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## **CHILD-FRIENDLY JUSTICE: PROTECTION AND PARTICIPATION OF CHILDREN IN THE JUSTICE SYSTEM**

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### I. INTRODUCTION

In November 2010, the Committee of Ministers of the Council of Europe adopted the Guidelines on Child-Friendly Justice (Guidelines).<sup>1</sup> The Guidelines serve as a practical tool for the forty-seven member states of the Council of Europe<sup>2</sup> “in adapting their judicial and non-judicial systems to the specific rights, interests and needs of children.”<sup>3</sup> The concept of child-friendly justice has emerged under the European human rights system but is rooted in international children’s rights, in particular in the child’s right to be heard and participate as laid down in the UN Convention on the Rights of the Child (CRC),<sup>4</sup> and as recognized in the case law of the European Court of Human Rights under the European Convention on Human Rights (ECHR).<sup>5</sup> With the adoption of the Guidelines, the concept of child-friendly justice has become part of the European legal and political framework concerning the position of children in criminal, civil, and administrative justice systems.

Child-friendly justice<sup>6</sup> aims to make justice systems more focused on

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1. COMM. OF MINISTERS OF THE COUNCIL OF EUR., GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON CHILD-FRIENDLY JUSTICE 1, 13 (2010) [hereinafter GUIDELINES], <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9>.

2. The Council of Europe is the European organization for human rights, democracy, and the rule of law and has forty-seven member states. See COUNCIL OF EUR., <http://www.coe.int/en/web/portal/home> (last visited June 1, 2016). The Council of Europe should not be confused with the European Union (EU), which has twenty-eight member states. Not all member states of the Council of Europe are members of the EU, but all EU Member States are members of the Council of Europe.

3. GUIDELINES, *supra* note 1, at 16.

4. Convention on the Rights of the Child, Nov. 20, 1989, 1557 U.N.T.S. 3 [hereinafter UN Convention of the Rights of the Child].

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 (Nov. 1, 1998) and 14 (June 1, 2010), Nov. 4, 1950, 213 U.N.T.S. 221.

6. Child-friendly justice should be distinguished from other concepts, such as *access to justice*, which can be understood as referring to “the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards,” U.N. High Comm’r for Human Rights, *Access to Justice for Children*, ¶ 4, U.N. Doc. A/HRC/25/35 (Dec. 16, 2013), and *justice for children*, which is a strategy (“approach”) to “ensuring full application of international norms and

children's rights, more sensitive to children's interests, and more responsive to children's participation in formal and informal decision making concerning them. It is directly linked to the legal status of children under international human rights law, the recognition of which emerged in the twentieth century and resulted in a paradigm shift codified by the CRC in 1989—that is, the recognition of the child as a rights holder rather than a mere object of care and special protection because of his particular vulnerability.

As highlighted in Section II below, the legal status of the child under international human rights law revolves around merging and balancing rights meant to protect and promote the child's best interests and "harmonious development"<sup>7</sup> (i.e., protection and provisions) on the one hand, and the right to participate in all matters affecting the child (i.e., participation) on the other. This Article aims to explore the meaning of the concept of child-friendly justice for the legal status of children<sup>8</sup> subject to (juvenile) criminal justice proceedings and the meaning of the Guidelines in furthering this legal status. As part of this analysis this contribution explores how child-friendly justice balances protection and participation, in particular of children in conflict with the law. The Article starts by addressing the emergence and origin of the concept of child-friendly justice in Section II. Subsequently, it highlights the aims of the Guidelines on child-friendly justice in Section II and their legal value in Section III, followed by a discussion, in Section IV, of their implications, in particular for two key issues related to children in the juvenile justice system: police interrogations and juvenile court proceedings. The Article concludes in Section V with some general observations on the added value of child-friendly justice as laid down in the Guidelines for furthering children's legal status in justice systems.

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standards for all children who come into contact with justice and related systems as victims, witnesses and alleged offenders; or for other reasons where judicial, state administrative or non-state adjudicatory intervention is needed, for example regarding their care, custody or protection," U.N. SECRETARY-GENERAL, GUIDANCE NOTE: UN APPROACH TO JUSTICE FOR CHILDREN 1 (2008), [http://www.unicef.org/protection/RoL\\_Guidance\\_Note\\_UN\\_Approach\\_Justice\\_for\\_Children\\_FINAL.pdf](http://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf). Child-friendly justice shows resemblance to a *child-sensitive approach*, defined as "an approach that [balances] a child's right to protection and that takes into account a child's individual needs and views," by the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. Economic and Social Council Res. 2005/20, art. 9(d) (July 22, 2005).

7. UN Convention on the Rights of the Child, *supra* note 4, pmbl.

8. In this Article, the term "children" refers to persons who were under the age of eighteen when they allegedly committed a criminal offense and who fall within the jurisdiction of the juvenile criminal justice system. Under the CRC, a child has been defined as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." UN Convention on the Rights of the Child, *supra* note 4, at 46. The Guidelines contain a similar definition: "[A] 'child' means any person under the age of 18 years." GUIDELINES, *supra* note 1, at 16. For practical reasons, this Article refers to the child in a masculine form; unless explicitly stated otherwise, this also includes girls.

## II. WHAT DOES CHILD-FRIENDLY JUSTICE MEAN AND WHERE DOES IT COME FROM?

### A. *Concept of Child-Friendly Justice*

“The [G]uidelines deal with the issue of the place and role, and the views, rights and needs of the child in judicial proceedings and in alternatives to such proceedings.”<sup>9</sup> This opening statement makes clear that the Guidelines have been developed to consider the position and role of children in formal and informal justice proceedings. They set out the principles considered necessary to “ensure that, in any such proceedings, all rights of children . . . are fully respected,”<sup>10</sup> they serve as a practical guide for states to implement international standards on which the Guidelines build, and they “give a place and voice to the child in justice at all stages of the procedures.”<sup>11</sup>

“[C]hild-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.<sup>12</sup>

This definition points out that the concept of child-friendly justice is based on the image of the child as a young human being in development entitled to all rights under international human rights law, including the right to participate in justice proceedings that concern him.

### B. *Roots of Child-Friendly Justice*

The concept of child-friendly justice is the outcome of the development of the legal status of children under international human rights law, which forms part of the emergence of human and children’s rights law in the twentieth century. The adoption of the CRC and its almost universal endorsement<sup>13</sup> confirms that the international community has moved away from the image of the child as a passive and merely vulnerable individual and embraced the image of the child as a rights holder, as a subject of rights.<sup>14</sup> The CRC clearly stipulates

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9. GUIDELINES, *supra* note 1, at 16.

10. *Id.*

11. *Id.* at 42.

12. *Id.* at 17.

13. The United States is the only country that has not ratified the CRC.

14. See Eugeen Verhellen, *The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN’S RIGHTS STUDIES 43 (Wouter Vandenhoe et al. eds., 2015); John Eekelaar, *Interest of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism*, 8 INT’L J.L. & FAM. 42, 44 (1994); John Tobin, *Justifying Children’s Rights*, 21 INT’L J. CHILD. RTS. 395, 434 (2013); *see also*

that children have to be regarded as bearers of human rights. Children are entitled to both civil and political rights, as well as social, economic, and cultural rights. As part of this, children have, like any other human being, the right to be adequately protected against infringements upon their human dignity<sup>15</sup> and physical and mental integrity.<sup>16</sup> They must, however, in light of their special status as children, be provided with care, assistance, and special provisions, such as education,<sup>17</sup> aimed at safeguarding and promoting their development toward becoming fully autonomous human beings.<sup>18</sup> This legal status of children under international human rights law has been built on four key provisions, recognized by the UN Committee on the Rights of the Child as the four general principles of the CRC<sup>19</sup>: (1) nondiscrimination;<sup>20</sup> (2) the best interests of the child as a “primary consideration” in all matters affecting the child;<sup>21</sup> (3) the right to life, survival, and development;<sup>22</sup> and (4) the right to be heard.<sup>23</sup> In addition, the position of the child’s relationship with his parents and (extended) family could be considered another core principle. This not only underscores that the child is, in accordance with his evolving capacities, dependent on others when it comes to exercising his human rights,<sup>24</sup> but also that parents have a primary responsibility for the upbringing of their child<sup>25</sup> and that the state has a supportive role to play in this regard.<sup>26</sup>

The right of the child to be heard has been characterized as one of the most innovative provisions of the CRC<sup>27</sup> and confirms that children’s legal status assumes that children should, in accordance with their evolving capacities<sup>28</sup> (assessed on the basis of age and maturity), be regarded as capable of participating in proceedings affecting them.<sup>29</sup> Article 12 of the CRC stipulates

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Michael Freeman, *Why It Remains Important to Take Children’s Rights Seriously*, 15 INT’L J. CHILD. RTS. 5, 5 (2007).

15. See e.g., UN Convention on the Rights of the Child, *supra* note 4, art. 37(c).

16. See e.g., *id.* arts. 19, 37(a).

17. See *id.* art. 28.

18. See e.g., *id.* art. 6.

19. Comm. on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, ¶ 22, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter CRC Committee 2003].

20. UN Convention on the Rights of the Child, *supra* note 4, art. 2.

21. *Id.* art. 3(1).

22. *Id.* art. 6.

23. *Id.* art. 12.

24. See *id.* art. 5.

25. See *id.* art. 18(1).

26. See *id.* arts. 18(2), 3(2).

27. Nigel Cantwell, *The Origins, Development and Significance of the United Nations Convention on the Rights of the Child*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 28 (Sharon Detrick ed., 1992).

28. See GERISON LANSDOWN, UNICEF INNOCENTI RESEARCH CTR., THE EVOLVING CAPACITIES OF THE CHILD 3–5 (2005), <http://www.unicef.org/adolescence/files/evolving-capacities.pdf>.

29. See Lothar Krappmann, *The Weight of the Child’s View (Article 12 of the Convention on the Rights of the Child)*, 18 INT’L J. CHILD. RTS. 501, 501–02 (2010).

that the child has the right to be heard in all matters affecting him, in particular in judicial and administrative proceedings.<sup>30</sup> This right is part of the group of children's participatory rights.<sup>31</sup> According to Lothar Krappmann, "[p]articipation is a very good term for that what results from expressing views, listening and giving due weight to the views, interests and goals of the child," and that the "notion of participation captures an essential feature of the [CRC]"—that is, the recognition "that the child is a human being, who has the right to be respected as a unique individual with his own perspective and personal intentions by fellow human beings and also by the state, its institutions and other organizations."<sup>32</sup> Consequently, the inclusion of participatory or procedural components in the child's legal status can have various implications for significant and also controversial procedural issues, including, for example, legal standing, the right to be heard in civil proceedings, and informed consent regarding, among other things, medical decision making and effective participation in criminal proceedings.<sup>33</sup>

The right of the child to be heard has found its way to the case law of the European Court of Human Rights ("the Court" or "ECtHR"). It has been acknowledged as part of the best interests of the child assessment under Article 8 of the ECHR on the protection of the right to private and family life in cases concerning access and custody, international child abduction, and child protection.<sup>34</sup> More importantly in the context of juvenile justice, the ECtHR has delivered groundbreaking judgments in which it has recognized the right to effective participation as part of the child's right to a fair trial under Article 6 of the ECHR, with explicit reference to Article 40 of the CRC.<sup>35</sup> The ECtHR ruled that "it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."<sup>36</sup> The Court found in this particular case, in which two eleven-year-old boys stood trial for murdering a toddler (the Bulger case), that because the boys were unable to participate effectively in the criminal proceedings, they did not receive a fair trial.<sup>37</sup> In

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30. UN Convention on the Rights of the Child, *supra* note 4, art. 12(1)–(2).

31. *Id.* arts. 12–17.

32. Krappmann, *supra* note 29, at 502.

33. See *infra* Section IV for a discussion of children in justice proceedings.

34. See, e.g., *M. & M. v. Croatia* (no. 10161/13), 2015 Eur. Ct. H.R. at 1; see also Ursula Kilkelly, *The CRC in Litigation Under the ECHR*, in *LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE* 193, 195 (Ton Liefwaard & Jaap E. Doek eds., 2015).

35. UN Convention on the Rights of the Child, *supra* note 4, art. 40(1) (listing children's fair trial rights in connection with the pedagogical aims of the juvenile justice system); Kilkelly, *supra* note 34, at 197.

36. *T. v. United Kingdom* (no.24724/94), 1999 Eur. Ct. H.R. at 29.

37. The Court held that it was "highly unlikely" that they would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with [their lawyers] during the trial or, indeed, that, given [their] immaturity and [their] disturbed emotional state, [they] would have been capable outside the courtroom of

another case, the ECtHR ruled that the child's right to a fair trial does not require that he should "understand or be capable of understanding every point of law or evidential detail," but that "'effective participation' in this context presupposes . . . a broad understanding of the nature of the trial process and of what is at stake . . . , including the significance of any penalty which may be imposed."<sup>38</sup> "[T]his is why the Convention, in Article 6 § 3 (c), emphasises the importance of the right to legal representation," according to the Court.<sup>39</sup>

The case law of the ECtHR has inspired<sup>40</sup> the U.N. Committee on the Rights of the Child (CRC Committee),<sup>41</sup> which stated in General Comment No. 10 that "[a] fair trial requires that the child . . . be able to effectively participate in the trial," and, as part of that, the child "needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed."<sup>42</sup> This also comes with requirements to modify courtroom procedures and practices. The CRC Committee also underscored the significance of acknowledging that juvenile justice proceedings "should be conducted in an atmosphere of understanding to allow the child to participate and to express herself/himself freely."<sup>43</sup> In relation to this, the CRC Committee observed in its General Comment No. 12 on the child's right to be heard that "[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age," and that "[p]roceedings must be both accessible and child-appropriate."<sup>44</sup> This also means that "[p]articular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, [and] clothing of judges and lawyers."<sup>45</sup> In this regard the CRC

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cooperating with [their] lawyers and giving them information for the purposes of [their] defence.

*Id.* at 30.

38. *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281, 295.

39. *Id.*; see also UN Convention on the Rights of the Child, *supra* note 4, art. 40(2); Güveç v. Turkey, 2009-I Eur. Ct. H.R. 231, 237.

40. See Kilkelly, *supra* note 34, at 193; Ton Liefwaard, *Juvenile Justice from an International Children's Rights Perspective*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 234, 248-49 (Wouter Vandenhoele et al. eds., 2015) [hereinafter Liefwaard, *Juvenile Justice from an International Children's Rights Perspective*].

41. The CRC Committee monitors the implementation of the CRC by states' parties. UN Convention on the Rights of the Child, *supra* note 4, art. 43. It also issues general comments, which serve as recommendations with regard to the interpretation and implementation of the CRC. See Jaap E. Doek, *The CRC: Dynamics and Directions of Monitoring Its Implementation*, in THE HUMAN RIGHTS OF CHILDREN: FROM VISIONS TO IMPLEMENTATION 99, 111 (Antonella Invernizzi & Jane Williams eds., 2011).

42. Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 46, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter CRC Committee 2007].

43. *Id.*; see Comm. on the Rights of the Child, *General Comment No. 12: The Right of the Child to Be Heard*, ¶ 60, U.N. Doc. CRC/C/GC/12 (Jul. 20, 2009) [hereinafter CRC Committee 2009].

44. CRC Committee 2009, *supra* note 43, ¶ 34.

45. *Id.*

Committee also underscored the importance of conducting court and other hearings in camera (i.e., behind closed doors) and that “[e]xceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child.”<sup>46</sup> The CRC Committee furthermore provided that in the context of juvenile justice it is important to acknowledge that “[i]n order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court.”<sup>47</sup>

Thus, there has been cross-fertilization between international children’s rights standards and the case law of the ECtHR with regard to the legal status of children, in particular as far as participatory and procedural elements of it are concerned.<sup>48</sup> This cross-fertilization has subsequently found its way to the Guidelines. As explained later, the need to protect children and their interests because of their particular vulnerability has also been acknowledged by the ECtHR, which has also contributed to the substantiation of children’s protection rights in the Guidelines.

### C. *Content of the Guidelines*

In light of the existing principles enshrined in international and European human rights law,<sup>49</sup> the Guidelines distinguish five categories of fundamental principles. The first one concerns *participation*, which revolves around the recognition of children as full bearers of rights and respect for the “right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them.”<sup>50</sup> The second fundamental principle concerns the *best interests of children* and provides that, in accordance with Article 3(1) of the CRC, states “should guarantee the effective implementation of the *right* of children to have their best interests be a primary consideration in all matters involving or affecting them.”<sup>51</sup> The views of the child, among others’ views, should be given due weight in

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46. *Id.* ¶ 61.

47. *Id.* ¶ 60.

48. See Charter of Fundamental Rights of the European Union, art. 24, 2000 O.J. (C 364) 391, 400 (referencing explicitly children’s rights standards, including a child’s best interests and taking into account the child’s views); Ingi Iusmen & Helen Stalford, *Introduction*, in *THE EU AS A CHILDREN’S RIGHTS ACTOR: LAW, POLICY AND STRUCTURAL DIMENSIONS* 9, 9–15 (Ingi Iusmen & Helen Stalford eds., 2016); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUR., *HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD* 195–212 (2015), [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf) (providing a more detailed description of the European law relating to the rights of the child).

49. See *GUIDELINES*, *supra* note 1, at 17–19. The preamble of the Guidelines provides a list of existing binding universal and European standards, including the CRC and ECHR. *Id.* at 13–14.

50. *Id.* at 17.

51. *Id.* at 18 (emphasis added).

assessing the best interest of children.<sup>52</sup> The third fundamental principle is that children should be treated with *dignity*—that is, “with care, sensitivity, fairness and respect throughout any procedure or case,” and with respect for their physical and mental integrity.<sup>53</sup> The final two principles that should be upheld and respected are the principle of *nondiscrimination*<sup>54</sup> and that the *rule of law* should apply fully to children as it does to adults.<sup>55</sup> As far as the rule of law is concerned, the Guidelines provide that children should have the right to access to courts (and informal equivalents) and that their right to a fair trial (i.e., “due process”) “should not be minimised or denied under the pretext of [their] best interests.”<sup>56</sup>

These fundamental principles confirm the Guidelines’ advocacy for unconditionally respecting the rights of all children, in theory and in practice, under international children’s rights standards as well as regional human rights law. At the same time, the Guidelines are not a mere repetition of other instruments. The key focus of child-friendly justice lies in enabling children to participate in formal and informal proceedings in order to “guarantee the respect and the effective implementation of all children’s rights at the highest attainable level.”<sup>57</sup> In this regard, it is interesting to note that the Guidelines clarify in the section on fundamental principles that child-friendly justice is about balancing children’s rights and the rights of others, and about merging protection, participation, and empowerment. Ultimately, the Guidelines elaborate upon child-friendly justice before, during, and after judicial proceedings.<sup>58</sup> They highlight the importance of adequate information and advice, protection of private and family life, safety, training of professionals, multidisciplinary, and the deprivation of liberty as a measure of last resort and for the shortest appropriate period of time as general elements of child-friendly justice.<sup>59</sup> The Guidelines conclude with a list of concrete child-friendly actions that member states are encouraged to take, including the promotion of research into all aspects of child-friendly justice, and the exchange of practice and the promotion of publication and dissemination of child-friendly versions of relevant legal instruments.<sup>60</sup>

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52. *Id.* This corresponds with the position of the CRC Committee. Comm. on the Rights of the Children, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, ¶ 43, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

53. GUIDELINES, *supra* note 1, at 18–19.

54. Interesting to note that this fundamental principle is considered as an incentive to grant specific protection and attention to “more vulnerable children, such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.” *Id.* at 19.

55. *Id.* This corresponds with one of the assumptions underlying Article 40 of the CRC, that children, like adults, are entitled to a fair trial. Liefwaard, *Juvenile Justice from an International Children’s Rights Perspective*, *supra* note 40, at 246–50; *see also* GUIDELINES, *supra* note 1, at 13–16.

56. GUIDELINES, *supra* note 1, at 19.

57. *Id.* at 17.

58. *Id.* at 25–32.

59. *Id.* at 20–24.

60. *Id.* at 33–34.

### III. POLITICAL AND LEGAL RELEVANCE OF THE GUIDELINES ON CHILD-FRIENDLY JUSTICE

#### A. *Political Relevance*

The Guidelines, adopted by the Council of Europe's decision-making body, the Committee of Ministers,<sup>61</sup> serve as a set of recommendations to the member states. They must therefore be regarded as a nonbinding legal instrument (i.e., soft law). However, they do have legal as well as political meaning. As far as the political meaning is concerned, the drafting of the Guidelines formed part of the Council of Europe's strategy, "Building a Europe for and with Children."<sup>62</sup> The next strategy, that "for the Rights of the Child," had the promotion of "child-friendly services and systems" as one of its core objectives.<sup>63</sup> This has had various spin offs, including the adoption of the resolution, "Child-Friendly Juvenile Justice: From Rhetoric to Reality," by the Council of Europe's Parliamentary Assembly,<sup>64</sup> and the most recent children's rights strategy, adopted in March 2016, which also has child-friendly justice at its heart.<sup>65</sup> In addition, the Guidelines have been taken up by the European Commission as part of the European Union's "Agenda for the Rights of the Child," which "aims to reinforce the full commitment of the EU . . . to promote, protect and fulfil the rights of the child in all relevant EU policies and actions."<sup>66</sup> This has contributed, among others things, to the inclusion of the concept of child-friendly justice in the development of European Union (EU) legislation (see below) and the funding of awareness raising and advocacy and training projects, as well as research.<sup>67</sup> These examples confirm that the efforts of both the Council of

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61. See *Committee of Ministers*, COUNCIL EUR., [http://www.coe.int/T/CM/aboutCM\\_en.asp](http://www.coe.int/T/CM/aboutCM_en.asp) (last visited June 1, 2016).

62. See COUNCIL OF EUR., BUILDING A EUROPE FOR AND WITH CHILDREN—2009–2011 STRATEGY 5 (2008), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045d226>. This was the first strategy of the Council of Europe's program, "Building a Europe for and with children," which launched in 2006. See *id.* at 2; see also *Children's Strategy*, COUNCIL EUR., <http://www.coe.int/en/web/children/children-s-strategy> (last visited June 1, 2016) (summarizing the Council of Europe's formal strategies since 2006 to promote and protect children's rights).

63. COUNCIL OF EUR., COUNCIL OF EUROPE STRATEGY FOR THE RIGHTS OF THE CHILD (2012–2015) 9 (2012), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045d224>.

64. Resolution 2010: Child-Friendly Justice: From Rhetoric to Reality, EUR. PARL. DOC. 12672 (2014).

65. *Adoption of the Strategy for the Rights of the Child*, COUNCIL EUR., <http://www.coe.int/en/web/children/-/test?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fchildren> (last visited June 1, 2016). See generally COUNCIL OF EUR., COUNCIL OF EUROPE STRATEGY FOR THE RIGHTS OF THE CHILD (2016–2021) (2016).

66. *An EU Agenda for the Rights of the Child*, EUR. COMMISSION, [http://ec.europa.eu/justice/fundamental-rights/child/eu-agenda/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/child/eu-agenda/index_en.htm) (last visited June 1, 2016).

67. The European Commission has funded three large-scale studies to collect data on children's involvement in criminal, civil, and administrative judicial proceedings for all twenty-eight EU Member States. See, e.g., *Child-Friendly Justice*, EUR. COMMISSION, [http://ec.europa.eu/justice/fundamental-rights/child/friendly-justice/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/child/friendly-justice/index_en.htm) (last visited June 1, 2016). In addition, the EU

Europe and the EU with regard to the rights of the child have become strongly connected and mutually reinforced, particularly in the area of child-friendly justice. They also show that the political impact of the Guidelines cannot be denied.<sup>68</sup>

### B. Legal Relevance

#### 1. Council of Europe

Even though the legal value of the Guidelines on child-friendly justice is limited, they have increasingly been used as a source of reference in the case law of the ECtHR. The ECtHR has referred to the Guidelines in its case law as among relevant international law instruments used by the Court to interpret the ECHR. In the case *Z.J. v. Lithuania*, for example, the ECtHR underscored “that the urgency principle should be applied in child custody cases, this being in line with the Guidelines on Child Friendly Justice.”<sup>69</sup> In the case *M.D. and Others v. Malta*, the ECtHR ruled that under Article 6(1) of the ECHR the interests of justice and those of the children required the appointment of a curator ad litem or representative to act on behalf of the children.<sup>70</sup> The court explained that such an action, which in this case the domestic court disregarded, “would also be in conformity with the message which the Council of Europe is promoting in this area, particularly in the light of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice adopted in 2010.”<sup>71</sup> In other cases, the ECtHR refers to the Guidelines when summing up the relevant instruments of international law, which comprise the general frame of reference used by the Court.<sup>72</sup> Although this does not clarify to what extent the provisions of the Guidelines have influenced the Court’s judgment on the merits of any case, it does indicate the significance of the Guidelines for the legal framework under which the ECtHR develops its case law. Last, it is interesting to note that the Guidelines have played a role in other cases either in concurring or dissenting opinions,<sup>73</sup> or in the arguments brought forward by governments.<sup>74</sup>

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Fundamental Rights Agency has commissioned research, which has resulted in, among other things, information on perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, CHILD-FRIENDLY JUSTICE—PERSPECTIVES AND EXPERIENCES OF PROFESSIONALS ON CHILDREN’S PARTICIPATION IN CIVIL AND CRIMINAL JUDICIAL PROCEEDINGS IN 10 EU MEMBER STATES (2015) [hereinafter EUFRA, PERSPECTIVES], [http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf).

68. See Resolution on the 25th Anniversary to the UN Convention on the Rights of the Child, EUR. PARL. DOC. 2014/2919(RSP) (2014) (acknowledging important elements of child-friendly justice, including children’s right to access justice).

69. *Z.J. v. Lithuania* (no. 60092/12), 2014 Eur. Ct. H.R. at 34.

70. *M.D. v. Malta* (no. 64791/10), 2012 Eur. Ct. H.R. at 11.

71. *Id.*

72. See, e.g., *M. & M. v. Croatia* (no. 10161/13), 2015 Eur. Ct. H.R. at 39; *Blokhin v. Russia* (no. 47152/06), 2013 Eur. Ct. H.R. at 30–32.

73. See, e.g., *X. v. Latvia* (no. 27853/09), 2013 Eur. Ct. H.R. at 41 (Pinto de Albuquerque, J., concurring); *Ertuş v. Turkey* (no. 37871/08), 2013 Eur. Ct. H.R. at 11 (2013) (Popović, Karakas, Pinto de

This also indicates the Guidelines are becoming a relevant frame of reference concerning children in judicial procedures.

## 2. European Union

At the level of the EU, the Guidelines have found their way to legislative initiatives. A very clear example concerns the proposed EU directive on special safeguards for children suspected or accused in criminal proceedings (Directive), which, among other things, builds on the Guidelines.<sup>75</sup> The original proposal for the Directive by the European Commission explicitly referred to the Guidelines in articles concerning the right to a lawyer (Article 6), the protection of privacy (Article 14), and the right to information for the holder of parental responsibility (Article 5). When the EU Directive is adopted, child-friendly justice, at least elements of it, will have to be incorporated in the legislation of EU member states, which is likely to have an impact on the position of children in domestic justice systems.

### C. European Narrative Supported by Children

It can, thus, be argued that the legal relevance of the Guidelines goes beyond the nonbinding status due to the two developments just mentioned. Of course, one has to be careful. At the time of writing, that is five years after the adoption of the Guidelines, references in case law and standard setting aimed at the development of hard law in both the Council of Europe and EU are limited. However, one can certainly argue that the Guidelines—and more importantly the concept of child-friendly justice, which is directly connected to legally binding principles of international and European human rights law—have started to find its way to becoming part of the legal framework affecting children and aiming to safeguard their rights and procedural status. This has increased their legal significance—a significance that is furthermore supported by the fact that the notion of child-friendly justice has become an eminent part of the European narrative when it comes to children in contact with the justice system. Furthermore, it is interesting to see that child-friendly justice has started to find its way to other regions of the world,<sup>76</sup> as well to academic research.<sup>77</sup> This

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Albuquerque, Js., dissenting); *Kijowski v. Poland* (no. 33829/07), 2011 Eur. Ct. H.R. at 9–10 (2011) (de Gaetano, J., dissenting).

74. See, e.g., *Manuello v. Italy* (no. 107/10), 2015 Eur. Ct. H.R. at 7.

75. *President Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings*, at 38, COM (2013) 822 final (Dec. 16, 2015) [hereinafter *2015 Draft Directive*].

76. The Guidelines have served as an example for the Guidelines on Action in the Justice System for Children in Africa, adopted in 2011 in Kampala with the Munyonyo Declaration on Justice for Children in Africa. Liefwaard, *Juvenile Justice from an International Children's Rights Perspective*, *supra* note 40, at 238. The African Committee of Experts on the Rights and Welfare of the Child endorsed these Guidelines in 2012. Julia Sloth-Nielsen, *What's in a Name? "Child-Friendly" Justice in Africa*, in *CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD* 316, 327 (Said Mahmoudi et al. eds., 2015). See generally *AFRICAN CHILD POLICY FORUM & DEF. FOR CHILDREN INT'L, ACHIEVING CHILD FRIENDLY JUSTICE IN AFRICA*

underscores its potential to become an instrument with an international outreach.

Finally, it is noteworthy that the legitimacy of the Guidelines is supported by the fact that children themselves have informed the drafting. Research commissioned by the Council of Europe gathered information through almost 3,800 questionnaires from children—both boys and girls, ranging between five and seventeen in age, living in twenty-five countries, and the vast majority of whom having had experience in justice systems—and through different focus groups with specific groups of children, such as children in detention or refugee children. These children underscored the importance of having information about their rights, receiving explanations in language they understand, being treated with respect, and being listened to.<sup>78</sup>

#### IV. IMPLICATIONS OF CHILD-FRIENDLY JUSTICE IN THE CONTEXT OF JUVENILE JUSTICE

##### A. *General Observations*

As indicated before, the Guidelines aim to regulate all justice proceedings—civil, criminal, and administrative proceedings—and the position of children before, during, and after such proceedings. Consequently, they have implications for children who are participating in justice proceedings related to, among other things, family law disputes, child protection measures, and immigration issues. They also provide guidance regarding the position of children who participate in criminal procedures as victims and/or witnesses.

The Guidelines provide guidance on critical issues and long-standing practices<sup>79</sup> and perceptions.<sup>80</sup> The Guidelines, for example, challenge the idea that children do not have legal standing and recognize their right to access to justice.<sup>81</sup> They also underscore that the right to be heard should not be limited

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(2012), [http://www.ipjj.org/fileadmin/data/documents/decision\\_resolution\\_meetings\\_outcomes/Kampa\\_laConference\\_AchievingChildFriendlyJusticeAfrica\\_2012\\_EN.pdf](http://www.ipjj.org/fileadmin/data/documents/decision_resolution_meetings_outcomes/Kampa_laConference_AchievingChildFriendlyJusticeAfrica_2012_EN.pdf).

77. See, e.g., CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD, *supra* note 76; STEPHANIE RAP, THE PARTICIPATION OF JUVENILE DEFENDANTS IN THE YOUTH COURT: A COMPARATIVE STUDY OF JUVENILE JUSTICE PROCEDURES IN EUROPE (2013).

78. URSULA KILKELLY, SUMMARY REPORT ON THE CONSULTATION OF CHILDREN AND YOUNG PEOPLE CONCERNING THE DRAFT COUNCIL OF EUROPE GUIDELINES ON CHILD-FRIENDLY JUSTICE 2–3 (2010). Key themes identified by the children as important were (1) the role and involvement of the family; (2) the need to treat children with respect, particularly in light of the general mistrust of authorities among children; and (3) the need to listen to children, considering findings that showed that “children want to be heard, [that] they want to receive information that they can understand[, and that they want] to be supported to participate in decisions made about them.” *Id.* at 4.

79. NAOMI KENNAN & URSULA KILKELLY, EUROPEAN COMM’N DIRECTORATE-GENERAL FOR JUSTICE & CONSUMERS, POLICY BRIEF: CHILDREN’S INVOLVEMENT IN CRIMINAL, CIVIL AND ADMINISTRATIVE JUDICIAL PROCEEDINGS IN THE 28 MEMBER STATES OF THE EU 3–4 (2015).

80. See EUFRA, PERSPECTIVES, *supra* note 67.

81. GUIDELINES, *supra* note 1, at 26.

solely on the basis of age, which questions the use of age limits.<sup>82</sup> Moreover, the Guidelines provide, as far as legal counsel and representation are concerned, that “[c]hildren should be considered as fully fledged clients with their own rights” and that “lawyers representing children should bring forward the opinion of the child.”<sup>83</sup> In relation to this, the Guidelines point out that “[c]hildren 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 interest between the child and the parents or other involved parties.”<sup>84</sup> These examples, and many others can be given, have in common that children’s independent procedural rights should be acknowledged and safeguarded in order to let them engage with and participate in justice proceedings.<sup>85</sup>

The following subsections zoom in on police interrogations and juvenile court proceedings in the context of juvenile justice. It is clear that the Guidelines also have implications for other important juvenile justice issues, including, for example, informal procedures, such as diversion, mediation, or restorative justice, or the role of probation services. The Guidelines do not give much guidance with regard to the minimum age of criminal responsibility (MACR). They merely state that the MACR “should not be too low,”<sup>86</sup> whereas the CRC Committee has recommended to set a MACR of at least twelve years of age—“the absolute minimum age.”<sup>87</sup> The absence of clarity in the CRC’s MACR assessment has not only led to a failure to garner a consensus regarding this age limit,<sup>88</sup> but has also left the door open for any state to adopt an MACR below the age of twelve. This absence of clarity and consensus might be furthermore problematic for a child’s effective participation in criminal proceedings. As pointed out by the CRC Committee, “[a]lleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to

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82. *Id.* at 28; see CRC Committee 2009, *supra* note 43, ¶ 21 (providing its position on age limits). Many European countries have such age limits. See ELENA JURADO, SIMONE KLINGE & JAMES KEARNEY, EUROPEAN COMM’N DIRECTORATE-GENERAL FOR JUSTICE & CONSUMERS, SUMMARY OF CONTEXTUAL OVERVIEWS ON CHILDREN’S INVOLVEMENT IN CIVIL AND ADMINISTRATIVE JUDICIAL PROCEEDINGS IN THE 28 MEMBER STATES OF THE EUROPEAN UNION 38–41 (2015).

83. GUIDELINES, *supra* note 1, at 27.

84. *Id.* (discussing the appointment of a guardian ad litem or another independent representative to represent the views and interests of the child in case of conflicting interests between parents and the child).

85. With the prohibition of discrimination in mind, this recognition should apply to *all* children. UN Convention on the Rights of the Child, *supra* note 4, art. 2.

86. GUIDELINES, *supra* note 1, at 25. The Guidelines use the same wording as rule 4.1 of the 1985 Beijing Rules. See G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice, ¶ 4.1, U.N. Doc. A/RES/40/33 (Nov. 19, 1985) [hereinafter Beijing Rules].

87. CRC Committee 2007, *supra* note 42, ¶ 32. Note that the CRC Committee recommends a higher MACR of possibly fourteen or sixteen years of age. *Id.* ¶ 33.

88. DON CIPRIANI, CHILDREN’S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE ch. 5 (2009); Liefwaard, *Juvenile Justice from an International Children’s Rights Perspective*, *supra* note 40, at 243–44; see also Beijing Rules, *supra* note 86, ¶ 4.1.

allegations of his/her infringement of the penal law.”<sup>89</sup> Therefore, the age at which children can be held accountable should take into account children’s capacity to participate effectively in criminal proceedings.

In addition, the concept of child-friendly justice is relevant for the position of children deprived of their liberty, both inside and outside the context of juvenile justice. Children deprived of liberty are in need of protection,<sup>90</sup> which justifies the Guidelines’ position that, above all, deprivation of liberty should be a “last resort” and used for the “shortest appropriate period of time.”<sup>91</sup> At the same time, there is a growing recognition that fair and child-friendly treatment, including access to adequate information, education, family contact, reintegration programs, and access to justice in cases of unlawful or arbitrary treatment, are very important safeguards if children are arrested, detained, or incarcerated. Moreover, treatment with fairness and respect turns out to be an important strategy toward the prevention of the many forms of violence that can take place in institutions.<sup>92</sup> It goes beyond the scope of this Article to elaborate on this subject, but the meaning of child-friendly justice for children deprived of their liberty requires further attention and should be included in research, including in the Global Study on Deprivation of Liberty of Children, predicted to start in 2016.<sup>93</sup>

## B. Police Interrogations

### 1. Guidelines and Protection of Children

With regard to the position of children during police interrogations, the Guidelines stipulate that “[w]henver a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his

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89. CRC Committee 2007, *supra* note 42, ¶ 45.

90. Human Rights Council Res. 18/12, U.N. Doc. A/HRC/21/25, ¶ 8 (Jun. 27, 2012) [hereinafter OHCHR Violence Study 2012]; G.A. Res. 60/231, Report of the Independent Expert for the United Nations Study on Violence Against Children, ¶ 28, U.N. Doc. A/61/299 (Aug. 29, 2006) [hereinafter UN Violence Study 2006].

91. GUIDELINES, *supra* note 1, at 24; *cf.* Convention on Rights of the Child, *supra* note 4, art. 37(b).

92. T. LIEFAARD, J. REEF & M. HAZELZET, REPORT OF VIOLENCE IN INSTITUTIONS FOR JUVENILE OFFENDERS 7 (2014), [http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/PC-CP%20\(2014\)%2013E\\_REV%20Draft%20report%20on%20Violence%20in%20Institutions%20for%20Juvenile%20OffendersFinal.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/PC-CP%20(2014)%2013E_REV%20Draft%20report%20on%20Violence%20in%20Institutions%20for%20Juvenile%20OffendersFinal.pdf) (defining scope of violence in study); André van der Laan & Veroni Eichelsheim, *Juvenile Adaptation to Imprisonment: Feelings of Safety, Autonomy and Well-Being, and Behaviour in Prison*, 10 EUR. J. CRIMINOLOGY 424, 438–39 (2013); Frank Neubacher, *Gewalt im Jugendstrafvollzug—Ein Überblick über Ergebnisse des Kölner Forschungsprojekts*, 63 FORUM STRAFVOLLZUG 320 (2014); *see also* OHCHR Violence Study 2012, *supra* note 90, ¶ 8 (explaining risk factors for violence in institutional settings); UN Violence Study 2006, *supra* note 90, ¶ 28 (providing examples of violence against children).

93. *See Global Study on Children Deprived of Liberty*, DEF. FOR CHILD. INT’L, <http://www.defenceforchildren.org/call-for-a-global-study-on-children-deprived-of-liberty/> (last visited June 1, 2016). *See generally* TON LIEFAARD, DEPRIVATION OF CHILDREN IN LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS (2008) (providing an analysis of children’s legal status when deprived of their liberty).

or her age and level of understanding of the reason for which he or she has been taken into custody.”<sup>94</sup> In addition, “[c]hildren should be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust.”<sup>95</sup> Also, parents should be informed about their child’s apprehension<sup>96</sup> and the reasons why, unless there are exceptional circumstances not to do so, and they should be invited to come to the police station.<sup>97</sup> The Guidelines furthermore provide that a child in police custody should not be questioned “except in the presence of a lawyer or one of the child’s parents or, if no parent is available, another person whom the child trusts.”<sup>98</sup>

These safeguards are considered necessary because of a child’s particular vulnerability in the earliest stages of a criminal justice proceeding. A child in the custody of the police and questioned in relation to allegations of committing a criminal offense needs protection against ill treatment by the police and against treatment that trumps his right to a fair trial. The police should recognize that children require greater protection than adults and should be sensitive to the special needs of children “who may be under a physical or mental disability or have communication difficulties.”<sup>99</sup> According to the explanatory memorandum of the Guidelines, states should consider working with trained police officials that work for special police units.<sup>100</sup>

The Guidelines’ recognition of children’s particular vulnerability builds on preceding international and European standards, including Article 40 of the CRC, the 1985 Beijing Rules, and case law of the ECtHR.<sup>101</sup> At the same time, the Guidelines are more concrete when it comes to access to a lawyer and the presence of a lawyer during police interrogations. This has been stimulated not only by landmark case law of the ECtHR,<sup>102</sup> but also by the continuous recommendations of the European Committee for the Prevention of Torture and

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94. GUIDELINES, *supra* note 1, at 26.

95. *Id.*

96. See CRC Committee 2007, *supra* note 42, ¶ 54 (detailing how the CRC Committee recommends that “parents must be notified of the apprehension of their child as soon as possible”).

97. GUIDELINES, *supra* note 1, at 26.

98. *Id.*

99. *Id.* at 25.

100. *Id.* at 72.

101. See *Güveç v. Turkey*, 2009-I Eur. Ct. H.R. 231, 255–58 (holding that a minor was denied effective participation in his trial in part due to his young age); *Nart v. Turkey* (no. 20817/04), 2008 Eur. Ct. H.R. at 8 (noting that pre-trial detention of minors should be used only as a last resort and should be kept as short as possible); *Okkali v. Turkey* (no. 52067/99), 2006 Eur. Ct. H.R. at 47 (noting that a twelve-year-old boy under arrest should have been accorded special protections due to his being a minor); *T. v. United Kingdom* (no. 24724/94), 1999 Eur. Ct. H.R. at 89 (holding that an eleven-year-old child was denied a fair hearing when he did not understand what was happening when he was tried as an adult).

102. See *Panovits v. Cyprus* (no. 4268/04), 2008 Eur. Ct. H.R. at 59, 66 (holding that a minor’s defense rights were violated when he was questioned out of the presence of his guardian and without being informed of his rights to receive legal representation or to remain silent); *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 80 (holding that a minor’s defense rights were “irretrievably affected” when he was not provided with a lawyer while in police custody).

Inhuman or Degrading Treatment or Punishment (CPT) that underscore that legal counsel in this stage is critical.<sup>103</sup> In other words, the Guidelines confirm the international recognition of children's right to protection given their particular vulnerability and give European states concrete guidance on how to materialize this in practice.

An issue of concern, however, is the use of alternative wording in Guideline IV.30, which states: "[A] child . . . should not be questioned . . . except in the presence of a lawyer or one of the child's parents."<sup>104</sup> This language equates legal assistance with parental assistance and does not rule out the likelihood that the presence of a lawyer could be denied if a parent is present. Yet, the significance of *legal* assistance in this particular phase of the criminal proceedings should not be underestimated. The CRC Committee has underscored the importance of legal assistance and stated that "[o]ther appropriate assistance is possible . . . but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice."<sup>105</sup> In addition, the Committee argues that "[t]he child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning."<sup>106</sup> Although parents generally lack the knowledge and skills to assist their child legally, they have an important supportive role to play, and their involvement, according to the Committee, "shall in general contribute to an effective response to the child's infringement of the penal law."<sup>107</sup>

There is one other point on which the Guidelines arguably do not go far enough to sufficiently protect the interests of children. The Guidelines are silent with regard to audiovisual recording of interrogations. Audiovisual recording can serve to protect a child against ill treatment and infringements on his right to a fair trial, including the principle of *nemo tenetur*. The proposed final text of the EU Directive includes an instruction concerning mandatory audiovisual recording of questioning.<sup>108</sup> Even though audiovisual recording is not mandatory if considered disproportionate given the circumstances of the case, including, *inter alia*, whether a lawyer is present or if a child is deprived of his liberty,<sup>109</sup> it

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103. See GUIDELINES, *supra* note 1, at 72. See generally EUROPEAN COMM. FOR THE PREVENTION OF TORTURE & INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, CPT STANDARDS 26 (2002), <http://cpt.coe.int/en/documents/eng-standards.pdf>.

104. GUIDELINES, *supra* note 1, at 26.

105. CRC Committee 2007, *supra* note 42, ¶ 49. That report also provides that every child accused of having infringed the penal law is entitled to "legal or other appropriate assistance." *Id.* ¶ 68. The presence of parents is considered an additional right. *Id.* ¶ 53. If a child is deprived of this liberty, he is entitled to "legal *and* other appropriate assistance." *Id.* ¶ 82 (emphasis added).

106. *Id.* ¶ 58.

107. *Id.* ¶ 54. The CRC Committee also provides that parents cannot act in defense of their child. *Id.* ¶ 53.

108. 2015 Draft Directive, *supra* note 75, art. 9(1).

109. *Id.* The language of Article 9 was stronger in the original proposal, which did not refer to the presence of a lawyer as a relevant factor for the proportionality assessment in this regard. Commission Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings, at 7, COM (2013) 822 final

underscores the significance of audiovisual recordings in juvenile cases as a rule.

## 2. Guidelines and Participation of Children

The Guidelines are not only about the protection of children because of their vulnerability. They also underscore the need for information and presence of and assistance by a lawyer or others, such as parents, in order to protect children's right to a fair trial and to facilitate children's participation as part of that fundamental right. As mentioned earlier, the Guidelines have been inspired by the standards developed by the ECtHR in its case law on children's effective participation as part of their right to a fair trial, which has been confirmed by the CRC Committee under Article 40(2) of the CRC.<sup>110</sup> However, the Guidelines are neither clear nor conclusive concerning some critical questions in this regard. For example, the section on children and the police does not address how to empower children in the specific context of police interrogations, and it remains unclear what the role of a lawyer or other representative should be during police interrogations. Moreover, it remains unclear as to what extent children should have the right to waive legal counsel. The Guidelines provide that a child in police custody should not be questioned without the presence of a lawyer or a parent or trusted person, which seems to indicate that there should always be someone present.<sup>111</sup> The case law of the ECtHR leaves open the possibility to waive counsel but places states under extra scrutiny when such a waiver occurs. According to the Court, a waiver by a child can be accepted "where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that [the child] is fully aware of his rights of defence and can appreciate, as far as possible, the consequence[s] of his conduct."<sup>112</sup> The European Commission proposed to provide children with mandatory legal assistance, by a lawyer, throughout criminal proceedings.<sup>113</sup> This position finds support in scientific research on children's psychological development and their inability to foresee the consequences of criminal proceedings for their lives and futures.<sup>114</sup> However, the proposed final text of the EU Directive does not entail mandatory legal assistance and does not include a clause that the right to a lawyer cannot be waived.<sup>115</sup> Therefore, states are not compelled to provide a child with a lawyer, despite the abundant support for it, not only in science, but

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(Nov. 27, 2013) [hereinafter *2013 Draft Directive*].

110. See *supra* Part II.B.

111. The alternative wording does not rule out that the presence of a lawyer could be denied if a parent or appropriate adult is present. See GUIDELINES, *supra* note 1, at 26. However, legal assistance seems critical in this phase, as also underscored by the UN Committee. CRC Committee 2007, *supra* note 42, ¶ 49. This seems even truer if the child is in custody. See *id.* ¶ 58 (guaranteeing access to "a legal or other appropriate representative" during police questioning).

112. *Panovits v. Cyprus* (no. 4268/04), 2008 Eur. Ct. H.R. at 19.

113. *2013 Draft Directive*, *supra* note 109, art. 6.

114. See Ton Liefwaard & Yannick van den Brink, *Juveniles' Right to Counsel During Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands*, 7 ERASMUS L. REV. 206, 213–15 (2014).

115. See *2015 Draft Directive*, *supra* note 75, art. 6.

also in calls upon the European legislature by civil society and in national legislative developments.<sup>116</sup>

In conclusion, the Guidelines confirm the need for adequate protection, because of children's vulnerability and their right to a fair trial, and elaborate further on the implications of such protection, in particular with regard to legal assistance and parental involvement in this critical phase of the criminal justice process. Yet, at the same time, they do not elaborate enough on issues that are critical for the balancing of protection, participation, and empowerment—in particular, the issue of mandatory legal representation.

### C. *Juvenile Court*

#### 1. Guidelines on Children in Juvenile Court

The Guidelines provide detailed guidance with regard to judicial proceedings and underscore the importance of recognizing that a child has the right to legal counsel and representation in his own name,<sup>117</sup> the right of avoiding undue delay,<sup>118</sup> and the right of conducting proceedings in a child-friendly environment, in which child-friendly language is used.<sup>119</sup> The Guidelines present a clear call for the treatment of an accused child in a specialized juvenile court setting, not only because of the need for protection, but also to enable the child to participate effectively in the proceedings. This has implications for the way juvenile court proceedings are processed and raises specific questions requiring further attention. Some observations follow.

As pointed out in Section II, the Guidelines are based on the international recognition that children have the right to be heard in judicial or administrative proceedings and that this right is directly connected to the right to effective participation in juvenile court proceedings. The Guidelines provide that the right to be heard must be respected during judicial proceedings and that the “[m]eans used for this purpose should be adapted to the child’s level of understanding and ability to communicate and take into account the circumstances of the case.”<sup>120</sup> This is closely linked to the Guidelines with regard to the organization of the proceedings, which revolves around the treatment of children, “with respect for their age, their special needs, their maturity and level of understanding,” and requires that they are “familiarised with the layout of the court or other facilities

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116. One could argue that the absence of a clear stand on the MACR, which could open the door to acceptance of a MACR that is lower than twelve, makes the absence of a plea for mandatory legal representation even more problematic. See *infra* Part IV.A for a discussion of the MACR and the Guidelines.

117. GUIDELINES, *supra* note 1, at 27.

118. *Id.* at 28. Article 40(2)(b)(iii) refers to the determination of a case “without delay,” which according to the CRC Committee—and in conjunction with Article 14 (3)(c) of the ICCPR, which also speaks of “without undue delay”—means that children’s cases should be dealt with more swiftly. CRC Committee 2007, *supra* note 42, ¶ 51.

119. GUIDELINES, *supra* note 1, at 29.

120. *Id.* at 28.

and the roles and identities of the officials involved.”<sup>121</sup> In addition, the language used should be appropriate to a child’s age and level of understanding, which means, among other things, that one should avoid jargon and formal language as much as possible.<sup>122</sup> The bottom line of this all is that a child should be *enabled* to participate effectively when he stands trial, which requires an investment on behalf of the state in offering specialized legal assistance and adequate information. In addition, it encourages specialized judges and other relevant professionals who understand what it takes to let children participate effectively and have the willingness to do so.<sup>123</sup> Stephanie Rap shows in her research that it is especially of importance for children’s effective participation in court proceedings that professionals acquire skills to hear the views of children.<sup>124</sup> Hearing the views of children requires conversation techniques that enable the child to give his views freely and to go beyond a mere interrogation or checking of facts. Conversation techniques refer to asking open-ended questions, showing genuine interest, and encouraging the child to give his views by listening and asking follow-up questions in an open and unbiased manner. Also of importance is to adapt language to the level of understanding of the young person and to adapt the length of proceedings to his attention span.<sup>125</sup>

Another critical component of child-friendly juvenile proceedings concerns the provision of information. As stated in the Guidelines: “Children should be provided with all necessary information on how effectively to use the right to be heard.”<sup>126</sup> This includes information regarding the possible sanctions and measures.<sup>127</sup> Providing information regarding the possible consequences of the child’s stand and the expression of his views is also relevant for his participation.<sup>128</sup> In addition, the child should be informed about the fact that his views may not necessarily determine the final decision. An interesting question in this regard is to what extent a court can impose a sentence without hearing a child’s views on the possible outcomes. This issue has been brought forward before the Netherlands Supreme Court.<sup>129</sup> The court ultimately ruled that there was no need for a court to discuss all possible sentences with the child, in particular because the child had a court-appointed lawyer who could explain this to him. This brings us back to the relevance of legal counsel and representation

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121. *Id.*

122. *Id.*

123. *Id.* at 33; *see also 2015 Draft Directive, supra* note 75, art. 19(1a) (encouraging member states to ensure judges and prosecutors dealing with juvenile criminal proceedings have special training); CRC Committee 2007, *supra* note 42, ¶ 40 (calling for member states to establish juvenile courts or, in the alternative, ensure the appointment of specialized judges to deal with juvenile justice).

124. RAP, *supra* note 77, at 131–32.

125. *Id.* at 125–30.

126. GUIDELINES, *supra* note 1, at 28.

127. CRC Committee 2007, *supra* note 42, ¶ 44; CRC Committee 2009, *supra* note 43, ¶ 60. *See supra* notes 35–39 and accompanying text for an examination of the relevant case law of the ECtHR.

128. CRC Committee 2009, *supra* note 43, ¶ 41. The CRC Committee also points to the possibility to be heard indirectly via a third person, including, for example, a legal assistant. *Id.*

129. HR 28 augustus 2012, NJ 2012, 506 m.nt. ¶ 5.2 (Neth.).

for children's participation. A child's lawyer has a critical role to play with regard to informing the child and assisting him in the trial phase. As far as the possible outcomes of the case are concerned, a minimum condition seems to be that that lawyer discusses all possible outcomes with his client as part of the preparation for the trial.<sup>130</sup>

The Guidelines furthermore provide that "[j]udgments and court rulings . . . should be duly reasoned and explained to them in language that children can understand."<sup>131</sup> This is even more important for the decisions in which children's views have been set aside. This confirms recommendations made by the CRC Committee in General Comment No. 12 that underscored the significance of the reasoning and clarification of the decision as a form of feedback, which serves as "a guarantee that the views of the child are not only heard as a formality, but are taken seriously," and as information that may also "prompt the child to . . . file an appeal or a complaint."<sup>132</sup> It can also be argued that treating the child "as a passive object . . . will not contribute to an effective response to his behaviour."<sup>133</sup> The Guidelines do not elaborate on the format, but they underscore that it is important that a child has a proper understanding of the reasons behind the decision and the weight given to his views in the decision-making process. This aims to contribute to the child's understanding and acceptance of the outcomes of the process.<sup>134</sup> In the specific context of juvenile justice, it can be argued that this supports the effectiveness of juvenile justice intervention and also the objectives of juvenile justice targeted at the child's reintegration and him playing a constructive role in society.<sup>135</sup>

## 2. Some Reflections

The Guidelines underscore and elaborate upon important safeguards meant to enable children to participate in juvenile court proceedings, but there are some weak links. First, they do not provide clear instructions to national legislators to provide for free legal aid to children prosecuted and tried before courts. They state, in rather general and weak wording, that "[a]ny obstacles to

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130. See *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281, 295 (finding that "effective participation" means that the accused juvenile, with the assistance of a lawyer if necessary, understands the nature of the trial and potential consequences); GUIDELINES, *supra* note 1, at 27.

131. GUIDELINES, *supra* note 1, at 28; see also CRC Committee 2009, *supra* note 43, ¶ 60 ("In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court.").

132. CRC Committee 2009, *supra* note 43, ¶ 45.

133. RAP, *supra* note 77, at 68-69.

134. *Id.* at 122. Professor Rap also points to the perceived fairness of a proceeding as an important element of a child's effective participation in court. *Id.* She argues that being taken seriously increases the perception of fairness, which in turn positively influences the child's understanding and acceptance of the decision. *Id.* at 132-33.

135. See UN Convention on the Rights of the Child, *supra* note 4, art. 40(1) ("States Parties recognize the right of every child . . . to be treated in a manner . . . which reinforces the child's respect for the human rights . . . and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.").

access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.”<sup>136</sup> The proposed EU Directive is much more instructive on this point. It stipulates in Article 18 that “[m]ember [s]tates shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to access to a lawyer,” although there is no explicit reference to free legal aid.<sup>137</sup> This provision corresponds with the rather strong recommendation made by the CRC Committee in relation to Article 40 of the CRC that “[t]he child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence.”<sup>138</sup> Although states have the discretion to determine how such assistance is provided, it should, according to the CRC Committee, be free of charge.<sup>139</sup>

Second, it is quite remarkable to note that the Guidelines are silent on the involvement of parents in court proceedings. Research convincingly shows that the involvement and presence of parents is important for children’s ability to participate effectively in court.<sup>140</sup> The Guidelines, however, focus almost exclusively on the empowerment of children at the cost of recognizing the importance of parents in this particular phase of justice proceedings. It also is remarkable that the Guidelines do not explicitly and unequivocally provide that children should be present at trial.<sup>141</sup> The proposed EU Directive, on the other hand, does recognize a child’s right to appear in person at his trial and that “[m]ember [s]tates shall ensure that children, who were not present at their trial, have the right to a new trial, or another legal remedy.”<sup>142</sup>

Furthermore, the Guidelines do not pay attention to the question of what should happen if a child turns eighteen during the prosecution and to what extent he remains entitled to be treated in accordance with the Guidelines. Under international law, it can be defended that young adults who commit an offense before they turn eighteen remain entitled to treatment in the juvenile

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136. GUIDELINES, *supra* note 1, at 27. If applied to the juvenile justice context, one would not speak of “access to court,” but it can be argued that the Guidelines aim at safeguarding access to a lawyer for all children in judicial proceedings. *See id.* at 26–27 (“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 interest between the child and the parents or other involved parties. . . . Adequate representation and the right to be represented independently from the parents should be guaranteed . . .”).

137. 2015 Draft Directive, *supra* note 75, art. 18.

138. CRC Committee 2007, *supra* note 42, ¶ 49.

139. *Id.*

140. RAP, *supra* note 77, at 115–21; *see also* CRC Committee 2007, *supra* note 42, ¶ 54 (recommending maximum possible parental involvement in a child’s legal proceedings, arguing that such involvement would contribute to an effective response to the child’s infringement of the penal law).

141. Implicitly one could read such an assumption into the Guidelines with regard to access to court and the right to be heard, but the Guidelines are not utterly clear on this issue. *See* GUIDELINES, *supra* note 1, at 26–28 (noting that juveniles have a right to access to court and right to be heard, but failing to specify at what times these rights are triggered in litigation proceedings).

142. 2015 Draft Directive, *supra* note 75, art. 16(2). This is in line with the case law of the ECtHR. *Güveç v. Turkey*, 2009-I Eur. Ct. H.R. 231, 256; *Stanford v. United Kingdom* (no. 19757/90), 1994 Eur. Ct. H.R. at 7.

justice system.<sup>143</sup> At the same time, there are many questions that make exceptions to this rule understandable. For example, what role should parents play when their child has turned eighteen and is no longer a minor under their custody? Their involvement might still be relevant, but what is the legal ground for their involvement and what if the young adult does not want to have his parents present? Another question is to what extent the trial should remain behind closed doors; the laws of a number of European countries provide that court trials in which young adults participate should be public, even if they stand trial for crimes committed before they turned eighteen. Both the Guidelines as well as other international legal standards are inconclusive in this regard.<sup>144</sup>

A final issue of concern mentioned here is, again, the absence of clear guidance on the MACR. A relatively low MACR poses serious challenges to children's participation in court. On the basis of studies on the cognitive and emotional development of adolescents, and the acquisition of certain skills during adolescence that are needed in order to be able to participate effectively and meaningfully,<sup>145</sup> it can be argued that children under the age of fourteen should not be prosecuted and tried in court because they will not be able to participate effectively. This means that even the "golden standard" of twelve years of age provided by the CRC Committee is too low. In this regard, more guidance for states could have been expected from the Guidelines, as well as from the proposed EU Directive. Such guidance would have underscored that effective participation could benefit from setting a MACR that is well above the international minimum standard of twelve years.<sup>146</sup>

#### V. CONCLUSIONS: EMERGING BUT MEANINGFUL?

The concept of child-friendly justice as developed under the wings of the Council of Europe adds a new dimension to the development of children's legal status under international human rights law. It is firmly grounded in international and regional human rights law, in particular in the CRC and the case law of the ECtHR, and confirms that children's legal status encompasses both protective as well participatory elements. It acknowledges not only children's particular vulnerability, but also their agency and capability to exercise their rights in a manner consistent with their evolving capacities. Child-friendly justice confirms that, in general, an approach toward children that is solely

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143. Liefwaard, *Juvenile Justice from an International Children's Rights Perspective*, *supra* note 40, at 244-45.

144. See Ton Liefwaard, *Juveniles in Transition from Juvenile Justice to Adult Criminal Justice*, in *PERSISTERS AND DESISTERS IN CRIME FROM ADOLESCENCE INTO ADULTHOOD: EXPLANATION, PREVENTION AND PUNISHMENT* 159 (Rolf Loeber et al. eds., 2012).

145. See RAP, *supra* note 77, at 85-122; Ido Weijers & Thomas Grisso, *Criminal Responsibility of Adolescents: Youth as Junior Citizenship*, in *REFORMING JUVENILE JUSTICE* 45, 60-65 (Josine Junger-Tas & Frieder Dünkel eds., 2009); ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 28-60 (2008).

146. See Resolution 2010: Child-Friendly Justice: From Rhetoric to Reality, EUR. PARL. DOC. 12672, ¶ 6.2 (2014) (calling upon member states to set the minimum age of criminal responsibility to at least fourteen years of age).

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protective, and often supported by an overly patronizing approach, should be ruled out. Specific circumstances and individual children may require more protection and more investment in children's participation.

The Guidelines have been drawn up to offer guidance to member states on how to implement the concept of child-friendly justice and how to strike the balance between protection and participation in the context of all justice systems. They send out the message that children should be enabled (legally empowered) to play active roles before, during, and after judicial proceedings. And they identify the essential components of legal empowerment of children, including adequate information, legal or other appropriate assistance, and access to justice. With regard to certain fundamental issues, such as legal standing and the role of a child's parents as legal representatives, the Guidelines offer innovative guidance, assuming that children are more autonomous in relation to their parents or other legal representatives.

At the same time, the Guidelines remain unclear or inconclusive at certain important points and sometimes merely repeat already existing standards; in this regard, their added value is limited. This Article has also identified some missed opportunities, such as a careful consideration of adolescents in transition from childhood to adulthood and the position of young adults, as emerging areas of concern both in the criminal and civil justice systems. In addition, the legal value of the Guidelines as such is weak and dependent on how they will interact with legally binding instruments, such as the proposed EU Directive and the case law of the ECtHR and domestic courts. There are some promising developments in this regard, particularly visible in the case law of the ECtHR. In addition, child-friendly justice has become part of the political agendas of both the Council of Europe and the EU, resulting in advocacy and implementation strategies, funding, and research. It is still too early to say much about the actual impact of the Guidelines on policy and legislation at the domestic level and, more importantly, on the position of children in justice systems in European countries. Therefore, there is a strong need for more specific research on how child-friendly justice can affect and affects children in justice systems at the domestic level; such research should take into account the diversity of juvenile justice systems and the practices in countries in Europe and elsewhere,<sup>147</sup> as well as the views and experiences of children themselves.

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147. See generally Barry Goldson & John Muncie, *Towards a Global 'Child Friendly' Juvenile Justice?*, 40 INT'L J.L. CRIME & JUST. 47 (2012)