** (European Court of Justice)

## **RESOURCES AT EU LEVEL**

- **EU acquis & policy documents on children**
- **FRA Handbook of European Law on the Rights of Children**
- **Guidance on the Victim's Directive**
- **Reference Document on EU Law & Policy on Unaccompanied Minors**

## **Workshop I**

### **Case study on trafficked child: the interplay of criminal and child protection laws**

Case Scenario:

Young Vietnamese person before the court is without documentation and of unknown age.

Young person was found by law enforcement working in a cannabis farm; prosecuted and imprisoned for crime. No consideration of whether the person had been trafficked had been contained in the original proceedings. Young person had no guardian, had a lawyer.

In the proceeding before Criminal Appeal Court, young person's lawyer argues that the individual is a child; that the child was smuggled into the country; he were exploited to pay back debt and his involvement in cannabis farm arose out of this exploitation and consequently he should not have been prosecuted or punished.

Prosecutor's office concedes that, on evidence now available including evidence of Vietnamese debt bondage and cannabis farming activities, it is likely that other persons directed and controlled the young person's activity.

*A. What child rights were involved in this situation?*

*B. What legal issues arise? What sources of law are relevant to resolve the case?*

*C. What actors are/should be Involved in addressing the child's situation? Exchange of perspectives between different professionals and different national systems.*

*D. What practical challenges arise in proceedings of these kind? Exchange of perspectives between different professionals and different national systems.*

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## Part I: Article 12 CRC

# Ensuring Effective Participation: The Child's Right to be Heard

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Ireland

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# Format

- Why listen to children?
  - Nature and Scope of Article 12 of the CRC
  - Barriers to Participation
  - The Way Forward
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# Why should children have a voice in decisions affecting them?

- Values and Benefits Generally
  - Informed decision-making
- Values and benefits for children of direct communication
  - Reassurance for the child around mixed messages/inaccurate presentation of views
  - Development point of view
- The child not only has the right to a voice, but they need it – a channel through which they can communicate their views to the decision-maker.

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# The Right of the Child to be Heard: A General Principle of the CRC

## Four General Principles

- Article 2 – non-discrimination
  - Article 3 – Best Interests principle
  - Article 6 – Right to life, survival and development
  - **Article 12 – Right of the Child to be Heard**
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# Article 12: A Literal Interpretation

States Parties shall assure to the child who is capable of forming his or her own views 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.

For this purpose, the child shall in particular, be provided with the opportunity to be heard in all 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(1)

- There are two distinct parts to Article 12(1)
  1. The views of the child should be heard
  2. Once expressed, the views of children should be given due weight by the decision maker in accordance with the age and maturity of the child

# Article 12 (1): A Literal and Legal Analysis

- Shall **Assure** – no room for states parties discretion
- Capable of **forming** views (NOT capable of **expressing** views) – presumption that all children are capable of forming views, not up to the child to prove capacity (Article 13 - freedom of expression is important in this context)
- Right to express views **freely** – no external pressure, child should be able to choose whether or not to be involved, use of an appropriate environment
- **All matters** affecting the child – all matters which affect a child directly/indirectly
- **Due Weight** in accordance with **Age and Maturity** –
  - Due Weight - listening to children is not enough, views should be seriously considered
  - Age and Maturity – dual criteria, children are not a homogenous group – case by case assessment required

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## Article 12(2)

- Reinforces Article 12(1) in Judicial and Administrative Proceedings
  - Envisages Direct and Indirect Participation
    - Direct: Judicial Interview/ Open Court/Letter to Judge
    - Indirect: Legal/ Other appropriate Representative
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# Common Barriers to Implementation of Article 12(1)

## ■ Age Limits

- Custody and Access: Ages range from 7-15 years
- Adoption: Ages range from 7 to 15 years
- The Solution? Case-by-Case Assessment

## ■ Cultural Family Traditions

- Solution? Awareness-raising, Training and Education
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# Other Barriers

- Judicial Discretion
  - Lack of Political Will and Enforcement
  - Lack of Guidance up until relatively recently
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# The Five Steps...

- Informed in child-appropriate language
  - Encouragement and Facilitation, Skills of Listener
  - Case by Case assessment
  - Feedback
  - Legislation: Complaints mechanisms
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# Reform

- Legislative Review
  - Awareness Raising
  - Enforcement
  - Training and Upskilling
  - More UN Guidance
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## **Workshop II**

### **The right of the child to be heard in civil judicial proceedings**

#### **Case scenario**

Anna is an 8 year old girl who lives with her parents and her two younger brothers, Jacob aged 6 and Marc aged 4. Their parents have decided to separate but they cannot agree on arrangements for the children so they have ended up before the Family Court. The law requires that the judge will make a decision as to the child's custody and residence (who has primary responsibility for the child and with whom the child shall live) and contact/access arrangements. It also requires that regard be had to the views of all children affected in this process. All of the children are intelligent but traumatised by their parents' separation. The boys want to live with their father, while Anna wants the family to be kept together with her mother.

**The children have made it clear that they want to speak to you, the judge, in this case. You are required to identify all necessary steps to ensure that this happens in line with their Article 12 rights.**

*TASK: Working in groups of 3-5 people,*

- 1. Identify the relevant issues above*
- 2. agree what steps must be taken to hear the child's views and*
- 3. identify what obstacles exist to the full implementation of the children's right to be heard in such cases*

*Separately, participants should share one relevant example of good practice from their jurisdiction.*



# Ensuring Effective Participation: Part 2 Involvement of the Child in Legal Proceedings

Aisling Parkes  
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Cork

*“There is a growing understanding of the importance of listening to the children involved in children’s cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than it is refusing to hear the parents’ views”*

*(Lady Hale, Re D)*



## Children and Legal Proceedings



# CRC: Two Alternative Forms of Participation

- Direct Participation
  - Direct Evidence
  - Letters to the Judge
  - Judicial Interview
- Indirect Participation
  - Court Reports
  - Not limited to legal representation
  - Appropriate bodies
  - Dual representation

Pre 2009 - Lack of Comprehensive Guidance  
from the Committee on the Rights of the Child

***HOW AND WHEN CHILDREN SHOULD PARTICIPATE IN FAMILY LAW  
PROCEEDINGS***



# Direct Participation



To have a direct input in this case,  
you may testify in open court or in  
my chambers...

# Indirect Participation – Lawyer for the Child





# Indirect Participation – Court Reports



# Judicial Proceedings

- Family Law cases
  - Custody and Access
  - Adoption
  - Child Care proceedings
- Criminal Law Cases
  - ECHR – European Court of Human Rights 1950 – Articles 6 & 8
  - T v UK; V v. UK
- Proceedings involving children as victims or witnesses
  - Un Economic and Social Council Resolution 2005/20

2009

# GENERAL COMMENT ON ARTICLE 12

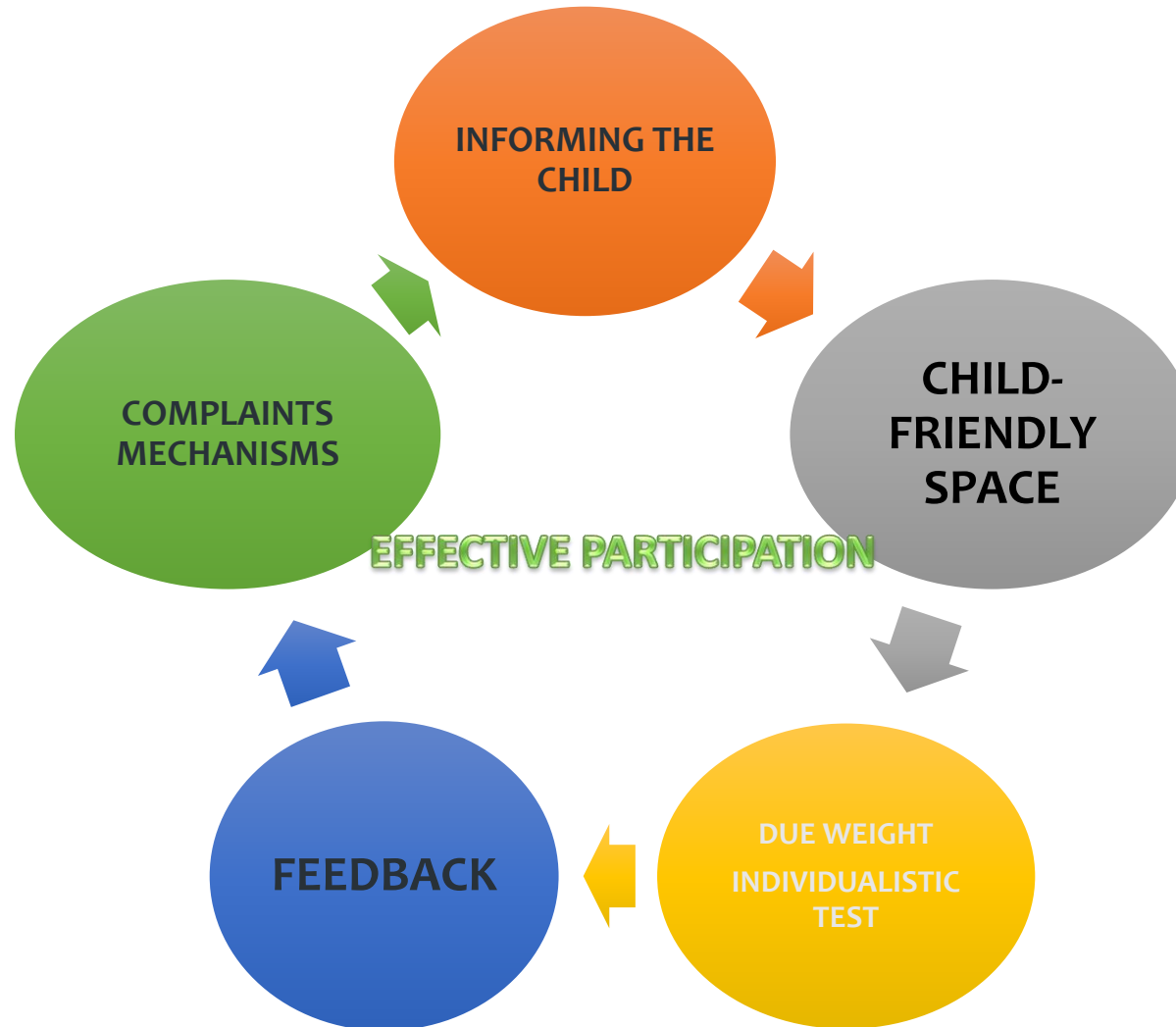
CRC

# General Comment on Article 12 CRC

## Family Law Proceedings

- Adopt Laws to specifically protect this right, or adopt or revise existing laws
- It's a choice for the child, not an obligation
- Provision of child-friendly information essential
- Child-friendly space
- 12(2) – judicial proceedings includes alternative dispute resolution mechanisms such as mediation processes for example
- Specific reference to legislation on separation and divorce to include the right of the child to be heard by decision makers and in mediation processes.
- Individual assessment of child's capacity

# Requirements for Effective Participation



# Common Challenges

- Adult Gatekeepers
- Lack of Skills and Professional Training
- Skills of the Listener
- Resources

# Practical Barriers to Participation

- Age Limits
  - Custody and Access: Ages range from 7-15 years
  - Adoption: Ages range from 7 to 15 years
  - The Solution? Case-by-Case Assessment
- Cultural Family Traditions
  - Solution? Awareness-raising, Training and Education

# Implementing Article 12 in Legal Proceedings

1. Preparation
2. The Hearing
3. Assessment of the Capacity of the Child
4. Information and Feedback to the child
5. Complaint's, Remedies, Redress



## **Workshop III**

### **Discussion on the child's direct and indirect representation in legal proceedings**

#### **Part 1: Effective Participation in Practice**

The concept of effective participation is well established in both case law of the European Court of Human Rights and as part of Article 12 of the Convention on the Rights of the Child. This principle applies explicitly to criminal proceedings where a child is accused of a criminal offence.

TASK: In small groups, consider the implications of this principle for the trial of children in criminal proceedings outlining what steps need to be taken to ensure that children are able to participate effectively in criminal proceedings.

#### **Part 2: Article 12 and administrative proceedings**

Article 12(2) makes provision for the child to be represented in judicial and administrative proceedings so that children's views can be heard and taken into account in matters that affect them.

Building on the training so far – Part 1 and 2 – discuss the issues raised by Article 12 for decisions-making in administrative areas like immigration, education or alternative care. Each group should:

- Identify three obstacles to children being heard in such proceedings and
- Identify three examples of good practice.

# Best practice guidelines for interacting with children in legal situations

Vilnius, September 16 – 17 2015



- “We think that decisions are often taken without our knowledge. We want more say, and have more of a feeling that we are really being listened to by our adviser, our lawyer or the judge in the juvenile court. At present, our opinion is too often sought via our lawyer. We can answer for ourselves.”
- “We also find it unfortunate that if our opinion is sought, it is not really taken into account sufficiently. We sometimes have the feeling that juvenile court judges only ask our opinion because it is a requirement, but that they do not actually listen to what we have to say.”

Unicef Brussels 2002, young people's report to the CRC committee



# INTRODUCTION

- Importance of art. 12 CRC: what do practitioners need?
- Main paradox: children are not aliens but...
- CRC, art. 12: not only a right, but a way to get better results or decisions

# The Child Friendly Justice Guidelines (2010)

- Background
- Close the gap between theory and practice
- In all proceedings and respecting children's rights

“While there is a certain belief that children should be kept out of courts as much as possible, Court procedure is not necessarily worse than an outside court alternative, as long as it is In line with the principles of child friendly justice.” (CFJ Memorandum, par. 83)



# Fundamental principles

- Participation
- Best interest
- Dignity
- Protection from discrimination
- Rule of law

And no age limits

<b>GENERAL ELEMENTS</b>	Information and advice Protection of private and family life Safety Training of professionals Multidisciplinary approach Deprivation of liberty
<b>BEFORE PROCEEDINGS</b>	MACR, informed choice between alternatives and proceedings, legal safeguards
<b>POLICE</b>	Information, legal counsel, parents, custody separate from adults
<b>DURING PROCEEDINGS</b>	Access to justice Legal counsel and representation Right to be heard and express views Avoiding undue delay Organisation of proceedings and CF environment and language Evidence/statements by children
<b>AFTER PROCEEDINGS</b>	Information, guidance, support, remedies, damages, constructive responses



“A child cannot be heard effectively where the environment is intimidating, hostile,  
Insensitive or inappropriate for his or her age”

(GC nr 12, par. 34)

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# CF Environment and language (1)

- Victim, third party, suspect...they are children first
- Weak legal status
- Respect for their age, special needs, maturity and level of understanding

# CF Environment and language (2)

- Non-intimidating and CF settings
- Familiarised with court layout and roles
- Language appropriate to age and level of understanding
- Respect and sensitivity
- Person(s) of trust
- Video- and audio recording
- Time and attention span
- CF rooms
- Specialist courts and institutions



# Evidence and statements by children

- Trained professionals
- Audio-visual statements
- Same interviewers, as little interviews as possible/needed
- Evidence rules and validity
- Adapted interview protocols



# Their requests?

- To be treated with respect
- To be listened to
- To get information that they can understand
- To get information on their rights

# Thank you

