The right to effective participation of refugee children: a critical children’s rights perspective

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1. Introduction

Worldwide, the number of child refugees has more than doubled in the last decade. Nearly one in every 200 children in the world today is a refugee. In Europe, one in four asylum seekers is a child. Refugee children comprise the most vulnerable group in the context of current migration flows; they often experience a dangerous journey, traumatic events and often lack access to essential necessities, such as food, shelter, medical aid and a healthy and stimulating environment for growing up. These children are often not recognised and respected as rights holders and thus as active agents in asylum procedures. However, a one-sided view of refugee children as vulnerable objects is not in coherence with international children’s rights law and standards, including among others the UN Convention on the Rights of the Child (CRC), that see all children as autonomous subjects and full bearers of rights. A rights-based perspective counters the sole protectionist view of refugee children as vulnerable objects in need of protection only. As such, the vulnerability and precarious situation of refugee children calls for a strong legal position in asylum procedures. Effective participation in asylum procedures – based on child-friendly and age-appropriate communication and adapted procedures – can strengthen the legal position of refugee children and contribute to the perceived fairness of complex procedures and outcomes.

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

2. Children in asylum procedures

Regardless of age, everyone who seeks asylum in the EU will enter a formal asylum procedure that will assess whether they have a legal ground to stay in the country they entered (hence, receiving or host country). In this formal procedure, multiple phases can be distinguished. The first phase comprises registration, applying for asylum and a resting period for the applicants. The second phase comprises research to the individual(s’) asylum claim. At the end of the second phase for every asylum seeker, status will be determined in either a right to stay, or an order to return to their home country. When the latter decision is made, every individual has a right to appeal.\(^8\)

How to refer to people seeking asylum dependents on two factors: their reason for applying for asylum and their legal status. The 1951 Refugee Convention differentiates asylum-seekers as individuals who are seeking international protection and refugees as individuals who are fleeing conflict or persecution.\(^9\) In the case of children,\(^10\) the UN Convention on the Rights of the Child ‘goes so far as to accord asylum seeker children the same rights and entitlements as refugees – whatever their actual status under the Convention relating to the Status of Refugees and its related Protocol’.\(^11\) As the United Nations High Commissioner for Human Rights explains, this means that they ‘appear in the universal protected group of ‘children’ no matter what classifications – legal or illegal, regular or irregular migrants – states choose to superimpose on them’.\(^12\)

In light of the different categories of asylum-seeking children, one can differentiate between, unaccompanied, separated and accompanied children. An unaccompanied child is defined by the UNHCR as a ‘person who is under the age of eighteen ( . . . ) and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so’.\(^13\) The same definition is provided by the UN Committee on the Rights of the Child (UN Committee), who provides a separate definition for separated children, namely: ‘separated children are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may,

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\(^8\) The right to appeal has been recognized in accordance with the Universal Declaration on Human Rights (UDHR) United Nations General Assembly, General Assembly resolution 217 A, 10 December 1948.


\(^10\) In this article the terms ‘child’ and ‘minor’ are used interchangeable and when meaning persons up to the age of 18 (in accordance with art. 1 CRC).

\(^11\) Crock, 2015.

\(^12\) Ibid, p. 223.

therefore, include children accompanied by other adult family members’. Despite their shared commonalities as being minors separated from their parents, it is important to realise that unaccompanied and separated children are a heterogeneous group, “not only in terms of gender, age, ethnicity and religion, but also in terms of their past experiences and present life situations.” This latter also accounts for accompanied children. This is a (third) group of refugee children, that arrives with their parent(s) or primary caregiver(s).

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

3. The right to participation

In 2017, the European Commission stated in a Communication to the European Parliament and the Council on the protection of children in migration, that appropriate safeguards must be applied to all children in all stages of the asylum procedure. Specifically, access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments are named as key protection measures. Moreover, it is recommended that children need to be informed – in a child-sensitive and age – and context – appropriate manner – on their rights, on procedures and on services available for their protection. In the same year, the Council of Europe issued the Action on Plan on Protecting Refugee and Migrant Children in Europe in which it highlights the importance of access to rights, access to information and child-friendly procedures. Many of the elements of child-sensitive practices that are brought forward in these documents, touch upon the right to participation. In this section, the right to participation will be further analysed, specifically in relation to the position of refugee children.

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15 Wernesjö, 2012, p.496.
16 See also Vandenhole, 2016; Crock, 2015, p. 237.
The right to be heard

The right to be heard, as it is laid down in article 12 CRC, can be seen as part of the broader umbrella term ‘participation’. The right to participation as such is not enshrined in the CRC, however, several participatory rights can be found in the CRC. Participation can be seen as a fundamental human right, because it enables children to exercise their rights effectively. The CRC is the first international children’s rights instrument in which participatory rights for children are laid down and therefore the convention is of particular significance for children. The right to be heard serves the purpose of acknowledging the growing autonomy of children and granting them ‘the opportunity to participate in decisions that immediately affect their lives’. As explained by the UN Committee on the Rights of the Child, the phrasing “shall assure” puts states parties under the strict obligation to undertake appropriate measures to fully implement this right for all children, leaving no leeway for states parties’ discretion. The child’s right to be heard is one of the general principles of the CRC (next to the right to non-discrimination, the best interests of the child principle and the right to life, survival and development). As such, the right to be heard should be considered in the interpretation and implementation of all other rights, and vice versa. Moreover, hearing children’s views should not be an end in itself or taking place as a matter of formality, but a means through which children can exercise their rights.

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

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26 Committee on the rights of the child, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12, 1 July 2009, para. 19.
27 Respectively: art. 2, art. 3 and art. 6 CRC. Committee on the Rights of the Child, General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention. CRC/C/5, 27 November 2003, para. 12.
29 CRC General Comment 5, para. 12.
30 CRC General Comment 12, para. 33.
The views and opinion of the child should be taken into account giving due weight to the age and maturity of the child (art. 12(1) CRC). Article 5 CRC gives further guidelines on how to interpret the term maturity in article 12. Children’s growing capacities should be taken into account in the exercise of their rights (art. 5 CRC). This implies that a balance must be found between on the one side treating children as active agents, who have the right and capacity to exercise their own rights and on the other side providing children with protection, because of their on-going development and immaturity.32

Because of the dynamic nature of the child’s right to be heard the UN Committee recommends the states parties to the CRC to not establish fixed age limits with regard to the exercise of this right.33 Ideally, in every case an individual assessment should be made regarding whether the child is capable of expressing his views.34 Specifically, in relation to refugee children the UN Committee has recommended that children should be provided with all relevant information, concerning for example the asylum process, to allow them to express their well-informed views and wishes. The information should be adapted to the level of maturity and understanding of the child.35 Moreover, in order for refugee children to enjoy the right to participation in an asylum procedure, states must provide all children access to the procedure in a child-sensitive and age-appropriate manner, hereby having due regard for the age and evolving capacities of the child.36

Every child, however, also has the right not to exercise their right to be heard – it is a choice, not an obligation.38 The UN Committee on the Rights of the Child explains that states parties have to ensure that the child receives all necessary information and advice to make a decision in favour of his best interests, which leads to the second core component of the right to participation: the right to information (see further below).39 An important implication of the right to be heard is that the child’s opinion must be taken seriously40 and that the child must be informed about how his opinion was taken into account in the decision-making process.41 This feedback must ensure that the child

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33 CRC General Comment No. 12, para. 21.
34 For practical reasons, in this article it is referred to children and adults in the masculine form. Feminine children and adults are to be considered included in the references as well.
36 CRC General Comment 6, para. 25.
37 Committee on the Rights of the Child, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 35.
38 CRC General Comment 12, para. 16.
39 Ibid.
40 CRC General Comment 12, para. 28.
41 CRC General Comment 12, para. 45; Guidelines on Child-friendly Justice, IV, A, para. 1(g) ; Explanatory memorandum IV, A, para. 55.
has not only been heard by way of formality, but that his opinion has been seriously considered by the decision-making authority.\textsuperscript{42} The environment or setting in which the child is heard has an important influence on whether the child can express his views freely. When a child is heard, this should take place in a setting that contributes to being able to give his opinion freely. This means that the environment may not be intimidating, hostile or otherwise inappropriate to the age of the child.\textsuperscript{43} Specifically, the UN Committee recommends that children are heard behind closed doors in court, also in order to protect the child’s privacy, and that adjustments are made to the design of the courtroom, the clothing of judges and lawyers and the waiting areas for children.\textsuperscript{44} Research, however, shows that children prefer informal forms of participation with professionals they know and trust, rather than participation in a formal setting with adults they do not know. The impressing and exciting setting and the presence of a larger number of adults makes it more difficult for children to express their opinions and wishes.\textsuperscript{45}

The right to be heard as laid down in the CRC shows the growing recognition of the international community for the child as a rights holder and an autonomous and active human being, rather than a silent and passive child that only needs protection from adults.\textsuperscript{46} The UN Committee acknowledges that giving due weight to children’s views is challenging and it requires change.\textsuperscript{47} Moreover, to ensure that the views of the child are taken seriously the decision-maker should provide the child with feedback on the outcome of the process and the extent to and manner in which the child’s views were considered.\textsuperscript{48} This is even more important when decisions are taken that go against the wishes of the child.\textsuperscript{49} Research shows that final decision of a judge is better understood and accepted by children when the reasons that led to a particular decision have been explained to the child.\textsuperscript{50}

To interpret and implement the right to participation, one should look at the conditions and

\textsuperscript{42} CRC General Comment 12, para. 45. See also CRC General Comment 14, para. 6.
\textsuperscript{43} CRC General Comment 12, para. 23, 34, 60; Guidelines on Child-friendly Justice IV, D, paras. 54-63.
\textsuperscript{44} CRC General Comment 12, para. 34; Guidelines on Child-friendly Justice IV, D, paras. 54-63, Explanatory memorandum IV, D, para. 112.
\textsuperscript{47} CRC General Comment No. 12, paras. 49; 76; 136
\textsuperscript{48} CRC General Comment No. 12, paras. 45; 134(i); Lundy, British Educational Research Journal 2007/33.
safeguards needed to participate effectively. There are several elements that enable children to fully 
exercise their right to participation, core components being the right to be heard and the right to 
information.\textsuperscript{51} Other additional components that are of importance are for instance the right to 
(legal) representation and right to access to justice and remedies.\textsuperscript{52}

The right to information

The right to information is laid down separately in article 17 of the CRC. However, the UN 
Committee on the Rights of the Child states that ‘children should be provided with full accessible, 
diversity-sensitive and age-appropriate information about their right to express their views freely.’\textsuperscript{53} 
Thus implies an explanation of what is expected of the child (where and when he is allowed to give 
his opinion, how will this be asked and in what setting) and on the other hand to explain the content 
of the case concerned, the possible decisions that can be taken and the consequences of those 
decisions.\textsuperscript{54} Giving child-friendly information makes it possible for the child to form his well-informed 
option.\textsuperscript{55} This requires trained professionals who are able to provide age-appropriate information in 
a way that is understandable to the child.\textsuperscript{56} However, it must also be made clear to the child that his 
option will not necessarily be decisive in the final decision taken.\textsuperscript{57} ‘To allow for a well-informed 
expression of such views and wishes, it is imperative that specifically asylum seeking and refugee 
children are provided with all relevant information concerning, for example, their entitlements, 
services available including means of communication, the asylum process, family tracing and the 
situation in their country of origin (arts. 13, 17 and 22(2)).’\textsuperscript{58} Refugee children who are old enough to 
understand what is meant by status determination should be informed about the process, where 
they stand in the process, what decisions have been made and the possible consequences.\textsuperscript{59} To 
receive adequate information is seen as a precondition for the child to be able to give his informed 
views and make clarified decisions.\textsuperscript{60} As such, the right to information has close ties to the right to be 
heard and should be regarded as a fundamental element of the right to participation.

The right to (legal) representation

An important starting point concerns the fact that the right to be heard implies a choice for the child 
and not an obligation.\textsuperscript{61} If a child decides to give his opinion to the relevant authority in a certain 
(legal) procedure, he then has the choice to do this himself or through a representative (art. 12(2) 
CRC). The representative of the child can be a parent, but also a lawyer, a guardian (ad litem) or a

\textsuperscript{51} CRC General Comment 12, paras. 13 and 25.
\textsuperscript{52} CRC General Comment 12, paras. 34 and 38.
\textsuperscript{53} CRC General Comment 12, para. 134(a).
\textsuperscript{54} CRC General Comment 12, paras. 25, 47, 48; Guidelines on Child-friendly Justice IV, A, para. 1(a). UNHCR Child 
Asylum Claims under Article 1(A)2 and 1(F) of the 1951 Convention and/or1967 Protocol relating to the Status 
of Refugees (2009), para. 77; CRC General Comment 12 para. 45; Pinheiro, P., S., “Reflections on Child-friendly 
\textsuperscript{55} CRC General Comment 12, paras. 25, 34, 60, 82; Guidelines on Child-friendly Justice IV, D, 3, para. 48.
\textsuperscript{56} CRC General Comment 12, paras. 34, 49, 134 (a), 134 (g).
\textsuperscript{57} Guidelines on Child-friendly Justice IV, D, 3, para. 48.
\textsuperscript{58} CRC General Comment 6, para. 25.
\textsuperscript{60} CRC General Comment 12, paras. 25, 80.
\textsuperscript{61} CRC General Comment 12, paras. 16, 58.
social worker. The child should preferably be heard personally and when this take place through the intervention of an adult, this person must have sufficient knowledge and understanding of the procedure and have experience with working with children. However, the UN Committee notes that there are risks of a conflict of interests between the child and their most obvious representative(s); parent(s). Therefore, they prescribe that: ‘representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. The representative must be aware that he or she represents exclusively the interests of the child and not the interests of other persons (parent(s)).’ Specifically for unaccompanied and separated children, the presence of a guardian and legal representative is required in all planning and decision-making processes, including interviews conducted by the refugee determination authority of a State and possible appeal hearings. As soon as a child enters a receiving country, states should appoint a (legal) representative to the child, who maintains the representative until the age of majority or permanent leave of the territory of the receiving country. Needless to say, this means that during all the phases of a formal asylum procedure, a qualified legal representative should be available to these children free of charge. Recent research shows that having a representative, in the form of a lawyer or a guardian ad litem, contributes positively to being able to participate in legal procedures. The representative can help the child influence the decision and can urge the other professionals to give the child feedback on the decision that is taken. Again, it is important that a relationship of trust exists between the child and the representative.

**Access to justice**

The availability of child-sensitive procedures can be seen as a requirement for the child’s access to justice. Access to justice refers to ‘the ability to obtain a just and timely remedy for violations of rights’. Liefaard notes that a clear relation exists between access to justice and the right to an effective remedy. Moreover, access to justice should be understood as a procedural (e.g. access to courts, legal representation) as well as a substantive concept (e.g. financial compensation, reparation of damages). However, specifically for children this right is not self-evident and they face challenges in exercising access to justice. To make access to justice for children procedurally more child-sensitive or child-friendly, Liefaard distinguished three elements: child-friendly information, child participation in procedures and child-friendly outcomes and remedies. As the first two have been dealt with above, the latter will be addressed here.

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62 CRC General Comment 12, para. 36.
63 CRC General Comment 12, para. 35.
64 CRC General Comment 12, para. 36.
65 Ibid.
66 CRC General Comment 12, paras. 36-37.
67 CRC General Comment 6, paras. 33, 72.
68 CRC General Comment 6, para. 33.
69 CRC General Comment 6, para. 69. See also, Articles 7(3), 19, 20 and 21 of Directive 2013/32/EU (recast).
70 Kennan et al., 2018.
Access to justice means that states parties need to ensure that children are provided with access to authorities and facilities that can help them to be heard, informed, and represented. Also, children must have access to appeals, complaints procedures and an ombudsman or children’s rights commissioner.\(^{73}\) For instance, in the Concluding Observations by the Committee on the Rights of the Child to France, the Committee noted its concern for specifically the situation of unaccompanied migrant children and their difficulties to access the child protection system and legal representation.\(^{74}\) Subsequently, the UN Committee addressed the number of asylum seeking children who were ‘subjected to administrative detention in 2014, in degrading conditions and without access to a judge’.\(^{75}\) Without access to a judge, these children were unable to appeal the administrative detention, and these children did not have the proper safeguards to be heard effectively in a formal asylum procedure. The UN Committee recommended the State to, in line with article 12 CRC, ‘establish systems and/or procedures for the participation of children, the training of social workers and administrative or court authorities, and the provision of support by a professional (lawyer, ad hoc administrator or social worker)’.\(^{76}\) Furthermore, the UN Committee recommended the State to ‘[d]evelop effective avenues for children’s views to be heard and adequately inform children of such channels’.\(^{77}\) By that, access to justice and child-friendly justice aim to be more responsive to the child’s right to participate in all formal and informal decision-making concerning them, and more focused on children’s rights in general.\(^{78}\) However, Liefaard acknowledges that international (children’s rights) standards do not give much guidance on what child-friendly remedies should entail. For the purpose of this study, the procedural element of access to justice is of particular importance, because it implies that legal procedures should be child-sensitive and child-friendly in order to be accessible to children.

The above described components of the right to participation are relevant in asylum procedures, but the question arises whether a receiving state has the strict obligation to enable children to participate in the earliest stages of the asylum procedure? Nonetheless, when following article 12(2) CRC, there is no doubt that this breaches the child’s right to participation, since it expressly obligates to provide children the opportunity to participate in all judicial and administrative decisions affecting them, thus including the earliest stages of an asylum procedure.\(^{79}\) Furthermore, the right to participation is endorsed to all children, including those in parental care.\(^{80}\) This means that also refugee children who arrived in the company of parents or legal guardians should be guaranteed this right.\(^{81}\)

\(^{73}\) CRC General Comment 12, paras. 46-47.
\(^{74}\) Concluding Observations to France, para. 73.
\(^{75}\) Ibid.
\(^{76}\) Concluding Observations to France, para. 30.
\(^{77}\) Concluding Observations to France, para. 30(a).
\(^{79}\) CRC, Art. 12(2). See also Tobin, 2013.
\(^{80}\) CRC General Comment 22, para. 36.
\(^{81}\) Also, Articles 12 and 7(3) of Directive 2013/32/EU (recast) confirm that children, whether or not arriving with their parents, have the right to participate in asylum procedures.
4. Participation in practice

In Europe, various legal safeguards have been put in place to protect the rights of refugee children and ensure the formal procedures are in line with the international and regional provisions. Many of these safeguards point to the right to participation, such as the provision of child-friendly information, the appointment of an independent representative or guardian and/or legal representation and advice.\textsuperscript{82} However, little is known about refugee children’s experiences in legal procedures\textsuperscript{83} and little sound empirical evidence exists of these children’s experiences.\textsuperscript{84} Anecdotal evidence and reports from civil society organisations suggest that the right to be heard and the right to information during the procedures are often not sufficiently upheld for refugee children. Several recent studies indicate that refugee children are not sufficiently enabled to participate in the predominantly adult-oriented asylum procedures.\textsuperscript{85} Information about the rights of refugees and asylum seekers is generally aimed at adults. When children are accompanied by parents or other caretakers it is assumed to be sufficient when the adult is informed and heard within the procedure.\textsuperscript{86}

Relevance of participation

In addition to the fact that the right to be heard is a treaty obligation that arises from the CRC, a large number of studies shows that participation for children has a number of positive effects. Positive experiences with participation can increase self-confidence, self-esteem and certain skills of children.\textsuperscript{87} Moreover, participation in decisions may have a positive influence on the development of autonomy and growing up into an independent adult, who is capable of standing up for himself (i.e. empowerment takes place through participation).\textsuperscript{88} Children also learn important skills by participating in decisions, such as reasoning skills, learning to formulate an opinion and collaborating

\textsuperscript{83} Van Os et al., 2016.
\textsuperscript{84} Previously, participation of children has been studied in several settings, such as in juvenile justice (Ten Brummelaar, 2016; Liefgaard, 2016; Rap, 2013; Christiaens & Goris, 2012; Cappon & Vander Laenen, 2015), public decision-making (Tisdall, Davies & Gallagher, 2008; Thomas, 2007), education (Lansdown et al., 2014), healthcare (Grootens-Wiegens, 2016; Kilkelly & Donnelly, 2011; Curtis et al., 2004) child protection and family matters (Taylor et al., 2012) and education (Lansdown et al., 2014; De Winter, 2012; Lundy, 2007).
with others. Research in the field of health care shows that treatment outcomes are probably better when children are involved in decisions from the start of the procedure. Involving children in decisions improves their knowledge and understanding of the disease and the role they can play in it. If participation is successfully given shape, this not only leads to more positive outcomes of the treatment offered, but also contributes to the child feeling better (although long-term effects are difficult to measure).

Being able to participate empowers children and helps them to better understand and accept the decisions that are taken. Participation facilitates children to grow up as responsible adults. Lack of regard for the agency of children promotes ‘a self-fulfilling cycle of learned helplessness’ and children feel as not being taken seriously by adults. Moreover, children themselves indicate that they value being an active participant in the decision-making process. Possibly, children’s participation in asylum procedures prevents them from becoming a marginalised group from the start of their life in a new country, with a lack of self-confidence and active engagement with society as a consequence.

In accessing and participating in legal procedures, children are largely dependent on adults. The relationship between for example social workers and children is seen as an important factor in making participation successful for children. Professionals are judged to be more positive by children when they listen to them. In addition, when being able to participate children perceive their own input as more important, they feel that they are treated more fairly and respect the decision more quickly. However, despite the positive effects that are accorded to participation in decision-making procedures, several studies on children’s participation in care arrangements show the image of professionals who believe that children do not have the skills and competences to be able to participate, but that they, on the contrary, should be protected against participation. Various studies show that the wishes and opinions of the child are only brought forward when they

89 Fitzgerald et al., 2009; Collins, 2017.
91 Vis et al., 2011.
93 Saywitz et al., 2010.
95 Saywitz et al., 2010.
96 Kennan et al., 2018.
99 Van Bijleveld et al., 2015.
correspond with those of the authorities or the court.\textsuperscript{100} Collins notes that children’s participation has a number of important challenges and difficulties, for example; the opinion of the child is asked but has no meaningful influence on the decision (i.e. tokenism), feedback to the child on how his opinion has influenced the final decision is lacking or the institutional structure impedes the meaningful, effective and sustainable involvement of the child.\textsuperscript{101} Two main challenges arise in this context: 1) a lack of understanding and feeling heard on the part of the children,\textsuperscript{102} and 2) a lack of skills and time on the part of professionals.\textsuperscript{103} Therefore, it is important that professionals recognize the importance of participation by children and that they not only see participation as a way to gather information or to have the decision already taken by the professional confirmed by the child.\textsuperscript{104} The training of professionals in communication skills, specifically aimed at communicating with children, is of great importance, because this can significantly stimulate effective participation of children.\textsuperscript{105}

5. Balancing of rights and interests of refugee children

In light of the holistic approach of the CRC, the right to participation cannot be seen in isolation and should certainly be regarded in relation to the other general principles of the CRC. In this section, the right to participation of refugee children will be further analysed in relation to the best interests principle.

Best interests of the child

Article 3(1) CRC provides that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. The principle has been criticised as being indeterminable and open-ended.\textsuperscript{106} However, the UN Committee describes the concept as flexible and adaptable; it should be adjusted and defined on an individual basis.\textsuperscript{107} The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same (but a

\textsuperscript{100} Leviner, 2011 in Leviner, 2018.


\textsuperscript{104} Van Bijleveld et al., 2015.

\textsuperscript{105} O’Reilly & Dolan, 2017.


\textsuperscript{107} Committee on the rights of the child, General Comment No. 14, On the right of the child to have his or her best interest taken as a primary consideration, CRC/C/GC/14, 29 May 2013, para. 32.
higher) level as all other considerations. This is justified on the basis of the special situation of the child: ‘dependency, maturity, legal status and, often, voicelessness’ and the fact that their interests are often overlooked by adults.\textsuperscript{108} The UN Committee stresses that the child’s best interests principle is a threefold concept which operates variously as a substantive right, an interpretative legal principle and a procedural right. The first implies that the child’s interests should be considered over and above other factors whenever a decision is made concerning the child, even if there are other compelling interests at stake. The second implies that if a provision is ambiguous, the interpretation which most effectively serves the child’s best interests should be chosen; and the third implies that any decision which affects a child must be arrived at by a process which includes an evaluation of the possible impact on the child. This requires certain procedural guarantees.\textsuperscript{109}

When looking at the substantive element of the best interests principle regarding refugee children the conceptual framework developed by Eekelaar is of relevance.\textsuperscript{110} Eekelaar makes a distinction between decisions affecting children directly and indirectly. In the first case, the decision-maker has the task to find a solution that has the best outcome for the child, also taking into account other considerations, but giving primary consideration to the interests of the child. In the latter case, the decision-maker has the task to find the best solution to the issue to be decided, whereby ‘the interests of the child are part of the agenda’.\textsuperscript{111} When applying this to the matter of child refugees involved in asylum procedures the distinction should be made between accompanied and unaccompanied (or separated) minors. In the case of unaccompanied minors a decision has to be taken that directly affects the child (i.e. whether he is granted refugee status and can stay in the receiving country). This decision should, in line with article 3(1) CRC, take into account an assessment of the best interests of the child.\textsuperscript{112} When it concerns an accompanied child, who has travelled to the receiving country with his parents or primary caregivers, the decision will indirectly affect the child. The parents will enter the asylum procedure and the child is dependent upon the decision that is taken in his parents’ asylum claim. In other words, the asylum claim of the whole family will be evaluated and the status of the parents determines the status of the child.

Regarding the procedural element of the best interests principle the status of the refugee child is also of importance. Unaccompanied and separated children file their own asylum claim in the receiving country. This means that they are the main source of information about their situation and that they will be heard directly in the asylum procedure.\textsuperscript{113} Moreover, a (more elaborate) best interests assessment can be carried out to evaluate their asylum claim.\textsuperscript{114} The UN Committee states that ‘[t]he “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in a specific situation’.\textsuperscript{115} Moreover, the child’s views should be taken into account when making this assessment.\textsuperscript{116} This should generally be the case with unaccompanied minors, because they have to be heard by an immigration officer to assess their asylum claim. As

\begin{thebibliography}{99}
\bibitem{108} CRC General Comment 14, para. 37.
\bibitem{109} CRC General Comment 14, para. 6.
\bibitem{110} Eekelaar, 2015.
\bibitem{111} Eekelaar, 2015, p. 5.
\bibitem{112} See for more Van Os et al., 2016.
\bibitem{113} UNHCR/UNICEF, 2014, p. 31.
\bibitem{114} See Van Os et al., 2016.
\bibitem{115} CRC General Comment 14, para. 47.
\bibitem{116} CRC General Comment 14, para. 53.
\end{thebibliography}
said, accompanied children depend on their parents’ asylum claim and the question arises to what extent they are able to participate in the asylum procedure independently or separately from their parents? Several studies indicate that the position of accompanied minors receives far less attention compared to unaccompanied and separated minors and they are not provided with the same safeguards.\(^{117}\) When children are accompanied by parents it is often assumed that it is sufficient if the adult is informed and heard within the asylum procedure and authorities assume that being in the care of a parent excludes them from being in the need of assistance, protection or attention.\(^{118}\) ‘Children are included as “accompanying family” or as “dependents” in applications made by adults and their faith is generally tied to those adults’.\(^{119}\) This implies that a best interests assessment might not take place and that the child’s views are not heard with regard to the asylum claim or the best interests assessment (if taking place). The UN Committee on the Rights of the Child, for instance, expressed concern about Australia’s laws that shun this group of children from participating, because they do not want to unnecessarily burden them with formalities and having to speak about their migratory journey.\(^{120}\) This, however, neglects the right to participation of these children.\(^{121}\) Crock argues that ‘[a]s far as practicable children must be given an opportunity to express their views on the matter, whether personally or through a responsible adult’.\(^{122}\)

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

The UN Committee on the Rights of the Child specifies that ‘there can be no correct application of Article 3 if the components of Article 12 are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives’.\(^{123}\) Moreover, the relation between assessing the best interests of the child and hearing the views of a child, as implied by the UN Committee, means that procedures should be of a child-friendly nature. When children are asked about their views, in light of this best interests assessment, this should take place in a child-appropriate and child-friendly manner.\(^{124}\) Otherwise, it can be argued that hearing the views of the child is not in his best interests at all, because it will result in adverse consequences for the (psychological) well-being of the child. This brings me to my last argument; whether hearing children in asylum procedures is in line with their best interests?

As argued before, refugee children comprise a particular vulnerable group, having possibly experienced violence, hardship and trauma in their home countries and during their flight. The right to participation can be scrutinised on the basis of secondary victimisation resulting from involvement in judicial procedures. Especially, with regards to child victims of (sexual) abuse strong evidence exists that being involved in judicial proceedings is particular harmful for their well-


\(^{118}\) ENOC Taskforce children on the move, 2016, p.29.

\(^{119}\) Crock, 2015, p.238.

\(^{120}\) Concluding Observation on Australia, CRC, 60th Session, 28 August 2012, UN Doc CRC/C/AUS/CO/4, paras. 31 & 80.

\(^{121}\) Ibid.

\(^{122}\) Crock, 2015, p.238.

\(^{123}\) CRC General Comment 12, para. 74; See also CRC General Comment 22, para 37.

\(^{124}\) See for example Lundy, 2007.
Several international and European instruments state that special measures should be taken with regard to child victims’ involvement in court procedures. However, such protection does not exist for, in particular, unaccompanied minors. The starting point of article 12 CRC is that children have the right to be heard and not the obligation, but in asylum procedures unaccompanied children are heard in principle by an immigration officer in the asylum procedure. However, the right to be heard is also part of the general human right to a fair hearing, which speaks in favour of participation in asylum procedures. In my opinion, this strongly calls for child-sensitive and child-friendly procedures, because involvement in asylum procedures is potentially harmful for children and therefore might not be in their best interests to take part in those procedures.

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

## 6. Concluding

Claiming the right to participate is not yet possible for many children across various settings, this is especially true for refugee children. In this article, the right to participation for this group of children has been analysed. The international children’s rights framework paints us a rather clear and concise picture of how child participation in judicial proceedings should be implemented in practice. Influenced by the adoption of the CRC and related children’s rights instruments and an increasing body of research evidence demonstrating the positive influence of participation, more

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126 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Ecosoc 2005), art. 39-40; EU Victims Directive art. 21(1) and 26; See also Beijer & Liefaard, 2011.
128 See also Tobin, 2013.
129 Lundy, 2007; Art. 12(1) CRC.
130 A. Daly, Children, autonomy and the courts. Beyond the right to be heard, Leiden: Brill/Nijhoff 2017.
131 Mannion, 2016.
132 Fitzgerald et al., 2009.
and more attention and acceptance of the right to participation has emerged in the past decades. The conception of the child as an autonomous human being, who can exercise his own rights has gained prominence, at least among Western countries. However, ‘(e)mbrazing the child-centered, child-enabling and child-empowering values underlying participation is one thing. Putting these values into practice is quite another’. This seems to apply in particular to refugee children. Refugee children find themselves in a vulnerable position, with regard to their precarious well-being and their status and dependency upon adults and authorities. The right to participation is seen as a tool to empower children, but for this particular group of children many challenges lie on the way of effective participation. Applying child-friendly procedures is a way forward, however, a critical analysis of participation in light of what is in the best interests of refugee children is urgently needed. In my view, the views and opinions of children themselves should be consulted in this regard as well. Only through truly listening to the opinions and experiences of children, it is possible to improve the procedures to which they are exposed.