

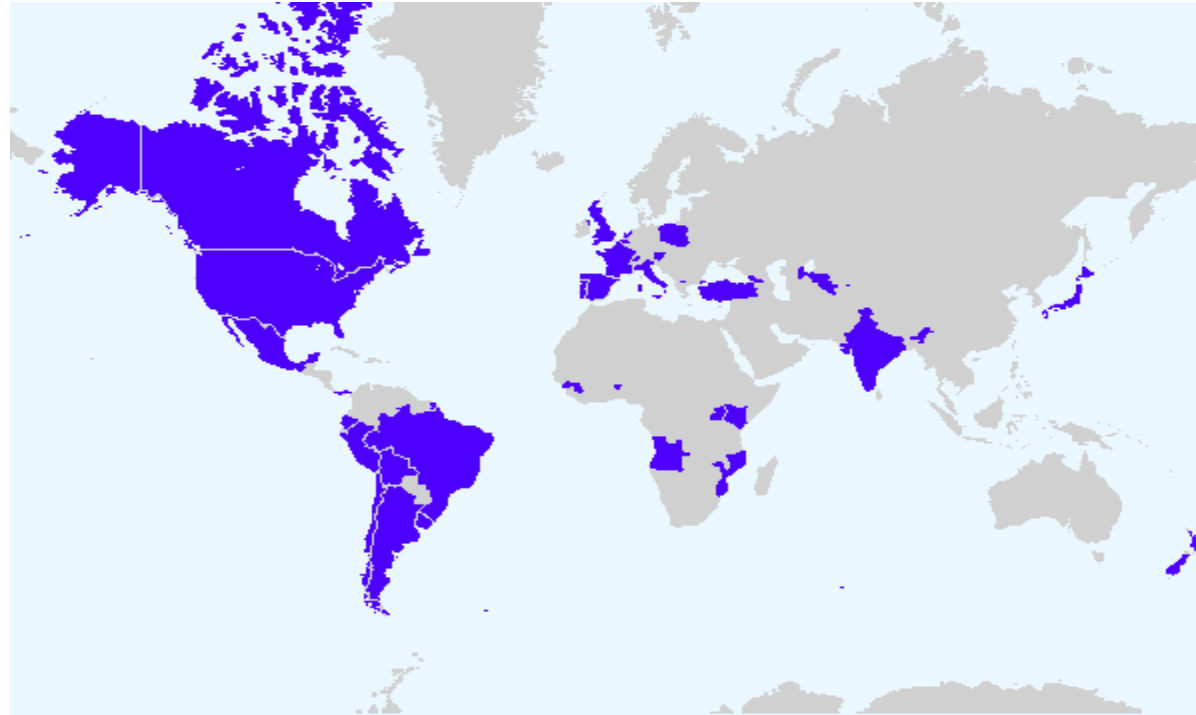
# Child Participation in Family and Child Protection matters

AIMJF's collaborative research within the Justice System in 36 countries

# The collaborative research

- Respondents are mainly members of the Association, judges and magistrates, and some other legal professionals who collaborate
- Responses reflect legal and practical aspects of child hearing
- In some countries where there were no specific legal provision on the aspect under analysis, respondents have provided information about their own experience, which may vary within the same country
- Some countries did not answer all questions, due to different reasons (lack of legislation, cultural aspects), with reflection in the percentage of data regarding each issue

# Overview of participants



# Countries participating in the research

Africa	Americas	Europe	Asia	Oceania
Angola	Argentina	Austria	Georgia	New Zealand
Benin	Bolivia	Belgium	India	
Cape Verde	Brazil	England & Wales	Japan	
Guinea-Conacry	Canada	France	Turkey	
Kenya	Chile	Georgia	Uzbekistan	
Mozambique	Ecuador	Italy		
Uganda	Mexico	Netherlands		
	Panama	North Macedonia		
	Peru	Poland		
	United States	Portugal		
	Uruguay	Spain		
		Switzerland		
		Turkey		

# Some quick statistics

- Europe: 13 countries, 36,11% of the sample
- Americas: 11 countries, 30,55%
- Africa: 7 countries, 19,44%
- Asia: 5 countries, 13,88%
- Oceania: 1 country, 2,77%

# Research focus and scope

- The research has focused on procedural aspects of the hearing, taking also into consideration the space and ambience where it takes place in two areas: family and child protection-matters.
- Irrespective of legal classification of Family Law and civil Child Protection matters (in some countries as private or public law), both in cases of (high) conflict family disputes and in neglect or violence cases, the place of the child in the family is at stake and the respect of their individual rights is an issue.
- Therefore, conflict within the family is the common ground of analysis
- The research has not focused on child-inclusive mediation, whereas we consider a very important issue to be analyzed
- The right to be heard is the core element of the right to participation and, therefore, the research focused on various elements of procedural due process that could enable children to deal with the Justice System, enforcing their rights and empowering their views on the issues discussed in the proceedings

# The role of children in the proceedings

- When recognizing that a certain matter affects the child, therefore that there's a personal interest in the decision to be taken, what's the nature of the child's intervention: do they become a party in the proceeding? An interested person? Or do they remain without a legal clear characterization?
- According to the respondents, in 21 countries (58%), children in some measure are considered as parties, although in many of them just in some cases, mostly in child protection matters. Another very commonly situation referred to become a party occurs when there is conflict of interests between the child and their parents
- In 38% of the sample (14 countries), children are not considered as parties and in one of them, Switzerland, they are considered as interested person.
- It's important to remark, however, some singularities in the answers. For instance, in the Netherlands children aged 12 or older have granted the possibility of approaching the court informally and asking for a specific decision

# Legal representation (1)

- The procedural right to be heard is connected with the right to legal counsel, especially when the right to be heard occurs within the Justice System. Legal counsel is important to provide information, to overcome obstacles and to achieve a substantial and procedural equality in the proceeding as a condition to have a democratic decision making process.
- The majority of the countries in our sample 26 out of 33 respondents guarantee legal representation for children, at least in some circumstances, such as conflict of interests.
- Importantly, when a lawyer is appointed to a child, the professional has equal powers as any other party in the proceeding (24 out of 26 respondents). In one country there are limits to the participation of legal representative and in another one the issue is not discussed.



# Legal representation (2)

- It's known the debate on the nature of the legal representation of children, whether representing the expressed views of the child (client-directed lawyers) or the professional's understanding of what should prevail in his/her best interests (best-interests attorney).
- In the majority of the countries the attorney should represent the views of the child (14 responses). In 9 countries, the views of the child must direct the attorneys intervention, except if it's not in accordance with the best interests of the child.
- In one country, the ethical commitment is geared to the court, who appoints the attorney for the child, and expects advice and recommendations based solely on what is in the best interests of the child

# Invitation and consultation to participate

- Participation is a right of the child, not a duty. How do Justice consult children if they really want to participate? And how they want to be heard?
- The research revealed that in the majority of the countries (24) participation is voluntary, but still in a considerable number of nations it is not the case. In 24 countries participation is theoretically voluntary, as some respondents expressed concern that, in practice, children are obliged to attend the court.
- In 7 countries, participation is not voluntary, especially in child protection cases.

# Who consults the child? And how?

- However, if we consider who consults the child, one can see a great variety of responses.
- In 6 countries, the consultation is made by the Judge him/herself.
- In 5 countries, it's the lawyer or the guardian ad litem who consults the child whether he or she wants to be heard or not by the Judge.
- In 5 other countries, social workers or psychologists (both from the Judiciary or social services) are responsible for this consultation.
- In 2 countries consultation is made by letter to the child and in one it's the district attorney who consults.
- In the majority of the countries, there is no special procedure for approaching the child when consulted about the interest to participate (22 countries), but in 8 countries there is reference to some experiences on how to give some previous information to children about the system.

# Who hears the child? And how?

- A clear majority of the countries (28) reveal that Judges do hear the children, although with some restrictive criteria.
- However, it's also stated by many countries that the practice is not uniform in the countries, depending not only of a case-by-case analysis, but also on the (lack of) confidence of Judges to hear the children. In some countries, in spite of being possible that the child be heard by the Judge, it does not occur often in practice.
- This research showed that in half of the countries (15 out of 31) there are some guidelines or protocols on how to communicate with children, although in many of them those guidelines are not specific for family proceedings, but related to child victims.
- If there are some connections between the two situations (the need of rapport, of a free recall and expression by the child, the prevalence of open questions), forensic interview protocols were developed for the specific purpose of gathering evidence in criminal proceedings. The nature of child participation in family and civil child protection proceedings is not the same and a different approach is required, showing that we are dealing with another kind of participation in court.

# Indirect participation

- In 9 countries, indirect participation is presented as the main modality of child participation in family and child protection matters, although in some of them as much as direct participation.
- For the majority of the countries, indirect participation is a subsidiary modality.
- Among the modalities of indirect participation, it's possible to see a clear preponderance of assessments by social workers, psychologists and pedopsychiatrics (25 countries).
- As a second modality, the representation by the lawyers (8 countries), although, as we have already seen, legal representation is not always client-directed.
- Videoconferencing and Gessel Camera is mentioned by 5 countries and written statements by 3.

# Opportunities for child participation

- Child participation aims to offer the child an opportunity to be heard and to have his/her views duly considered and weighed in the decision-making process. Usually proceedings involve more than one decision that causes impact on the child's life, normally an initial provisional decision and a final, after mediation or trial. Incidental proceedings may also take place, with other opportunities for participation.
- In 20 countries, children have the opportunity to participate in all occasions that a decision is required and may affect the child.
- In 10 countries there are more clear limits to child participation during proceedings, normally after hearing the parents and prior to the final decision.
- In three countries, the issue is not specified in the law and no reference about the common practice has been shared.

# The extension of child participation

- In 18 countries, the child has the opportunity to bring new questions for judicial appreciation during the hearing, not limiting themselves to the issues addressed by their parents or other parties.
- In four countries, the child participation is framed by the issues brought by their parents, but incidental proceedings are possible.
- Some countries mentioned that there is not a clear link between the child's participation and the issues addressed, being the child invited to tell his/her history, which has an impact on how this history will or not impact the decision-making process.

# Direct participation: who is with the judge and the child? (1)

- In seven countries, the judge hears the child in private, without the participation of any other professional.
- In 27 countries other legal professionals are present to the hearing.
- Among these, in 9 of these countries, the lawyers of the other parties are in the room.
- In six of these countries, the child defender, child guardian or the district attorney is present.
- In three countries, in addition to the child defender, a child assistant or a social worker/psychologist is in the room.
- In two countries, parties may also stay in the room.



# Direct participation: who is with the judge and the child? (2)

- Two countries mentioned that Gessel Chamber are used to grant the other parties the opportunity to follow the child hearing and in one this possibility is granted by a video-link.
- In one country, the issue is not specified by law and no answer has been provided; one country mentioned the possibility of just a support person be present with the child and the judge.
- It seems clearly that children are normally not heard in front of their parents.
- Different configurations are observed in order to balance the possibility of safety and spontaneity and the rights of other parties.

# Who dialogues with the child?

- In 28 countries it's the Judge who interacts with the child when it's the case of direct participation.
- Forensic interviewers are mentioned in 4 countries. In two, the lawyers make the questions when the child gives evidence
- In case the interview is conducted by the Judge, there is some kind of interaction by the other parties, with the possibility of making questions to the child in 22 countries.
- In 6 countries, there is no possibility of other parties to make questions.
- The issue is important in terms of impact of the child hearing in the decision, whether and in which extent the Judge is or not allowed to take the child's view into consideration if it was not allowed to other parties to follow the act (procedural due process)

# Criteria for weighing the child's views

- According to the respondents, there is a variety of criteria to give due weight to the child's views.
- In ten countries, the child's views are considered when in accordance to the child's best interests.
- In 10 countries, age and maturity are both considered by the Judge.
- In 6, only maturity, without any reference to age, is a criteria for giving weigh to the child's view.
- In 6 countries, no specific criteria is mentioned on the law.
- In one country, age is the only criteria taken into account to have the child's view in mind.

# Age and maturity: criteria

- When age is mentioned, in 7 countries 12 y.o. is the paramount. In 3 countries, 10 y.o. and in another group of 3 countries, 13 y.o.
- Six other countries mentioned ages: 7, 8, 9, 10, 14 and 15 y.o., each of this age range with one representative.
- Regarding the criteria to decide whether the view of the child is or not mature, there is no clear picture from the research either.
- Some respondents mentioned the importance of the child's views when in accordance with the child's best interest (11 countries), another relevant group shows the importance of the child views by itself (9 countries) and in 4 country, maturity is considered according to psychological criteria.

# Decision's announcement and communication: 5 aspects

- **A)** In the majority of the countries, the decision is not taken in front of the child (21 countries), but in 12 countries, if the child wants to and at judicial discretion, it is possible that the child remains in the room.
  - In 6 countries it is mentioned that the child remains in the room when the decision is announced.
  - **B)** In 19 countries, the Judge has a role in communicating the decision to the child. In 7 countries, the parents or the lawyers or guardian ad litem communicate the decision.
  - No provision on the issue was mentioned by 4 countries and in 3 of them other professionals are responsible for this communication, such as social workers or psychologists.
  - **C)** With the exception of two countries, there is no protocol or guidelines on how to communicate the decision to the child.
  - **D)** 21 countries mentioned the theoretical possibility granted to the child of clarification, in a direct interaction with the judge, if he or she does not understand some aspect, although many respondents mentioned this situation as rare.
  - **E)** Communication and clarification are important to grant the child the right of appeal. With the exception of 6 countries, all respondents informed that the child could challenge the decision by means of an appeal.
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# Ambience, solemnity and formalities

- The ambience where the child is heard is important to provide conditions for spontaneity, for safety.
- There is a slight preponderance of hearings in chambers or judge´s office: 16 countries.
- In 14 countries the child is heard in the regular courtroom. Respondents have shared photos of their courtrooms and there are considerable differences regarding the formality of those spaces.
- In 4 countries it is not specified where the child should be heard and the decision remains at judicial discretion.
- Two countries referred the possibility of hearing the child outside the court, either in their houses or in shelters, services for children or other public spaces, with examples of itinerancy of courts to the communities (buses, boats).
- Regarding the dressing´s formalities, in the majority of the countries business attire is predominant among Judges (24 countries).
- In 5 countries, Judges use formal dressing (gowns and wigs) when hearing the child and in 3 it is not specified in the law and respondents have not informed how it occurs in practice.

# Concluding remarks (1)

- Any of the questions have reached unanimity
- In contrast to other areas of child rights, where more detailed guidelines have reached international consensus, in family and child protection matters differences are greater and more intense. Family and civil child protection matters should be object of a more focused attention on guidelines.
- In most of the countries, there's limited recognition of children as equal legal parties. In spite of recognizing conflict of interests as a possibility to enable an autonomous legal status in judicial proceedings, it's still to be understood how conflict of interests are identified and recognized.
- Legal counseling and representation is, therefore, of great importance, irrespective of existing or not conflict of interests.
- The lack of a clear protocol on how to hear the children does not allow to understand clearly the scope, range and extension of the issues addressed during the hearing.
- The research shows that different kinds of direct child hearing take place in family and child protection matters, which influence the organization of these procedural act.



# Concluding remarks (2)

- According to the practices related in the research, there is a variety of possibilities of child participation in family and civil child protection matters:
- Children may have a more proactive participation, with the status of legal party or interested person with specific and autonomous legal representation and procedural rights;
- Children may be consulted about the issues discussed in the proceedings (consultation);
- Children may have an opportunity to just bring their history, without no clear intentionality of the hearing regarding the proceedings (the judge in a more passive attitude, just open to the child's inputs) = meeting;
- Children may give evidence, with a major concern of due process guarantees for other parties.



# Concluding remarks (3)

- These modalities have an impact on who is present during the hearing, but also on how influential child participation will be in the decision making process and in the manner the Judge will consider and weigh the child's views
- Children have the right, not the duty, to participate, but conditions to decide if and how he/she would like to take part in the proceeding should be improved, both in terms of consultation and information provided to children
- The research shows as well the importance of flexibility and new (technological) resources to provide conditions for children to participate, but, at the same time, to preserve the rights of other parties and, in some extent, to be part of this procedural act
- Regarding the decision, there are still great differences on how to weigh the child's views and how to consider what is a mature child.
- In spite of recognition by law of the right to appeal, there's a lack of care in the communication of the decision in many countries, with the risk of ineffectiveness of this right (for instance when the decision communication is left to the parents and no legal representation is granted)

# Concluding remarks (4)

- Identification and sharing of good practices is vital
- Continuous research is also fundamental to understand:
  - critical procedural aspects to better balance the right to family life and privacy and the rights of the child within the family;
  - the modalities of child hearing and it's meaning and influence regarding the decision making process;
  - the limits of legal intervention in name of the best interests of the child, having in mind the intrusive and controlling history of justice in family and social life
- It's also important to have in mind not only individual but also social rights of children in the context of the justice system.
- In many countries where collective actions are recognized by law, there could be (and there is) collective participation of children when their rights are at stake
- It's vital to have the individual and collective participation of children in the researches (designing, participating as researchers, discussing the outcomes) and in the design, implementation and monitoring of judicial policies

# Argentina – Family Courtroom



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# Austria

**Courtroom**



**room for interaction with children**



# Benin

## Regular Courtroom



## Chambers/Judge's office





# Brazil

## Family court



## Family court



# Brazil - some examples of Family Court itinerancy



# Cape Verde – Courtroom





# Canada - Québec



# Chile – Gessel Chamber



# England & Wales



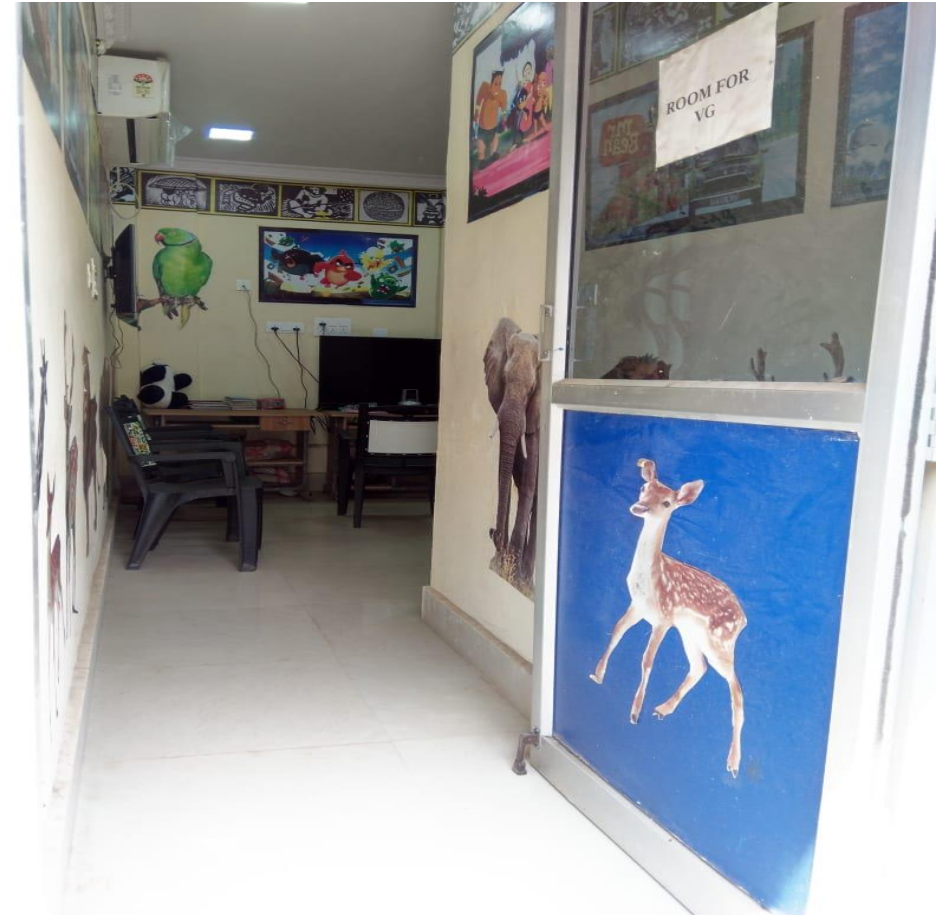
# France



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# India - videolink



# Italy

## Office for hearing the children in protection matters



## Room for childhearing (videolink)





# Mexico



# The Netherlands



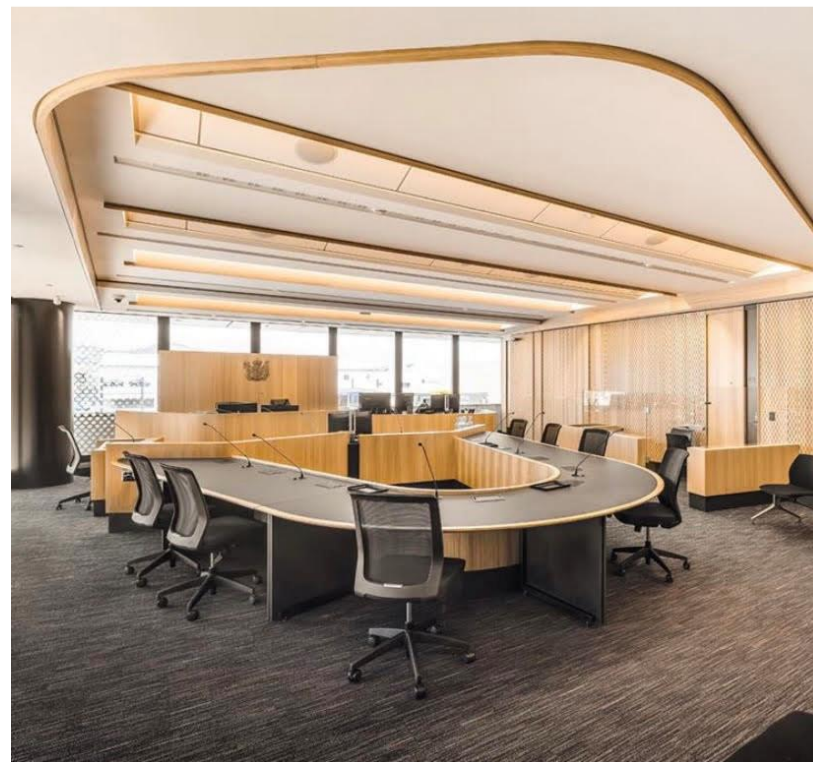


# New Zealand

## Chambers



## Courtroom



# North Macedonia





# Panama

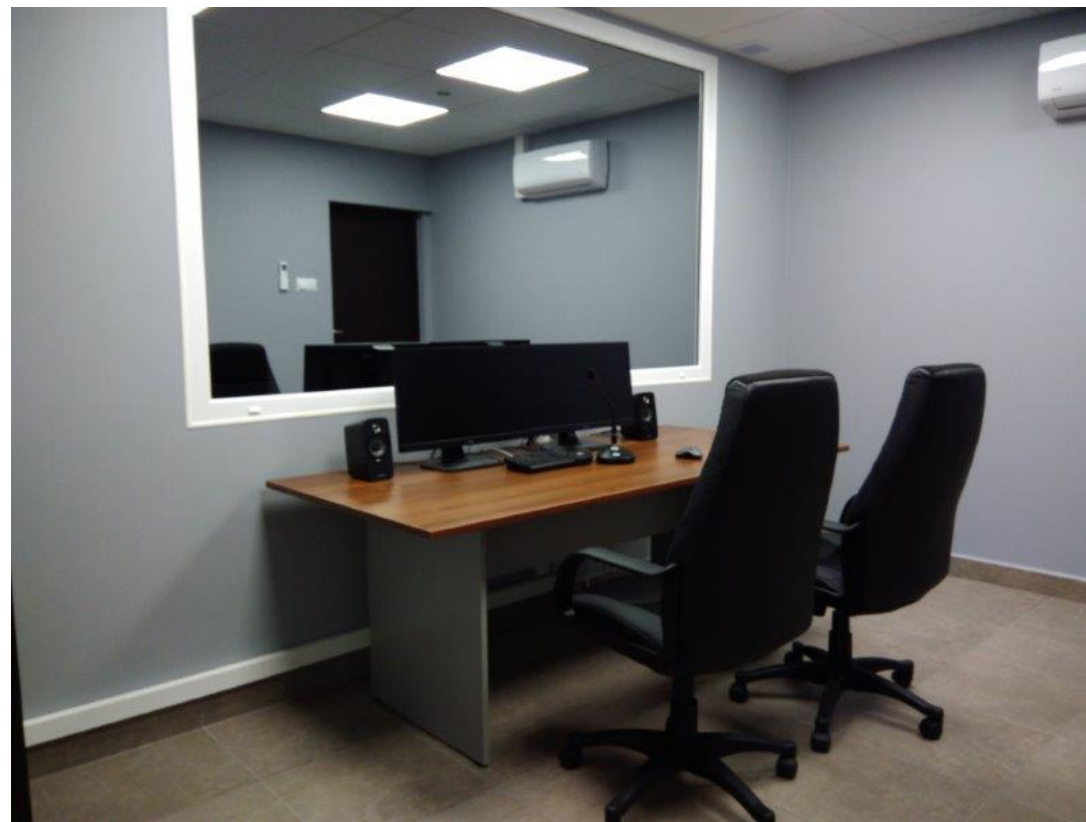


# Peru – Gessel chamber and room for Family meeting





# Poland

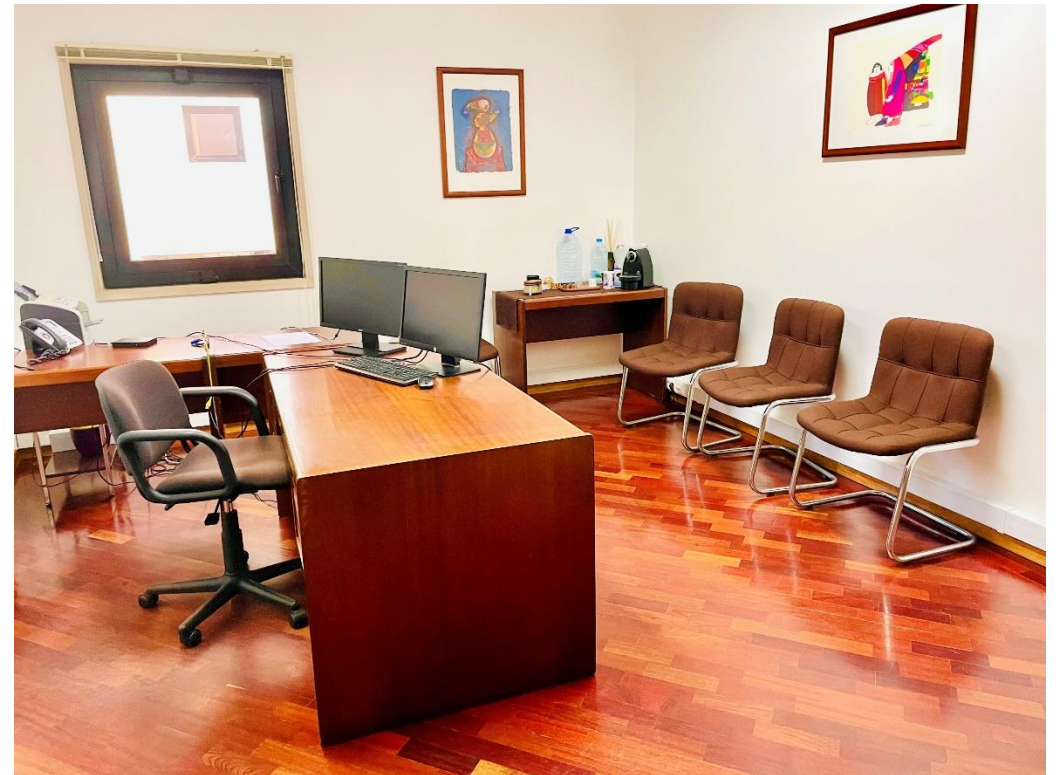


# Portugal

## Courtroom



## Chambers



# Spain



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# Switzerland – Judge's office



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# Turkey



# Uganda



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# Uruguay - Courtroom



USA



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