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A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Proceedings affecting Child Victims and Witnesses

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1. Introduction

For some time, judicial authorities struggle with child victims and witnesses as actors in criminal proceedings. This is especially true for (sexual) abuse cases as their testimony is often of paramount importance for the evidence-gathering and the truth-finding process.¹ Criminal proceedings concerning abuse are usually perceived as an ordeal by young victims and crucial child witnesses² and can be rather traumatising and result in secondary victimisation (i.e., victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim).³ Especially in this kind of case, regular proceedings

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- 1 Prosecuting alleged child abuse cases is difficult. Physical evidence of molestation is not always present and the perpetrator and the child victim are usually the only witnesses. See J. Haugaard et al, 'Children's Definitions of the Truth and their Competency as Witnesses in Legal Proceedings', 1991 *Law and Human Behavior* 15, no. 3, pp. 253, 254. See also for instance D. Whitcomb, 'Legal Interventions for Child Victims', 2003 *Journal of Traumatic Stress* 16, no. 2, April, p. 149.
- 2 Studies by for instance Goodman et al., Spencer & Flin, Whitcomb et al., show that confronting the accused is a major stress factor for child witnesses. See G. Goodman et al., 'Emotional effects of criminal court testimony on child sexual assault victims', 1992 *Monographs of the Society for Research in Child Development*, 57 (Serial no. 229); J. Spencer & R. Flin, *The evidence of children: The law and psychology*, 1999; D. Whitcomb et al, *When the victim is a child: Issues for judges and prosecutors*, Washington DC: U.S. Department of Justice, 1985. Another negative effect is caused by the multiple interviews that the child has to endure during the course of the investigations. See for instance L. Berliner & J. Conte, 'The effects of disclosure and intervention on sexually abused children', 1995 *Child Abuse and Neglect* 19, no. 3, pp. 371-384 and J. Henry, 'System intervention trauma to child abuse victims following disclosure', 1997 *Journal of Interpersonal Violence* 12, pp. 499-512. However, not all researchers are of the opinion that testifying in court is always harmful for the child. See for instance R. Otto & G. Melton, 'Trends in legislation and case law on child abuse and neglect', in R. Ammerman & M. Hersen (eds.), *Children at risk: An evaluation of factors contributing to child abuse and neglect*, 1990, pp. 55-83 and G. Cecchetti-Whaley, 'Children as witnesses after *Maryland v. Craig*', 1993 *Southern California Law Review* 65, no. 4, pp. 1993-2037. Cecchetti-Whaley concludes that testifying in court is not categorically harmful and may even be beneficial to children in the long run (p. 2018).
- 3 UNODC/UNICEF, *Justice in Matter involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, New York 2009, pp. 5 and 33 with reference to the UNODC, *Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, New York 1999.

are modified in one way or another to accommodate and protect children. The European Union obliges Member States to take into account the interests of vulnerable witnesses in organising criminal proceedings.⁴ International standards from the United Nations (UN) entail similar instructions, as will be pointed out below. These special protective measures are primarily meant to protect the child and to prevent secondary victimisation. They can also aim at both protection and the enhancement of the truth-finding process. Videotaping the evidence prior to the trial, one-way screens, videoconferencing and out-of-court statements are frequently used methods, both in Europe and other jurisdictions like the United States and Australia.⁵

Since the adoption of the 1989 UN Convention on the Rights of the Child (CRC)⁶ the child's right to be heard as well as the broader concept of the child's right to participate,⁷ have been recognised internationally as one of the key-features of the child as a human being who is independently entitled to human rights and fundamental freedoms. The right to be heard as laid down in Article 12 CRC means that States Parties must 'assure to the child who is capable of forming his or her own views' can 'express those views freely in all matters affecting the child' and that the views of the child are given 'due weight in accordance with the age and maturity of the child'. In addition, Article 12(2) CRC provides that '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'. This has a number of implications for the participation of child victims and witnesses in criminal proceedings, which have been elaborated upon in, inter alia, the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime⁸ and the 2009 General Comment No. 12 of the UN Committee on the Rights of the Child (hereinafter: CRC Committee) on the 'right of the child to be heard'.⁹

These international standards, supported by recent similar standard-setting developments by the Council of Europe,¹⁰ provide child victims and witnesses with the right to actively participate in proceedings. This adds a new dimension to the existing and already problematic balance between the protection of the child victim and witness on the one hand and the fairness of the criminal proceedings on the other, prompted by the right to a fair trial as recognised in domestic jurisdictions as well as global and regional human rights instruments¹¹ (see inter alia Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR)). Traditionally, one is primarily concerned about the child's protection against the potentially negative influences of criminal proceedings,

4 Framework Decision of the Council of Europe on the Standing of Victims in Criminal Proceedings (2001/220/JHA).

5 See for instance G. Goodman et al., 'Face-to-Face confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony and Jurors', *Decisions*, 1998 *Law and Human Behavior* 22, no. 2, pp. 165-203; D. Marsil et al., 'Child Witness Policy: Law Interfacing with Social Science', 2002 *Law and Contemporary Problems* 65, no. 1, pp. 209-241; J. Wilson & G. Davies, 'An evaluation of the use of videotaped evidence for juvenile witnesses in criminal courts in England and Wales', 1999 *European Journal on Criminal Policy and Research* 7, pp. 81-96.

6 GA Res. 44/25, 20 November 1989.

7 L. Krappmann, 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)', 2010 *International Journal of Children's Rights* 18, p. 501.

8 ECOSOC Res. 2005/20.

9 UN Doc. CRC/C/GC/12, 20 July 2009 (hereinafter: General Comment No. 12).

10 See the recently adopted Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010. As part of its agenda for 2011, the European Commission announced that it would adopt a proposal for a Directive on victims' rights, which aims to raise the level of protection of vulnerable victims, including children. In addition, the Commission aims to support and encourage the development of training activities for judges and other professionals at the European level regarding the optimal participation of children in judicial systems; see Press Release of 15 February 2011, IP/11/156.

11 See on the conflicting rights of children and the defendant for instance E. Walton, 'The Confrontation Clause and the Child Victim of Sexual Abuse', 1994 *Child and Adolescent Social Work Journal* 11, no. 3, June, pp. 195-207 and Marsil et al., supra note 5.

which can be on strained terms with other interests, such as due process, and, thus, with the way criminal proceedings are organised and justified in domestic jurisdictions. The right to participate arguably makes the balance between the interests just mentioned even more complex and could turn the balancing process into a Bermuda triangle. This raises a number of questions one of which concerns the added value of the recognition of the right to participate, given the complexity and status quo of the legal systems within (Western-) Europe and the United States.

In this article, we focus on the position of the child victim and witness¹² in criminal proceedings: the child victim and witness that needs to be protected, the child as a vital source of information to the judicial authorities and the child as a person under the age of eighteen who has the right to participate (Article 1 in conjunction with 12 CRC).¹³ We aim to clarify which assumptions regarding the interests of children and their special needs underlie legal regulations and doctrine and whether these assumptions can be reconciled with one another. The multiple legal issue is how to reconcile the image of children as vulnerable and dependent persons in need of protection with the necessity to extract reliable information from them and the legal obligation to let them participate effectively in the criminal process. Although we will not be able to comprehensively address research regarding the question whether the legal perception of the needs and abilities of children are at odds with psychological findings, we will refer to these findings occasionally.

The article commences with a brief overview of the main characteristics of the CRC and the legal concept of the child as laid down in this significant and almost universally ratified UN treaty for children. In addition, we will highlight the general implications of Article 12 CRC, as one of general principles recognised under the CRC, as well as international standards: the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and the 2009 General Comment No. 12 of the CRC Committee.¹⁴

Subsequently, we will address the position of the child victim and witness in criminal proceedings, more particularly the feasibility of the use of the child witness' statements in the US and the European region. Even though the former is not bound by the CRC, it is interesting to focus on those two regions because their rules and regulations regarding child witnesses are based on different premises as are their assumptions on how to acquire the most reliable testimony. In the United States, in principle, children have to testify in open court. In most European states, especially young children are heard during pre-trial proceedings by specialised examiners (e.g., police, psychologists). After having analysed these legal realities in the US and under the case law of the European Court of Human Rights (ECtHR), we will conclude by providing our main finding regarding the reconciliation of the various rights and interest at stake when considering the legal position of the child witness in fair criminal justice proceedings.

2. The right of the child to participate – general observations and specific implications

2.1. The CRC: some general remarks

The adoption of the CRC in 1989 and its entry into force one year later marked a change in the way children are considered by adults. The CRC codified the recognition of the child as a rights-

12 We refer to 'he or him', while meaning 'she or her' as well, unless explicitly stated otherwise.

13 It is important to acknowledge that a child victim is not necessarily a child witness and vice versa, and that there are differences in the legal status of the child as a victim and the child as a witness. However, for the sake of clarity we will address the child who is both victim and witness, unless explicitly stated otherwise. The relevant UN instruments and literature relied upon in this article generally refer to the child victim and witness as well.

14 This article will not address the position of child victims and witnessed under international criminal law.

holder entitled to human rights (both civil and political as well as economic, social and cultural rights), while beforehand a child was merely recognised as a person in need of special care and assistance (see e.g., Article 24 ICCPR).¹⁵ Still, the CRC also recognises the child as a human being with special needs, who is entitled to protection and to special treatment that aims at his development towards becoming an autonomous and independent adult (Article 6(2) CRC)¹⁶ and whose best interests must be ‘a primary consideration’ in ‘all actions concerning [them]’ (Article 3(1) CRC). It is argued that the CRC recognises three groups of human rights, the ‘3 P’s’:¹⁷ 1) rights meant to offer ‘protection’, including the right to respect for privacy and family life (Article 16 CRC) or the right to be protected against violence (Article 19 CRC); 2) rights meant to offer special ‘provisions’, including the right to an adequate standard of living (Article 27 CRC), to education (Articles 28 and 29 CRC) and health care (Article 24 CRC); and 3) rights meant to enable the child’s ‘participation’, including the right to be heard (Article 12 CRC), freedom of expression (Article 13 CRC) and the right to information (Article 17 CRC).

One provision with a protective nature particularly concerns the support of child victims, Article 39 CRC. It stipulates that ‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts’ and that ‘[s]uch recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child’.

Even though the CRC led to the full recognition of the child’s entitlement to civil, political, economic, social and cultural rights,¹⁸ while not losing sight of the fact that he is a dynamic human being developing his capacities towards full capacity as an adult, this does not mean that the child is a ‘stand-alone individual’¹⁹ with full autonomy. The following observations should be made. In the first place, the child is primarily recognised as a member of his family. According to the preamble of the CRC, the family is regarded as ‘the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children’. Subsequently, Article 18 CRC acknowledges the specific position of the parents, as those who ‘have the primary responsibility for the upbringing and development of the child’.

Second, the relationship of child, family and parents is one that is dynamic and changes as the development of the child moves towards gaining more autonomy.²⁰ This is called the concept of the child’s ‘evolving capacities’ (Article 5 CRC).²¹ The fact that the child should be regarded as an individual in development does not apply only in relation to his family, but also in light of the exercise of his rights in general. Moreover, some CRC provisions explicitly refer to this concept. A prominent example in this regard is Article 12 CRC. According to this provision the right of the child to express his views is limited to the child who is capable of forming his own views. Subsequently, the views of the child should be given ‘due weight in accordance with the

15 J. Doek, ‘The Eighteenth Birthday of the Convention on the Rights of the Child: Achievements and Challenges’, 2007 *University of Michigan Journal of Law Reform* 41, no. 1, p. 62.

16 *Ibid.*, p. 62.

17 N. Cantwell, ‘The Origins, Development and Significance Of the United Nations Convention On The Rights Of The Child,’ in S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the ‘Travaux Préparatoires’*, 1992, p. 27; cf. A. Quennerstedt, ‘Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the “3 p’s”’, 2010 *The International Journal of Children’s Rights*, no. 4, pp. 619-635.

18 For more on the CRC, including the drafting process, core principles and key-characteristics see S. Detrick (ed.), *supra* note 17, and G. van Bueren, *The International Law on the Rights of the Child*, 1995.

19 J.E. Doek, ‘The Eighteenth Birthday of the Convention on the Rights of the Child: Achievements and Challenges’, 2007 *University of Michigan Journal of Law Reform* 41, no. 1, p. 63.

20 *Ibid.*, p. 62.

21 See further G. Lansdown, *The Evolving Capacities of the Child*, 2005.

age and maturity of the child' (Article 12(1) CRC). On the one hand, this implies that depending on the maturity of the child, parents can make decisions on his behalf. On the other hand, this means that the recognition of the child as a rights holder has been made contingent on the developmental phase he is in.²² Thus, concept of 'evolving capacities' does not mean that a young and/or immature child should be denied human rights, but his competence to exercise his rights autonomously may be subject to limitations and fall under the responsibility of others, such as parents.²³

Having already mentioned Article 12 CRC, it is important to note that this provision has been recognised by the CRC Committee as one of the general principles of the CRC, together with Article 2 (non-discrimination), Article 6 (right to life and development) and Article 3 (the best interests of the child principle).²⁴ Together with Article 3, Article 12 is considered as one of 'the most notable improvements and innovations' of the CRC.²⁵ It represents, arguably in the clearest form, 'the concept of the child underlying the entire Convention'²⁶ and the recognition of the child as a subject of rights rather than an object of special care and protection.²⁷ It embodies the right of the child – and the positive obligation for States Parties to safeguard this right – to have their voices heard in all matters that concern them.

2.2. Article 12 CRC: right of the child to be heard / right to participation

Article 12 CRC embodies the right of the child to be heard, which is considered part of the group of participatory rights (Articles 12-17 CRC). According to Krappmann '[p]articipation is a very good term for that what results from expressing views, listening and giving due weight to the views, interests and goals of the child' and that the 'notion of participation captures an essential feature of the [CRC]', that is: the recognition 'that the child is a human being, who has the right to be respected as a unique individual with his own perspective and personal intentions by fellow human beings and also by the state, its institutions and other organisations'.²⁸

The text of the provision is as follows:

'1. 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.

2. 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.'

22 Ibid., pp. 3-4 for more on the significant link between Art. 5 and Art. 12 CRC.

23 J. Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', 1994 *International Journal of Law & the Family* 8, pp. 42-61; Lansdown, *supra* note 21, , p. 3 et seq.

24 General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6), CRC/GC/2003/5, 27 November 2003.

25 Cantwell, *supra* note 17, p. 28.

26 See Krappmann, *supra* note 7, p. 501.

27 Cf. Art. 24 ICCPR and General Comment No. 17 of the Human Rights Committee (HRC General Comment No. 17, Rights of the child (Art. 24), 7 April 1989).

28 See Krappmann, *supra* note 7, pp. 502-504 and Detrick (ed.), *supra* note 17, for more on the drafting of Art. 12 CRC. See also paras. 12 and 13 of General Comment No. 12. For more on the right to participation see F. Ang et al. (eds.) *Participation Rights of Children*, 2005.

The CRC Committee argues in its General Comment No. 12 on the child's right to be heard that Article 12 CRC leaves no room for a reluctant or lenient attitude towards this provision: States 'shall assure' the right to be heard 'in all matters affecting the child'.²⁹ One should make a distinction between the actual hearing and the taking into account (i.e., the giving due weight) of the opinion of the child and/or the information provided by the child. The latter should be done in conformity with the 'age and maturity' of the child. Regarding the former part, the CRC Committee has taken the position that as a principle any child should be regarded as capable of forming his own views.³⁰ As a minimum, this provision should not be understood as a potential limitation of the right to be heard. On the contrary, one should take into account all possible communication methods (including non-verbal forms, such as facial expressions, drawing, play, body language etc.) rather than denying certain (e.g., young) children the right to be heard based on the argument that a child cannot communicate (i.e., speak properly). In light of this, the CRC Committee chose not to provide age limits. Although one could have favoured the setting of age limits for the argument of legal certainty and equality,³¹ the CRC Committee has chosen not to. By doing it this way, it underscored the assumption that every child is capable of expressing his views and that the burden of proof that he might not be, lies upon the State. The Committee furthermore stresses that a child that is experiencing difficulties in communicating, such as those children who are disabled, should receive support.³² In this regard, it is noteworthy that the CRC Committee underlines that it is not necessary per se that the child understands every detail of what is going on;³³ he should, however, have sufficient understanding of those aspects that are relevant for the forming of his views, an approach that is also recognisable in the case law of the ECtHR regarding children subject to criminal justice proceedings.³⁴ This assumes, among others, adequate and child friendly information for the child on the most relevant aspects of the proceedings and decisions to be taken (see also below).

The CRC Committee's position regarding this first part of Article 12(1) CRC has implications for child victims and witnesses. In this regard, the CRC Committee warned for the 'negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment'.³⁵ Consequently, the utmost carefulness is required and States Parties are held to take 'all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child'.³⁶ However, the delicacy of the child's involvement should as such not be used to justify the denial of the child's right to express his views.

Article 12(1) CRC furthermore states that a child must be able to express his views 'freely'. This implies that a child is not compelled to express his views and he may not be put under pressure or manipulated; the hearing should take place in 'an environment in which the child feels respected and secure when freely expressing her or his opinions'.³⁷ It also means that he should be able to express his views from his own perspective.³⁸ This is particularly relevant for

29 General Comment No. 12, Para. 19.

30 Ibid., Para. 20 et seq.

31 See e.g. Lansdown, supra note 21, p. 49 et seq.

32 See also the paras. 32 and 33 in General Comment No. 9, The rights of children with disabilities, CRC/C/GC/9, 27 February 2007; cf. Art. 7(3) of the 2006 UN Convention on the Rights of Persons with Disabilities.

33 General Comment No. 12, Para. 21.

34 See *S.C. v. United Kingdom*, [2004] ECtHR, appl. no. 60958/00, Para. 29

35 General Comment No. 12, Para. 21. See also below.

36 Ibid., Para. 21.

37 Ibid., Para. 23.

38 Ibid., Para. 22.

child victims and witnesses. As pointed out below, research reveals that children, particularly young children, may adapt their statements to their perception of what the adult wants to hear. This should be avoided as much as possible. In light of this, it is crucial that a child's memory is not put to the test more than necessary (i.e., no more interviews than strictly needed).³⁹ Furthermore, it is important to stress that in order to be able to express one's views 'freely' it is 'essential' that the child has been informed adequately and in a manner that takes in to account the age and maturity of the child (i.e., the information must be provided in a child friendly way, which must be adjusted to the age and maturity of the child).⁴⁰ This information should concern the matters regarding the child may express his views ('what is it all about?') and the possible consequences of expressing these views (e.g., the court may call this child as a witness). Other questions concern: how will the hearing or interview take place and will it be confidential or not? Confidentiality can be problematic in criminal justice proceedings, particularly in light of the right to a fair trial and the principle of equality of arms (see e.g., Article 6(3)(d) ECHR).

The second part of Article 12(1) CRC concerns the taking into account of the opinion of the child and/or the information provided by the child, which should be done in conformity with the 'age and maturity' of the child. Thus, one should not merely provide the child with the possibility to express his views; one should actually take into consideration the child's views.⁴¹ At the same time, the wording of the second part of Article 12(1) CRC allows for limitations based on the age and maturity of the child. Thus, Article 12 CRC implies, at least according to the view of the CRC Committee, that a child should in principle be regarded competent to express his views in one way or the other. The question to what extent the opinion of the child should be taken into account may be subject to limitations. This has the following implications.⁴²

First of all, 'age' alone cannot be decisive.⁴³ Age and maturity should be considered together, which seems to prohibit the exclusion or setting aside of children's views as if irrelevant based on an age criterion only. Maturity in this regard refers to the child's competence to assess the consequences and/or implications of the matter that affects him and regarding which he has expressed his views; he should be able to balance the interests at stake. The key-question is: to what extent is the child competent to make the required assessment and to make a reasonable judgment and express his views accordingly? This implies that the specific context of the hearing should be taken into account and that the child should have a fair chance of making the required assessment carefully and adequately.⁴⁴ This requires – inter alia – adequate assistance and information and the hearing taking place in an environment that enables the child to express his views in an adequate manner.⁴⁵

The age and maturity criterion makes the application of Article 12(1) CRC dynamic. It requires a tailored assessment in each case separately and seems to rule out age limits set by law, although such age limits undoubtedly serve significant legal interests, like legal certainty and equality.⁴⁶ In addition, this provision requires, according to the CRC Committee, transparency

39 Ibid., Para. 23.

40 Ibid., Para. 25.

41 See also Krappmann, supra note 7.

42 See supra note 35, para 28 et seq.

43 See further Lansdown supra note 21.

44 See Eekelaar, supra note 23.

45 See on how the environment affects the ability of child witnesses to testify for instance K. Saywitz, 'Improving Children's Testimony; The Question, the Answer and the Environment', in M. Zaragoza et al., *Memory and Testimony in the Child Witness*, 1995, pp. 131-135.

46 See e.g. Lansdown, supra note 21, pp. 49-50. As mentioned earlier, the CRC Committee deliberately chose not to recommend age limits in this regard. Cf. its position regarding another (dynamic) issue, the minimum age of criminal responsibility; General Comment No. 10, 'Children's rights in juvenile justice', UN Doc. CRC/C/GC/10, 25 April 2007, Para. 32.

in the decision making on this point.⁴⁷ One should clarify in general, but particularly to the child, to what extent his views have been of influence in the actual decisions taken.⁴⁸ For judicial authorities that have heard the child, this implies that they should clarify in their judgement how they have given weight to the views of the child or the information provided by the child. That this approach is not necessarily supported by (domestic) courts is proven by the Netherland Supreme Court that has ruled that Article 12 CRC does not require an explicit clarification in this regard.⁴⁹

Article 12(2) CRC concerns the right of the child to be heard in judicial procedures. According to the CRC Committee, this provision should be interpreted broadly and include both formal and informal judicial procedures, such as mediation, and administrative procedures. In addition, it should be applied ‘without limitation’,⁵⁰ and, include, for example, procedures affecting ‘child victims of physical or psychological violence, sexual abuse or other crimes’.⁵¹ The right of the child to be heard furthermore applies to proceedings initiated by the child as well as to those initiated by others that affect the child.⁵²

One aspect of effective participation concerns the accessibility of judicial procedures, which is directly linked to awareness of the child’s legal status (i.e., the possibility to participate in procedures).⁵³ Is the child aware of the fact that he can participate in judicial proceedings and does he understand how to access the proceedings? Arguably, a child should be informed or should be able to find ways to become informed, for example, through legal assistance or involvement of legal aid clinics for children. For child victims and witnesses, this means that actors in and around legal procedures in which these children are involved should provide information (and assistance) in this regard.⁵⁴ Accessibility also implies that the procedures as such are understandable for the child (see earlier), which calls for child-friendly procedures.⁵⁵ This could be lacking, particularly when the proceedings are primarily focused on adults (e.g., if an alleged adult perpetrator stands trial and the child is involved as victim and/or witness). Within the context of juvenile justice, the CRC Committee favours closed court sessions in order to foster the effective participation of the child.⁵⁶ This adds another dimension to the feature of court and other hearings *in camera*, which should no longer be regarded only as an aspect of the child’s privacy (i.e., under Article 40 in conjunction with 16 CRC).⁵⁷ Arguably, this approach is of equal relevance for child victims and witnesses and could imply that (part of the) proceedings take place behind closed doors (see also below). This seems to be supported by the CRC Committee stating that ‘[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age’.⁵⁸

Another aspect of effective participation in judicial procedures concerns the clarification by the judicial authorities of two decisions in particular: 1) the decision whether or not to hear

47 General Comment No. 12, Paras. 29 and 30.

48 Ibid., Para. 45.

49 HR 26 March 2010, LJN: BL2226.

50 General Comment No. 12, Para. 32.

51 Ibid.

52 Ibid., Para. 33.

53 Adequate information is essential for the child’s legal status in general; T. Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, 2008, p. 282.

54 See e.g. General Comment No. 12, Para. 64 and further below.

55 Ibid., Para. 34. See also the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 17 November 2010.

56 General Comment No. 12, Para. 61.

57 Cf. General Comment No. 10, ‘Children’s rights in juvenile justice’, UN Doc. CRC/C/GC/10, 25 April 2007, Para. 65-66 and T. Liefaard et al., ‘Procedural rights for juveniles: a human rights and developmental psychology perspective’, 2011 *Chronicle of the International Association of Youth and Family Judges and Magistrates*, pp. 47-52.

58 General Comment No. 12, Para. 34.

the child,⁵⁹ and 2) the substantive decisions made and the question to what extent the views of the child have been taken into account and been given due weight (see also earlier).⁶⁰ In addition, the CRC Committee stresses that the child should be provided with remedies (complaints or appeals procedures) to challenge the violation or the disregarding of his right to be heard and his views being given due weight.⁶¹

A final element of Article 12(2) CRC that will be addressed here concerns the wording ‘either directly, or through a representative or an appropriate body’. The CRC Committee points out that a child should preferably be heard directly, either orally or through correspondence in writing.⁶² However, taking into account the views of the child without hearing the child in person is allowed. Although the CRC Committee does not explicitly provide for this, one of the justifications for not hearing a child in court can be found in the best interest of the child principle, for example if this entails a risk for the child.⁶³

The CRC Committee does state that it is up to the child to decide on the form (i.e., directly or through a representative) and method.⁶⁴ It is not hard to imagine that this is quit challenging in practice and seems to require – as a minimum – sufficient information for the child, even though Article 12 CRC does not provide that courts have to reach out for the child’s participation.⁶⁵ However, this does not mean that the domestic authorities, such as legislators, have no responsibility in attributing children special forms representation, such as a *guardian ad litem* in family law cases or a court-appointed lawyer during criminal proceedings, police interrogations and deprivation of liberty (Article 37(d) CRC). Another issue in this regard concerns the question to what extent parents can decide to represent their child themselves or to let him be represented (cf. Article 5 CRC). The CRC Committee considers parents as children’s ‘most obvious representative[s]’, although there may very well be conflicting interests (e.g., if the child is accusing his parent(s) of abusive practices).⁶⁶ The best interests of the child should always be fully respected (Article 3(1) CRC). In light of this, the representative should ‘represent exclusively the interests of the child and not the interests of other persons (...) or institutions or bodies’.⁶⁷ Other representatives could be guardian(s), legal counsel or another person, such as a social worker.⁶⁸ It is important that representatives have ‘sufficient knowledge and understanding’⁶⁹ of the procedures and decision-making process. In addition, the CRC Committee stresses that should representatives have experience in working with children.⁷⁰

Despite these challenges and issues, the rationale behind the approach of the CRC Committee that it is up to the child to decide whether he wants to be represented or not seems to fit in the concept of the child’s right participation, which excludes that the child has no say in his representation or that he cannot opt for another representative. Subsequently, provided that the child has a representative, it may be considered part of this representative’s duty to communicate with the

59 The latter option should, in light of the general approach of the CRC Committee, be used reluctantly. However, this approach raises a number of practical issues, such as: should the court indeed hear a very young child if it is to be expected that it will (ultimately) not take into account his views given his young age and lack of maturity?

60 See also General Comment No. 12, Para. 45.

61 *Ibid.*, Para. 46 with reference to General Comment No. 5, Para. 24, and Para. 47.

62 General Comment No. 12, Para. 35.

63 See e.g. *Sahin v. Germany*, [2003] ECHR, appl. no. 30943/96, paras. 73-74. The court rejects that as a rule every child must be heard in court (Para. 73).

64 General Comment No. 12, Paras. 35 and 36.

65 See Eekelaar, *supra* note 23, p. 54.

66 General Comment No. 12, Para. 36.

67 *Ibid.*, Para. 37.

68 *Ibid.*, Para. 36.

69 *Ibid.*

70 *Ibid.*

child carefully before providing the judicial authorities with the information from and on behalf of the child.⁷¹

In essence, Article 12 CRC no longer allows that (judicial) proceedings and decision making processes take place without letting the child participate effectively. This also has implications for the position of the child victim and witness, such as involvement in the prosecution of the alleged perpetrator, including effective participation as one of the interested parties either directly or indirectly,⁷² information regarding the proceedings including the progress made and the outcomes, influence on and participation in the potential outcomes of the case, including the decision to prosecute and participation in the evidence gathering, including providing testimonies in (pre-)trial proceedings. These implications will be addressed more in detail below.

2.3. Right to be heard and participation of child victims and witnesses

In its General Comment No. 12, the CRC Committee pays special attention to the position of the child victim and witness in the context of criminal proceedings. It stresses that ‘every effort has to be made to ensure that a child victim or/and witness is *consulted* on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process’ (emphasis added).⁷³ In this regard, information is crucial. That is why the CRC Committee explicitly links the right to be heard with ‘the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which “questioning” is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal’.⁷⁴ Above all, the CRC Committee stresses that child victims and witnesses must have the opportunity ‘to fully exercise her or his right to freely express her or his view in accordance with [the Guidelines in Matters involving Child Victims and Witnesses of Crime]’.⁷⁵ This explicit reference to these guidelines underscores their significance for the implementation of Article 12 CRC for the legal position of child victims and witnesses.

2.4. UN Guidelines in Matters involving Child Victims and Witnesses of Crime

The Guidelines in Matters involving Child Victims and Witnesses of Crime (hereinafter: Guidelines) adopted by the Economic and Social Council (ECOSOC) of the UN entail a further elaboration of the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly in 1985⁷⁶ and of Articles 12, 3 and 39 of the CRC.⁷⁷ When adopting the Guidelines, the ECOSOC explicitly referred to the particular vulnerability of the child victim and witness and the ‘need for special protection, assistance and support appropriate which takes into account the age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice

71 See Eekelaar, *supra* note 23, for more on this, particularly in light of principle of the best interests of the child.

72 In this regard, one should distinguish between the victim who acts as a witness and the victim who does not.

73 General Comment, No. 12, Para. 63.

74 *Ibid.*, Para. 64.

75 *Ibid.*, Para. 62.

76 GA Res. 40/34 of 29 November 1985.

77 J. van Dijk & R. Letschert, ‘Recht doen aan minderjarige slachtoffers en getuigen. Nieuwe richtlijnen van de Verenigde Naties’, 2006 *Tijdschrift voor de Rechten van het Kind*, pp. K2-K4.

process'.⁷⁸ Nevertheless, it considers the participation of child victims and witnesses in criminal proceedings 'necessary for effective prosecutions, in particular where the child victim may be the only witness'.⁷⁹ This reveals an underlying notion that 'justice for child victims must be assured'⁸⁰ and that victims 'are entitled to access to the mechanisms of justice and to prompt redress'.⁸¹ The Guidelines underscore the big dilemma here: children that suffer from abusive practices and crimes must be adequately recognised and perpetrators must be brought to justice; at the same time one should prevent these children from 'suffer[ing] additional hardship when assisting in the justice process'.⁸²

The Guidelines are founded on four principles,⁸³ resembling the general principles of the CRC as highlighted above, and which are worked out in the substantive provisions of the Guidelines.⁸⁴ The child victim and witness must be treated with respect for his dignity, without any form of discrimination (e.g., no difference in treatment of boys and girls and no unlawful distinction based on age). In addition, the child has the right to have her or his best interests given 'primary consideration', when the rights of accused and convicted offenders should be safeguarded. 'This includes the right to protection (e.g., from hardship during the justice process'⁸⁵) and to a chance for harmonious development' as stipulated by the Guidelines in Paragraph 8(c), which use rather strong language here, whereas Article 3(1) CRC merely requires that the best interests of the child must be 'a primary consideration'. The fourth principle is the right of the child to participation: '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 especially to the decisions affecting his or her life, including this 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'.⁸⁶

One of the key approaches of the Guidelines concerns the 'child-sensitive' manner in which child victims and witness should be treated, which 'denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views'.⁸⁷ This child-sensitive approach, therefore, includes the balance between protection and respect for the child's needs and views. Consequently, respect for the views of the child should be regarded as part of the general approach towards child victims and witnesses and is recognisable throughout the Guidelines. As part of the right to be treated with dignity, for example, the Guidelines provide that '[a]ll interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity'.⁸⁸ In addition, the child should understand and be able to communicate in the language used. As part of the non-discrimination principle, the Guidelines stress that '[a]ge should not be a barrier to a child's right to participate fully in the justice process' and that '[e]very child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or

78 ECOSOC Res. 2005/20.

79 Ibid.

80 Ibid.

81 Declaration of Basic Principles for Victims of Crime and Abuse of Power, Para. 4.

82 Guidelines, Para. 7.

83 Ibid., Para. 8.

84 Guidelines, Para. 10 et seq.

85 Ibid., Para. 29 et seq.

86 Ibid., Para. 8(d).

87 Ibid., Para. 9(d). See also D. O'Donnell, *The Right Of Children To Be Heard: Children's Right To Have Their Views Taken Into Account And To Participate in Legal and Administrative Proceedings*, 2009, p. 41 et seq.

88 Guidelines, Para. 14.

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'.⁸⁹ Again, an important position that fits in the CRC Committee's approach under Article 12 CRC.

There are a number of substantive paragraphs in the Guidelines that have direct implications for the right of the child victim and witness to participation; these paragraphs are categorised as provisions regarding 'the right to be informed', 'the right to be heard and to express views and concerns', 'the right to effective assistance', 'the right to privacy', 'the right to be protected from hardship during the justice process' and the issue of 'implementation', including adequate training of professionals.⁹⁰

Right to be informed (Paragraphs 19 and 20)

The Guidelines stress that child victims and witnesses should be informed, promptly and adequately, and so too should their parents or guardians and legal representative. The information should cover, inter alia, the criminal justice procedures, including all kinds of information regarding the role of the child victim and witness, the importance, timing and manner of testimony, and the way the child can be questioned during the investigation and trial. It can be assumed that children hardly have any idea of what the legal procedures entail,⁹¹ let alone that they know sufficient information about their legal position and rights under the CRC and other international standards, and furthermore about existing support mechanisms and protective measures for them when making a complaint or participating in the proceedings and existing mechanisms for review of decisions affecting them. The Guidelines stipulate that the child victim and witness should receive information on these elements as well. Additionally, prompt and adequate information about the progress and outcome of the case, including interim decisions from, among others, the prosecutor should be provided, as well as information on ways to obtain reparation and redress.

Right to be heard and to express views and concerns (Paragraph 21)

The Guidelines explicitly underscore the significance of this right for child victims and witnesses. They stipulate that professionals should make 'every effort' to enable child victims and witnesses to enjoy this right 'related to their involvement in the justice process'. These efforts include the consultation of child victims and witnesses in all the matters regarding which they should receive information. In addition, professionals must ensure 'that the child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process'. This instruction clearly adds a new dimension to the participation of child victims and witnesses in criminal proceedings. One should not only recognise their particular role for the truth finding process and their particular vulnerability. Within the specific context and reality of domestic criminal proceedings, one should facilitate the child's active involvement, which

⁸⁹ Ibid., Para. 18.

⁹⁰ See also Guidelines, Para. 32 et seq. on the guarantee that the child's safety must be protected.

⁹¹ Ask a child the meaning of 'court' and the reply is likely to be: 'A place to play basketball'. See K. Saywitz, 'Children's Conceptions of the legal System: "Court is a place to Play Basketball"', in S. Ceci et al. (eds.), *Perspectives on Children's Testimony*, 1989. See also J. Meyers et al., 'Hearsay exceptions: Adjusting the ratio of intuition to psychological science', 2002 *Law and Contemporary Problems* 65 p. 17. See also research regarding the position of the child in (juvenile) criminal justice proceedings; e.g. T. Grisso, & R.G. Schwartz (eds.), *Youth on Trial. Developmental Perspectives on Juvenile Justice*, 2000.

implies that he has a say in the proceedings and that his opinions and views should be taken into consideration. Although both these guidelines and Article 12 CRC do not stipulate that the child's wishes must be paramount, as a minimum, they assume that professionals take into account the expressed wish of the child and, if so, clarify to the child why they decided to act otherwise or why they did not give due weight to his views. In this regard, it is important to reiterate that age alone cannot be a justification for not giving due weight. The child's age and maturity can, however, provide for such a justification, which should be assessed in light of the specific context of the matter concerned. Those involved should, in other words, give 'due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child'.⁹² As mentioned earlier, the complexity of the context in which a child participates may justify limitations in this regard. At the same time, one may expect that one does its utmost to provide the child with the opportunity to participate effectively.

Right to effective assistance (Paragraph 22 et seq.)

Professional assistance is regarded as another key to effective participation or, in terms of the Guidelines, to deal with child victims and witnesses in a 'child-sensitive' manner. This includes all kinds of assistance and support services such as legal assistance, counselling and social services.⁹³ Assistance should be provided by specialists who make every effort to prevent that the child is subjected to excessive interventions and who should 'develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at pre-trial stages and trial stages'.⁹⁴ These measures may include the provision of child victim and witness specialists who can address the children's special needs, the provision of persons who can support the child during testimony (this may include 'appropriate family members'⁹⁵) and the appointment of guardians to protect the legal interests of the child.⁹⁶ Thus, effective assistance aims at the protection of the child; he should not be 'subjected to excessive interventions', for example.⁹⁷ However, the Guidelines underline that assistance is also crucial for the child's effective participation.

Although the legislator is not mentioned here explicitly, one may assume that domestic law should provide a legal basis for special (legal and/or other appropriate) assistance for child victims and witnesses.⁹⁸

Right to privacy (Paragraph 26 et seq.) and to be protected from hardship during the justice process (Paragraph 29 et seq.)

The protection of the privacy of child victims and witnesses⁹⁹ is another important element of the 'child-sensitive' manner in which they should be treated. The Guidelines consider the protection of privacy 'as a matter of primary importance',¹⁰⁰ meaning that the child's involvement should be kept confidential and that the disclosure of information that may identify the child involved should be restricted. In light of the position of the CRC Committee regarding protection of

92 Guidelines, Para. 21.

93 Guidelines, Para. 22.

94 Ibid., Para. 25.

95 Ibid.

96 Ibid.

97 Ibid., Para. 23.

98 See e.g. Guidelines, Para. 45 and General Comment No. 12. See furthermore Art. 4(1) CRC.

99 Although, the legal status of the child victim (non-witness) may differ from that of the child witness, the Guidelines do not make any distinction in this regard.

100 Guidelines, Para. 26.

privacy and effective participation (as highlighted earlier) criminal proceedings (trial and pre-trial) in which child victims and witnesses participate arguably best take place behind closed doors. However, the Guidelines are far from explicit on this point and provide little guidance. They state that '[m]easures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony where permitted by national law'.¹⁰¹ This wording indicates that the domestic legislator has full discretion in this regard.

Closely linked to privacy protection is the right to be protected from hardship during the justice process, which aims at the protection of child victims and witnesses by instructing professionals to act very carefully and to approach these children 'with sensitivity'.¹⁰² More concretely, this means, inter alia, that one should provide information (e.g., to avoid uncertainty about the process and expectations) and support. Furthermore, one should ensure that trials take place with expedience, which does not only serve the child's personal interests, in terms of protection and effective participation, but is also likely to serve the value of his statements, information etc (see also earlier). Moreover, the guidelines address the way children should be accommodated when interviewed, questioned, etc.: one should '[u]se child sensitive procedures, including interview rooms designed for children (...) modified court rooms 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'.¹⁰³ In addition, one should avoid that the child goes to court unnecessary, which is particularly relevant for systems in which trials can endure. Paragraph 31 of the Guidelines pays particular attention to some measures that regulate the conduct of interrogating children. The number of interviews, statements and hearings should be limited and this should be regulated through special procedures for collection of evidence from child victims and witnesses. '[U]nnecessary contact with the justice process' should be avoided through the use of video recording.¹⁰⁴ In addition, child victims should be protected from being cross-examined, if compatible with the legal system and with the right of the accused to a fair trial. The Guidelines provide little guidance on how to balance these aspects properly, while this is one of the most challenging aspects concerning the protection and participation of child victims and witnesses.¹⁰⁵ However, the Guidelines do state that the child should, preferably, be interviewed and examined in court, out of sight of the alleged perpetrator. Furthermore, judicial supervision is referred to as one of the safeguards to guarantee the questioning of the child in a 'child-sensitive manner', as is the use of testimonial aids or the appointment of psychological experts.¹⁰⁶ As pointed out below, enforcement of the Guidelines can be quite challenging at this point in both the United States as well as the European region.

Implementation

Obviously, an important issue regarding the incorporation of international standards, such as the Guidelines, concerns the implementation at the domestic level. This is a domestic matter in the first place. The Guidelines include a number of explicit references to domestic legislator action. In this regard, the UN Office on Drugs and Crime (UNODC) and UNICEF have drawn up a

¹⁰¹ Ibid., Para. 28.

¹⁰² Guidelines, Para. 30.

¹⁰³ Ibid.

¹⁰⁴ Ibid., Para. 31.

¹⁰⁵ See also O'Donnell, *supra* note 87, p. 45. O'Donnell's study provides information regarding a number of jurisdictions in which measures (such as use of pre-trial statements, use of videotaped testimonies, presence of support person and questioning by judges and experts rather than lawyers) have been taken to the benefit of protection of child witnesses and their participation (see p. 45 et seq.).

¹⁰⁶ Guidelines, Para. 31.

model law (and related commentary) for both civil law and common law countries in order to facilitate the incorporation of the Guidelines into domestic (statutory) law.¹⁰⁷

Another important aspect of implementation concerns the adequate training and education of professionals, including training in and information on the required skills and substantive knowledge.¹⁰⁸ This training should not only be based on the premise that child victims and witnesses need special protection, but also include attention for the specific criminal justice context and the notion that child victims and witnesses should be regarded as bearers of human rights, including the right to be heard and to participate actively and effectively during all aspects of the proceedings.¹⁰⁹

3. The position of child witnesses in the United States

3.1. *The competency to testify and the assessment of credibility*

The acceptance of children's testimony has historically been a topical issue. In early common law, children were deemed to be incompetent to testify in court if they had not reached the age of puberty.¹¹⁰ Eventually, as the English common law developed, children were accepted as competent witnesses if they were older than seven years old, provided some requirements were met.¹¹¹ They were allowed to give a statement if it could be demonstrated that they understood the nature of an oath albeit they did not need to understand the precise concept of it. The trial judge needed to establish whether the child understood that he or she was not allowed to tell lies.¹¹²

In the American colonies the (early) English common law tradition of excluding child-witness testimony prevailed until the infamous Salem Witch Trials in 1692. Approximately 20 persons were convicted and executed in Massachusetts for the crime of being wizards and witches. They were accused of flying on broomsticks and having placed nails and pins in children. Four young girls provided the key testimony that led to the executions. Eight years later, several of the children recanted their story and begged for forgiveness for the mistakes they had made. For 200 years the Salem trials served for the American courts as a ground for not allowing uncorroborated statements of children.¹¹³

Until 1918 the idea prevailed that children were presumed to be incompetent to make a statement in court, unless a party successfully challenged this presumption before the judge. However, in *Rosen v. United States* (1918) it was decided that the assumption should be that the child is competent rather than incompetent to testify, leaving the credit and weight of such testimony to be decided by the jury or by the court.¹¹⁴ So the emphasis on competency to be decided by the judge, shifted to the responsibility of the trier-of-fact to decide on credibility. According to the *Wheeler* decision (1895), there is no age limit to disqualify a child as a witness.

107 UNODC/UNICEF, *Justice in Matter involving Child Victims and Witnesses of Crime*, New York 2009.

108 Guidelines, Para. 40 et seq.

109 See e.g. Guidelines, Para. 42(a).

110 N. Perry & L. Samuel, *The child witness: legal issues and dilemmas*, 1991, p. 37; Haugaard et al., supra note 1, p. 255; L. McCough, *Child Witnesses: fragile voices in the American legal system*, 1994, p. 97; N. Bala et al., 'Children as Witnesses: Understanding their Capacities, Needs and Experiences', 2001 *Journal of Social Distress and the Homeless* 10, no. 1, p. 41.

111 Perry & Samuel, supra note 110, p. 38. Please note there is an important legal distinction between competency and the credibility of a witness. Competency includes the general qualities which every witness must possess in order to be allowed to testify. The credibility refers to the extent to which a judge or jury believe that a witness is providing honest and accurate testimony. See Haugaard et al., supra note 1, p. 254 and Walton, supra note 11, p. 197.

112 See for instance Haugaard et al supra note 1, p. 255; McCough, supra note 110, p. 98.

113 See Perry & Samuel, supra note 110, p. 38 v.

114 *Rosen v. United States*, 245 US 457 (1918).

‘While no one would think of calling as a witness a child of only three years of age, there is no precise age which determines the question of competency.¹¹⁵ This depends upon the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former.’¹¹⁶

Walker remarks that today, no doubt as a consequence of the desire to prosecute child abuse cases, even a person of three can be called to the stand, although this remains a rare occurrence.¹¹⁷ Nowadays, all states have regulations on competence of children, but of course their laws vary. Some states accept the Federal Rules of Evidence as a guideline whereas others still conduct competency examinations.¹¹⁸ In Florida for instance, the trial judge must conduct an adequate inquiry into whether a child witness possesses a moral sense of duty to tell the truth prior to finding the child competent to testify. ‘When the competency of a child witness is at issue, as it was here, the trial judge must determine whether the child is capable of observing, recollecting, and narrating facts, and whether the child has a moral sense of the duty to tell the truth.’¹¹⁹ In the instant case, the trial judge failed to conduct an adequate inquiry concerning the four-year-old victim’s moral sense of duty to tell the truth prior to finding her competent to testify.

Although there are no special corroboration rules on the use of child testimony, it is, however, recognised that the determination of the trustworthiness of a child’s statement is a complex issue demanding special attention. According to Saywitz¹²⁰ at least four dimensions are of paramount importance in evaluating credibility. First, children of different ages or stages of development differ from one another. Second, children of the same age or stage of development differ.¹²¹ Third, children cope in varying ways with stress when they are examined.¹²² Fourth, each incident is determined by an array of varying contextual factors such as the relation to the alleged offender and the duration of the exposure to the offence.

Problems can also arise if the interviewer or fact-finder is unaware of the language ability of a certain child. Children’s words maybe misunderstood and questions asked in an age-inappropriate language might confuse the child witness.¹²³ Questions like ‘Didn’t your mother

115 This does not mean that a three-year old child can not be a reliable witness when interviewed with the appropriate techniques. For a case study on a three year old abducted and sexually abused child see D. Jones et al., Can a three-year old child bear witness to her sexual assault and attempted murder?, 1986 *Child Abuse & Neglect*, vol. 10, pp. 253-258.

116 *Wheeler v. United States*, 159 US 523 (1895).

117 Perry & Samuel, supra note 110, p. 41.

118 Rule 601 of the Federal Rules of Evidence states: ‘Every person is competent to be a witness except as otherwise provided in these rules.’

119 *S.C. v. State*, 837 So.2d 1159 (Fla. 1st DCA Feb. 21, 2003).

120 K. Saywitz, ‘The credibility of child witnesses’, 1988 *Family Advocate* 10. Quoted by Perry & Samuel supra note 110, p. 199. See especially on the possible influence of parents on the statements of children in sexual abuse cases Haugaard et al., supra note 1, p. 258.

121 Psychologists have increasingly turned their attention to individual differences in children’s memory and trustworthiness. Individual factors related to children’s knowledge and emotion may affect the accuracy and completeness of the memory report. Myers et al. conclude that much more information is needed to better ascertain how such factors influence children’s ability to encode, retain and recall information accurately. See Myers et al., ‘Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science’, 2002 *Law and Contemporary Problems* 65, p. 24.

122 See for instance Goodman et al. supra note 2, pp. 1-161. In their study on the effects of children testifying, using a sample of 218 children it was found that the two greatest predictors of the children’s courtroom experiences were age and the severity of abuse. It was found that testifying in court was associated with negative effects for many, but not all, children of sexual abuse. Further it was suggested that the negative effects were more evident in short time than in long time.

123 For example terms like ‘truth’, ‘lie’, ‘remember’ are well understood by children from 5 to 12 years old but terms like ‘charges’ and ‘allegations’ are too difficult for children in that age range. See K. Saywitz, supra note 45, p. 116. To complicate matters, research by Piaget may indicate that young children (under the age of seven) have a broader definition on the term ‘lie’ than older children. See J. Piaget, *The moral judgement of the child*, 1962. There is limited research in this area.

tell you not to go over to his house?’ containing a double negative (as lawyers often use) are difficult to understand for most children.¹²⁴

Furthermore, children can conceptualise events in another manner than adults do and they might have problems with a more abstract categorisation of objects.¹²⁵ Fact-finders, be it judges or juries, must be aware of these issues when they are called upon to evaluate the credibility of the child’s statement.¹²⁶

This begs the question whether expert witnesses should be employed to inform them on the credibility of the statements made by child witness. This is not an easy question to answer as views on whether this type of expert testimony should be allowed differ.¹²⁷ In the American system it is deemed to be the task of the jury to assess the validity of the statement.¹²⁸ Therefore, courts are extremely hesitant to admit expert testimony on the credibility of a witness. This can be explained (partly) by the more general fear (or bias) against expert decision-making and the faith in the integrity of an ordinary citizen’s judgment. Expert decision-making is associated with inquisitorial systems as opposed to the democratic, adversarial American justice system.¹²⁹ However, it is allowed to introduce expert testimony for example on the stages of development of children and typical reactions to child abuse provided the general rules on the admissibility of expert testimony are observed.¹³⁰

3.2. The Confrontation Clause versus the interest of the child witness

In the United States, as in Great Britain, there seem to be consensus that child witnesses are particularly disadvantaged by the adversarial trial system because, in principle, they are obliged to testify in court.¹³¹ A child that is called to testify in an American court will generally be treated as an adult witness; he must face the defendant and is submitted to cross-examinations. The reason for this is that the Sixth Amendment guarantees the defendant the right to be confronted with the witness against him. In the United States the growing need for children’s testimony gave rise to the development of empowerment programs. The aim is to prepare children for the courtroom experience and thus diminish the use of alternatives like taped interviews or the use of live links. In these programs children take a trip to court, they are told about their role in court, the importance of telling the truth and ways to respond to cross-examination. These programs aim to empower children by giving them information on the procedures and helping them to tell their story and reduce the level of stress related to their duty to have to testify in open court. The purpose of empowerment is not only to have the child give accurate testimony but also to lessen the potential for secondary victimisation.¹³² Research in the United States shows that the majority

124 On the influence of language and grammatical constructions as factors in eliciting reliable responses from children, see Saywitz, *supra* note 45, pp. 117, 118.

125 If a child is asked the question ‘Did the man take off his clothes?’ He might say ‘no’. But if asked ‘Did the man take off his pants?’ He might respond ‘yes’. To the child clothes and pants may be two distinct ideas. Thus the child’s testimony appears to be inconsistent when in reality it is not. Example quoted by Perry & Samuel, *supra* note 110, p. 73.

126 Yuille et al., ‘Interviewing children in sexual abuse cases’, in G. Goodman & B. Bottoms (eds.), *Child Victims, Child Witnesses: Understanding and Improving Testimony*, 1993, p. 98.

127 See on this discussion for instance Perry & Samuel, *supra* note 110, pp. 202, 203 and McCough, *supra* note 110, pp. 233-267.

128 See McCough, *supra* note 110, p. 252. ‘Credibility assessment lies at the heart of jury deliberation and its resulting judgement.’

129 *Ibid.*, p. 253.

130 The Federal Rules of Evidence and similar state rules or statutes facilitate the admission of expert opinion into evidence. Rule 702, for example broadly promises that an expert witness may give evidence including opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. See on the use of expert testimony in assessing a child’s credibility, McCough, *supra* note 110, pp. 233-267.

131 See for instance G. Davies & H. Westcott, ‘the Child Witness in the Courtroom; Empowerment or Protection?’, in M. Zaragoza et al, *Memory and Testimony in the Child Witness*, 1995, p. 199.

132 *Ibid.*, p. 204.

of children and parents find the programs helpful. However, opinions among professionals on the impact of the preparation on the child's behaviour in court, differ.¹³³

In principle, child witnesses have to make their statements in open court.¹³⁴ However, the Supreme Court accepts closure if this is necessary to protect the child. In the *Globe* decision it was held that the state has a compelling interest in protecting children who are victim of sex crimes from further trauma and embarrassment.¹³⁵ But still courts have to decide on a case-by-case basis whether barring the public and press is necessary to protect the child. Factors to be weighed are the victim's age, maturity, nature of the crime, the desires of the victim and the interests of the parents.

Furthermore, a number of measures are available to protect child witnesses from direct confrontation. Federal and state courts most commonly use three types of shielding procedures: the use of a screen, videotape and closed-circuit television. Screening allows a child to testify in court with some kind of barrier between him or her and the defendant.¹³⁶ Recorded depositions of children can be played at the trial. Finally, closed-circuit television transmits the child's statement made during direct- and cross-examination.

The assumption underlying the use of protective measures is that courtroom confrontation will severely traumatise the child witness, especially in child abuse cases.¹³⁷ Shielding methods are mostly used in these cases. The methods are highly controversial because of their possible interference with the defendant's constitutional right to confrontation. The Sixth Amendment's right to confrontation does not expressly require face-to-face confrontation, but it is generally accepted that this right is included.

In *California v. Green*, the US Supreme Court held that the right to confrontation serves three purposes. In the first place it insures that the witness will give his statements under oath. In the second place it forces witnesses to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of the truth'. In the third place the right of confrontation permits the jury to observe the demeanour of the witness in making his statements, thus aiding the jury in assessing his credibility.¹³⁸

3.3. *Coy v. Iowa and Maryland v. Craig; the use of shielding methods*

In *Coy v. Iowa*, the defendant was charged with sexually assaulting two thirteen-year-old girls. In the courtroom a screen was placed between the child witnesses and the defendant during their testimony.¹³⁹ The screen blocked him from their sight but allowed him to see them vaguely and hear them. The jury and judge had an unimpeded sight of both children. The defendant was convicted for the assault and the Iowa Supreme Court affirmed. Coy claimed the use of this

133 Ibid., p. 205.

134 But note that because of the plea-bargaining system, relatively few cases (16.8% according to Walton) involving child witnesses are resolved through a trial proceeding in the United States. Walton, supra note 11, p. 204. Children who allege sexual abuse are far more likely to become involved in the criminal justice system than are children who allege physical abuse because sexual abuse frequently leaves no physical evidence. The case then becomes a matter of the child's word against that of the adult. Whitcomb, supra note 1, p. 150.

135 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Federal legislation also allows for the closure of the courtroom: 'When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Government's specific compelling interest'. See U.S. Code: Title 18, Para. 3509(c).

136 For an overview of state legislation see Marsil et al., supra note 5, p. 210. The federal law (U.S. Code: title 18, Para. 3509) allows for videotaped depositions and live testimony by two-way closed television as an alternative for life in-court testimony.

137 See for instance Marsil et al., supra note 5, p. 209.

138 *California v. Green*, 399 U.S. 149 (1970).

139 *Coy v. Iowa*, 487 U.S. 1012 (1988). See on *Coy v. Iowa* for instance, Marsil et al., supra note 5 and Walton, supra note 11.

special measure had denied him his constitutional right to confrontation. The majority of the US Supreme Court agreed and reversed the conviction.

Justice Scalia, who delivered the (5-4) majority opinion, stated that the right to confrontation traces back to early western civilisation citing the Roman Governor Festus: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges.'¹⁴⁰ Scalia also alluded to the literal meaning of the word 'confrontation' which leaves little doubt that confrontation refers to a face-to-face confrontation since 'contra' meaning 'against' or 'opposed' and the noun 'frons' means forehead. Shakespeare was thus describing the root meaning of the confrontation when he had Richard the Second say: 'Then call them to our presence face-to-face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.'¹⁴¹ Scalia concluded that the literal right to confront an adverse witness is the core of the values furthered by the Confrontation Clause.

Furthermore, Justice Scalia reasoned that the face-to-face encounter between witness and accused serves ends related to both appearances and reality. History conveys 'that there is something deep in human nature that regards face-to-face confrontation between accuser and accused as essential to a fair trial in criminal prosecution'.¹⁴² According to the majority opinion, confrontation does not only serve fairness but it also enhances the fact-finding process because it is always more difficult to tell a lie about a person to his face than behind his back. 'Even if the lie is told, it will often be told less convincingly'.¹⁴³

As to the balancing of interests between witnesses and the defendant, the Court remarks that face-to-face presence may unfortunately upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. 'It is a truism that constitutional protections have costs.'¹⁴⁴

In *Coy v. Iowa* the majority indicated that an exception to the right of confrontation is only allowed when necessary to further an important public policy and that it would require specific findings that the witness needed special protection.¹⁴⁵ This approach was accepted by the Supreme Court in *Maryland v. Craig*, though vehemently protested by Justice Scalia.¹⁴⁶ In this case Craig was tried on several charges related to her alleged sexual abuse of a six-year-old child. The Maryland statute required a preliminary hearing on the issue of whether the child, if confronted with the defendant in court, would suffer 'serious emotional stress such that the child cannot reasonably communicate'. If this is established, the court can authorise the taking of the testimony by closed-circuit one-way television whereby the child can not see the defendant.

The Supreme Court acknowledged that a state's interest in the physical and psychological wellbeing of child abuse victims may be sufficiently important to outweigh, at least in some cases, the defendant's right to confrontation. According to the Court the fact that most states enacted shielding statutes showed the widespread belief in the importance of protecting minor victims of sex crimes. The majority formulated a three-pronged test for assessing the necessity of special protective measures: the shielding method may only be used if it is necessary to protect the particular child's welfare (case specific finding); the finding should be that the child would

140 *Ibid.*, at 1015.

141 *Richard II*, Act I, scene I. *Ibid.*, at 1016.

142 Quoting *Pointer v. Texas*, 380 U.S. 400 (1965). *Ibid.*, at 1017.

143 *Ibid.*, at 1019.

144 *Ibid.*, at 1020.

145 *Ibid.*, at 1021.

146 *Maryland v. Craig*, 497 U.S. 836 (1990).

be traumatised by the confrontation with the defendant, not by the courtroom in general; and furthermore, the distress suffered by the child needs to be 'more than de minimis'.¹⁴⁷ In this case the trial court made individualised findings based on expert testimony that the child witnesses needed special protection.

The question arises whether it is enough to demonstrate probable serious trauma or must the trauma impair the child's ability to give (reliable) evidence? From the Court's holding it can be deduced that the trauma must have an adverse influence on the truth-finding process. The underlying assumption being that face-to-face confrontation 'may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-function of the trial itself'.¹⁴⁸

As to the right to confrontation, the Court observes that it does not guarantee the defendant an absolute right to confrontation. The central concern of the Confrontation Clause is to ensure the reliability of the statement made by the witness by subjecting it to rigorous testing. In this case the witnesses were placed under oath, the defendant was given the opportunity to cross-examine the children and the trier of fact (as well as the defendant) could observe the children when they gave testimony. For these reasons, the purposes of the Confrontation Clause were served and the trier of fact was given satisfactory basis to evaluate the testimony. So, according to the Court the admission of the statements was consonant with the Confrontation Clause.

Both *Coy v. Iowa* and *Maryland v. Craig* involve child sexual abuse prosecutions. A possible exception on the rule against hearsay was accepted when necessary to further an important public policy. Protection of children in sex abuse cases is clearly an 'important public policy'. The question whether the wording of the Supreme Court indicates that this is the only type of crime where shielding of child witnesses is allowed, is controversial.¹⁴⁹ The question can be raised whether for instance the child witness of a violent crime like armed robbery or murder can invoke the right to be shielded from confrontation with the defendant. Some lower courts have so held.¹⁵⁰ Also the Uniform Child Witness Testimony by Alternative Methods (Child Witness Act 2002) does not forbid shielding children in other cases than sex abuse cases.

In a struggle to balance the interests of children and defendants' rights, the National Conference of Commissioners on Uniform State Laws drafted the 'Child Witness Act' in 2002. Individual states are allowed to enact this law, which approves of the use of shielding methods that make it possible for children to testify outside the presence of the defendant.¹⁵¹ The law gives broad latitude to judges to devise their own strategies in protecting child witnesses. However, this law has been criticised by lawyers and judges because it does not satisfy the standards set in *Maryland v. Craig* and thus in their opinion compromises the defendants rights.¹⁵² The great fear of false accusations, wrongful convictions and the potentially devastating effect false

147 Ibid., at 841, 842.

148 The Supreme Court quotes from the Brief for the American Psychological Association as Amicus Curiae.

149 McCough, supra note 110, p. 169 remarks that the Confrontation exemption extends to any child witness, regardless of the crime prosecuted. K. Gearson is of the opinion that shielding children in other than sex abuse cases deviates substantially from the limited applicability of witness shielding contemplated by the U.S. Supreme Court. See K. Gearson, 'Proposed Uniform Child Witness Testimony Act: Impermissible Abridgement of Criminal Defendants Rights', 2004 *Boston College Law Review* 45, pp. 468-498.

150 See McCough, supra note 110, p. 169. She mentions the Arizona Supreme Court as an example.

151 See Gearson, supra note 149, pp. 468-494.

152 Gearson, supra note 149, p. 470, 495. For instance the highest court in Massachusetts has consistently barred the application of the statute providing for shielding measures. The American Bar Association is concerned the shielding measures will erode the rights of the defence.

accusations have on the lives of suspects, is a driving force for the fierce opposition against measures that violate the confrontation clause.¹⁵³

3.4. Use of hearsay testimony and recorded testimony

As a rule, the right to confrontation forbids the use of hearsay testimony.¹⁵⁴ However, the Supreme Court has ruled more than a century ago that not all hearsay is forbidden¹⁵⁵. Since then it has been accepted that society's need for accurate fact-finding may require the use of out-of-court statements as evidence. In *Ohio v. Roberts* the Supreme Court limited the use of hearsay to situations in which the prosecutor can demonstrate that the witness is 'unavailable'.¹⁵⁶ He must also demonstrate the trustworthiness¹⁵⁷ of the statement unless it falls within a 'firmly rooted hearsay exception' like dying declarations or spontaneous utterances.¹⁵⁸ It is beyond the scope of this article to elaborate on the hearsay exceptions; however, we will just discuss *White v. Illinois*, a decision highly relevant for child witnesses who have difficulties testifying in court.¹⁵⁹ Hearsay evidence can be crucial, especially in child abuse cases because cases can take a long time before they get to trial and the child may have forgotten the details of the abuse,¹⁶⁰ the child maybe recovering from a trauma caused by the abuse or, like in the *White* case, the child simply is afraid to testify in court.

The *White* case is about a girl of four years old that accuses her mother's boyfriend of having sexually assaulted her. The state twice attempted to call her as a witness but on each occasion she experienced emotional difficulties on being brought into the courtroom. She never testified in court. The defence never attempted to hear her as a witness and the trial court neither made, nor was asked to make a finding that she was unavailable as a witness. The prosecutor sought to admit the (hearsay) statements she made to her mother, the babysitter and the investigative officer. The statements to the mother and babysitter were made immediately after the attack. The above-mentioned adults (and a nurse and a doctor) testified at the trial.

The Court accepted the child's statements as 'spontaneous declarations' falling within the hearsay exceptions.¹⁶¹ Thus the statements were presumed to be reliable and it was not required to show the unavailability of the declarant. The Court stated:

153 Grearson, *supra* note 149, p. 470.

154 In the Federal Rules of Evidence in Rule 801(c) 'hearsay' is defined as follows. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

155 *Mattox v. United States*, 156 U.S. 237 (1895).

156 *Ohio v. Roberts*, 948 U.S. 56 (1980). In Rule 804 of the Federal Rules of Evidence it is stated that a declarant is for instance unavailable as a witness if he persists in refusing to testify despite an order by the court to do so; if he testifies to lack of memory on the subject matter or if he is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness.

157 The fact that the statement is made before of the grand jury might make this statement trustworthy in the eyes of a court. See *U.S. v. Papadakis*, 572 F. Supp. 1518 (1983). However, state practice varies.

158 Dying declarations and excited utterances are to be regarded as long established examples of hearsay exceptions. Courts have to decide on a case-by-case basis whether there are particularised guarantees of trustworthiness. The fact that the statement is made before of the grand jury might make this statement trustworthy in the eyes of a court.

159 *White v. Illinois*, 116 L Ed 2d 848 (1992).

160 Psychological literature reveals that several factors influence children's memory capacity, including: the child's age, the complexity of the event, the child's familiarity with the event and the delay between the event and the time at which the event is recalled. See generally Goodman & Bottoms, *supra* note 126, and Myers et al., *supra* note 121, p. 22.

161 The Supreme Court and lower courts consider spontaneity an important indicator of reliability. But, the Supreme Court cautiously noted in *Idaho v. Wright* that if there is evidence of prior interrogation or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness. *Idaho v. Wright*, 497 U.S. 805, 807 (1990). In the psychological literature, the spontaneity of children's statements in child abuse cases have been a topic of much debate. Meyers concludes from the existing research that it is hazardous to make any definitive conclusions regarding spontaneity and disclosure. Myers et al., *supra* note 121, p. 28.

‘We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the “integrity of the fact-finding process.” And as we have also noted, a statement that qualifies for admission under a “firmly rooted” hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. Given the evidentiary value of such statements, their reliability, and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs (...).’¹⁶²

If the testimony does not fall within the hearsay exception, the unavailability of the child must be shown. Each state has its own views on unavailability, but loss of memory and the refusal to answer questions despite a court order to do so, are frequently found in the legislation of states as a situation in which the declarant is assumed to be unavailable.¹⁶³ These two situations can be appropriate to use in child abuse cases.¹⁶⁴

State appeals courts have followed this pragmatic Supreme Court approach. Several lower courts accept as evidence the child’s statements made to her mother for instance if they are deemed to be trustworthy. Before *White*, some lower courts already accepted this type of statements. See for instance *State v. Wagner* in which it was noted that ‘limited reflective powers’ of the three-year-old child and the lack of motive or reflective capacities to prevaricate the circumstances of the attack as supporting the trustworthiness of the child’s statements.¹⁶⁵ In other cases the use of hearsay has been rejected because it could not be established that the child’s statements were made sufficiently close in time to the alleged molestation. Thus, ‘implanting or cleansing’ could have occurred.¹⁶⁶

The question whether or not to accept hearsay statements from a child made to an adult is still debated. The Supreme Court in *White* and state courts have accepted this type of hearsay in some circumstances. However, it is not clear what the impact of a more recent Supreme Court decision on the use of hearsay evidence will be. In *Crawford v. Washington*, the Court decided that when a hearsay statement is ‘testimonial’ the Confrontation clause bars the state from using the statement against a defendant unless the person who made the statement is available to testify at trial, or the defendant had a prior opportunity to cross-examine that person. The Court did not define ‘testimonial’ but it gave as an example of a testimonial statement a statement that is made during police interrogations.¹⁶⁷ In a Californian child abuse case the appeals court, relying on *Crawford*, ruled that the (testimonial) hearsay statement of a child made in a Multidisciplinary Interview Centre could not be accepted as evidence.¹⁶⁸

In the aftermath of *Crawford*, some authors have concluded that many if not all hearsay statements in child abuse cases will become inadmissible.¹⁶⁹ Others still see the possibility of an

162 See *White v. Illinois*, supra note 159 at 860. In *White*, Justice Thomas (concurring), remarks that the analyses that the Confrontation Clause bars only unreliable hearsay, is not correct.

163 See also Federal Rules of Evidence, Rule 804.

164 See McCough, supra note 110, p. 175.

165 *State v. Wagner*, 508 N.E. 2d 164, 167, Ohio Ct. App. (1986).

166 *Carpenter v. State*, 786 N.E. 2d 696, Indiana Supreme Court (2003).

167 *Crawford v. Washington*, 541 U.S. 36 (2004).

168 *People v. Sisavath*, May 27, 2004.

169 S. McMahon, ‘Note, The Turbulent Aftermath of *Crawford v. Washington*: Where Do Child Abuse Victims Stand?’, 2006 *Hastings Constitutional Law Quarterly* 33, p. 361.

interpretation that is favourable to the protection of child victims.¹⁷⁰ In the meantime, due to the fact that the Supreme Court still did not comprehensively define what constitutes a ‘testimonial statement’, courts remain uncertain whether a child’s hearsay statement is admissible. According to McMahon the near majority of statements from children about abuse have been classified as testimonial and excluded except where there has been an opportunity for cross-examination.¹⁷¹ This makes the development of alternative options to protect children as used in *Craig*, for example, all the more relevant.

Videotaping children’s testimony

From empirical evidence some draw the conclusion that an accurate record of an interview conducted soon after the event is more reliable than live testimony given at the later conducted trial because a child’s memory is believed to fade rapidly over time.¹⁷² For this reason the use of pre-recorded videotaped testimony, which is standard practice in a lot of Western European jurisdictions is also advocated in the USA.¹⁷³ A videotaped record resembles in-court testimony because it shows the process of the interview, the question asked and the body language and demeanour of the child while he is answering the questions asked by an independent skilled person. However, the American adversarial process is not really geared to include questioning by a ‘neutral’ professional. Adversarial proceedings are often described as a contest between two (more-or-less equal) parties. So, examinations of witnesses and experts must be conducted by the interested parties themselves in order to let them develop their own story before the judge and the jury.

Furthermore, videotaped evidence accommodates only partly the (in Section 2.2 discussed) underlying values of the constitutional requirement for confrontation because the child is not subject to cross-examination by the defence at the time he delivers the statement. This is a powerful argument and it is probably an important reason why only a minority of the states authorise the videotaping of a child’s testimony for the later use at the trial.¹⁷⁴ However, it has been pointed out that the Supreme Court has never interpreted the Confrontation Clause to require cross-examination before an out-of-court statement can be heard at the trial. If the child is shown to be unavailable or even, if produced, displays a loss of memory, courts are allowed to use the statement.¹⁷⁵ But even if we assume the use of videotaped testimony is not unconstitutional per se, the adversarial structure of criminal proceeding including the great trust in cross-examination of witnesses as a weapon to discover the truth are strong reasons for states to limit or forbid the use of videotaped testimony.¹⁷⁶

3.5. Some empirical findings on child testimony

There is such an abundance of studies available on how children function as witnesses in the criminal justice system that is impossible to even mention the most important findings. Moreover, we are not experts in the field of forensic psychology. Therefore it is difficult for us to

170 See for instance A. Eichner, ‘Note, Preserving Innocence: Protecting Child Victims in the Post-*Crawford* Legal System’, 2010 *American Journal of Criminal Law* 38, pp. 101-116. He suggests the scope of the term ‘testimonial’ can be limited in reach so as to define the statements made by children of a certain age non-testimonial (p. 116).

171 See McMahon, *supra* note 169, p. 369.

172 See McCough, *supra* note 110, p. 198. See generally on children’s memory G. Goodman et al., *Children’s Eyewitness Memory*, 1987, pp. 2-24.

173 See McCough, *supra* note 110, p. 189.

174 *Ibid.*, p. 220.

175 See for instance *United States v. Owens*, 484 U.S. 554 (1988).

176 See for instance Wigmore stating that ‘Cross-examination, not trial by jury is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure’. Quoted by McCough, *supra* note 110, p. 223.

assess the value of all the findings presented in the many studies on issues regarding child testimony. However, some of the findings are that relevant for our research on the protection and participation of children in the criminal justice system, that we just cannot just leave them unmentioned. Just as the policies on child witnesses vary from jurisdiction to jurisdiction, the research focus also varies. For instance, a lot of work has been done by American scholars on the conception of jurors of children testifying in court. Scholars recognise the importance of knowledge on the accuracy of the testimony of children, but are also focused on the jurors perception because, at the end of the day, that determines the outcome of the trial.¹⁷⁷

Empirical research has challenged the view that children are not competent to testify.¹⁷⁸ Under many conditions even young children can produce accounts that are reliable and useful for the police and other investigators.¹⁷⁹ Of course there are many pitfalls in assessing the child's credibility. Especially young children are susceptible to misleading questions, for instance.¹⁸⁰ But experts believe this can (partly) be overcome by using approved witness strategies and protocols.¹⁸¹ However, in child abuse cases memory-related issues are not the only ones to consider, motivational factors may influence their veracity as well. Children as young as four can differentiate a lie from a truthful statement, but this does not guarantee honesty.¹⁸² An important determination of the course of action a child chooses to take, such as lying or telling the truth may also depend on what they think will happen to them as a result of choosing that particular action. So, no doubt, children can deliberately make false allegations against an innocent person, or deny abuse that did occur.¹⁸³ External pressure by a parent in a custody case for instance, will have an impact on children and might incite them to lie.¹⁸⁴ It is suggested that false allegations of younger children will more likely to be discovered than that of older children. Evidence suggests that very young children (age 2-3 years) lack the cognitive development to lie (deliberately tell a falsehood with the intent to deceive) and children (3-5 years) lack the cognitive development to effectively deceive.¹⁸⁵

The only sound conclusion presented is that testimony of children, just as testimony of adults, has to be evaluated on its own merits.¹⁸⁶ The question arises of how the criminal justice system has to deal with this. The assumption in the American Supreme Court decisions on the right to confrontation is that having the witness testify in court, improves the accuracy of the fact-

177 See for instance P.C. Regan et al., 'The impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases', 1998 *Journal of Family Violence* 13, no. 2, pp. 187-195 and Goodman et al., supra note 2, pp. 165-203.

178 A. Tobey et al., 'Balancing the rights of Children and Defendants; Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions', in M. Zaragoza et al., *Memory and Testimony in the Child Witness*, 1995, p. 215; Bala et al., supra note 110. See also Section 3.1.

179 See for instance L. Claman et al., 'The adolescent as a witness in cases of incest: Assessment and outcome', 1986 *Journal of the American Academy of Child Psychiatry* 25, no. 4, pp. 457-461; B. Naylor, 'Dealing with child sexual assault: Recent developments', 1989 *British Journal of Criminology* 29, no. 4, pp. 109-123.

180 See Goodman et al., supra note 2, pp. 185, 186. They found that that older children were less suggestible witnesses than younger children and that younger children who testified in a closed-circuit setting made less errors than younger children testifying in court. See regarding the influence of suggestive questioning on children's testimony also Haugaard et al., supra note 1, p. 267.

181 A.R. Warren & L. McCough, 'Research Children's Suggestibility', in B. Bottoms & G. Goodman (eds.), *International Perspectives on Child Abuse and Children's Testimony*, 1996, p. 38. See on this issue also N. Walker, 'Forensic interviews of children: the components of scientific validity and legal admissibility', 2002 *Law and Contemporary Problems* 65, pp. 149-178.

182 K. Bussey et al., 'Lies and secrets: Implications for Children's Reporting of Sexual Abuse', in Goodman & Bottoms, supra note 126, p. 151.

183 According to Bulkley false retractions are more common than false accusations of sexual abuse. J. Bulkley, 'Legal proceedings, reforms and emerging issues in sexual abuse cases', 1988 *Behavioral Sciences and the Law* 6, no. 2, pp. 153-180. Children rarely have a motive for lying about sexual abuse because they risk the stigma attached to sexual abuse as well as the victimization of court proceedings. See Walton, supra note 11, p. 198.

184 Bala et al., supra note 110, p. 61. See also R. Alexander, 'Legal decisions affecting sexually abused children: Implications for policy and practice', 1993 *Journal of Law & Social Work* 4, no. 1, pp. 22-32.

185 See Bala et al., supra note 110, p. 51.

186 See Bussey et al., supra note 182, p. 154.

finding process. However some empirical studies show that the atmosphere of intimidation and the long interval between the time when the (alleged) offence occurred and the trial date, has a negative influence on the fact-finding process. The long interval weakens the child's memory and increases the risk of 'contamination' by outside influences.¹⁸⁷ Regarding cross-examination, we will not enter the debate on its general merits but it can be called into question whether this way of eliciting information from children is the best way to go about doing so. McCough suggests it is often counter productive and incapable of finding errors in the child's testimony, such as ideas that were implanted in the child's head as a result of pre-trial interviews.¹⁸⁸ Some empirical work confirms that the best quality of evidence is gathered when the child is relaxed, trusts the interviewer and when the interviewer is well trained in using appropriate methods.¹⁸⁹

The second presumption underlying decisions like *Coy* and *Craig* is that the ability of the jury to detect lies is impeded if the witness does not appear in court. Research does not support this presumption. The ability of an adult to distinguish between truthful and deceitful persons is not much better than chance.¹⁹⁰ Moreover, most legal professionals are not better in detecting lies than untrained individuals.¹⁹¹ More than fifty studies indicate that inferences about testimonial reliability drawn from a witness' demeanour are often inaccurate. Demeanour evidence is commonly misinterpreted. Jurors – and presumably judges as well – place too much emphasis on the facial expression and the confidence with which the witness speaks and hence may wrongfully discredit an intimidated child.¹⁹²

Studies by Goodman reveal that mock jurors have problems discerning truth from lies regardless whether the evidence is presented as life testimony, videotaped testimony or hearsay.¹⁹³ However, observing the child witness live, was associated with higher perceived credibility and sympathy towards the child. The mock jurors were less convinced of the defendant's guilt after hearing hearsay evidence than after hearing life testimony.¹⁹⁴ It is suggested that jurors probably believe that the child cannot withstand the scrutiny of a trial process. Therefore, the prosecutor's case can be harmed if the child is not available to testify in court.¹⁹⁵ The same holds true for testimony delivered via other shielding methods like a closed-circuit television link as was conditionally accepted as a shielding method in *Craig*. It is perceived as less reliable than live testimony, although in reality it might be more trustworthy.

One study by Goodman provides some evidence that children who were shielded provide more accurate and detailed testimony. They also make fewer errors than children that are required to testify in court.¹⁹⁶ In this study the children were not testifying about a traumatic sexual abuse incident. Therefore the study might under-predict how shielding improves children's accuracy.¹⁹⁷

187 *Ibid.*, p. 159.

188 See McCough, *supra* note 110, p. 108; Marsil et al., *supra* note 5, p. 222.

189 See McCough, *supra* note 110 p. 223.

190 A. Vrij et al., 'Detecting lies in young children, adolescents and adults', 2006 *Applied Cognitive Psychology*, pp. 1225-1237.

191 See the research mentioned in N.R. Troxel et al., 'Child Witnesses in Criminal Court', in B. Bottoms et al. (eds.), *Children as Victims, Witnesses and Offenders: Psychological Science and the Law*, 1996, p. 160.

192 McCough, *supra* note 110, p. 121.

193 Goodman et al., *supra* note 2, p. 170.

194 Bottoms et al., *supra* note 191, p. 160. See for studies with different results Marsil, *supra* note 5, p. 229-234.

195 M.B. Kovera & E. Borgida, 'Children on the Witness Stand: The use of Expert Testimony and Other Procedural Innovations in U.S. Child Sexual Abuse Trials', in B. Bottoms & G. Goodman (eds.), *International Perspectives on Child Abuse and Children's Testimony*, 1996, p. 215.

196 Goodman et al., *supra* note 2, p. 183.

197 See Marsil et al., *supra* note 5, p. 222.

4. Protection of child witnesses v. defence rights in a European context

4.1. Introduction

In Western Europe the idea has long prevailed that, as a principle, children are competent to testify.¹⁹⁸ This view is supported by more recent empirical evidence.¹⁹⁹ Courts accept testimony of child witnesses for what it is worth, as they do with the testimony of adult witnesses. It is also not commonly accepted that the evidence given by a child requires corroboration simply because the child did not take the oath. In some jurisdictions it is not possible to convict on the evidence given by one witness, but no distinction is made between adults and children.²⁰⁰

Both the European Union and the Council of Europe concern themselves with child victims, their right to be protected and their role as a witness in criminal proceedings. They both recognise the duty to protect children as a victim and witness in court proceedings. We will explain the impact of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings in Section 4.2. In Section 4.3 we will focus on the case law by the ECtHR and their way of balancing the interest of (child) witnesses in child abuse cases and the right of the defence to be tried in a fair manner. Neither the European Framework Decision nor the ECtHR addresses the issue of child victim and witness participation directly, however it can be argued that the protective measures they allow, also aim at making participation of children in criminal proceedings possible.

Special measures to protect children in inquisitorial and adversarial jurisdictions

The European Union Framework Decision and the ECtHR require that European states in some cases take protective measures if child victims are involved as witnesses in criminal proceedings. This is especially true in child abuse cases. As a rule, it is far more difficult for an adversarial system like the English to allow protective measures as compared to inquisitorial systems because of the stricter adherence to orality and the need to have witnesses cross-examined in court. However, under the Youth Justice and Criminal Evidence Act 1999 (YJCEA) courts have a range of measures available to them to apply to vulnerable witnesses like the use of screens, live television links and video-taped testimony.²⁰¹ The English common law does not recognise the principle of face-to-face confrontation, so the measures are not problematic in that respect. However, courts are hesitant to depart too much from the oral nature of criminal proceedings and from the adversarial model that guarantees defendants the right to cross-examination. Prosecutors are hesitant to use evidence by live link or videotape because the emotional impact of the testimony may be reduced and the child's testimony may be judged to be less compelling.²⁰²

In inquisitorial jurisdictions like the Netherlands, it is relatively easy to adapt procedures to the special needs of child witnesses because judges do not, as a rule, rely on live testimony. Dutch judges attach relatively little importance to a physical confrontation between the defendant and the witness. To a significant degree, the system relies on the skill and competence of the

198 In England and Wales the view that children can provide useful evidence stems from a more recent date. Children's powers of observation and memory were deemed to be less-reliable than adults, they were believed to be highly susceptible. In the 1991 Criminal Justice Act this position was abandoned.

199 Tobey et al., *supra* note 178, p. 215.

200 This is the case in Scottish law. See. B. Flin et al., 'Children's Evidence; Scottish Research and Law', in B. Bottoms & G. Goodman (eds.), *International Perspectives on Child Abuse and Children's Testimony*, 1996. See also the Netherlands Art. 342(2) Dutch Code of Criminal Procedure.

201 The Act also makes it possible to exclude certain persons (other than the defence) from the courtroom, to remove wigs and gowns etc. See Sections 23-30. See on this Act for instance, L. Ellison, *The adversarial Process and the Vulnerable Witness*, 2001, pp. 33-65.

202 *Ibid.*, p. 34.

professional judge to decide on the basis of the ‘cold files’. Thus, not only out-of-court statements made by witnesses in general but also by children are treated with far less suspicion than in adversarial jurisdictions. Other states, like Germany, accept hearsay exceptions to accommodate vulnerable witnesses if they are deemed to be unavailable.²⁰³

In the Netherlands, children younger than twelve do not have to appear in court as a rule and children younger than sixteen years old are not placed under oath.²⁰⁴ Children under twelve are interviewed by experts (psychologists) and specially trained police officers in cases of sexual offences.²⁰⁵ This takes place in a special interview room equipped with video and audio equipment that is designed for this purpose. The interview is videotaped and they can be used during courtroom proceedings (as support), but in principle, justice is done on the basis of the verbatim transcript taken down by the police officer who interviewed the child.²⁰⁶ Most of the time, the defence is not present during the interview. There might not even be a known suspect at the time the interview is conducted. The defence is allowed to view the tapes later. This might cause him or her to ask the prosecutor or judge to question the child, but such a request is commonly refused because a court appearance might harm the wellbeing of the witness.²⁰⁷ A lot of European states do not request children to testify in open court. The authorities videotape the child’s testimony before trial²⁰⁸ and use the tape as evidence or the transcript of the interview.²⁰⁹

4.2. The duty to protect children in court proceedings in European law; the Framework Decision on the Standing of Victims in Criminal Proceedings

Article 8 of the preamble of the Framework Decision on victims in criminal proceedings expresses its primary goal: ‘The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of the procedure and the right to have allowance made for the disadvantages of living in a different Member State from the one in which the crime was committed.’²¹⁰

Article 2, first paragraph, of the Framework Decision makes it clear that each Member State has the obligation to ensure that all victims have a real and appropriate role in criminal proceedings. They have to recognise the rights and legitimate interests of victims with particular reference to criminal proceedings. The second paragraph of Article 2 refers to the special position of vulnerable victims: ‘Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.’ However, the Framework Decision does not state the criteria by which Member States should decide that a victim is ‘particularly vulnerable’. Most European legislations do not give a definition of the term

203 See for instance *P.S. v. Germany*, [2011] ECHR, appl. no. 33900/96. The child was deemed to be unavailable because the parents did not want her to testify in court on account of the risk that her health would deteriorate.

204 See Art. 290 in conjunction with 216 Dutch Code of Criminal Procedure.

205 See the Prosecutorial Guideline ‘*Aanwijzing opsporing en vervolging inzake sexueel misbruik*’ (1 January 2011). It is also possible to hear older children in a special interview room if it is deemed to be necessary because of their stage of development.

206 See for instance F. Lamers-Winkelmann & F. Buffing, ‘Children’s Testimony in the Netherlands: A Study of Statement Validity Analysis’, in B. Bottoms & G. Goodman (eds.), *International Perspectives on Child Abuse and Children’s Testimony*, p. 48.

207 Art. 264(1) Dutch Code of Criminal Procedure. See also B. de Wilde, ‘Compensatie voor het uitblijven van een gelegenheid om een minderjarig slachtoffer als getuige te ondervragen’, 2009 *NJCM-Bulletin*, July/August, p. 496.

208 *Ibid.*, p. 496.

209 In order to assess the reliability of the statement, the transcript should contain the statement in the victims own words. *Kovač v. Croatia*, [2007] ECHR, appl. no. 503/05.

210 On the context and background of the Framework Decision see M.S. Groenhuijsen & A. Pemberton, ‘The Framework Decision for Victims of Crime: Does Hard Law make a Difference?’, 2009 *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 43-59.

‘vulnerable’ but the report of the *Project Victims in Europe* in which the implementation of the Framework Decision in all Member States was monitored, shows that all states afford child victims special treatment; they are as a rule, treated with more consideration than other victims. The authors of the report conclude that this implies that child victims, as a rule, are viewed as vulnerable.²¹¹ However, there is no information given in the report on the precise definition used by the states of the term ‘child’.²¹² There is also no information with regards to the (possible) exceptions. However, from the statement in the report that child victims are ‘as a rule’ treated as vulnerable, we can conclude that child victims from other crimes than (sexual) abuse, are protected too. According to the report the necessity of the special treatment is related to the risk of secondary victimisation in the interaction with criminal justice agencies. According to the writers of the report – many of them representatives from Victim Support groups – the risk of secondary victimisation is elevated for victims of sexual violence, young persons and persons with a mental disability.²¹³ So, within the European Union it is widely accepted that (alleged) victims of child abuse need special treatment within criminal proceedings to avoid secondary victimisation as much as possible.

The Framework Decision and its preamble emphasise the need to offer protection to vulnerable victims. But what does it have to say about the victim’s right to participation? This right is not expressly mentioned in the respective articles of the Framework Decision nor in its preamble. However, the right to receive information (Article 4), the right to assistance (Article 6) and the right to protection (Article 8) among other goals, aim at making victim participation possible. The Project Victims in Europe especially associates Article 3 with the victim’s participatory rights.²¹⁴ The first part of Article 3 of the Framework Decision regards the victim’s right to be heard during proceedings and to supply evidence. The second part obliges the Member States to ensure that victims are only questioned so far as necessary for the purpose of criminal proceedings. Article 3 is phrased in an open manner, so it is not easy to find out how the Member States implemented this obligation. According to the report on victims in Europe all Member States have implemented measures that provide victims with avenues for participation, however the diversity of the measures do not make a comparison possible.²¹⁵ The report links the right to participation for instance to the right to supply the court with evidence for compensation, the right to provide a Victim Impact Statement and the right to private prosecution.²¹⁶

Another form of participation is the involvement as a witness in criminal proceedings. Article 3 obliges the Member States to give victims the right to be heard during proceedings. Recognising that such a form of participation can be especially stressful for vulnerable victims, the researchers of the Project Victims in Europe also focused on the questioning of minors. It was found that the awareness of the need to adapt normal questioning methods when conducting the questioning of children is present in all Member States.²¹⁷ Although the issue of repetitive questioning is not covered by the Framework Decision, eleven Member States limited repetitive

211 Project Victims in Europe; Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union, 2009, <http://ec.europa.eu/justice/news/consulting_public>, p. 49. See on the term vulnerability also J. McEwan, ‘The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union’, 2009 *ERA Forum*, p. 373.

212 According to J. McEwan, the definition of the term ‘child’ varies slightly between states.

213 Project Victims in Europe, supra note 211, p. 39.

214 Ibid., p. 42.

215 Ibid., p.58.

216 Ibid., p. 44. The writers of the report express a ambiguous feeling on victim participation. One the one hand they recognise that participation can benefit victims (referring to J. Shapland et al., *Victims in the criminal justice system*, 1985). On the other hand should the benefits of increased participation be weighed against the stress that may accompany increased participation (referring to U. Orth, ‘Secondary Victimization of Crime Victims by Criminal Proceedings’, 2002 *Social Justice Research*, pp. 313-325).

217 Ibid., p. 49.

questioning for minors.²¹⁸ Furthermore it was found that in all Member States the examination of children takes place in a child-friendly environment and that in most Member States (20) the interviews were conducted by specially trained police officers.²¹⁹ Twenty-four out of twenty-seven member-states have the option available to use a television-link and or video recording,²²⁰ although the circumstances in which the options are used may vary.²²¹ In almost all the jurisdictions the registration of the pre-trial questioning can be used as evidence.

Article 8 of the Framework Decision requires Member States to ensure a suitable level of protection for victims regarding their safety and protection of privacy where the authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy. Article 8(4) addresses the need to protect the most vulnerable witnesses and victims in court proceedings. If necessary, states need to protect them from the effect of giving evidence in open court by taking special measures that will protect them, as long as the measures taken are compatible with the states basic legal principles. The Framework Decision does not mention any examples of such measures but of course they need to be in accordance not only with domestic law but also with Article 6 of the European Convention of Human Rights that guarantees defendants a right to a fair trial. It follows from the report on the implementation of the Framework Decision that all Member States have the possibility to hold in camera hearings. It is mostly left to the discretion of the court whether this form of protection is used. This makes it very difficult to draw any conclusions on the frequency that it is used in cases where child victims have to testify. Having said this, it must be noted that in some Member States like the Finland and the Netherlands, child victims below a certain age are, as a rule, not heard in open court.

In the *Pupino* judgment for the first time, the Court of Justice gave its interpretation of some provisions relevant to the standing of children as victims and witnesses in criminal proceedings. It made it very clear that the Framework Decision requires Member States to ensure specific protection of vulnerable victims.²²² States need to protect them for example by hearing them outside the trial and before it takes place.²²³ In the case, which centered on maltreatment of a student by a teacher, the Court ruled that the national court must be able to authorise vulnerable victims to testify in a way that guarantees their protection. The Italian law provided for such a procedure but only in sexual abuse cases. The Court of Justice stated: ‘However, independently of whether a victim’s minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision, it cannot be denied that where, as in this case young children claim to have been maltreated, and maltreated, moreover, by a teacher, those children are suitable for such classification, having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to be a victim (...)’.²²⁴ However, all measures on protection and prevention of secondary victimisation must be designed in such a way that the defendant is still granted a fair trial.²²⁵ So, the principle of a fair trial (at least in theory) prevails over the interest of victims to

218 The authors of the report on the implementation of the Framework Decision covered this topic in their research because they are of the opinion that repetitive questioning is a widely recognised source of secondary victimization. The 11 Member States are: Finland, France, Sweden, Portugal, Italy, Poland, The Netherlands, Luxembourg, Lithuania, Latvia, and Austria.

219 Project Victims in Europe, supra note 211, p. 51.

220 Ibid., p. 51.

221 See Section 4.3. for some examples.

222 Case C-105/03, ECR I-5285.

223 Case C-105/03, ECR I-5285, Para. 61.

224 Ibid., Para. 53.

225 Ibid., Para. 59.

be protected. This might mean in practice that a criminal proceeding has to be dropped if the damage to the victim outweighs the benefit of trying the alleged offender.²²⁶

4.3. The duty to protect child witnesses against the obligation to ensure a fair trial; case law by the ECtHR

Duty to protect victims and witnesses

In the *Doorson* case the ECtHR gave its view on the duty to protect witnesses. Although Article 6 of the Convention does not require states to take into account the interests of victims and witnesses, if their life, liberty or right to privacy is at stake, the Convention offers them protection. Such interests of victims and witnesses are in principle protected by other provisions of the Convention (like Article 2 protecting the right to life and Article 8 protecting the right to privacy). This implies that 'Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'²²⁷

Right to a fair trial

The defendant's right to a fair trial requires that in principle all the evidence has to be presented in open court, in the presence of the accused.²²⁸ Measures restricting the rights of the defence in order to protect victims and witnesses are only permitted if strictly necessary and if the limitations caused by the measures are sufficiently 'counterbalanced by the procedures followed by the judicial authorities'. Unlike the American Constitution, the European Convention does not guarantee a right to face-to-face confrontation between the witness and the defendant. However, it recognises that the defence is handicapped if such a confrontation does not take place.²²⁹ If the defence is prevented from observing the demeanour of a witness under direct questioning, it is prevented from testing their reliability. In that case the authorities have to make sure the handicaps under which the defence labours are 'counterbalanced'. The question arises how national courts have to undertake this 'balancing act' if the interests of child witnesses are at stake.

Case law of the ECtHR on child victims and witnesses in sexual abuse cases

We would like to emphasise that it is not the role of the ECtHR to determine whether particular types of evidence like statements of children are admissible; this is for the national jurisdictions to decide. The question that the European Court must answer is whether the proceedings as a whole are fair. In determining this, the Court examines whether the defendant was given the opportunity to oppose the use of the evidence. In addition, the quality of the evidence and the circumstances under which it was obtained must be taken into account. According to the Court, no problem of fairness necessarily arises where the evidence is unsupported by other material 'it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.'²³⁰

226 B. Shünemann, 'Protection of children and other vulnerable victims', 2009 *ERA Forum*, p. 394.

227 *Doorson v. the Netherlands*, [1996] ECtHR, appl. no. 20524/92, Para. 70.

228 However, the ECtHR does not guarantee the accused an unlimited right to secure the appearances of witnesses in court, even if it concerns witnesses in charge. See for instance *Bocos Cuesta v. the Netherlands*, [2005] ECtHR, appl. no. 54789/00, Para. 68.

229 *Van Mechelen v. the Netherlands*, [1997] ECtHR, appl. no. 55/1996/674/861-864, Para. 62.

230 *Bykov v. Rusland*, [2009] ECtHR, appl. no. 4378/02, Para. 33.

We will discuss and analyse a few important cases decided by the ECtHR involving children as witnesses. All of those cases are about sexual abuse. Apparently this is the area where most problems regarding the balancing between the defendant's right to examine the witness and the interests of the child occur. In none of the cases the child appeared in open court. In all of them the defendant's right to question the witness and ultimately the right to a fair trial was at stake. The case law makes it very clear that the Court has regard to the special features of criminal proceedings concerning sexual offences. 'Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor.'²³¹ Therefore the Court accepts that in sexual abuse cases involving minors certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.²³²

In *S.N. v. Sweden* a ten-year-old boy testified (twice) to the police that he was sexually abused by the applicant.²³³ The interviews were carried out by a police-inspector who had long-standing experience with investigations in child abuse cases. The first interview was videotaped, the second audio-taped. Applicant's counsel was invited to be present during the second interview, but agreed it could be conducted without his presence. The police officer and the lawyer agreed on the aspects of the case that needed to be discussed. However, no list of questions was drawn up. The child was not examined in court. The applicant's counsel stated that, in line with long standing practice, such a request would have been refused.

The ECtHR accepts the view that the applicant could not have obtained a live statement by the child made in court. However, the applicant's lawyer could have asked for a postponement of the interview and he could have asked to have the second interview videotaped in order to satisfy himself the interview was conducted fairly. Furthermore, counsel was given the opportunity to have questions put to the defendant. For these reasons the defendant's right to examine or have examined the witnesses was not violated. The Court accepts that in sexual offence cases (because of its special features) a direct-examination by the accused or his counsel is not always possible.²³⁴

Although the statements made by the boy were virtually the only evidence against the accused, the Court is of the opinion that the proceedings were fairly conducted. The videotape was shown during trial and appeal hearings and the record of the second interview was read out before the District Court and the recordings were played before the Court of Appeal. In the opinion of the Court, this gave the applicant sufficient opportunity to challenge the child's statement. Because the defendant could not exercise his rights fully, the Court satisfies itself that the statements were treated with extreme care. In the opinion of the Court, the Swedish Appeal Courts applied the necessary care because it took into account that some of the information was lacking in detail and had regarded the leading nature of some of the questions put to the child.

In *Bocos Cuesta v. the Netherlands* the defendant was convicted for sexual assault mainly on the basis of four statements made by the alleged victims to the police.²³⁵ The defence asked to hear them in court, but this request was refused. In balancing all interests involved, the Court of

231 *S.N. v. Sweden*, [2002] ECtHR, appl. no. 34209/96, Para. 47.

232 *Ibid.*

233 *Ibid.*

234 See *S.N. v. Sweden*, supra note 231, Para. 52.

235 *Bocos Cuesta v. the Netherlands*, [2005] ECtHR, appl. no. 54789/00.

Appeal was of the opinion that the interests of the four young children (aged between six and eleven years old) not to relive the trauma, must be given priority over the interests of the defendant in hearing the children. The court heard the reporting police officers on the manner in which the children were examined. For several reasons the court found the statements to be reliable. The descriptions of the defendant given by the witnesses showed a high level of similarity and there were no points of contradiction. The confrontation of the witnesses with the suspect had been carried out with the required care. Furthermore, the witnesses had recognised the suspect in a confrontation (albeit that this was a confrontation with only one person). The witnesses were questioned by police officers with extensive experience and the questioning had been conducted in an open and non-suggestive manner. Finally, the statements made by the children independently, corroborated each other.²³⁶ The Dutch courts were of the opinion that the interest of the defendant in hearing the witnesses was outweighed by against the interest of the children not to relive a possible traumatic experience. The ECtHR rejected this argument because there was no concrete evidence in the file, for instance an expert opinion, that the children would have been traumatised if they had to testify at the trial.

The ECtHR found the Dutch proceedings unfair because the statements made by the children were the only direct evidence of the facts held against the applicant they must have been of a decisive importance for the court's finding of guilt.²³⁷ So, the question the Court has to examine is whether the applicant was given an adequate opportunity to examine the witnesses. In this case the defendant had not been given this opportunity. Furthermore, because the statements were not recorded on tape, the judges were not able to observe the demeanour of the children under questioning and thus form their own opinion of their reliability.

Even if the statements made by the child are recorded and played back before the trial courts, the right to a fair trial may have been violated, as can be concluded from a number of (similar) Finnish cases.²³⁸ In those cases the video recordings were the only direct evidence against the defendant. In the case of *A.L. v. Finland* for instance, the recording allowed the defendant and the court, at least to some degree, to assess the credibility of the child. Furthermore, the defendant was given the possibility to give his comments on the evidence thus presented. However, because of the defendant's lack of opportunity to put questions to the child witness, the ECtHR concluded that he had not been given a fair trial.²³⁹ We can conclude from the Finnish cases that a defendant has to be given an opportunity to question the witness. A statement by a parent on the perceived changes in the child's personality or the testimony of a psychologist on the reliability of the child's statements cannot 'counterbalance' the fact that the defence had not been able to question the child if the information by the child is the only direct evidence against the defendant.²⁴⁰

In the case of *Kovač v. Croatia* the child's statements made before the investigating magistrate were the only direct evidence against the defendant.²⁴¹ Therefore they were of decisive importance for the court's findings of his guilt, despite the fact he had not been given any opportunity

236 A factor that might have contributed to the conviction of the judges that the defendant was guilty is the fact that the defendant had been convicted in Spain for sexual assault of minors. The defendant confirmed this information from the Spanish authorities during the trial proceedings.

237 Cf. *P.S. v. Germany*, supra note 203.

238 *W. v. Finland*, [2007] ECtHR, appl. no. 14151/02.

239 *A.L. v. Finland*, [2009] ECtHR, appl. no. 23220/04, Para. 75. The fact that the defendant consented to viewing the recordings could not be understood as having waived his right to put questions to the child. See Para. 74.

240 See for instance *P.S. v. Germany*, supra note 203.

241 *Kovač v. Croatia*, [2007] ECtHR, appl. no. 503/05.

to question the child. The written transcript was not an authentic version of the child's testimony in her own words, but a version worded by the investigative magistrate in a language which could not possibly reflect the child's manner of expressing herself.²⁴² According to the ECtHR this means that the transcript could not have provided a complete and truthful picture to the judges. In these circumstances the Court found that the defendant had not been given a fair trial.

4.4. Analysis of the case law by the ECtHR

The above-discussed cases make it very clear that if there is no concrete, corroborating evidence, the ECtHR perceives the proceedings as unfair if the defendant is not given the right (in any stage) to question the witnesses on which testimony the conviction is based. Statements by parents on the child's changes in behaviour and expert testimony on the credibility of the children's statements do not count as corroborative evidence. It has not been decided whether it is sufficient in child abuse cases to have the defendant's lawyer ask the questions without the defendant being present.²⁴³ The Court will probably decide this on a case-by-case basis. If there is no direct confrontation between the child and the defendant this will in most cases benefit the child because there is growing empirical evidence that confrontation negatively affects children's wellbeing and the completeness of their testimony.²⁴⁴ On the other hand, this would possibly deny the defendant the possibility to effectively question the witness because the defendant's lawyer cannot always replace the defendant. Therefore the Court prefers defendants being present during the questioning of adult witnesses.²⁴⁵

Furthermore, the Court seems to accept the situation that children in child abuse cases (under a certain age) do not appear in person in court to make their statements provided the rights of the defence are observed. Not only Finland, Sweden the Netherlands and Germany, but a lot of other European states adhere to the practice to interview children only during the pre-trial stage as is suggested by the Court of Justice in the *Pupino* case.

Apparently it is not necessary as a rule to show on a case-by-case basis that for a particular child it would be harmful to appear in open court. This situation is different if the evidence given by the child is the only direct evidence against the defendant and the defendant has not been given the opportunity to question the witness. In that case, national courts have to examine whether the interests of the child prevent him or her from testifying in open court. If the child does not have to appear because he would be traumatised, it is not possible to convict the defendant. The ECtHR made it very clear that a conviction cannot be based to a decisive extent on the statement by a child that is not examined by the defendant. This general rule applies to all witnesses, adults and children.²⁴⁶ Expert testimony on the reliability of the child's statement, hearsay evidence by parents and the introduction of a video-taped statement by the child cannot 'counterbalance' the defence right to question the witness.

4.5. Participatory rights in the ECtHR

Unlike recent international instruments, the ECHR does not guarantee child victims and witnesses the right to participation in criminal proceedings in a broad sense. However, states must

242 The child concerned was mentally challenged, she expressed herself with difficulty, could not read and write. She barely remembered the event in question. She simply stated the defendant had hit her with a wooden spoon. Therefore, the account (that contained allegations of sexual abuse) had obviously been worded by the investigating judge. *Ibid.*, Para. 28.

243 In a drugs case the ECtHR accepted that the anonymous witnesses were solely examined by a lawyer, without the defendant being present. *Doorson v. the Netherlands*, *supra* note 227, Para. 74.

244 See for instance, *Regan et al.*, *supra* note 177, p. 191.

245 *Doorson v. the Netherlands*, *supra* note 227, Para. 74.

246 *Al-Khawaya and Tahery v. U.K.*, [2009] ECtHR, appl. no. 26766/05, 22228/06.

ensure that victims can be heard during proceedings and are able to supply evidence. This right both serves victims personally as the ends of justice generally. Although the Convention does guarantee all witnesses safety and a right to privacy (as explained above), it focuses primarily on the rights of the defence.²⁴⁷

The ECtHR does guarantee young defendants, charged with very serious crimes an effective right to participate in criminal proceedings.²⁴⁸ Although the Court's holdings refer to the position of young defendants and not to child witnesses, they can serve as a source of inspiration for those who favour child witness participatory rights because it recognises the fact that full adult procedures are not appropriate for children.

5. Synthesis

The right to participation has been recognised internationally as one of the general principles of the child's legal status. This provision laid down in the 1989 CRC has significant implications for the position of child victims and witnesses in criminal proceedings, which have been worked out in detail in the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. The recognition of the child's right to participation adds a new dimension to the existing and already problematic balance between the protection of the child victim and witness on the one hand and the fairness of the criminal proceedings on the other. One of the main objectives of this article was to clarify the implications of this new dimension in light of the rich case law, supported (or not) by evidence from social sciences, regarding the 'old dilemma' present in criminal proceedings in which children are involved as victims and witnesses. In addition, we aimed to clarify which assumptions on the interests of children and their special needs underlie legal regulations and doctrine and whether these assumptions can be reconciled with one another. The multiple legal issue is how to reconcile the image of children as vulnerable and dependent creatures in need of protection with the necessity to extract reliable information from them and the legal obligation to let them participate fully and effectively in the criminal process. We will mention our most important findings here.

Although historically children were deemed to be untrustworthy and not fit to testify at a trial, today, at least in the Western world, they are seen as competent no matter what their age is. In this respect, legal systems meet the standard provided by the UN Guidelines involving Child Victims and Witnesses of Crime, which is supported by Article 12 CRC and which-in principle-considers children as capable witnesses.

Social sciences made prosecuting authorities and judges aware of the pitfalls in interviewing children and evaluating their statements. This calls for special knowledge for instance on the (psychological) development of children, on how to interview children and on how to reduce their stress during the interview. The Guidelines emphasise that child victims and witnesses should be treated in a 'child-sensitive' manner. This does not only aim at respect for the child's dignity, it is assumed to serve adequate fact-finding and the right to participate in the criminal

247 The European Framework Decision on the standing of Victims in Criminal Proceedings, however, obliges Member States to ensure that victims can be heard during proceedings and are able to supply evidence. See Art. 3.

248 See for instance *V. v. the United Kingdom*, [1999] ECtHR, appl. no. 24888/94. The above-mentioned decision relates to the trial of one of the two eleven-year-old boys convicted for the murder of the two-year old James Bulger. This trial attracted a massive public and media attention. It took place in the Crown Court. The defendants were seated in a dock in the centre of the court-room in full view of the press benches and the public gallery. As to Art. 6 ECHR the defendants argued they had not been given a fair trial because they had not been able to fully participate. The Court, as a principle, stated that it is essential that a child charged with an offence is dealt with in a matter which takes full account of his age, level of maturity and intellectual and emotional capacities and that steps be taken to promote his ability to understand and participate in the proceedings. See *T. v. the United Kingdom*, [1999] ECtHR, appl. no. 24724, Para. 84.

justice system as well. Empirical research confirms that the best quality of evidence is deduced if the child is relaxed and the interviewer is well trained and uses appropriate interviewing techniques. This way of organising procedures gives children the chance to tell their story in a child friendly environment which enhances their possibilities to effectively participate in criminal proceedings as is required by Article 12 CRC.

A complicating factor is that legal systems are generally designed for adults. This is particularly true for a setting in which an alleged adult offender stands trial on the basis of the accusation of child abuse. The rise in child abuse cases has ‘challenged this adult system not only to accept and accurately interpret the testimony of child witnesses, but to adapt to their special needs’.²⁴⁹ The right to participation provides additional challenges. A court session in which children take part should preferably be held behind closed doors, not only to protect their privacy, but also to ensure their testimonies and other forms of participation. The US Supreme Court only accepts closing of the doors if necessary to protect the child from trauma. This means that the measure is regarded as a protective measure not (also) as a measure to ensure (more) effective participation as proclaimed by the UN Committee on the Rights of the Child.

In light of this, it is interesting to note that the European Union's Framework Decision on the standing of victims does not explicitly mention the victim's right to participate in criminal proceedings. However, the Framework decisions lists a number of rights that aims at enabling participation if the victim so desires (Articles 2, 3, 4, 6 and 8). Furthermore, the European Court of Human Rights' focus in child abuse cases is on the tension between the protection of the child and the rights of the defence, rather than on the victim's participation as such.

As stated above, most or all Western legal systems regard children as competent witnesses. In principle, their statements need not to be corroborated. In some U.S. jurisdictions a conviction can be based solely on the hearsay statement by a child if the child is not available to testify and the statement is judged to be trustworthy. Spontaneous outings by young children are seen as reliable because of ‘the limited reflective powers’.

Although the ECtHR is generally more lenient in accepting hearsay evidence, it would not accept that states base a conviction solely (or to a decisive extent) on such a statement if the defence has not been given the opportunity to examine the witness.

In virtually all jurisdictions the fairness of protective measures has been subject to debate. Especially in the United States great concern has been expressed in relation to the violation of the defendant's right to confrontation (i.e., the principle of orality). The principle of orality is one of the key-features of the adversarial trial. The primacy of live testimony is partly explained by the structure of adversarial proceedings where evidence is presented before an unprepared fact-finder (i.e., a judge or jury). Furthermore, adversarial court proceedings are seen as a two-sided contest between the prosecution and the defence. The trial judge functions as an impartial arbiter who needs to keep the balance between the two parties. In such a party-driven context it is not easy to fit in the interests of a third party: the child witness. In Europe, where less emphasis is placed on orality and most proceedings are of an inquisitorial nature, it seems easier to accommodate child witnesses. In most European states children are heard only in the pre-trial phase in a child-friendly environment.

However, concerns are expressed here as well regarding the fairness of the proceedings and the possibility for the defence and the judicial decision makers, to scrutinise the statements of child witnesses. The difference in the way the European and American regulations and courts

249 J. Batterman & G. Goodman, ‘Effects of Context on the Accuracy and Suggestibility of Child Witnesses’, in G. Goodman & B. Bottoms (eds.), *Child Victims, Child Witnesses: Understanding and Improving Testimony*, 1993, p. 324.

perceive the positions of child witnesses in criminal proceedings and the reliability of their statements makes it interesting to compare the approach by the United States Supreme Court and the ECtHR.

The defendant's right to confront an adverse witness is deeply ingrained in American history and (trial) culture. Both the adversarial structure of the trial and the presence of a jury make confrontation between accusers and the accused an important aspect of trial proceedings. This makes it extremely difficult to adapt courtroom proceedings to the needs of the child. Only if there is case-specific finding that the child will not be able to adequately testify if he is confronted with the defendant, shielding measures can be applied. So, in the United States the focus is more on the defendant's procedural rights and the perception of fairness of trial arrangements than on the protection of the child. However, if the child's effective participation as a prerequisite for the effectiveness of the truth-finding goal of the procedure is at stake, the Supreme Court accepts shielding methods in court as exceptions on the defendant's right to confrontation.

The legal assumption underlying the Confrontation Clause is that it furthers fact-finding. However, numerous empirical studies show that adults can hardly tell from watching children testifying in court whether their statement is truthful or not. This is not a conclusive enough argument in American eyes to do away with confrontation if children who are called to give evidence. An important aspect of the right to confrontation is the *appearance* of fairness of trial procedures. Trials simply do not appear to be fair if the accuser does not (dare to) face the accused. Thus, in the American (and perhaps in other adversarial systems as well) it is hardly possible to comply with the Guidelines that aim to guarantee children the right to be protected from hardship during the proceedings (Article 29 et seq.). The Guidelines prefer the use of video recordings but only a minority of states make use of this method because it is not in accordance with the right to confrontation.

According to the Guidelines child victims should not be subject to cross-examination, if this is compatible with the legal system and the right of the accused to a fair trial. As explained, cross-examination is a vital element of the American trial system that envisages the trial as a contest between two parties. Although it can be called into question whether cross-examination is the most effective way to elicit information from especially very young or vulnerable children, as a general rule it is legally impossible to deny the defendant this important right.

In the United States both protection and empowerment are seen as strategies to ensure the child witness testimony. Empowerment is seen as an essentially child-centred method to secure accurate testimony and reduce the stress related to the duty to testify. Empowerment programs aim to make it possible for children to participate in the proceedings and presumably make it easier for the prosecutor to secure a conviction because jurors attach more weight to live testimony than to for instance video taped evidence. Maybe in Europe this strategy would not be seen as 'essentially child-centred' because it helps children to *adapt* themselves to the demands of the adult legal system instead of the system adapting itself to a certain degree to the needs of the child. In addition, it is questionable to what extent empowerment really aims at stimulating the child to exercise his *right* to effective participation (although legally the US is not bound by Article 12 CRC).

For European states it seems to be easier to comply with the Guidelines and Article 12 CRC because of the inquisitorial structure of the trial proceedings, the bigger trust in 'neutral' and professional interviewers and a more lenient attitude to the use of hearsay evidence.

In Europe, however, the focus is on protection of vulnerable child witnesses and not so much on the participation in the courtroom proceedings itself. The focus is on the participation

in the pre-trial process. The use of pre-recorded video statements is standard practice in a lot of European states. The practice to conduct interviews in a child-friendly environment is in accordance with the Guidelines and it makes it possible for children to participate more effectively in the proceedings. It also serves the fact-finding process because an interview conducted soon after the event is probably more reliable than live testimony given much later at the trial. However, the discussed cases before the ECtHR make it clear that states, for example because parents do want their child to be interviewed a second or third time do not always allow the defendant to question the child. If this happens, the defence is denied a fair trial, especially if the statement of the child is of paramount importance for a conviction. The defence should be given a chance to ask questions (and maybe more than once as the case develops in an unexpected way) however difficult this is for the child. Trial fairness cannot be compromised.

6. Conclusion

It is fair to say that the right to participation of child victims and witnesses adds a rather challenging dimension to the existing balance between the protection of a group of vulnerable actors in criminal proceedings and fair trial principles. In addition, this new dimension can be a complicating factor, particularly if one takes into account domestic reality based on the already existing legal traditions and practice in criminal proceedings. However, the increased attention for the effective participation child victims and witnesses in criminal proceedings and the innovative ways to achieve this, may turn out to be beneficial for both the truth finding process as well as the recognition of the special status of the child. Although, we are confronted with a 'Bermuda' triangle, it certainly is one that is worth further exploring. The right to participation provides a new dynamic regarding the legal status of child victims and witness in the context of fair criminal justice proceedings.