

Introduction

The working group on youth law of the Nederlandse Juristen Comité voor de Mensenrechten (NJCM)¹ welcomes the opportunity to provide suggestions on the Draft General Comment No. 27 on children's rights to access to justice and effective remedies.² NJCM is the Dutch section of the International Commission of Jurists (ICJ).

Article 3 CRC requires that professionals responsible for making decisions that influence children's lives, should make these decisions in the best interest of the child. Assessment of a child's best interests must include respect for the child's right to express her/his views directly or indirectly. Due weight must be given to said views in all matters affecting the child.³

In this contribution, NJCM has explored several existing legal and socio-cultural barriers preventing children from having access to justice and effective remedies. NJCM has examined specific issues in which children are confronted with a legal system that does not give them legal standing and does not sufficiently acknowledge that a child can and may have an opinion that must be heard, weighed and considered in (legal) procedures (Part A). Children in State care, including refugee children, have little or no knowledge about complaint mechanisms and remedies. In Part B of this contribution NJCM will address this power imbalance. To better safeguard the interests of children, NJCM will also emphasize that access to justice and effective remedies should include access to restorative justice for children (Part C).

Each part of this contribution contains suggestions to strengthen the position of children in procedures and practice.

PART A: The right of the child to be heard in civil judicial proceedings

This part of the submission focuses on article 12(2) CRC: *The child shall in particular be provided the opportunity to be heard in any judicial [...] proceedings affecting the child, either directly or through a representative [...] in a manner consistent with the procedural rules of national law.*

It is NJCM's opinion that the right of the child to be heard through a representative, particularly a guardian ad litem, needs clarification in General Comment No. 27.

¹ NJCM is part of the International Commission of Jurists (ICJ), please see www.njcm.nl and <https://www.icj.org/>.

² <https://www.ohchr.org/en/calls-for-input/2024/call-submissions-draft-general-comment-no-27-childrens-rights-access-justice>.

³ CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

1. Background

Children in the Netherlands lack legal standing, due to their perceived vulnerability and their assumed need to be protected from starting ill-considered legal proceedings.⁴ Therefore, they can (with a few exceptions) only take legal action in (formal) civil judicial proceedings through parents/legal guardian and, in addition, through an appointed guardian ad litem. Such a guardian can be appointed on the court's own motion or upon request of an interested party (e.g. the child or a parent).

The right of the child to be heard directly in civil judicial proceedings is limited to children older than twelve years, although children between eight and twelve years may be heard on their (informal) request.⁵ The average time spent on these so called 'child conversations' is five minutes in youth law proceedings and fifteen in family law cases.⁶ Given this relatively short duration as well as the high number of non-participating children, there is ongoing debate amongst Dutch youth law professionals whether this practice complies with article 12(2) CRC.⁷

In order to enhance children's access to justice, academics have been discussing the desirability of appointing a guardian ad litem to represent children in (and out of) court more often, and of hearing more children indirectly through such a guardian.⁸

2. Problem

A guardian ad litem who accurately conveys the child's views and interests, and is aware of their needs for general and psychological support throughout the proceedings, can be of great value.⁹ Since a child is also entitled to a legal representative, a lawyer-guardian ad litem, who is able to initiate proceedings or file an appeal on behalf of the child, can be of even greater value.¹⁰

However, in the Netherlands, a guardian ad litem can merely be appointed in matters relating to the child's care and upbringing, and only if this serves the interest of the child in the opinion of the court.¹¹ Moreover, there must be, in the court's view, a (potential) conflict of interest between the child and her/his parents/legal guardian. Unsurprisingly, a (child's) request to appoint a guardian ad litem is regularly denied by Dutch courts.¹²

⁴ Limbeek M., *'De bijzondere curator: een volwaardig sluitstuk van rechtsbescherming?'*, in: J.H. de Graaf e.a. (red.) *Rechten van het Kind en Waardigheid*, 2013.

⁵ According to article 809 Rv.

⁶ Bruning M., Smeets, D., e.a. *'Het hoorrecht en de procespositie van minderjarigen in familie- en jeugdzaken geëvalueerd'*, FJR2020/24, p. 96-104.

⁷ CRC Committee, General Comment No. 12 (2009), para. 21 and 52. Recently, Tromp B., *'De kinderrechter heeft tien minuten om het kind van ouders in een scheidingszaak aan te horen'*, NRC, 16 juli 2024.

Article 12(2) CRC is only applicable if the child is capable of forming her or his own views (article 12(1) CRC).

⁸ E.g. Bruning (above n. 6).

⁹ International Association of Youth and Family Judges and Magistrates (IAYFJM), *Guidelines on Children in Contact with the Justice System*, 2017, para. 3.3.1-3.3.6.

¹⁰ According to CRC Committee, General Comment No.14, para 96. See also Council of Europe, *Guidelines on Child Friendly Justice* (2010), para. 37-43.

¹¹ According to article 1:250 BW.

¹² Pieters I., *'De bijzondere curator anno 2022. In de rug gedekt door de wet?'*, FJR 2022/26, p. 19-31. See also: Gerechtshof Arnhem-Leeuwarden, 19 december 2023, ECLI:NL:GHARL:2023:10776.

Furthermore, in the Netherlands, as in several other jurisdictions¹³, a guardian ad litem does not have the CRC-based obligation to (correctly) communicate the child's views and interests.¹⁴ On the contrary, they can even assume or substitute their own views for those of the child.¹⁵ Usually, Dutch courts provide a guardian ad litem with task instructions based on internal guidelines.¹⁶ This often results in a guardian ad litem being asked to act as an expert in determining the child's best interests, rather than solely communicating the views of the child.¹⁷ Not adequately communicating these views may be detrimental to the child('s development).¹⁸

On top of that, Dutch courts regularly appoint non-lawyers as guardian ad litem, e.g. psychologists, behaviourists or orthopedagogues. However, children should also be provided with a legal representative to safeguard their right to their own legal counsel and representation, especially when there is a (potential) conflict of interest between the child and parents/legal guardian.¹⁹

3. Suggestions relating to article 12(2) CRC

1. NJCM suggests recommending State Parties to provide by legislation the mandatory appointment of a guardian ad litem in (formal) civil judicial proceedings in which the interests of the child are at stake, unless the child wishes to abstain from such an appointment;
2. In cases when the child's best interests are to be formally assessed by the court and (potential) conflicting interests exist between the child and parents/legal guardian, the child should be entitled to a free legal representative in their own name: i.e. a lawyer-guardian ad litem or a tandem: meaning two types of guardians ad litem (a lawyer and e.g. a psychologist or other expert);
3. NJCM proposes clarifying that if a child is heard indirectly in (formal) civil judicial proceedings by a guardian ad litem, this guardian has to accurately communicate the child's views and interests;
4. NJCM suggests adding that a guardian ad litem has to advise the court, in conformity with the applicable code of conduct,²⁰ on the child's (age and) maturity, so the court, when considering the child's best interests, is able to give due weight to the child's views with respect for the child's evolving capacities.²¹

¹³ E.g. Czechia: CRC Committee, CRC/C/93/D/139/2021, 15 May 2023 (adoption of views). Also Lundy L., Tobin J., Parkes A., *Art.12. The Right to Respect for the Views of the Child*, in: Tobin J., (Ed.), *The UN Convention on the Rights of the Child: A Commentary*, 2019.

¹⁴ CRC Committee, General Comment No. 12, para. 36; General Comment No. 14, para. 90 and CRC Committee, above n. 13, para. 8.14. See also Council of Europe, above n. 10, para. 42.

¹⁵ See e.g., Lundy L., above n.13 and Bruning M., Mol C., '*Child Participation in International and Regional Human Rights Instruments*', in: Schrama W., Freeman M., Taylor N. (Eds.), *European Family Law* (p. 13-40).

¹⁶ Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW, versie 1 april 2014, laatst bijgewerkt 14 oktober 2014.

¹⁷ See critical reflections of: Doek J., '*De bijzondere curator: een 'counsel for the child' of een instrument van de rechtbank?*' In: Smits V., De Jong R., Van der Linden A., *In verbondenheid. Opstellen aangeboden aan professor mr. Paul Vlaardingebroek ter gelegenheid van zijn emeritaat*, Deventer: Wolters Kluwer 2017, 221-234.

¹⁸ Lundy, L. (above n. 13). See also CRC Committee, General Comment No. 12, para. 79.

¹⁹ Above n. 10. Also: ECLI:NL:RBAMS:2024:5246.

²⁰ CRC Committee, General Comment No. 12, para. 37.

²¹ CRC Committee, General Comment No. 12, para 28-31 and General Comment No. 14, para. 44.

PART B: Access to justice for children with youth protection measures and (un)accompanied refugee children

Children with youth protection measures

Children with youth protection measures are vulnerable and depend on the State for their caretaking. Most children come from vulnerable homes, e.g. some from parents who are recognized victims of the ‘Childcare Allowance Affair’²², others from ‘complex divorces’,²³ where coercive control is often overlooked²⁴ due to a lack of comprehension of such behavior. These children have in common that the State generally believes they need to be protected from their parents and placed in State care. When in State care, they need safety, protection, attentive care and adequate treatment.

However, according to various reports, the State of the Netherlands unchangingly fails in the protection of these children.²⁵ There are major concerns about incorrect and incomplete reports²⁶ from the Dutch Child Protection Counsel and certified institutions (authorized to carry out youth protection measures), while courts decide on grounds of these reports on those invasive measures. In addition, in practice ‘voluntary or preventive’ youth protection measures are often imposed without legal basis. On top of this, children in youth protection care face long waiting lists, inadequate care and a lack of specialized care workers. They are

²² Toeslagen.nl, 2024, ‘68.376 mensen melden zich tussen start en einddatum voor herstel kinderopvangtoeslag’. Retrieved August 5, 2024, from: <https://herstel.toeslagen.nl/68-376-mensen-meldden-zich-tussen-start-en-einddatum-voor-herstel-kinderopvangtoeslag/>.

²³ Nederlands Juristenblad 98 (34), 2023, M. Bruning en A. van Montfoort, ‘Minder maatregelen van kinderscherming bij scheidingsconflicten: waarom en hoe?’. Retrieved August 5, 2024, from: <https://hdl.handle.net/1887/3728391>

²⁴ Dutch CEDAW Network shadow report on the Istanbul Convention, 2024, ‘Building trust by delivering support, protection and justice’, p. 26, 27, 31-34. Retrieved August 21, 2024, from: <https://www.vn-vrouwenverdrag.nl/wp-content/uploads/2024/08/Shadow-report-Building-Trust-Dutch-CEDAW-Network-14-aug-2024-DEF.pdf>; See also: Dutch NGOs shadow report for CEDAW, 2024, ‘Mind the Gap: Addressing Policy Gaps in Women’s Rights’. Retrieved August 5, 2024, from: https://www.vn-vrouwenverdrag.nl/wp-content/uploads/2024/07/Shadow_report_Dutch_CEDAW_Network_incl_references-4-July-2024def.pdf.

²⁵ Such as the following reports published in the Netherlands: J. Bhugwandass. 2024. ‘Eenzaam gesloten: onderzoek ZIKOS van Jason’. Retrieved August 5, 2024, from: https://www.expex.nl/wp-content/uploads/2024/03/06032024_Jason_Gesloten-jeugdzorg_drukker2.pdf; See also: De Jong, A, Sabahoglu, A, & Hopman, M. 2023. ‘Waar ik bij ben: Kinderen over hoe het conflict tussen hun ouders en de overheid hun eigen leven en vertrouwen in de overheid beïnvloedt’. Retrieved August 5, 2024, from: <https://www.kinderombudsman.nl/system/files/publications/2024-/Rapport%20Waar%20ik%20bij%20ben%20Kinderombudsman.pdf>.

²⁶ See for reports: Advies van de Adviescommissie Rechtsbescherming en Rechtsstatelijkheid, 2023, ‘Kinderen en ouders met recht goed beschermd’, Rijksoverheid.nl. Retrieved August 5, 2024, from: <https://open.overheid.nl/documenten/f2c28101-c5aa-4928-be3d-56c3bf3bd7bc/file>; See also: WODC.nl, 2023, ‘Actieplan droeg nauwelijks bij aan verbetering kwaliteit feitenonderzoek door jeugdbescherming’. Retrieved August 5, 2024, from: <https://repository.wodc.nl/handle/20.500.12832/3289>; And: Inspectie Jeugd en Gezondheidszorg (IGJ), 2019, ‘Kwetsbare Kinderen onvoldoende beschermd’. Retrieved August 5, 2024, from: <https://www.igj.nl/binaries/igj/documenten/rapporten/2019/11/08/kwetsbare-kinderen-onvoldoende-beschermd/Kwestbare+kinderen+onvoldoende+beschermd.pdf>;

at high risk of maltreatment, neglect, aggression or (sexual) abuse. Moreover, these children are usually placed far away from home, institutionalized wherever there is capacity, instead of nearby as to preserve the continuity of family life.

Children usually lack knowledge about rights and remedies in case of violations of their rights, or where or whom to turn to for information on and support for filing a complaint against people they depend on. Existing complaint mechanisms do not provide sufficient corrective action.

NJCM suggests recommending State Parties to provide legislation:

1. on the right of the child in youth protection to file a complaint about the child protection system and to receive adequate, funded legal assistance;
2. on simplification of existing complaint mechanisms and an age-appropriate complaints protocol, with information regarding aid, support, (judicial) representation and fundings concerning complaint mechanisms and remedies relating to youth protection measures;
3. on the reversal of the burden of proof: so that children do no longer need to prove violations and abuse, but instead youth protection workers and institutions need to disprove violations and abuse.

Furthermore, NJCM proposes to clarify and remind State Parties:²⁷

4. that States provide resources to lawyers to organize and support all children, including refugee children, in exercising their right to file complaints.
5. to offer rehabilitation and compensation to children who have suffered rights violations and lacked protection while in State care.

(Un)accompanied refugee children

Refugee children, whether accompanied or unaccompanied, are considered an especially vulnerable group. These children flee due to war, persecution, violence, human rights violations or other circumstances and are taken in by other countries.²⁸ When the capacity of a host country is under pressure, children sometimes find themselves unable to eat, sharing sleeping spaces with adults in crowded places, without access to education, lacking structured activities, and/or facing unsafe conditions in shelters.²⁹ Additionally, some host countries detain refugee children in immigration detention while awaiting deportation. Such methods of accommodation and detention are inhumane.

²⁷ CRC Committee, GC No. 5, para. 24 and articles 3 (3) and 39 CRC, and UN Commission on Human Rights, Resolution 2005/35, Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, Doc. E/CN.4/2005/L.10/Add.11.

²⁸ UNHCR. 2023. *Global Trends: forced displacement in 2023*. Retrieved July 31, 2024, from <https://www.unhcr.org/global-trends-report-2023>.

²⁹ Altare, C. et al. 2019. *Infectious disease epidemic in refugee camps: a retrospective analysis of UNHCR data (2009-2017)*. Retrieved July 31, 2024, from <https://www.joghr.org/article/12009-infectious-disease-epidemics-in-refugee-camps-a-retrospective-analysis-of-unhcr-data-2009-2017>.

Due to various barriers, including language, poor contact with or inaccessibility of legal representatives, these children may be unable to file complaints with the appropriate person or institution.³⁰

In this regard NJCM suggests the following:

6. Refugee children who experience inhumane accommodation or detention should have the autonomous right to lodge complaints with national and local government bodies responsible for these matters. States should establish national and/or local complaint systems that allow refugee children to exercise independent complaint rights at these levels, ensuring their voices are heard. NJCM therefore suggests that General Comment No. 27 includes, under the scope of the Participation sections, that (un)accompanied refugee children should have the individual and autonomous right to lodge complaints, thus ensuring immediate access to legal protection in the host State, so that States can structure their national and/or local complaint system accordingly.
7. In this context, NJCM proposes establishing a supervisory body empowered to address individual complaints from refugee children, so that there is oversight to ensure that these children can exercise their right to file complaints.
8. Furthermore, the complaints system must not only be accessible to children but also designed to be child-friendly. This is especially crucial given that asylum procedures are generally not tailored to the age of children.
9. NJCM proposes to remind State Parties that refugee children have their right acknowledged to obtain compensation for the damage they have suffered due to inadequate care during reception and/or detention period, while waiting on the outcome of their application.

PART C: Youth restorative justice is a children's right

Restorative justice is currently mentioned sporadically in previous General Comments. To better serve the interests of the child, it would be beneficial to include a dedicated section on restorative justice in the new General Comment.³¹ Giving restorative justice a more prominent place, will bring alignment with the changes in international treaties and guidelines.³²

Restorative justice focuses on bringing together the victim, the suspect/offender, and the community following a conflict or crime. The primary aim is to address and repair the harm

³⁰ Rap, S. 2020. *Access to Justice and Child-friendly justice for refugee and migrant children: international and European legal perspectives*. Retrieved July 31, 2024, from https://www.europedeslibertes.eu/app/uploads/2020/10/Rap_Access_to_Justice_and_Child-friendly_Justice-EurRL20202.pdf.

³¹ Wolthuis, A. & Chapman, T. (eds.) (2022), *Restorative Justice from a Children's Rights Perspective*. The Hague: Eleven Publishers.

³² EU Strategy on the Rights of the Child, adopted by the European Commission (2021) and the Council of Europe (2022). EU directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; European Child Guarantee op? ec.europa.eu; <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0800>.

caused, with a central role for the directly involved parties. This process often involves mediation and facilitation. In youth criminal justice, there is increased attention for mediation and restorative practices. Restorative justice is also increasingly applied in cases involving children, particularly where a pedagogical approach is emphasized.

International and national research has examined the effectiveness of restorative justice. Participants often feel seen and heard, experience a sense of justice and report high levels of satisfaction. An important aspect is their ability to move on and continue with their lives. Another effect is a reduction in recidivism, partly because young people learn and reflect on how they can handle situations differently in the future and consider possible different solutions. In cases where criminal prosecution occurs, restorative justice can be a means to ensure that children are not subjected to detention. However, there are also risks associated with restorative justice, such as secondary victimisation, power imbalances, and pressure to participate.³³

Child-friendly justice

Justice should always be friendly towards children, no matter who they are or what they have done.³⁴ Child-friendly justice is accessible, age appropriate, adapted to and focused on the needs of the child, respecting the right to participate in and to understand the proceedings, and respecting the child's right to integrity and dignity. In youth (criminal) cases, a pedagogical approach is prioritized. The principle is to consider age and development of minor victims, minor suspects, and minor convicts. Detention is considered a last resort and should be as brief as possible; the preference is to seek alternatives and to initially see if behaviour can be addressed with a warning. Youth (criminal) cases have additional safeguards.³⁵

The right to restorative justice also belongs in this list and is gaining more recognition. It also aligns with participation and the right of young people to be heard in matters that affect them.³⁶ Meaningful participation ensures that children receive age-appropriate information, can express their opinions, have the right to be heard, are taken seriously, receive feedback, and have the opportunity to appeal decisions.³⁷

Access to restorative justice for children and young people

Access to restorative justice is key to implement a child-friendly justice approach, including meaningful participation. The aim should be to consider, in principle, whether every criminal case involving a young suspect and/or offender is suitable for a restorative justice approach before proceeding to potential sentencing. Assuring that children are dealt with in a manner appropriate to their well-being, restorative justice needs to be adapted to the specific

³³ Berger, M. & Wolhuis, A. (2022), Fouten moet je kunnen herstellen, Tijdschrift Pedagogiek in Praktijk (PIP) nr. 128 – sept 2022.

³⁴ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

³⁵ Such as specially trained personnel, detention as a last resort, the right to a multidisciplinary individual assessment and evaluations.

³⁶ Article 12 CRC.

³⁷ CRC Committee, General Comment 12 (2009), The right of the child to be heard.

interests and needs of the child.³⁸ This includes specialised information and advice, child specific knowledge and specific skills and training for mediators and justice professionals.

Restorative justice interventions, such as victim offender mediation, conferencing and mediation in criminal cases, should be accessible for children and young people in *all phases* of the criminal procedure.³⁹ However, there are many barriers that hinder children from accessing restorative justice. In many cases they are not informed about, or referred to a restorative intervention, or restorative interventions are not available.

NJCM suggests that the right to restorative justice should be integrated in the youth justice system as a primary consideration by adding a dedicated section on restorative justice in the new General Comment. It is time for restorative justice to be recognized as a children's right.

³⁸ Article 40, para. 3 and 4 CRC emphasize the importance of diversion, the establishment of laws, procedures, authorities and institutions specifically applicable to children, and of child specific training for professionals working with children in the justice system. Art 40 para. 3 CRC: State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law (....).

Art 40 para. 4 CRC: A variety of dispositions (...) shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

³⁹ Meaning: A) Prevention: diverting children from the criminal procedure. B) During the criminal procedure: a justice professional can refer to mediation in criminal cases. Deprivation of liberty can be prevented and only used as a measure of last resort. C) And after trial / in prison: A wider restorative circle or group conference can focus on restoring relations and reintegration to society.