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## Working Paper No.8

# Examining Measures Facilitating Participation of Female Child Victims in the Prosecution of Sexual Abuse Cases in Uganda's Criminal Justice System

**Daisy Nabasitu**

**September 2018**

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Centre for Criminal Justice & Human Rights

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# EXAMINING MEASURES FACILITATING PARTICIPATION OF FEMALE CHILD VICTIMS IN THE PROSECUTION OF SEXUAL ABUSE CASES IN UGANDA'S CRIMINAL JUSTICE SYSTEM

***Daisy Nabasitu****

***Abstract:***

Children in most African traditional societies were not actively involved in decision-making processes in matters affecting them thereby impacting on the enjoyment of their rights. These traditions have been abandoned with the adoption of article 12 of the Convention on the Rights of the Child (CRC) which provides for children's right to participate in all matters affecting them. Sexual offences against female children are prevalent in Uganda due to the vulnerability and age. As victims of sexual abuse, children are often called upon to testify in criminal proceedings. Although children's right to participate in criminal trials is guaranteed in the Constitution of Uganda and other national laws such as the Children's Act, prosecution of sexual offences in Uganda's adversarial system is hindered by lack of victim's medical evidence, absence of eye witnesses to the commission of the offence, traumatic and unregulated cross-examination by defence counsel and limited participation based on age. These hinder female victim's participation in criminal trials. This calls for adoption special protective measures such as use of video testimony, use of child sensitive cross-examination techniques, concealing victim's identity during trial, exclusion of public from the court room, use of intermediaries. Not only will these provide relief to the victim but will enhance female child victim participation in sexual abuse trials.

This paper examines the role of child victims in criminal trials. It reviews the international and regional legal framework regulating child participation in Uganda's criminal justice system in part two. It further points out the adversarial system as a major barrier to female child victim participation. Lastly, the paper advances reasons for use of special protective measures intended to protect victims of sexual abuse from intimidation and secondary victimisation while testifying in criminal proceedings.

***Keywords:*** **participation, female child sexual abuse, protective measures, criminal justice system**

* A principal State Attorney working with the Office of the Directorate of Public Prosecutions, Kampala, Uganda with 15 years prosecutorial experience in child sexual abuse cases. The idea for this research evolved from the practical challenges faced in my day-to-day work while prosecuting sexual abuse cases involving female victims. This research was submitted as part of the UCC LLM in International Human Rights Law & Public Policy in September 2017, under the supervision of Dr Fiona Donson, and has been lighted edited and updated as of September 2018.

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CAT | UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment |
| CCTV | Closed Circuit Television |
| CEDAW | Convention on the Elimination of all forms of Discrimination Against Women |
| CJS | Criminal Justice System |
| CRC | Convention on the Rights of the Child |
| CSA | Child Sexual Abuse |
| CVs | Child Victims |
| CVSA | Child victims of sexual abuse |
| FCVP | Female Child Victim participation |
| FCVs | Female Child Victims |
| FCVSA | Female Child Victims of Sexual Abuse |
| GBV | Gender Based Violence |
| ICCPR | International Covenant on Civil and Political Rights |
| JLOS | Justice Law and Order Sector |
| PMs | Protection Measures |
| SAC | Sexual Abuse Cases |
| SPMs | Special Protection Measures |
| UDHR | Universal Declaration of Human Rights |
| VPM | Victim Protection Measures |
| VSA | Victims of Sexual Abuse |

# A. INTRODUCTION

## 1.1 Background

Traditionally, children were treated as invisible members of society who were 'seen and not heard.'[1]Even where they suffered gross abuses and needed to seek justice, adults spoke on their behalf. In criminal trials, child victims were unable to participate since they were perceived as third parties.[2] This view changed in the last quarter of the twentieth century as evidenced in Hart's observation that children are 'independent, thinking subjects capable and deserving of a greater degree of participation.'[3] It implies that as victims whose individual rights have been infringed, children are capable of giving credible and accurate testimony when given the opportunity to do so.[4] Children's active participation plays a prominent role of promoting their wellbeing, recognising and upholding their rights within the criminal justice system[5] as well as helping judicial officers reach informed decisions in punishing the offenders.[6] Despite the major shift, criminal justice stakeholders are taking long to recognise the child victim's role by failing to implement measures enabling their participation in the criminal justice system; hence a need to examine measures that facilitate participation of female child victims in the prosecution of sexual abuse offences in Uganda. Children require special protection to enable them to access justice and participate in criminal proceedings.[7]

Before the enactment of the Convention on the Rights of the Child (CRC), there was no international human rights instrument specifically providing for children's participatory rights.[8] Presently, several human rights standards and national legal frameworks have embedded this right. This study will however examine only those international standards applicable to Uganda.[9] Participation is defined as 'the process of sharing decisions which affect one's life and the life of the community in which one lives.'[10] Children's fundamental rights are protected by allowing them to express their views in judicial and administrative proceedings affecting them.[11]Judicial proceedings include sexual abuse criminal proceedings where children are called to testify as victims whose rights have been violated.[12] The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power defines a victim as 'a person who, individually or collectively suffers

[1] Aisling Parkes, *Children and International Human Rights Law* (Routledge, 2013) 1.
[2] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294-316, 294.
[3] Roger A. Hart, *Children's Participation: The Theory and Practice of Involving Young Citizens in Community Development and Environmental Care (UNICEF & Earthscan Publications 1997)*11.
[4] Robyn Layton, 'The Child and the Trial' in Justice Tom Gray *et al*, *Essays in Advocacy* (Barr Smith Press, 2012) 201.
[5] Doak, 'Victims' Rights in Criminal Trials' (n.2) 294.
[6] Gerison Lansdown, *Youth Participation in Decision-Making: World Youth Report* (Advanced Version, 2003) A/58/79 & E/CN.5/2003/4) 275. Available at: www.un.org/esa/socdev/unyin/documents/worldyouthreport.pdf (last accessed 21 September 2018).
[7] Doak, 'Victims' Rights in Criminal Trials' (n.2) 275. Access to justice is a basic rule of law principle whose absence renders victims unable to be heard.
[8] UN General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, 1577 UNTS 3, article 12.
[9] These are discussed in detail in Chapter 2 (2.2, 2.3, 2.4.1 and 2.4.2) of this study.
[10] Yanghee Lee, 'Child Participation and Access to the United Nations Convention on the Rights of the Child', in *International Justice for Children* (Council of Europe Publication 2008)105, 107 (referencing Roger Han's definition for participation).
[11] *CRC*, article 12.
[12] Barry Percy-Smith and Nigel Thomas, *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2010). A victim is defined as a person who has suffered the violation.

harm through acts or omissions that are in violation of criminal laws ...'[13] This study will adopt this definition in relation to individual harm suffered by sexually abused children.

Child sexual abuse[14] is a public concern that constitutes one of the widest spread human rights abuse against children in Uganda with deleterious consequences.[15] Child sexual abuse victims are mostly females[16]who suffer defilement as the leading sexual offence.[17] Defilement is a sexual act with a person below eighteen years[18] usually perpetuated by people with intimate and close relationships with the child victim.[19] Due to its predominance and a need to combat it, this study will focus on the role of female child victims of defilement in the adjudication of sexual abuse cases in Uganda's criminal justice system. Crime in the adversarial criminal justice system was primarily seen as a violation of public order,[20] therefore victims were used as tools in presenting prosecution evidence.[21] Victims were regarded as witnesses without any form of proactive participation since their interests fall outside the concern of criminal trials.[22] This perception has evolved in that child victims are now consulted and their participatory rights in criminal trials are now primarily recognised. Recognition of children's participatory rights is at the heart of criminal trials, thus failure to consult victims on fundamental matters affecting them constitutes a breach of their right to be heard.[23] To effectively promote their participatory role in court, measures facilitating their participation should be implemented.

During court proceedings, some child victims easily adopt to the courtroom environment while others cannot withstand it due to their vulnerabilities. Vulnerabilities in children arise due to age, lack of maturity and difference in individual needs.[24] Failure to adopt to court procedures exposes child victims to trauma which negatively impacts on their participation. Trauma is defined as 'an emotional response to a terrible event …

[13] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34.

[14] Sexual abuse occurs when a child is used by another person for his or her gratification or sexual arousal, or for that of others. Examples of child sexual abuse include: defilement, incest, rape, and sexual assault.

[15] African Network for Prevention and Protection against Child Abuse and Neglect (ANPPCAN – Uganda Chapter): *A situation analysis of child abuse and neglect in Uganda* (2011) 16. Available at: www.anppcanug.org/wp-content/uploads/press_releases/PR_Situational_Analysis_of_Child_Abuse_and_Neglect_2011.pdf (last accessed 21 September 2018). Child abuse affects the child both physically and psychologically.

[16] David Finkelhor, *Sexually Victimized Children* (New York: The Free Press, 1979). Also see: David Finkelhor, *Child Sexual Abuse: New Theory and Research* (New York: The Free Press, 1984).

[17] JLOS, *Annual JLOS Performance Report 2015/16* (2016) p.77. Available at: www.jlos.go.ug/index.php/news-media-events/newsroom/latest-news/item/571-jlos-performance-2015-16-key-facts-and-figures (last accessed 21 September 2018). The numbers of defilement victims recorded is as follows: in 2003 – 9,598 victims; 2014 – 12, 077 victims; and 2015 – 13, 118 victims. These were especially in the districts of Lira, Gulu, Pallisa, Soroti, Rakai and Tororo.

[18] The Penal Code (Amendment) Act, 2007 s.129 (1).

[19] Diana E.H. Russell, 'The Incidence of Interfamilial and Extrafamilial Sexual Abuse of Female Children' (1983) 7 *Child Abuse & Neglect* 135-139.

[20]Anne-Marie de Brouwer and Marc Groenhuijsen, 'The Role of Victims in International Criminal Proceedings' in Gdran Sluiter & Sergey Vasiliev (eds), *International Criminal Procedure: Towards A Coherent Body of Law* (2009) 149-151.

[21] David Faulkner,*Crime, State and Citizen: A Field Full of Folk* (Winchester Waterside Press 2001) 226.

[22] John R. Spencer, 'Improving the Position of the Victim in English Criminal Procedure' (1997) 31 *Israel Law Review* 286-292.

[23] *The Prosecutor v William Samoei Ruto and Joshua Arap Sang (ICC-01/09-01/11) paragraph 11.*

[24] Mandy Burton *et a*l, *Are The Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (1998) (Home Office online report 01/06) 3.

with adverse effects to the child including hindering their participation in criminal trials.'[25] The impact of trauma on children creates a need for special protection of child victim's rights during trial.[26]

The Constitution of the Republic of Uganda (Constitution) guarantees children the right to protection from sexual abuse[27] and the right to participate in matters affecting them.[28]The state discharges its duty by allowing child victims to participate in the prosecution of sexual abuse cases committed against them.[29] Prosecution of sexual offences is however faced with challenges[30] such as lack of medical evidence, absence of eye witnesses, traumatic cross-examination by defence counsel and limitations of victim's tender age.[31] These hinder child participation thereby necessitating adoption of protective measures that will assist vulnerable witnesses adduce evidence in court. Such measures include use of video testimony, adoption of child sensitive cross-examination techniques, concealing victim's identity and training officers dealing with child victims aimed at increasing effective female child victim participation female child victim participation in sexual abuse proceedings. Adoption of these measures minimises trauma experienced by child victims during trial, assures victims of the likelihood of being compensated for damage suffered and is likely to increase conviction rates.

As an integral component of international human rights law, modern criminal justice systems require consideration of the victim's rights at all stages of proceedings without prejudice to the accused's rights.[32] Although there are no specific instruments laying down details on how victim's participatory rights are to be recognised and at what stage of the criminal process they are to be applied,[33] this study emphasises the adoption of protection measures during criminal trials that will facilitate female child victim participation in Uganda's criminal justice system. Reference will be made to best practices adopted in other jurisdictions that depict a child-appropriate justice system.[34]

## 1.2 Problem Statement

The prevalence of defilement in Uganda has led to an increase in the number of sexual abuse cases under adjudication.[35] The successful prosecution of these cases depends on several factors, including female child

[25] Alexandra Emily Bochte, 'The Double-Edged Sword of Justice: The Need for Prosecutors to Take Care of Child Victims' (2015) 35 *Children's Legal Rights Journal* 200- 203

[26] UN Office of the High Commissioner for Human Rights, 'The Protection of Victims and Witnesses: A Compilation of Reports and Consultations in Uganda' (OHCHR, 2010) 25. Available at: www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf (last accessed 21 September 2018). The rights guaranteed under ICCPR particularly the right to life, prohibition form torture and other inhuman degrading treatment and others.

[27] *Constitution of the Republic of Uganda, 1995*, Article 34(7).

[28] ibid article 36.

[29] *CRC*, article 12.

[30] G Davies et al, *Psychology, Law and Criminal Justice* (1996) 170; Anne Cossins, 'Complaints of Child Sexual Abuse: Too Easy to Make or Too Difficult to Prove?' (2001) 34 *Australian & New Zealand Journal of Criminology* 149-168.

[31] Astrid Heger *et al*, 'Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children' (2002) 26 *Child Abuse & Neglect* 645-659.

[32] UNGA, Declaration of Basic Principles (n.13), Principle 6(b), Annex.

[33] Parkes, *Children and International Human Rights Law* (n.1) 1.

[34] Anthony Bottoms and Julian V. Roberts, *Hearing the Victim: Adversarial Justice, Crime Victims and The State* (William Publishing 2010) 258.

[35] *Uganda Police Annual Crime Report 2014*, 19. Available at: www.anppcanug.org/wp-content/uploads/Resource_Center/Annual_Reports/Police/R_P_annual_report_2014.pdf (last accessed 21 September 2018). It is reported that a total of 12,077 cases were reported in 2014 as compared to 9,598 cases in 2013. Also see, The ANPPCAN Uganda Chapter, 'Analysis of Child Abuse in Uganda 2005' (2006) report P. i. indicating that based on

victim participation. Female child victims experience trauma during the sexual act as well as trauma caused due to unfamiliar, frightening and intimidating courtroom environment.[36] The trauma continues during the numerous interviews arising from repetitive narration of painful events that might lead to further emotional trauma and may continue even after proceedings.[37]

Article 34(7) of the Constitution imposes a primary obligation criminal justice system to hold suspects accountable. Although the state discharges this obligation, there is however delay in disposing of cases coupled with low conviction rates.[38] The Justice, Law and Order (JLOS) annual report of 2015/16 indicates that out of 15,338 cases taken to court, 1,348 suspects were convicted while 12,915 are still pending. The glaring gap between reported cases and conviction rates is caused by factors such as lack of medical evidence, oral presentation of evidence during trial, unregulated cross-examination, and failure to adopt other PMs besides *'hearings in camera'* when victims testify in court. Concerns of how to increase child sexual abuse conviction rates presents a need to implement protection measures facilitating female child victim participation in order to tackle this problem.[39] Interestingly, even where convictions are attained, it is in rare circumstances that courts will impose the maximum sentence of life imprisonment.[40]

Internationally[41]and nationally,[42] courts pay a considerable degree of attention to the accused's right to a fair trial which is not the case for victims. There is a move to advocate for recognition of victim's rights in observing fair trial rights. To strike a balance for both parties' rights, there is a need to establish protective measures which juxtapose female child victim's rights with those of the accused without perceiving them as an infringement on the latter's fair trial rights. Criminal trials are viewed as a contest between the state and the alleged perpetuator, while victims are viewed as witnesses for the state with little or no consideration given to their interests[43] which hinders their participation. Limited protection under the law leads to traumatic experiences and secondary victimisation of female child victims of sexual abuse (FCVSA) who are often very young and the only witnesses to the sexual act.[44] Considering the vulnerability of female child

cases reported at police, the High Court, Uganda Human Rights Commission, FIDA and ANPPCAN from January to December 2005, sexual abuse accounted for 80.62%.

[36] Joanna Sharpland and Mathew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in Bottoms and Roberts, *Hearing the Victim* (n.34).

[37] Council of Europe: Committee of Ministers, *Regional legislation and action to combat sexual exploitation and abuse of children*, 18 October 2012, Resolution 350 (2012), para 4.

[38] JLOS, *Annual JLOS Performance Report* (n.17). Out of a total of 34,793 cases of defilement recorded in the last three years, 15,343 were taken to court, and 15,338 suspects were arraigned before court. Of these, 1,348 were convicted, while 12,915 cases were still pending in court.

[39] Bottoms and Roberts, *Hearing the Victim,* (n.34) 62.

[40] The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions,2013. Paragraph 22 stipulates instances where death can be imposed in defilement cases. Paragraph 23 provides for imprisonment for life after considering aggravating and mitigating factors. Guideline 34 provides for considerations in determining a sentence for defilement. The third schedule to the guidelines (part 1 paragraph 19) provides for a sentencing range between 30 years to death for aggravated defilement. For simple defilement, the range is between 3 years to imprisonment for life. (part V) paragraph 33.

[41] UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217A(III), article 10; UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, article 14(1); ACHR art. 8.

[42] *Constitution* (n.27), article 28.

[43] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 31.

[44] UN, Office for Drug Control and Crime Prevention, *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 (1999*) 9. Available at: https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf (last accessed 21 September 2018) notes that victimisation occurs through the response of institutions and individuals to the victim.

victims of sexual abuse and the roles they play during the trial process, there is need to adopt conducive special protective measures (SPMs) that are fair to all.[45]

The distinctiveness of SAC requires striking a balance between pursuing justice by holding the perpetuator liable, avoiding further abuse during court proceedings, and meeting the public interest. As a signatory to international instruments promoting children's rights,[46] the Ugandan government is obliged to discharge this duty through legislation[47] and adoption of best practices. Effective operationalisation of legislation requires creating structures enabling efficient observance of victim's participatory rights. McBarnet rightly recognised that proposed solutions have been overly centred on addressing visible problems within the criminal justice system as opposed to 'the deeper structures that help create them.'[48] It is submitted that Uganda's criminal justice system should focus on implementing structural PMs that ensure that evidence adduced by children during sexual abuse criminal proceedings is admissible and reliable. This is possible through adoption of best practices facilitating female child victim participation some of which have been adopted in states such as the United Kingdom (UK), Ireland, Canada, South Africa, Namibia, Zimbabwe and Australia from which Uganda can borrow examples.

### 1.3 Research Questions and Statement

The main aim of this study is to examine the extent to which female child victim participation can be realised within Uganda's adversarial court system. In light of the existing problems, this study offers guidance to Uganda's criminal justice system by addressing the question: How can Uganda's criminal justice system ensure effective participation of female child victim of sexual abuse using court-oriented protective measures? In addressing this question, the study will simultaneously tackle the following questions:

(a) What role do child victims of sexual abuse play in criminal trials and what evidential challenges do they face in the criminal justice system?
(b) How can existing laws be interpreted and applied to ensure that female child victims of sexual abuse are accorded their right to participation?
(c) What role do procedural safeguards such as use of visual-audio link and improved/regulated cross-examination play in ensuring participation of female child victims of sexual abuse in Uganda's criminal trials and what limitations do they face?

### 1.4 Research Outline and Methodology

The study critically analyses jurisprudence, both primary and secondary academic sources. Examples will be drawn from other jurisdictions including South Africa, Namibia, Zambia, Canada, the UK, Australia and Ireland with a view of adopting best practices that will benefit Uganda's criminal justice system in promoting participation and protecting dignity of female child victims of sexual abuse. Focus will be placed on female

Failure by the criminal justice system to protect children against the ravages of trauma after suffering the offence amounts to secondary victimisation.

[45] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* (2009) ZACC 8, 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) para 116.

[46] Uganda is a signatory to the CRC which provides for implementation of rights recognised in the convention. See: *CRC*, article 4.

[47] Enikő Horváth *et al*, 'Gender-Based Violence Laws in Sub-Saharan Africa' (2007), Committee on African Affairs of the New York City Bar. Available at: www.nycbar.org/pdf/report/GBVReportFinal2.pdf (last accessed 21 September 2018).

[48] Doreen J. McBarnet, *Conviction, The State and The Construction of Justice* (Macmillan 1989) 303.

child victim participation at the trial stage because trial offers the victim a chance to narrate events and the court has maximum opportunity to hear facts and receive evidence from all those directly affected by the crime not just the accused and the prosecution.[49] In so doing, victims contribute to the truth finding process[50] which has a great bearing on the final verdict.[51]

The key objective of the study is to advance reasons for adopting the use of visual-audio links and controlled cross-examination as SPMs that will effectively enhance participation of female child victims of sexual abuse in Uganda. Child victims need protection from intimidation and secondary victimisation while testifying in criminal proceedings which will increase their participation, balance the fair trial rights of both accused and victim and restore public confidence.[52]

This study is presented in 4 parts. Part one points out the significant role of child victims, the discrepancy between prevalence of child sexual abuse and the low conviction rates which are attributed to limited protective measures for female child victims of sexual abuse during criminal proceedings. Part two is a review of international and regional legal framework regulating child participation in Uganda's criminal justice system. Hindrances to their participation and areas for reform will be highlighted. Part three discusses the purpose of protective measures pointing out the adversarial system as the major barrier to female child victim participation. It discusses use of visual-audio link as a special protective measure necessary for the prosecution of child sexual abuse cases in Uganda citing best practices facilitating participation of female child victims of sexual abuse applied in other jurisdictions. Pertinent to addressing barriers to female child victim participation, part four discusses improved/regulated cross-examination as a protective measure simultaneously used with visual-audio link in enhancing child participation in Uganda. Conclusions pointing to the importance of implementing visual-audio links and improved/regulated cross-examination as adequate protective measures minimising re-victimisation of the female child victim during trials will be drawn. Attention will be drawn to the need to amend laws to recognise the use of recorded evidence in regulating procedure. Lastly, training of all stakeholders including child victims on the importance of protective measures will be emphasised.

## B. LEGAL FRAMEWORK REGULASTING PARTICIPATION OF FEMALE CHILD VICTIMS OF SEXUAL ABUSE IN UGANDA'S CRIMINAL JUSTICE SYSTEM

### 2.1 Introduction

The state has registered defilement as a leading CSA crime suffered by female children in Uganda.[53] In order to combat it, female child victims should be provided the opportunity to testify in criminal trials[54] to increase the conviction of perpetuators which may in turn reduce its prevalence. As a core value of any modern

[49] Doak, *Victims' Rights,* (n.43) 135.
[50] ibid 186.
[51] ibid.
[52] Michael Tonry, 'Rebalancing the Criminal Justice System in Favour of the Victim: The Costly Consequences of the Populist Rhetoric' in Bottoms and Roberts, *Hearing the Victim* (n.34).
[53] JLOS, *Annual JLOS Performance Report* (n.17) 77. Defilement continues to lead the sex related crimes in Uganda where a total of 34,793 cases were recorded. Also see the *Uganda Police Annual Crime Report 2014* (n.35) at p.19 which reports defilement as a leading sex related crime. A total of 12,077 cases were reported in 2014 as compared to the 9,598 cases reported in 2013 giving an increase of 25.8%.
[54] John E.B. Myers, 'Adjudication of Child Sexual Abuse Cases' (1994) 4 *The Future of Children* 84. He notes that there are no national statistics on how many children testify in criminal trials each year.

criminal justice system, child victim participation in criminal proceedings includes active involvement and expression of views at different stages of criminal proceedings.[55] Children's participatory rights are derived from article 12 CRC which provides for consideration of children's views and opinions in decision making processes.[56] The popularity of provisions on child participation in different international human rights instruments suggests that victims of sexual abuse (VSA) ought to be able to participate in criminal proceedings[57] and attention should be paid to their views as prescribed in various legal frameworks.[58] The formulation of international standards recognising the role and treatment of victims of sexual abuse within the criminal justice system has led to domestic reforms in several jurisdictions[59]as evidenced in parts and 4 of this study. Despite the provisions prescribing for female child victim participation and the best practices adopted in other jurisdictions, Uganda's adversarial court system continues to hinder prosecution of child sexual abuse cases as discussed in section 3(2)(a). To resolve that problem, Protective measures that give confidence to child victims that their dignity and rights will be protected should be adopted.

Legislations respond to sexual abuse survivors by protecting their fundamental rights to bodily integrity through prosecuting and punishing perpetrators. This part justifies the relevance of applying laws in enhancing participation of female child victims of sexual abuse in Uganda's criminal justice system, commencing with an examination of relevant international and regional human rights instruments ratified by Uganda providing for children's right to participation. It reviews Uganda's legal framework on child participation pointing out hindrances to female child victim participation and areas that need reform. Conclusions will be drawn recommending proper interpretation and application of laws promoting child victim participation and amending laws that hinder female child victim participation.

### *(a) International instruments regulating child participation in sexual abuse cases*

International and regional human rights standards focus on the fundamental principle of best interest of the child in highlighting measures promoting participatory rights of child victims. The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime[60] emphasises respect for key cross-cutting principles contained in all human rights instruments on children rights and access to justice.[61] In line with international standards, a Model Law for Justice in Matters Involving Child Victims and Witnesses in Crime (hereinafter

[55] Lee, 'Child Participation and Access' (n.10) 105. Also see: Gerison Lansdown, *Every Child's Right to be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12* (UNICEF & Save the Children, 2011) 3.

[56] *CRC*, article 12. It makes provision for adults to listen to children's opinions when making decisions that affect them.

[57] *UDHR*, article 2; *ICCPR*, article 10; *CRC*.

[58] Brouwer and Groenhuijsen, 'The Role of Victims' (n.20) 151-52.

[59] Doak, *Victims' Rights* (n.43) 29.

[60] UN Economic and Social Council (ECOSOC), *UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of* Crime, 8, UN Doc. E/RES/2005/20 (July 22, 2005) [*hereinafter Guidelines on Justice*].

[61] ibid. The cross-cutting rights include; Right to dignity 8(a) and CAT article 3(1), protection from discrimination 8(b), right to participation 8(d), among others. Other rights include the right to be informed, the right to effective assistance and the right to be protected from justice process hardships. See: International Bureau for Children's Rights, *The Rights of Child Victims and Witnesses: A Compilation of Provisions Drawn from International and Regional Instruments,* January 2005. Available at: www.ibcr.org/wp-content/uploads/2016/06/Compilation-provisions-english-3.pdf (last accessed 21 September 2018) at 39-50, 65-80 and 93-112 respectively.

Model Law)[62] was developed to provide assistance and protection to child victims.[63] Its detailed provisions enhancing participation will be discussed in part 3 of this study.

International instruments do not contain specific provisions on child participation, save for the CRC.[64] As an important right subject to international rules, children's participatory rights are derived from instruments such as the Universal Declaration of Human Rights (UDHR)[65] and the International Covenant on Civil and Political Rights (ICCPR)[66] which provide for protection of privacy. The ICCPR imposes a duty on states to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the Covenant.[67] This duty includes implementing measures recognising vulnerable victims of sexual abuse in criminal proceedings.

Other instruments promoting child participation are the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT),[68] and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)[69] and the CRC.[70] These instruments prohibit discrimination and other forms of inhuman degrading treatment including sexual abuse in all actions concerning children. The CRC is the most comprehensive and specific international human rights treaty affording every child a right to participate in matters affecting them.[71]

[62] UN Office on Drugs and Crime (UNODC), *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, (April 2009). Available at: www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf (last accessed 21 September 2018). This resource was developed by international and governmental human rights bodies in collaboration with UNICEF and the International Bureau for Children's Rights and the UN Office on Drugs and Crime.

[63] ibid 3-4, part one, preamble, option 2.

[64] *CRC*, article 12 specifically provides for the right of children to participate on all matters affecting them.

[65] *UDHR*, article 2 prohibits discrimination of any form.

[66] *ICCPR*, article 10 provides for 'respect for the inherent dignity of human persons.' See also: article 17 and article 24(1) which prohibit discrimination based on sex, race religion, and a right to such measures of protection as are required by their status as a minor.

[67] ibid article 2(2) provides that; 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.'

[68] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, 10 December 1984, 1465 UNTS 85. Article 1 prohibits infliction of pain on any person ... intimidation or coercion or any form of discrimination.

[69] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, 1249 UNTS 13. Article 2 prohibits discrimination in all its forms. Children are usually discriminated against when it comes to participating in criminal proceedings based on their gender and age.

[70] Article 2 provides for non-discrimination of children. it imposes obligations on state parties to protect children from discrimination and take positive action to promote their rights.

[71] ibid article 12 specifically provides for the right of children to participate on all matters affecting them. Article 2 CRC provides for the principle of non-discrimination and article 3 CRC provides for best interest of the child principle as primary in all matters concerning children.

### *(b) The UN Convention on the Rights of the Child (CRC)*

The CRC is the most highly ratified international instrument in the world to which Uganda is legally bound.[72] It promotes children[73] as individuals whose rights should be protected, respected, and fulfilled by ratifying states.[74]To ensure compliance, the Committee on the Rights of the Child monitors its implementation within the domestic legal order of state parties.[75]

Article 12 CRC is widely recognised as an important aspect in implementation of the CRC.[76] It specifically provides for children's rights to participate in all matters affecting them and their views being given weight according to their age and maturity as a fundamental guiding principle in the convention. It affirms children's potential to contribute to decision-making processes, sharing their experiences and act as change agents.[77] Although children can realise their other rights through participation,[78] it is subject to measured parental guidance in accordance with her evolving capacity.[79] Participatory rights of children in criminal trials is achieved by receiving their testimony in a child-friendly manner in compliance with laws, procedures and established mechanisms that are responsive to the plight of female child victims of sexual abuse.

As a party to the proceedings, the victim's voice should be heard.[80] This raises a point of consideration as to what participation in criminal prosecutions entails and to what extent is the child expected to participate? The CRC General Comment No.12 responds by stating that:

> The concept of participation emphasises that including children should not be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures.[81]

This implies that children should be involved in the formulation of policies and PMs designed to facilitate their participation in criminal proceedings.

The principles of non-discrimination and best interest of the child are primary considerations in giving weight to children's views in decision making processes.[82] However, the CRC's failure to set the age at which children

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[72] Paulo Sérgio Pinheiro, 'Violence against Children: A Global Report' (2006) 11 *Ciência & Saúde Coletiva* 453, pp.5 and 11, XIII. The CRC is currently ratified by 196 states. Its Committee is composed of 18 international independent experts who monitor its implementation. Uganda ratified it on 17 August 1990.

[73] A child is defined in the Convention as a person under the age of 18 unless national laws mandate an earlier age of majority, Article 1 CRC.

[74] Pinheiro, 'Violence against Children' (n.72).

[75] *CRC*, article 43.See also: Parkes, *Children and International Human Rights Law* (n.1) 3.

[76] Laura Lundy *et al*, 'The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries' (UNICEF-UK, 2012) p.7. Available at: www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,368351,en.pdf (last accessed 21 September 2018).

[77] UNICEF (2008a), *Fact Sheet. The Right to Participation*, p.1. Available at: www.unicef.org/crc/files/Right-to-Participation.pdf (last accessed 21 September 2018).

[78] UNESCO, *Guidelines on Justice* (n.60) 272. Such rights include the right to life (article 6 CRC), right to privacy (article 16 CRC), right to provision of basic needs and protection from all forms of harm including sexual abuse (article 19 CRC).

[79] *CRC*, article 5.

[80] Clark Butler, *Child Rights the Movement, International Law, And Opposition* (Purdue University Press 2012) 39.

[81] UN Committee on the Rights of the Child (CRC), *General Comment No.12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 13, p.7.

[82] *CRC*, articles 2 and 3 respectively. Also see Marisa O. Ensor and Amanda J. Reinke, 'African Children's Right to Participate in Their Own Protection' (2014) 22 *The International Journal of Children's Rights* 75.

should have the opportunity to be heard in decisions affecting them[83] has hindered children's participatory rights. Age of children is a determining factor in admissibility of their evidence as elaborated in section 2(4)(c) below which discusses the requirement to corroborate evidence of a single identifying witness. Although children's participatory rights are guaranteed, they lack full independence to act on their own. Resultantly, adults intervene in exercise of their duties to fulfil children's needs. In speaking and acting on children's behalf, adults may promote their self-interests in disregard of the best interest principle.[84] Even where actions taken are well intentioned, if children are not heard, adults' actions may end up harming rather than helping them.[85] This emphasises the need to actively involve children in making decisions affecting them.

Article 34 CRC provides for protection of children from sexual exploitation and sexual abuse by requiring state parties to:

> Take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse ...[86]

Sexual abuse is interpreted as 'inhuman degrading treatment' under the ICCPR.[87] It obstructs female participation and violates the principle of equality of rights and respect for human dignity enshrined in the CEDAW.[88] Children can actively contribute to the fight against sexual abuse by receiving sex education which encourages them to participate in all sexual abuse related matters such child sexual abuse proceedings thereby protecting them from inhuman degrading treatment and discrimination based on sex. No such provision is enshrined in the CRC; however, the CEDAW mandates state parties to adopt measures protecting children from sexual abuse by promoting their participation.

### *(c) Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*

CEDAW identifies sexual abuse as a form of discrimination suffered by women (including girls)[89] which hinders their full participation in society.[90] The convention requires states to adopt measures eliminating all forms and manifestations of discrimination against women including gender-based violence (GBV).[91]Gender based violence is that 'violence directed against a women because she is a woman or that affects women

[83] Parkes, *Children and International Human Rights Law* (n.1) 59.

[84] Kristen Cheney, 'Malik and His Three Mothers: AIDS Orphans' Survival Strategies and How Children's Rights Translations Hinder Them' in *Reconceptualising Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge University Press 2013) 15 and 163. Sometimes adults settle sexual offences in the interest of the perpetuator where he is a family member or friend. In other instances, they opt for monetary compensation and withdraw the case in disregard of the child victim's interests and needs.

[85] Lansdown, *Youth Participation in Decision-Making* (n.6) 273.

[86] *CRC*, articles 4 and 19 (1). Also see UN Special Rapporteur on Violence Against Women, *Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, 45, *delivered to the Commission on Human Rights*, UN Doc. E/CN.4/1996/53 (Feb. 5, 1996) (*prepared by* Ms. Radhika Coomaraswamy).

[87] David S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' (2005) 15 *Duke Journal of Comparative & International Law* 222-226.

[88] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, 1249 UNTS 13, Preamble.

[89] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Violence against women*, 2017 CEDAW/C/GC/35 para 14.

[90] *CEDAW*, article 1.

[91] ibid article 2 prohibits discrimination in all its forms.

disproportionately' … and it is a violation of their human rights.[92] To address gender based violence, the CEDAW Committee called on state parties to take all measures including legal means to prevent and protect women and girls from GBV using impartial and fair legal procedures.[93] Legal procedures include prosecution of gender based violence through apprehension of the perpetuators thereby alleviating its effects.

International instruments promoting children's participatory rights manifest the important role played by children in the adjudication of criminal justice. Similar provisions are entrenched in regional treaties including the African Charter on Human and People's Rights (Banjul Charter)[94] and the African Charter on the Rights and Welfare of the Child (ACRWC)[95] which are discussed in the next section.

## 2.2 Regional Instruments

The Banjul Charter and ACRWC are the two African regional instruments protecting and promoting children's participatory rights.

### *(a) The Banjul Charter[96]*

Although not a child-specific charter, the Banjul Charter has provisions prescribing individual's 'right to participate in public life'[97] and the 'right to freedom of expression, association and information.'[98] These provisions can be invoked in enabling children to exercise their participatory rights in criminal proceedings. The charter also sets out individual complaints provisions to the African Commission on Human and Peoples' Rights (the Commission) by state parties, individuals and NGOs. As a signatory to this charter, Uganda is bound to implement these provisions in observance of the rights of female child victims.[99] Similarly, Uganda ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)[100] which provides for protection of girl's dignity, free development of her personality[101] and protection from sexual harassment.[102] In fulfilment of its mandate, the Commission[103] adopted principles and guidelines on the right to fair trial and legal assistance in Africa[104] which provide for allowing victims of

[92] *CEDAW General Recommendation No. 35* (n.89) para 6.
[93] ibid para 26(c). Also see: Pinheiro, 'Violence against Children' (n.72) 453.
[94] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Uganda ratified it on 10 May 1986.
[95] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child (ACRWC)*, 11 July 1990, CAB/LEG/24.9/49 (1990). Uganda ratified it on the 21 October 1994 and it is bound to prosecute sexual offences when the need arises.
[96] OAU, *Banjul Charter* (n.94).
[97] ibid article 13. Also see: *CRC*, article 12.
[98] ibid article 9. Also see: *CRC*, article 13.
[99] Uganda ratified the ACHPR on 10 May 1986 and signed it on 18 August 1986.
[100] Adopted by the Ordinary Session of the Assembly of the African Union on 11th July 2003. Uganda ratified it on 16 February 2001.
[101] ACHPR article 3.
[102] ibid article 12(1)(C).
[103] OAU, *Banjul Charter* (n.94) Article 29 part II. The Commission is a quasi-judicial body established on 2 November 1987 tasked with promoting and protecting human rights and collective rights throughout the African continent as well as interpreting the ACHPR. Its headquarters are now in Banjul, Gambia
[104] African Union, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2001). Available at http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf (last accessed 21 September 2018). These principles and guidelines promote participation of victims and witnesses during legal proceedings.

crime to present their views and concerns at appropriate stages of proceedings.[105] These guidelines are a useful reference for Uganda's criminal justice system in handling female child victims of sexual abuse. Besides these provisions, the ACRWC contains specific participatory child rights as discussed below.

*(b) The African Charter on the Rights and Welfare of the (ACRWC)[106]*

The ACRWC is the first regional treaty specifically addressing children's rights. It grants greater protection for children in areas similar to the CRC. ACRWC perceives children as rights bearers and refers to critical situations facing most African children due to their unique socio-economic rights.[107] It recognises children's right to voice their opinions during legal and administrative proceedings and emphasises their freedom of expression.[108] Drawing from the principles of the CRC,[109] child participation is a useful strategy for protecting children against child sexual abuse and realising their rights.[110] As human beings, protection of children's privacy is paramount[111] and state parties should fulfil this obligation by adopting both legislative and administrative measures.[112] Adopted measures are implemented alongside the Guidelines on Justice[113] which have been incorporated into Uganda's national legal frameworks guaranteeing children's participatory rights, as discussed in the next section.

## 2.3 Uganda's Legal Framework Regulating Participation of female child victims of sexual abuse in Criminal Proceedings

Children's right to participate is insignificant and foreign to African culture.[114] It was traditionally assumed that children in most African communities could never challenge their elders or express their views, even when their rights were violated, which increased children's vulnerability to sexual abuse.[115] Uganda has however moved away from such traditional beliefs and practices by embracing CRC provisions promoting child participation in its national legislation. The CRC becomes meaningful and potentially transformational when given legal effect in a domestic legal system. Legal frameworks prescribing and promoting children's

[105] ibid Guideline N(f)(2) provides for allowing children's views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

[106] OAU, *ACRWC* (n.95). Uganda ratified it on the 21 October 1994 and it is bound to prosecute sexual offences when the need arises.

[107] Parkes, *Children and International Human Rights Law* (n.1) 247.

[108] OAU, *ACRWC* (n.95), articles 4 and 7 respectively.

[109] The core principles are the right to non-discrimination, best interest, right to survival and development and right to be heard

[110] OAU, *ACRWC* (n.95), articles 16 and 27. Sexual abuse falls under the scope of 'torture, inhuman or degrading treatment'.

[111] ibid article 10.

[112] ibid article 16.

[113] The Guidelines were adopted to achieve full implementation of AU and related international instruments related to the criminal justice system (preamble of the guidelines). Though not legally binding, according to para 6, the Guidelines shall be implemented within the context of national legislation and international standards.

[114] Lansdown, 'Every Child's Right to be Heard' (n.55) 17.

[115] Lansdown, *Youth Participation in Decision-Making* (n.6) 273. Participation of children in African traditional society was in form of sitting round the fire, sharing folklore, stories, songs and dances. Children were not actively involved in decision making which impacted on the enjoyment of their rights. Adults spoke on their behalf and they were expected to keep quiet while an adult was talking.

participatory rights in Uganda include the Constitution, Children Act,[116] the Penal Code Act[117] and the Evidence Act[118] which are discussed in the next section.

(a) *The Constitution*

The Constitution is the supreme law of Uganda[119] with an expansive bill of rights[120] consolidating the legal effect of international human rights treaties. Criminal laws derive their force from the supreme laws of states. Therefore, the instructional constitutional values and norms in prosecution of sexual offences becomes inevitable.[121] A child is defined as a person under the age of eighteen[122] whose rights are set out in article 34 of the Constitution.[123] While there is no specific constitutional provision protecting children from sexual abuse, this right is broadly interpreted from the provisions of article 24 and 25(1).[124] Article 20 imposes a positive obligation on the state to respect, uphold and promote the rights guaranteed under the Constitution. Similarly, article 34(7) imposes obligations on the criminal justice system to hold suspects accountable for offences against children. These provisions become effective by providing a conducive environment enabling children to participate in the prosecution of offenders.

The CRC imposes an obligation on the state to adopt special protective measures for children's rights by developing laws, procedures and mechanisms significant in the prosecution of sexual offences.[125] The obligation extends to private spheres including homes that are considered to be safe, yet some of the sexual abuse cases occur there and are often out of reach of the state.[126] The state discharges its duty by prosecuting offenders. Prosecuting defilement cases requires proof of victim's age. However, due to parent's failure to register children at birth as required by the Births and Deaths Registration Act,[127] child victim's age is often hard to prove. This results in acquittal of perpetuators leading to low conviction rates. To ease ascertainment of children's age, the Ugandan government has embarked on a national registration process of all children.[128] Age contributes to determining reliability and admissibility of victim's evidence in sexual offences therefore, if a victim's age is undisputed, it is easier to determine her credibility during proceedings.

Failure to incorporate a specific provision protecting children from sexual abuse in Uganda's Constitution renders the right insignificant. In order to fight against the increased child sexual abuse, it is submitted that the Constitution should incorporate a specific provision protecting children from sexual abuse, as is the case

[116] The Children Act, 1997 (Cap 59) Laws of Uganda.
[117] The Penal Code Act, 1950, (Cap. 120) Laws of Uganda
[118] The Evidence Act 1909 (cap 43) Laws of Uganda.
[119] *Constitution of the Republic of Uganda, 1995*, article 2.
[120] ibid, Chapter 4, articles 22-24, 27-28.
[121] Emma Charlene Lubaale, 'Bridging the Justice Gap in The Prosecution of Acquaintance Child Sexual Abuse: A Case of South Africa and Uganda' (LLD, University of Pretoria 2015) 27.
[122] *Constitution*, article 257(1). Also see: section 2 of the Children's Act.
[123] Specific rights are enshrined in Article 34 of the Constitution while other rights are gathered from general provisions of chapter 4 of the Constitution.
[124] *Constitution*, article24 and 25(1) providing for right of freedom from torture and cruel, in human degrading treatment, freedom from slavery or servitude respectively. There is no specific provision prohibiting sexual abuse of children however, it can be implied from these sections.
[125] *CRC*, article 34. Such rights include the right to dignity, freedom from abuse, health, freedom from inhuman and degrading treatment, privacy, fair hearing and others. See articles 24, 27, 28 of the Constitution of Uganda respectively.
[126] Karen Müller and Karen Hollely, *Introducing the Child Witness* (Vista University, 2000) 132.
[127] The Births and Deaths Registration Act 1973 cap 309 Laws of Uganda section 7. Also see article 18 of the Constitution of Uganda.
[128] See Registration of Persons Act, 2015. Part V (1) on Registration of birth provides for registration of every birth.

in the South African Constitution.[129] The CRC Committee welcomed the inclusion of specific sections on the rights of the child in national constitutions to reflect the key principles of the CRC.[130] To achieve a child-friendly justice system,[131] article 45 CRC imposes obligations on states to incorporate provisions protecting children's rights similar to those enshrined in instruments such as the CRC and the ACRWC.[132]

Despite the lack of a specific provision protecting children from sexual abuse, participatory rights of minorities in decision-making processes are significantly recognised in article 36 of the Constitution.[133] Child participation secures their rights and makes a difference in their lives.[134] National action plans have reviewed laws and policies to combat sexual exploitation of children.[135] Conspicuously missing in the legislative amendments so far made are provisions guaranteeing enhanced access to justice by child survivors through expeditious and victim-friendly trial processes.[136] This calls for enactment of provisions enhancing access to justice for child victims of sexual abuse. It is worth noting that other laws contain provisions promoting female child victim participation similar to those contained in the CRC as discussed below.

(b) *The Children Act*

Uganda ratified and domesticated the CRC[137] and the ACRWC[138] implying that the standards elaborated therein can be invoked by courts in Uganda. The CRC has been incorporated into national legislation in the Children Act which emphasises the 'welfare principle' as the guiding principle.[139] Participatory rights under the Children Act affect children's survival and development.[140] To protect children from defilement,

[129] *Constitution of the Republic of South Africa*, 10 December 1996, Section 28(1)(d). It provides that 'children will be protected from maltreatment, neglect, abuse or degradation.' Abuse in this case includes sexual abuse.

[130] UN Committee on the Rights of the Child (CRC), *General Comment No.5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 21. The Committee notes that besides inclusion of specific provisions on rights of the child, additional legislative and other measures are necessary to promote children's rights.

[131] UNICEF, *Prosecuting Child-Related Cases in Uganda: A Handbook for Uganda Directorate of Public Prosecutions (2016)* 2. Available at: www.unicef.org/uganda/Uganda_DPP_Hand_Book__2016.pdf (last accessed 21 September 2018). 'A child-friendly justice system refers to systems which guarantee the respect and effective implementation of all children's rights in an accessible, speedy, diligent, age appropriate and focused on the needs and rights of the child'. It includes the right to participate in criminal proceedings through seeking their views on options, processes and implementing mechanisms that promote children's rights and dignity.

[132] *Banjul Charter* (n.94) article 16 obligates states to put in place supportive measures for victims of sexual abuse.

[133] *Constitution*, article 36. It provides that 'Minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes'.

[134] *Uganda National Action Plan for Child Well-Being 2016-2021*. Available at: https://bettercarenetwork.org/sites/default/files/Uganda%20Child%20Well-Being%20Plan.pdf (last accessed 21 September 2018) whose goals and objectives are survival, development, protection, participation and implementation.

[135] ECPAT-Uganda Chapter, *The National Plan of Action on Child Sexual Abuse and Exploitation (2008-2012): Reviewing Progress and Moving Forward*. Available at: www.unicef.org/uganda/National_Plan_of_Action_on_CSEC.pdf (last accessed 21 September 2018). Participation is one of the key intervention areas in the Global Declaration and Agenda for Action that was adopted in the 1st World Congress against Commercial Sexual Exploitation of Children held in Stockholm, Sweden in 1996 which Uganda adopted in 2001.

[136] ibid section 6.

[137] Uganda ratified the CRC on 17 August 1990

[138] Uganda ratified the ACRWC on the 21 October 1994

[139] Section 3 and first schedule of the Children Act cap 59.

[140] *The National Child Participation Guide for Uganda: Creating an Environment for Children to be Heard* (Ministry of Gender, Labour and Social Development, Uganda Child Rights NGO Network and UNICEF-Uganda Office) p.16. Available at: http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1033/The_National_Child_Participation_Guide_Uganda.pdf (last accessed 21 September 2018).

parents/guardians or persons in positions of responsibility are obliged to ensure that they report the commission of such offences to the relevant authorities.[141]

Once a defilement case is before court, it is mandated to apply provisions of the law relating to trial procedures involving children.[142] The prominence of the welfare principle mandates courts to expeditiously dispose of sexual cases involving children.[143] Regardless of their gender, children have a right to express their views, beliefs or opinions in matters affecting their well-being.[144]This enables state actors, including courts, to interact with children and take more sensitive actions in implementing their rights in a child-friendly environment that promotes their participation.[145] While participating in decision making, efforts should be made to avoid intimidation using a range of procedural[146] and operational[147] measures that have been adopted in other jurisdictions. They include establishing procedural safeguards,[148] use of child-friendly rooms,[149] protecting children's privacy by excluding media during proceedings and adopting child-sensitive interviewing techniques which are to be discussed in par 3. Adopting such measures helps preserve the victim's testimony and provides remedies for the violations suffered. Although some measures are prescribed in laws, there is no witness protection law prescribing their application. The Evidence Act plays a complementary role to the Penal Code Act**[150]** in ensuring protection and participation of female child victims of sexual abuse as discussed below.

(c) *The Penal Code Act and the Penal Code (Amendment) Act, 2007*

The Penal Code Act is the legislation prescribing different criminal offences, penalties and general rules governing criminal responsibility under the laws of Uganda. Criminal cases are presented by prosecutors on behalf of the government and the people of Uganda in a bid to seek justice.[151] Relying on evidence on police files to prosecute cases, prosecutors owe a duty to victims and society to bring perpetuators of crimes to justice in accordance with the Constitution.[152] While prosecutors play a significant role in criminal

[141] Children Act (n.116) section 11(1).
[142] Children Act (n.116) section 16 and rule 4(2) of the Children (Family and Children Court) Rules (SI 59-2). Also see: s.104(3) Children Act.
[143] Section 3, Children's (Amendment) Act. Also see: s.99 (1) of the Children Act and The National Child Participation Guide for Uganda (n.140), Principle 5.
[144] The Children's (Amendment) Act, ibid, s.4 (1)(j) and s.4(1)(b).
[145] CRC, General Comment No.5 (n.130) article 12. The Committee emphasises the general principles of non-discrimination, best interest of the child, right to survival and development and the right to participation in children's matters.
[146] Procedural measures are provided for under the law and are regulated by judicial officers or judicial authority who guarantee observance of both victim and accused's rights. They include use of closed sessions, use of visual-audio links, proper cross-examination, and anonymity of victim's identity.
[147] Operational measures are administrative in nature, they do not require legislation and do not require extra procedure. They include provision of witness waiting rooms, escorting witnesses and providing support to the victim.
[148] Use of video recording, voice distortion, hiding victim's identity and others safeguards.
[149] This included availability of child interview rooms in all courts, availability of equipment and use of interview tools during hearings like toys. Finland and Estonia have adopted these measures.
[150] The Penal Act (n.117). In 2007 an amendment to the Act was introduced. Child sexual offences include defilement of a person under the age of eighteen.
[151] This mandate is derived from article 120 of the 1995 Constitution which lays out the functions of the Director of Public Prosecutions.
[152] UN, *Basic Principles on the Role of Lawyers*, 7 September 1990; International Association of Prosecutors (IAP), *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999); UN, *Guidelines on the Role of Prosecutors* (1990) UN Doc. A/CONF.144/28/Rev.1; Also see: Ugandan Director of Public Prosecutions, *Prosecution Performance Standards and Guidelines* (2014).

proceedings, participation of child victims in the criminal justice system is necessary for effective prosecution of sexual abuse cases as they are the witness to the offence.[153]

Defilement is criminalised in the Penal Code Act and to successfully prosecute its perpetuators the child victim required to testify in criminal proceedings. Although it is distinguished based on age,[154] the Penal Code Act is ambiguous in regard to child-to-child sex prescribed under s.129A of the Penal Code (Amendment) Act[155] where both male and female children are required to be charged. Regardless of whether the female child victim was forced into the sexual act, the section requires bringing her to court both as a victim and an offender which discourages her from testifying. It is unfortunate that such cases cannot be diverted from the criminal system which increases the backlog in the criminal justice system.[156] While it is inconveniencing for a child victim to testify as a witness in a case where she is an accused, female child victims of sexual abuse are discouraged from participating in such proceedings for fear of reprimand. Resultantly, parents of female child victims of child-to-child sex refrain from reporting such cases for fear of reprisal and intimidation. Even where the case is reported, it may be withdrawn for commercial gains the expense of victim's interest and needs. Such factors hinder female child victim participation and to overcome this hindrance, s.129A should be amended to ensure that the law facilitates participation in criminal trials.[157]

Defiled imbeciles[158] are another category of female child victims of sexual abuse whose participation is hindered. Victims require services of interpreters to adduce evidence in court due to lack of mental ability to express their views in criminal trials. Unfortunately, many courts in Uganda lack skilled interpreters to assist such witnesses to testify. Even where interpreters are available, the courts lack a child-friendly courtroom environment to facilitate their participation.[159] This results in their non-attendance, hence increasing the perpetuator's impunity. Upon the CRC Committee's finding that defilement of girls constitutes more than half of the cases of child abuse in Uganda,[160] the Committee recommended that Uganda enacted legislation regulating procedures for handling sexual abuse victims, leading to the adoption of the Sexual Offences Bill, 2015 and implementing protective measures for handling sexual offences.[161] While it is not enough to criminalise all sexual offences in Uganda using the Penal Code Act, it is submitted that Uganda's criminal

[153] Sexual offences are prescribed in Chapter XIV, ss.123-151 of the Penal Code Act as 'offences against morality.' They include indecent assault, defilement of persons under the age of 18, defilement of imbeciles and other related sexual aggression that does not involve penetration. A sexual act is defined under s.129(7) of the Penal Code (Amendment) Act as 'penetration of the vagina, mouth, however slight of any person or unlawful use of any object or organ by a person on another person's vagina or penis.

[154] Defilement is prescribed under s.129(1) of the Penal Code (Amendment) Act and is committed when a person 'performs a sexual act with another person who is below the age of eighteen years.' Aggravated defilement is provided for under ss.129(3) and 129(4) PCA, where the victim is below 14 years and the offender falls in one of the following categories; offender is infected by Human Immunodeficiency Syndrome (HIV), offender is a parent or guardian or a person in authority over the victim. A victim is a person with a disability, or offender is a serial offender and is triable by the High Court.

[155] Penal Code (Amendment) Act (n.18) s.129A,the offence is committed by a male child and female child upon each other when each child is under the age of 12 years.

[156] Children Act (n.116) part X requires diversion of cases from the criminal system where a child comes in contact with the law.

[157] CRC, General Comment No.5 (n.130) para 18.

[158]Defilement of imbeciles is provided for under s.130 of the Penal Code Act. The term "imbecile" is a legal terminology in Ugandan books but it is out-dated. Also see: Henry Campbell Black, *Black's Law Dictionary* (2nd ed, 1910) p.484 defines an imbecile as a person with mental retardation and IQ.

[159] UNICEF, *Prosecuting Child-Related Cases in Uganda* (n.131) 29. Courts lack facilities for disabled children such as furniture, conducive rooms and support services for such child victims.

[160] UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Uganda*, 23 November 2005, CRC/C/UGA/CO/2, paras 75 and 270.

[161] ibid para 76 (a). See: The Sexual Offences Bill, 2015 (Bill No. 35).

justice system should adopt protective measures encompassing the needs of vulnerable CVs and consolidating all sexual abuse offences into one act, as was done in South Africa. This will facilitate female child victim participation.

Although children are social actors in criminal proceedings whose voice should be considered in the decision-making process,[162] their participation is restricted by treating their evidence with caution. Children were considered 'inherently unreliable' witnesses and liars[163] whose evidence was prone to suggestibility, fantasy and exaggeration.[164] Indeed, back then in 1984, Goodman observed that many professionals are still convinced that children were "the most dangerous of all witnesses".[165] Such perceptions about children led to the development of the cautionary principle requiring judges to exercise caution when considering evidence of young children, accomplices and complainants in sexual offences. Courts treat such testimony with caution by requiring corroboration for a conviction to be sustained.[166]

The cautionary rule has become a 'victim' of inappropriate interpretation and application in prosecution of child sexual offences in Uganda.[167] Absence of corroboration of evidence of a single identifying child of tender years required under s.40(3) Trial on Indictment Act (TIA) and s.101(3) Magistrates' Court Act (MCA) bars female child victim participation leading to acquittal of the accused person even where there is sufficient evidence to prove the offence beyond reasonable doubt. Corroboration is required in Scotland (unlike in England and Wales) and there have been debates in Scotland about whether to modify the corroboration rules for sexual offences exactly for these reasons.[168] In Uganda, the requirement to corroborate children's evidence is backed up by legal provisions.[169]Considering that child sexual offences are usually committed clandestinely and are rarely supported by corroborative evidence other than the evidence of the single child victim,[170] the requirement to corroborate such evidence infringes participatory rights of a child victim especially where it is lacking.

[162] Percy-Smith and Thomas, *Handbook of Children and Young People's Participation* (n.12) 18. Also see: Andrew West and David Crimmens, 'Children and Participation: Meanings, Motives and Purpose', in *Having Their Say: Young People and Participation: European Experiences* (2004)14.

[163] ALRC and NSWLRC, *Family Violence Report*, vol.2, 1311 [28.11]; ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No.84 (1997) [14.15].

[164] John Spencer and Rhona Flin, *The Evidence of Children: Law and Psychology* (Blackstone Press 1990) 286-287. Spencer and Flin identified the six main objections to relying on children's evidence as follows: (a) children's memories are unreliable; (b) children are egocentric; (c) children are highly suggestible; (d) children have difficulty distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault; and (f) children do not understand the duty to tell the truth. According to Spencer and Flin, this belief accords with societal and 'expert' views that were prevalent up until the 1960s.

[165] Gail S. Goodman, 'Children's Testimony in Historical Perspective' (1984) 40 *Journal of Social Issues* 9-31

[166] The cautionary rule evolved in England requiring judicial officers to exercise caution before adopting evidence of certain witnesses whose evidence it considers unreliable such as children. Also see: David T Zeffertt *et al*, *The South African Law of Evidence* (4th ed, Butterworths 2003) 793 the purpose of cautionary rule is to decide whether or not guilt has been proven beyond reasonable doubt.

[167] Emma Charlene Lubaale, 'Admissibility of Evidence Presented by Children in Sex Abuse Prosecutions in Uganda: The Case for Reforms' (2015) 5 *African Journal of Law and Criminology* 4.

[168] In South Africa, there is no statutory requirement for evidence of a child of tender years to be corroborated. Courts rely on the child's credibility and reliability. See: *Woji v Santam Insurance Co Ltd*, 1981 (1) SA 1020 (A), 1028B-D. In Canada, the case of *R v W (R),* (1992) 74 CCC (3d) 134 illustrates that cases are treated with due consideration of their individual merits

[169] Lubaale, 'Admissibility of Evidence' (n.167) 1. Also see: ss.40 (3) and 101 (3) the TIA and MCA respectively.

[170] Steve Herman, 'The Role of Corroborative Evidence in Child Sexual Abuse Evaluations' (2010) 7 *Journal of Investigative Psychology and Offender Profiling* 191.

Although s.40(3) TIA and s.101(3) MCA require corroboration, the Evidence Act provides that a conviction may be founded on the evidence of a single witness if it is satisfactory in all material respects provided that 'no other law in force' has a countermanding effect in the matter.[171] Where evidence of a single identifying child of tender years is relied on, the judges must warn themselves of the dangers of convicting on such evidence by testing with great care the circumstances pointing to the guilt of the accused.[172] Such provisions create discrepancies in children's sexual abuse cases implying that convictions in some cases can be sustained in the absence of corroborative evidence if the judge believes the child victim's evidence beyond reasonable doubt while they may insist on corroboration in other instances.

It is submitted that insistence on corroboration bars participation, promotes inequality and discrimination among children based on age contrary to provisions of article 21(1)(3) of the Constitution in regard to admissibility of evidence of children of tender years in criminal trials.[173] South African statute books lack the requirement to corroborate children's evidence. Corroboration is considered where necessary depending on context and application.[174] Whereas Canada rejected the rigid application of the cautionary rule by treating children as fully rounded individuals,[175] this does not prevent the judge from treating the child's evidence with caution considering the strengths and weaknesses in the evidence presented. For the cautionary rule to effectively apply in Uganda's criminal justice system without discrimination, legal provisions prescribing corroboration of evidence of a child of tender years should be repealed and judges be left to exercise their discretion on a case by case basis.

It is obvious that different standards are employed for adult victims and victims between 14 and 18 years compared to child victims below 14 years in Uganda. For the latter, a *voir dire*[176] must be conducted to establish the child's competency to testify and to determine admissibility of their evidence.[177] The procedure for conducting a *voir dire* is laid down in the case of *Dhamuzungu Nathan v Uganda*[178] where court stated that:

> The procedure is that the judge should himself question the child to ascertain whether he or she understands the nature of an oath and, if the judge does not allow the child to be sworn he should record whether or not in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence because the child understands the duty of talking the truth.

Besides case law, there are no established guidelines for conducting a *voir dire.* Discretion is left to the trial judge to determine whether the female child victim possesses the requisite capacity to appreciate the nature of oath. In such circumstances, if evidence is given not on oath, corroboration of a child testimony is required

[171] Evidence Act (n.118) s. 133.
[172] *Chila v R* [1967] EA 722. This is the cautionary rule on evidence of children.
[173] In *Mukasa Deogratius v Uganda*, Supreme Court Cr. Appeal 21/1993, *Kibageny Arap Kolil v R* (1959) EA 92the expression 'child of tender years' was defined to mean any child of any age or apparent age of 14, in the absence of any special circumstances.
[174] *Director of Public Prosecutions v S* 2000 (2) SA 711 TPD. The flexibility of applying the cautionary rule in South Africa is dependent on the capacity of individual child and the test is trustworthiness of the child's evidence.
[175] *R v W (R),* (1992) 74 CCC (3d) 134.
[176] A *voir dire* is a procedure reserved for children under 14 years to determine if as witness they know the difference between the truth and falsehood, they understand the duty to tell the truth and if they understand the nature of an oath. See *Uganda v Kuru Jeremia* (H.C.S No. 0021 of 2005) by Hon. Justice Augustus Kania.
[177] s.40 (3) Trial on Indictment Act (TIA) and s.102(1&2) MCA.
[178] Court of Appeal Criminal Appeal No.70 of 2000 (unreported).

to sustain a conviction.[179] Absence of uncorroborated evidence of a female child victim of tender years, renders it impossible to sustain a conviction.[180] The requirement to corroborate a child's testimony in Uganda is derived from s.40 (3) TIA, s.101(3) MCA and the leading case of *R v Campbell*[181] which emphasise application of the cautionary rule**.** Such legal standards hindering child victim participation result in acquittal of perpetuators or convicting them of minor offences. To promote participatory rights of female child victims, caution and corroboration should be applied on a case-by-case basis and provisions requiring mandatory corroboration should be repealed.

Medical evidence is important and useful in corroborating defilement cases.[182] It influences the prosecutor's decision in determining the probable charge to be sustained by the available evidence.[183] Similarly, absence of corroborating medical evidence influences dropping of charges by prosecutors where victim's own evidence is insufficient to sustain the charges. This can arise from the victim's failure to make a timely disclosure which means that any genital or other sustained injuries may have healed. Where timely disclosure is made, doctors may not be available to medically examine her or the examination may be done but injuries are invisible.[184] Prosecution has a duty to prove its case beyond reasonable doubt by adducing all available evidence.[185] Lack of medical evidence may hinder victim's participation leading to acquittal of accused persons. This denies the child victim a remedy through criminal prosecution which explains the high incidences of sexual abuse in Uganda. Although some may convict an accused of defilement in the absence of medical reports, many others still depend on medical evidence to prove the ingredients which hinders female child victim participation.

In all sexual abuse cases involving children, age is a guiding factor in admitting their evidence in criminal trials. As rights bearers, every child should be treated as a capable witness whose evidence should not be disregarded on basis of their age alone. Therefore, by requiring corroboration and exercising caution, age should not be a barrier to children's participation in criminal procedures.[186] The CRC Committee expressly discouraged 'state parties from introducing age limits which restricts the child's right to be heard in all matters affecting her or him either in law or in practice.'[187] This provision is relevant in Uganda's criminal justice system where children of tender years and those believed not to possess the requisite knowledge to understand the purpose of taking an oath may be barred from testifying. Placing such restrictions in giving evidence curtails children's participation in criminal proceedings. Therefore, in order for female child victims of sexual abuse to enjoy their participatory rights, laws curtailing this right should be amended and non-discriminatory procedures in admitting children's evidence should be followed.

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[179] TIA (n.177).

[180] *Kizza Samuel v Uganda* Criminal Appeal No. 102 of 2008

[181] (1956) 2 ALLER 272, 276 Lord Goddard emphasised the need to exercise caution to unsworn evidence of a child implicating an accused and to uncorroborated evidence of a child and unsworn evidence of a child amounting to corroboration of sworn evidence.

[182] *Basita Hussein v Uganda* Criminal Appeal 35 of 1995. It was held that though desirable, it is not a hard and fast rule that the victims' evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Also see: Evidence Act (n.118) s.43.

[183] Penal Code Act (n.117) s. 129 distinguishes circumstances that are considered in determining the nature of defilement committed against the victim. It is simple defilement if the victim is below the age of 18 and not below 14 years. It is aggravated defilement if it falls in any of the circumstances listed in s.129 (4) of the Penal Code (Amendment) Act.

[184] David Muram, 'Child Sexual Abuse: Relationship Between Sexual Acts and Genital Findings' (1989) 13 *Child Abuse & Neglect* 213.

[185] *Woolmington v DPP* [1935] AC 462.

[186] CRC (n.8) article 20.

[187] CRC General Comment No.12 (n.81) para 21.

### 2.4 Conclusion

Uganda's legal framework measures up to international instruments providing for participation of female child victims of sexual abuse in the criminal justice system. However, some rules and procedures fail to recognise children's vulnerability during court proceedings which renders it difficult for them to testify. Although the child victim's evidence is crucial in determining the case, her testimony is used to test her reliability and credibility. Victim's age plays a very significant role in determining whether or not to testify. This is evident where corroboration is required and where a *voir dire* is conducted before admitting her evidence. Such legal requirements promote discrimination against the child based on her age thereby limiting her participation in criminal proceedings. To ensure observance of female child victim participatory rights, laws that hinder children's participation should be amended and those laws that do not require amendment should properly be interpreted to facilitate child participation.

## C. THE USE OF VISUAL-AUDIO LINK AS A PROTECTIVE MEASURE FACILITATING PARTICIPATION OF FEMALE CHILD VICTIMS OF SEXUAL ABUSE IN UGANDA'S CJS

### 3.1 Introduction

Adults and child victims of crime experience problems while testifying in sexual abuse cases.[188] Female children are more prone to sexual abuse due to their dependence, powerlessness and limited communication skills.[189] Resultantly, they are traumatised by both the act and the subsequent judicial process which negatively impacts on the child's physical and mental health.[190] During court proceedings, children are required to recall the traumatic events and bravely narrate them in front of family, strangers and juries which exposes them to further trauma.[191] To minimise the trauma and the negative effects of criminal proceedings on child victims,[192] prosecutors and judges should be cognisant of signs of a traumatised victim and adopt SPMs that facilitate their participation.[193] Protection is a primary rule in establishing Victim protection measures (VPMs)[194] which increase the number of children testifying[195] and the culpability of perpetuators.[196]

[188] See Paul Rock*, Constructing Victims' Rights: The Home Office, New Labour and Victims* (Oxford University Press, 2004) 405.

[189] David Finkelhor and Jennifer Dzuiba-Leatherman, 'Victimisation of Children' (1994) 49 *American journal of Orthopsychiatry* 173-83.

[190] Vincent J. Felit Defence for Children International, ti *et al*, 'Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study' (1998)14 *American Journal of Preventive Medicine*245-258 at 252.

[191] Burton, 'Special Measures' (n.24) 200-214. Prosecutors take decisions on victim's behalf and their views are represented by adults which render them powerless in cases where their rights are violated.

[192] ibid 201.

[193] Mathew Hall, 'Children Giving Evidence through Special Measures in the Criminal Courts: Progress and Problems' (2009) 21 *Children and Family Law Quarterly* 65-86, 86. Also see: Burton, 'Special Measures' (n.24) 201.

[194] ibid 86.

[195] Rock, 'Constructing Victims' Rights' (n.188).

[196] Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways' (2010) 33 *University of New South Wales Law Journal* 662-683, 662. The adversarial trial process is not producing convictions commensurate with the number of offences committed.

Failure to protect female child victims of sexual abuse violates their fair trial rights and the basic principles enshrined in the CRC.[197]

In order to promote child participation, courts have implemented special procedures and regulations helping reduce the harmful effects of testifying on children.[198] States such as Canada, Australia, United Kingdom, New Zealand, Namibia, South Africa and Tanzania have adopted SPMs through adopting legislation and best practices such as the use of visual-audio link as will be discussed herein. In fulfilling provisions of article 4 CRC,[199] Uganda should borrow best practices from other jurisdictions so that it strengthens the adopted victim protection measures. This requires assessing victim's needs and ensuring victim's willingness to testify such that more cases can proceed to trial.[200]

In analysing the use of visual-audio link as a special protective measure adopted in Uganda's criminal justice system, this part will be divided into three sections. The first section discusses the purpose of protective measures to victim participation. Section 2 will discuss the adversarial system as a major barrier to prosecution of sexual abuse cases in Uganda. Section 3 analyses the effective implementation of visual-audio link as a victim protective measure[201] facilitating child victim participation in Uganda's criminal justice system making reference to other jurisdictions. Conclusions will be drawn suggesting a need to familiarise child victims with this measure, establishing specialised child sexual abuse courts, amending the Evidence Act to cater for this innovation and allocating resources for its implementation through budgeting. It will be highlighted that the successful operation of this measure requires sensitising victims and training all stakeholders about its operation to avoid re-traumatising child victims while using this measure.

### *(a) Purpose of protective measures*

As victims required to testify in sexual offences, female child victims of sexual abuse are indispensable in the criminal justice system. They are called to court to testify orally[202] and thereafter, subjected to rigorous cross-examination which exposes them to direct and indirect trauma.[203] Trauma arises from the institutional reactions and unconducive courtroom environment that is unresponsive to victim's interests and needs. Lack of provisions accommodating children's needs and vulnerabilities in criminal trials[204] was based on the perceptions that children are invisible and inherently unreliable witnesses.[205] This view has now changed and

[197] Non-discrimination (article 2), Best interest of the child (article 3), right to survival and development (article 6) and the right to participation (article 12).
[198] Burton, 'Special Measures' (n.24) 209.
[199] *CRC*, article 4 provides that states are required to take all appropriate legislative, policy, administrative and other measures for implementation of the rights contained in the CRC and other legislation.
[200] Becky Hamlyn *et al*, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses (Home Office Research Study 2004),* Home Office, London. Available at: www.popcenter.org/problems/witness_intimidation/PDFs/Hamlyn_etal_2004.pdf (last accessed 21 September 2018).
[201] Witness protection can be defined as the protection of a threatened witnesses before, during and after a trial, according to the Uganda Law Reform Commission, *Legislation for Witness Protection in Uganda*, Study Report February 2015, p.15.
[202] OHCHR (n.26) article 28(3)(d). See also: s.55 TIA cap 23, *Bogere Moses & anor v Uganda* [1998] KALR 1, 3.
[203] Burton, 'Special Measures' (n.24) 203.
[204] Nicholas Bala *et al*, 'Hearing the Voices of Children in Canada's Criminal Justice System: Recognising Capacity and Facilitating Testimony' (2010) 22 *Child and Family Law Quarterly* 21*;* J. A. Quas *et al*, 'Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court' (2005) *70 Monographs of the Society for Research in Child Development* 1.
[205] Phoebe Bowden *et al,* 'Balancing Fairness to Victims, Society and Defendants in the Cross Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 546. Also see: Mariana Pena

children are viewed as rights holders able of forming opinions and giving cogent and accurate testimony. To minimise intimidation and avoid retaliation,[206] child victims should be rendered protection before, during and after the trial by implementing special protection measures.[207] Special protection measures recognise child victim's vulnerability by minimising stress while testifying[208] and protecting against invasion on their privacy and dignity.[209] Prinsloo rightly notes that such measures are implemented to protect the vulnerability of children against the negative effects of the criminal justice system and are intended to facilitate children's unique abilities.[210]

Physical appearance in court subjects female child victims to trauma leading to adoption of measures such as use of Closed Circuit Television (CCTV) and live video link testimony. These alter the courtroom structure by changing a victim's necessary presence in the courtroom in a way less intimidating to child victims.[211] Such evidence is free from any adverse influence[212] resulting in receipt of 'best evidence' that would have been lost if the child is compelled to speak in a full court setting.[213] Availability of protective measures enables child victims give a detailed and accurate account of what really happened because they feel confident and less intimidated.[214] These interventions improve justice delivery, access to justice for all and public trust in the judicial process[215] which are imperative to the integrity and success of a judicial process.[216]

Internationally and nationally adopted special protection measures amplify the child's voice by accommodating the child's special requirements.[217] Measures strike a balance between serving the best interest of a child victim by ensuring preservation of accused rights while ensuring accuracy and completeness of her evidence.[218] Measures adopted under article 68 of the Rome Statute of the International Criminal Court (ICC) have influenced promotion of female victim's participatory rights at an international

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and Gaelle Carayon, 'Is ICC Making the Most of Victim Participation?' (2013) 17 *International Journal of Transitional Justice* 518-535, 519

[206] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147.

[207] UN Sub-Commission on the Promotion and Protection of Human Rights, *Expanded Working Paper on the Difficulties of Establishing Guilt and/or Responsibilities with Regard to Crimes of Sexual Violence*, submitted by Lalaina Rakotoarisoa, 7 July 2004, E/CN.4/Sub.2/2004/11.

[208] Hart, 'Children's Participation' (n.3) 201.

[209] Russel, 'Incidence' (n.19) 173.

[210] Jonah Prinsloo, 'The Rights of Child Victims and Witnesses of Crime: An International Analysis' (2012) 13 *Child Abuse Research: A South African Journal* 74. Also see: UN Commission on Human Rights, *Report of the independent expert to update the set of principles to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, principle 10, states that, 'effective measures shall be taken to ensure the security, physical and psychological well-being of the victim, and where requested, the privacy of victims and witnesses…'.

[211] Johanna F. Motzkau, 'Matters of Suggestibility, Memory and Time: Child Witnesses in Court and What Really Happened' (2007) 8(1) *Forum: Qualitative Social Research*.

[212] ibid. For example where CCTV is used, the child is absent from the courtroom and communicates via CCTV link but will be examined after giving evidence in chief.

[213] Kerry Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses* (US Department of Justice, 1995). Available at: www.ncjrs.gov/pdffiles/witintim.pdf (last accessed 21 September 2018).

[214] Motzkau, 'Matters of Suggestibility' (n.211) article 14.

[215] Finkelhor, *Sexually Victimized Children* (n.16) 15 where public confidence and trust it is at 3.15 on a scale of 1 compared to the situation in 2012 where trust was at 1.5 on a similar scale at the start of the SIP III.

[216] Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Institute for Security Studies 2010) 1.

[217] Motzkau, 'Matters of Suggestibility' (n.211).

[218] Emma Davies *et al*, 'Facilitating Children to Give Best Evidence: Are There Better Ways to Challenge Children's Testimony?' (2010) 34 *Criminal Law Journal* 347.

level.[219] As a positive step in the administration of criminal justice, the problems experienced by victims of crime are solved by implementing special protection measures which ensure successful prosecution of cases.[220] While special protection measures improve the situation for vulnerable witnesses in many respects, underlying problems hindering female child victim participation in criminal trials still remain.[221]

## 3.2 Barriers to Prosecuting Child Sex Abuse cases in Uganda

Promotion of child participation in criminal trials is very important. However, there is need to recognise the potential risks involved. The common barriers to child participation in Uganda include delay in disposal of cases, giving oral testimony, harmful media exposure, punishment, retaliation,[222] psychological harm and children's dependence on adults whose attitudes differ.[223] Where the perpetuator is a family member or trusted friend, adults may not believe in the child victim's actions of testifying in court.[224] Furthermore, adults fear that children will be traumatised by the adversarial court process. Besides the trauma, many Ugandan communities curtail female child victim participation by maintaining the cultural belief that sexual matters are a forbidden subject of discussion[225] as observed by the CRC Committee that 'traditional societal attitudes limit children's free expression in schools, courts and within the family.'[226] All the above factors all hinder female child victim participation; however, the next section focuses on the distinctive nature of the adversarial court system as a major barrier to child victim participation in Uganda.

### *(a) The adversarial court system*

As a major obstacle to child victim participation in the criminal process,[227] the adversarial system is characterised by obligations of the parties to one another and the way facts are proven.[228] The onus rests on the parties to produce evidence substantiating their own case and counteracting their opponent's arguments.[229] The highly competitive and confrontational atmosphere between the prosecution and accused/advocate renders victims fundamentally ill-equipped to address the emotional trauma and private conflicts that arise from commission of the offence.[230] Jorda and de Hemptinne identified the nature of proceedings as the main factor likely to impede effective participation of victims.[231] Resultantly, the number

[219] Article 68(1) ICC Statute. Many commentators are, however, sceptical of the potential effectiveness of these mechanisms. See, further, Claude Jorda and Jerome de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta, and John Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1401. Victims in the ICC have a right to choose their legal representatives, who have a right to present their views and make submissions when their interests are likely to be affected as long as they do not prejudice the rights of the accused.

[220] Thomas Pigot, *Report of the Advisory Group on Video-Recorded Evidence* (Home Office, London 1989).

[221] Bowden, 'Balancing Fairness' (n.205) 563.

[222] CRC (n.8) article 12.

[223] UNICEF, *Situation Analysis of Children in Uganda: Summary* (2005) 84. Available at: www.unicef.org/uganda/UNICEF_SitAn_Summary_7_2015.pdf (last accessed 21 September 2018).

[224] Sophie Witter and Jenifer Bukokhe, 'Children's Perceptions of Poverty, Participation and Local Governance in Uganda' (2007) 14 *Development in Practice* 645-659, 649.

[225] Richard Nzita and Mbaga-Niwampa, *Peoples and Cultures of Uganda* (3rd ed, Fountain Publishers Ltd 1999).

[226] CRC, Concluding Observation (n.160) para 35.

[227] Doak, 'Victims' Rights in Criminal Trials' (n.2) 297.

[228] Gary Goodpaster, 'On the Theory of American Adversary Criminal Trial' (1987-1988) 78 *Journal of Criminal Law& Criminology* 118, p.119. Each party to the suit has an obligation to the other in compliance with legal procedures. The prosecution has to prove its case beyond reasonable doubt while the accused has no duty to prove their guilt.

[229] Doak, 'Victims' Rights in Criminal Trials' (n.2) 297.

[230] ibid.

[231] Jorda and de Hemptinne, 'Status and Role of the Victim'(n.219) 1388.

of convictions produced in adversarial process is not commensurate with the number of offences committed.[232]

Adversarial trials deny child victims the opportunity to relay their narrative to court using their own words.[233] As a verbal battle between the child and the defence advocate,[234] the defence counsel can easily exploit the child's vulnerability through cross-examination.[235] Cossins rightly argues that the adversarial system is not about the child or the truth, but it is designed to make life difficult for witnesses.[236] Counsel's questioning complicates the process of arriving at the truth since the answers to the questions are within the parameter of the questioner.[237] The questioning style subjects the victim to stress and trauma thus hindering her participation. In assessing the purpose of criminal trials, the question to determine is whether vulnerable witnesses can ever be treated in a manner that alleviates stress and allows them to give 'best evidence' in adversarial proceedings.[238] The answer lies in implementing measures facilitating participation of children in the administration of justice which will be discussed in the next section.

The adversarial system presumes that oral evidence is the 'best evidence' which can only be tested through cross-examination.[239] Child victims give oral evidence and are thereafter subjected to rigorous cross-examination by defence counsel.[240] Oral testimony places female child victims of sexual abuse under a considerable degree of stress because of the requirement to narrate their ordeal in open court. Lynn observes that one of the greatest fears of child victims is testifying in front of his or her abuser[241] who is usually older than her or is a person in a position of responsibility. Child victims are discouraged from participating in criminal trials which results in acquittal of perpetuators where the victims cannot adduce sufficient evidence or where they fail to turn up in court for fear of experiencing the intimidating court process. This can be reversed by implementing special protection measures for child victims of sexual abuse (CVSA).

It is worth noting that every adopted measure hangs on witnesses' testimony. Child victim's testimony can reliably be obtained in a conducive courtroom environment. Ellison suggest that the approach to vulnerable and intimidated witnesses is introduction of a range of 'special measures' which eligible witnesses including children can avail themselves.[242] Such measures include clearing the public gallery, screening the witness from the accused, live television link, video-taped testimony and restrictions on cross-examination.[243] Although these measures can minimise stress associated to proceedings, the next section will focus on the

[232] Naylor, 'Effective Justice' (n.196) 662.
[233] William T. Pizzi, 'Trials Without Truth: Why our system of trials has become an expensive failure and what we need to do to rebuild it' (New York University Press 1998) 197.
[234] Helen L Westcott and Marcus Page, 'Cross-Examination, Sexual Abuse and Child Witness Identity' (2002) 11 *Child Abuse Review*137, 139, 147-8.
[235] Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials' (2009) 33*Melbourne University Law Review* 68, 70.
[236] ibid 82.
[237] Louise Ellison, *The Adversarial Process and The Vulnerable Witness* (Oxford University Press 2001) 53-4. See also: Marcus Stone, *Cross-Examination in Criminal Trials* (Tottel Pub 2009) 120-6.
[238] Katie Quinn, 'Justice for Vulnerable and Intimidated Witnesses in Adversarial Proceedings?' (2003) 66 *Modern Law Review* 139-155, 150-151.
[239] ibid 150. Cross-examination is the optimum method for testing witnesses in the adversarial system.
[240] Jane Morgan and Lucia Zedner, *Child Victims: Crime, Impact, and Criminal Justice* (Oxford Clarendon Press, 1992) pp.121-122
[241] Lynn M Copen, *Preparing Children for Court: A Practitioner's Guide* (Sage Publications, 2000) 59-60; American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse* (3rd ed, Sage Publications, 2004).
[242] Ellison, *Adversarial Process* (n.237) 40-41.
[243] ibid.

use of visual-audio link as the most suitable measure facilitating participation of female child victims of sexual abuse in Uganda's criminal justice system.

*(b) Use of visual-audio link as a SPM in Uganda's criminal justice system*

Forcing traumatised children to testify is damaging and against their best interests.[244] In order to protect their privacy and encourage them to participate in criminal proceedings,[245] attention should be paid to avoiding re-traumatising them. To achieve this, appropriate structures enabling female access to justice were established in the Guidelines on Action for Children in the Justice System in Africa[246] in compliance with the CRC and the Maputo Protocol.[247] In compliance with the guidelines, Uganda's judiciary has adopted use of visual-audio links as a measure facilitating participation of female child victims of sexual abuse in the criminal justice system.

Adoption of visual-audio technology involves use of CCTV[248] and similar techniques such as opaque screens and one-way mirrors which block child victims from seeing the accused.[249] The victim testifies behind a one-way screen and the oral evidence is transmitted to the courtroom via television technology.[250] The video screen only shows the face of the person asking questions from the courtroom which saves the victim from secondary victimisation.[251] This technology is recommended and used in Canada[252] and Spain[253] to facilitate child participation in cases.[254] In Canada,[255] video-recorded interviews for child victims of sexual abuse are conducted at the initial stages of investigation which preserves evidence and discovery of the truth.[256] This makes participation of children in the criminal justice system less stressful and less traumatic. On the other hand, Australia has adopted the use of CCTV, remote rooms and pre-recorded evidence to address children's vulnerabilities.[257]

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[244] Alison Cunningham and Lynda Stevens, *Helping a Child Be a Witness in Court* (Centre for Children and Families in the Justice System, 2011) 17-19.

[245] Defence for Children International and African Child Policy Forum, *Guidelines on Action for Children in the Justice System in Africa*, November 2011, guideline 69. Also see: *UN Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power*, GA Resolution 40/34, 29 November 1985 (paragraph 6); Office of the UN Human Rights Commissioner 'Guidelines on the Role of Prosecutors as adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', Havana, Cuba, 27 August to 7 September 1990. Available at: www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx (last accessed 21 September 2018) and the UN Guidelines for Action on Children in Criminal Justice.

[246] Adopted in November 2011.

[247] ACHPR (n.101).

[248] CCTV involves use of video cameras to transmit a signal to a specific place, on a limited set of monitors.

[249] JLOS, *Annual JLOS Performance Report (n.18) 89.*

[250] See: D. Healey, *Victims and Witness Intimidation: New Developments and Emerging Responses* (US Department of Justice, 1995).

[251] Hall, *Children Giving Evidence* (n.193) 79.

[252] Criminal Code, R.S.C.1985, c. C-46, sect. 486.2, subsect. 1.

[253] *Ley de Enjuiciamiento Criminal*, art. 448, para. 3, and art. 707).

[254] Bala, 'Hearing the Voices' (n.204) 32.

[255] s.715.1 of the Criminal Code 1988 provides for recording of video evidence of a child within a reasonable time of events in question and that the child testified and adopted the contents of the recording while on the stand.

[256] *R v DOL* [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289, at para [1] supreme court of Canada by Lamer C.J.

[257] *Crimes Act 1914* (Cth) ss 15YI-15YJ, 15YM; *Evidence (Miscellaneous Provisions) Act1991* (ACT) ss 8, 40F, 40Q; *Criminal Procedure Act 1986* (NSW) ss 306U, 306ZB; *Evidence Act1939* (NT) ss 21B, 21E; *Evidence Act 1977* (Qld) ss 21AK, 21AQ; *Evidence Act 1929* (SA)s 13A; *Evidence (Children and Special Witnesses) Act 2001* (Tas) ss*5-6; Evidence Act 1958*(Vic) ss 37B, 41G-41H; *Evidence Act 1906* (WA) ss 106HA, 106N. A 'remote room' is one that is located away from the courtroom, but is generally within close proximity. Evidence is to be given by the child from the remote room through the use of CCTV.

The judiciary in Uganda has introduced use of visual-audio links by enacting the Judicature (Visual-Audio Link) Rules[258] (herein rules)aimed at enabling vulnerable witnesses[259] such as child victims of sexual abuse testifying without full view of their molesters.[260] Adoption of live video testimony increases FCVP and saves the victim the painful experience of having to repeat a description of events they experienced in open court.[261] To adopt this measure, the prosecutor requires consent from the court.[262]

Regardless of its anticipated advantages, this technological innovation is faced with limitations and criticisms which impacts on female child victim participation in the criminal justice system. Luchjenbroers argues that using that innovation entails children presenting their accounts in an 'unnatural' way where both the victim and lawyer do not see each other.[263] In protecting the victim's identity and privacy, court is denied the opportunity to observe the witnesses' demeanour as opposed to the oral procedure of adducing evidence. Although psychological studies show that facial and behavioural expressions are an unreliable indicator of veracity,[264] observation of victim's demeanour in determining her credibility during criminal trial is useful in drawing conclusions about her testimony.[265] Use of CCTV denies court officers handling the case the possibility of properly assessing victim's demeanour during trial which plays a big role in arriving at decisions. Similarly, Hall argues that the child witness needs to read the lawyers just as lawyers need to read witnesses.[266] This proposition reflects the natural way people communicate in normal circumstances. Failure to use the oral communication model makes proceedings look fictitious and it may cause further trauma.

Secondly, it may not be the best way for the victim to give evidence[267] as the victim is distanced from the courtroom without anyone comforting her which subjects her to trauma. The child victim sees and hears one person at a time through the video-link which can be confusing and frustrating.[268] MacFarlane argues that the presence of a camera substantially increases a child's feeling of isolation by 'separating him from those with whom he is communicating.'[269] In addition to this, use of visual-audio links as a special protection measure intended to protect children 'from the full rigour of adversarial' proceedings[270] is faced with a challenge of absence of court personnel responsible for monitoring the welfare of the child during court appearance.[271] In order to minimise the impacts of isolation and the likely trauma this measure can cause,

[258] Judicature (Visual-Audio Link) Rules, 2016 (SI No.26 of 2016). These allow a witness to give evidence and the court to receive the evidence through electronic means without a person physically appearing in court. These have binding effect on the courts and other users on their application.
[259] Witnesses who cannot appear in court due to infancy, old age, distance and costs.
[260] Judicature (Visual-Audio Link) Rules, (n.258) rule 5. The use of visual-audio link was launched on 19th August 2016 by the Hon. Chief Justice Bart M. Katureebe. UNICEF sponsored the ICT strategy. Rwanda is currently the only East African country using the same technology. Also see: article 11(a) of the Model Law. Also see John E.B. Myers, 'Adjudication of Child Sexual Abuse Cases' (Summer/Fall 1992) *The Future of Children*89.
[261] Gail S. Goodman*et al*, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57 *Monographs of the Society for Research in Child Development* 1-159, 57.
[262] Judicature (Visual-Audio Link) Rules (n.258) rule 6(1).
[263] J. Luchjenbroers, '"In your own words ...": Questions and Answers in a Supreme Court Trial'(1996) 27 *Journal of Pragmatics* 477. Children are not in position to see the lawyer just as the lawyer is not in position to see witness.
[264] Paul Ekman *et al*, 'A Few Can Catch a Liar' (1999)10 *Psychological Science*263, 265.
[265] Tim Hallahan, 'An Overview of Trial Evidence Techniques' (1996) *Practice Litigator* 5, 21, 25-26. Demeanour includes the witness's dress, attitude, behaviour, manner, tone of voice, grimaces, gesture and appearance.
[266] Hall, 'Children Giving Evidence' (n.193) 81.
[267] ibid 79.
[268] ibid.
[269] Kee MacFarlane, 'Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases' (1985) 40 *University of Miami Law Review* 135.
[270] Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *International Journal of Evidence and Proof* 29,34.
[271] Cossins, 'Cross Examination' (n.235) 91.

articles 14 and 25 of the Model Law provide for provision of support persons who provide emotional support during court proceedings.[272] Similar provisions are entrenched in acts of states such as Australia[273] and Zimbabwe.[274] To reduce the discomfort likely to be created while using video testimony, the female child victim should be informed about its use pointing out its benefits[275] and she has to consent to it use.[276] If the child victim accepts to use this measure, a familiarisation court process should be carried out by conducting familiarisation tours and prior sensitisation on how the measure operates. Familiarisation programmes ensure that court process is non-traumatic to child victims of sexual abuse as far as possible.[277]

South Africa has embraced this practice by introducing guidelines requiring taking of a witness to court prior to the trial day, meeting with the prosecutor and touring the court.[278] Victims are informed of the meaning of taking proceedings *in camera* and are given their statements to read before trial to refresh their memories.[279] Further, they are informed about the role of media and assured that their identity will not be disclosed. This is similar to the 'kids' court' operated by the District Attorney office of Tulare County, California.[280] In New Zealand, child witnesses attend Court Education for Young Witnesses services programme.[281] Here, children are given 'victim advisers' who provide them with information on how to cope with the court process/environment and the role they play as witnesses is explained to them.[282] Even with limited resources to implement this measure, the Model Law recommends adoption of practical solutions such as use of screens between the child and accused which is a less expensive alternative to the use of CCTV.[283] It is therefore submitted that for Uganda's judiciary to effectively employ the use of visual-audio link as a victim protection measure, it should incorporate the use of court familiarisation tours, sensitisation of the victim and stakeholders about the operation of the measure[284] and use of screens which are less expensive. These practices will minimise trauma among CVs thereby encouraging them to testify in court.

[272] A judge or magistrate appoints support persons to support the child throughout his or her participation in court.
[273] Criminal Procedure Act 1986, §294C (1) and §306ZK(2) [Australia]. In the US support persons remain in close proximity to the child while s(he) testifies and can do so while holding the child's hand or carrying the child on their laps (see United States Code collection, Title 18, ch. 223, s.3509, *Child victims' and child witnesses' rights*, subsection*(i).)*
[274] Criminal Procedure and Evidence (Amendment) Act, s.319F [Zimbabwe]. The procedures to follow in appointing support persons are laid therein.
[275] ECOSOC, (n.60) article 9. Also see: ECOSOC, *Guidelines on Justice* (n.60) paragraph 19 and 20.
[276] Hall, 'Children Giving Evidence' (n.193) 86. However, the criminal justice system in England and Wales lacks the feature of giving children opportunity to choose which method to use.
[277] Defence for Children International, Guidelines (n.245) article 51(b).
[278] The South African Department of Justice and Constitutional Development's *National Policy Guidelines for Victims of Sexual Offences*, and the *National Guidelines for Prosecutors in Sexual Offence Cases* (Pretoria 1998) chapter 3 s. 10.
[279] ibid.
[280] UN Office on Drugs and Crime (UNODC), *Handbook for Professionals and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime*, E.10.IV, (2009) 71. Available at: www.unicef.org/albania/hb_justice_in_matters_professionals.pdf (last accessed 21 September 2018).
[281] Ministry of Justice (New Zealand), *Parents and Whanau of Young Witnesses, Preparing for Court*. Available at: www.justice.govt.nz/publications/global-publications/p/parents-and-whanau-of-young-witnesses/preparingfor-court#court-education-for-young (last accessed 21 September 2018).
[282] Ministry of Justice (New Zealand), *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system: Current Provisions for Child Witnesses*, available at www.justice.govt.nz/publications/globalpublications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justicesystem/current-provisions-for-child-witnesses#footnotes (last accessed 21 September 2018).
[283] ECOSOC, (n.60) 55. Article 28(4) Chapter III on Assistance to child victims and witnesses during the justice process.
[284] ibid article 8.

The quality of evidence gathered using live video-link depends on the quality of equipment and the technical know-how of the users. Bad equipment interferes with the victim's evidence in terms of quality of sound.[285] Courts should ensure that the facilities used maximise the quality of evidence.[286] Use of visual-audio link as an Information, Communication and Technology (ICT) strategy requires resources, stable power supply and specialised infrastructure amenities for victim support services to enhance judiciary's performance.[287] Like other states,[288] Uganda is faced with high costs of implementing this procedure and inadequate personnel to operate equipment. Facilities used in this technological innovation in Uganda are confined to major high court circuits such as the High Courts of Kampala, Mbale, Fort Portal, Mbarara, Arua and Gulu.[289] For the impact of this innovation to be felt countrywide, it is submitted that it should be rolled out in all District Courts handling child sexual abuse cases. Well-functioning equipment should be installed in those courts and more equipment handlers should appropriately be trained. This can be achieved through appropriate budgeting and allocating funds for this innovation.

As a procedural measure, the use of video testimony in Uganda is subject to rules of procedure regulated by the Evidence Act that governs adducing evidence through oral testimony.[290] Electronically recorded evidence is not covered in the Evidence Act. Therefore, continued reliance on the orality principle and traditional rules of evidence facilitate challenges that bar victim participation in criminal trials.[291] Video testimonies require the use of electronically recorded evidence and microphones which the child victim may not be familiar with. Interestingly, even with this innovation, judges continue to write down proceedings which slows the victim's pace while testifying. To avoid these shortcomings, it is argued that the Evidence Act should be amended to admit electronically recorded evidence to avoid procedural and evidentiary challenges arising from admitting video recorded evidence using the Evidence Act.

Besides the limitations faced in the use of video testimony, this measure benefits child victims. Open court hearings are in observance of the right to fair trial prescribed in the Constitution.[292] However, the use of CCTV or screens is beneficial to child victims, the accused, the public and the court itself if it is consistent with the 'proper administration of justice.'[293] Minor alterations to accommodate children are proper so long as the accused's rights are protected.[294] Children who testify via CCTV are less anxious and fearful. They tend to be more relaxed and audible when testifying.[295] Article 26 of the Model Law recommends use of modified court environment considering the child's situation. In absence of constitutional provisions prescribing courtroom lay out, it is submitted that audio-visual fitted court rooms should be child-friendly and have child-sized

[285] Hall, 'Children Giving Evidence' (n.193) 82.
[286] Youth Justice and Criminal Evidence Act 1999, s.21(4)(c)
[287] Speech of the Honourable the Chief Justice Bart M Katureebe at the New Year Law, 30 January 2017, 14. Available at:
www.judiciary.go.ug/files/downloads/Speech%20of%20CJ%20at%20the%20NEW%20LAW%20YEAR%202017D2.pdf
(last accessed 21 September 2018).
[288] Bala, 'Hearing the Voices' (n.204) 32. Canada continues to suffer similar logistical concerns which have created problems in hearing the child.
[289] By Betty Amamukirori, Hillary Nsambya in the New Vision of 25th January 2016. Also see Speech of the Honourable the Chief Justice at the New Year Law 2017, held at the High Court Grounds on 30th January 2017 at 5.
[290] Evidence Act (n.118) s.59 governs adducing evidence in court proceedings in Uganda through oral evidence/physical attendance.
[291] Andrew Sanders and Imogen Jones in 'The Victim in Court' in Sandra Walklate, *Handbook of Victims and Victimology* (Taylor and Francis 2012). The orality principle necessitates that evidence should typically be presented out loud.
[292] OHCHR (n.26) article 28(1).
[293] Spencer and Flin, *Evidence of Children* (n.164) 169.
[294] JLOS, *Performance Report* (n.17).
[295] S.R. Hall and B. Sales, *Courtroom Modifications for Child Witnesses Law and Science in Forensic Evaluations* (American Psychological Association, 2008).

furniture[296] strategically placed next to the prosecutor or support persons/intermediaries during trial. This creates an enabling environment with which the child is familiar.[297] The rooms where the child victim is placed during transmission of testimonies should take care of a child's needs thereby making the child feel at ease and comfortable.[298] Comfort items like dolls and diagrams that can help a victim overcome fear of testifying can be used for demonstration during trial.[299] Poland successfully uses child-friendly interview rooms with competent staff to interview witnesses. Similarly, Uganda's criminal justice system should adopt these simple practices to complement the use of this measure so that child victims of sexual abuse are encouraged to testify in court.

Furthermore, protection of children's identity is paramount in using this measure. Information disclosing a child's identity should not be published.[300] To achieve this, the public gallery should be cleared during the trial of sexual abuse cases to avoid intimidation.[301] Notably, although the media plays an important role in fighting against child abuse, proceedings may be conducted *in camera* thereby prohibiting them from publicising proceedings concerning children.[302] Where journalists are allowed to attend proceedings, they should disguise the child's identity by fogging or hiding her face or changing her identity.[303] In Zimbabwe, all proceedings involving children are held *in camera* and the specialised court prohibits publication of the name, address, school or any information likely to reveal the identity of the child involved in criminal trials by the media.[304] Similarly, while using video screens, victim's identity can be concealed using pseudonym, voice distortion[305] and shielding victim's body language to avoid identification by the perpetuator, his relatives or members of the public. It is worth noting that the specialised children's courts in Zimbabwe[306] and South Africa are not bound by existing procedural rules which place them in a better position to perform this task. In order to increase conviction rates of sexual abuse cases in Uganda, it is submitted that practices protecting female child victim's identity during sexual abuse trials should be adopted and these can efficiently be applied in specialised sexual courts which should be established in Uganda to facilitate female child victim participation in criminal proceedings.

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[296] Bradley M. Cowan, 'Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse' (2013) *Army Lawyer* 4, 9. Child victims will feel comfortable with furniture usually used in schools, day-care centres and other places.

[297] ibid, 9.

[298] Penal Reform International, *Protecting Children's Right in Criminal Justice System. A Training Manual and Reference Point for Professionals and Policy Makers* (2013) Chapter 5, 65. Available at: www.penalreform.org/resource/juvenile-justice-manual/ (last accessed 21 September 2018).

[299] Cowan, 'Children in the Courtroom' (n.296) 10. Also see: *Smith v State*, 119 P.3d 411 (Wyo. 2005) (fifteen-year-old allowed to hold teddy bear).

[300] Defence for Children International, *Guidelines* (n.245) Guideline 64.

[301] ibid.

[302] Children Act (n.116) s. 16(1)(b).

[303] *Report of the Government of Uganda to the UN Committee on the Rights of the Child: Implementation of the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*, September 2006 by Ministry of Gender, Labour and Social Development, 15. Available at: www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc.c.opsc.uga.1.doc (last accessed 21 September 2018).

[304] Children's Act, Cap.5:06 [Zimbabwe] s.6 prohibits presence of persons in court save for those authorised by law or the court.

[305] Mahony, *Justice Sector* (n.216) 43. Also see: rule 101.4(c) of the International Criminal Court, Assembly of State Parties, fourth session, staff rules of the International Criminal Court, ICC-ASP/4/3, 25 August 2005. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-4-3_English.pdf (last accessed 21 September 2018).

[306] Children's Act, Cap. 5:06 [Zimbabwe] s.5 (1). Also see: Davies Mumba, *The Juvenile Criminal Justice System in Zambia Vis-à-Vis the International Protection of Children's Rights* (2011) (Masters Dissertation, University of Zambia, Lusaka), at 105.

Although Uganda's courts restrict the public from attending child sexual abuse trials in compliance with the UN guidelines,[307] it is recommended that laws such as the MCA and TIA which provide for disclosure of the child victim's identity through service of witness summons and examination of witnesses should be amended to avoid disclosure of child victim's identity.[308] These laws are used in summoning female child victims of sexual abuse who are to testify using video testimony which renders the special protection measure unresponsive to female child victim's vulnerability. It is argued that all documents containing information identifying a child to be called as a witness during trial should be securely kept in order to protect her privacy.[309] Release of information regarding a child's identity can cause shame, emotional distress and humiliation to the child victim of sexual abuse. For female child victims to testify using video link testimony without fear of being identified, procedural laws should be amended to cater for this special protection measure.

In a bid to promote the right to fair trial, Uganda has developed a practice of full pre-trial disclosure of evidence to the defence before commencement of criminal trials. This was settled in the case of *Soon Yeon KongKim (2) Kwanga Mao v Attorney General*[310] where it was held that 'a right to a fair trial contains a right to pre-trial disclosure of material statements and exhibits.' Disclosure is done at an early stage before commencement of proceedings. However, there are no exceptions pertaining to disclosure of victim's identity which exposes victim's identity to the adverse party. To effectively balance the fair trial rights prescribed in *Soon's* case, there is need to enact a witness protection law prescribing exceptions to pre-trial disclosures regarding witnesses' identity. Absence of a law regulating information disclosure, prejudices child victim's rights to privacy, while the disclosure requirement hinders their participation by revealing child victim's identity to accused who may intimidate her.

### 3.3 Conclusion

Although video-link testimony increases female child victim participation by reducing the possibility of subjecting child victims to intimidation in the courtroom, it may confuse or discourage the victim from testifying if not properly implemented. For its proper application, the child victim should not be subjected to further intimidation. The available equipment and facilities during court proceedings should constantly take care of child victim's vulnerability. Where the child possesses the requisite capacity to decide, she should be provided with information and the opportunity to decide on whether to use it. Once prosecutors and judicial officers are trained, they will detect the signs of a traumatised child and avoid re-traumatising her using special protection measures.[311] The successful operation of this measure requires amendment of procedural laws regulating admission of evidence. Notwithstanding its purposes, it is apparent that the use of video testimony as a special protection measure will be meaningless if the language and style used in cross-examination remains unchanged[312] as discussed in the next part.

[307] ECOSOC (n.60) para 28. Also see: s. 16(1)(2) Children Act.
[308] s.94 MCA and s.33 TIA.
[309] PRI, Protecting Children's Right in Criminal Justice System (n.298) 67 Chapter 5.
[310] Constitutional Reference No.6 of 2007. It was held that a right to a fair trial contains a right to pre-trial disclosure of material statements and exhibits.
[311] Burton, 'Special Measures' (n.24) 203.
[312] Judy Cashmore and Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005) 48-51.

## D. REGULATED CROSS-EXAMINATION AS A MEASURE FACILITATING PARTICIPATION OF FEMALE CHILDVICTIMS OF SEXUAL ABUSE IN UGANDA'S CRIMINAL JUSTICE SYSTEM

### 4.1 Introduction

The preceding part demonstrates how the use of live-video transmission of testimonies minimises trauma for female child victims of sexual abuse in Uganda's criminal proceedings as a special protective measure facilitating their participation. However, cross-examination as a method of testing truthfulness and accuracy of testimony within the adversarial system,[313] is one of the most traumatising aspects of giving evidence for children.[314] It is provided for under s.136(1) of the Evidence Act[315] and Cossins rightly describes it as an oppressive tool for intimidating and confusing children.[316] Rigorous cross-examination in sexual abuse cases is based on cultural beliefs that women and children are promiscuous and liars[317] whose evidence should be challenged to support the offender's case.[318] Although children were regarded as unreliable witnesses, it is now established that children are capable of giving cogent and accurate testimony in a conducive environment.[319] It is evident that besides the trauma experienced during the sexual act, child victims in the adversarial court system are subjected to cross-examination which traumatises them and hinders their participation. It is in that regard that this part seeks to explore ways of improving and regulating cross-examination to facilitate female child victim participation in criminal proceedings aimed at getting the 'best evidence'. This part begins by discussing the aims and impact of cross-examination on female child victim participation in the first section. The second section discusses the questioning techniques used by defence counsel and the latter's duty to defend their client as factors complicating the cross-examination exercise in criminal proceedings. The third section discusses measures and best practices that can be adopted to improve and regulate cross-examination of female child victims of sexual abuse in Uganda. Reference will be made to the Model Law provisions and examples adopted by other jurisdictions. Conclusions will be drawn suggesting a shift from traditional cross-examination as a mechanism for testing evidence, to the use of child-friendly questioning through judicial intervention and use of intermediaries aimed at preventing further traumatisation of child victims. It is emphasised that the successful operation of these measures requires training of all court stakeholders.

[313] Ellison, 'Protection of Vulnerable Witnesses in Court' (n.270) 29-35. Also see Evidence Act (n.118) s.145.
[314] Cossins, 'Cross Examination' (n.235) 75.
[315] Evidence Act (n.118). It provides that the examination of a witness by the adverse party shall be called his or her cross-examination.
[316] Cross-examination can be used as an oppressive tool for intimidating and confusing children rather than as a forensic tool for exposing a dishonest witness according to Cossins, 'Cross-Examination' (n.235) 73.
[317] Judith A Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (1990); see also Carol Smart, 'Law's Truth/Women's Experiences' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) 1 at 8.
[318] *Carroll v Carroll* [1947] (40 SA 37 (W) 40. Also see: Mark Brennan, 'The Discourse of Denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71-91, 72. Cross-examination calls into question the credibility of the child victim witness.
[319] Hart, *Children's Participation* (n.3) 201.

*(a) Aims and impacts of cross-examination on Female Child Victim participation*

As a component of the right to fair trial,[320] cross-examination is a distinguishing feature of the adversarial system that detects and exposes discrepancies in victim's testimony.[321] Defence counsel employs it to elicit suppressed facts that undermine the examination-in-chief by asking questions in favour of the accused.[322] Defence's argument is strengthened by discrediting the witnesses' testimony[323] using questioning techniques designed to make her stumble and fall when giving testimony.[324] Upon considering both the examination-in-chief and the cross-examination, the judge evaluates the evidence and comes up with rational decisions based on evidence presented in court.[325] In testing the credibility of child victim's evidence, cross-examination can result in inaccurate and inconsistent evidence[326] as well as causing her further trauma.[327] This defeats the purpose of the criminal justice system therefore calling for measures to improve its use.

The completeness, credibility as well as accuracy of children's evidence is tested through cross-examination.[328] This is dependent on the child's competency and reliability to testify, as discussed in section 2(4)(c) above. During cross-examination, the victim's credibility comes under attack.[329] Therefore, the issue under contention is to what extent should cross-examination be restricted to give recognition to the child's particular vulnerability?[330] Due to their vulnerability, children's testimony is often discredited for factors relating to their development, confidence or intellect as opposed to the reliability of their account.[331] Brennan rightly notes that regardless of the motive behind the questions posed, cross-examination unduly and systematically destroys the credibility of the child on account of its style and content.[332] Through cross-examination, defence counsel subjects the child to aggression, humiliation, harassment and accusations of lying[333] which jeopardises the chance of both the truth emerging and ensuring that justice is done.[334] It is

[320] ICCPR, article 14(3)(e). A fair trial includes the right to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'
[321] Marc Rosenberg, 'The Contribution of Chief Justice Lamer to the Development of the Law of Hearsay' (2000) 5 *Canadian Criminal Law Review* 115-119.
[322] Richard Du Cann, *The Art of the Advocate* (Penguin Books, 1980) 95; also see Colin Tapper, *Cross and Tapper on Evidence* (11th ed, Oxford University Press, 2007) 336.
[323] James Lindsay Glissan, *Cross-Examination Practice and Procedure: An Australian Perspective* (2nd ed, Butterworths, 1991) 73-74.
[324] Doak, *Victims' Rights* (n.43) 250.
[325] Gail S Goodman and Annika Melinder, 'Child Witness Research and Forensic Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological Psychology*1, 5.
[326] Cossins, 'Cross Examination' (n.235) 71.
[327] Christine Eastwood and Wendy Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (Research Report, Queensland University of Technology, 2002) 32-34, 30.
[328] Cossins, 'Cross Examination' (n.235) 86; Ellison, 'Protection of Vulnerable Witnesses' (n.270) 35; *Wakeley v The Queen* (1990) 93 ALR 79, 86 (Mason CJ, Brennan, Deane, Toohey and McHugh JJ), quoting *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 359 (Viscount Sankey LC)
[329] Cann, *Art of the Advocate* (n.322) 336; also see Tapper, *Evidence* (n.322)336.
[330] Judge Kevin Sleight, 'Commentary on the Video "A Case for Balance"–The Issue of Judicial Control of Cross-Examination' (Paper presented at the Biennial District and County Court Judges' Conference, Fremantle, Western Australia, 27 June - 1 July 2007) 3.
[331] Westcott and Page, 'Cross Examination' (n.234) 140-143.
[332] Mark Brennan, 'The Battle of Credibility: Themes in the Cross-examination of Child Victim Witnesses' (1994) *International Journal for the Semiotics of Law* 51-54.
[333] Judy Cashmore *et al*, *The Evidence of Children. Judicial Service Commission of New South Wales* (1995) 31-32; Also see Louise Ellison 'The Mosaic Art?': Cross-examination and the Vulnerable Witness' (2001) 21 *Legal Studies* 354-360.
[334] Bowden, 'Balancing Fairness' (n.205) 540.

therefore essential to minimise negative experiences of victim's exposure to evidentially probing of defence counsel.[335]

Cross-examination as a fair trial right is not absolute therefore, it is subject to controls where necessary.[336] The controls promote fairness and keep the rights of the prosecution and defence in balance.[337] The prosecution's case is tested without compromising the suspect's right to a fair trial.[338] While it is widely accepted that the rights and interests of victims might be balanced against rights of suspects, it is possible to improve the way testimonies from children are tested.[339] Minimising traumatic experiences of victims of sexual abuse during trial process is one of the ways used to balance fair trial rights. In order for the court to arrive at just decisions in criminal proceedings, attention should be paid to the language used during cross-examination by avoiding confusing and intimidatory questions.[340]

Using intimidating questioning that children do not understand or cannot answer[341] ignores children's interests, thereby supporting the perception that sexual abuse trials are a 'legally sanctioned' forum in which children can be emotionally traumatised by the unregulated behaviour of defence counsel.[342] Judges' failure to intervene in inappropriate cross-examination worsens the plight of child victims of sexual abuse.[343] Spencer rightly observes that cross-examination is one of the fears children have about testifying.[344]

Notwithstanding its effects, cross-examination remains the least regulated part of the adversarial trial[345] that negatively impacts on female child victim participation. It results in distorted evidence arising from suggestive questioning and unfavourable disclosures.[346] To minimise trauma caused during cross-examination and avoid inaccurate evidence, measures regulating/improving it should be adopted. Before discussing those measures, it is important to first discuss factors complicating cross-examination in criminal proceedings.

### 4.2 Factors Complicating Cross-Examination Exercise in Criminal Proceedings

In ensuring that cross-examination achieves its aims, difficulties arising from its application which impact on the performance of the criminal justice system must be addressed. These include discrediting witnesses, delay in reporting and disposing of cases, language and phrasing of questions and defence lawyer's discharge of their duty to the client.[347] For lack of space, this section of the study will discuss questioning techniques

[335] Lubaale, 'Bridging the Justice Gap' (n.121)193.
[336] *R v TA* (2003) 57 NSWLR 444, 446-44. Spigelman CJ noted that harassing, offensive and oppressive questions are inadmissible.
[337] Eva Manco, 'Protecting Children's Rights to Participate in Criminal Justice Proceedings: A Training Manual and Reference Point for Professionals' (2016) 8 *Amsterdam Law Forum* 48-77, 77.
[338] Bowden, 'Balancing Fairness' (n.205) 545.
[339] Standing Committee on Law and Justice, Parliament of New South Wales ('NSWSCLJ'), *Report on Child Sexual Assault Prosecutions,* Parl Paper No.208 (2002) 78 *('NSWSCLJ Report').*
[340] Brennan, 'Discourse of Denial' (n.318).
[341] Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC), *Seen and Heard: Priority for Children in the Legal Process,* ALRC Report No.84 (1997) 343.
[342] Eastwood and Wendy, 'Experiences of Child Complainants' (n.327) 4.
[343] P.J. Schwikkard and S. E.van der Merwe, *Principles of Evidence* (4th ed, Juta & Co. Ltd, 2010) 366.
[344] John R Spencer, 'Evidence and Cross-examination', in Michael E. Lamb *et al* (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2nd ed, John Wiley & Sons Ltd, 2011) 285-301. The second fear is being perceived as liars.
[345] Cossins, 'Cross Examination' (n.235) 70.
[346] Eastwood and Wendy, 'Experiences of Child Complainants' (n.327) 4-5.
[347] Bowden, 'Balancing Fairness' (n.205) 550.

and defence counsel's duty in presenting their case as the two main reasons complicating the cross-examination exercise in criminal trials.

Giving oral evidence as a requirement of the adversarial system subjects the victim to cross-examination which does not result in 'best evidence'.[348] Cross-examination discredits a child victim by making her appear confused and at worst a liar.[349] Defence counsel considers that 'if in the process of destroying the evidence it is necessary to destroy the child, then so be it.'[350] In achieving this, defence lawyers allege facts that subject children to trauma thereby hindering them from expressing their views and opinions. Judicial officers may underestimate its consequences. As Henderson rightly observes, although judges have power to control and limit cross-examination, they may not recognise problems when they arise.[351]

Defence counsel use interviewing and questioning as means of collecting information from female child victims of sexual abuse during cross-examination which may produce inaccurate evidence.[352] Responses given by children depend on the lawyer's questioning style and the type of questions asked.[353] Leading questions[354] that indirectly or directly suggest a particular answer from a witness are the most frequently used but these obtain inaccurate responses.[355] Confusing questions such as those containing double negatives are also regularly used in cross-examination of children.[356]

Lawyers use these types of questions to defend the perpetuator at the expense of the victim's incapacity to comprehend the questions asked.[357] Resultantly, children continue giving answers even when they do not understand what is being asked of them.[358] This results in inaccurate and distorted information which renders it impossible for judicial officers to tell whether the child's testimony has been influenced by external or social forces.[359] External forces influencing children's testimony include diminished memory,[360] prior experiences, delays,[361] retention intervals between witnessing and recalling an event, stress experienced during the

[348] Ellison, 'Protection of Vulnerable Witnesses in Court' (n.270) 34.
[349] Diane J.Birch, 'The Criminal Justice Act 1988 – Documentary Evidence (Pt 2)'[1989] 15 *Criminal Law Review* 17.
[350] Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (Report, National Child Sexual Assault Reform Committee, March 2010) 250-5 [4.14]-[4.41].
[351] Emily Henderson, 'Alternative Routes: Other Accusatorial Jurisdictions on the Slow Road to Best Evidence' in John R Spencer and Michael E. Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 43 at 59.
[352] Cossins, 'Balancing Fairness' (n.235) 72; Brennan, 'Discourse of Denial' (n.318) 73.
[353] Rachel Zajac and Harlene Hayne, 'I Don't Think That's What *Really* Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports' (2003) 9 *Journal of Experimental Psychology: Applied* 187, 207.
[354] Evidence Act (n.118) s.140 defines leading questions as any question suggesting the answer which the person putting it wishes or expects to receive.
[355] Cossins, *Alternative Models* (n.350) 250-5 [4.64]-[4.65].
[356] Mark R. Kebbell *et al*, 'People with Learning Difficulties as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 *British Journal of Learning Disabilities* 98, 99-100. Example of such questions are: 'Now, when you did that you did not say that it was something that you did not like?'
[357] Cossins, 'Balancing Fairness' (n.235) 68.
[358] Anne Graffam Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993)17 *Law and Human Behavior* 59,67.
[359] Goodman and Malinder, 'Child Witness Research' (n.325) 13. Internal factors include memory changes.
[360] Henderson, 'Alternative Routes' (n.351) 44.
[361] Finkelhor, *Sexually Victimized Children* (n.16). These occur commonly due to the process of gathering evidence, prosecutorial preparation and setting trial dates.

incident and during the judicial process[362] and suggestibility.[363] Gathering information from such a child victim whom a cross-examiner believes is dishonest and inconsistent could mean that cross-examination has produced a confused and/or psychologically stressed child who has 'succumbed to the effects of complex, misleading, or aggressive questioning even when he or she was originally telling the truth.'[364] It is therefore submitted that relying on such evidence in coming up with a decision does not meet the ends of justice. Accordingly, since psychologists and sociologists have found children to be natural story-tellers who deal with trauma of all kinds by incorporating it into their overall life,[365] child victims should be left to use their own narratives.

It is argued that questioning techniques can increase the accuracy and completeness of children's testimony through mimicking the vocabulary of the child, avoiding legal jargon, confirming meanings of words with children, using 'wh- questions' (what, when, where but not why), limiting use of yes/no questions, and avoiding abstract conceptual questions.[366] The use of repeated questions should be avoided as it can signal to a child that the previous answer they gave was unacceptable or 'wrong.'[367] As endorsed by other professional organisations,[368] Zajac and Hayne have identified use of non-leading, open-ended questions for eyewitness testimony to ensure accuracy of children's reports.[369] These simple child-friendly measures can be adopted by defence counsel through practice and routine trainings. Legal aid clinics organised by professional legal organisations such as the Uganda Law Council and Legal Aid organisations should train legal professionals on the need to adopt appropriate questioning during cross-examination as a measure to promote quality of a child's testimony.[370] It is submitted that defence lawyers in Uganda should adopt child-appropriate questioning techniques to minimise the negative impacts of cross-examination on female child victim participation. They should emulate the Australian model of defence lawyers talking to the child as opposed to the adversarial questioning model.

Besides questioning techniques, defence counsel's professional duty of ensuring that their client is fully and properly presented[371] is another problem arising from cross-examination. In dispensing their duty in the administration of justice, defence counsel has a duty to represent their client's interests.[372] Discrediting a witness through cross-examination may therefore be perceived as a legitimate tactic to achieve this end.[373] In discharging their duty, lawyers use repetitive, misleading, confusing, ambiguous and suggestive questions. These are known to be the most unreliable method for eliciting information from children since they can

[362] David Finkelhor and Angela Brown, 'The Traumatic Impact of Child Sexual Abuse: A Conceptualization' (1985) 55 *American Journal of Orthopsychiatry* 530-541.
[363] Stephen J. Lepore, 'Child Witness: Cognitive and Social Factors Related to Memory and Testimony' (1984-1991) 3 *Journal of Social Issues*.
[364] Zajac and Hayne, 'Effect of Cross-Examination' (n.353) 187.
[365] K. Sewell and A. Williams, 'Broken Narratives: Trauma, Metaconstructive Gaps, and the Audience of Psychotherapy' (2002) 15 *Journal of Constructivist Psychology* 205.
[366] See: M.P. Toglia *et al*, *Handbook of Eyewitness Psychology: Memory for Events* (Lawrence Erlbaurn Associates, 2007), vol1; Goodman and Malinder, 'Child Witness Research' (n.325) 1.
[367] Penal Reform International, *Protecting Children* (n.298) 66, chapter 5.
[368] Goodman and Malinder, 'Child Witness Research' (n.325) 10-13.
[369] Zajac and Hayne, 'Effect of Cross-Examination' (n.353) 187.
[370] Doak, *Victim's Rights* (n.43) 78-152.
[371] Commission for the Administration of justice, *Code of Ethics and Conduct for Advocates Rule 1(c)*. Available at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Malta_code_of_ethics_and_conduct_for_advocates.pdf (last accessed 21 September 2018). Lawyers have a duty to act in the best interest of their clients.
[372] UN, *Basic Principles* (n.152) Guidelines 12, 13(b) and 14.
[373] Cossins, *Alternative Models* (n.350) 250-5 [4.14]-[4.41].

distort the child's memory.[374] Absence of laws regulating demeanour and language used during cross-examination avails a defence lawyer opportunity to confuse, intimidate, manipulate and bully the child victim since (s)he is in a position of control and power.[375] Absence of a witness protection law, such tactics trump children's rights and hinders their participation in criminal trials. It is therefore argued that to achieve a child-appropriate cross-examination, the type of questions asked by defence counsel should be changed or improved.[376]

As part of the evidentiary procedure, cross-examination cannot be disregarded if a fair trial is to be achieved. It only needs to be improved by adopting measures and practices that will enhance female child victim participation in Uganda's criminal justice system as discussed in the next section.

### 4.3 Measures and Best Practices Improving Cross-Examination of Female Child Victims of Sexual Abuse in Uganda as a Way of Facilitating their Participation in Criminal Trials

While it is important to balance the defendant's right with the rights and interests of victims, practice requires improving the way testimonies of children are taken and tested without compromising the defendant's right to a fair trial.[377] To achieve real change that will facilitate female child victim participation in child sexual abuse trials, cross-examination as a traditional adversarial process should be altered[378] by adopting victim protective measures that ensure their participation. A broad range of measures to be discussed herein are stipulated in the UNODC Model Law[379] and have been adopted in other jurisdictions such as Australia, the UK, New Zealand, Ireland, South Africa and Zimbabwe. To achieve the purpose of cross-examination, guideline54 of the Guidelines on Action for Children in the Justice System in Africa[380] recommends states to ensure that child witnesses give their evidence with minimum distress.

Collection of information through interviewing and questioning by defence counsel should be child-sensitive, fair and conducted in a child-friendly manner.[381] Questions posed to child victims should be appropriate to their age, mental capacity and facts of the case. If proper questions are administered, children as young as 4 years can provide accurate information about events that happened to them one or two years earlier.[382] Cross-examination can be made more child-appropriate by changing the types of questions used.[383] The guidelines protect children from hostile and intimidating questions.[384] Therefore, judicial officers should adopt these practices in order to protect children and enhance their participation. Article 12 of the Model Law recognises the need to develop and implement measures assisting children in testifying such as rejecting

[374] Bala, 'Hearing the Voices' (n.204) 28; Spencer and Flin, *Evidence of Children* (n.164) 289-91.
[375] Adrian Keane, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalism' (2012) 16 *International Journal of Evidence and Proof* 176-179**.**
[376] Zajac and Hayne, 'Effect of Cross-Examination' (n.353) 207-208.
[377] Bowden, 'Balancing Fairness' (n.205) 545.
[378] ibid.
[379] UNODC, *Model Law* (n.62) article 27(3).
[380] Defence for Children International, *Guidelines* (n.245). The African Child Policy Forum and Defence for Children International convened a Global Conference on Child Justice in Africa held a conference in November 2011 in Kampala, Uganda that developed guidelines for implementation of the ACRWC, African Youth charter in addition to other international human rights instruments.
[381] *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, guideline 10.
[381] UNODC, *Model Law* (n.62) para 31(c).
[382] See: C. Peterson, 'Children's Long-Term Memory for Autobiographical Events' (2002) 22 *Developmental Review* 370.
[383] Zajac and Hayne, 'Effect of Cross-Examination' (n.353) 207-208.
[384] Defence for Children International, *Guidelines* (n.245) Guideline 64.

prejudicial questions[385] as adopted in the UK, Australia and New Zealand.[386] It is submitted that guidelines regulating use of questions should be enacted to avoid use of prejudicial questions during cross-examination by defence counsel.

Similarly, the right to cross-examine prosecution witnesses should be subjected to necessary controls through judicial intervention[387] where unduly harassing, offensive or oppressive questions are used by defence counsel in sexual abuse cases.[388] In such instances, the judge should intervene and stop that kind of cross-examination.

Judicial intervention in questioning however depends on the attitude of the presiding judge.[389] Some judges may be 'more willing to intervene ... [to] prevent intimidatory, hostile, badgering tactics',[390] but they are 'less likely to intervene in confusing cross-examination tactics.'[391] On the other hand, some judges may tolerate or even perpetuate child abuse in the legal system'[392] through their reluctance to intervene during criminal proceedings under the disguise of promoting a fair trial.[393] Surprisingly, even where judges intervene, defence counsel may refuse to be controlled which exposes the victim to the risk of secondary victimisation. This should be guarded against in accordance with provisions of the guidelines which mandate states to protect children from hostile or intimidating questions.[394] In order to protect vulnerable child victims from being subjected to intimidating questioning which leads to re-traumatisation, Uganda's criminal justice system should strictly adopt and adhere to these standards.

Although there is no law regulating cross-examination in Uganda's criminal justice system, the Evidence Act prohibits use of indecent and scandalous questions.[395] Judges in Uganda, like their counterparts in South Africa, have a duty to prohibit intimidating, harassing or disrespectful questions which hinder FCVP.[396] This duty is however discretionary in that it becomes insignificant if the judge is reluctant or not proactively engaged.[397] It arises for fear of jeopardising the accused's right to fair trial and where the judicial officer is

[385] Doak, *Victim's Rights* (n.43) paragraph 25.
[386] UNODC, *Model Law* (n.62) art.21.
[387] *NSWSCLJ Report* (n.339) 71.Judicial intervention is a strategy that can be employed in minimising harsh or confusing cross-examination of children.
[388] *R v TA (2003) 57 NSWLR 444, 446-7.* Spigelman CJ noted that 'in sexual assault matters, it is appropriate for the court to consider the effect of cross-examination and of the trial experience upon a complainant when deciding whether cross-examination is unduly harassing, offensive or oppressive.'
[389] Questions designed to intimidate or upset the child, rapid and repeated questions, confusing questions, questions using complex language beyond a child's development age and questions that infer consent by the child should be avoided as they amount to intimidation. See: *Model Law* (n.62) article 27.
[390] Evidence to NSWSCLJ, Sydney, 19 April 2002, 5 (Judy Cashmore), cited in *'NSWSCLJ Report'* (n.339) 71.
[391] Ibid 71.
[392] *ALRC Report* (n.341) 346.
[393] Cashmore, *Evidence of Children* (n.333)19-20.
[394] Defence for Children International, *Guidelines* (n.245) guideline 64. 'Investigation and practices of judicial bodies should be adopted to afford greater protection to children and to respect children's rights without undermining the defendant's right to a fair trial.'
[395] Evidence Act (n.118) ss.150 and 151 prohibits use of indecent and scandalous questions.
[396] The National Policy Guidelines for Victims of Sexual Offences of the Department of Justice and Constitutional Development of South Africa and the National Guidelines for Prosecutors in Sexual Offence Cases of the Department of Justice of South Africa (Pretoria, 1998), chap. 10, para. 1; Criminal Procedure (Scotland) Act 1995, s.274.
[397] Stephen Odgers, 'Witness Questioning: The Role of the Judge and the Role of the Barrister' (Lecture delivered at the Student Forum, University of New South Wales Law School, Sydney,29 August 2008) (notes of speech on file with the author). Also see: Cossins, *Alternative Models* (n.350) 270[4.119]-[4.136], 335 [6.87]-[6.89], 270.

conscious of the risks of an appeal if the accused is convicted.[398] Lord Denning in *Jones v National Coal Board*[399] stated that judges play the role of an umpire. This confirms the judge's duty to balance and protect parties' rights and interests during the trial process. It is submitted that judges should pay attention to the kind of questions and the way questions are posed in order to get the best evidence possible.[400] In exercising their discretion, a duty to intervene during questioning of witnesses should be imposed on all judges in Uganda, as was done to Australian judges.[401] That notwithstanding, it squarely falls back to the judge to protect vulnerable witnesses against improper questions[402] even where the prosecutor does not raise objections. This practice has successfully been adopted[403] in South Africa,[404] the UK,[405] New Zealand and Australia.[406]

In addition to supervisory roles of judicial officers, there is a common belief that regulation of cross-examination by judicial officers will solve problems associated with cross-examination of children.[407] The state of New South Wales in Australia adopted this practice when developing new Bar Association Rules to prevent barristers from asking sexual abuse complainants improper questions and to take into account 'any particular vulnerability of the witness' while questioning them.[408] Due to judicial officer's failure to exercise their interventional role in Uganda, it is submitted that guidelines for judicial officers protecting vulnerable witnesses from oppressive questioning should be enacted. The guidelines should consider the age and mental ability of child victims.[409] The proper implementation of this strategy requires informing child victims of sexual abuse about defence lawyer's tactics and what to expect during cross-examination.[410]

Adoption of this best practice will overcome judicial officer's reluctance to intervene in cross-examination. The successful implementation of this measure requires training of judges, prosecutors and defence lawyers

[398] ALRC, NSWLRC and VLRC, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 149 [5.97].

[399] *Jones v National Coal Board* (1957) CA. Also see: J. McEwan, *Evidence and the Adversarial Process* (1998) 13 re the observation of Lord Justice Clarke-Thomson.

[400] Questions designed to intimidate or upset the child, rapid and repeated questions, confusing questions, questions using complex language beyond a child's development age and questions that infer consent by the child should be avoided as they amount to intimidation. See: UNODC, *Model Law* (n.62) article 27.

[401] Upon enactment of s.275A of the Criminal Procedure Act 1986 (New South Wales) schedule 1 item 4.A duty to protect vulnerable witnesses from improper questioning was imposed on Australian judges.

[402] UNODC, *Model Law* (n.62) article 27(4) 54. Also see: VLRC 2004, *Sexual Offences: Final Report (2004)* at 314.Judicial officers should ensure that questions asked are fair, comprehensible, and appropriate.

[403] ibid article 27(3) 54.

[404] UN, *Policy Guidelines for Victims* (n.396) chap. 10, para. 1

[405] Criminal Procedure (Scotland) Act 1995, s.274.

[406] ALRC and HREOC, *Seen and Heard Report* (n.341) 347 (recommendation 112).In Australia, it was recommended that judges be educated to become more interventionists and professional conduct rules be changed such that 'they specifically prescribe intimidating and harassing questioning of child witnesses. Also see: Martine B. Powell, 'Improving the Reliability of Child Witness Testimony in Court: The Importance of Focusing on Questioning Techniques' (2005) 17 *Current Issues in Criminal Justice* 137, 141.

[407] *NSWSCLJ Report* (n.339) 75-7,204; Criminal Justice Sexual Offences Taskforce, Attorney-General's Department (NSW), *Responding to Sexual Assault: The Way Forward* (2006)118.

[408] New South Wales Bar Association, *New South Wales Barristers' Rules* (2008) rr 35A, 35B.Both rr 35A and 35B were gazetted on 30 May 2008: New South Wales, *Government Gazette,* No.61, 30 May 2008, 4083. This is known as the enactment of the positive judicial duty. It led to the amendment of s.41of the Evidence Act 1995 amended by Evidence Amendment Act 2008 (NSW) schedule 1 item 12 to adopt the terms of s.275A of the Criminal Procedure Act 1986 (NSW).

[409] *Evidence Act 1939* (NT) s.16(2); *Evidence Act 1977* (Qld) s.21(2); *Evidence Act 1929* (SA) s.25(4); *Evidence Act 2001* (Tas) s.41(2); *Evidence Act 1906* (WA) s.26(3).

[410] UNODC, *Model Law* (n.62) article 9, 43. Also see: ECOSOC, *Guidelines on Justice* (n.60) paragraph 19 and 20; VLRC *Final Report* (n.402) 296 (recommendation 137).

about the dynamics of child abuse and child development.[411] Although there are no consequences for judges who fail to protect vulnerable witnesses through intervention,[412] the development of guidelines and training of lawyers, judges and prosecutors will easily enable them to recognise that a child victim is confused, stressed or they do not understand the question they are responding to. The victim will be shielded from answering such questions.

It is worth noting that judicial intervention and regulated cross-examination works hand-in-hand with other measures such as the use of intermediaries.[413] Intermediaries are used in England, Israel,[414] Ireland,[415] Zimbabwe[416] and South Africa[417] to interpret the meaning of questions asked so that child victims give accurate testimony. Failure to understand questions put to a child witness hinders their ability to give accurate testimony.[418] Intermediaries are appointed to convey children's evidence given in examination-in-chief, cross-examination or re-examination throughout the criminal trial.[419] Under such arrangements, the child is heard and seen in court but the intermediary advises the judge on whether or not each question put in cross-examination is age appropriate, suggestive in content, misleading, confusing, oppressive, intimidating, humiliating, repetitive or cannot be understood by a child of that particular age.[420] Intermediaries also play an important role in advising on protective measures that will be useful in questioning the victim and advising the court on the problems that may arise due to questions a witness will be subjected to.[421] In so doing, they eliminate the imposition of undue stress on the child where it seems that

[411] *NSWSCLJ Report* (n.339)75-77,204.
[412] Cossins, 'Cross Examination' (n.235) 98-99.
[413] ibid 99.
[414] Kirsten Hanna *et al*, Institute of Public Policy, AUT University, *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (2010) 157. Available at: www.crin.org/docs/NZ_Child_Witnesses.pdf (last accessed 21 September 2018). The procedure for use of intermediary was reformed in 1955. Youth interrogators are appointed to veto the child testifying and they present the evidence in his/her stand. This innovation was introduced to protect children from the trauma of prolonged and aggressive cross-examination. And the trauma of testifying against family members.
[415] Criminal Evidence Act, 1992 (No.12 of 1992), §14: Evidence through intermediary. [Ireland]. Under s.14 CEA, an intermediary has only once been used by an Irish court.
[416] *Zimbabwe Magistrates' Handbook*, at 75. Also see: Mumba, *Juvenile Criminal Justice System in Zambia* (n.306) 105.
[417] Penal Reform International, *Protecting Children* (n.298) 68. Also see Criminal Procedure Act 1977 (Act No.51 of 1977), §170A(1) [South Africa]. African Child Policy Forum, *Child-friendly Laws in Africa,* 2009; African Child Policy Forum & Defence for Children International, *Achieving Child-friendly Justice in Africa,* 2012. Intermediaries are used alongside video-link to minimise further stress and trauma during testimony. This is provided for under the South African Criminal Law Amendment Act.
[418] Elizabeth Brundige, *Child Testimony Admissibility, Reliability and Procedures* (Avon Global Centre for Women and Justice) 38.
[419] s.170A(2)(a) of the Criminal Procedure Act of South Africa. They advise the trial judge on whether or not each question put in cross-examination is age appropriate, suggestive in content, misleading, confusing, oppressive, intimidating, humiliating, repetitive or unable to be understood by a child of a particular complainant's age based on the intermediary's training. In UK, vulnerable witnesses may be cross-examined using and intermediary during the witnesses live or pre-recorded evidence in chief, cross-examination, and re-examination. (Youth and Criminal Evidence Act 1999 UK) ch 23, ss.16-17,29.
[420] The Youth Justice and Criminal Evidence Act 1999 (UK) ch 23, ss.16-17, 29which gives a court the power to order the examination of certain types of vulnerable witnesses (including all sexual assault victims) using an intermediary during the witness' live or pre-recorded evidence-in-chief, cross-examination and re-examination. In the Republic of South Africa, see Criminal Procedure Act 1977 (RSA) s.170A, which is similar to the provisions of the UK and Western Australia. In these jurisdictions, the intermediary acts as an interpreter for the child, rather than simply advising the court as to the appropriateness of questions.
[421] E. Henderson, 'Alternative Routes: Other Accusatorial Jurisdictions on the Slow Road to Best Evidence' in J.R. Spencer and M.E. Lamb (eds), *Children and Cross-examination: Time to change the rules*? (2012) 66-67.

the child would be at risk of suffering such stress in the trial process.[422] Intermediary services result in effective participation of child victims.

Although the use of intermediaries was challenged in the South African case of *K v The Regional Magistrate No and Others*[423] where the defence counsel argued that it impairs proper cross-examination thereby infringing on the accused's right to fair trial, the court found that:

> Ordinary procedures in the criminal justice system are inadequate to meet the child's special needs … that the right to cross-examination and accused's right to fair trial are not violated by use of an intermediary as prescribed under s.170A.

It therefore follows that, intermediaries are used to balance the fair trial rights of the victim, the offender and the community in which the offence was committed by applying their professional expertise in stress and trauma management throughout the trial process.[424] South Africa, Namibia and Zimbabwe's successful use of intermediaries has given child victims of sexual abuse opportunity to optimally participate in the justice process.[425]

Uganda's visual-audio rules[426] provide for use of intermediary services during trial. However, neither are intermediaries being used in sexual trials involving children nor are there established procedures regulating their appointment and terms of service. Conversely, South Africa has adopted intermediary services during sexual abuse trials with established procedures for their appointment.[427] These have successfully minimised the impact of cross-examination on female child victims of sexual abuse during trials. It is submitted that Uganda's criminal justice system should emulate the South African model of using intermediaries during sexual abuse trials in order to increase the number of child victims of sexual abuse testifying in court. This will increase the conviction rates thus deterring perpetrators from committing such offences. The successful implementation of intermediary services requires training of legal officers, judicial officers, victims and other court users about the benefits of using intermediaries during cross-examination and developing guidelines regulating their operation. It is important to note that the adoption of intermediary services should co-exist with other measures aimed at improving cross-examination discussed above such as judicial intervention and child-appropriate questioning.

Despite the role played by intermediaries during sexual abuse trials, it is worth noting that South Africa as a model state still suffers practical problems in using intermediaries as a special protective measure. They lack specialised skilled intermediaries who fail to appreciate the type of questions put to the witnesses.[428] This

[422] s.170A (1) of the Criminal Procedure Act of South Africa.
[423] 1996 1 SACR 434 [E].
[424] They should possess skills like basic knowledge in criminal court procedure, type of questions administered to the victim, impartial, knowledge on court functions, establishing rapport with children, knowledge on child development, awareness on the effect of testifying, knowledge on concentration levels of the child victim, patience with child witnesses and ability to work in a team.
[425] S.P. Walker 'The Court for Sexual Offences: Perceptions of the Parties Involved' (unpublished LLD Thesis: University of the Free 2002) Sate 13. In 1993 intermediaries were introduced in sexual offences court of Wynberg Magistrate's Court in South Africa.
[426] Judicature (Visual-Audio link) Rules (n.258) rule 15 (1) provides that the court shall adopt child friendly procedures when obtaining evidence from a child and may decide that the examination be done through an intermediary.
[427] Also see: Carmel R. Matthias and F. Noel Zaal, 'Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251, 256-7.
[428] E Henderson, 'Alternative Routes' (n.421) 66-67. Also see: S.P. Walker and D.A. Louw, 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspectives of victims, their families and the professionals

prejudices the victim's fair trial rights and affects the quality of evidence gathered. Other challenges include delays between the initial complaint and trials, lack of electronic equipment to support the scheme, insufficient finances, lack of training and unattractive work conditions which makes their recruitment difficult.[429] These impact on the performance of intermediaries and service delivery in the criminal justice system. It is argued that these challenges should not overshadow the role played by intermediaries in minimising stress during cross-examination. To successfully adopt intermediary services as a special protective measure during cross-examination, Uganda's criminal justice system should appropriately budget for the implementation of this measure and find solutions to problems envisaged in other jurisdictions before its implementation. This will ensure female child victim participation that does not prejudice any person's rights.

For all the suggested solutions to the problems caused by cross-examination during child sexual abuse trials, it is important to note that child victims need to be psychologically prepared for what they are likely to face during cross-examination. Specialised persons are well placed to discharge this duty. In addition to preparing them for court, they teach children how to manage feelings of distress. While implementing the suggested special protective measures, the question to meditate upon is whether live cross-examination is still the best method of testing evidence.[430] Due to the devastating repercussions of cross-examination on female child victim participation, it is argued that the traditional approach of testing evidence be altered and other methods such as interrogation and narrations be adopted to ensure that female child victims freely express their views and opinion without stress and restraint.

## 4.4 Conclusion

Children's participatory rights and welfare should not be sacrificed in a bid to test their evidence during cross-examination.[431] In attaining the 'best evidence' during criminal proceedings, cross-examination should be used to balance the fair trial rights of the accused, victim and the interests of society where the offence was committed. Defence lawyers as representatives of perpetuators play a significant role in discharging their duties by ensuring that victim's evidence is tested through questioning. The questioning techniques and language used should aim at bringing out accurate evidence but not to discourage children from disclosing the truth by intimidating them. This can be achieved by use of child-appropriate questioning and language techniques, employing intermediary services, use of specialised persons and intervention of judicial officers taking into consideration the child's mental capacity and age. Cross-examination should be regulated by formulating guidelines stipulating the type of questions to be used during child sexual abuse trials which saves the child victim from answering intimidating, scandalous, suggestive and leading questions. Controlled questioning preserves the child's emotional and mental health and minimises the risk of traumatising her.[432] The suggested practices will recognise the important role of female child victim participation in criminal trials, will increase children's access to justice as well as improving the community's perception of the fairness of the trial. The recommended practices have been adopted in other jurisdictions. Therefore, Uganda's criminal justice system should borrow from them and appropriately implement them to suit victim's needs with an aim of facilitating their participation.

involved' (2004) 17 SACJ 289. Intermediaries may not prevent intimidatory tactics by defence counsel which are profoundly traumatising.

[429] Matthias and Zaal, 'Intermediaries' (n.427) 252.

[430] Doak, *Victims' Rights* (n.43) 287.

[431] Cossins, 'Cross Examination' (n.235) 82.

[432] Eastwood and Wendy, 'Experiences of Child Complainants' (n.327) 68. The legal process has a detrimental effect on a significant proportion of child complainants: Reid Howie Associates, Scottish Executive Central Research Unit, 6-7.

## E. GENERAL CONCLUSION

The prevalence of child sexual abuse coupled with low conviction rates in Uganda has led to the examination of measures facilitating participation of female child victims of sexual abuse in Uganda's criminal justice system in this study. The trauma experienced by female child victims of sexual abuse through giving oral testimony and being subjected to rigorous cross-examination in Uganda's adversarial system hinders children's participation. The criminal justice system is not only concerned with ascertaining the truth but also with fairness and protection of rights of both the accused and victim. Criminal trials place a lot of emphasis on accused's rights; however, victim's rights should be protected to enable them effectively participate in criminal proceedings. Victims play a primary role in criminal proceedings. Therefore, their involvement in trials provides an important contribution to the wider values of the criminal justice system.[433] To secure their participation, it is argued that criminal courts should treat intimidated and vulnerable victims in a sensitive manner so as avoid causing emotional trauma. Spencer rightly argues that a key subsidiary aim of proceedings should be to inflict 'as little pain as possible ... to everyone concerned.'[434] Achieving this requires adoption of special protective measures enhancing participation of female child victims of sexual abuse. Courts around the world have considered the role and place of victims in the criminal justice system by adopting a range of creative practices that are sensitive to children's unique courtroom experiences.

This study identifies the use of visual-audio link and regulation/improvement of cross-examination as the most effective victim protective measures that will enhance female child victim participation in Uganda's criminal justice system. While live video testimonies are used, the adversarial system still preserves the practice of adducing oral evidence and cross-examination which expose the child victim to trauma thereby hindering their participation. To achieve the objective of testifying using video testimonies, procedural laws including the Evidence Act, MCA, TIA and all laws regulating admission of evidence should be amended to accommodate this innovation. Significantly, Uganda should enact a witness protection law prescribing procedures required to protect vulnerable and intimidated witnesses during trials. That law should include provisions that bar victim participation such as disclosure of victim's identity. States such as Australia, South Africa and Canada use CCTV, one-way mirrors and video recorded evidence to prevent secondary victimisation of child victims of sexual abuse. Uganda should borrow best practices from those states to effectively apply this protective measure. Special protective measures not only work with improved technological equipment and facilities, but they also require conducive procedures for vulnerable witnesses at all levels of the criminal justice system. Sufficient resources are required for this innovation. They should appropriately be budgeted for to ensure its efficient operation and proper administration of justice.

The successful implementation of visual-audio link requires improvement in the cross-examination of female child victims. Failure to change traditional cross-examination techniques in Uganda's adversarial system renders the use of video testimony meaningless. Cross-examination exposes the powerless and vulnerable female child victims of sexual abuse to trauma and secondary victimisation which hinders victim's participation. To minimise the trauma caused by both the sexual act and ensuing judicial process, cross-examination should not be used to elicit inaccurate evidence from female child victims of sexual abuse. Although their evidence should be tested, victims should be allowed to give account of the circumstances in

[433] Doak, 'Victims' Rights in Criminal Trials' (n.2) 312.

[434] J. Spencer, 'Criminal Procedure: The Rights of the Victim versus the Rights of the Defendant' in J. Jackson, 'Putting Victims at the Heart of Criminal Justice? The Gap Between Rhetoric and Reality. In Cape (ed) Reconcilable Rights? Analysing the Tension between victims and Defendants. London: Legal Action Group (2004) 65-80, p.67.

their own words thereby promoting transparency to the outcome of the case.[435] This study suggests use of appropriate questioning techniques, judicial intervention, use of intermediaries or support persons for broader protection of child victims and regulation of cross-examination as victim protective measures to be used in improving cross-examination. These measures have been applied in other states such as South Africa, Australia, Zimbabwe and New Zealand from which Uganda should draw inspirations.

It is worth noting that the successful application of all measures facilitating female child victim participation in Uganda requires sensitisation and training of all stakeholders, including the victim. Resources required for the training and implementation of special protective measures should appropriately be budgeted for to enable the smooth operation of the criminal justice system. In implementing the discussed measures, regard should be made to protection of all concerned parties' rights and avoiding miscarriage of justice. The appropriate implementation of these measures in Uganda increases access to justice of child victims of sexual abuse, guarantees increased child participation leading to increase in sexual abuse conviction rates thereby contributing to reducing its prevalence.

[435] Doak, 'Victims' Rights in Criminal Trials (n.2) 314.