The right to protection of children testifying in criminal proceedings

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"I REJOICE in the Lord, and again I REJOICE"

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ABSTRACT

The Bill of Rights of the *Constitution of the Republic of South Africa*, 1996 guarantees the protection of children in all circumstances and in all matters concerning them. The *Constitution* provides for the best interests of the child as a paramount consideration in all matters affecting the child (section 28 (2)) and for the right to protection from maltreatment, neglect, abuse or degradation (section 28 (1) (d)). On the other hand the *Children's Act* 38 of 2005 offers comprehensive protection of children predicated upon internationally recognised guiding principles like the best interests and participation. The *Criminal Procedure Act* 75 of 2008 provides for the appointment of intermediaries for children testifying in criminal proceedings (section 170A). However, the term "child witness" is not explicitly mentioned in any of these legal instruments. In South Africa, the *Service Charter for Victims of Crime in South Africa* (the Victims' Charter) and the *Minimum Services Standards for Victims of Crime* provide for the protection of child witnesses. Reference is made to international law for the protection of child witnesses, instructed by section 39 (1) (b) and (c) of the *Constitution* articulating that in interpreting the Bill of Rights, a court, tribunal or forum must refer to international law, and may refer to foreign law. The *United Nations Convention on the Rights of the Child* (1989), the *African Charter on the Rights and Welfare of the Child* (1990) and the *United Nations Guidelines on Justice for Child Victims and Witnesses to Crime* (2005) provide an international framework for the protection of child witnesses in criminal judicial processes. Further, foreign jurisdictions like Israel and Scotland have statutory instruments for the protection of child witnesses in criminal proceedings. Considerably, South Africa has made strides in an attempt to protect children testifying in criminal proceedings through statutory provisions and case law.

Key words: Child witness, criminal proceedings, best interests of the child, intermediary

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
BJSW	British Journal of Social Work
CARSA	Child Abuse Research a South African Journal
CPA	Criminal Procedure Act
CRC	Convention on the Rights of a Child
IJCR	International Journal of Children's Rights
IJLP	International Journal of Law and Psychiatry
NPA	National Prosecuting Authority of South Africa
RAPCAN	Resources Aimed at Prevention of Child Abuse and Neglect
SACJ	South African Journal of Criminal Justice
SALC	South African Law Commission
SAPR/PL	South African Public Law
SAPS	South African Police Services
THRHR	Journal of Contemporary Roman-Dutch Law
VWA	Vulnerable Witnesses Act of Scotland

"It is therefore very pleasing to note that the rights of the Victims Charter are being translated into reality within the criminal justice system as a whole."

President Jacob Zuma (10 December 2009)

Chapter 1: Background of Study

1.1 Introduction

The chapter introduces the research, state the problem statement as justification for the study and explains the reasons why the research was undertaken. Further, it points out the challenges that children[1] who testify in criminal proceedings encounter. This is followed by the structure of the mini-thesis and an outline of the research methodology.

More children are in interface with the "criminal justice system"[2] today than ever before, due to an increase in violence.[3] It has been recorded in South Africa that a total number of 167 264 cases of crimes committed under violent circumstances were documented during the 2014/2015 period.[4] With such high rates of violence occurring in society, it is without doubt that violence is also committed against children. Children are witnessing crime more than as it were in history.[5] To support this, it is noted that a total of 50,688 children (not cases) were recorded to have witnessed violent crimes in South Africa; ranging from common assault, assault with grievous bodily harm, attempted murder, murder, common robbery and sexual related cases.[6]

Criminal cases are prosecuted by the National Prosecuting Authority of South Africa (NPA) which has the constitutional mandate and power to institute criminal proceedings on behalf of the State.[7] The prosecution is *dominus litis*, endowed with the power and discretion to decide which witnesses to call for the purpose of establishing a *prima facie* case,[8] and this includes calling in children as witnesses. Research shows that child

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1 A child is defined as any person under the age of 18 years, in terms of A 1 of the United Nations (UN) *Convention on the Rights of a Child* (CRC), A 2 of the *African Charter on the Rights and Welfare of the Child* (ARWC) and s 28(3) of the *Constitution of the Republic of South Africa,* 1996 (*Constitution*).

2 Sanders *Criminal Justice* 1, defines the criminal justice system as a complex social institution which regulates potential, alleged and actual criminal activity.

3 Schoeman *A training program for Intermediaries* 4.

4 South African Police Service (SAPS) Crime Report 2014/2015.

5 Schoeman *A training program for Intermediaries* 4.

6 South African Police Service (SAPS) Crime Report 2011/2012.

7 Section 179 of the *Constitution* and the preamble of the *National Prosecuting Authority Amendment* 32 of 1998.

8 *R v Brown and Brown* [1997] 1 Cr.App para 113.

witnesses[9] struggle with various difficulties in criminal justice processes, attributed to their lack of maturity and developmental shortcomings.[10] Children's participation in the criminal justice system, especially when they testify in court, is substantially undermined by the fact that the criminal court processes are not easy to understand.[11] Children find it difficult to understand the procedures and language used in court during criminal trial proceedings.

Cognisant of the vulnerabilities of children testifying in criminal proceedings, amendments were made to accommodate child witnesses and ensure their full participation.[12] As a result, provision has been made for the conducting of trials "*in camera*"[13] in cases involving children.[14] Further, the amendments introduce the concept of intermediary services.[15] Thus, where it appears to a court that a child witness would be exposed to undue mental stress or suffering if he or she testifies at such proceedings,[16] the court is

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9 Child witness is defined, in terms of para 9 (a) of the UN *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (2005) (herein UN Guidelines), as any person under the age of 18 who is a victim of or witness to a crime, regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders. The study is limited to this group of persons with the exception of child offenders.

10 Muller and Van de Merwe 2005 *SACJ* 42-43.

11 Schoeman *A training program for Intermediaries* 76.

12 Van de Merwe *Children as Victims and Witness* 569.

13 It means that proceedings involving a child (accused, complainant or witness) are conducted behind closed doors, restricting the public or any class thereof, and the media from being present at such proceedings. See s 153 (1) of the *Criminal Procedure Act* 51 of 1977 (herein the *CPA*), and s 63 (5) of the *Child Justice Act* 75 of 2008 (hereinafter *CJA*).

14 Section 153 (5) of the *CPA* states that:
"Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court".

15 The concept of intermediary services (also referred to as the intermediary system) became a reality in 1993, (amendment in terms of section 61 of the *Children's Act* 38 of 2005(*Children's Act*)) introduced in the Children's Court. The concept ensures the protection of child witness from suffering undue mental stress by the appointing of a competent person as an intermediary. The witness would give his or her evidence through that intermediary. Consequently, no examination, cross-examination or re-examination of the child witness, in respect of whom a court has appointed an intermediary, except examination by the court, shall take place in any manner other than through that intermediary.

16 Section 170A (1) of the *CPA* states that:
"Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary".

authorised to appoint an intermediary.[17] The provisions to allow a child to testify via an intermediary applies to all children who are witnesses in criminal proceedings,[18] with the exception of child offenders accused of committing a crime.[19]

The *Constitution* guarantees the protection of children in South Africa.[20] Of particular importance are the provisions proclaiming that; the best interests of a child are paramount in every matter concerning the child,[21] and that children have the right to protection.[22] The *Children's Act* further stipulates that the best interests of children are paramount in all matters concerning them.[23] However, currently there are no clear guidelines on how an intermediary could serve as a frontline person in assisting child witnesses before and during criminal court proceedings.

The *Constitution* provides that when interpreting the Bill of Rights[24] and any legislation,[25] consideration shall be made to international law and foreign law. In this case reference has to be made to the CRC,[26] the ACRWC,[27] the UN Guidelines,[28] and any other relevant legal instrument. The UN Guidelines set forth good practice founded on the unanimity of

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17 An intermediary is a qualified and competent person who can act as a facilitator assisting the child through criminal trial, registered and appointed as such in terms s 170A (4) (a) of the *CPA*. See s 170A (4) (a) of the *CPA* provides for the Minister to determine the persons or category or class of persons who are competent to be appointed as intermediaries (such as medical practitioners (paediatricians, psychologists), family counsellors, child care workers, social workers, educators and psychologists).

18 *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8.

19 Child offenders are specially dealt with in terms of the *Child Justice Act* 75 of 2008.

20 Section 28 of the *Constitution* enumerates the rights of children and guarantees their protection thereof.

21 Section 28 (2) of the *Constitution,* also see A 3 of the CRC, and A4 of the ACRWC.

22 Section 28 (1) (d) of the *Constitution* provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

23 Section 9 of the *Children's Act* proclaims that; "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied".

24 Section 39 (1) (b) and (c) of the *Constitution* provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law.

25 Section 233 of the *Constitution* provides that: "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

26 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

27 Doc. CAB/LEG/24.9/49 OAU, adopted by the African Member States of the Organization of African Unity, 11 July 1990 and entered into force 29 November 1999.

28 Adopted in 2005 by the Economic and Social Council of the United Nations. The recommendations were made for South Africa to adopt it in May 2005, and thereafter the UN Guidelines were adopted in South Africa.

contemporary knowledge, norms, standards and principles. The UN Guidelines deliver a useful guide to the concept of the rights of child witnesses in criminal proceedings to have the child's best interests given primary consideration in all matters. The rights of child witnesses are enumerated and explained, including the right to dignity, the right to receive special protection and assistance, and the need to take preventive measures.[29]

The study seeks to examine the use of intermediary services in the protection of child witnesses, and whether the use thereof is in their best interests. This is considered based on the common law position under the law of evidence of competency and compellability[30] of witnesses.[31] Young age is not a factor for the exclusion of a person from testifying in criminal proceedings.[32] Consequently, when compelling children of any age to testify in criminal proceedings, their best interests shall be a paramount consideration. The interests of the NPA to prosecute criminal cases, and the judicial interests in the administration of justice, should be balanced with the best interests of the child witness in such proceedings.

The research is based on a desktop review, relying on textbooks, international and national legal instruments, electronic sources, journal articles and case law. The study also makes reference to foreign law and practices concerning the protection of child witnesses in criminal proceedings to indicate the relevance, importance and viability of similar practices.

The study is structured as follows: the second chapter is a discussion of the South African legal framework for the protection of child witnesses. The third chapter ventilates the international framework for the protection of child witnesses, calling upon relevant legal

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29 In the preamble the Guidelines set out the following principle, 'While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration'.

30 It connotes an obligation to testify enforceable by law.

31 Section 192 of the *CPA* provides that:
"Every person not expressly excluded by the Act from giving evidence shall, be competent and compellable to give evidence in criminal proceedings". The exclusion from competency is related to mental illness, or any imbecility of mind the due to intoxication or drugs or any other affliction or mental disability.

32 Section 194 of the CPA provides that:
"No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled".

instruments into analysis in line with section 39 (1) (b) of the *Constitution*. The fourth chapter considers foreign law, particularly intermediary services in Israel and Scotland,[33] as similar jurisdictions. The concluding chapter is a summary of the submissions, and provides for recommendations which may be adopted by South Africa in an effort to protect child witnesses.

[33] The choice of the countries are based on the researcher's preference and the fact that the countries have well established intermediary service systems, for instance the Israeli intermediary system was established in 1956.

Chapter 2: Protection of child witnesses in South Africa

2.1 Introduction

This chapter explores the right to protection of child witnesses in the South African legal system as they participate in criminal proceedings. The right of every child is enshrined in the *Constitution* as the supreme law,[34] and subsidiary legislation concerning the welfare of children.[35] The *Constitution* provides for the protection of children in South Africa.[36] Further, it provides for an all-encompassing right and expansive guarantee,[37] proclaiming that a child's best interests are of paramount importance in every matter concerning the child.[38] This constitutional injunction is all-embracing and relates to all matters not explicitly mentioned therein, for instance, in cases of child witnesses testifying in criminal proceedings. The *Children's Act* also provides for the best interests of the child,[39] and a practical guide on how to apply it.[40]

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34 Section 2 of the *Constitution* provides for the supremacy of the *Constitution* proclaiming that any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

35 *Children's Act*, *CJA*, *CPA* amongst others.

36 Section 28 (1) of the *Constitution* proclaims that every child has the right:
a) to a name and a nationality from birth;
b) to family care or parental care, or to appropriate alternative care …;
c) to basic nutrition, shelter, basic health care services and social services;
d) to be protected from maltreatment, neglect, abuse or degradation;
e) to be protected from exploitative labour practices;
f) …
g) not to be detained for infringing the penal code except as a measure of last resort;
h) to legal representation at state expense, in civil proceedings affecting the child …; and
i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

37 *Sonderup v Tondelli and Anor* 2000 ZACC 26 para 29 where Goldstone J interpreted the best interests of the child enshrined in the *Constitution* as an expansive guarantee.

38 Section 28 (2) of the *Constitution*.

39 Section 6 (2) of the *Children's Act* provides that:
a) All proceedings, actions or decisions in a matter concerning a child must respect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7, and the right and principles set out, subject to any lawful limitation;
b) respect the child's inherent dignity;
c) treat the child fairly and equitably;
d) protect the child from unfair discrimination on any ground, including on the grounds of the health status, disability of the child or a family member of the child;
e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and
f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has."

40 Sections 7 and 9 of the *Children's Act*.

The term "child witness" is used to refer to;

> Any person below the age of eighteen years who is or may be required to give evidence, or who has given evidence in any criminal judicial proceedings.[41]

This definition is also in-tandem with the one under international law.[42] However, this discussion focuses on a child who is a victim or survivor of a crime rather than an accused who testifies in their own trial in terms of the *CJA*.

This chapter looks at the historical background of child witnessing, the testifying of children through an intermediary, the use of protective measures by the witness and the constitutional guarantees thereto. Further, the rights of a child, as a child and a as a witness, are discussed as enshrined in the Bill of Rights and the *Children's Act*. The protection of child witnesses with disabilities[43] testifying in criminal proceedings is also considered and discussed.

2.2 A historical overview

In order to fully grasp the concept of child witnesses, a historical perspective providing the psychological[44] and legal reasoning on the challenges associated with children testifying in court is necessary. Research indicates that child witnesses struggle with numerous difficulties in the criminal justice system,[45] and this is attributed to their lack of maturity and developmental short-comings.[46] Consequently, this has generated into discussions of competency and credibility of child witnesses, resulting in the testimony of children being treated with caution for the reason that:

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41 Section 1 of the *Witness Protection Act* 112 of 1988 of South Africa.

42 See footnote 9 above.

43 The discussion of child witnesses with disabilities is too broad to get detailed attention in this study, as it may form a separate research topic. However, the study briefly outlines to the need to protect children with disabilities who testify in criminal proceedings.

44 This pertains to the emotional and intellectual developmental stages of children in relation to competency and credibility in providing reliable evidence in court.

45 Van der Merwe "Children as victims and witnesses" 567.

46 Muller and Van de Merwe 2005 *SACJ* 43.

> Children are egocentric, highly suggestible, their memories are unreliable, they have difficulty in distinguishing facts from fantasy and they do not understand the duty to tell the truth.[47]

The long standing distrust of child witnesses is traceable from the British legal system,[48] in the *Salem Witch Trial* case of the 17th century.[49] This discourse refrains from the competency, suggestibility, credibility and compellability debates and arguments, save to mention that it is established that children suffer hardships through testifying in criminal trials.

South African courts have also experienced the difficulty to deal with child witnesses in the administration of justice.[50] The recognition of the vulnerabilities of child witnesses came to light in the late 1980's, prompting the introduction of more specialised approaches and innovative child-centred procedures.[51] These measures include the protection of the child witness from direct confrontation by the accused or his or her legal representative. This involves placing a child in a separate room other than the courtroom, and making use of an intermediary and closed circuit television (CCTV).[52]

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47 As per Ebrahim JA (as he then was) in *S v S* 1995 (1) SACR 50 (Z) 54H-I.

48 Ceci and Bruck *Jeopardy in the courtroom* 1995.

49 According to Hill in his book, *A Delusion of Satan* (1995); Salem saw nineteen (19) villagers executed as a result of the evidence given by a group of children. The case and executions started when a nine (9) year old Elizabeth (Betty) Parris and eleven (11) year old Abigail Williams (the daughter and niece of Samuel Parris, Minister of Salem Village) began having fits, including violent contortions and uncontrollable outbursts of screaming. The girls contorted into grotesque poses, fell down into frozen postures, and complained of biting and pinching sensations. In February, arrest warrants were issued to apprehend certain women, whom the girls accused of bewitching them. More than one hundred and fifty (150) villagers were jailed before the trials began. Meanwhile, the number of afflicted girls continued to grow. In May of the same year, the newly appointed governor William Phips ordered the establishment of a special Court of Oyer (*to hear*) and Terminer (*to decide*) on witchcraft cases. Even though the children had at later points during the trial attempted to recant their accusations, the court handed down its first conviction, on the 2nd of June 1692, and the first execution on the 10th of June of the same year. Five (5) more people were hanged in July, five (5) more in August and eight (8) in September of the same year, at what became known as Gallows Hill in Salem.

50 *S v Vilakazi* 2009(1) SACR 552 (SCA) para 21, the court stated that the prosecution of sexual crimes always presents peculiar difficulties especially when the complainant (witness) is a young person. From prosecution it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence and the meticulous attention to detail. For judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence.

51 Morgan and William 1993 *BJSW* 23.

52 Schoeman *A training program for Intermediaries* 35.

The process involved extensive investigation and research into the challenges of child witnesses in the criminal justice system.[53] The South African Law Commission (SALC) concluded the report by recommending that special measures should be taken when a child is testifying in criminal proceedings. This is when the proposal to have an intermediary system was tabled as a possible solution resulting in statutory amendments.[54] As a result, in July 1993, an intermediary was appointed for the first time in South Africa.[55] The use of intermediary services is discussed in sub-sections 2.3 below.

The protection of victims and witnesses is complemented by the adoption of the *Service Charter for Victims of Crime in South Africa* (the Victims' Charter) and the *Minimum Service Standards for Victims of Crime* (Minimum Service Standards) (2004). The Victims Charter and Minimum Service Standards are significant documents available to witnesses to crime for claiming their rights and to act in ensuring the realisation of these rights. The same enumerate the rights of victims and witness to crime, without specific reference to children. It is submitted that children, as human beings, have the right to enjoy the rights enumerated in the Victims Charter and the Minimum Service Standards.

2.3 Intermediary services

2.3.1 Testifying through an intermediary

The use of an intermediary when a child is testifying in criminal proceedings was introduced in South Africa in 1993,[56] following the compilation of a working paper by the SALC.[57] Towards the end of 2007, certain amendments took effect, allowing the appointment of an intermediary for persons with mental disabilities, and acknowledging the vulnerability of children less than 14 years of age.[58] Cognisant of the vulnerabilities

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53 In 1989 the South African Law Commission (SALC) undertook the research and made recommendations.

54 *Criminal Law Amendment Act* 135 of 1991 which inserted s 170A into the *CPA*.

55 Schoeman *A training program for Intermediaries* 203.

56 Proc R64 in GG 15025 of July 1993. In terms of s 61 of the *Children's Act*, the intermediary service system was introduced in the Children's Court.

57 SALC *the Protection of the Child Witness*: Project 71 Working Paper 28 (April 1989). This was followed by the Commission's Report (February 1991), which gave rise to s 3 of the *Criminal Law Amendment Act* 135 of 1991 introducing the concept of an intermediary.

58 Van der Merwe "Children as victims and witnesses" 567; see also the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007, came into effect in December 2007. Section 68 amended s 170A (1) and added s 170A (7) – (10) to the *CPA*.

of children testifying in court, section 170A (1) of the *CPA* authorised the appointment of an intermediary. For evidence to be led through an intermediary, a court should be satisfied that certain requirements have been met. This means that:

> Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.[59]

An intermediary can be seen as a facilitator who assists a child witness to testify and give evidence.[60] As a result, all communications exchanged between the child and the court is done through the intermediary; from examination in chief, cross-examination to re-examination.[61] The intermediary acting as a communication conduit cannot ask his or her own questions, amend the meaning of the questions, or change the questions.[62] Thus, the intermediary's role is to translate the questions from the prosecution or accused, and put them to the child in a language that the child understands. The child's own answers or explanations are audible to the court, prosecution and defence during the proceedings.[63]

The child witness does not testify in an open court. The child and the intermediary are normally placed in a room adjacent to the courtroom, in any other room in the court building or in another suitable place.[64] A CCTV is used to protect the child witness, giving the people in the courtroom sight of the separate room.[65] The court may, on the appointment of an intermediary, order that the witness shall then give his or her evidence at any place;

> Which is informally arranged to set that witness at ease; or which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any

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59 Section 170A (1) of the *CPA*.
60 Schoeman *A training program for Intermediaries* 204.
61 Section 170A (2) of the *CPA*.
62 Van der Merwe 1995 *The orbiter* 197.
63 Van der Merwe "Children as victims and witnesses" 570.
64 Whitear-NeL 2006 *SACJ* 335.
65 Schoeman *A training program for Intermediaries* 197.

> electronic or other devices, the intermediary as well as that witness during his or her testimony.[66]

The intermediary is not a party or witness to the proceedings; as such he or she is an independent participant in the trial.[67] The role of the intermediary is to create a child friendly environment to enable the child to participate freely. This is described by the Constitutional Court as follows:

> The provision of an intermediary is intended to create this atmosphere [that is conducive for a child to speak freely about the events relating to the offence]. The child conveys his or her experiences to a person skilled in dealing with children. This person knows how to communicate with a child and to do so in a manner that is neither intimidating nor embarrassing to the child. But at the same time, this person is able to communicate what the child has conveyed to him or her to the adults in court. In sort this person acts as a link to bridge the communication gap between the child and the court.[68]

The intermediary shields the child from hardships that the court may pose to the child. In cases where the child speaks any language other than English, the intermediary will further perform the role of court interpreter in the proceedings.

2.3.2 Appointment of an intermediary

The *CPA* provides for the appointment of an intermediary in proceedings involving a child.[69] For the appointment to take place, general principles of law dictate that the court is required to form and to communicate, the intention to appoint the intermediary.[70] While the appointment of the intermediary per se is compulsory on a finding of likely exposure to undue mental stress or suffering in the affirmative, it is the courts discretion to determine the measures that should be implemented.[71]

Section 170A (4) (a) of the *CPA* provides that the Minister of Justice may determine persons competent to be appointed as intermediaries and publish this by notice in the government gazette. The persons, category or class of persons who are competent and qualified to be appointed as intermediaries are medical practitioners (such as

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66 Section 170A (3) of the *CPA*.

67 Schwikkard and Van Der Merwe *Principles of Evidence* 2009 378.

68 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) (hereinafter *DPP v Minister of Justice*) para 96.

69 Section 170A (1) of the *CPA*.

70 Whitear-NeL 2006 *SACJ* 335.

71 Van der Merwe "Children as victims and witnesses" 570.

paediatricians and psychiatrists), family counsellors, child care workers, social workers, educators and psychologists.[72]

The administration of the oath, affirmation or admonishment shall not be invalid solely by virtue of the fact that the intermediary was not competent to act as an intermediary in terms of section 170A (4).[73] The implications of an invalid oath, affirmation or admonishment, are that the witnesses' evidence is inadmissible in terms of sections 162, 163 and 164 of the *CPA*.[74] However, evidence presented through an incompetent intermediary will not be inadmissible solely on the basis that the intermediary was incompetent to act as such.[75] The guiding principle should be substantive justice, and additional formal requirements for the appointment of an intermediary and the application of section 170A (5) should not be lightly read into the law.[76] Instead, if the intermediary was appointed in good faith, but was not competent for such an appointment then in terms of section 170A (5) (b) of the *CPA* the court has the discretion to make a finding on the admissibility of the evidence. The finding is based on three factors,[77] aimed at balancing the rights of (the) accused person(s) against the rights of the complainant in the overall interests of justice.[78] The provisions of section 170A (5) (a) are a safeguard against a failure of justice caused by technical non-compliance with the rules relating to the appointment of an intermediary.[79]

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72 In terms of GNR 1374 GG 15024 of 30 July 1993, as amended by GNR 360 GG 17882 of 28 February 1997, and by GNR 597 GG 22435 of 2 July 2001.

73 Section 170A (5) (a) of the *CPA*.

74 Whitear-NeL 2006 *SACJ* 334.

75 Section 170A (5) (a) of the *CPA*.

76 Whitear-NeL 2006 *SACJ* 341.

77 In terms of s 170A (5) (b) of the *CPA* the court considers the reason why the intermediary concerned was not qualified to be appointed as an intermediary and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely; the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and the likelihood that real and substantial justice will be impaired if that evidence is admitted.

78 Whitear-NeL 2006 *SACJ* 335.

79 *S v Booi* 2005 (1) SACR 599 (B) 607E-H. In this case the court stressed that the safeguards inherent in s 170A (5) only find application where the intermediary has been appointed, but the appointment is invalid because the intermediary does not comply with the requirements for appointment as set out by the Minister. Given the *bona fide* non-compliance, justice cannot be defeated. In this case, one of the intermediaries only had 13 months of service, falling short of the minimum of two years of experience required for appointment as an intermediary. The High Court invoked s 170(A)(5) concluding that the incompetence of that intermediary did not adversely affect the reliability of the

2.3.3 The criterion of whether to appoint an intermediary

Before the appointing of an intermediary, a court should be satisfied that certain requirements have been met. This is referred to as the "undue mental stress or suffering criterion". The test for determining whether an intermediary should be appointed is; whether testifying at the proceedings would cause the child "undue mental stress or suffering" and not simply that the child is young.[80] The concepts in the phrase "undue mental stress or suffering" are by their very nature exceedingly vague and complex to give content to.[81] Therefore, the decision as to whether to allow a child under the age of 18 to use an intermediary or not, must be guided by factors such as intelligence, age, sex, personality, nature of the evidence, among others.[82]

In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* (*DPP v Minister of Justice*)[83] the Constitutional Court had an opportunity to interpret the meaning of the (undefined) phrase "undue mental stress or suffering", and expand it from the narrow interpretation given in some cases.[84] Adopting the old approach would mean that section 170A (1) of the *CPA* can only be invoked if the witness would suffer more stress than would ordinary have been experienced.[85] Nonetheless, research has indicated that even the ordinary stress suffered by children when testifying in a contested trial can be regarded as undue.[86] It is recommended that the statutory section which sets out the guidelines as to which factors a court should take into account, in all criminal cases affecting children, when determining the concept of

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evidence, and that real and substantial justice would not be impaired if the evidence led through her was admitted (603F-G); see also Whitear-NeL 2006 *SACJ* 336.

80 In the *S v Booi* case, Magoeng JP held that the application for the appointment of an intermediary should not be granted, as so often happens, just because the victim is young (para 13). See also *S v Mathebula* 1996 (4) All SA 168 (T), where the court stated that youthfulness alone was not enough to warrant the use of an intermediary.

81 Bekink 2014 *CARSA* 40; see also Van der Merwe "Children as victims and witnesses" 570.

82 Whitear-NeL 2006 *SACJ* 339.

83 2009 (2) SACR 130 (CC).

84 For instance the case of *S v Stefaans* 1999 (1) SACR 182 (C) 187F-G, where the court held that "undue" connotes a degree of stress greater than the ordinary stress to which witnesses, including witnesses in complaints of sexual nature, are subjected to.

85 Bekink 2014 *CARSA* 40.

86 Schwikkard 1999 *SACJ* 262.

"undue mental stress or suffering", would greatly enhance the interest of justice in such cases.[87]

Relevant to this study, is the finding that in appointing intermediaries, courts recognise and affirm the vulnerabilities of child witnesses. Thus, it is a statutory affirmation that child witnesses need protection within the criminal justice system.

2.4 Constitutional rights of child witnesses

The *Constitution* does not explicitly mention the protection of child witnesses within the criminal justice system. It provides for an over-arching protection of children, proclaiming that the best interests of the child are the paramount considerations in all matters concerning the child.[88] In practice, children's interests, views and experiences are often considered secondary to the interests of the criminal justice system, and of the adults who work in that system.[89] The *Constitution* guarantees children the right to dignity,[90] equality before the law,[91] and protection from maltreatment, neglect, abuse or degradation,[92] amongst others, discussed hereunder.

2.4.1 The best interests principle as a right

Section 28 (2) of the *Constitution* entrenches the best interests of the child in the Bill of Rights as of paramount importance in all matters concerning the child. The phrase, "all matters concerning the child" implies every action or matter affecting the child, including child witnessing.

Ex facie, the provision seems to reiterate a principle that is recognised in common law through case law.[93] Due to constitutional developments, the courts have categorised the best interests as a right going further than the common law principle.[94] The Constitutional Court had the opportunity, in several cases, to interpret and explain the unique role of

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87 Bekink 2014 *CARSA* 41.
88 Section 28 of the *Constitution*.
89 Christina and Blanche *RAPCAN's Child Witness Project* 7.
90 Section 10 of the *Constitution*.
91 Section 9 of the *Constitution*.
92 Section 28 (1) (d) of the *Constitution*.
93 In *Fletcher v Fletcher* 1948 (1) SA 130 (A), the Appellant Division laid down the principle.
94 *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 16.

the best interests in South Africa's jurisprudence. In 2000, as per Goldstone J, the Constitutional Court stated that;

> Section 28 (1) is not exhaustive of children's rights. Section 28 (2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words indicates that the reach of section 28 (2) cannot be limited to the rights enumerated in section 28 (1) and section 28 (2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28 (1).[95]

Another important case is the *DPP v Minister of Justice* that came before the Constitutional Court for confirmation and declaration of unconstitutionality of section 170A of the *CPA* in that it was inconsistent with section 28 (2) of the *Constitution*.[96] The approach of the Constitutional Court was that in every trajectory in which a child is to testify, the court will enquire into the desirability [reasonableness] of appointing an intermediary. In doing so, the judicial officer should consider whether, on the evidence presented, viewed in the light of the objectives of the *Constitution* and the subsection, it is in the best interests of the child, that an intermediary be appointed.[97] The court also stressed that every child is unique and has his or her own individual dignity, special needs and interests which have to be taken into account.[98] What is required, is individual justice, that is, justice which is appropriately tailored to the needs of the individual case.[99] Hence, the court intertwined the test of undue mental stress or suffering with the best interest of the child test.[100]

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95 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 17.

96 Bertelsmann J, consolidated the cases *S v Mokoena; S v Phaswane* and *mero-motu* proceeded to consider the constitutional validity of certain provisions of the *CPA*, including ss 153, 158, 164(1) and 170A. All of the provisions under consideration were concerned with the protection to be awarded to child complainants when they give evidence in criminal proceedings involving sexual abuse. After carefully examining these provisions, the High Court declared ss 153(3) and (5); 158(5); 164(1); and 170(A)(1) and 170A(7) of the *CPA* invalid on the grounds that they infringed the 'best interests' of child complainants as guaranteed in s 28(2) of the *Constitution*. The High Court then referred its declaration of invalidity to the Constitutional Court for confirmation in terms of s 172(2) (a) of the *Constitution*. The Constitutional Court, however, refused to do so and expounded on the object of s 170A (1) and assessed the constitutionality of the provisions in line with s 28 (2) of the *Constitution*.

97 *DPP v Minister of Justice* para 114 – 115; see also Bekink 2014 *CARSA* 41.

98 *DPP v Minister of Justice* para 120.

99 *DPP v Minister of Justice* para 123 – 124.

100 Bekink 2014 *CARSA* 41. This approach was also followed in *Kerkhoff v Minister of Justice and Constitutional Development* 2011(2) SACR 109(GNP) para 7 as per Southwood J, after referring to *DPP v Minister of Justice,* added that; "it is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed".

The Constitutional Court held that, contrary to the High Court's view,[101] that the child should first be exposed to undue mental stress or suffering before the provision may be invoked, the object of the provision is to prevent the child from being exposed in the first place.[102] A child has to be assessed prior to giving evidence in court to determine whether there is a need for the appointment of an intermediary. Such a procedure would, according to the court, ensure that both the objectives of section 170A (1) of the Act and section 28(2) of the *Constitution,* are achieved.[103] Factors that have to be considered include: the best interests of the child principle as set out in section 28(2) thereof; and the objectives of section 170A (1), namely to prevent the child from exposure to undue stress that may arise from giving evidence in court.[104]

The fundamental rights of child witnesses, particularly the right to dignity, the right to bodily and psychological integrity, and the rights to individual autonomy are encapsulated in section 28(2) of the *Constitution*.[105] For instance, it has been repeatedly held by the Constitutional Court that section 28(2) indeed establishes a fundamental right and not a mere guiding principle.[106] Thus, it is respectfully submitted that child witnesses are constitutionally protected from the violation of their right to dignity and psychological integrity, within the right enshrined in section 28 (2) of the *Constitution*.

The best interests' injunction within the *Constitution* is a prescription that is also located in the *Children's Act* which provides that:

> In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.[107]

It is a standard that is set and of paramountcy in matters that concern the protection of children, *in casu*, the protection of child witnesses. The rights that a child has and are

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101 *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T) at para 79.
102 Bekink 2014 *CARSA* 41.
103 *DPP v Minister of Justice* para 111-112.
104 Bekink 2014 *CARSA* 40.
105 Prinsloo *Child Abuse Research* 58.
106 Robinson *THRHR* 2013 410; see also *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC). In *Fitzpatrick* para 17 the court held that s 28(2) creates a right that is independent of those specified in s 28(1).
107 Section 9 of the *Children's Act*.

expounded for in terms of the *Children's Act*, supplement the rights that a child has in terms of the Bill of Rights enshrined in the *Constitution*.[108]

The best interests principle in section 9 of the *Children's Act* cannot be applied in isolation of the right enshrined in section 28 (2) of the *Constitution*.[109] The articulation of the provisions means that a child witness' best interests shall be considered within the framework of his or her constitutional rights. Yet, the best interests of the child is a useless injunction if it is applied without consideration of the child's right to participate, to be heard and to be taken seriously.

2.4.2 Right to participation

Section 28 of the *Constitution* does not explicitly provide for the right of the child to participate. The *Constitution* provides for freedom of expression[110] but does not clearly provide for the right to participate as provided for in the *Children's Act*. The right to participate is read together with section 28 (2) of the *Constitution*. The *Children's Act* incorporates this right, proclaiming that:

> Every child that is of such an age, maturity and stage of development has to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.[111]

Thus, it is submitted that the appointment of an intermediary is to promote and facilitate the active participation of the child witness. The intermediary builds rapporteur with the child witness, thus enabling the child to participate directly with the intermediary, and express his or her views. It is argued that, considering the child's evolving capacities, the intermediary can also act as a representative of the child's views to the court.

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108 Section 8 of the *Children's Act*.

109 Schafer *Child Law in South Africa* 65.

110 Section 16 (1) of the *Constitution* provides that; everyone has the right to freedom of expression, which includes-
a) freedom of the press and other media;
b) freedom to receive or impart information or ideas;
c) freedom of artistic creativity; and
d) academic freedom and freedom of scientific research.
This provision does not clearly articulate the right of the child to be heard, participate and be taken seriously as enshrined in the CRC and the ACRWC.

111 Section 10 of the *Children's Act*.

2.5 Child witnesses with disabilities

Disability is not defined under South African legislation, or even under international law. The *Convention on the Rights of Persons with Disabilities* (CRPD) recognises it as an evolving concept.[112] Disability is characterised by three interrelated barriers, that is, social, psychological and structural.[113] The *Constitution* provides for the protection of the rights of 'persons with disabilities',[114] and admonishes that all persons are equal before the law.[115] However, the *Children's Act* provides for the protection of children with disabilities, with a bias towards the parent-child relationship:

> In any matter concerning a child with a disability due consideration must be given to making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have; and providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.[116]

Notably, the provisions are not explicit with regards to the participation of children with disabilities in the court system. However, a child friendly interpretation may be given to provide a child with conditions that ensure dignity, and facilitate active participation. The problem of *disablism*[117] may be overcome by the need to recognise children's disabilities on an individual basis and create an enabling environment to respond to their special needs.[118] Considering the limited number of registered intermediaries, not all of them are sensitive to the needs of child witnesses with disabilities.

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112 Preamble to the CRPD (2006).

113 White Paper on the Rights of Persons with Disabilities (March 2016) approved by Cabinet in December 2015.

114 The White Paper on the Rights of Persons with Disabilities defines persons with disabilities to include those who have perceived and/or actual physical, psychosocial, intellectual, neurological and/or sensory impairments which, as a result of various attitudinal, communication, physical and information barriers, are hindered in participating fully and effectively in society on an equal basis with others.

115 Section 9 of the *Constitution* provides that everyone is equal before the law and has the right to equal protection and benefit of the law; and the State may not discriminate directly or indirectly against anyone on or ore grounds, including gender, sex, sexual orientation, age, disability, language amongst others.

116 Section 11 (1) (b) and (c) of the *Children's Act*.

117 It is the negative attitudes, behaviours, practices and environmental factors which discriminate (intentionally or unintentionally) against disabled people and create barriers to their equal participation in mainstream society.

118 Section 6 (2) (f) of the *Children's Act*.

2.6 Implementing protective measures

The CRC, ACRWC and the UN Guidelines provides for the normative standards that are expected of every judicial body or tribunal when dealing with child witnesses in criminal proceedings. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age.[119] It is submitted that the intermediary brings with him or her professional skills to relate with the child, and makes the proceedings less hostile, less insensitive and less intimidating. During trial proceedings the court aura must be both accessible and child appropriate to enhance the child's participation throughout the whole process. Some of the commendable steps are enlisted below.

2.6.1 Child preparation

Child court preparation is the process of orienting the child with the court environment and the court proceedings.[120] Court familiarisation gives the child confidence to testify. Simply put, it encompasses the right of the child witness to be informed about issues such as, his or her role as a witness, the ways in which questioning is conducted, existing support mechanisms after testifying (if there are any) during court proceedings and the availability of protective measures. Though there are other court preparation officials, the intermediary often does the child court preparation.[121] The intermediary acting as a neutral third party to the proceedings, can independently prepare the child witness for court without influencing his or her testimony.[122] This preparation is separate from coaching the child for trial.

A child witness effectively prepared to testify is equipped with the necessary knowledge of the judicial system.[123] The child witness is empowered physically and emotionally for the experience of testifying.[124] The question of when a child can be prepared to testify differs. In most cases, the child is oriented on the day of the trial while he or she waits

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119 Schoeman *A training program for Intermediaries* 94.
120 Ghetti, Alexander and Goodman 2002 *IJLP* 9.
121 Schoeman *A training program for Intermediaries* 184.
122 Alvaro et al *Handbook for Professionals* 69.
123 Schoeman *A training program for Intermediaries* 184.
124 Muller *Preparing children for courts* 103.

to testify. Factors that may lead to orientation on the trial date are; reducing witness expenses for frequenting the courtroom and the need to minimise the interactions and interviews with the child.

2.6.2 The hearing

The intermediary is more important during trial when the child is testifying. During this time the intermediary will be visible to the child, the court and the accused. In that case, the intermediary acts as a professional support person equipped to make the child witness feel comfortable, as well as to help the court conduct the trial. It is in the best interests of the child witness that testifying be done from a separate room, with a CCTV or screen, to avoid further hardships and confrontation with the accused person.[125] Every interaction with the child has to be made via the intermediary.[126] Thus, the child witness freely participates in the proceedings without knowledge of the court environment and the people watching from the other end. The accused person and his or her attorney, the prosecutor and any other person in the court will be positioned to see and hear the evidence from the separate room.[127] It is respectfully submitted that the intermediary will serve to promote the best interests of the child throughout the trial.

2.7 Conclusion

Section 170A (1) of the *CPA*, as it is read in with line section 28 (2) of the *Constitution*, is a constitutional provision for the protection of child witnesses.[128] This is so because the best interests of the child is treated as an independent right and not a mere principle.[129] The participation of child witnesses in the justice processes with an intermediary, enhances their participation and assures them of meaningful contribution. However, there are no guidelines on the manner in which the intermediaries ought to perform their services during trial proceedings. There is no provision of procedural regulations that outlines how the intermediaries are to conduct their duties. It has been established that

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125 Section 158 of the *CPA*.
126 Section 170 (2) (a) of the *CPA*.
127 Section 170 (3) (c) of the *CPA*.
128 *DPP v Minister of Justice*.
129 *MS v S (Centre for Child Law* as Amicus Curiae) 2011 (2) SACR 88 (CC).

child witnesses with disabilities may suffer further hardships compounded by the lack of disability friendly justice system equipment. The following chapter considers the protection of child witnesses under international law.

Chapter 3: International legal framework

3.1 Introduction

The history of the child rights movement at the international level started around 1924, and became more pronounced in the *Geneva Declaration of the Rights of the Child* (Geneva Declaration).[130] This Declaration is considered a remarkable, momentous document, recognising and affirming the existence of the human rights of children for the first time in history.[131] Subsequently, in 1959 the UN *Declaration of the Rights of the Child* [132] was adopted, giving recognition to the vulnerabilities of children and proclaiming that children deserve special treatment in all matters concerning them.[133] Further, the adoption of the CRC[134] and the ACRWC[135] pronounced children's rights as human rights under international law. Nevertheless, all these instruments do not specifically mention the term child witness. Specific reference to child witnesses in the criminal justice system is only made in the UN Guidelines.

This chapter examines the protection of child witnesses under international and regional laws. This consideration is made against the background that the *Constitution* proclaims that in interpreting the Bill of Rights and any legislation, a court or tribunal must consider international law.[136] Provisions that relate to the protection of child witnesses in the CRC, the ACRWC, and the UN Guidelines are discussed below. The CRC and the ACRWC does not make specific reference to child witnesses, and how they should be treated. Be that as it may, the guiding principles enshrined therein provides for the protection of child witnesses, particularly the best interests of the child and the right to participate.[137] In

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130 Adopted 26 September 1924 by the League of Nations.

131 Humanium.org date unknown *The Origin of the Declaration of the Rights of the Child* http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child/.

132 Adopted unanimously by Member States of the United Nations General Assembly in Resolution 1386 (XIV), on 20 November 1959.

133 Preamble of the 1959 *Declaration of the Rights of the Child*.

134 South Africa signed on 21 January 1993 and adopted it on 16 June 1995.

135 South Africa signed on 10 October 1997 and adopted it on 07 January 2000.

136 Section 39 (1) (b) of the *Constitution*.

137 See 3.2.1 and 3.2.2 below.

addition, the chapter enumerates and explains the rights of child witnesses as provided for in the UN Guidelines.

3.2 Convention on the Rights of the Child

Since the adoption of the CRC, children's rights have assumed a central position in a wide variety of disciplines and policing. It is regarded as the most distinguished source of children's rights and probably the most wide-ranging human rights treaty intended for a specific group of people.[138] The CRC has been commended as the most progressive of the treaties on the human rights of children.[139] Anchored on four guiding principles, namely, non-discrimination,[140] the right to maximum life, survival and development,[141] participation[142] and the best interests of the concerned children,[143] the CRC is the cornerstone of children's rights.

It goes without saying that the CRC does not address the issue of child witnesses in criminal proceedings, save the providing for child offenders in conflict with the law.[144] Further, it does not expressly make reference to "intermediaries". It is submitted that the failure of the CRC to refer to child witnesses and intermediaries does not mean that there is no protection for them. The over-arching guiding principles are instructive on how the intermediaries should protect the best interests of child witnesses testifying in criminal proceedings. The discussion that ensues elaborates on how guiding principles may assist the intermediaries protect child witnesses.

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138 Schafer *Child Law in South Africa* 90.
139 Van Bueren *The international law of the rights of the child* (1995) 402.
140 A 2 of the CRC.
141 A 6 of the CRC.
142 A 12 of the CRC.
143 A 3 of the CRC.
144 A 40 of the CRC provides for juvenile justice proclaiming that; a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. The child is entitled to basic guarantees as well as legal or other assistance for his or her defence. Judicial proceedings and institutional placements shall be avoided wherever possible, and detention coming as a measure of last resort.

3.2.1 The best interests of the child

The concept of the best interests of the child is, arguably, aimed at ensuring both the full and effective realisation and enjoyment of all children's rights recognised in the CRC.[145] Ultimately, the CRC promotes the holistic development of the child in all aspects that concern the child. The concept of the "child's best interests" is not new.[146] However, the CRC developed and transformed the latitude and application of the principle beyond its original scope.[147] The principle is considered to be a dynamic concept that encompasses various issues that are continuously evolving.[148] It is argued that this principle meets the requirements of customary international law.[149] The CRC proclaims 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.[150]

The provision is clear and crafted in unambiguous terms. The best interests of the child witness are a primary consideration. Reference to "a primary consideration" connotes that the child's best interests is not the overriding factor to consider, but should be considered amongst other competing or conflicting interests.[151] The principle cannot be considered in isolation but in the entirety of all the provisions of the CRC.[152] Further, it should be read together with other rights giving recognition to the universal, indivisible, interdependent and interrelated nature of children's rights.[153]

The challenge is posed when applying the principle to individual cases. Due to the indeterminate nature of the principle; social workers (intermediaries), lawyers (magistrates, prosecutors and defence counsel) and child psychologists might legitimately make varying conclusions about what is in the best interests of the same child.[154] Thus,

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145 Para 4 of General Comment No 14.
146 It pre-dates the CRC, it is enshrined in para 2 of the *Declaration of the Rights of the Child* (1959) and A 16 (1) (d) of the *Convention on the Elimination of All Form of Discrimination Against Women* (1979).
147 Mabery "The United Nations Convention on the Rights of the Child" 318.
148 Para 5 of General Comment No 14.
149 Schafer *Child Law in South Africa* 154.
150 A 3 (1) of the CRC.
151 Mabery "The United Nations Convention on the Rights of the Child" 319.
152 Hodgkin and Newell *Implementation Handbook* 37.
153 Para 6 of General Comment No 14.
154 Schafer *Child Law in South Africa* 154-155.

when the NPA wishes to call a child witness, a prime consideration is what will be in the best interests of the child witness. This determination demands the need to strike a balance between the interests of the administration of justice and the interests of the child witness. The decision of whether the child's best interests takes precedence, though not trumping over other competing interests, is vested upon the determining authority. The application of the principle is inherently susceptible to the influence of the decision-maker or determining authority's life experiences, and is therefore subjective.[155] The duty enshrined in Article 3(1) of the CRC on determining authorities to consider the child's best interests, requires those interests to actually be taken into account, and not to merely be noted.[156]

South Africa has an obligation under international law to ensure the protection and care of child witnesses as is necessary for their well-being.[157] The obligation to ensure child protection at all levels, is enshrined as follows:

> States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[158]

In this context, the NPA, the Department of Justice and Constitutional Development (DJCD) and the Department of Social Development (DSD) are the responsible state institutions to ensure that the best interests of child witnesses are taken into account.

3.2.2 Expressing the child's views

A child's right to express his or her opinion freely and to participate in matters concerning the child is firmly entrenched in international law.[159] This right is framed on the recognition

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155 Reece "The paramountcy principle: Consensus or Construct?" 267.
156 McAdam 2006 *IJCR* 254.
157 A 3 (2) of the CRC.
158 A 3 (3) of the CRC.
159 A 12 of the CRC, A 7 of the ACRWC and a similar right has been inferred from the due process rights protected by A 14 (1) of the *International Covenant on Civil and Political Rights* (1966).

that children are right holders, they are individuals with a distinctive personality, and not small adults.[160]

The CRC provides that;

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[161]

The phrase, "shall assure" is a legal term of special strength, which leaves no leeway for the discretion of States parties.[162] In so far as there is an imposition of the duty, it is argued that the formulation of the right is ambiguous, since there is no clear or practical definition of a child's capacity to express his or her views.[163] Instead, the right requires a factual assessment of the child's capacity with reference to his or her evolving capacities. The element of evolving capacities considers the child's ability to understand and comprehend the matter at hand, and express an independent, reasonable opinion.[164] There is no age limit on the age of the child to express his or her views.[165] Even children as young as five (5) years, as long as they can be deemed competent to testify, can express their views.[166] Full implementation of the right to participate requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.[167] It is also important to take into account the views of child witnesses with disabilities.[168]

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160 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC) para 18, wherein Sachs J stated that, "every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them".

161 A 12 (1) of the CRC.

162 Para 8 of General Comment No 12.

163 Schafer *Child Law in South Africa* 164.

164 Para 30 of General Comment No 12.

165 Para 9 of General Comment No 12.

166 Para 14 of General Comment No 7.

167 Para 21 of General Comment No 12.

168 Para 32 of General Comment No 9.

The child is afforded an opportunity to express their views in two ways, namely by means of participation[169] and representation[170] as articulated in the CRC;[171]

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[172]

The child can express his or her views directly to the intermediary or social worker, who will in turn represent or communicate these views to the court. If the noting of the child's views is undertaken through a representative, it is of utmost importance that these views are transmitted correctly to the decision maker by the representative.[173]

The deciding authority must give due consideration to the child's views and opinions. This does not mean that what the child expresses becomes the final decision. Rather, it is the duty upon the decision maker to establish what is best for the child, thus a decision different from the wishes of the child may be taken.[174]

Accordingly, South Africa is under an obligation to undertake appropriate measures to implement and safeguard the right of child witnesses to participate. Every effort has to be made to ensure that child witnesses are consulted and given an opportunity to express their views regarding participating or testifying in criminal proceedings.

3.3 African Charter on the Rights and Welfare of the Child

The motivation for the adoption of the ACRWC was a perceived limited participation of African States in the drafting of the CRC.[175] There was an expressed deep concern about the welfare of the African children which were not addressed in the CRC,[176] culminating in the development of the regional instrument. The ACRWC, while upholding all the

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169 This refers to rules and measures to ensure the child is heard directly without a middle person.

170 This refers to provisions that allow a child to instruct an attorney, seek legal advice or have other form of representation from an adult person in legal proceedings.

171 Davel "General Principles" 12.

172 A 12 (2) of the CRC.

173 Para 36 of General Comment No 12.

174 Schafer *Child Law in South Africa* 166.

175 Viljoen *International Human rights Law in Africa* 261, see also Viljoen "The African Charter on the Rights and Welfare of the Child" 218, see also Mezmur 2006 *AHRJ* 549 arguing that only Algeria, Egypt, Morocco and Senegal actively participated in the CRC drafting.

176 Schafer *Child Law in South Africa* 94.

universal standards outlined in CRC, speaks to the specific problems that African children encounter.[177] These have led it to being lauded for its stance against harmful cultural practices, child soldiers, a family centred approach and child responsibilities.[178]

It is argued that though the ACRWC has been criticised as an unnecessary duplication of the CRC, the synergy that exists between the two instruments is that of complementarity,[179] and they have the same agenda.[180] Some of the provisions discussed in this context are similar to those provided for in the CRC, elaborated above. To avoid repetition, focus is given to issues not discussed earlier under the CRC. The ACRWC is differently worded, and, arguably, offers much more protection than the CRC:

> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.[181]

The use of "the" and not "a" primary consideration offers more emphasis to the importance of the best interests of the child. It is not placed as a mere consideration amongst others, but as the primary consideration.[182] The best interests of the child is identified as the criterion against which a state party has to measure all aspects of its laws and policy regarding children.[183] The ACRWC knit the best interests together with the right to participate in the same article declaring that;

> In all judicial proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative …, and those views shall be taken into consideration...[184]

Further, the child is assured the freedom to express himself or herself in matters concerning him or her.[185] Thus a child witness has to be provided with a platform to

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177 Sloth-Nielsen and Mezmur 2007 *AHRLJ* 331.
178 Viljoen "The African Charter on the Rights and Welfare of the Child" 218-219.
179 The relationship between these two instruments is to improve and support each other's quality, see also A 1 (2) of the ACRWC which provides that; 'nothing in this Charter shall affect any provisions are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in the State'.
180 Mezmur 2008 *SAPR/PL* 14.
181 A 4 (1) of the ACRWC.
182 Mezmur 2008 *SAPR/PL* 18.
183 Viljoen "The African Charter on the Rights and Welfare of the Child" 219.
184 A 4 (2) of the ACRWC.
185 A 7 of the ACRWC.

express his or her concerns, wishes and views about testifying in criminal proceedings either directly or through an intermediary.

3.4 Guidelines on Justice for Child Witnesses of Crime

3.4.1 Brief background

The UN General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Declaration of Basic Principles)[186] which provides a framework for responding to the challenges and needs of victims. The Declaration of Basic Principles outlines measures to assist victims of crime on international, regional and national levels.[187] In 2004, an intergovernmental expert group was set up at the request of the UN Economic and Social Council (ESC) to develop guidelines on justice in matters involving child victims and witnesses of crime. Based on guidelines drawn up by the International Bureau of Children's Rights, the ESC adopted the UN Guidelines.[188] The UN Guidelines are not binding upon States parties to the CRC, or to the UN treaties, but are of a persuasive value. They provide a useful framework to guide and assist member States in enhancing the protection of child witnesses in the criminal justice system, setting forth good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and practices.[189] This is to assist, support and guide professionals[190] working with child witnesses of crime in their day to day practice.[191]

The UN Guidelines were developed with special consideration of the inadequate recognition of the rights of child witnesses and their suffering of additional hardship when assisting in the justice process.[192] In addition, it was the realisation that children are vulnerable and require special protection appropriate to their gender, age, level of

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186 29 November 1985 at the 96th plenary meeting, A/RES/40/34.

187 Skelton *Justice for child victims and witnesses of crime* 1.

188 Resolution 2005/20.

189 Para 1 of the UN Guidelines.

190 Para 9 (b) of the UN Guidelines in which the term is used in reference to persons who, within the context of their work, are in contact with child witnesses of crime or are responsible for addressing the needs of children in the justice system including, but is not limited to: child support persons, child protection service practitioners, prosecutors and, where appropriate defence lawyers, judges and magistrates, court interpreters and intermediaries, law enforcement officials, and social workers.

191 Para 3 (c) and (d) of the UN Guidelines.

192 Para 7 (a) of the UN Guidelines.

maturity and individual special needs,[193] and thereby offering support to the criminal justice system.

3.4.2 Guiding principles

The UN Guidelines are guided by cross-cutting principles reflecting the spirit and word of the CRC.[194] However, there is no express mention of the term "intermediary" in the list of professionals enumerated therein. It is submitted that intermediaries can be categorised under social workers.[195] That being the case, intermediaries are guided by the principles, guidelines and recommendations provided in the UN Guidelines.

The first guiding principle is the right to dignity, which provides for the protection of every child's right to dignity by treating each individual as a unique and valuable human being. Respecting and protecting the right to dignity upholds the right to privacy and takes into account the special needs and interests of every individual child.[196] The second principle provides for equality and non-discrimination as follows:

> Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.[197]

The third principle makes provision for the right of the child to express his or her views, wishes and opinion. The right to be heard and participate is applied on an individual basis, taking into consideration personal circumstances as they are interpreted within the applicable municipal laws. The UN Guidelines provide as follows

> Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute particularly to the choices influencing his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.[198]

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193 Para 7 (b) of the UN Guidelines.
194 Van der Merwe "Children as victims and witnesses" 566.
195 Para 9 (b) of the UN Guidelines define professional to include social workers.
196 Para 8 (a) of the UN Guidelines.
197 Para 8 (b) of the UN Guidelines.
198 Para 8 (d) of the UN Guidelines.

The forth principle outlined in the UN Guidelines is the best interests of the child principle.[199] The principle stipulates that every child has the right to have his or her best interests given primary consideration, at all levels. The best interests of the child witness compete with the rights of the accused.[200] As a result, there has to be a balancing of these and other competing interests.[201] While there is a need to safeguard the rights of the accused or offender,[202] the best interests of the child should be given primary consideration.[203]

The best interests of the child recognises the right to protection and promotion of harmonious development of the witness. The right to protection entails that every child has to be shielded from any form of hardship or abuse, including physical, psychological, mental and emotional.[204] In essence, protecting the child's best interests goes beyond protecting the child from victimisation and hardship while involved in the justice process as a witness. It also enhances the child's capacity to contribute to that process.[205]

On the other hand, the element of harmonious development assures a chance for harmonious growth and to a standard of living adequate for physical, mental, spiritual, moral and social growth.[206] Each case requires a careful assessment of the situation of the child in order to decide which intervention is in the best interests of the child.[207] In cases of a child witness traumatised by witnessing crime, every step should be taken to enable the child to enjoy healthy development.[208] These measures include psychosocial support to build the child's resilience.

Giving the best interests of the child primary consideration is in conformity with the CRC and is therefore consistent with international law on safeguarding the interests of justice.

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199 Para 8 (c) of the UN Guidelines.
200 The right to a fair trial and confronting the accuser as espoused in A 14(3) (e) of the *International Covenant on Civil and Political Rights* (1966).
201 Alvaro et al *Handbook for Professionals* 8.
202 A 14 of the *International Covenant on Civil and Political Rights* (1966), A7 of the *African Charter on Human and People's Rights* (1981).
203 Alvaro et al *Handbook for Professionals* 6.
204 Para 8 (d) (i) of the UN Guidelines.
205 Alvaro et al *Handbook for Professionals* 9.
206 Para 8 (d) (ii) of the UN Guidelines.
207 Alvaro et al *Handbook for Professionals* 10.
208 Para 8 (d) (ii) of the UN Guidelines.

3.4.3 Rights of Child Witnesses

The UN Guidelines enlist the rights of child witnesses.[209] The rights are interconnected and cannot be applied in isolation. It is trite to note that most of these rights are realisable through the services of the intermediary; for instance: the right to be treated with dignity, the right to be informed of the justice processes and the right to be heard and express views and concerns.

3.4.3.1 Protection of the right to dignity

The right to dignity is a fundamental and inherent human right enshrined in various international instruments.[210] It is also one of the guiding principles to the UN Guidelines.[211]The right implies that the child is treated as a human being with full rights and not as a passive recipient of adult care and protection.[212] The right is further complemented with showing compassion for the child. The witness' right to be treated with dignity and compassion lays the foundation for child-sensitive[213] treatment for all child witnesses.[214] Every individual child should be treated as a distinct person with his or her individual needs, wishes and feelings;[215] in a caring and sensitive manner, taking into account personal situations and immediate needs, age, gender, mental or moral integrity, disability and level of maturity.[216] In South Africa, the right is found within the *Constitution*,[217] and the *Children's Act*.[218]

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209 Paras 10 – 39 of the UN Guidelines.

210 A 1 of the *Universal Declaration of Human Rights* (1948), A1 of the *International Covenant on Civil and Political Rights* (1966), preamble of the *International Covenant on Economic, Social and Cultural Rights* (1966), preamble of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and others.

211 See 3.4.2 above.

212 Alvaro et al *Handbook for Professionals* 15.

213 The term as used in the UN Guidelines denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

214 Alvaro et al *Handbook for Professionals* 14.

215 Para 11 of the UN Guidelines.

216 Para 10 of the UN Guidelines.

217 Section 10 states that;
Everyone has inherent dignity and the right to have their dignity respected and protected.

218 Section 6 (2) (b) states that;
All proceedings, actions or decisions in a matter concerning a child must respect the child's right to inherent dignity.

The evolving capacities of an individual child warrant treatment according to his or her age and level of maturity. Levels of understanding of any given situation may differ from one child to the next child. At the same time the level of understanding is different from that of an adult, yet children have the potential to be precise and deliver credible testimony.[219] Lansdown argues that;

> The concept of evolving capacities is invoked as it is fundamental to balance between recognising the child as an active agent in his or her own life, entitled to be listened to, respected and granted autonomy in the exercise of rights, while also being entitled to protection in accordance with his or her relative immaturity and youthfulness.[220]

Having an understanding of the evolving capacity of the child and its impact on the justice process may help to anticipate what services children require in their particular situation in order to preserve or gain their integrity.[221] It is submitted that the concept of evolving capacities ensures respect for the child, without exposing him or her prematurely to the full responsibilities normally associated with adulthood; and takes into consideration the child's needs, age, gender, disability and level of maturity.[222]

Accordingly, children also have the right to be treated with compassion, which implies understanding and being sensitive to their feelings, needs, beliefs,[223] communicative style and individual experiences.[224] Any professional dealing with a child witness of crime should recognise that the child may not be in a position, at a given time, to fully understand and recount events that happened or to comprehend the full impact of the crime.[225]

It is imperative to ensure that all the processes involving children as witnesses, such as interviews,[226] are conducted in a child-friendly environment,[227] and respect the child's right

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219 Alvaro et al *Handbook for Professionals* 15.
220 Lansdown *The Evolving Capacities of the Child* 2005 3.
221 Alvaro et al *Handbook for Professionals* 15.
222 Lansdown *The Evolving Capacities of the Child* 2005 4.
223 Para 11 of the UN Guidelines.
224 Para 14 of the UN Guidelines.
225 Alvaro et al *Handbook for Professionals* 15.
226 Para 13 of the UN Guidelines spells out that:
Interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner in order to avoid further hardship to the child.
227 Para 14 of the UN Guidelines proclaims that:

to privacy.[228] It is crucial to ensure that the child does not feel responsible for the commission of the crime, the events surrounding it or to feel accountable for what he or she has suffered.[229]

3.4.3.2 Protection from discrimination

The basic purport of the right to be protected from discrimination is to ensure that child witnesses are treated equally before the law.[230] Generally, the protection of children from discrimination, as a specific aspect of the general protection of citizens, is provided for, *inter alia*, by child protection laws.[231] In South Africa, the right is provided for in the *Constitution*,[232] the *Children's Act*[233] and other legislation.

It is submitted that non-discrimination, has three aspects. The first leg is the general protection of children from all forms of discrimination. The second leg, a frequent corollary of non-discrimination, is the principle that distinctions between children should only be based on their best interests and specific needs, so that extra efforts are made to ensure that all children have their rights met equally.[234] The third leg of the protection from discrimination is with regards to the child's competency to testify as a competent and credible witness. In essence, every child should be treated as a competent witness in the manner that an adult is treated. Also, the testimony of a child should not be deemed

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Interactions should take place in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity and also in a language that the child uses and understands.

228 Para 12 of the UN Guidelines.

229 Alvaro et al *Handbook for Professionals* 15.

230 Para 15 of the UN Guidelines; see also s 9 of the *Constitution*.

231 Alvaro et al *Handbook for Professionals* 22.

232 Section 9 provides that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms, and promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

233 Sections 2 (e), 6 (2) (c)-(d) and 8 (2) of the Act.

234 Paras 16 -17 of the UN Guidelines; see also Alvaro et al *Handbook for Professionals* 22.

inadmissible, invalid or untrustworthy by reason of his or her age.[235] A good practice in this respect is to presume the child's competency to testify, irrespective of his or her age, and to keep his or her age and maturity as factors to be taken into account in the assessment of his or her testimony.[236]

3.4.3.3 Right to be kept informed

The child witness has a right to be informed of his or her rights as a witness in criminal proceedings.[237] It is in the child's best interests that this right be communicated to him or her directly, as well as to his or her parents or guardians. This entails providing them with the most general information, including; the assistance they are entitled to, the way legal proceedings are organised and the role they can play in the proceedings.[238] Most importantly, the child has to be informed in a language that he or she understands.

It is argued that the right to be informed about the progress of a case begins once the child gets involved in the justice process.[239] Be that as it may, various stakeholders play different roles unique to their contribution in the criminal justice process. For instance, child witnesses have a right to receive information on the proceedings, in particular on the scheduling of hearings and what is expected from them.[240] Yet, information such as that which may relate to the scheduling of hearings, may be dispensed of by role players, for instance, the police and prosecutors. The intermediary's special assignment, upon building rapporteur with the child, is to relay the information in a child sensitive and assuring manner, depending on the child's age and level of maturity.

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235 Para 18 of the UN Guidelines reads as follows;
"Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance."

236 Alvaro et al *Handbook for Professionals* 25.

237 Para 19 (d) – (g) of the UN Guidelines.

238 Alvaro et al *Handbook for Professionals* 33.

239 Alvaro et al *Handbook for Professionals* 34; see also Para 19 of the UN Guidelines providing that; child witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate.

240 Alvaro et al *Handbook for Professionals* 37.

3.4.3.4 The right to be heard and to express views

The right to be heard, to express views or concerns and to have those views and concerns taken seriously, is a cornerstone to ensuring that the rights of children are realised.[241] It is embedded in the CRC and the principle affirms that children are fully-fledged persons who have the right to express their views in all matters affecting them.[242] It is required that those views be heard and given due weight in accordance with the age and maturity of the child.[243] In terms of this principle adults are no longer seen as mere providers, protectors or advocates, but also as negotiators and facilitators, creating spaces and promoting processes designed to enable and empower children to express views, to be consulted[244] and to influence decisions.[245]

Child witnesses, especially of violent crimes such as domestic violence committed in their direct surroundings, may suffer from the impact that these crimes have on their daily life and relationships with caregivers.[246] In such instances, the child witnesses should be enabled to express freely and in their own manner, their views and concerns regarding safety in relation to the accused, and depending with their age and level of maturity, the manner in which they prefer to provide testimony.[247]

The right to be heard and to express views and concerns implies that the authorities in charge should give child witnesses an opportunity to fully express themselves, and should listen to these children and give due regard to their views.[248] However, it is submitted that the UN Guidelines[249] do not create an obligation to satisfy the requirements and expectations expressed by the child.[250] If the requirements and expectations of the child cannot be met, this should be explained to him or her. A child witness' expectation may

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241 Para 21 of the UN Guidelines.
242 A 12 of the CRC.
243 Alvaro et al *Handbook for Professionals* 42.
244 Para 21 of the UN Guidelines asserts that, professionals (included are intermediaries) should make every effort to enable child witnesses to express their views and concerns related to their involvement in the justice process, through consultation with the child.
245 Alvaro et al *Handbook for Professionals* 42.
246 Alvaro et al *Handbook for Professionals* 34.
247 Para 21 (b) of the UN Guidelines.
248 Alvaro et al *Handbook for Professionals* 43.
249 Para 21 (c) of the UN Guidelines.
250 Alvaro et al *Handbook for Professionals* 43.

be contrary to the demands of the court system. For this reason it must be explained to the child, in a child-friendly manner, why certain decisions are made, why certain elements or facts are or are not discussed or questioned in court and why certain views are not taken into consideration. [251]

The challenge associated with the realisation of child witnesses' right to express their views and concerns in the context of the criminal justice system is that, witnesses have traditionally been considered as tools and often expendable ones, in the quest for a successful prosecution.[252]

3.4.3.5 The right to effective assistance

The child witness deserves effective assistance to mitigate potential damage or victimisation that may result through testifying in the criminal proceedings.[253] It is recommended that in assisting child witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions from different role players in the system.[254] In this regard, the intermediary does not necessarily delve into the substance of the matter or the child's story but builds a rapporteur with the child to ensure that the child feels comfortable talking to him or her. The provision of child witness specialists,[255] *in casu* intermediaries, may enhance the child's participation, thus giving the child a voice in the proceedings.

3.4.3.6 Protection from hardships during trial

The UN Guidelines acknowledge that indeed children are vulnerable when testifying during trial proceedings. The court experience is very stressful for children.[256] This is caused by the fears and frustrations that children may have of testifying in a court which may include but not limited to facing the accused, describing disgraceful details of the

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251 Alvaro et al *Handbook for Professionals* 43.
252 Alvaro et al *Handbook for Professionals* 43.
253 Para 22 - 25 of the UN Guidelines; see also A 5 of the Victims Charter.
254 Para 23 of the UN Guidelines.
255 Para 25 (a) of the UN Guidelines provides that child witness specialists should address the child's special needs during trial while the child is giving evidence or testifying.
256 Alvaro et al *Handbook for Professionals* 67.

case, not being able to understand the questions put to them, and looking stupid.[257] Thus, the UN Guidelines proclaim that professionals should take appropriate measures[258] to prevent hardships during the prosecution process in order to ensure that the best interests and dignity of the child witnesses are respected.[259] Ultimately, protecting child witnesses from hardship during trial increases their capacity to participate in justice processes.[260] It is submitted that the use of intermediaries is another measure that facilitates or mitigates the occurrence of further hardships upon the child witness.

The right of the child witness to be protected from hardships, and the right to be safe, guarantees that the giving of evidence in court becomes a validating experience, which does not always have to be harmful.[261] It is recommended to use child-sensitive procedures, including interview rooms designed for children, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, and other appropriate measures to facilitate the child's testimony.[262] The intermediary will act in the best interests of the child to monitor the performance of the child during testimony, and when necessary recommend an adjournment or recess. Thus, it is commendable that the child witness should testify when he or she seems able and willing to do so. In this respect, a well-prepared and child-friendly trial may, in fact, prove beneficial, as it offers the child an opportunity to actively participate, and to formally denounce injustice.[263]

3.5 Conclusion

The term "child witness" is not explicitly mentioned in the CRC, ACRWC or any other binding international and regional instruments save for the UN Guidelines. On the other hand, reference to intermediaries is made by inference to the professional class of social workers who are better equipped to work with child witnesses. Given the fact that the CRC and ACRWC have cross-cutting principles that protect children in all situations, even

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257 Alvaro et al *Handbook for Professionals* 67.
258 For instance the use of CCTV.
259 Para 29 of the UN Guidelines.
260 Alvaro et al *Handbook for Professionals* 66.
261 Alvaro et al *Handbook for Professionals* 67.
262 Para 30 (d) of the UN Guidelines.
263 Alvaro et al *Handbook for Professionals* 67.

those not canvassed, inference of the applicability of these principles is justifiable. The UN Guidelines provide a comprehensive array of principles and rights for the protection of child witnesses in criminal proceedings. Contextually, the professional duties of social workers, working as intermediaries, should ensure that the right to dignity, the right to be informed, the right to be heard, amongst others, are realised and child witnesses are protected. The children's rights principles and rights discussed *supra* are a reflection of the need to protect child witnesses through intermediary services. The next chapter considers practices in foreign jurisdictions on the protection of child witnesses.

Chapter 4: Protection of child witnesses in foreign jurisdictions

4.1 Introduction

Since the adoption of the CRC, children's rights have assumed a central position in a wide variety of disciplines and policing.[264] This includes the protection of child witnesses within the criminal justice system. As a result, there is a growing body of multi-disciplinary research attempting to address challenges of children testifying in an open criminal court.[265] Research shows that children experience trauma and other hardships when they testify in criminal proceedings.[266] The constitution provides that when interpreting a provision which may fall within the Bill of Rights, such as the best interests of the child, courts and other tribunal may consider foreign law.[267] In line with this constitutional imperative, reference is made to common law countries with similar intermediary systems such as Israel, and Scotland.

These countries promulgated legislation for the protection of child witnesses and intermediary services.[268] These intermediary systems allow intermediaries to deal with a wide range of issues, including addressing problematic question sequences and some other techniques likely to cause difficulties with child communication.[269] In conclusion, the research considers lessons that South Africa may learn from the practices and jurisprudence of these respective systems. Reference to foreign law is not for comparative purposes as highlighted earlier.

4.2 Israel

The Israeli system is a mixed system, comprising of the English accusatorial models and the continental inquisitorial system.[270] Even though the Israeli judicial system is

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264 Vandenhole *et al International Handbook of Children's Rights* 1.
265 Robinson 2015*IJLP* 169.
266 Spencer and Lamb *Children and Cross-Examination* 77.
267 Section 39 (1) (c) of the *Constitution.*
268 Israel promulgated the *Evidence Revision (Protection of Children) Law* (1955), and Scotland the *Vulnerable Witnesses Act* (2004).
269 Spencer and Lamb *Children and Cross-Examination* 91.
270 Spencer and Lamb *Children and Cross-Examination* 78.

adversarial, the procedures for managing the testimony of children are not adversarial.[271] The trial proceedings are in many ways similar to those of the South African or British model, with the exclusion of the "jury system".[272] Protective methods are used, particularly the use of an intermediary, to assist the child's interactions with the judicial system.

In 1956, the intermediary system was introduced in Israel, making it one of the oldest within the accusatorial world.[273] The perceived culture of aggressive cross-examination, and the relationship of the child witness and the offender, has been the key driving force to have the intermediary services.[274] The general aspects of the trauma, harm and dangers of children testifying in criminal proceedings were also taken into account to motivate this development.[275]

In the event that the child witness is below the age of 14 years, and is in a position to understand the basic tenets of telling the truth, then they may be competent to testify.[276] The hallmark of using the intermediary service is to protect the child under the age of 14 from being subjected to dreadful cross-examination, as intermediaries testify in their place.[277] The child is assigned a specialist social worker, referred to as a "youth investigator". The youth investigator is a professional, competent intermediary. He or she assists the child in the entire process. This includes, evaluating the credibility and competency of the child to testify, particularly in sex related offences and/or in cases against parents or a guardian.[278]

The youth investigator's recommendations on whether to allow a child to appear in court and take special measures to protect the witness, are considered by the court.[279] The

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271 The procedures introduced by the enactment of the *Evidence Revision (Protection of Children) Law* (1955); see also Robinson 2015 *IJLP* 172.

272 Procedures that consists of a group of selected independent persons who sit in criminal trials and determine whether the accused is guilty or not based on the facts presented. The judge decides issues on matters of law.

273 Robinson 2015 *IJLP* 172.

274 Spencer and Lamb *Children and Cross-Examination* 78.

275 Henderson "Innovative practices in other jurisdictions" 121.

276 Amendment to the *Law of Evidence Revision* gave the child the option of testifying in open court (Amendment no. 10, 2004).

277 Robinson 2015 *IJLP* 172.

278 Robinson 2015 *IJLP* 173.

279 Henderson "Innovative practices in other jurisdictions" 122.

youth investigator in making these findings, takes into account the child's views on whether he or she is willing to testify in court. Consideration is also given to the child's age and evolving capacities.[280] The discretion of the youth investigator is absolute and final. As such, the court or any other party cannot impose any other condition or tamper with the exercise of this discretion.[281] Notably, no one can overrule the investigator's judgments on these matters.[282]

The measures are meant to protect the child witness, as aptly stated that:

> The *Evidence Revision (Protection of Children) Law* (1955) was meant to balance the three interests; the social interests of bringing offenders to court and punishing them, the social and the private interests to protect children from causing them additional mental damage as a result of the exposure to the legal processes and in general their being cross examined, and the common interest of the defendant and society in the existence of fair process and revealing the truth.[283]

As a result of the discretion bestowed upon the youth investigator, children seldom testify. In the event that they do testify, special measures such as screens or CCTV links are used.[284] The intermediary will also be available to support and protect the child from further hardships. In such instances the intermediary may testify in place of the child, assisting with the child's version of the story.[285] It is commendable that paramount dedication to the protection of child witnesses through the use of intermediaries is offered within this system.[286]

The child witness is examined through the intermediary. The system makes use of specialist intermediaries in the criminal process to; advise on, monitor and translate questions posed to the child.[287] This approach is similar to that in South Africa in that, all communications to the child via CCTV are made through the intermediary.[288] Thus, the procedure is meant to protect the child witness from direct examination in chief, cross examination or re-examination. The use of intermediary services is to ensure that the

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280 Robinson 2015 *IJLP* 173.
281 Robinson 2015 *IJLP* 173.
282 Henderson "Innovative practices in other jurisdictions" 121.
283 *Mizrali v The State of Israel* 35(4) PD 421, 427.
284 Robinson 2015 *IJLP* 172.
285 Henderson "Innovative practices in other jurisdictions" 122.
286 Robinson 2015 *IJLP* 173.
287 Henderson "Innovative practices in other jurisdictions" 122.
288 See 2.3.1 above.

child is facilitated to actively participate and that the evidence the child gives is adequately tested.[289]

Robinson[290] argues that, the intermediary services of the Israeli system is flawed in that it fails in giving the accused an adequate opportunity to test the child's evidence. In itself, it is a barrier to an effective justice delivery which balances the rights of the accused and those of the witness within the trial proceeding.

4.3 Scotland

Scotland has a comprehensive piece of legislation, the *Vulnerable Witnesses Act* of Scotland (herein the *VWA*)[291] for the protection of vulnerable witnesses; both adults and children. The *VWA* introduced a range of measures intended to help vulnerable witnesses, adults and children, give their best evidence in court. Many of the special measures set out in the *VWA* were already available for witnesses through application to the court, alongside non-statutory measures such as clearing the court and removing wigs and gowns.[292] The promulgation of the *VWA* was a necessary development to ensure vulnerable witnesses were afforded the support and protection that was not always being offered during court hearings.[293]

The scope of application entails the recognition of the vulnerability of child witnesses below the age of 16 years. This allows the child witnesses access to the right to give evidence using standard special measures which include; the use of CCTV, a screen, and a support person.[294] The application of these special measures are applicable on a case to case basis, and may be applied independent of the other or in conjunction with another.[295] The use of the CCTV is in accordance with the guidance provided for in the "Special measures for vulnerable adult and child witnesses: a guidance pack". [296]

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289 Spencer and Lamb *Children and Cross-Examination* 87.
290 2015 *IJLP* 172.
291 *Vulnerable Witnesses Act* of Scotland 2004 (hereinafter the *VWA*) entered into force in 2005.
292 Richards, Morris and Richards *Turning Up the Volume* 18.
293 Richards, Morris and Richards *Turning Up the Volume* 20.
294 Support person is any person who is not a witness in the matter and may be a parent or social worker.
295 *Vulnerable Witnesses Guidance Pack* 4.
296 Guidance on Questioning of Children in Court http://www.gov.scot/Publications/2008/04/21142140/6

In terms of procedure, the *VWA* requires that the child witnesses should serve or submit a notice highlighting the intention to use the "special measures".[297] A child witness is entitled to the use of the standard special measures specified in the child witness notice.[298] In the proceedings, the court will take into account the views of the child witnesses, the views of the witness' parents, [299] provided that the parent is not the accused or any other party allegedly implicated in the matter. In cases where the parent's views differ from that of the child, and the latter is aged 12 or older, taking into account the child's evolving capacities, the child's views will be given greater weight by the court than that of the parent or guardian.[300]

It is readily acceptable that children by definition qualify as vulnerable. However, the court takes into account various factors in determining the vulnerability of each individual child. These factors include; significant social or learning disabilities, the circumstance and nature of the offence, relationships between the accused and the witness, the witness' age and maturity, and any other relevant factors.[301]

Further, there are also provisions allowing court officials to remove their wigs and gowns upon an application form any party, to put the child at ease. This relates to the testifying of child witnesses within the courtroom without the use of the CCTV or screen. This approach is adopted in cognisance of the fact that participating in the justice system, particularly the giving of evidence in court – can make an already traumatic experience even more upsetting and stressful for a child witness.[302]

There is no mention of the term "intermediary" in the *VWA.* Instead, the profession - "social worker" is used in reference to practitioners or support persons assisting vulnerable witnesses. Be that as it may, the legislature contemplated the best interests of the child in structuring these protective measures. This study refrains from discussing

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297 Special measures are referred to as the measures that child witnesses under the age of 16 have a right to use, which include: a live television link (CCTV) where the witness is in another part of the court building, a screen, and a supporter in conjunction with either CCTV or a screen.

298 *Vulnerable Witnesses Guidance Pack* 4.

299 For purposes of the *VWA* a parent means any person who has parental responsibilities as enshrined in s 1 (3) of the *Children's (Scotland) Act* 1995.

300 *Vulnerable Witnesses Guidance Pack* 4.

301 Henderson "Innovative practices in other jurisdictions" 120.

302 *Vulnerable Witnesses Guidance Pack* 6.

the procedural measures outlined in the *VWA* but emphasises on the protective special measures. The lack of specific mention of the term "intermediary" does not take away the role that the support person and other practitioners play in ensuring that the best interests of child witnesses have been taken into consideration.

4.4 Lessons to learn

The development and success of the intermediary services within the jurisprudence of other countries/jurisdictions vary based on the level of political developments. In as much as South Africa itself has a fairly protective intermediary system, adopted by an amendment to the *CPA,* there is a lot to be emulated from other jurisdictions.

The Israeli intermediary system offers a protective mantle higher than the one existing in South Africa. This is evident in the discretion upon the intermediary or youth investigator, which is unquestionable. The intermediary's findings are final and absolute, and cannot be tempered with even by the court.[303] The intermediary in South Africa does not have such powers and discretion to decide on or make findings about the child. In South Africa, it is the court which makes the final determination regarding the interests of the child witnesses. In the Israeli system, the intermediary's judgement cannot be overruled by the court[304] because the intermediary is considered best and professionally equipped to understand the child's best interests, better than the court.

The Scottish government provides a "guidance pack"[305] simplifying on how the vulnerable witness can be protected in the criminal justice system. Apart from the Victims Charter, South Africa does not have an elaborated pack or manual amplifying section 170A of the *CPA*. The use of the CCTV and other special measure together with the intermediary require the use of guidance pack to ensure that these measures are used for the benefit and interests of child witnesses.

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303 Robinson 2015 *IJLP* 173.

304 Henderson "Innovative practices in other jurisdictions" 121.

305 A simplified manual on dealing with matters concerning the *VWA* and the procedures related to its implementation.

4.5 Conclusion

South Africa adopted the use of intermediaries in 1993,[306] while the Israeli system introduced the same much earlier, in 1956.[307] Thus the South African system is still undergoing developments and improvements. There are certain discretionary powers and practices that rest upon the intermediary in the Israeli system, which are not available for the intermediary in South Africa. On another note, the Scottish government promulgated a comprehensive practice manual for the benefit of professionals working with child witnesses. The general purport of these provisions is to invoke the best interests of the child principle, which for Israeli requires professionals (intermediary) properly equipped to make decisions about child witnesses, being given the ultimate say amongst other considerations. This chapter examined how other jurisdictions use intermediary services for the best interests of child witnesses in criminal proceedings. The chapter that ensues summarises the study and provides recommendations that may be adopted within the South African intermediary services.

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306 See 2.3.1 above.
307 See 4.2 above.

Chapter 5: Conclusion and Recommendations

5.1 Conclusion

In conclusion, the best interests of the child is a constitutional injunction for the protection of children in all matters concerning their welfare and well-being. The intermediary services, are protective measures that are taken to ensure that the best interests of the child are paramount in all matters affecting the child witness.

The CRC and the ACRWC provides normative standards for the protection of children, and implore States parties to take appropriate measures[308] to protect children in all matters concerning them.[309] These international instruments provide a threshold for the balancing of all rights within the parameters of the four cardinal principles, namely; non-discrimination, participation, survival and development, and the best interests of the child. Thus, any policy, action and decision concerning a child, has to be guided by one or all of these guiding principles. For instance, the best interests of the child is considered an all-encompassing principle for the protection and implementation of children's rights. The formulation of the best interests of the child principle is considered the standard upon which a State party has to meter all its laws and policies regarding children.[310] The wording in the ACRWC places the best interests of the child as the primary consideration, in all matters concerning the child. Taking this approach, the interests of child witnesses are the cornerstone of these two international and regional children's rights instruments. It is submitted that the CRC and the ACRWC does not explicitly mention the terms "child witnesses" or "intermediary".

The best interests of the child principle is also entrenched in South African legislative framework. The *Constitution* provides that a child's best interests are paramount in all matters concerning the child.[311] Considering that the best interests principle is entrenched in the Bill of Rights, the Constitutional Court construed and declared that it is not a mere

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308 The measures should be guided by the guiding principles and be tailor-made to meet each individual child's needs.

309 A 4 of the CRC and A 1 of the ACRWC.

310 See footnote 184 above.

311 Section 28 (2) of the *Constitution*.

principle but an independent right.[312] Thus, child witnesses have the right to have this right exercised and implemented in all matters affecting them. The *Children's Act* urges that in all matters affecting children, the best interests standard should be used.[313] This standard, when adopted, guarantees the protection of children testifying in criminal proceedings. This criterion is the one that ensures that child witnesses are protected against further hardship in the criminal justice processes, particularly by adopting intermediary services during trial.

Intermediary services are measures taken to ensure the realisation of children's right to dignity. The right to human dignity is recognised under international law, regional law and the South African legal framework. Further, the right to dignity of children is connected with the right to equality and non-discrimination, the right to survival and development, participation and the best interests. The right to survival and development is manifested in the special measures that are taken to ensure that a child is protected from further hardships. Thus the intermediary will ensure that the best interests of the child witness are upheld and that the child is treated with respect in line with the CRC general principles.

The UN Guidelines is a child witness centred document, comprehensively canvassing the protection and handling of child witnesses in the criminal justice system. These guidelines set out cross-cutting guiding principles instructive to professionals working with child witnesses, as guided by the CRC. Not only do they provide for the guiding principles, but they enumerate child oriented rights. The UN Guidelines provide that child witnesses have the right to be treated with dignity and compassion through-out the criminal justice process, and to receive the utmost protection in a non-discriminatory manner. Child witnesses deserve to be kept informed of any developments in the unfolding of their cases. This means that, depending on their age and maturity, they may be informed directly or indirectly through their guardian or parents. In so far as this right refers to the entire criminal justice process, from the first contact with the police, specific emphasis is given to the role of the intermediary to keep the child informed of the court processes

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312 *Minister of Welfare and Population Development v Fitzpatrick* para 17.
313 Section 9 of the *Children's Act*.

and developments with the case. The intermediary, acting in the best interests of the child, shall ensure the realisation of these and other rights.

One fundamental principle that ensures that the best interests of child witnesses are taken into account is to allow them to participate fully.[314] The use of intermediary services assures the child that his or her voice and wishes are taken into consideration and seriously. For example, in South Africa an intermediary is professionally a practitioner who is trained to communicate with children at their level. The child witnesses' concerns, fears and wishes are relayed to the court undiluted. The intermediary monitors the child's performance, demeanour and anxiety during testifying and tries as much as possible to protect the child's interests. The right to participate, to be heard and to be taken seriously is enshrined in the CRC, the ACRWC, the *Constitution* and the *Children's Act*. These legal instruments accentuate on the importance of listening to children's views in matters concerning them. In accordance with these international, regional and national legal instruments, the intermediary services are used as a measure to ensure that a child is an active participant in the criminal processes.

The intermediary services as established in terms of section 170A of the *CPA* provides for protective measures for shielding child witnesses from hardships. The Constitutional Court outlined in the cyclostyled judgement of *DPP V Minister of Development*[315] that, the intermediary services is in tandem with section 28 (2) of the *Constitution*. The appointment of an intermediary is in the best interests of child witnesses, guaranteeing their constitutional right to protection. This study outlined that, the best interests of the child does not trump over other rights but is the guide to ensure the protection of child witnesses in criminal proceedings.

The research question in this study sought to evaluate whether intermediary services offer child witnesses a constitutional right to protection from hardships during criminal proceedings. It is submitted that there is an interconnectedness of the rights of child witnesses as they interface with the criminal justice system. Important is the proclamation

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314 Van Bueren "The United Nations Convention on the Rights of the Child" 205.
315 See footnote 68 above.

by the Constitutional Court, that section 28 (2) of the *Constitution* is not just a mere principle but a right in itself.

It is submitted that the constitutional rights on the protection of child witnesses are upheld by a combination of rights, standards and practices. The constitutional injunction of the best interests of the child as the precise, stands out to ensure the protection of child witnesses, linked to other human rights of children under international and regional legal instruments. The measures taken in South Africa to protect child witnesses are commendable, though there is need to consider the recommendations enumerated below.

5.2 Recommendations

It is recommended that the intermediary system of South Africa should consider the following:

Adopting national guidelines, to elaborate and define the manner in which intermediaries perform their functions. This is the approach adopted by the Scottish government in simplifying, elaborating and pronouncing how the vulnerable witness system works. For instance, the Scottish government provides for practical measures or steps taken to ensure that a child is protected when testifying in criminal courts, as with the use of the CCTV.

It is imperative for the South African government to provide support for the training of intermediaries. For designated professionals qualified to perform the duties of an intermediary, there is need for strengthening their capacity to ensure uniformity in the treatment of child witnesses. The Department of Justice and Constitutional Development, in charge of judicial staff and interpretorial services, may carry out training workshops for the training of intermediaries. The training will have to be designed to merge the offices of the interpreter and the intermediary - the intermediary may act as an interpreter for the child witness.

There is a need to consider giving the intermediary wide discretion to ensure that he or she does not just act as mere strange third parties during trial proceedings. This approach

is adopted in the Israeli legal system, where the youth investigator makes an assessment on the child's welfare and decides on whether the child may testify or not. The youth investigator's discretion is final, absolute and unquestioned.

Consideration has to be given to the protection of child witnesses with any form of disability. The South African legal and policy framework is silent on the protection of child witnesses with disabilities. Thus, there is a need to make available disability-friendly facilities to ensure that child witnesses with impairments participate fully in the process. The realisation of the rights of child witnesses with disabilities calls for intermediaries trained and equipped to work with persons with disabilities.

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